



REPUBLIC OF KENYA



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Zibu & 11 others (Suing on their own behalf and on behalf of the residents of Good Hope Rehabilitation Centre and Blue Cross Kenya-Kibwezi East) v Director of Public Prosecutions & 3 others (Environment & Land Petition E001 of 2020) [2024] KEELC 1386 (KLR) (6 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1386 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ENVIRONMENT & LAND PETITION E001 OF 2020

TW MURIGI, J

MARCH 6, 2024

**IN THE MATTER OF THE RIGHT OF PROPERTY UNDER ARTICLE
40 OF THE CONSTITUTION AND THE RIGHT NOT TO BE
DISCRIMINATED AGAINST UNDER ARTICLE 27 OF THE CONSTITUTION**

AND

**IN THE MATTER OF COMPLIANCE WITH COURT ORDERS BY THE DIRECTOR
OF PUBLIC PROSECUTION WHILE EXERCISING MANDATE UNDER ARTICLE
157 OF THE CONSTITUTION, THE PENAL CODE AND OTHER LAWS**

AND

**IN THE MATTER OF THE POWERS OF DIRECTOR PUBLIC PROSECUTION
UNDER ARTICLE 157 OVER ISSUES UNDER ACTIVE AND CONCLUDED ISSUES IN
CIVIL PROCEEDINGS, THE HIERARCHY OF COURTS DOCTRINE OF FINALITY
WITHIN THE PROVISIONS OF CHAPTER TEN OF THE CONSTITUTION**

AND

**IN THE MATTER TO A FAIR TRIAL UNDER ARTICLES 50 AND 162 OF
THE CONSTITUTION, AND CHAPTER SIX OF THE CONSTITUTION**

AND

**IN THE MATTER OF ELC NO. 78 OF 2017 MAKUENI
(FORMERLY MACHAKOS CIVIL CASE NO. 1 OF 2014)**

AND

**IN THE MATTER OF PETITION BY CYRUS ROBERT ZALA, DR. KLAUS HERBERT
RITCHER, STEVE NZIVE MAKAU, PETER KIMEU MWANGANGI, LILIAN KATUNGE**



**MUEMA, PETER MANGALA, JUMA OLIVER MASILA, MUTUKU KATAL, FRANCIS KIETI,
JOHN MUTUNGI, EUNICE KALONDU MALUNGU, HENRY KIPRONO KOSGEY FOR
PROTECTION OF THEIR FUNDAMENTAL RIGHTS AND FREEDOMS UNDER CHAPTER
40 OF THE CONSTITUTION, AND THE RIGHT TO FAIR TRIAL UNDER ARTICLE 50**

BETWEEN

CYRUS ROBERT SALA ZIBU	1 ST PETITIONER
KLAUS-HERBERT RICHTER	2 ND PETITIONER
STEVE MAKAU	3 RD PETITIONER
PETER KIMEU MWANGANI	4 TH PETITIONER
LILIAN KATUNGE MUEMA	5 TH PETITIONER
PETER MANG'ALA	6 TH PETITIONER
JUMA OLIVER MASILA	7 TH PETITIONER
MUTUKU KATALA	8 TH PETITIONER
FRANCIS KIETI	9 TH PETITIONER
JOHN MUTUNGI	10 TH PETITIONER
EUNICE KALONDU MALUNGU	11 TH PETITIONER
HENRY KIPRONO KOSGEY	12 TH PETITIONER

**SUING ON THEIR OWN BEHALF AND ON BEHALF OF THE RESIDENTS
OF GOOD HOPE REHABILITATION CENTRE AND BLUE CROSS KENYA-
KIBWEZI EAST**

AND

DIRECTOR OF PUBLIC PROSECUTIONS	1 ST RESPONDENT
INSPECTOR GENERAL OF POLICE	2 ND RESPONDENT
HONOURABLE ATTORNEY GENERAL	3 RD RESPONDENT
HENRY MULI MUNGUTI	4 TH RESPONDENT

JUDGMENT

1. The Petitioners filed this Petition against the Respondents seeking the following orders: -
 - a. A declaration that when an issue relating to the use and occupation of and title to land has been conclusively determined by the Environment and Land Court the Director of Public Prosecution and the Inspector General of Police cannot open and prefer criminal charges relating to the same issue involving the same parties or their agents.
 - b. A declaration that the opening of investigations and proposed charges based on a complaint by the 3rd Respondent against the Petitioners relating to occupation of and title to Plot No. 3762 is in breach of the doctrine of fair trial contemplated under Article 50 (1) of *the Constitution*.



- c. A declaration that unless the decree in ELC No. 78 of 2017 Makueni is overturned and set aside on appeal by the Court of Appeal, the Director of Public Prosecutions cannot prefer charges against the Petitioners over the same dispute.
 - d. The 1st, 2nd and 3rd Respondents have openly discriminated against the Petitioners by failing to charge the 4th Respondent with criminal charges but instead moving to prefer criminal charges against the Petitioners contrary to Article 27 of Constitution.
 - e. An order of judicial review in the form of certiorari to quash the decision by the 1st and 2nd Respondents to charge the Petitioners relating to use, occupation of and title to Plot No. 3762.
 - f. A declaration that the remedy available to the 3rd Respondent on issues touching on use, occupation and title of Plot No. 3762 against the Petitioners can only be raised in Civil Appeal No. 199 of 2018 Nairobi but not by way of a complaint before the 1st and 2nd Respondents.
 - g. Costs of the Petition.
2. The Petition is supported by the affidavit of Steve Nzive Makau sworn on 1st September 2020 on his own behalf and on behalf of his Co-Petitioners.

The Petitioners Case

3. The deponent averred that in the year 2014, they instituted Makueni ELC Case No. 78 of 2017 in which the 4th Respondent herein was the 1st Defendant in that suit. That the suit was heard and determined vide the judgment delivered on 20th June, 2018 in favour of the 2nd Petitioner and his partners effectively awarding them ownership, possession and control over Plot No. 3762 Mtito Andei. He argued that their right over the suit property is protected under Article 40 of *the Constitution* and the State cannot arbitrarily deprive them of the same
4. That being aggrieved by the judgment, the 4th Respondent filed Nairobi Civil Appeal No. 199 of 2018 alongside with an application for stay of execution of the decree at the Court of Appeal. That on 1st August, 2018 the Court of Appeal issued an order for status quo to maintained pending the hearing and determination of the Appeal. In addition, he stated that the 4th Respondent sued the Petitioners in Makindu CMCC No. 20 of 2018 where he confirmed that they were in occupation of the suit property.
5. He further averred that on 24th June, 2019, the 4th Respondent in the company of his agents forcibly entered the suit property and as a consequence, the Petitioners reported the incident at Mtito Andei police station under OB No. 27/27/6/2019. He further averred that a further report was made and registered under OB No. 13/29/6/2019. That despite the said reports, the police have refused to charge the 4th Respondent with any criminal offence.
6. He went on to state that on another separate occasion, the 4th Respondent forcibly entered into the suit property and evicted the security guards, took over the premises and started carrying out excavation activities therein. That despite the Petitioners having reported the incident at Mtito Andei police station under OB entry No. 13/17/8/2020, the 4th Respondent is yet to be arrested and charged with any criminal offence. That prior to the takeover of the suit property, the 4th Respondent, filed a complaint with the DCI Kibwezi alleging that the Petitioners had trespassed on his property and as a result, the 10th, 11th and 12th Petitioners were summoned by the DCI Kibwezi to record their statements on the complaint which they did.
7. He further averred that the other nine Petitioners have also been summoned by the DCI Kibwezi to record their statements concerning the ownership and control of the suit property. That since then,



the Petitioners have been facing threats of criminal prosecution by the 1st Respondent on account of the 4th Respondent's complaint. He stated that the 4th Respondent is using the criminal justice process to audit the judgment of this Court as opposed to pursuing Nairobi Civil Appeal No. 199 of 2018 before the Court of Appeal.

8. He argued that the issue of ownership, possession and use of the suit property was conclusively determined on 20th June 2018 in ELC Case No. 78 of 2017 which decision has not been set aside. According to him, the 4th Respondent was using the criminal process to get what he lost in ELC No.78 of 2017. He argued that they were aggrieved with the intended criminal process of investigations, institution and the prosecution of charges for the following reasons:-
- a) The complainant Henry Muli Munguti who is also the Appellant in Civil Appeal No. 199 of 2018 is using the criminal process to undermine the integrity of the judicial process as conclusively determined in ELC No. 78 of 2017.
 - b) The proposed criminal trial would amount to a second trial which is contrary to the provisions of Article 50 of *the Constitution*.
 - c) The intended prosecution is marred with illegalities and extreme bias against the Petitioners contrary to the provisions of Chapter 6 of *the Constitution*.
 - d) The intended criminal prosecution of the Petitioners is malicious, oppressive and an abuse of the criminal justice process as it violates the Petitioners' right to fair trial as contemplated under Article 50 of *the Constitution*.
 - e) The intended criminal process offends the rights of the Petitioners' and amounts to discrimination contrary to Article 27 of *the Constitution*.

He averred that the intended prosecution of the Petitioners is unconstitutional and shall breach their rights under Article 27, 40 and 50 of *the Constitution*. He urged the Court to allow the Petition as prayed.

The 2nd and 3rd Respondents Case

9. The 2nd and 3rd Respondents opposed the Petition through the replying affidavit of Simon Mitau, DCI Badge No. 232669 sworn on 12/11/2020.
10. The deponent averred that on 22/4/2020, they received a complaint from one Henry Muli Munguti (the 4th Respondent herein) who alleged that he is the Director of Good Hope Children's Home, having purchased land parcel No. 3762 from one Timothy Thuku where the children home premises stand. That the 4th Respondent stated that on 28th February 2018, Mr John Mutungi went to the children home and asserted that he was the new Director since the 4th Respondent had been chased away. That the 4th Respondent produced a copy of the sale agreement for the suit property, certificate of ownership issued on 22/3/2020 by the District Land Adjudication and Settlement Officer, Kibwezi indicating that the suit property was recorded in the name of Good Hope Children's Home, a certificate of registration of a self-help group/project for the children's home and a certificate of incorporation for Good Hope Children's Home Foundation dated 12/6/2007 indicating that he was the Director thereof.
11. That upon commencing investigations, he recorded statements from Malia Joicy Muli, David Ndunda Nyungu, Eunice Kalondu Malungu, Timothy Mutuku Matenge, Thomas Mbaluka Mbutu, Henry Koskey and John Mutungi.



12. He went on to state that as at the time when 4th Respondent filed the complaint, it was not brought to their attention that there was in existence a decree in Makueni ELC No. 78 of 2017 or that the matter was pending before Court of Appeal.
13. According to him, *the Constitution* of Kenya as read with Section 35 of the *National Police Service Act*, 2011 mandates the 2nd Respondent to investigate any complaint brought to their attention to its logical conclusion. He argued that under Section 52 (1) of the *National Police Service Act*, 2011, a police officer has power to summon any person believed to have information which may assist in investigations.
14. He further averred that the allegation that the 1st and 2nd Respondents discriminated against the Petitioners by failing to charge the 4th Respondent while moving to charge the Petitioners were not substantiated. According to him, the 2nd Respondent inquiry was geared towards aiding the investigations and therefore it cannot by itself amount to infringement of the Petitioners fundamental rights. He stated that no criminal charges have been preferred against the Petitioners as investigations have not been completed. He further averred that prayer (e) of the Petition has no basis in law since criminal charges are non-existent.
15. According to the deponent, the Petition herein is premature and is based on unfounded apprehensions. He asserted that the 2nd Respondent's actions were guided by the law and that the Petitioners' cooperation in the investigations would aid in bringing a closure of the same. In addition, he stated that the Petition is fatally defective since the Petitioners have not demonstrated with reasonable precision the manner in which their rights have been violated or threatened with violation. He urged the Court to dismiss the Petition with costs.

The Response

16. In a supplementary affidavit dated 15/1/2021, the deponent averred that the 10th Petitioner presented the decree and judgment in ELC Case No. 78 of 2017 when he was summoned at Kibwezi Police Station by the 2nd Respondent. He stated that the 2nd Respondent's Officer, one Simon Mitau declined to receive the judgment and decree on the basis that the suit was civil in nature and unrelated to the criminal proceedings which the DCI is mandated to investigate.
17. He argued that Section 35 of the *National Police Service Act*, 2011 does not provide for selective investigation of complaints while Section 51 (b) of the said Act provides that police officers shall obey and execute all orders and warrants lawfully issued. That when the Petitioners reported a complaint against the 4th Respondent's trespass onto the suit property vide OB No. 20/20/08/2020, the 2nd Respondent did not issue summons, effect arrest or carry out any investigations. He urged the Court to allow the Petition as prayed.
18. Despite being duly served, the 1st and 4th Respondents did not file any response to the Petition.
19. The Petition was canvassed by way of written submissions. As at the time of writing this judgment, the 2nd and 3rd Respondents had not filed their submissions as directed.

The Petitioners Submissions

20. The Petitioners submissions were filed on 2nd June 2023.
21. On their behalf, Counsel reiterated the contents of the affidavit in support of the Petition. Counsel submitted that under the doctrine of finality, the ELC Court conclusively determined the Petitioners' rights in respect of control, use and ownership of Plot No. 3762 vide the judgment in Makueni ELC



Case No. 78 of 2017. On the basis of the above, Counsel contended that the 1st, 2nd and 3rd Respondents cannot initiate criminal charges to audit the judgment in ELC Case No. 78 of 2017.

22. In new developments, Counsel submitted that Civil Appeal No. 260 of 2018 was heard and dismissed vide the judgment delivered on 7th July 2022. That being aggrieved, the 4th Respondent filed an Originating Summons before the Supreme Court seeking for the matter to be certified as of public importance. Counsel submitted that the Respondents are still keen on prosecuting the Petitioners despite the fact that ownership of Plot No. 3762 has been transferred to Good Hope Rehabilitation Center. Counsel further submitted that the judgment in ELC Case No. 78 of 2017 conferred upon the Petitioners inalienable property rights in the suit property and that an attempt to reverse the decision through criminal proceedings is oppressive and unconstitutional. Counsel submitted that the proposed criminal proceedings are in breach of Article 50 (1) of *the Constitution* since it would amount to a second trial.
23. Counsel further submitted that he was cognizant of the fact that the existence of a civil suit and the commencement of parallel criminal proceedings on the basis of the same set of facts does not amount to an abuse of the court process. Nonetheless, Counsel contended that the court can interfere with the exercise of the DPP's powers in the event that those powers are exercised for an improper purpose. It was Counsel's contention that the commencement of criminal proceedings against the Petitioners would amount to abuse of discretion and selective prosecution.
24. Concluding his submissions, Counsel urged the court to allow the Petition as the Petitioners have demonstrated that the 2nd Respondent was taking sides with the 4th Respondent in frustrating the Petitioners' course of justice. To buttress his submissions, Counsel relied on the case of Ezekiel Waruinge v Director of Public Prosecutions & 2 Others [2017] eKLR.

Analysis and Determination

25. Article 22(1) of *the Constitution* grants every person the right to institute proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.
26. When a party institutes a Constitutional Petition contending that there has been a violation of its rights and fundamental freedom, the right must be clear and unequivocal, the violation must be discernible and the Respondent must be identified to have been the violator.
27. In the case of Anarita Karimi Njeru Vs The Republic (1976-1980) KLR 1272 the court laid down the substantive test to be applied when making a finding on whether the alleged violation formed the basis of the Petitioner's complaint and held that: -

“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.”

28. This position was reaffirmed by the Court of Appeal in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR where it was held that: -

“(43) The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of *the Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged



infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown *the Constitution*, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of *the Constitution* and the rule of law, without any particulars.

44. We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case.”

29. Further, the Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR held that: -

“(349) ...Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Annarita Karimi Njeru v. Republic (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”

30. In the matter at hand, the only issue for determination is whether the Petitioners’ Constitutional rights under Articles 27, 40, and 50 have been violated or threatened with violation by the Respondents.

31. At the heart of this Petition is the judgment delivered on 20/06/2018 in Makueni ELC Case No. 78 of 2017. The record shows that the judgment and decree was issued in Makueni ELC Case No. 78 of 2017 in the following terms:-

- a) A declaration that the relationship between the 2nd Plaintiff and the 11st Defendant starting from the year 1991 up to 2013 resulted in creation of an implied trust.
- b) A declaration that the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants are trustees of the 2nd Plaintiff and the donor friends of the 2nd Plaintiff for all set ups, systems, documents, entities, funds, movable and immovable assets now registered in the name of the 1st Defendant, the 1st Defendant’s agents, spouse, servants and/or appointees of the 11th Defendant.
- c) A declaration that all accounts currently operated in the name of the 11th Defendant and the funds therein are assets of the trust of the 2nd Plaintiff and the donors.
- d) A declaration that the implied trust between the 2nd Plaintiff and the 1st Defendant graduated to and became a public trust in which the Plaintiffs and the people of Makueni County are the beneficiaries thereof.
- e) A mandatory injunction compelling the 7th Defendant to register Plot No. 3792 in the name of the 11th Defendant
- f) Costs of the suit.



32. It is not in dispute that the decision was in favour of the Petitioners. It is also not in dispute that the 4th Respondent appealed against the judgment and decree to the Court of Appeal vide Civil Appeal No. 199 of 2018. Subsequently, the Appeal was dismissed by the Court of Appeal vide the judgment delivered on 7th July 2022.
33. Effectively, the judgment in Makueni ELC Case No. 78 of 2017 divested the 4th Respondent of ownership and control of Plot No. 3762.
34. This Court is called upon to determine whether the 4th Respondent's criminal complaint and the 2nd Respondent's criminal investigations violate the Petitioners' fundamental rights and freedoms enshrined under the bill of rights.
35. The National Police Service is vested with the mandate to carry out investigations. Articles 243 to 245 of *the Constitution* provides for the establishment, objects, functions and command of the National police service.
36. Under Section 35 of the National Police Act, the Police are mandated to undertake investigations, detect crime amongst other functions. Section 51 (1) of the Act provides as follows:
- (1) A police officer shall-
- a. Obey and execute all lawful orders in respect of the execution of the duties of office which he may from time to time receive from his superiors in the Service;
 - b. Obey and execute all orders and warrants lawfully issued;
 - c. Provide assistance to members of the public when they are in need;
 - d. Maintain law and order;
 - e. Protect life and property;
 - f. Preserve and maintain public peace and safety;
 - g. Collect and communicate intelligence affecting law and order;
 - h. Take all steps necessary to prevent the commission of offences and public nuisance;
 - i. Detect offenders and bring them to justice;
 - j. Investigate crime; and
 - k. Apprehend all persons whom he is legally authorized to apprehend and for whose apprehension sufficient ground exists.
37. The duty and mandate of the police was set out in *Republic vs Commissioner of Police & Another ex parte Micheal Monari & Another* (2012) eKLR where the court held that:-
- “The police have a duty to investigate 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 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 decision to charge act in a reasonable manner the High Court would be reluctant to intervene.”



38. From the foregoing, it clear that the police are mandated to investigate the commission of criminal offences and in so doing they are allowed to record statements.
39. It is the Petitioners case that the investigations undertaken by 2nd Respondent pursuant to the complaint made by the 4th Respondent against the Petitioners were carried out in a discriminatory manner.
40. The Blacks Law Dictionary 9th Edition defines discrimination as:-
- “(1) the effect of a law or established practice that confers privileges on a certain class because of race, age, sex, nationality, religion or hardship (2) Differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured”.
41. Article 27(1) of *the Constitution* provides that every person is equal before the law and has a right to equal protection and benefit of the law. It is clear from the above provision that people cannot be treated differently depending on such variations as sex, religion, race, ethnicity or status of life in the society.
42. In the case of John Harun Mwaui v IEBC & Another (2013) eKLR the court stated as follows with regards to Article 27 of *the Constitution*:-
- “It must be clear that a person alleging a violation of Article 27 of *the constitution* must establish that because of the distinction made between the claimant and others the claimant has been denied equal protection or benefit of the law. It does not necessarily mean that the different treatment or inequality will per se amount to discrimination and a violation of *the constitution*,”
43. *The Constitution* advocates for non discrimination and for everyone to be treated equally before the law. In order for the Petitioners to succeed they must demonstrate that the investigations were carried out with ulterior motives.
44. The Petitioners faulted the 2nd Respondent for recording their statements despite having presented the judgment in ELC Case No. 78 of 2017 which conferred proprietary rights upon them. They argued that the investigations carried out by the 2nd Respondent were biased since the 2nd Respondent did not act on their complaints made against the 4th Respondent. The Petitioners stated that they are apprehensive that their right to fair hearing is threatened with violation. They argued that in the event that they are charged they will suffer double jeopardy since they would be subjected to second trial. It was submitted that the investigations and intended prosecution is intended to overturn the judgment in ELC No. 78 Of 2018. The Petitioners contended that the 4th Respondent was abusing the process to get what he lost in ELC No. 78 OF 2018.
45. The 2nd Respondent averred that the 4th Respondent complained that the Petitioners were trespassing on his property. The 2nd Respondent enumerated the facts which led him to undertake the investigations and record statements from the Petitioners. He produced the statements recorded by the Petitioners as Exhibits “SM7” to “SM13”. According to the 2nd Respondent, the instant Petition is premature since it was filed before the investigations were completed.
46. It is not in dispute that the 2nd Respondent is an independent institution established under *the Constitution*. The court can only interfere with or interrogate the actions of the 2nd Respondent if there is sufficient evidence that they have acted in contravention of *the Constitution*. However, if the



Petitioners demonstrate that the investigations carried out by the 2nd Respondent constitute an abuse of the process, the court will not hesitate in putting a halt to such investigations.

47. The Petitioners have not demonstrated how the 2nd Respondent discriminated against them while carrying out the investigations. They alleged that despite lodging their complaints, the 2nd Respondent did not summon, investigate or arrest the 4th Respondent. The power to investigate is conferred upon the 2nd Respondent. In the circumstances, the court cannot make a finding on the merit on the decision to investigate.
48. No evidence was adduced to show that the 2nd Respondent did not comply with its mandate under Section 35 and 51 (1) of the *National Police Service Act*, 2011. The Petitioners did not demonstrate the manner in which the 2nd Respondent's investigations were aimed at an ulterior motive which threatened their fundamental rights. There is no evidence on record to suggest that the 2nd Respondent's investigations were induced by an ulterior motive. The court cannot order, direct or supervise police investigations.
49. The Office of the Director of Public Prosecution is also an independent office established by *the Constitution* to prosecute criminal cases. The ODPP is mandated to prefer charges against any party where it has established sufficient evidence to prefer the charges. The Petitioners submitted that the proposed criminal charges against them relating to the occupation of title No. 3762 violate their right to fair trial since they will be subjected to a second trial. In this regard, the Petitioners sought for an order of Certiorari to quash the decision by the 1st and 2nd Respondents to charge the Petitioners relating to the use, occupation and title of Plot No. 3762. No evidence was adduced to demonstrate that 1st and 2nd Respondents have made a decision to charge and prosecute the Petitioners in any criminal proceedings.
50. There can be no legal bar preventing them from charging and prosecuting the Petitioners anyway as long as they have legal and justifiable cause to do so when a conclusion has been made that a crime has been committed. The Petition does not lay out any basis that the presumption of innocence of the Petitioners was at risk or that there was an apparent risk that they would not face a fair trial. In any event, the burden of proof in criminal proceedings is always on the prosecution.
51. The Court of Appeal held a similar view in *Commissioner of Police & The Director Of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others* [2013] eKLR where it observed as follows: -

“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 above of power that may lead to harassment or persecution. See *Githunguri V. Republic* [1985] LLR 3090.”

52. As rightly submitted by Counsel for the Petitioners, Section 193A of the Criminal Procedure Code permits the undertaking of both criminal and civil proceedings concurrently and provides as follows:-

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.

53. The Supreme Court had occasion to address itself on the above provision in *Dande & 3 others v Inspector General, National Police Service & 5 others* (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment) where the Court aptly held as follows: -

“ 18. From section 193A of the Criminal Procedure Code, both civil and criminal jurisdictions could run parallel to each other and neither could stand in the way of the other unless either of them was being employed to perpetuate ulterior motives or generally to abuse of the process of the court in whatever manner.”

54. In the instant Petition, the Petitioners alleged that their constitutional rights to fair hearing, equality and freedom from discrimination in addition to the protection of their right to property have been threatened by the Respondents. The Petitioners did not adduce any evidence to support the allegations.

55. The upshot of the foregoing is that the Petition is devoid of merit and the same is dismissed. Each party to bear its own costs.

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HON. T. MURIGI

JUDGE

JUDGMENT SIGNED, DATED AND DELIVERED VIA MICRO SOFT TEAMS THIS 6TH DAY OF MARCH, 2024.

In the Presence of:

Muthiani for the 4th Respondent.

Court assistant Kwemboi.

