



**Mutuma & another v Inspector General of Police & 4 others; Bytech Savanna Ltd & another (Interested Parties) (Petition E439 of 2022) [2025] KEHC 212 (KLR) (Constitutional and Human Rights) (22 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 212 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION E439 OF 2022  
LN MUGAMBI, J  
JANUARY 22, 2025**

**BETWEEN**

**ELIPHUS MUTUMA ..... 1<sup>ST</sup> PETITIONER**

**BRIDGET GAKII NYAGA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**INSPECTOR GENERAL OF POLICE ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 2<sup>ND</sup> RESPONDENT**

**OFFICER COMMANDING STATION (OCS) RAILWAYS POLICE STATION ..... 3<sup>RD</sup> RESPONDENT**

**MARGARET MURIITHI ..... 4<sup>TH</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**BYTECH SAVANNA LTD ..... INTERESTED PARTY**

**BONIFACE KINYUA MURIITHI ..... INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. The Petition dated September 12, 2022 was later on amended on 26<sup>th</sup> September 2022. The amended Petition was further mended on 24<sup>th</sup> February 2023. The Petition is supported by Petitioners’ affidavits.



2. The crux of the instant Petition as supported by the averments in the Petitioners' affidavits is that the Petitioners' arrest and prosecution by the Respondents at the initiation of the Interested Parties is in violation of their constitutional rights under Articles 10(1)(2), 232(1)(2), 244 and 245(2)(b) of the Constitution.
3. Accordingly, the Petitioners seek the following reliefs:
  - a. A declaration that the intimidation and harassment through inter alia, the arrest and instituting of charges against the Petitioners in Milimani Magistrates Court Criminal Case Number E821 of 2022 Republic vs Elphus Mutuma and Bridget Gakii Nyaga at the behest of Bytech Savanna Limited through one of its two directors, Boniface Murithi is an abuse of the powers of the offices of the Inspector General of Police, the Directorate of Criminal Investigations & The Director of Public Prosecution and in violation of Articles 10(1)(2), 232(1)(2), 244 and 245(2)(b) of the Constitution as read together with Sections 10(4)(b) of the National Police Service Act and Section 6 of the ODPP Act.
  - b. An order of prohibition do issue restraining the Respondents either by themselves or agents from harassing, intimidating and/ or commencing, sustaining or proceeding with any investigations and from recommending/ commencing and/ or sustaining criminal proceedings against the Petitioners Milimani Magistrates Court Criminal Case Number E821 of 2022 Republic vs Elphus Mutuma and Bridget Gakii Nyaga.
  - c. An order do issue quashing the proceedings in Milimani Magistrates Court Criminal Case Number E821 of 2022 Republic vs Elphus Mutuma and Bridget Gakii Nyaga in their entirety.
  - d. General damages for gross violation of the Petitioners' constitutional rights.
  - e. Costs and interest.

### **Petitioners' Case**

4. Upon filing of a complaint report at Railway Police Station by the 1<sup>st</sup> Interested Party through the 2<sup>nd</sup> Interested Party against the Petitioners, the 4<sup>th</sup> Respondent commenced investigations into the matter. The 1<sup>st</sup> Interested Party has two directors; the 2<sup>nd</sup> Interested Party herein and the 2<sup>nd</sup> Petitioner are its two co-directors.
5. The complaint was to the effect that the 2<sup>nd</sup> Petitioner (a co-director) had stolen Kshs. 4,819,000 and deposited it account number 0100xxxxxxx at Stanbic Bank held by Biotech Organics Limited which is a company is owned by the 1<sup>st</sup> Petitioner.
6. For context, the 2<sup>nd</sup> Petitioner averred that the 1<sup>st</sup> Interested Party used to transact with Biotech Organics Limited. Accordingly, the 1<sup>st</sup> Interested Party on 2<sup>nd</sup> July 2022 requested 1<sup>st</sup> Petitioner through Biotech Organics Limited to the supply of goods worth Ksh.4,819,000/-. Upon delivery, the amount was duly paid to Biotech Organics Limited. This is the amount is what is purported to have been stolen.
7. The 2<sup>nd</sup> Petitioner states that she swore an affidavit to that effect in Milimani Magistrates Court Criminal Miscellaneous Application No. E2538 of 2022. She however depones that the investigating officers in this matter proceeded to obtain freezing orders in relation to the impugned account held by Biotech Organics Limited.
8. The Petitioners also argue that the investigation was a sham. They contend that the police officers obtained the freezing order based on material non-disclosure in light of the fact that Biotech Organics



Limited is was one of the companies that conducted business with the 1<sup>st</sup> Interested Party for provision of goods.

9. The Petitioners further fault the investigation for being instigated with a personal interest on the part of the police. First it is noted that the Petitioners alongside Peter Wadambwa, a former accountant of the 1<sup>st</sup> Interested Party were arrested on 7<sup>th</sup> September 2022 and held for 24 hours without being charged. The three were later on, on 8<sup>th</sup> September 2022 released on a bond of Ksh.100,000/-.
10. It is averred that on the day of their release, the 2<sup>nd</sup> Petitioner, being one of the signatories, in hand cuffs, alongside the 2<sup>nd</sup> Interested Party, were accompanied by the police officers to withdraw a total sum of Ksh.500,000/-. It is said that Ksh.300,000/- was used to pay their bond while the rest was used to pay the police officers.
11. It is further alleged that during the period of arrest, the 4<sup>th</sup> Respondent attempted to coerce the 2<sup>nd</sup> Petitioner to enter into an agreement on the following terms: first, consenting to the release of Ksh.4,819,000/- to the 2<sup>nd</sup> Interested Party and second, to resigning as a director. It is stressed that the police officers were also parties to this agreement. In turn, the 2<sup>nd</sup> Petitioner was informed that all the charges would be dropped if she agreed to the terms.
12. It is contended that in the end, the 2<sup>nd</sup> Petitioner under duress signed the agreement to release Ksh.4,000,000/- to the 2<sup>nd</sup> Interested Party. It is alleged that the 2<sup>nd</sup> Interested Party stated that he would pay Ksh.1,000,000/- to the 4<sup>th</sup> Respondent as a reward.
13. The Petitioners further assert that the police officers did not record their statements and denied them access to their advocates. In fact, it is stated that their advocates were chased away from the police station even after identifying themselves.
14. Be that as it may, it is deponed that on 14<sup>th</sup> September 2022, the police officers proceeded to arraign the Petitioners in Milimani Magistrates Court Criminal Case Number E821 of 2022 Republic vs Elphus Mutuma and Bridget Gakii Nyaga.
15. On this premise, it is argued that the police officers conduct amounts to gross misconduct. They add that the 2<sup>nd</sup> Interested Party with the aid of the police officers has resorted to using the criminal justice system to advance personal interests which is an abuse of the mandate of the Respondents and violation of their constitutional rights.

### **Respondents' Case**

16. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents in opposition to the Petitioners' case filed grounds of opposition dated 28<sup>th</sup> September 2022 on the grounds that:
  - i. The prayers sought by the Petitioners are unconstitutional as they seek to prevent the 5<sup>th</sup> Respondent from exercising its mandate as provided under Article 157 of *the Constitution*. The prayers if granted would result in a greater injustice in the criminal justice system and public interest.
  - ii. Under Article 157(10) of *the Constitution* and Section 6 of the Office of the Director of Public Prosecution Act, the 1<sup>st</sup> Respondent does not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of the powers or functions, shall not under the direction or control of any person or authority.



- iii. 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.
  - iv. The Petitioners have not adduced reasonable evidence to show that the criminal proceedings are mounted for an ulterior purpose.
  - v. The Petitioners must demonstrate that substantial injustice would otherwise result if the criminal proceedings proceed. The cases are determined on merit.
  - vi. It is in the public interest that complaints made to the police are investigated and the perpetrators of crimes are charged and prosecuted.
17. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents as well filed a Replying affidavit through PC Linda Barasa sworn on 28<sup>th</sup> September 2022 deponed that the Petitioners case is based on misleading and malicious information.
  18. She depones that investigations established that the 2<sup>nd</sup> Interested Party registered the 1<sup>st</sup> Interested Party in 2017.
  19. At the time he ran the company with his wife and co-director, Rachael Kanini. Later on, the two decided to bring on a third person with expertise in the agricultural sector. It is on this premise that the 2<sup>nd</sup> Petitioner joined the 1<sup>st</sup> Interested Party as one of the Directors.
  20. Thereafter, through the company resolution dated 3<sup>rd</sup> April 2022, the 2<sup>nd</sup> Petitioner took over the 2<sup>nd</sup> Interested Party's wife's place as co-director and signatory. The 2<sup>nd</sup> Interested Party was allocated 75% of the shares while the 2<sup>nd</sup> Petitioner, 25%. The two then ran the company (1<sup>st</sup> Interested Party) thereafter without any problems. In fact, even when the 2<sup>nd</sup> Interested Party travelled, he would leave behind signed blank cheques and RTGS forms for any transactions that might arise while he is away and they would do reconciliation afterwards. This went on well up until 18<sup>th</sup> July 2022 when the 2<sup>nd</sup> Interested Party discovered a suspicious transfer of Kshs.4,819,000 from the 1<sup>st</sup> Interested Party's account number 0114xxxxxxxx held at Co-operative Bank to the impugned account at Stanbic Bank made on 12<sup>th</sup> July 2022.
  21. The 2<sup>nd</sup> Interested Party deponed that the 1<sup>st</sup> Interested Party had never transacted with Biotech Organics Limited. The 2<sup>nd</sup> Interested Party filed a complaint with the police who sought freezing and search orders of the impugned account vide Miscellaneous Application Number E2538 of 2022.
  22. Stanbic Bank furnished the impugned account documents. It was discovered that Biotech Organic Limited had 3 directors one of whom was the 2<sup>nd</sup> Petitioner herein holding 34% of its shares and also a signatory to the said account. Furthermore, the impugned account had been opened on 29<sup>th</sup> June 2022 without the 2<sup>nd</sup> Interested Party's knowledge which the 2<sup>nd</sup> Interested Party presumed was for the purpose of defrauding the 1<sup>st</sup> Interested Party. It was further discovered that on 27<sup>th</sup> July 2022, a sum of Kshs. 600,000 had been transferred to Dudu East Africa and another Kshs. 300,000 to the 1<sup>st</sup> Petitioner.
  23. At the end of their investigations, the 2<sup>nd</sup> Respondent found the Petitioners culpable of the offence of stealing contrary to Section 282 of the Penal Code and conspiracy to defraud contrary to Section 317 of the Penal Code.



24. Upon perusal of the file and advice by the 5<sup>th</sup> Respondent, the two were subsequently arrested and charged. It is stated further that the Petitioners refused to record their statements in this matter contrary to their allegations.

### **1<sup>st</sup> and 2<sup>nd</sup> Interested Party's Case**

25. In like manner, the Interested Parties filed their Replying Affidavit sworn by the 2<sup>nd</sup> Interested Party sworn on 16<sup>th</sup> September 2022.

26. He depones that the 1<sup>st</sup> Interested Party was registered on 21<sup>st</sup> September 2017 by him and his wife, Rachael Kanini. Thereafter in 2022, the 2<sup>nd</sup> Petitioner was brought on as a director replacing his wife.

27. He states that the 1<sup>st</sup> Interested Party in its day-to-day activities was actively run by himself and the 2<sup>nd</sup> Petitioner. He states that the management went on smoothly based on trust. That he would leave behind signed bank cheques and RTGS forms while he travelled to facilitate Company's transactions. The reconciliations would then be carried out later on.

28. He depones that during one of the routine reconciliation's checks, he stumbled on a suspicious transaction of Kshs. 4,819,000 done by the 2<sup>nd</sup> Petitioner which had been effected through one of the blank RTGS forms that he ordinarily left behind. He avers that he was not privy to this transaction.

29. Upon this detection, he proceeded to Cooperative Bank, to inquire further and get a copy of the bank statement. He thereafter proceeded to Railways Police Station and reported the matter vide OB Number 28/27/7/2022. Subsequently, police investigations unearthed what had transpired.

30. He depones that on 7<sup>th</sup> September 2022, a day before the Petitioners were arraigned in Court, his wife received a call from the 1<sup>st</sup> Petitioner's wife, Terezzia Matiko and the 2<sup>nd</sup> Petitioner's husband, Geoffrey Ongoya seeking to resolve the matter out of Court. He also received similar communication.

31. Essentially, the 2<sup>nd</sup> Petitioner's husband asked him to prepare the requisite documents for the removal of the 2<sup>nd</sup> Petitioner as a Director. Moreover, that the 2<sup>nd</sup> Petitioner would facilitate return of the disputed funds to the 1<sup>st</sup> Interested Party.

32. The 2<sup>nd</sup> Interested Party alleges that intent on giving compromise a chance, he met the 2<sup>nd</sup> Petitioner and her husband on 8<sup>th</sup> September 2022 at the 2<sup>nd</sup> Respondent's office at Railway Police Station to discuss the matter. In the end, it was agreed that a consent agreement would be drawn and executed on the proposed terms.

33. He stated that during the meeting cash bail was also discussed as the Petitioners could not raise the amount. In that regard, it was agreed that the monies would be accessed from the 1<sup>st</sup> Interested Party's account at Credit Bank. This was on the condition that PC Linda Barasa, accompany them to withdraw the amount. Out of the total sum Ksh.500, 000/-, Ksh.300,000/- was paid for cash bail, Ksh.100,000/- paid to the 2<sup>nd</sup> Petitioner and Ksh.100,000/- retained by himself to process the documents by his advocates.

34. It is alleged that after the proposed consent agreement was prepared by his advocates, the 2<sup>nd</sup> Petitioner's advocates never responded after sent the Agreement. He depones that without any further feedback or way forward, he went to the police and requested the matter proceed to Court.

35. He asserts that despite extending an olive branch to the 2<sup>nd</sup> Petitioner in preparing the consent agreement, she did not show any goodwill and instead filed this Petition to subvert justice. For this reason, he alleges that the Petition lacks merit and thus should be dismissed.



## Parties Submissions

### Petitioners' Submissions

36. The Petitioners through OMK Advocates LLP filed submissions dated 13<sup>th</sup> June 2023. Counsel submitted that the key question for determination was whether the Petitioners had demonstrated sufficient grounds to warrant quashing of the criminal proceedings in Milimani Magistrates Court Criminal Case Number E821 of 2022 Republic vs Elphus Mutuma and Bridget Gakii Nyaga.
37. Counsel recognizing the Respondents' mandate submitted that their mandate ought to be exercised within the confines of the law and *the Constitution*. As such where the Respondents' exercise this power in violation of the law, the Court has jurisdiction to interfere.
38. Counsel reiterating and relying on the facts set out in the Petitioners' affidavits, noted that the police officers had acted outside their mandate in seeking to procure a consent agreement from the Petitioners. Further that it was an agreement that the police officers signed.
39. It was as well stressed that the police officers had held the Petitioners for more than 48 hours. Counsel also faulted the fact that the cash bail used to secure the Petitioners release was paid for by the complainant being the 2<sup>nd</sup> Interested Party herein. To support this case reliance was placed in Bitange Ndemo v Director of Public Prosecutions & 4 others [2016] eKLR where it was held that a statutory power donated to any organ is not to be exercised in an unreasonable manner.
40. Counsel in view of the foregoing argued that the prosecution that had been instigated against the Petitioners' amounted to gross abuse of the Court process. Reliance was placed in Anthony Murimi Waigwe v Attorney General & 4 others [2020] eKLR where it was held that:

“It is no doubt that under Article 157 (10) of *the Constitution* the ODPP is enjoined in exercising the powers conferred by the aforesaid Article to have regard to public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.”
41. Like dependence was placed in Meme -vs- Republic & Another (2004) eKLR.
42. Counsel further argued that where the Respondents abuse their power as the case herein, the Court is mandated to intervene. Reliance was placed in Lameck Okeyo & another v Inspector General of Police & 2 others (2016) eKLR where it was held that:

“However, if the applicants demonstrate that the investigations that the Respondents intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such investigations since investigations must be carried out independently and must be carried out in good faith without malice or for the purpose of achieving some collateral goal divorced from the purpose for which the investigatory powers are given to the Respondents.”
43. Like dependence was placed in Bernard Mwikya Mulinge v Director of Public Prosecutions & 3 others [2019] eKLR.

### 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents' Submissions

44. Prosecution Counsel, Kinuthia Njenga filed submissions dated 23<sup>rd</sup> May 2024 for these Respondents. The issues for discussion were highlighted as: whether these Respondents had violated the Petitioners



- rights, whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' actions were undertaken within the law and whether the order of prohibition should be granted.
45. On the first issue, Counsel submitted that the Petitioners had failed to meet the threshold set out in *Anarita Karimi Njeru vs. Republic (1976-1980) KLR 1272*. This is because the Petitioners had merely stated the rights purported to be violated but had not demonstrated how these rights were specifically infringed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
46. Furthermore, Counsel argued that Article 24 of *the Constitution* makes it plain that a fundamental right can be limited so long as the limitation is reasonable and justifiable in an open and democratic society.
47. Moving to the second issue, Counsel submitted that the 5<sup>th</sup> Respondent is empowered under Article 157(6) of *the Constitution* to institute, undertake and takeover prosecutions of criminal proceedings. Further that this is undertaken without anyone's consent as seen under Article 157(10). This mandate can only be reviewed under certain conditions as captured in *Matalulu versus OPP (2003) 4 LRC 712*. They are:
- a. "In excess of the OPP's Constitutional or statutory powers.
  - b. Contrary to the provisions of Constitution, the OPP could be shown to have acted under the direction or control of another person or authority and failed to exercise his or her own independent discretion.
  - c. In bad faith.
  - d. In abuse of the process of the court in which it was instituted.
  - e. Where the DPP has fettered his discretion by a rigid policy."
48. In this matter, Counsel submitted that the Petitioners had failed to demonstrate how the 5<sup>th</sup> Respondent had acted in excess of mandate or departed from the rules of natural justice in directing that the Petitioners should be charged owing to the evidence gathered.
49. On whether the order of prohibition should issue, Counsel submitted that this order is discretionary and can only be granted where the body in question has acted in excess of its power, which the Petitioners had failed to prove. It was stressed that the decision to charge the Petitioners had been informed by the sufficiency of the evidence on record and public interest.
50. Furthermore, that the Petitioners had failed to show that the 2<sup>nd</sup> Respondent's intention to institute criminal proceedings against the Petitioners was done in bad faith and in abuse of the process.
51. Reliance was placed in High Court Petition No. 537 of 2017 *Stephen Oyugi Okero -Vs -Milimani Chief Magistrate's Court & DCI* where abuse of Court process was defined as:
- "as something so unfair and wrong with the prosecution that the court should not allow a prosecutor to proceed with what is, in all other respects, a perfectly supportable case."

### **Interested Parties Submissions**

52. The Interested Parties through Mutea Mwange and Associate Advocates filed submissions dated 25<sup>th</sup> January 2022.
53. Counsel in like manner recapped the Respondents mandate as envisaged under *the Constitution*. Owing to the 5<sup>th</sup> Respondent's mandate, Counsel highlighted that the Court therefore ought to



proceed with extreme caution so as not to prejudice the pending proceedings as appreciated in Republic v Attorney General & others ex parte Diamond Hashim Lalji & Ahmed Lalji [2014] eKLR.

54. It was equally appreciated that the police have a fundamental duty to investigate any complaint reported to them as observed in David Ndolo Ngali & 2 others v Director of Criminal Investigations & 4 others [2015] eKLR. In exercising this mandate, the police have the power to summon, arrest and detain an accused person.
55. Consequently, relying on Kipoki Oreu Tasur v Inspector General of Police [2014] eKLR argued that the Court ought to exercise restraint in such matters unless violation of fundamental rights and freedoms are expressly demonstrated through the evidence adduced.
56. Counsel additionally argued that grant of prohibition orders against the Respondents can only occur where it is demonstrated that they had acted in excess or without power. In this matter, it was contended that the Petitioner had not proved any illegality on the part of the Respondents in carrying out their mandate. In conclusion, Counsel argued that the Petition lacks merit and hence not sustainable.

### **Analysis and Determination**

57. It is my considered opinion that the issues that arise for determination are as follows:
  - a. Whether the Petitioners' rights under articles 10(1)(2), 232(1)(2), 244 and 245(2)(b) of *the Constitution* were violated by the Respondents; and
  - b. Whether the Petitioners are entitled to the reliefs sought.  
Whether the Petitioner's rights under Articles 10(1)(2), 232(1)(2), 244 and 245(2)(b) of *the Constitution* were violated by the Respondents
58. The Intervention by the Court is warranted where State Agencies exceed their mandate or act capriciously in violation of fundamental freedoms and rights of any person. Article 21 (1) of *the Constitution* makes it clear organs of the State must respect and uphold fundamental rights. It states thus:  
  
"Article 21 (1) It is the fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of rights."
59. In Daniel Ogwoka Manduku vs Director of Public Prosecutions & 2 others [2019]eKLR the Court after a review of a number of authorities stated as follows:

"... It is therefore not possible to stop any criminal investigations unless the foundation of such investigations is malicious or is an abuse of power.

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

"... In order for the applicant to succeed he must show that not only are the investigations which were being done by the police are being carried out with ulterior motives but that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence. It must always be remembered that the motive of





institution of the criminal proceedings is only relevant where the predominant purpose is to further some other ulterior purpose and as long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene...”

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

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

60. It is thus necessary to examine carefully the respective mandates of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondent and weigh it against the conduct of their agents to determine if anything was done in violation of the law or the rights of the Petitioners.
61. Article 239 (1) (c) of *the Constitution* identifies the National Police Service as one National Security Organs and proceeds to provide for its definite establishment in Article 243 of *the Constitution*.
62. The *National Police Service Act*, 2011 provides for the discharge of the functional mandate of National Police Service under *the Constitution* and this Act is envisaged by Article 245 (8) of *the Constitution*.
63. Section 24 (e) lists one of the functions of the National Police Service among others, to be, ‘investigation of crimes.’
64. Further Section 35 of the Act provides that the functions of the Directorate of Criminal Investigations to be:
  - a. collect and provide criminal intelligence;
  - b. undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime among others;
  - c. maintain law and order;
  - d. detect and prevent crime;
  - e. apprehend offenders;
  - f. maintain criminal records;
  - g. conduct forensic analysis;
  - h. execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of *the Constitution*;



- i. co-ordinate country Interpol Affairs;
  - j. investigate any matter that may be referred to it by the Independent Police Oversight Authority; and
  - k. perform any other function conferred on it by any other written law.
65. The 2<sup>nd</sup> Respondent's office derives its authority from Article 157 of *the Constitution*. Specifically, Article 157(6) (a) of *the Constitution* provides as follows:
- (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—
    - a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
66. In carrying out this duty, Article 157 (10) of *the Constitution* provides that the 5<sup>th</sup> Respondent shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.
67. Further under Article 157(11) the 5<sup>th</sup> Respondent in exercising the power is to pay regard to public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.
68. The facts giving rise to the investigation and subsequent prosecution are that 2<sup>nd</sup> Interested Party lodged a complaint of suspected fraudulent transfer of Kshs. 4,819,000/- belonging to the 1<sup>st</sup> Interested Party. The 1<sup>st</sup>, 2<sup>nd</sup> Respondents through the 3<sup>rd</sup> and 4<sup>th</sup> Respondents commenced investigations by applying for search warrants which led to obtaining of account documents that provided a money trail and revealed who the account holders were, and that it showed that the impugned account holders were the 2<sup>nd</sup> Petitioner, a co-director of the 1<sup>st</sup> Interested Party and the other one was the 1<sup>st</sup> Petitioner. This information is not controverted by the Petitioners, except that the 2<sup>nd</sup> Petitioner contends that the money was transferred as payment for supplies made to the 1<sup>st</sup> Interested Party by the 1<sup>st</sup> Petitioner's company.
69. However, 1<sup>st</sup> and 2<sup>nd</sup> Respondents revealed that the investigations further divulged that the 2<sup>nd</sup> Petitioner was also a joint owner of the Company in whose account the money was transferred to and that she owned 34% of the shares in the suspected company.
70. In my humble view, this Court should stop a prosecution where it is manifest that is no reasonable and probable foundation for undertaking an investigation or prosecution such as where it is evident that the same is driven by personal vendetta or any other underhanded motives. This has not been demonstrated in this case, instead, the facts reveal an investigation and/or prosecution premised on a reasonable or probable cause.
71. Courts do not interfere with investigations or prosecutorial decisions except in the clearest of cases where abuse that produces injustice is established. The Court of Appeal in *Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others* [2018] eKLR quoted with approval the following passage from the Supreme Court of India in *State of Maharashtra & Others v. Arun Gulab & Others*, Criminal Appeal No. 590 of 2007 affirmed this position as follows:

“... The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations



made in the F.I.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction to the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor can it soft-pedal the course of justice at a crucial stage of investigation/proceedings.

The provisions of Articles 226, 227 of *the Constitution* of India and Section 482 of the Code of Criminal Procedure, 1973 (hereinafter called as “Cr.P.C.”) are a device to advance justice and not to frustrate it. The power of judicial review is discretionary; however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of power of the Court, but the more the power, the more due care and caution is to be exercised in invoking these powers...”

72. The allegation by the Petitioners to the effect that the alleged transfer of the sum of Kshs. 4, 819,000 was justified because it was in payment for the supply of goods by the 1<sup>st</sup> Petitioner’s Company to the 1<sup>st</sup> Interested Party might be a good defence to the criminal charge which should be raised before the trial court, not in this Court as a ground for stopping the criminal case at the trial court. As held in *Dande & 4 others v Inspector General, National Police Service & 2 others* (Civil Appeal 246 of 2016) [2022] KECA 170, the likelihood of an arrest or investigations not being upheld is not a reason to consider it unreasonable.

73. As further held by the Court of Appeal in *Kuria & 3 Others Vs. AG* (2002) 2 KLR 69 as cited with approval in *Raymond Kipchirchir Cheruiyot & another v Republic* [2021]eKLR;

“ 30. Further in *Kuria & 3 Others Vs. AG* (2002) 2 KLR 69 the court emphatically stated thus:

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tolls for personal score-settlings or vilification of issues not pertaining to that which the system was even formed to perform.... A prerogative order should only be granted where there is an abuse of the process of the law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution... It is not enough to state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the Applicant are under serious threat of being undermined by the criminal prosecution. In the absense of concrete grounds.... it is not mechanical enough that the existence of a civil suit precluded the institution of criminal proceedings based on the



same set of facts. The effect of criminal prosecution on an accused person is adverse but so also are their purpose in the society, which are immense... an order of prohibition cannot also be given without any evidence that there is manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial.”

74. Accordingly for the Petitioners’ claim to succeed it was necessary to demonstrate that the manner in which these Respondents acted was contrary to the law which evidence is lacking in this Petition.
75. The agreements that the Petitioners complain that they were allegedly coerced to sign after that arrest requiring them to concede to the release of the money in question is an admissibility issue if the prosecution decides to introduce the agreements in the criminal trial. The trial Court will be in a position to evaluate the circumstances and decide on their admissibility based on the provisions of the *Evidence Act*. I do not think the matter should be used at this stage as a ground to invalidate the decision of the DPP to charge.
76. In the overall analysis, I find no merit in this Petition which I dismiss with costs to the Respondents and the Interested Parties.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 22<sup>ND</sup> DAY OF JANUARY, 2025.**

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**L N MUGAMBI**  
**JUDGE**

