



**Haria & 3 others v Director, Directorate of Criminal Investigations
& 3 others (Petition E049 of 2021) [2025] KEHC 2549 (KLR)
(Constitutional and Human Rights) (21 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2549 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E049 OF 2021

EC MWITA, J

FEBRUARY 21, 2025

BETWEEN

**JAYANTILAL K HARIA 1ST PETITIONER
MAHENDRA G PATHAK 2ND PETITIONER
CHUNILAL KHIMASIA 3RD PETITIONER
AMEET BHATTESSA 4TH PETITIONER**

AND

**THE DIRECTOR, DIRECTORATE OF CRIMINAL INVESTIGATIONS 1ST
RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT
THE HON ATTORNEY GENERAL 3RD RESPONDENT
VIJAY KUMAR KANJI GOHIL 4TH RESPONDENT**

JUDGMENT

The petitioners' case

1. The petitioners purchased apartments developed by Treo Apartments Limited on Land Parcel Number 1870/11/388 (the suit property) along Peponi road in Westlands area, Nairobi in 2004 at Kshs. 5,000,000. They paid the purchase price and took possession of the apartments in the same year.
2. In 2007, directors of the holding company (Treo Apartments Limited) held a meeting and resolved to add the petitioners as shareholders in the company, by virtue of having purchased the apartments. The company secretary forwarded the resolutions to the Registrar of Companies for action. In 2017



- subleases were registered in the petitioners' names through the firm of P.J Kakad & Co. Advocates after payment of applicable stamp duty. By that time, the 4th respondent who has 50% shareholding in the company, had a dispute with the two other initial directors of Treo Apartments Limited (Suresh Mohanlal Fatania (Mr. Fatania) and Shantilkal Karsandas Varia (Mr. Varia) over the parcel of land on which the apartments were constructed.
3. On 20th November 2020, the 1st petitioner learnt that the initial directors of the company had been arrested over issues relating to the suit property. The petitioners were later summoned by the 1st respondents' officers at Kilimani police station for interrogation. They were thereafter summoned to the 1st respondent's offices on many other occasions; had their finger prints taken and were informed that they would be arrested at any time.
 4. The petitioners averred that the suit property, the subject of this petition, is also the subject of several civil suits, namely, Nairobi High Court Civil Case No. 64 of 2006; Vijay Kumar Dayaji Kanji Gohil v Suresh Mohanlal Fatania & 8 others; Insolvency Case No. 14 of 2018- In the matter of Treo Apartments Limited and Nairobi E.L.C Case No. 188 of 2019; Vijay Kumar Dayalji Kanji Gohil v Treo Apartments Limited and 10 others.
 5. The petitioners stated that they had previously been summoned on many other occasions for questioning regarding Treo Apartments Limited even though criminal investigations were concluded in 2015 by virtue of a letter by the DCI dated 15th June 2015. Investigations had concluded that the 4th respondent's complaints had no basis and did not disclose any wrong doing.
 6. The petitioners asserted that although section 193A of the *Criminal Procedure Code* allows concurrent proceedings, it should not be used as a basis for abusing the criminal justice process to achieve a favourable result in the civil cases. The petitioners argued that the allegations levelled against them were not only malicious but also an attempt by the 4th respondent in collusion with the 1st respondent's officers to coerce them into signing subdivision forms for a parcel of land which cannot be sub divided any further.
 7. The petitioners argued that despite the numerous suits the 4th respondent had filed in courts, the Chief Lands Registrar filed a defence in ELC No. 188 of 2019 and confirmed that the land was lawfully transferred to Treo Apartments Limited through an instrument of transfer dated 17th July 2003. The Chief Lands Registrar also confirmed that a caveat placed by the 4th respondent was lawfully removed in 2017. Subsequent transactions on the suit property were registered on 22nd September 201. The subleases registered as IR 84601/8, 9, 10, 11, 12, 13 were lawfully registered and there had never been any application by Treo Apartments Limited or any of its authorised representatives to the Chief Land Registrar for registration of the purported subdivision of the suit property.
 8. The petitioners asserted that the company secretary of Treo Apartments Limited had also sworn an affidavit that they were appointed as new directors and shareholders at a meeting of the company and they were allotted 83 shares each. During the meeting, a resolution was passed to register sub leases for the individual properties; the process leading to the appointment of directors was genuine and verified by him as the company secretary and the company had been filing annual returns which have always been accepted by the Registrar of Companies.
 9. The petitioners argued that they were granted anticipatory bail of Kshs. 200,000 on 4th December 2020, thorough Misc Application No. E301/2020; Suresh Mohanlal Fatania & 5 others v the Inspector General of Police and another to stop their arrest and prosecution.
 10. According to the petitioners, the initial directors had mutually agreed that Mr. Fatania and Mr. Varia who occupied the undeveloped portion of the suit property, would construct apartments on it. The



apartments were therefore constructed with the 4th respondent's knowledge. The 4th respondent had since the incorporation of the company and the purchase of the property been living in the same compound even when construction of the apartments was ongoing, thus his allegations of fraud, collusion or trespass have no basis.

11. The petitioners maintained that they were innocent purchasers of the apartments for value without notice based on the agreement among the initial directors, facts the 4th respondent was aware of. According to the petitioners, people who purchase apartments, like they did, they had to eventually become shareholders and or directors of the company which owns the property. That is how they (petitioners) became directors/shareholders. The 4th respondent still owns 50% shareholding in Treo Apartments Limited. It is not true, therefore, that his shares had been diluted.
12. The petitioners asserted that on 15th July 2005, the 4th respondent was offered the pre-emptive right to purchase the shares which meant he was to purchase the apartments but he declined. The shares were later transferred to the petitioners who had lawfully purchased the apartments through a resolution passed at a meeting held on 14th April 2007 with the 4th respondent's knowledge. The petitioners maintained that the 4th respondent had persecuted them for far too long and they were constantly being summoned to the 1st respondent's offices.
13. It was the petitioners' position that despite being questioned at length by the 1st respondent's officers, they had never been given any document detailing the allegations levelled against them. They maintained that the decision to investigate, arrest, charge or prosecute them is unconstitutional, illegal, unreasonable, arbitrary, unlawful, unjustified and a violation of articles 2(1), 3(1), 10, 19, 20, 21, 22, 23, 25, 27, 28, 29, 31, 40, 47, 50, 73, 157(11), 159, 165(3), 232, 258, 259 and 260 of *the Constitution*.
14. The petitioners relied on the decision in *Githunguri v Republic* [1986] eKLR, to argue that the investigations and the intended prosecution was instigated by malice which makes the entire process unconstitutional and a breach of their rights, since from the 1st and 2nd respondents replying affidavit, the allegations of any wrongdoing were against the initial 4th respondent's co-directors, Mr. Fatania and Mr. Varia.
15. The petitioners argued that since the 1st respondent's officers had indicated in the letter dated 15th June 2015 that there was going to be no further police action in the matter, they (petitioners) had not carried out any new transactions over the suit property to warrant fresh investigations. Investigations were being conducted with ulterior motive. They relied on the decision in *Commissioner of Police and Director of Criminal Investigations Department v Kenya Commercial Bank and Others* [2013] eKLR.
16. The petitioners again relied on *Republic v Attorney General another Ex-Parte Kipng'eno Arap Ng'eny* [2001] eKLR, that the 1st respondent's investigations violated their right to fair administrative action guaranteed under Article 47 of *the Constitution*. The 1st respondent had not informed them the charges they were to face thus, criminal justice system was being used contrary to Articles 157(11), 239 (3) and 245 of *the Constitution*. The petitioners relied on many other decisions in support of their case.
17. Based on the above arguments, the petitioners sought the following reliefs:
 - a. A declaration that the respondents violated articles 2(1), 3(1), 10, 19, 20, 21, 22, 23, 25, 27, 28, 29, 31, 40, 47, 50, 73, 157(11), 159, 165(3), 232, 258, 259 and 260 as well as the provisions of Chapter Six of *the Constitution* of Kenya 2010.
 - b. A declaration that the 2nd respondents violated the petitioners' right under article 27 of *the Constitution* regarding the right to equality and freedom from discrimination by unlawfully, illegally, selectively and discriminately pursuing investigations against the petitioners.



- c. A declaration do issue that the intended prosecution of the petitioners in the manner proposed is unfair, discriminatory an abuse of the process of the court, irrational, unreasonable, malicious, vexatious, oppressive and therefore unconstitutional and unsustainable.
- d. An order be issued prohibiting the respondents from sustaining, proceeding, hearing, conducting, or in any manner dealing with any intended charges a result of the botched and malicious investigations.
- e. A declaration do issue that the intended charges, prosecution and proceedings against the petitioners are unconstitutional and an abuse of the legal process.
- f. Any other relief that court may deem just and expedient in the circumstances.
- g. That the costs of this petition be borne by the respondents.

1st & 2nd respondent's case

- 18. The 1st & 2nd respondents opposed the petition through a replying affidavit, grounds of opposition and written submissions. The replying affidavit and grounds of opposition cannot, however, be viewed on the portal.
- 19. In the written submissions, the 1st & 2nd respondents argued that the prayers sought will interfere with their respective mandates and result into greater injustice in the criminal justice system and public interest. They relied on the decision in *Anarita Karimi Njeru v The Republic* [1979] eKLR and Articles 24(1), 160 and 161 of *the Constitution* that the petitioners enjoy the right to equal protection in any court of law and a fair administrative process.
- 20. The 1st and 2nd respondents again relied on Article 245 of *the Constitution* and section 35 of the *National Police Service Act* to argue that in exercising its investigative power, the 1st respondent is independent and can only take directions from the 2nd respondent in writing. The petitioners had not shown that the 1st respondent had been directed on what to do by any authority to justify the claim that investigations had been commenced for a collateral purpose.
- 21. The 1st and 2nd respondents asserted that the law allows the agency to investigate the petitioners if there's probable cause to do so. The 1st respondent was prompted to investigate an alleged offence of obtaining land registration by false pretence contrary to section 320 of the *Penal Code* following a complaint by the 4th respondent. They relied on the decision in *Alfred N. Mutua v The Ethics & Anti-Corruption Commission (EACC) & 3 others* [2016] eKLR.
- 22. The 1st and 2nd respondents again relied on the decisions in *Republic v Commissioner of Police & Another Ex-Parte Michael Monari & Another* [2012] KEHC 4595 (KLR) and *Cascade Company Limited v Kenya Association of Music Production (KAMP) & 3 Others* [2015] eKLR, for the contention that unless the petitioners established that the 1st respondent was acting ultra vires his powers, the court should not inhibit investigations.
- 23. The 1st and 2nd respondents relied on Article 157 of *the Constitution*; section 5 of the ODPP Act and the decision in *James Ondicho Gesami v Attorney General & 2 others* [2012] KEHC 3308 (KLR) to assert that in carrying out its mandate the 2nd respondent is not under the direction or control of any person, body or authority.
- 24. The 1st and 2nd respondents maintained that the primary test in making a prosecutorial decision is whether or not the material gathered meets the evidential and public interest threshold. Reliance was placed on *Mohamed Ali Swaleh v The Director of Public prosecutions & Attorney General Ex parte*



- Titus Musau Ndome [2017] KEHC 7460 (KLR) and Republic v Commissioner of Police & Another Ex-Parte Michael Monari & another (supra).
25. The 1st and 2nd respondents argued that the court should only intervene where a State organ or officer is acting ultra vires, outside the confines of reasonableness, procedural fairness, malafides and in disregard of the doctrine of proportionality in decision making. In this case there is no reason for the court to bar investigations and prohibit prosecution since none of the above grounds existed.
 26. They relied on Pauline Raget Adhiambo Agot v Director of Public Prosecutions & b5 others [2016] eKLR; Attorney General v Attorney General for and on Behalf of Inspector General of Police & 3 others ex-parte Thomas Ng'ang'a Munene [2014] eKLR and Republic v Attorney General & 4 others Ex parte Kenneth Kariuki Githii [2014] eKLR.
 27. The 1st and 2nd respondents maintained that where an applicant brings judicial review proceedings with a view to determining contested matters of fact and, in effect, urges the court to determine the merits of two or more different versions presented before it, the court would have no jurisdiction to determine such a matter and should leave parties to the normal forums where the matter ought to be resolved. Reliance was placed on Total Kenya Limited & 9 others v Director or Criminal Investigation Department & 3 others [2013] KEHC 3510 (KLR).
 28. The 1st and 2nd respondents again relied on the decision in Alfred N. Mutua v Ethics & Anti-Corruption Commission (EACC) & 3 others (supra) for the position that this court is estopped by the doctrine of separation of powers from interfering with their mandate unless there is abuse of power. They submitted that the letter dated 15th June 2015 is not binding on the 2nd respondent and the 1st respondent has the right to change his opinion when there is additional and compelling evidence as was in this matter. They urged that the court to dismiss the petition with costs.

3rd respondent's case

29. The 3rd respondent opposed the petition through grounds of opposition and written submissions. The 3rd respondent contended that the petitioners had failed to demonstrate how the respondents violated their constitutional right and that there is no cause of action against it.
30. The 3rd respondent asserted that under Article 157(6) (a) of *the Constitution*, the 2nd respondent has mandate to institute and undertake criminal proceedings against any person before any court in respect of any offence committed and is not under control of any person or authority.
31. The 3rd respondent asserted that the 1st respondent derives its mandate from the *National Police Service Act* to undertake investigations. The 1st and 2nd respondents acted within their respective mandate and the petitioners had not demonstrated how they would suffer substantial injustice if charged in court.
32. The 3rd respondent maintained that the petition falls short of the threshold of a constitutional petition for not disclosing with reasonable degree of precision, the manner in which the 2nd and 3rd respondents have violated any of the petitioners' rights. The 3rd respondent relied on the decisions in Anarita Karimi Njeru v Republic [1979] eKLR; Mumo Matemu v Trusted Society Human Rights Alliance & 5 others [2013] eKLR and HO (suing through next friend P.O (a minor) v Peter Obwogo O. the Secretary Board of Management St Joseph's Boys High School & 3 others [2016] eKLR.
33. The 3rd respondent took the view, that the petitioners had failed to demonstrate how the 2nd respondent acted in breach of the rules of natural justice; that the power to recommend prosecution is discretionary (section 6 of the ODDP Act) and that the court can only interfere where the 2nd respondent acts



in violation of *the Constitution*. Reliance was placed on the decision in *Nganga Nyaga & 2 others v Attorney General & 3 others* [2013] eKLR.

34. The 3rd respondent maintained that the court's jurisdiction to interfere with the 2nd respondent's discretion should be exercised sparingly and in the clearest of cases where it is demonstrated to have been unfairly and improperly exercised. The 3rd respondent relied on the decision in *Douglas Maina Mwangi v Director of Public Prosecutions & another* [2013] KEHC 4434 (KLR).
35. The 3rd respondent again relied on *Republic v Director of Public Prosecution & 7 others* [2013] eKLR and *Kenya Commercial Bank Ltd & 2 others v Commissioner of Police and another* [2012] eKLR, that the offices of the ODPP and Inspector General of Police Service are independent and the court would not interfere in the running of those offices and exercise of their discretion within the limits provided by law, unless the facts disclose a violation of the rights and fundamental freedom.
36. The 3rd respondent again relied on the decision in *Republic v The Chief Magistrate Milimani & another Ex-Parte Tusker Mattresses Ltd & 3 others* [2013] eKLR for the argument that an order for prohibition is discretionary and only tenable where a public body or official has acted in excess of their powers. The court was urged to dismiss the petition.

4th respondent's case

37. The 4th respondent opposed the petition through a replying affidavit and written submissions. He stated that on 22nd May 2003, together with Mr. Fatania and Mr. Varia incorporated Treo Apartments Limited. He had 50% of the shares while the two took 25% shares each.
38. The company was incorporated for purposes of pooling resources together to purchase the suit property at a cost of Kshs. 10,800,000. They agreed that the suit property would be registered in the name of Treo Apartments Limited. It was to be subdivided and apportioned according to their respective shares in the company. It was further agreed that he would retain the house already constructed on part of the suit property upon paying a further Kshs. 2,000,000. The land was to be subdivided into two equal portions with the undeveloped portion retained by other two directors for development purposes. They contributed the purchase price according to their shareholding portions in the company.
39. The property was registered in the company's name; he took possession of his portion and settled in the house constructed thereon while the other two took possession of the undeveloped portion. On 12th May 2005, Mr. Fatania and Mr. Varia resigned as directors of the company. That notwithstanding, they fraudulently and in collusion with the petitioners, erected six apartments on their portion before formal subdivision, illegally encroaching on his half and thereby interfering with his quiet possession of the property.
40. The 4th respondent further stated that Mr. Fatania and Mr. Varia sold the six apartments to the petitioners and others without his knowledge or approval and without obtaining a proper resolution from the company. They had already been charged in court for impersonation and fraud in relation to the issues raised in the petition, a criminal conduct that had benefitted the petitioners.
41. The 4th respondent stated that when he discovered that the two had no intention to have the suit property subdivided and registered as agreed, he lodged a caveat with the Registrar of Lands. The company initiated the process of subdivision but it was sabotaged by the petitioners in collusion with Mr. Fatania and Varia. Varia, purporting to act as a director of Treo Apartments Limited, swore an affidavit alleging that the certificate of title to the suit property was lost during a carjacking. Mr. Varia



and Mr. Fanatia secretly applied for a provisional certificate without his knowledge. They also applied for change of directorship of the company.

42. It was the 4th respondent's case that the petitioners were fraudulently appointed as directors with equal shareholding without his consent. He was never approached by anyone to sell his 50% shareholding and thus, the act of appointing new directors was unlawful.
43. With the provisional certificate of title, Mr. Fatania and Varia purporting to be directors and in collusion with the petitioners caused the caveat to be removed without service notice to him. He later learnt that a letter had been posted to him with a notice contesting the caveat. However, the date the letter was written to him was the same date the caveat was removed. Using the provisional certificate, the petitioners colluded to register the subleases on the suit property to themselves as joint owners of the suit property. Another illegal and wrong entry was made to an unknown person.
44. The subleases indicate that all the parties own equal shares in the suit property despite the fact that he contributed half of the purchase price and is entitled to half of the property. The process was a forgery whose net effect was to steal his half share in the property and kick him out of the company. The property had changed hands to 12 people, including the petitioners and more transfers were underway when the police initiated the investigations.
45. According to the 4th respondent, when he became aware, he reported the matter to various agencies and some of the perpetrators of the fraudulent scheme had been charged in court. The petition is meant to sabotage the legal process.
46. The 4th respondent denied the allegation that he wanted to have an upper hand in the civil cases through police assistance. By a letter dated 21st December 2020, the petitioners initiated negotiations before the 1st respondent, proposing that the suit property be subdivided into two parcels. They later on changed their minds alleging the property is incapable of being subdivided.
47. The 4th respondent asserted that removal of the caveat, transfer and registration of leases in individual names and change of directorship and shareholding in the company were done fraudulently. Investigations were initiated by the Cabinet Secretary, Ministry of Lands, after the suspected fraudulent removal of the caveat. These are part of the issues being investigated as to the involvement of the petitioners.
48. The 4th respondent maintained that the petitioners were fraudulently appointed as directors of the company by Mr. Fatania and Mr. Varia who had already resigned as directors, which cannot be a civil matter. Investigations on the fraud and forgeries will not give him an upper hand in the civil suits pending in court since they require a higher degree of proof and is in relation to crimes committed against him.
49. The 4th respondent argued that by virtue of Article 247 of *the Constitution* and sections 28 and 35 of the *National Police Service Act*, the 1st respondent's officers were within their constitutional and legal mandate to carry out investigations against the petitioners and to arrest them. He relied on the decision in *R. v Commissioner of Police and Another ex parte Michael Monari & Another (supra)*.
50. According to the 4th respondent, the fact that there exist civil proceedings between the parties does not prevent criminal proceedings being instituted against the petitioners, since section 193A of the *Criminal Procedure Code* allows concurrent criminal and civil proceedings.
51. The 4th respondent denied that the investigations were an abuse of the process. He was entitled to lodge a complaint and it was the duty of the police to investigate whether the complaint disclosed reasonable grounds to charges. The petitioners had not demonstrated that the respondents were motivated by any



other reason than the purpose of conducting a fair criminal process. He relied on the decision in *R v Commissioner of Police Ex parte Ben Nyamweya HCMA No. 1404 of 1998* and *Kuria & 3 others v Attorney General (supra)* for the position that there was no evidence that the prosecution was against the court process to warrant a prohibition order.

Determination

52. I have considered the pleadings, arguments by parties and the decisions relied on. The gravamen of this petition is the 1st respondent's decision to investigate the petitioners with a view to charging and prosecuting them on matters they allege are civil in nature thus, raising the question whether this court should halt the intended criminal prosecution.
53. The facts giving rise to this petition from the petitioners' perspective are largely clear. They purchased apartments constructed on LR No. 1870/11/388, along Peponi road within Nairobi, and known as Treo Apartments. They paid the purchase price and took possession of the apartments.
54. Subleases were registered in the petitioners' names upon paying stamp duty thereby becoming owners of those apartments. They were then added as shareholders and directors of the managing company following a meeting of directors of the Holding Company (Treo Apartments Ltd). The company secretary then forwarded the resolutions of the meeting and the proposed changes to the Registrar of companies for action.
55. The petitioners acknowledge that the 4th respondent who holds 50% of the shares in the company had a dispute with the other two other original directors (Mr. Fatania and Mr. Varia) over the parcel of land on which the apartments were constructed. Those directors had earlier been were arrested over issues relating to the suit property.
56. The 1st respondent's officers later summoned the petitioners on many occasions for questioning regarding Treo Apartments Limited even though criminal investigations were concluded in 2015 by virtue of a letter dated 15th June 2015 from the DCI, noting that the 4th respondent's complaints hid not disclose wrong doing.
57. There is no dispute that the suit property is also the subject of several civil suits, namely; Nairobi High Court Civil Case No. 64 of 2006; *Vijay Kumar Dayaji Kanji Gohil v Suresh Mohanlal Fatania & 8 others*; Insolvency Case No. 14 of 2018- In the matter of Treo Apartments Limited and Nairobi E.L.C Case No. 188 of 2019; *Vijay Kumar Dayalji Kanji Gohil v Treo Apartments and 10 others*.
58. The petitioners argued that despite section 193A of the *Criminal Procedure Code* allowing concurrent criminal and civil proceedings, the section should not be used as a basis for abusing the criminal process to achieve a favourable result in the civil proceedings. The petitioners argued that the allegations being levelled against them are not only malicious, the intended prosecution is an attempt by the 4th respondent in collusion with the 1st respondent's officers, to coerce them into signing subdivision forms for the parcel of land which cannot be subdivided any further. The criminal justice system is thus, being weaponized to further a personal vendetta against them, a violation of their constitutional rights and fundamental freedoms. They call on this court to halt the intended prosecution.
59. The respondents on their part, maintained that there is no violation of the petitioner's fundamental rights and freedoms as alleged; the intended prosecution is well founded and the 1st and 2nd respondents are properly exercising their constitutional and statutory mandate in instituting investigations and undertake prosecution, if necessary.



60. The 4th respondent stated that he, Mr. Fatania and Mr. Varia incorporated Treo Apartments Limited where he held 50% shares while the two had 25% shares each. They purchased the suit property and had it registered in the name of Treo Apartments Limited. The property was to be subdivided according to their respective shares in the company and the 4th respondent was to retain the house already constructed on part of the property on payment of a further Kshs. 2,000,000. The land was to be subdivided into two equal portions with Mr. Fatania and Mr. Varia taking the undeveloped half for later development.
61. The 4th respondent admitted that the property was registered in the company's name and he took possession of his portion and settled in the house constructed thereon while the other two took possession of the undeveloped portion.
62. According to the 4th respondent, on 12th May 2005, Mr. Fatania and Mr. Varia resigned as directors of the company. That notwithstanding, the two fraudulently and in collusion with the petitioners, erected six apartments on the undeveloped half of the property before formal subdivision; illegally encroaching on his half thereby interfering with his quiet possession of his portion of the property.
63. The 4th respondent, however, admitted that Mr. Fatania and Mr. Varia sold the six apartments to the petitioners and other purchasers but without his knowledge or approval and without obtaining a proper resolution from the company. Mr. Fatania and Mr. Varia had already been charged in court for impersonation and fraud in relation to the issues raised in the petition a criminal conduct that benefitted the petitioners.
64. When he (4th respondent), realized that Mr. Fatania and Mr. Varia had no intention to have the suit property subdivided as agreed, he lodged a caveat with the Registrar of Lands. The company initiated the process of subdivision which was however sabotaged by the petitioners in collusion with Mr. Fatania and Mr. Varia with Varia swearing an affidavit (as a director of Treo Apartments Limited) alleging that the certificate of title to the suit property was lost during a carjacking. Mr. Varia and Mr. Fatania secretly applied for a provisional certificate without his knowledge and also applied for change of directorship of the company.
65. The 4th respondent's position was that the petitioners were fraudulently appointed as directors with equal shareholding without his consent. He was never approached by anyone to sell his 50% shareholding thus, the act of appointing directors was unlawful.
66. With the provisional certificate of title, Mr. Fatania and Varia purporting to be directors and in collusion with the petitioner caused the caveat to be removed without notice to him. Using the provisional certificate, the petitioners colluded to register subleases on the suit property in their favour as joint owners of the suit property.
67. The respondents maintained that the petitioners had not demonstrated that investigations were malicious; were not being done in accordance with the law, or were against public interest.
68. The 1st respondent has mandate to investigate any criminal activities where a complaint is lodged with it. On the other hand, the 2nd respondent (DPP) has constitutional mandate and discretion to initiate, continue and, or terminate criminal prosecutions. (Article 157). In doing so, the 2nd respondent does not require consent, or permission from any person or authority (157(10)). The 2nd respondent must, however, exercise his powers in a manner that has regard to public interest, interests of administration of justice and the need to prevent and avoid abuse of the legal process (Article 157(11)). (See Director of Public Prosecutions v Martin Mina & 4others [2017] eKLR).



69. In that respect, the law is settled that where the police are investigating a crime, or the DPP has exercised constitutional discretion conferred on his office, courts will rarely interfere with that mandate or discretion. Courts have affirmed on many occasions that they should only interfere on justifiable grounds.
70. In *Republic v Director of Public Prosecution & 2 others Ex parte Francis Njakwe Maina & another* [2015] eKLR, it was observed that courts ought not usurp the constitutional mandate of the Director of Public Prosecutions to undertake prosecution in exercise of the discretion conferred upon that office. A point was, however made, that if an applicant demonstrates that the criminal proceedings constitute an abuse of process, the court will not hesitate in putting a halt to such proceedings.
71. Further, in *Paul Ng'ang'a Nyaga v Attorney General & 3 others* (2013) eKLR, it was held that the court will only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that those bodies acted or are acting in contravention of *the Constitution* or the law.
72. Similarly, in *Francis Anyango Juma v The Director of Public Prosecutions and another* [2012] eKLR, the Court stated:
- [T]he intention under *the Constitution*, was to enable the Director of Public Prosecutions to carry out his constitutional mandate without interference from any party. This court cannot direct or interfere with the exercise by the DPP of his power under *the Constitution* or direct him on the way he should conduct his constitutional mandate, unless there was clear evidence of violation of a party's rights under *the Constitution*, or violation of *the Constitution* itself.
73. And in *Williams v Spautz* [1992] HCA 34; 174 CLR 509; 66 ALJR 585, it was stated that “If a stay is sought to stop a prosecution which has been instituted and maintained for an improper purpose, it by no means follows that it is necessary, before granting a stay, for the court to satisfy itself in such a case, that an unfair trial will ensue unless the prosecution is stopped.”
74. The Court emphasized that unless the interests of justice demand it, courts should refrain from exercising the jurisdiction, and persons charged with criminal offences should not obtain an immunity from prosecution.
75. Courts have thus, maintained that the DPP's discretion to charge will only be interfered with where there is evidence of abuse, malice and all the negative instances that blur exercise of that discretion.
76. As it was emphasised in *Kuria & 3 others v Attorney General* [2002] 2 KLR 69, the court has the power and duty to prohibit continuation of criminal prosecution if extraneous matters divorced from the goals of justice, guide their instigation. A stay by an order of prohibition should be granted where compelling an accused to stand trial would violate the fundamental principles of justice.
77. As is clear from the decisions, the law is settled that courts should be slow to interfere with the police investigations or DPP's constitutional mandate and discretion to prosecute. In that respect, Article 157(10) shields that discretion, so that the DPP does 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.” The only caveat is in Article 157(11), that in exercising those powers, the DPP should have regard to “public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”



78. For a petitioner to succeed, he is required to show that the investigations or intended prosecution is not in public interest or interest of administration of justice, but is based on extraneous matters and, therefore, an abuse of the legal process.
79. The petitioners before this court were purchasers of apartments from Mr. Fatania and Varia, a fact the 4th respondent admitted. The petitioners were registered as owners of the apartments and according to them, they were added as shareholders in the holding company. The petitioners stated that the 4th respondent had an issue with Mr. Fatania and Mr. Veria over the property but not with them as purchasers.
80. I have considered the respondents' arguments more so, the 4th respondent's concerns contained in his affidavit and submissions against the petitioners. The 4th respondent merely seems to suspect that Mr. Fatania and Mr. Veria acted in whichever manner they did, in collusion with the petitioners. The alleged infractions, included that Mr. Fatania and Mr. Varia having resigned as directors of the company, they still fraudulently and in collusion with the petitioners erected six apartments on their portion of the property before formal subdivision thereby illegally encroaching on his (4th respondent's) half and as a result, interfered with his quiet enjoyment of possession of his portion.
81. The issue of illegal encroachment and interference with quiet enjoyment of possession is a civil claim that the ELC Court has jurisdiction to handle. This is so, because both sides were in agreement that there is a case pending in that court, namely; Nairobi ELC Case No. 188 of 2019; Vijay Kumar Dayalji Kanji Gohil v Treo Apartments and 10 others. Even then, the 4th respondent stated that parties had agreed that Mr. Fatania and Mr. Varia were to develop their portion which was undeveloped they purchased the property. portion
82. The 4th respondent again argued that the petitioners were fraudulently made shareholders and directors of the company. The petitioners on their part argued that a resolution was passed at a meeting of the company that they be added as shareholders and directors having purchased the apartments. Whether inclusion of the petitioners as shareholders and or directors in the company was fraudulent or not is an issue to be properly decided in a civil court taking into account the fact of purchase of apartments and the law regarding ownership of apartments (under the *Sectional Properties Act*), since there is already a case before the ELC which should determine ownership of apartments and the applicable law. The issue of whether purchasers of apartments became shareholders and directors in the holding company is a an issue for the civil court. Parties further admitted that there a civil case, namely; Civil Case No. 64 of 2006; Vijay Kumar Dayaji Kanji Gohil v Suresh Mohanlal Fatania & 8 others pending before court.
83. Although section 193A of the *Criminal Procedure Code* allows concurrent civil and criminal proceedings, criminal proceedings should not be undertaken where the issue in controversy can be properly and effectively determined through civil proceedings. This assists in avoiding use of criminal justice system as a weapon against one said of the contestants before the civil court.
84. The petitioners again argued that criminal investigations were concluded in 2015 and a letter from the 1st respondent's office dated 15th June 2015 communicated the fact that investigations had concluded that the 4th respondent's complaints had no basis. The respondents admitted to the existence of the letter only to state that it was not binding on the 2nd respondent and that the 1st respondent had the right to change mind if there is additional and compelling evidence as was the case in this matter.
85. I have seen the letter dated 15th June 2015 signed by M O Okumu on behalf of the CCIIO, Nairobi. Indeed, the letter confirmed that after investigations, it had been concluded that there was no wrong doing and the investigations were closed.



86. Section 24 of the Police Service Act provides for the functions of the Police Service which include; investigating crime, maintenance of law and order and protection of life and property. The police are, however, required to exercise their powers and discharge their functions subject to the constitutional safeguards of human rights and fundamental freedoms. Once investigations are concluded, the file is passed on to the DPP to make a decision whether or not to charge. If investigations conclude that there was no offence committed, the file is closed and that is the end of the matter.
87. In this petition, there was no denial that investigations over this matter concluded that the 4th respondent's complaint was not well founded; the investigation file was closed and a letter to that effect was issued and the petitioners relied on it. The DPP did not have to make a decision on whether or not to prosecute the petitioners. For the respondents to turn around and argue that the 1st respondent has a right to change mind, they must show that the file was reopened following a new complaint or evidence, when it was reopened and whether there was indeed new evidence.
88. It will not be proper for the 1st respondent having closed investigations to suddenly begin investigations again when the same matters are pending before civil courts. One can only conclude that the respondents' action was being taken in bad faith and was intended to assist the 4th respondent in the civil matters pending before the courts, a clear case of abuse of the criminal justice system.
89. Section 193A of the *Criminal Procedure Code* permits both criminal and civil proceeding arising from same set of facts to continue concurrently and should not be a ground for any stay, prohibition or delay of the criminal proceedings.
90. In *Republic v Attorney General & 4 Others ex parte Kenneth Kariuki Gathii* (supra), the court stated that facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit and it will not be a ground for staying a criminal process if the same can similarly be a basis for a criminal offence.
91. The court however observed that if commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim, the institution of the criminal process would have been for achieving a collateral purpose other than its legally recognised aim.
92. In *Wamburu v Director of Public Prosecution & another (Petition E430 of 2023)* [2024] KEHC 11496 (KLR), this court observed that "the Court will intervene in a case where a petitioner shows that the criminal prosecution is being used for improper purposes, ulterior motive, or to coerce one to admit a civil claim."
- See also *R v Attorney General Ex p arte Kipngeno Arap Ngeny* (High Court Civil Application No. 406 of 2001), that a criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose.
93. This court is aware that matters of fact should be left to the trial court. However, where the facts clearly show that the issues raised in the petition which are the basis of the intended prosecution are of a civil in nature and fall for a proper and conclusive determination before civil courts, the court should not allow prosecution to commence or continue if doing so will interfere with the court process pending before the civil courts.
94. As the court emphasised in *R v Attorney General Ex p arte Kipngeno Arap Ngeny* (supra), a "prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable."
95. Flowing from the above observations and considering the material placed before this court, the history of the matter and the relationship between the parties, including the civil case before the ELC, I agree with the petitioners that the investigations and indeed any intended prosecution is not being done in



the interest of criminal justice system. It is being undertaken to serve ulterior purpose and influence or interfere with the civil cases pending before both the ELC and the other courts which are capable of determining issues of fraud and directorship and shareholding in a company. respectively.

Conclusion

96. Having considered the petition, responses and arguments by parties, the conclusion I come to, is that the petitioners have demonstrated that the issues being pursued by the respondents through criminal investigations and any possible prosecution, are the same issues pending before the ELC and Commercial Division Courts. Those courts are best placed to fully and conclusively determine the issue of subdivision; trespass; fraudulent (or obtaining land registration by false pretence); purchase and ownership of apartments; shareholding in a holding company and any disputed directorship in Treo Apartments Limited, being purely issues of civil nature.
97. The investigations and intended prosecution if allowed to proceed concurrently with the cases in the civil courts, will interfere with the proceedings pending before those courts and impair the course of justice.

Disposal

98. Based on the above conclusions, the court makes the following declarations and orders:
 - a. A declaration is hereby issued that the intended arrest and prosecution of the petitioners is unreasonable and will not be in the interest of administration of justice thus, is a violation of *the constitution* and the law.
 - b. An order of prohibition is hereby issued prohibiting the Director of Criminal Investigations and the Director of Public Prosecutions from arresting, preferring charges and prosecuting the petitioners on the basis of matters arising from or in relation to the ownership of apartments or shares and directorship in Treo Apartments Limited.
 - c. Each party shall bear their own costs the petition.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY 2025

E C MWITA

JUDGE

