Aperera v Officer Commanding Langata Police Station & 2 others; Maina (Interested Party) (Constitutional Petition E008 of 2024) [2025] KEHC 4472 (KLR) (8 April 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CONSTITUTIONAL PETITION E008 OF 2024

DR KAVEDZA, J

APRIL 8, 2025

BETWEEN

FARZHAN APERERA ..... PETITIONER

AND

OFFICER COMMANDING LANGATA POLICE STATION .... 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE ..... 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION ..... 3RD RESPONDENT

AND

JULIET WANJIRU MAINA ..... INTERESTED PARTY

JUDGMENT

A. Introduction

1. This is a petition filed under a certificate of urgency together with an application, now spent, filed in court on 3 September. The petition challenges the Respondents' exercise of powers. The Petitioner craves an order stopping the intended institution of criminal charges against her. She argues that the respondents have violated *the Constitution* and should be stopped in their tracks before any further harm can be suffered.

B. Background

2. The Petitioner's case is that in August 2023, while serving as the chairperson of the Phenom Park Estate, Samburu Court Residents' Association, the court residents reported a series of thefts and burglaries in their houses. She followed up on these reports in her capacity as the chairperson of the association and would, from time to time, issue updates to the members through their WhatsApp page.

3. On 3 September 2023, another report backed up by a CCTV camera captured an unknown person trying to break into the petitioner's house. As would be expected, the incident raised security concerns and was extensively discussed by the residents both offline and also on the WhatsApp page. The interested party, who is also a resident of the estate, complained that she had been defamed on the WhatsApp page by the Petitioner and others. The Interested Party and four others, not in this Petition filed a suit, Nairobi Chief Magistrate Court Civil Case No E4921 of 2023: Major Dennis Mutai, Juliet Wanjiru Maina, Debbie Wangari, Michael Oteyo, Daniel Muia Kativoi Versus Patrick Muchele Kuchio, Bernard Wainaina And Farzana Perera seeking damages. This case is still pending determination.

4. The petitioner also avers that while the civil suit was still pending, the Plaintiffs in the civil case threatened to lodge a complaint with Langata Police station so that the petitioners and the other defendants could be prosecuted, claiming that they were connected.

5. As fate would have it, the police from the said police station visited the home of the Petitioner, apparently acting on a complaint lodged by the interested party. This was followed up by a text message to the petitioner from George on 1st September 2024. George introduced himself as a police officer from Langata Police Station, and asked the petitioner to visit the station in order to answer to the charges of creating a disturbance at House No. 5 as reported by the Interested Party. The crux of the Petitioner's case is that:

    a. The intended prosecution is not legitimate and proper, it is solely meant to influence the outcome of the civil case.

    b. The intended charges are oppressive and trumped up; the petitioner has never been asked to record a statement to shed light on what happened in the estate regarding the security of the residents, specifically at House no 5, which is owned by the Complainant.

    c. The intended prosecution is an abuse of the court process.

    d. In preferring charges against the petitioner, the Respondents have acted unreasonably, and the power to prosecute is not open-ended.

6. The petition asked for a raft of reliefs;

    a. A declaration that within the intendment of Article 10 of *the Constitution*, the Respondents are bound to discharge their public duties in a non-discriminatory manner.

    b. A declaration that within the intendment of Article 47(1) of *the Constitution*, the 1st and 2nd Respondents are bound to undertake police investigations in an efficient, lawful, reasonable and procedurally fair manner.

    c. A declaration that within the intendment of Article 73(2) (b) of *the Constitution*, Respondents are bound to be objective and impartial in decision making and to ensure that their decisions are not influenced by any improper motives or manifest abuse of power.

    d. A declaration to be issued from the facts of this case, the decision of the director of public prosecutions to approve charges against the Petitioner on matters that are pending in Nairobi Chief Magistrate Court Civil Case No E4921 of 2023: Major Dennis Mutai, Juliet Wanjiru Maina, Debbie Wangari, Michael Oteyo, Daniel Muia Kativoi Versus Patrick Muchele Kuchio, Bernard Wainaina And Farzana Perera violates the Provisions of Article 157(6) of *the Constitution*.

e. A declaration that the decision of 1st and 2nd Respondents to recommend the prosecution of the Petitioner without, according to her explaining what happened at Phenom estate with respect to the security of the Residents, specifically at House No 5 that is owned by the complainant is procedurally unfair and violates Article 47 of *the Constitution*.

f. A declaration that from the facts of this case, the decision of the director of public prosecution to approve criminal charges against the petitioner on matters concerning her push for the security and welfare of the Residents of Phenom Estate amounts to an unreasonable exercise of prosecutorial powers in Article 157(6) of *the Constitution*.

g. A permanent injunction be issued stopping the respondents from arresting, commencing a prosecution or preferring any criminal charges against the petitioner before any competent court in the republic of Kenya based on a complaint made by Juliet Wanjiru Maina or any other person on security and welfare issues the petitioner raised in her capacity as the chairperson of Samburu court residents' association at Phenom Estate in Langata.

h. A permanent injunction be issued stopping the respondents from arresting, commencing a prosecution or preferring any criminal charges against the petitioner before any competent court in the republic of Kenya based on a complaint made by Juliet Wanjiru Maina or any other person on security and welfare issues the petitioner raised in her capacity as the chairperson of Samburu court residents' association at Phenom Estate in Langata.

i. A permanent injunction be issued stopping the respondents from arresting, commencing a prosecution or preferring any criminal charges against the petitioner before any competent court in the republic of Kenya based on a complaint made by Juliet Wanjiru Maina or any other person in respect of matters that are pending in Nairobi Chief Magistrate Court Civil Case No E4921 of 2023: Major Dennis Mutai, Juliet Wanjiru Maina, Debbie Wangari, Michael Oteyo, Daniel Muia Kativoi Versus Patrick Muchele Kuchio, Bernard Wainaina And Farzana Perera

j. The Costs of the Petition be borne by the Respondent and the Interested party.

7. The Court Record shows that, on several occasions, when the matter came up for directions or mention, the court granted the Respondents and the Interested Party time to file a response to the petition and submissions (see, 11th November 2024, 21st January 2025, 18 February 2025 and recently on 4 March 2025). Despite these directions, at the time of writing this Judgment, the Respondents have neither filed a response to the petition nor submissions.

8. The Interested party however filed a Replying Affidavit sworn by Juliet Wanjiru Maina in court on 18 February 2025. The petition was canvassed through written submissions. The Petitioner filed her submissions on 20 February 2025, and the Interested party filed her submissions on 26 February 2025.

C. Issues for determination

9. Having looked at the petition and the submissions by parties, the following consequential issues call for determination:

i. Whether the petition offends the doctrine of ripeness and the Anarita precedent

ii. Whether this Court has jurisdiction to interfere with the decision of the Director of Public Prosecution to approve and institute criminal proceedings

iii. Whether the Respondents in commencing the Investigations and approval of charges against the Petitioner violated their powers under Articles 157 and 245 of *the Constitution* and thereby abused their powers

iv. What reliefs should the Court issue

D. Analysis

I. Whether the petition offends the doctrine of ripeness and the Anarita precedent

10. The interested party while relying on the decision of the Supreme Court in Attorney-General & 2 others v Ndii & 79 others; Prof Rosalind Dickson & 7 others (Amici Curiae) (2022) KESC 8(KLR) argues that the petitioner offends the doctrine of ripeness. The doctrine of ripeness, the interested party argues, discourages a party from instituting an action in court before the matter has matured. She argues that the petitioner has acted on unfounded fear and, therefore, the petition is unripe for determination. Further, that the claim for undue influence is immature as the civil dispute is yet to be determined. And since the investigations are still ongoing, there is nothing before the Court for determination.

11. The other related claim is that the petition offends the Anarita precedent, which requires that a constitutional petition be pleaded with precision, clearly identifying the constitutional provisions alleged to have been violated and the manner of their violation. The Petitioner's submissions do not cover this issue and the Petitioner did not file submissions in response to the Interested Party's submissions. However, be that it may, it is an obligation of the Court to address an issue raised by a party, notwithstanding the fact that it might not have been responded to.

12. Whereas the ripeness and Anarita precedent doctrines held much sway in pre-2010 constitutional litigation, they must be read with necessary modifications so as to give effect to the 2010 Constitution. Our Constitution is a transformative Constitution whose full effect must be felt across our borders. Its reach cannot, therefore, and should not be limited by the strict application of Anglo-Saxon doctrines such as the one on ripeness. Whereas they are necessary doctrines, they cannot stand along the path and block the transformative effect of the 2010 Constitution.

13. To start with, the doctrine of ripeness asks courts to only address crystallised issues and not engage in academic exercise of addressing mere fears. The meagre judicial resources should be spent only when it is necessary. Whereas this doctrine appears doctrinally sound, it must be read together with our Articles 22 and 258 of *the constitution*. Article 22(1) grants every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Article 258 on the other hand, provides that every person has the right to institute court proceedings claiming that *the Constitution* has been contravened or is threatened with a contravention.

14. The inclusion of the term threatened in our Constitution has modified the justifiability question. Today, a party does not have to wait until a violation has crystallised before approaching this Court. A party is allowed to come to Court where a right or *the constitution* is threatened. In other words, unlike when a person needs to wait until flu symptoms kick in, running nose, sneezing, joint pains, fever, before going to hospital, the mere threat of a constitutional flu grants a party an audience before this court.

15. This Court elaborately considered this question in Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10; others [2015] Eklr where a five-judge bench held that

112. However, we are satisfied, after due consideration of the provisions of Article 22, 165(3) (d) and 258 of *the Constitution*, that the words of *the Constitution*, taken in their ordinary meaning, are clear and render the present controversy ripe and justiciable: a party does not have to wait until a right or fundamental freedom has been violated, or for a violation of *the Constitution* to occur, before approaching the Court. He has a right to do so if there is a threat of violation or contravention of *the Constitution*.

113. We take this view because it cannot have been in vain that the drafters of *the Constitution* added "threat" to a right or fundamental freedom and "threatened ..... contravention" as one of the conditions entitling a person to approach the High Court for relief under Article 165(3) (b) and (d) (i). A "threat" has been defined in Black's Dictionary, 9th Edition as "an indication of an approaching menace e.g. threat of bankruptcy; a Person or a thing that might cause harm" (emphasis added). The same dictionary defines "threat" as "a communicated intent to inflict harm or loss to another..."

114. The use of the words "indication", "approaching", "might" and "communicated intent" all go to show, in the context of Articles 22, 165(3) (d) and 258, that for relief to be granted, there must not be actual violation of either a fundamental right or of *the Constitution* but that indications of such violations are apparent.

16. In Centre for Rights Education & Awareness (CREAW) v Attorney-General& Another [2015] eKLR, the court reiterated the position, that a party does not need to wait for a violation to occur in order to seek reprieve from the court and stated at paragraph 68:

> I fully agree with the sentiments of the Bench in the CORD case. A party need not wait for a violation of a right or a contravention of *the Constitution* to occur before approaching the Court for relief. It appears to me that the intent behind the use of the word "threatened" in both Articles 22 and 258 was to preempt the violation of rights, or of *the Constitution*. If a clear threat to either is made out, it cannot be properly argued that the petitioner should have waited for the violation or contravention to occur, and then seek relief. It is,, therefore,, my finding, and I so hold, that this petition is not premature and is properly before me."

17. The point here is that one need not wait for violation of rights or freedoms to be breached to pursue an action under a constitutional petition. Mere threatening is sufficient reason for one to pursue an action in a constitutional petition. In the case at hand, the petitioner avers in her affidavit that she received a text message from the police, (message is annexed), informing her of charges being instituted against her. Further, the advocate on record reached out to the police officer who confirmed that the DPP had approved the charges. In my considered view, there is a reasonable apprehension of fear that charges would be instituted against her. In the petitioner's view, the entire criminal investigation and prosecution is an abuse of constitutional powers. This alone, in my view, meets the threatened angle in our Constitution.

18. I am fortified in this position by the holding in Jane Nyaboke Njagi v Inspector General of the National Police Service & 3 others; Steve Mwendwa & another (Interested Parties) [2021] eKLR, where the Court held that: '57. Similarly, the High Court can stop actual or contemplated criminal proceedings if they are oppressive, vexatious or amount to an abuse of the Court process and a breach of fundamental rights and freedom

19. Moreover, emerging jurisprudence points to a departure from the strict requirement of particularization in the Anarita Precedent. *The Constitution*, moreso, the Mutunga Rules recognizes informal documentation (see Rule 10(3) & (4) (Protection of Rights and Fundamental Freedoms)

Practice & Procedure Rules 2013). As such, the Anarita precedent must be applied with caution and in its context. The decision was rendered at a time when the adjudication of human rights was governed by the retired Constitution. Without modifications, it is clear that the Anarita precedent is out of touch with the current progressive and transformative Constitution that boldly calls the High Court to protect human rights and *the Constitution*.

20. The high court has previously called for a cautionary reading of the Anarita principles. In Kevin Turunga Ithagi v Fred Ochieng & 5 others [2015] eKLR at para 47,the Court held that the said principle was only to be applied with caution.

In my view, the ratio of Anarita Karimi Njeru –v- Republic (Supra) should be applied by the court with caution and prudence. Thus where the pleadings filed and documentation availed reasonably take the trajectory of Constitutional interpretation or application then that should suffice to have the Petition admitted and determined on its merits.

21. On a similar note, the late Justice Joseph Onguto in Fazleabbas Mohammed Chandoo vs A.I Hussein - Kadhi, Kadhi's Court & 4 Others, Petition Number 374 of 2015 also refused the blind application of the Anarita principle. The Judge started by appreciating that the Anarita case was decided nearly a quarter a century prior to the promulgation of *the Constitution* and proceeded to render himself as follows

> Article 22(3) of *the Constitution* enjoins the Chief Justice to make rules providing for court proceedings relating to the Bill of Rights. Such rules are required to satisfy the norm that formalities relating to proceedings are kept to the bare minimum and in particular the fact that the Court is enjoined, if necessary to entertain proceedings on the basis of informal documentation. This clause read together with Article 258 of *the Constitution* leads to the more prudent conclusion that the rigorous requirements set out by the Court in the Anarita Karimi Njeru's case need deeper reflection before being applied to any given case.''

22. A three Judge bench of this Court in Trusted Society of Human Rights Alliance vs Attorney General & 2 Others, Petition 229 of 2012 also held that

> " 45. We must point out that Anarita Karimi Njeru was decided under the Old Constitution. The decision in that case must now be reconciled and be brought into consonance with the new Constitution. In our view, the present position with regard to the admissibility of petitions seeking to enforce *the Constitution* must begin with the provisions of Article 159 on the exercise of judicial authority. Among other things, this Article stipulates that: (d) justice shall be administered without undue regard to procedural technicalities; and (e) the purpose and principles of this Constitution shall be protected and promoted.
>
> 47. This being a constitutional issue of immense public importance and interest, we refuse to worship at the altar of formal fetishism on this issue and hold that the controversy at issue has been defined with reasonable precision to warrant a proper judicial determination on merits."

23. Similarly, I also refuse to worship at the altar of formalism. The Petition before me clearly identifies the provisions that have been violated and also lays down an analysis of the facts and the provisions of *the Constitution*. It is on this basis that the Interested party has responded to the Petition. She understood what the petitioner was challenging and responded accordingly. Worshipping at the altar of formalism

is a ghost of the past, and I cannot accept or even imagine being a guest at that party. The objection is accordingly dismissed.

II. Whether this Court has jurisdiction to interfere with the decision of the Director of Public Prosecution to approve and institute criminal proceedings

24. This Court, as the custodian of the Bill of Rights, is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under *the Constitution*. The Court in Miscellaneous Application 40 of 2016 Republic v Director of Public Prosecutions& 2 others Ex parte Zablon Agwata Mabea [2017] eKLR while citing the case of Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69, stated that: "...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 tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform..... "

25. The court further held that selective prosecution may be misused for unfair and unreasonable purposes. It stated; "…. It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves… "

26. The power to institute criminal proceedings is a constitutional power under Article 157 of *the Constitution*. The power is not absolute and is capped by Article 157(11). The said article requires the DPP to exercise prosecutorial powers while taking into consideration the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. When a petition is filed contending that the intended exercise of prosecutorial powers is an abuse of the legal process, this Court is effectively equipped under Article 165 to consider any question whether anything said to be done under the authority of *the Constitution* is constitutional. The Supreme court has endorsed this view in Cyrus Shakhalanga Khwa Jirongo v Soy Developers Ltd & 9 others [2021] eKLR that

> (82) 'Although the DPP is thus not bound by any directions, control or recommendations made by any institution or body, being an independent public office, where it is shown that the expectations of Article 157(11) have not been met, then the High Court under Article 165(3)(d)(ii) can properly interrogate any question arising therefrom and make appropriate orders.'

27. These views were also expressed by Justice Majanja who echoed this principle of law in Kenya Commercial Bank Limited & 2 Others vs. Commissioner of Police and Another, Nairobi Petition No. 218 of 20122 (2013) eKLR, where he held that:

> " The office of the Director of Public Prosecution and Inspector General of the National Police Service are independent and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within the limits provided by the law. But these offices are subject to *the Constitution* and the Bill of Rights contained therein and in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under *the constitution*."

28. The mere fact that a person will be charged before a court is not a bar and cannot stop the Court from exercising its supervisory and constitutional jurisdiction. A flawed criminal process can be stopped at any time without waiting for the trial to conclude. The Court in Republic v Attorney-General & 9 others Ex Parte Cyrus Shakhalaga Khwa Jirongo (2017) eKLR stated that:

> 'Therefore, the people placed in charge of investigation and prosecution must in deciding whether to prefer criminal charges ask themselves whether in the circumstances, a fair trial is possible notwithstanding the material placed before them. In other words the police and the DPP ought not to conduct themselves as if they are an appendage of the complainants. In exercising their discretion to charge a person both the police and the DPP's office must take into account and must exercise the discretion on the evidence of sound legal principles.....It is now clear that the mere fact that the applicant will be subject to a criminal process where he will get an opportunity to defend himself is not reason for allowing a clearly flawed, unlawful and unfair trial to run its course.'

29. The Supreme Court has similarly endorsed the position that the Court can stop a constitutionally/ statutory process where the same is being used to violate the Bill of Rights. The apex Court held in Zacharia Okoth Obado vs. Edward Akong'o Oyugi & 2 others [2014] eKLR where it was held that:

> " Article 3(1) of *the Constitution* imposes an obligation on every one, without exception, to respect, uphold and defend *the Constitution*. This obligation is further emphasized with regard to the exercise of judicial authority, by Article 159(2) (e) which requires that in the exercise of judicial authority the Courts must pay heed to the purpose and principles of *the Constitution* being protected and promoted. However, all statutes flow from *the Constitution*, and all acts done have to be anchored in law and be constitutional, lest they be declared unconstitutional, hence null and void. Thus, it cannot be said that this Court cannot stop a constitutionally-guided process.

30. Flowing from the jurisprudence above it is clear that when the criminal process is set in motion to serve adverse purposes and is an indictment to the objectives of criminal proceedings, this court has jurisdiction to intervene. Indeed, no court of law or constitutional judge should sit and fold its arms when constitutional powers are being abused for to do so would be a betrayal of the oath of office.

III. Whether the Respondents in commencing the Investigations and subsequent approval of charges against the Petitioner abused their powers under Articles 157 and 245 of *the constitution* and thereby violated her constitutional rights.

31. The Petitioner challenges the decision to charge by the ODPP as well as the investigative powers of the police. She avers that the exercise of the powers is neither legitimate nor proper and that it is solely meant to influence the outcome of the civil case. That the criminal justice system is being deployed so as to intimidate the petitioner into settling the civil case. Further, the ODPP violated its own Guidelines on the decision to charge, which requires the ODPP to conduct an objective and independent analysis of the case before arriving at a decision to charge.

32. The interested party submits that the mere existence of a civil case is not a bar to criminal proceedings and that section 193 of the *Criminal Procedure Code* allows the concurrent running of civil and criminal disputes. The interested party relied on several decisions, including Kuria & 3 others vs AG (2002) 2 KLR, to support this position.

33. The interested party did not dispute the existence of the civil dispute. She, however, contended that the petitioner went beyond her powers as the Chairperson of the Association when she created disturbances and ordered the search of vehicles entering and exiting the Interested party's premises. The petitioner should therefore be held responsible for the undue interference with the right to privacy. Further, the interested party also submitted that she did not influence the Respondents to institute the charges. The interested party submitted that the Respondents are independent offices and cannot be influenced.

34. Indeed, the Interested party is right that the mere existence of a civil dispute is not a bar to the institution of criminal proceedings. Any interpretation to the effect that the mere existence of a civil dispute bars the institution of criminal proceedings is not supported by *the Constitution*, statutes and existing case law.

35. However, it is a different scenery when criminal proceedings are used to oppress or intimidate a party into settling a civil dispute. Secondly, criminal proceedings should not be instituted when the dispute is purely a civil dispute. A Canadian court puts this point convincingly in R v. Conway [1989] 1 Supreme Court Reports, Canada 1659, at 1667 that Courts can stay criminal proceedings where they are tainted to such a degree that to allow it to proceed would tarnish the integrity of the Court.

36. Equally, the Supreme Court of India has waded into this debate in Arnab Ranjan Goswami v. Union of India (2020) 14 SCC 12 as cited with approval in Mohammed Zubair vs State Of Nct Of Delhi Writ Petition (Criminal) No 279 of 2022 reiterated the role of courts in protecting personal liberty and ensuring that investigations are not used as a tool of harassment:

> "60. ... Courts must be alive to the need to safeguard the public interest in ensuring that the due enforcement of criminal law is not obstructed. The fair investigation of crime is an aid to it. Equally it is the duty of courts across the spectrum – the district judiciary, the High Courts and the Supreme Court – to ensure that the criminal law does not become a weapon for the selective harassment of citizens. Courts should be alive to both ends of the spectrum – the need to ensure the proper enforcement of criminal law on the one hand and the need, on the other, of ensuring that the law does not become a ruse for targeted harassment. Liberty across human eras is as tenuous as tenuous can be. Liberty survives by the vigilance of her citizens, on the cacophony of the media and in the dusty corridors of courts alive to the rule of (and not by) law. Yet, much too often, liberty is a casualty when one of these components is found wanting. 61. [...] The doors of this Court cannot be closed to a citizen who is able to establish prima facie that the instrumentality of the State is being weaponized for using the force of criminal law. Our courts must ensure that they continue to remain the first line of defense against the deprivation of the liberty of citizens.

37. In Kenya, the position was espoused in R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001: "Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure

settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case.",

38. In Commissioner of Police & Another vs. Kenya Commercial Bank Ltd & 4 Others [2013] eKLR, the Court of Appeal held that the High Court can stop investigations by the police when the same amount to an abuse of Court process. The Court held that

> "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. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution. See Githunguri v Republic [1985] LLR 3090.It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See Ndarua v. R.[2002] 1EA 205

39. The point being advanced by comparative jurisprudence is that the criminal justice system cannot be used to achieve ulterior motives or be used as a tool of harassment to settle personal scores.

40. In the case at hand, the Respondents, have monumentally failed to adhere to the Constitutional edicts under Articles 10, 157 (11), 238(2) and 245 of *the Constitution*. They have, by conduct, engaged in a fishing expedition akin to the fame of Russian Roulette aimed at targeting the Petitioner in a clear show of abuse of processes.

41. It is not in doubt that there exists a history between the Petitioner and the Interested party. A history that cannot be ignored. The Petitioner is the chairperson of the estate's association, an estate that has faced several security challenges. Challenges that the police have never attempted to address. The genesis of the 'bad blood' between the Petitioner and the Interested Party is not difficult to tell. It stems from the messages posted in the estate WhatsApp group that is annexed to the affidavit of the Petitioner as part of the documents in the civil dispute pending before another court.

42. The demand letter addressed to the Petitioner from the firm of Kamunda Njue & advocates, dated 26 October 2023, sheds more light on this background. The letter accuses the Petitioner of posting allegedly defamatory statements and insinuating that the interested party was harbouring thieves. In paragraph *6*, the letter refers to the 'illegal search and detention of their vehicles', and in paragraph *7* ', we are informed by ours that efforts to enquire into the incidence were met with futility which subjected our clients' daughter, their employees and their entire household to ridicule and mental anguish'. In paragraph *10*, the letter further reads ' further the illegal searches of their property were not only invasive but also conducted without any basis or evidence to support such claims. This was in contradiction to the claims that it was a proposal in the minutes that were agreed upon as per the annual general meeting..'

43. In their submissions before this court, the Petitioner, as the chairperson, argues that the measures, including the search of vehicles going into the Interested party's premises, were undertaken to fix the security concerns and implemented certain measures. The Interested party claims that this interferes with her peaceful stay and her right to privacy.

44. How then does this become an issue for a criminal proceeding? I have struggled to understand how the issue addressed in the demand letter quickly turned into becoming a subject of a criminal charge. It was in my view a purely civil dispute. A violation of the right to privacy is a matter that can be settled in a civil dispute. If the demand letter is correct that the leaders of the estate's association went beyond the agreed minutes of the meeting, their actions can be challenged in a civil dispute.

45. The problem is exacerbated by the existence of a civil case between the parties. In my view, the two cases cannot be delinked. The criminal investigations and intended proceedings were pursued after the civil case and one can reasonably recognize the intention. There is also an averment that was not disapproved. The petitioner averred that the interested party promised to teach them a lesson because she was 'well connected'. Also, it was averred that the police went to the home of the interested party and it was at that point that a complaint was lodged, thereby showing collusion. Third was the failure of the police to take the statements of other people. These facts remain uncontroverted, and the court would have benefited from the Respondent's affidavit, but the Respondent chose not to respond to the Petition.

46. It is my finding that the Respondents were required to independently review the complaint and make their decisions independently after at least listening to both parties. Having failed to do so, I am constrained to agree with the Petitioner's argument that the Respondents abused their powers as was held in Jacob Juma & another v Commissioner of Police & another (2013) eKLR where the Court stated as follows:

> '..... However, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. I say ordinarily because the mere fact that the version of one of the parties is not considered does not make the subsequent prosecution malicious. However, where the police deliberately decide not to take into account the version of the suspect and acts on a story that eventually turn out to be improbable and which no ordinary prudent and cautious man would have relied upon, that failure may constitute lack of reasonable and probable cause for the purposes of malicious prosecution.'

47. Although it is the prerogative of the Police and the Prosecutor to institute charges, the same must be done responsibly, in accordance with the laws of the land in good faith. Similarly, the criminal law machinery should not be deployed for an ulterior motive. I will adopt the position expressed by the Court of Appeal in Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others Nairobi Civil Appeal No. 56 of 2012 [2013] eKLR that the police should not be involved in the settlement of what is purely a civil dispute and that 'It is not in the public interest or in the interest of the administration of justice to use criminal justice process as a pawn in civil disputes'.

48. In conclusion on this point, criminal justice powers are not toys to be played around with, and this Court, as the bulwark and sentinel of fundamental rights and freedoms, must enforce the Bill of Rights in our Constitution where the violation is proved and quash the pending criminal proceeding which violates *the Constitution*. Put differently, this Court should not be seen to abet abuse of discretion and power and criminality.

49. I find that the machinery of criminal justice was being deployed as a pawn in the personal dispute between the leaders of the estate association and the interested party. As such the Respondents are in violation of Articles 10, 157 (11), 238(2) and 245 of *the Constitution*. Despite this finding, I am not persuaded that a case has been made out on the violation of Article 73 of *the Constitution*.

IV. Reliefs

50. Accordingly, for the reasons set out above, the court makes the following orders:

    i. A declaration be and is hereby issued that the Respondents have violated Articles 10, 157 (11), 238(2) and 245 of *the Constitution*.

    ii. An order of certiorari be and is hereby granted to bring to this court and quash the decision of the 1st Respondent to approve charges against the Petitioner.

    iii. An order of permanent injunction be issued prohibiting the respondents from arresting, commencing a prosecution or preferring any criminal charges against the petitioner before any competent court in the republic of Kenya based on a complaint made by Juliet Wanjiru Maina on security and welfare issues the petitioner raised in her capacity as the chairperson of Samburu court residents' association at Phenom Estate in Langata.

    iv. A permanent injunction be issued prohibiting the respondents from arresting, commencing a prosecution or preferring any criminal charges against the petitioner before any competent court in the republic of Kenya based on a complaint made by Juliet Wanjiru Maina or any other person in respect of matters that are pending in Nairobi Chief Magistrate Court Civil Case No E4921 of 2023: Major Dennis Mutai, Juliet Wanjiru Maina, Debbie Wangari, Michael Oteyo, Daniel Muia Kativoi versus Patrick Muchele Kuchio, Bernard Wainaina And Farzana Perera

    v. Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT KIBERA THIS 8TH DAY OF APRIL 2025

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D. KAVEDZA

JUDGE

In the presence of:

Mr. Mutuma for the respondent/DPP

Kamunda for the Interested party

Ms. Komen h/b Wanyama for the Petitioner.

Tonny Court Assistant.