



REPUBLIC OF KENYA



**Hassan v Directorate of Criminal Investigations & 2 others (Constitutional Petition E709 of 2024)
[2025] KEHC 7266 (KLR) (Constitutional and Human Rights) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7266 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E709 OF 2024**

AB MWAMUYE, J

MAY 15, 2025

BETWEEN

ABDULLAHI MAALIM HASSAN PETITIONER

AND

DIRECTORATE OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS 2ND
RESPONDENT**

**CHIEF MAGISTRATES, CRIMINAL COURT AT MILIMANI 3RD
RESPONDENT**

JUDGMENT

1. The Petitioner, has moved this Court to challenge his intended prosecution on allegations arising from a lease transaction involving the Agricultural Development Corporation (ADC) and a company known as Sahal Holdings. The 1st Respondent is the Directorate of Criminal Investigations (DCI), which investigated the matter; the 2nd Respondent is the Office of the Director of Public Prosecutions (ODPP), which has approved the Petitioner's prosecution; and the 3rd Respondent is the Chief Magistrate's Court at Milimani (Nairobi), where the criminal case is intended to be prosecuted.
2. The Petitioner's grievance stems from a pending decision to charge him in relation to an allegedly fraudulent registration of a lease over land known as Galana Ranch/Block 1/1 a large tract of land held by ADC. It is alleged that on or about May 2021, the Petitioner procured the registration of a sub-lease over the ADC land through fraudulent means. According to the investigations by the DCI, the lease dated 17th February 2021 between Sahal Holdings and ADC was fraudulently obtained, and the Petitioner deceived the Mombasa Land Registrar by presenting a forged application for registration purporting to originate from ADC's lawyers (M/s Cheptumo Advocates). This forged document was



- allegedly used to effect changes in the land records on 19th May 2021 without ADC’s knowledge. The DCI’s inquiry file was forwarded to the ODPP, which upon review found sufficient evidence offering a “realistic prospect of conviction” and recommended that the Petitioner (together with one Nyereru David Bosire) be prosecuted for criminal offenses arising from the above transaction.
3. The Petitioner contends that the decision to prosecute him is unconstitutional and amounts to an abuse of the legal process. He argues that the dispute in question is civil in nature – essentially a commercial or property dispute over the lease – and thus deploying the criminal process against him is oppressive, malicious, and intended to achieve ulterior motives other than genuine law enforcement. He states that he has already engaged civil remedies. The Petitioner asserts that despite the existence of court orders issued by the High Court at Malindi on 8th May 2024, 18th July 2024, and 12th November 2024 (annexed as exhibits “MOS3A”, “MOS3B” and “MOS3C” to his supporting affidavit), the Respondents proceeded to obtain warrants for his arrest and to pursue charges against him in Nairobi, in disregard of those orders. This, he argues, demonstrates bad faith and an abuse of court process. He alleges violation or threatened violation of his fundamental rights – particularly the right to a fair trial (Article 50 of *the Constitution*) and the right to equal protection and benefit of the law – if the criminal case is allowed to proceed under these tainted circumstances. The Petitioner therefore prays for reliefs including: a declaration that the Respondents’ actions violate *the Constitution*; an order of certiorari to quash the decision to charge him (and any charge sheets or warrants issued pursuant thereto); an order of prohibition to restrain the Respondents from arresting or prosecuting him in relation to the subject matter; and any other appropriate relief. He also seeks to have the warrants of arrest issued on 19th December 2024 cancelled or set aside, and costs of the Petition.
 4. The Petition is opposed by all the Respondents. The DCI (1st Respondent) and the DPP (2nd Respondent) maintain that the intended prosecution is founded on credible evidence of criminal wrongdoing by the Petitioner and that the Petitioner has not demonstrated any rights violation or abuse of process to warrant the High Court’s intervention. The 2nd Respondent’s Grounds of Opposition emphasize that the Petitioner has not met the threshold for grant of the orders sought – especially the drastic remedy of halting a prosecution. They contend that the Petitioner misapprehends the law regarding concurrent civil and criminal proceedings, noting that the existence of a civil dispute or suit does not bar the State from undertaking criminal proceedings in appropriate cases. Any relief to halt the criminal case, they argue, would amount to an “unjustified interference” with the constitutional mandate of the DPP under Article 157 and an improper intrusion into the function of the trial court (the 3rd Respondent) to hear and determine the matter. The Respondents characterize the Petition and the accompanying application as a vexatious and frivolous attempt to derail lawful proceedings, and an abuse of the court process.
 5. In response to the Petitioner’s specific allegations, the 1st Respondent (DCI) through a Replying Affidavit sworn by the investigating officer avers that their investigation was conducted lawfully and in accordance with the Petitioner’s rights. The DCI depones that they were not aware of, nor served with, the orders issued in Malindi HC Petition E003 of 2024 (on 8th May, 18th July, and 12th November 2024), and therefore when they sought and obtained warrants of arrest against the Petitioner from the Chief Magistrate on 19th December 2024, they did not knowingly flout any court order. In any event, the Respondents assert that those Malindi proceedings to which the DCI was not a party, or which did not explicitly bar the criminal process cannot insulate the Petitioner from investigation and prosecution for alleged criminal conduct.
 6. The 1st Respondent further states that part of the alleged offenses occurred in Nairobi at the ADC head office where some fraudulent documents were prepared or executed and partly in Mombasa where the land registry is located, and thus the choice to charge the matter before the Nairobi Chief



Magistrate’s Court is legally sound in terms of territorial jurisdiction. The Respondents urge that it is in the public interest and the interests of justice that the Petitioner, like any other person against whom evidence of criminality exists, be subjected to the criminal trial process so that a determination can be made on his guilt or innocence by the trial court. They argue that the Petitioner should not be allowed to circumvent the due process of a trial by inviting the High Court to prematurely evaluate the evidence or motives behind his prosecution – tasks which properly belong to the trial court. In sum, the Respondents view this Petition as unmeritorious and pray for its dismissal with costs.

7. Having considered the pleadings, the parties’ affidavits including annexures and court orders, and the written and oral submissions of counsel, the Court frames the key issues for determination as follows:
 - A. Whether the initiation and continuation of criminal proceedings against the Petitioner (in Milimani Chief Magistrate’s Court Criminal Case No. \ of 2024 – pending registration) violate or threaten to violate the Petitioner’s constitutional rights, particularly the right to a fair trial under Article 50 of *the Constitution*.
 - B. Whether the intended prosecution of the Petitioner amounts to an abuse of the legal process or is otherwise being conducted in a manner that is oppressive, vexatious, or in bad faith.
 - C. What is the scope of this Court’s authority to interfere with the DPP’s decision to prosecute, given Article 157 of *the Constitution* which guarantees the independence of that office?
 - D. What reliefs (if any) the Petitioner is entitled to, in light of the determination of the above issues.

Analysis

Alleged Violation of the Right to a Fair Trial

8. The right to a fair trial is a fundamental right enshrined in Article 50 of *the Constitution* and is among those rights that cannot be limited (Article 25(c)). The Petitioner argues that his fair trial rights are imperilled by the manner in which the Respondents have conducted themselves – specifically, by subjecting him to a criminal process that is allegedly tainted by malice, disregard of court orders, and misuse of the justice system to settle what he characterizes as a civil dispute. He contends that if the prosecution is allowed to proceed, he will not receive a fair trial because the process has been “weaponized” to oppress him.
9. In support of this argument, the Petitioner points to the existence of High Court orders from Malindi (Petition E003 of 2024) which, in his view, restrained the Respondents from taking adverse action against him pending the resolution of that earlier petition. He avers that by ignoring those court orders and obtaining warrants for his arrest on 19th December 2024, the DCI violated the rule of law and his rights – effectively ambushing him with a criminal process that he had reason to believe would not proceed while the High Court’s orders stood.
10. The Petitioner’s position is that such conduct by state actors undermines the integrity of any subsequent trial and offends the constitutional principle in Article 50(1) that disputes should be resolved in a fair and public hearing before an impartial court. Additionally, he argues that his right to liberty and security of the person (Article 29) was infringed by the unlawful issuance of warrants, and that the ODPP failed to uphold its constitutional obligation under Article 157(11) to prevent and avoid abuse of the legal process in making the decision to charge him.



11. The Respondents dispute that any of the Petitioner's rights have been or will be violated. They emphasize that the Petitioner will receive a fair trial in the ordinary course of the law: he will have the opportunity to appear before the Chief Magistrate's Court, plead to the charges, seek bail, and defend himself with all the safeguards of due process in a criminal trial. The mere fact of being subjected to trial, they argue, is not a violation of fair trial rights – on the contrary, a fair trial is the means by which the justice system determines the truth or falsity of allegations against an accused person.
12. Regarding the Malindi High Court orders, the Respondents particularly the DCI have given evidence on affidavit that they were never served with those orders and were not aware of them at the material time. On this point, the Court has considered the evidence. The Petitioner exhibited copies of what appear to be interim orders issued by the High Court at Malindi on the dates mentioned. While the precise terms of the orders are not fully before this Court, it is asserted that they restrained the respondents in that suit from arresting or charging the Petitioner, or from interfering with his quiet enjoyment of the suit property. The Petitioner's complaint is that the DCI and DPP knew or ought to have known of these orders and should have refrained from preferring charges or seeking warrants in Nairobi. The DCI's replying affidavit, however, categorically states that they had no knowledge of the Malindi orders, as those were never served on the DCI. The Petitioner did not provide proof of service of the Malindi orders upon the DCI or ODPP.
13. In the absence of evidence that the 1st or 2nd Respondents were made aware of the said orders, this Court is inclined to accept the Respondents' contention that any prima facie breach of those Malindi orders was not deliberate or intentional on their part. It is also noteworthy that the Petitioner, upon learning of the warrants issued on 19th December 2024, moved with haste to file the present Petition (on 23rd December 2024) and obtained interim conservatory orders from this Court staying his arrest. Thus, any prejudice that might have arisen from the short-lived warrant was effectively mitigated by this Court's intervention pending hearing of the Petition.
14. The question remains whether, even assuming the Respondents had ignored a subsisting court order, such conduct would automatically render the ensuing prosecution unconstitutional so as to justify a permanent stay or quashing of the proceedings. It is certainly a serious matter for state agencies to disregard court orders – doing so undermines the rule of law and could potentially amount to contempt of court. However, the appropriate remedy for breach of a court order would typically be to enforce that order or punish the contemnor; it does not necessarily follow that an otherwise lawful prosecution must be quashed for that reason alone. The Court must be careful to distinguish between personal grievances or procedural missteps and a violation of the right to fair trial in the substantive sense.
15. The Petitioner has not demonstrated that the alleged non-compliance with the Malindi interim orders has in any way compromised the fairness of the actual trial he would face in the Magistrate's Court. If anything, that issue could be addressed by ensuring the Petitioner is not prejudiced by any lost time or opportunity and can prepare his defense. In short, while the Court does not condone any disrespect of judicial orders, it is not persuaded on the evidence that the Petitioner's fair trial rights have been infringed in this regard, especially given the Respondents' uncontroverted claim of lack of service.
16. The Petitioner's broader claim is that the prosecution is malicious and baseless, which if true could implicate his fair trial rights. To assess this, the Court must examine whether the Petitioner has provided sufficient evidence of malice, bad faith, or lack of foundation in the charges. It is not the role of this Court to conduct a miniature trial or to test the sufficiency of the prosecution's evidence in detail – that is the domain of the trial court. However, in constitutional petitions of this nature, the High Court can look at the conduct of the prosecution and the available material to determine if the case



is so devoid of merit or is propelled by such ulterior motives that allowing it to proceed would itself constitute an injustice.

17. The Petitioner asserts that the matter is “purely civil”. The context is that ADC and Sahal Holdings have a dispute over the validity of a lease. It is true that disputes over land transactions and contracts can give rise to civil litigation. Indeed, the record suggests that ADC, upon discovering what it believed to be a fraudulent registration of a lease, took steps to rectify the title in November 2023 and may have been involved in civil proceedings or administrative actions to nullify the fraudulent entries. However, the existence of a civil aspect to a dispute does not immunize criminal conduct if such is disclosed. Each process has its own purpose: the civil process aims to vindicate private rights or compensate loss, whereas the criminal process aims to punish wrongdoing and protect the public interest in law enforcement. The Petitioner’s suggestion that the dispute should be confined to a civil court would be persuasive only if the criminal process was being used in the absence of any criminal element – for instance, if the dispute was truly a simple breach of contract with no fraud or crime involved. But here, the DCI’s investigation indicates prima facie commission of serious crimes. The DPP has independently reviewed the investigation file and was satisfied that the evidence meets the threshold for prosecution. This independent review by the constitutionally-mandated prosecutor under Article 157(10) – who is not subject to direction or control of any person – further attenuates the Petitioner’s claim that the prosecution is driven by malice. There is no evidence placed before this Court of any improper influence on the DPP or any extraneous purpose guiding the decision to charge. In fact, one of the suspects to be charged is not just the Petitioner but also another individual Mr. Bosire, suggesting the investigation targeted the acts, not the person.
18. The courts have held on numerous occasions that concurrent civil and criminal proceedings can proceed without offending the sub judice rule or amounting to abuse, provided that the criminal process is not being used oppressively. In *William S. K. Ruto & Another. v Attorney General*, for example, the court observed that the existence of a civil dispute or even ongoing civil litigation does not bar the State from prosecuting if the facts disclose a criminal offence – unless it is shown that the criminal process is being utilized “to put pressure on the applicant to settle the civil claim” or for an ulterior motive. In the case at hand, the Petitioner has not demonstrated that the criminal case is intended to achieve an improper purpose in the civil dispute. ADC is not even a party to this Petition; the prosecution will be conducted by the DPP, not ADC. If the Petitioner’s position in any civil litigation is correct, he will have the opportunity to present that as a defense in the criminal trial – success in the criminal trial would indeed bolster his civil claim. Conversely, if the criminal trial establishes that a fraud took place, the outcome would likely resolve the civil dispute as well. Therefore, rather than viewing the criminal case as a needless duplication, it may well be a necessary process to uncover the truth of the matter. The mere parallel existence of civil proceedings does not, without more, violate the Petitioner’s fair trial rights.
19. In conclusion on this first issue, the Court finds that the Petitioner has not proved any violation (actual or threatened) of his fair trial rights or other fundamental rights by the mere fact of being subjected to a prosecution. The criminal process itself contains robust safeguards for fairness. Should any specific issue arise in the course of that trial – for example, if the prosecution were to withhold exculpatory evidence, or excessively delay the trial, or otherwise act in a manner that prejudices the defense – the Petitioner will have recourse to the trial court to address such issues. As of now, his complaints are largely speculative or procedural rather than substantive. On the evidence and material before this Court, I am not satisfied that the Petitioner’s right to a fair hearing has been infringed.



Abuse of Legal Process – Malice, Ulterior Motive and Improper Use of the Criminal Law

20. The term “abuse of process” refers to the misuse of the court’s procedures for purposes other than those for which they were intended, or in a manner that is oppressive or vexatious to a party. In the criminal context, an abuse of process typically means that the machinery of justice is being used in a perverse way – for instance, to harass an individual, to secure private vengeance, to pressure the person into succumbing to some demand, or generally in a way that brings the administration of justice into disrepute.
21. The Petitioner alleges that the criminal proceedings against him amount to an abuse of process. Several strands can be discerned in this allegation: (a) that the criminal case is founded on no factual or legal basis; (b) that the criminal process is being used to achieve goals outside the legitimate aims of criminal justice – such as to compel the Petitioner to abandon his civil claim to the land or to tarnish his reputation; and (c) that the initiation of the prosecution ignored or side-stepped existing judicial proceedings (the Malindi Petition) in a way that is duplicitous or vexatious (i.e., multiple proceedings over the same subject matter in different courts).
22. The legal burden to establish abuse of process lies on the Petitioner who alleges it. The threshold for proving abuse is high, because the court is being asked to take the exceptional step of stopping an ongoing or contemplated prosecution, which is a mandate ordinarily reserved for the DPP and the trial courts. As was observed by the Court of Appeal in *Peter George Anthony Costa v. AG* (Nairobi Petition No. 83 of 2010),

“The process of the court must be used properly, honestly and in good faith, and must not be abused. ... Where there is an abuse of the court process there is a breach of the accused’s fundamental rights as the accused will not receive a fair trial. It is the duty of the court to stop such abuse of the justice system.”
23. And in *Rosemary Wanja Mwagiru & 2 Others v. AG & 2 Others* (2013), Mumbi J. similarly stated:

“The criminal process should not be used to harass or oppress any person or to settle personal scores. Should the court be satisfied that the criminal proceedings have been instituted for a purpose other than the honest enforcement of criminal law, then the court ought to step in and stop such proceedings in their tracks.”

These pronouncements make clear that if a court concludes a prosecution is mounted in bad faith or for extraneous reasons, it not only can but indeed must intervene, since allowing such a prosecution to proceed would result in an unfair trial and a failure of justice.
24. Conversely, our courts have also warned that the power to halt prosecutions must be exercised sparingly and with circumspection. In *Thuita Mwangi & 2 Others v. Ethics and Anti-Corruption Commission & 3 Others* [2013] eKLR, the High Court acknowledged that while the DPP’s discretion is not unfettered and must align with constitutional values (Article 157(11) and section 4 of the ODPP Act, which emphasize impartiality, promotion of public confidence, and the need to prevent abuse of legal process), the court may intervene only where it is clear that the prosecution is for purposes other than the honest enforcement of the law. The court underscored that there must be “clear evidence” of improper motive or material to show that the basis for the prosecution is absent. A prosecution initiated without a factual foundation, or on grounds of pure malice, would indeed be suspect as an abuse. But the court should not readily infer abuse from mere assertions of the accused; solid proof is required.



25. In evaluating the facts of the present case against these principles, the Court is not persuaded that the Petitioner’s prosecution is an abuse of the court process. To begin with, the material presented by the Respondents shows there is a concrete factual foundation for the charges. The DCI’s investigation unearthed specific documents that are allegedly forged (such as the application for registration dated 17th May 2021, purportedly from Cheptumo Advocates, which ADC’s advocates have disowned), and specific actions attributable to the Petitioner (presenting that document at the land registry on 19th May 2021). These are not vague or generalized accusations; they are discrete acts which, if true, constitute criminal offences. The DPP’s decision to prosecute was made after applying legal and evidentiary tests independently. There is no indication that the DPP acted capriciously or arbitrarily. On the contrary, the ODPP in its communications (letters dated 13th and 18th November 2024) explicitly considered whether the evidence met the threshold of a “realistic prospect of conviction”, echoing the standard set out in the National Prosecution Policy that prosecutors must be satisfied that the evidence can support a conviction before proceeding. This demonstrates adherence to proper standards, not abuse.
26. The Petitioner’s counsel argued that the delay in bringing the charges (the events in question occurred in 2021, yet the decision to charge was made in late 2024) is suggestive of malice or an afterthought. However, the chronology reveals that the matter was under investigation over a period of time. Some delay can be attributed to the complexity of the fraud. Moreover, it appears the Petitioner was aware of the investigation because he sought refuge in the Malindi Petition as early as May 2024, perhaps anticipating imminent charges. Thus, this is not a case of “sleeping on rights” or a completely surprise resurrection of an old matter (as was the case in the famous *Stanley Munga Githunguri v. Republic* [1986] KLR 1, where a prosecution was brought 8 years after the offence and 4 years after the State had explicitly told the accused he would not be charged, which was held to be oppressive and an abuse). Here, the timeline from offence to charge is about 3 years, which, while not immediate, is not so inordinate as to be presumptively oppressive – especially in the absence of any promise or representation by the State that the Petitioner would not be prosecuted. It is also noteworthy that ADC only finalized rectification of the title in late 2023, an event which might have catalyzed or concluded the investigations. In any event, the Petitioner has not demonstrated specific prejudice caused by this timeline (for instance, loss of evidence due to delay); on the contrary, he has been on notice and actively engaged with the dispute throughout.
27. On the allegation that the prosecution is being used to exert pressure in the civil dispute: The Court has looked for any evidence that the criminal case was initiated to intimidate the Petitioner into yielding on some civil claim. No such evidence was provided. There is no letter, meeting, or communication suggesting that ADC or any state officer threatened criminal action unless the Petitioner gave up his claim. Absent such evidence, the Court cannot infer an ulterior motive. It cannot be said that because ADC stands to benefit from the Petitioner’s potential conviction, the prosecution is therefore mounted to serve ADC’s interests rather than public interest. If a crime was committed against ADC it is squarely within public interest for the perpetrator to be prosecuted. As *Lenaola J* (as he then was) stated in *Martin Wambora v DPP* [2016] eKLR, the criminal law is not a servant of civil processes, but neither is it a stranger where crimes are intertwined with civil matters – each must be allowed to run its course unless one process is being perverted to defeat the other.
28. Lastly, the Court must address the Petitioner’s assertion that the prosecution is “baseless”. While this overlaps with Issue 1’s discussion on fair trial, it is worth noting that courts have set a clear test: a prosecution will be quashed if it is shown to be manifestly devoid of evidence – for example, if no reasonable prosecutor could have brought the charge, or if the allegations do not disclose any offence known to lawkenyalaw.org. This is akin to the test for a no-case submission but applied pre-trial. In



the instant case, the alleged offences (forgery, uttering a false document, obtaining registration by false pretences, etc.) are all well-known offences under the *Penal Code* and related statutes. The facts alleged by the DCI clearly correspond to these offences. The Petitioner has not disputed, for instance, that the application for registration was lodged and that Cheptumo Advocates have disowned it – facts which strongly suggest a forgery occurred. His likely defense may be that he personally did not author or know of the forgery, or that he was a bona fide recipient of ADC's lease. Those are issues of evidence and intent appropriate for trial. They do not render the charge itself baseless; rather, they are the Petitioner's alternate narrative to be tested in court. This Court cannot declare the prosecution devoid of basis merely because the Petitioner maintains his innocence. As the Court of Appeal held in *Uwe Meixner & Another v. Attorney General* [2005] 2 KLR 189, "It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. ... [For the High Court to intervene by stopping the prosecution on the ground that the evidence is insufficient] would be a subversion of the law regulating criminal trials, as it would usurp the function of the trial court.". I echo that reasoning here. Stopping the prosecution at the invitation of the Petitioner would effectively require this Court to prejudice the evidence, which is not warranted in the circumstances.

29. In summary, having scrutinized the record and the parties' contentions, I find no abuse of the court's process in the intended prosecution of the Petitioner. On the contrary, it appears to be a bona fide exercise of prosecutorial mandate in response to a complaint of criminal conduct. The Petitioner has failed to demonstrate that the purpose of the prosecution is anything other than the genuine enforcement of criminal lawkenyalaw.org. Consequently, the plea to declare the prosecution an abuse of process is rejected.

The High Court's Intervention in Prosecutions – Separation of Powers and Threshold for Quashing a Prosecution

30. The third issue essentially asks: even if the Petitioner had concerns about his prosecution, to what extent can this Court intervene given the constitutional role of the DPP and the general principle of separation of powers?
31. Article 157 of *the Constitution* establishes the Director of Public Prosecutions as an independent office. Article 157(6) grants the DPP the power to initiate, take over, continue, or discontinue criminal proceedings (except for a few exceptions like a court-martial) against any person. Article 157(10) pointedly states that the DPP "shall not require the consent of any person or authority for the commencement of criminal proceedings and ... shall not be under the direction or control of any person or authority." This constitutional insulation underscores those prosecutorial decisions are to be made objectively, based on the evidence and the law, without interference. That independence, however, is not absolute in the sense of being beyond the law – Article 157(11) imposes a duty on the DPP to "have regard to the public interest, the interests of the administration of justice, and the need to prevent and avoid abuse of the legal process." Thus, the DPP is accountable to *the Constitution* and the law in how prosecutorial power is exercised. If the DPP were to act contrary to Article 157(11) – for example, bring charges in bad faith or without regard to justice – the High Court has the authority under Article 165 to intervene and check such action, for no state officer can claim immunity for unconstitutional conduct.
32. Our constitutional design distributes powers among the Executive, Legislature, and Judiciary, and expects each branch to respect the roles of the others. The decision to charge and prosecute an individual is an executive function vested in the DPP and investigative agencies. The trial and determination of guilt is a judicial function vested in the courts, starting with the magistracy or High Court for trials. The High Court, as a constitutional court, stands in an oversight capacity



- to ensure that the exercise of Executive powers (like prosecution) does not violate individual rights or *the Constitution*'s limits. However, this oversight should not collapse into micro-management or usurpation of the executive role. The point was well made by the Court of Appeal in *Meixner v AG*, that the High Court must not turn itself into a trial court when considering a challenge to a prosecution. Similarly, the Court of Appeal in *Joram Mwenda Guantai v. The Chief Magistrate, Nairobi* [2007] 2 EA 170 held that the High Court has inherent jurisdiction to prevent abuse of process “by prohibiting prosecutions brought to oppress, or to vex, or which fail to meet the ends of justice,” but cautioned that such power should be exercised with great care and only in clear cases.
33. The jurisprudence from other jurisdictions mirrors ours on this point. In the UK, the courts have inherent power to stay a prosecution for abuse of process, but it is considered an exceptional remedy – used, for instance, where “it would be unfair to try the accused” or “where the integrity of the criminal justice system would be compromised by the trial”. In *R v. Horseferry Road Magistrates ex parte Bennett* [1994] 1 AC 42 (HL) the courts upheld a stay where the accused was unlawfully abducted to the UK to face trial, which was an affront to justice. But absent such appalling circumstances, English courts generally prefer the trial to proceed, leaving any deficiencies to be addressed within the trial or by appeal. The Privy Council in *Sharma v. Brown-Antoine* [2007] 1 WLR 780, a case from Trinidad & Tobago, observed that the court should interfere with a prosecutorial decision only in rare cases of dishonesty, bad faith or exceptional circumstances. Likewise, the Privy Council in *Mohit v. DPP of Mauritius* [2006] UKPC 20 affirmed that the power to stop a prosecution via judicial review is to be exercised sparingly, lest the courts encroach upon the domain of the prosecutorial authority.
34. South African law, under a constitutional framework similar to ours, also treats the permanent stay of a prosecution as an extraordinary remedy. For instance, the South African Supreme Court of Appeal in *Zanner v. Director of Public Prosecutions, Johannesburg* (2006 (2) SACR 45 (SCA)) held that “the power to stay a prosecution should be exercised sparingly and only in exceptional circumstances,” underscoring that the integrity of the judicial process must be protected and that a stay (equivalent to quashing a prosecution) should not be granted lightly. The South African Constitutional Court in *Sanderson v. Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) set out factors to consider in deciding whether a delay in prosecution warrants a stay, making it clear that not every delay or procedural flaw will justify terminating a prosecution – there must be real trial-related prejudice or injustice that cannot be remedied within the trial itself. These persuasive authorities reinforce the principle that ending a prosecution pre-trial is akin to exonerating an accused before a full hearing on the merits, and thus should be reserved for the clearest of cases.
35. In a recent decision of the Kenya Supreme Court – *Dande & 3 Others v. Inspector General NPS & 4 Others* (Petitions 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated), [2023] KESC \ (KLR)) – the apex court considered an appeal in a matter where individuals sought to quash their prosecution on grounds of alleged abuse of power by the DPP. The Supreme Court, while upholding the lower courts’ refusal to halt the prosecution, cited with approval the holding of *Mativo J.* (in the High Court judgment under appeal) that “the power to quash criminal proceedings amounts to exonerating a suspect before trial, and such power should only be exercised in exceptional cases where there is clear evidence of abuse of power, abuse of discretion, or a clear absence of a factual basis to mount the prosecution.” The Supreme Court concurred that determining the veracity or weight of evidence is the province of the trial court and that the High Court’s intervention is only justified if there are clear breaches of *the Constitution* or the law in the decision to prosecute.
36. In light of all the above, the governing principle is this: The High Court will not lightly interfere with or stop a criminal prosecution unless it is demonstrated that the prosecution is wholly lacking in legal or factual foundation, or that it is being initiated for an ulterior motive or in contravention of the



law or Constitution such that the defendant would not receive a fair trial. This is a power exercised in the courts' inherent mandate to prevent injustice and protect the integrity of judicial processes. It is a residual safeguard – meaning that if other remedies or defenses exist within the trial process, they should be pursued there. The High Court should be a court of last resort in this context, stepping in only to prevent a clear abuse or travesty.

37. Applying that standard to this case, and as already found in Issue 1 and 2 above, the Petitioner's circumstances do not meet the exceptional threshold required for this Court to quash the prosecution. There is no convincing evidence of a constitutional or legal breach by the DPP in making the decision to charge the Petitioner. On the contrary, the DPP appears to have acted within the “four corners of *the Constitution*” and with regard to the factors in Article 157(11). Public interest and the interests of justice would favour that allegations of such nature be prosecuted, provided there is evidence – which there is. There is also no indication of selective prosecution or discrimination against the Petitioner that would offend Article 27 (the Petitioner has not alleged that others similarly placed were spared prosecution or that he was targeted for an unlawful reason). In short, the prosecutorial discretion in this case was exercised lawfully and reasonably, and thus deserves deference from this Court.
38. The Petitioner's counsel urged that the Court should be proactive to prevent “a violation before it occurs”, positing that once he is subjected to trial, the process itself is the punishment. While it is true that being accused of a crime and undergoing trial is stressful and often stigmatizing, these alone are not grounds to stop a trial. If they were, no trials would ever proceed. As the courts have often said, “the public interest in the prosecution of crimes must be balanced against the rights of the accused,” and that balance ordinarily is struck by allowing prosecutions to run their course in a fair manner, not by preemptively aborting them. Only where the public interest itself is disserved by the prosecution – for example, if the prosecution is so weak that it amounts to a waste of judicial time, or if it is instituted for a purpose alien to criminal justice – will the scales tip in favour of stopping the trial. In this case, public interest and private interest of the complainant, ADC both point toward having a judicial determination on the merits of the allegations.
39. In conclusion, this Court finds no justification to exercise its extraordinary power to quash or prohibit the Petitioner's prosecution. The separation of powers doctrine demands that we respect the DPP's mandate to undertake prosecutions, and only intervene upon a clear showing of illegality or abuse. The Petitioner has not made such a showing here.

Appropriate Relief.

40. Having found that the Petitioner's rights have not been violated and that the prosecution is not an abuse of process, it follows that the primary reliefs sought – orders of certiorari to quash the decision to prosecute, and prohibition to stop the criminal case – are unwarranted. Granting them would be an error on the Court's part, as it would amount to shielding the Petitioner from answering to charges that have been validly brought. The Petition must therefore be dismissed.
41. However, before finalizing, the Court considers one aspect of relief: the warrants of arrest issued on 19th December 2024 by the 3rd Respondent (the Chief Magistrate's Court). The Petitioner had sought cancellation or setting aside of those warrants. Given that this Court (Ong'udi J.) on 23rd December 2024 granted interim orders staying the arrest of the Petitioner, it is presumed that the warrants were held in abeyance. Now that this Petition is being dismissed, the interim protection will lapse. Ordinarily, the Petitioner would be required to submit to the jurisdiction of the trial court, which may involve appearing before the Magistrate to have the warrants lifted and to be formally released on bail/bond pending trial. Since the matter was in this Court, it is in the interest of clarity to issue directions to ensure an orderly transition back to the subordinate court. The appropriate course is to



direct the Petitioner to present himself before the trial court within a specified time to respond to the charges, failing which the warrants of arrest may be executed. This gives the Petitioner an opportunity to appear voluntarily rather than being arrested.

42. This being a constitutional petition that involved claims of fundamental rights, the general practice is not to award costs against the petitioner, so as not to chill the enforcement of constitutional rights. The Petitioner acted within his rights to approach the Court, and although the Petition is unmerited, it raised issues of public importance concerning the limits of prosecutorial power. The Court does not discern any bad faith or abuse in the mere filing of the Petition. Accordingly, each party shall bear its own costs.
43. Finally, it is worth emphasizing that the dismissal of this Petition is not a finding of guilt or innocence on the part of the Petitioner. That determination is reserved for the trial court. The Petitioner retains, undiminished, the presumption of innocence and all rights guaranteed to him in the criminal trial. This judgment simply ensures that the proper forum – the trial court – will adjudicate the factual and evidentiary issues without interference, as there has been no demonstrated transgression of the Constitution to justify this Court’s intervention.

Conclusion.

44. For the reasons set out in the analysis above, the Petition is determined as follows:
 - a. The Petition herein is hereby dismissed in its entirety.
 - b. The conservatory or interim orders earlier issued by this Court staying the arrest or prosecution of the Petitioner are discharged forthwith; and the criminal process against the Petitioner may proceed to its logical conclusion in the Chief Magistrate’s Court;
 - c. The Petitioner is directed to appear before the Chief Magistrate’s Court at Milimani in Nairobi (Criminal Division) for the mention of the intended case and/or taking of plea within Seven (7) days of the date of this Judgment or such earlier or later date as the trial court may direct; and in default of such voluntary appearance, the stay on the warrant of arrest having been lifted, the Respondents shall be at liberty to execute the warrant to secure the Petitioner’s attendance and
 - d. There shall be no order as to costs.
45. It is so ordered and File Closed Accordingly.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 15TH DAY OF MAY 2025

BAHATI MWAMUYE

JUDGE

In the presence of :

Petitioner’s Counsel – Mr Shikanda h/b Mr Osundwa

2nd Respondent’s Counsel - Mr Mulati h/b Mr Owiti

Court Assistant – Ms Neema

