



**Wacuka v Office of the Director of Public Prosecution & 4 others;
Mbugua & 2 others (Interested Parties) (Constitutional Petition
E004 of 2023) [2025] KEHC 12621 (KLR) (2 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 12621 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CONSTITUTIONAL PETITION E004 OF 2023**

GL NZIOKA, J

MAY 2, 2025

BETWEEN

MINNIE WACUKA PETITIONER

AND

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION .. 1ST RESPONDENT
DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT
OFFICER COMMANDING STATION NAIVASHA POLICE
STATION 3RD RESPONDENT
THE CHIEF MAGISTRATE’S COURT NAIVASHA 4TH RESPONDENT
THE HONOURABLE THE ATTORNEY GENERAL 5TH RESPONDENT**

AND

**SAMMY WAWERU MBUGUA INTERESTED PARTY
PETER MWANGI KIMARU INTERESTED PARTY
DANIEL KIMANA INTERESTED PARTY**

JUDGMENT

1. By a petition dated 25th July, 2023, the petitioner is seeking for the following orders against the respondents: -
 - a. A declaration that the 1st respondent abdicated his constitutional duty under Article 157(1) of *the Constitution* of Kenya 2010 to prevent the abuse of the legal process.



- b. A declaration that the 3rd respondent has no authority whatsoever to direct/consent/authorize the 1st respondent to institute charges against the petitioner and that the same is ultra vires the powers of the 3rd respondent thus unconstitutional.
 - c. A declaration that investigations on the Petitioner by the 1st and 3rd respondents and the institution of criminal proceedings by the 1st and 3rd respondents' against the petitioner in Naivasha Chief Magistrate's Criminal Case No.663 of 2023 and E1349 of 2022 to advance what ought to be a civil suit is unlawful, oppressive, malicious and comprise a violation of the petitioner's constitutional rights thus null and void.
 - d. A declaration that maintenance and prosecution of Naivasha Chief Magistrate's Criminal Case No. E1349 of 2022 and 663 of 2022 against the petitioner herein is an abuse of the Criminal Justice System and contravenes the Petitioner's Fundamental Rights and freedoms to freedom and security of the person, right to fair hearing and right to equality and freedom from discrimination.
 - e. An order of certiorari to remove and bring to this Honourable court and to quash the decision of the 1st and 3rd respondents to prefer criminal charges against the Petitioner in regard to the parcel of land Naivasha/Maraigushu/Missouri Block 1/2900 in Naivasha Chief Magistrate's Criminal Case No. E1349 of 2022 and 663 of 2023.
 - f. An order of prohibition directed at the 1st respondent prohibiting the prosecution of the petitioner for the alleged offences of conspiracy to defraud, making a false statement, obtaining registration by false pretense, and abuse of office with respect to the parcel of land Naivasha/Maraigushu/Missouri Block 1/2900.
 - g. An order of prohibition directed at the 4th respondent being the Chief Magistrates Court Naivasha, barring and forbidding the continuance of Naivasha Chief Magistrate's Criminal Case No. E1349 of 2022 and 663 of 2023 against the petitioner herein.
 - h. An order of compensation for the psychological torture, oppression, harassment and ridicule suffered by the petitioner.
 - i. Any further order that this Honourable court may deem fit to grant in the circumstances.
 - j. Costs of the petition and interest.
2. The petition is supported by the grounds thereto and an affidavit of the even date sworn by the petitioner wherein she avers that, she is employed as a District Land Registrar and stationed at Naivasha.
 3. That on 15th May 2019, while in the ordinary course of duty, she was presented with transfer documents in respect of land parcel Naivasha/Maraigushu/Missouri Block 829, registered in the name of Missouri Safari Farmers Co. Ltd. That the parcel of land was to be transferred to the 2nd interested party. That she verified the documents, registered the transfer and issued a title deed in the name of the 2nd interested party.
 4. That on 29th June 2021, the 2nd respondent informed the Land Registrar at Naivasha that, the 1st interested party, had lodged a complaint under investigation, to the effect that, he had been defrauded his land; Naivasha/Maraigushu/Missouri Block 1/895. That he purchased in the year 2002, from one Kimani Macharia, and upon the purchase the number changed to Naivasha/Maraigushu/Missouri Block 1/2900. That the 2nd respondent was requesting for copies of the documents used to effect the transfer.



5. That in response by a letter dated 26th August 2021, the Land Registrar informed the 2nd respondent that the parcel of land; Naivasha/Maraigushu/Missouri Block 1/895 claimed by the 1st interested party is distinct from the parcel Naivasha/Maraigushu/Missouri Block 1/2900.
6. Further that the parcel Naivasha/Maraigushu/Missouri Block 1/895 was first registered in the name of; Josephat Buttah Ngugi and later transferred third parties who closed it off for subdivision.
Furthermore, parcel Naivasha/Maraigushu/Missouri Block 1/2900 was first registered in the name of; Missouri Framers Co. Ltd then transferred to the 2nd interested party on 15th May 2019, and later to the 3rd interested party on 16th March 2020.
7. The petitioner avers that, on 5th June 2023, she was summoned to Naivasha Police Station to shed light on the transfer of Naivasha/Maraigushu/Missouri Block 1/2900. That, on arrival, the investigating officer asked her whether it was possible for her to cancel the entries transferring proprietary rights in the subject land to the 2nd and 3rd interested parties.
8. That she responded that it is impossible to cancel the entries, whereupon she was immediately arrested and charged jointly with the interested parties over the offences of; conspiracy to defraud, making a false statement, and obtaining registration by false pretence.
9. That, on 15th June 2023, the case was consolidated with Naivasha Chief Magistrate's Criminal Case No. E1349 of 2022, in which the 2nd interested party was charged, and wherein she was charged with a fourth count of abuse of office.
10. The petitioner avers that upon considering the prosecution witness statements she noted that the 1st interested party's claim is based on a balloting card number 895 issued in 1989. That all the offences against her are hinged on the 1st interested party being the registered proprietor of Naivasha/Maraigushu/Missouri Block 1/2900. However, the letter from her office to the 2nd respondent is clear that, the 1st interested party has never been a proprietor of the said parcel of land, and therefore the charges against her are not based on any evidence.
11. The petitioner argues that, in any case, the balloting card became irrelevant when the title deed was issued in the year 1989 and therefore the 1st interested party cannot use it to lay claim on the property. Further, it is absurd that the person who sold the land to the 1st interested party in the year 2002 did not have a title deed.
12. Furthermore, the second charge of making a false statement contrary to section 103(1)(s) of the Land Act is non-existent as section 103 of the Land Act deals with an application for relief by a chargor. That in any event, if a false statement was made to procure the registration then as the Land Registrar she is the victim and not the perpetrator. That, the transfer documents are always prepared by the clerical departments before being presented to the Land Registrar for verification and registration.
13. Further that, the 1st respondent being well versed in the law knows that, proof of ownership of land is a title deed, and that a criminal court cannot determine the ownership of land. That, if the 1st interested party has any claim to the land he should approach the Environmental and Land Court (ELC) to seek a declaration of ownership and cancellation of the title deeds issued.
14. The petitioner further avers that, from the charge sheet it is apparent that the decision to charge her is unconstitutional as it was made by the 1st and 3rd respondent in violation of Article 157 (10) of the Constitution of Kenya which confers upon the 2nd respondent sole power to make a decision to prosecute without the authority of any other person.



15. That the 1st, 2nd, and 3rd respondents are abusing the criminal process to aid the 1st interested party and that she is a pawn used to achieve an ulterior motive of intimidating and oppressing the 2nd and 3rd interested parties so that they surrender the land to the 1st interested party.
16. Further, criminal process herein is being used to embarrass, persecute, harass and frustrate her from doing her lawful duties and to advance what ought to be a civil claim. Furthermore, that the lack of material evidence to support the charges against her is a clear indication that the charges against her are frivolous, oppressive and made in bad faith.
17. That the court has powers to halt the flawed charges against her and urges that the prayers sought are merited and should be allowed as prayed.
18. However, the 1st respondent opposed the petition vide a replying affidavit dated 24th August 2023 sworn by Serling Joyce an Advocate of the High Court of Kenya and a Prosecution Counsel in the Office of the 1st respondent. She averred that, she in charge of prosecuting the Chief Magistrate's Criminal Case No. E1349 of 2022.
19. That as regard this matter, the investigation file and all requisite documents were presented before the 1st respondent and it was revealed that, the complainant in the criminal case lodged a complaint with the 2nd respondent claiming that his land had been wrongly registered without his consent and that there was conspiracy to defraud him of his land.
20. That as per the investigations it was found that the petitioner had issued the 2nd interested party with a title deed without proving ownership. That, the conduct of the petitioner to issue her co-accused with a title deed in order to defraud the complainant fitted the definition of conspiracy under the Black's Law Dictionary and satisfied the ingredients of common intent under section 21 of the Penal Code. Further, the petitioner's allegation that her work was to stamp documents approved by her clerk showed complacency of her duties.
21. That, the 1st respondent made the decision to charge the petitioner in line with Article 157 of *the Constitution* of Kenya. That no malice has been exhibited by the respondents and the mere fact that the petitioner is a Land Registrar does not give her immunity from prosecution where she had committed a cognizable offence.
22. Furthermore, the petition is an abuse of the court process as the petitioner is attempting to malign constitutional offices that are doing their jobs. That the court should allow the criminal case No. E1349 of 2023 to be heard and determined by the trial court where the petitioner will have ample opportunity to give her defence.
23. The 5th respondent in response to the petition entered appearance on behalf of the 2nd, 3rd, 4th, and 5th respondents vide a statement of response dated 17th October 2023. In a nutshell, it is argued that, the 2nd respondent is mandated under section 35 of the *National Police Service Act* to investigate the petitioner with regards to the impugned transaction relating to Naivasha/Maraigushu/Missouri Block 1/2900.
24. That at the close of its investigations, the 2nd respondent recommended that James Mwaniki Kirathi and Peter Mwangi Kimaru be charged and exonerated Daniel Kimana Ndungu of any criminal liability. That the decision to charge the petitioner is taken within the respondents' mandate as provided by law.
25. The respondents denied using the criminal justice system to aid the 1st interested party acquire ownership of the disputed, however, the respondents conceded that, a balloting card is not proof of ownership of land; and that the criminal justice system is not the right forum to solve land ownership dispute and that indeed the Environmental and Land Court is the right forum.



26. However, the respondents further argued that the petition as filed does not meet the threshold of; *Anarita Karimi Njeru vs Republic* (1979) 1 KLR 154 reiterated in the case of *Mumo Matemu vs Trusted Society of Human Rights Alliance Civil Appeal No. 290 of 2012* in that the petition does not specifically demonstrate with reasonable precision the manner in which the respondents have violated and/or limited the petitioner's constitutional and human rights, and whether any such limitation is contrary to Article 24 and/or does not qualify under Article 25 of *the Constitution* of Kenya 2010.
27. The respondents argued that, in light of the afore the petitioner is not entitled to any of the orders sought as the petition is devoid of merit and should be dismissed with costs to the respondents.
28. Similarly, the 1st interested party opposed the petition vide a replying affidavit dated 16th August 2023, wherein he averred that he is the complainant in Naivasha Chief Magistrate's Criminal Case No(s). 1347 of 2022 and No. 663 of 2023. That he is the owner of land parcel No. Naivasha/Maraigushu/Missouri Block 1/2900 formerly Land Ballot No. 895 Missouri Safari Farmers Company.
29. That he purchased the land on 1st October 2002, from Kimani Macharia and had left it in the care of his brother, Paul Mbugua, as he was residing in Nairobi. That on 27th June 2021, his brother informed him that there was an ongoing construction on the said land by the purported owner named Ndungu. That, the following day he proceeded to Naivasha Police Station where he reported the matter to the Directorate of Criminal Investigations, recorded his statement and handed over the agreement of sale, ballot card number, identity card of the vendor, and a receipt from the advocates for purposes of investigations.
30. That at the end of investigations it was revealed that, land ballot number 895 Missouri Safari Farmers Company was resurveyed, allocated a new number 2900, and a title deed number Naivasha/Maraigushu/Missouri Block 1/2900 registered. That clearance certificate was fraudulently issued to the 2nd interested party as it was revealed that the 2nd interested party had no links to the suit property, not a member of the company nor a purchaser of land from the company.
31. Furthermore, no stamp duty, land registration fees and land rates had been paid during registration of the title deed, being clear evidence that the petitioner, and the 2nd and 3rd interested parties had conspired to defraud him of his land. That in addition, the title deed for Naivasha/Maraigushu/Missouri Block 1/2900 was issued on 15th May 2019, before the issuance of the clearance certificate on 24th June 2019.
32. The 1st interested party denied the claim by the petitioner that he is not the proprietor of the subject land and argued that no title deed has ever being issued in reference to ballot card No. 895 and therefore the ballot card is the only valid evidence of ownership. Further, his name is duly entered in the register of members of Missouri Safari Farmers Company which shows both the old and new numbers of the plot being 895 and 2900 respectively.
33. He argued that the petition is a desperate attempt to avoid the cause of justice as there is overwhelming evidence against the petitioner and the 2nd and 3rd interested parties thus the criminal cases against is lawful and should be allowed to proceed to its logical conclusion.
34. The 2nd interested party filed a replying affidavit dated 4th August 2023 in support of the petition. He avers that, he is charged together with the petitioner and other persons in Naivasha Chief Magistrates criminal case No. 1349 of 2022.
35. That the land Naivasha/Maraigushu/Missouri Block 1/2900 initially belonged to Missouri Farmers Company Limited and he was the 1st registered proprietor. That on 27th June 2019, he sold the land to the 3rd interested party and executed the sale agreement, application for land control board consent



- and transfer forms. Subsequently, the documents were presented to the Naivasha Land Registry in the normal course of business and title deed issued in favour of the 3rd interested party. That there was no collusion between him and the petitioner.
36. That, the charges against him are civil in nature and therefore the claim should have been filed before the Environment and Land Court. Further, that there is a current civil proceedings; Environmental and land Court Case No. E041 of 2023, Daniel K. Kimana Ndungu vs Peter Mwangi Kimaru, Land Registrar Naivasha and The Honourable Attorney General.
 37. That, the criminal case against the accuseds are oppressive and a total abuse of the court process. He prays that the petition be allowed.
 38. Similarly, the 3rd interested party supported the petition vide replying affidavit dated 3rd October 2023, and avers that he is a bona fide purchaser of; Naivasha/Maraigushu/Missouri Block 1/2900 and has a valid title deed thereto. That the charges against him are fictitious and are being used by the 1st interested party and the respondents to oppress him.
 39. That, the petition is relevant as it addresses the issue of abuse of his rights to freedom, dignity, fair treatment, ownership of property and enjoyment of public service. Further, he has filed a civil suit and seeks that the same should be heard and determined first.
 40. At the conclusion of the arguments by the parties the parties filed their respective submissions considered herein. The petitioner filed submissions dated; 15th May 2024 and argued that it is only the Office of the Directorate of Public Prosecution and not the Officer Commanding Station (OCS), that is empowered to draft the charges, stamp, sign and place their initials and rank on the charge sheet, as provided for under Chapter 4.3 of the ODPP Decision to Charge Guidelines 2019.
 41. That the charge sheet herein was signed and stamped by the OCS, an indication of authority to prefer the charges. Further, although the charge sheet bears a stamp and signature of the Office of the Director of Public Prosecution, the initials and rank of the prosecutor are not indicated. Furthermore, the 1st respondent used Police Form No. 5 that emanates from the Police Standing Orders instead of Form ODPP2 Appendix 3 from their own guidelines. That, taking into consideration the foregoing, it is clear that the charge sheet as presented is defective.
 42. The petitioner submitted that, the decision to charge was not properly reached. That before making a decision to charge, a prosecution is required to consider whether the material before it pass the threshold of evidential and public interest tests. That in this case there is no proper evidence to support the charges against her.
 43. That, the 1st interested party's claim is anchored on a sale agreement dated 1st October 2002, between him and Kimani Macharia in relation to parcel; Naivasha/Maraigushu/Missouri Block 1/895. However, at the time of the sale plot No. 895 was registered in the name of Josephat Buttah Ngugi who had a valid title deed.
 44. Furthermore, despite Kimani Macharia alleging to have bought the land from Josephat Buttah Ngugi before selling it to the 1st interested party, there is no sale agreement between Josephat Buttah Ngugi and Kimani Macharia in support of the same.
 45. That, the balloting card forming crucial prosecution evidence does not bear the name nor the size of the plot. That in any case Plot No. 2900 is a subdivision of 89 and not 895 which two plot are distinct from each other.



46. The petitioner submitted that page 19 of the ODPP Decision to Charge Guidelines stress that a case that does not pass the evidential stage must not proceed regardless of how serious or sensitive the case may be. The petitioner relied on the case of; R vs attorney General ex parte Kipngeno Arap Ngeny (2001) KLR 612 where the High Court stated that, a criminal prosecution commenced in absence of factual foundation raises suspicion of ulterior motive and that a prosecutor must demonstrate there is reasonable and probable cause for a criminal prosecution.
47. The petitioner further submitted that, she was charged in count (2) with non-existent offence of making a false statement contrary to section 103(1)(A) of the Lands Act. However, that section relates to application for relief by a chargor. Further, the respondents forced her to take plea on the same despite it not disclosing an offence.
48. The petitioner relied on, Article 50(2)(b) of *the Constitution* of Kenya which provides that an accused must be informed of the charge with sufficient detail to answer it, while Article 50(2)(n) states that an accused can only be charged and convicted for an act or omission that is either an offence in Kenya or under international law.
49. She further relied on the case of; Henry O Edwin vs Republic [2015] eKLR where the Court of Appeal observed that the appellant was charged under section 5(b) of the Narcotic Drugs and Psychotropic Substances Control Act No 4 of 1994. which was non-existent and held that the charge sheet was fatally defective.
50. The petitioner reiterated that, the 1st interested party's claim is for ownership of land and ought to have been filed before the Environmental and Land Court.
51. The case of, Kangwana & 2 others vs Director of Public Prosecutions & 3 others; Monarch Insurance Company Ltd & another (Interested Party) [2022] eKLR where the High Court stated that the complainants who were seeking recovery of the suit property were expected to institute civil proceedings for nullification of the title deed, failure of which the petitioners were well within their right to argue that criminal process was being used to achieve what ought to have been achieved through the civil process, if they were not time barred.
52. The petitioner argued that, the 1st interested party could not institute a civil suit before the Environmental and Land Court as his claim that was to be filed within twenty (20) years was statute barred.
53. The petitioner reiterated that, the criminal charges herein are meant to harass her. She relied on the case of; Cyus Shakhlanga Jirongo vs Soy Developers Ltd & 9 Others [2021] eKLR where the Supreme Court of Kenya held that the Office of Director of Public Prosecution in instituting prosecution should act judiciously and not perpetuate an unfair and malicious criminal complaint and must always be guided by the principle that the right to fair trial cannot be limited raising the bar of whether to prosecute or not.
54. The petitioner submitted that regarding the issue of violation of her rights, the court set the threshold in the case of; Anarita Karimi Njeru vs Republic [1979] eKLR where the Court of Appeal stated that a petitioner must plead with reasonable degree of precision the rights and constitutional provisions alleged to have been violated, and the jurisdictional basis for it.
55. The petitioner reiterated that her right to fair trial under Article 50 of *the Constitution* of Kenya have been violated on the grounds that; she is charged with a non-existent offence; that the decision to charge her was not properly arrived at as there is no evidence in support of the charges; and that the charges against her were preferred by the police.



56. She further submitted that, her right to equality and freedom from discrimination under Article 27 of *the Constitution* of Kenya have been violated as she has been subjected to frivolous charges meant to intimidate her by the entities that are meant to protect her right.
57. That in additionally, her arbitrary arrest, detention and charge of frivolous offence without just cause, has denied her right to freedom and security of the person. That the investigative agencies ought to have conducted proper investigations before subjecting her to such a process.
58. She relied on the case of; Okiya Omtatah Okoiti vs the Director of Public Prosecution; Inspector General of National Police Service & another (Interested Parties) International Commission of Jurists (Kenya Section) (Amicus Curiae) [2022] eKLR where the High Court stated that, the Police, State organs or any person should not arrest a person without justifiable reason and take them through the criminal justice system just for the sake of it. That there must be a basis for making a person a suspect and/or an accused person.
59. Further, the police can only take action once satisfied that an offence has been committed and the prosecutor must be satisfied there are legitimate reasons for obtaining certain orders before moving the court.
60. The petitioner further submitted that, being subjected to a flawed criminal process violates her right to human dignity as provided for under Article 28 of *the Constitution*. She referred to the case of; Ahemd Isaack Hassan vs Auditor General [2015] eKLR where the High Court stated that right of human dignity is promoted and protected if a person enjoys all other rights in the bill of rights but it will be violated where the other rights are violated.
61. The petitioner submitted that Article 23 (3) of *the Constitution* of Kenya, outlines the orders grantable in a constitutional petition and urged the court to uphold the constitutional values and principles and find that the charges herein amounts to an abuse of the court process, are null and void, should be quashed and an order of prohibition be issued against the respondent to prohibit her continued harassment.
62. However, the 1st respondent in submissions dated 19th September 2023, relied on Article 157(6) of *the Constitution* of Kenya, and argued that it has the mandate to institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed.
63. Further, Article 157(10) of *the Constitution* of Kenya, replicated in section 6 of the *Office of the Director of Public Prosecutions Act*, 2013, provides that the 1st respondent does not require the consent of any person or authority for the commencement of criminal proceeding neither does not act under the direction or control of any person or authority.
64. The 1st respondent submitted that, the complainant lodged a complaint by the 1st respondent led to the decision to charge the petitioner. That, in making that decision the 1st respondent considered the sufficiency of evidence gathered by the investigating officer, the culpability of the petitioner as an accused and the relevant laws among others.
65. Further, in exercising its duty the 1st respondent upheld professionalism and ensured that the spirit of Chapter 6 (six) of *the Constitution* of Kenya was observed. That the decision to charge the petitioner was not actuated by malice, ill-will or spite and cannot therefore be faulted in absence of concrete evidence to establish mala fides on its part.



66. The 1st respondent argued that, the matters of fact and evidence deposed in the petition and supporting affidavit are matters of evidence which can adequately be considered by the trial court during the full trial of the criminal case. That at the full trial the 1st respondent will demonstrate how the petitioner and her co-accused and/or interested parties defrauded the complainant his land. Further, the petitioner will be given an ample time to present her defence and only then will the trial court can make a determination thereof.
67. The 1st respondent further submitted that, the petitioner being a Land Registrar cannot rely on section 14(5) of the [Land Registration Act](#), as that protection is only to the extent that the Registrar shall not be held personally liable for lawful acts discharged in good faith. However, a Land Registrar can be charged with a criminal charge where a cognizable offence has been committed. That in the present case, the petitioner acted unlawfully and her actions were not in good faith and cannot therefore claim protection of the law.
68. Further, good faith can only be used by the petitioner as a defence in the trial court and not as a ground for application for an order of certiorari to quash the charges against her. That, the trial court is the only court that can determine whether the petitioner acted in good faith as rightly held by the High Court in the case of; Erick Kibiwott Taurus versus Director of Public Prosecutions and others (2014) eKLR.
69. Lastly, the 1st respondent submitted that, the petitioner had failed to demonstrate how her right has been violated through the decision to charge her. The court was urged to dismiss the petition for being an abuse of the court process and allow the criminal case to proceed to its logical conclusion.
70. The 5th respondent filed submissions dated; 16th April 2024 on behalf of the 2nd to 5th respondents and argued that, the actions of the respondents did not infringe on the rights of the petitioner. That, the 1st interested party raised on complaint and the 2nd and 3rd respondents investigated it and found discrepancies in the documents provided by the petitioner's office. That at the close of investigations the 2nd and 3rd respondents wrote to the 1st respondent recommending that; James Mwaniki Kirathi and Peter Mwangi Kimaru, the 2nd interested party, be charged under section(s) 313, 317, and 320 of the Penal Code.
71. However, the 1st respondent recommended that James Mwaniki Kirathi and the 2nd interested party be charged under section 317 and 320 of the Penal Code; and the 2nd interested party be further charged under section 103(1)(a) of the [Land Registration Act](#) No. 3 of 2012 and section 313 of the Penal Code.
72. That on the 18th April 2023, the 1st respondent wrote to the 2nd and 3rd respondents and directed that the petitioner be charged together with the afore persons and that pursuant to section 29(9) of the [National Police Service Act](#) No. 11A of 2011, the 2nd respondent's complied with the directions of the 1st respondent.
73. Further, that the 1st respondent has powers to institute proceedings against a party in a criminal case and the decision to charge squarely lies with it as provided for in section 29 of the Office of Public Prosecutions Act
74. The 5th respondent stated that the person who submits forged and/or false documents to the land registry should bear the blame. Furthermore, the law provides mechanisms for rectification where it is established that there is fraud or misrepresentation either through the Environmental and Land Court, or the Registrar.
75. That, The 5th respondent reiterated that, the petition does not meet the threshold set out in the case of Anarita Karimi Njeru v Republic (supra) and Mumo Matemo v Trusted Society of Human Rights



- Alliance Civil Appeal No. 290 of 2012 . That the petitioner has failed to lay any claims against the 4th and 5th respondents and therefore the suit against them should be dismissed with costs.
76. The 2nd interested party in submissions dated 16th November 2023, reiterated his averments in his response to the petition
 77. That, on 27th June 2019, he sold the property to the 3rd interested party and a new titled deed was issued. That he is aware that the 3rd interested party started construction on the said property. However, in the year 2022 he was charged in criminal case no. 1349 of 2022 jointly with one James Mwaniki Kirathi and in the year 2023 the petitioner and the 3rd interested party were joined in the criminal case.
 78. The 2nd interested party submitted that, he obtained registration of the land parcel legally and there was no conspiracy between him, the petitioner and the 3rd interested party.
 79. He reiterated that the matter herein is a subject of a civil nature and the criminal proceedings are an attempt to short circuit the course of justice and it is oppressive to him. He relied on the case of; Reuben Mwangi vs Director Of Public Prosecutions & 2 others; UAP Insurance & another (Interested Parties) [2021] eKLR where the High Court quoted with approval the case of; R vs Attorney General exp arap Ngeny Civil Application No 406 of 2001 and stated that the Court will interfere with a criminal trial in a subordinate court if it is determined that the prosecution is an abuse of the court and is oppressive and vexatious.
 80. Finally, the 2nd interested party submitted that, his prosecution is oppressive, totally unmerited and that the charges are in contravention of the Constitution of Kenya 2010 and urged that the petition be allowed as prayed
 81. The 1ST and 3RD interested parties did not file any submissions.
 82. At the conclusion of the arguments by the parties I note that the petitioner is basically alleging that the criminal charges levelled against her are violating her human rights guaranteed under the Constitution of Kenya.
 83. In that regard, law is settled that a party seeking relief for breach of fundamental rights under Article 22 of the Constitution of Kenya must set out in the petition with precision, the complaints, the rights and the manner in which the subjects rights have been violated.
 84. The afore principles were set out in the case of; Anarita Karimi Njeru v Republic (supra) where the Court of Appeal stated: -

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.” (emphasis added)
 85. The Court of Appeal re-affirmed the above principles in Mumo Matemo vs Trusted Society of Human Rights Alliance (supra) and stated as follows: -

“The principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the constitution and the overriding objective. Principle under section 1A and 1B of the civil procedure Act (Cap 21) and Section 3A and 3B of the appellate Jurisdiction



Act (Cap) 9. Procedure is also a hand maiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The principle in Anarita Karimi Njeru (Supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extract of this principle”.

86. Further, whenever a petitioner alleges that his constitutional rights have been contravened, it is incumbent to prove that such right has indeed been proved. The Court of Appeal in Mohammed Abduba Dida v Debate Media Limited & another [2018] eKLR stated that: -

“In the Zimbabwean case of Catholic Commission for Justice and Peace in Zimbabwe vs Attorney General (1993) 2 LRC (Const) 279, when considering where the burden of proof rested in disputes concerning fundamental rights, Gubbay, CJ stated thus;

“I consider that the burden of proof that a fundamental right, of whatever nature has been breached is on he who asserts it...[it] is essentially a matter of fact and some evidence would have to be adduced to support the contention. The Respondent is not obliged to do anything until a case is made out which requires to be met”.

This is to say that, ordinarily, the burden of demonstrating that a right was infringed would be upon the person alleging such violation, as, that person would be in the better position to prove it. It is for the petitioner to show that, compared to another person, he or she has been denied a benefit or suffered a disadvantage, which are matters that are within the petitioner’s knowledge. Once the case is made out, the burden shifts to the other party.”

87. In the instant matter, the petitioner relies on the following provisions of the Constitution of Kenya;

- a. Article 27; on equality and freedom from discrimination;
- b. Article 28; the right to human dignity;
- c. Article 29; right to freedom and security of the person;
- d. Article 49 rights of arrested persons;
- e. Article 50 right to a fair hearing;
- f. Article 2 supremacy of the law;
- g. Article 43 economic and social rights;
- h. Article 20 bill of Rights,

88. In support of the aforesaid, the petitioner avers in a nutshell that, the respondents have violated her rights by: -

- a. Preferring a defective charge sheet; as it is drawn by an incompetent person;
- b. Offering inadequate evidence; as there is no clear evidence as to how the title in issue moved from Josephat Buttah Ngugi to Kimani Macharia and then to 1st interested party;
- c. That plot No. 2900 is a subdivision of 89 and not 895, as alleged and does not exist in reality;



- d. The prosecutor has failed to demonstrate there is reasonable and probable cause for a criminal prosecution;
 - e. That the offence she is charged with in count (2) of making a false statement contrary to section 103(1)(A) of the Lands Act is non-existent in law;
 - f. That the 1st interested party's claim is for ownership of land and therefore ought to have been filed before the Environmental and Land Court;
 - g. That the 1st interested party's claim is statute barred. As it should have been filed within twenty (20) years
89. It is against the aforesaid that the petitioner seeks for equitable remedies of certiorari and prohibition. The nature and scope of the order of certiorari was discussed in the case of Captain Geoffrey Murugi -vs Attorney General Miscellaneous Application No. 293 of 1993 as follows: -
- “Certiorari deals with decisions already made – so that when issued an order brings up into this court a decision of an inferior court, tribunal or of a public authority to be quashed. Such an order (certiorari) can only be issued where the court considers that the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of natural justice; or contrary to law.” (emphasis added)
90. The order of prohibition deals with the future events. That position was well articulated in the case of; Kenya National Examination Council -vs- Republic Ex parte Geoffrey Gathenji Njoroge & 9 others 1997 KLR as follows:
- “That is why it is said prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision.”
91. Pursuant to the afore and based on the fact that a decision has already been made to charge the petitioner, the order of prohibition is not tenable.
92. Be that as it were the grant of certiorari writ is discretionary. Similarly, it will not be granted to impede mandate of an authority to discharge its functions or where an alternative remedy is available or avoid statutory laid down processes.
93. In the case of; Republic v National Employment Authority & 3 others Ex parte Middle East Consultancy Services Limited (2018) eKLR the court stated that:
65. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include ... where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration, or where the judge considers that an alternative remedy could have been pursued...



66. The grant of the orders of Certiorari, Mandamus and Prohibition is discretionary. The Court is entitled to take into account the nature of the process against which Judicial Review is sought and satisfy itself that there is reasonable basis to justify the orders sought. In this regard, it is important to mention that a serious issue arises, namely, whether or not the ex parte applicant is using Court processes to avoid the statutory laid down process.
94. To revert back to the issues raised by the petitioner, if the charges are defective by the fact that they were drawn and/or drafted by the OCS instead of the ODPP, I find that, the issue can be canvassed in the trial court. Similarly, whether the charge in count (2) is non-existent in law or not, the trial court can deal with it. Notably, both issues are matters of law that can be raised through a preliminary objection.
95. The rest of the issues relating to inter alia; the ownership of the subject parcel of land, whether the claim by the 1st interested party is of a criminal or civil nature, whether the respondents are acting in good faith or otherwise in charging the petitioner, are matters of facts subject to proof. The burden of proof lies with the petitioner before the respondents are called upon to respond.
96. In that regard, there is need to adduce evidence to support the petitioner's allegation and establish her role in the entire matter and draw a conclusion as to whether she conspired with each co-accused to defraud the 1st interested party of his said property and whether indeed that property exists.
97. So the question is, how will these allegations be proved? In my considered opinion, the veracity of the allegation can only be established through the hearing of the case, so that at the end of the day, when the evidence adduced is considered, it can be established whether the petitioner committed the offences she is charged with or not.
98. To demonstrate, the afore, there is an allegation that documents were presented to the petitioner and were not properly verified before the land was registered in favour of the 2nd interested party. The question is; what documents were presented the petitioner and by who? What did she do with them? Did she act prudently or fraudulently while processing the transfer?
99. Notably, these issues can only be resolved that through a trial. The law is settled that he who alleges proves the allegations. Once the trial commences the prosecution that has brought the petitioner to court will have to prove the charges beyond reasonable doubt.
100. However, a further issue arises; if the charges are not quashed at this stage will the petitioner suffer any prejudice? What of the prosecution, will it be prejudiced if the charges are quashed at this stage?
101. In answering the afore question, I find that if case is to be heard, the trial may take a short or long time depending on various factors, and the petitioner may go through the emotional and/or psychological effect thereof. But again, if acquitted she will move out of shackles of a criminal case hanging on her shoulders. Further if acquitted and is aggrieved, sue for damages or compensation for inter alia; malicious prosecution.
102. On the other part, if there is evidence to support the charges and the prosecution is stopped at this stage, the prosecution will be prejudiced, as it will not have an opportunity to prosecute the petitioner. Consequently, the scale of justice tilts in favour of prosecution of the case.
103. In that regard, the hearing of the case cannot be conducted in this court and will be handled by the trial court bearing in mind the doctrine of presumption of innocence is overriding.
104. In addition, the ODPP has constitutional power under Article 157 of *the Constitution* of Kenya to institute proceeding without consultation and/or interference. However, that power must be exercised



professionally and in the interest of justice. As to whether the ODPP have acted in good faith or not, in charging the petitioner will be determined at the trial.

105. Finally, pursuant to Anarita's case, it is not clear from the materials placed before this court, how inter alia, the petitioner's rights to equality and freedom from discrimination, human dignity and freedom and security of the person protected, have been violated. For example, on discrimination, the petitioner is not alleging that other people have been left out of trial or treated differently from her as it relates to this matter.
106. Basically in summing up, I hold the view that I do not have sufficient material before me to quash the proceedings in the trial court. Consequently, I decline to grant any of the prayers in the petition and dismiss it.
107. At this stage, I don't think it will be in the interest of justice to condemn the petitioner to pay the respondents' costs, I order each party meets their own costs.
108. It is so ordered. Right of appeal explained.

DATED, DELIVERED AND SIGNED ON THIS 2ND DAY OF MAY, 2025.

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Chaungo h/b for Mr. Mwangi for the petitioner

Ms. Chepkonga for the 1st respondent

Mr. Njuguna for the 2nd interested party

N/A for the 2nd to 5th respondents

N/A for the 1st interested party

N/A for the 3rd interested party

Ms Hannah- Court Assistant

