



**Bushebi v Director of Public Prosecution & 3 others; Nyambura
(Interested Party) (Petition E071 of 2023) [2025] KEHC 8300 (KLR)
(Constitutional and Human Rights) (12 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8300 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E071 OF 2023
LN MUGAMBI, J
JUNE 12, 2025**

BETWEEN

JOSEPH BUSHEBI PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT

**DIRECTOR, DIRECTORATE OF CRIMINAL INVESTIGATIONS 2ND
RESPONDENT**

CARL DOUGLAS RUSNELL 3RD RESPONDENT

CHIEF MAGISTRATE'S COURT (MILIMANI) 4TH RESPONDENT

AND

CECILIA NYAMBURA INTERESTED PARTY

JUDGMENT

1. The Petition dated 8th March 2023, is supported by the Petitioner's affidavit in support of even date and a further affidavit dated 15th November 2023.
2. The Petition is premised on the Petitioner's grievances that the criminal prosecution against him by the 1st and 2nd Respondents was primarily instituted in order to assist the 3rd Respondent access and obtain the documentary evidence through Milimani Criminal Case No. 1315 of 2016 Republic Vs Joseph Bushebi & Cecilia Nyambura so as to use them in his civil suit, High Court Civil Suit No. 45 of 2017 Carl Douglas Rusnell & Fernwood Developments Limited-Versus-Joseph Bushebi, hence a



violation of his constitutional rights under Articles 27, 28, 31, 35, 39, 40, 43, 47, 49, 50 and 51 of the Constitution.

3. Accordingly, the Petitioner seeks the following reliefs against the Respondents:

- a. A declaration be issued that the initiation, maintenance and prosecution of Milimani Criminal Case No. 1315 of 2016 Republic Vs Joseph Bushebi & Cecilia Nyambura by the Respondents against the Petitioner herein in the absence of proper factual foundation is an abuse of the Criminal Justice process and contravention of the Petitioner's Constitutional Rights to freedom and security of the person, the Right to freedom of movement and the Right to secure protection of the law.
- b. A declaration that the institution, maintenance and prosecution of Milimani Criminal Case No. 1315 of 2016 Republic Vs Joseph Bushebi & Cecilia Nyambura by the Respondents is oppressive, malicious and an abuse of the Court process contrary to Article 157(11) of the Constitution.
- c. A declaration be issued that the ex parte warrants namely Criminal Miscellaneous Application no. 2508 of 2016, Republic Versus Joseph Bushebi; Criminal Miscellaneous Application no. 2722 of 2016, Republic Versus Rafiki Bank DTM Ltd; Criminal Miscellaneous Application No. 2390 of 2016 Republic Versus Equity Bank Ltd; Criminal Miscellaneous Application No. 2391 of 2016, Republic Vs Family Bank; Criminal Miscellaneous Application No. 1916(A) of 2017 Republic Versus Rafiki Microfinance, Joseph Bushebi, Cecilia Nyambura and Carl Rusnell; Criminal Miscellaneous Application No.1916(B) of 2017 Republic Versus Rafiki Microfinance, Joseph Bushebi, Cecilia Nyambura Gachuiiri and Carl Rusnell and Criminal Miscellaneous Application No. Republic -Versus-Joseph Bushebi and Cecilia Nyambura, issued by the 4th Respondent to investigate, search and seize properties, documents and items belonging to the Petitioner, breached the Petitioner's rights and fundamental freedoms under the provisions of Article 27 (1) (2), Article 35 (1), Article 47(1) & (2), Article 50(1), 50(2)(c) and 50(2)(j) of the Constitution, hence void for all intents and purposes.
- d. A declaration be issued that the failure by the Respondents to make and file returns in the Chief Magistrate's Court Milimani pursuant to warrants issued in Criminal Miscellaneous Application no. 2508 of 2016; Criminal Miscellaneous Application no. 2722 of 2016; Criminal Miscellaneous Application No. 2390 of 2016; Criminal Miscellaneous Application No. 2391 of 2016; Criminal Miscellaneous Application No. 1916(A) of 2017 and Criminal Miscellaneous Application No.1916(B) of 2017, their failure to produce the seized articles before the Court was a contravention of Section 121 of the Criminal Procedure Code and was therefore unlawful.
- e. A declaration that the failure by the Respondents to notify or furnish the Petitioner with copies of the ex parte warrants and proceedings which adversely affected his Rights and Freedoms, violated his Right to fair trial and equal benefit of law as enshrined in Article 27 (1) (2), Article 27(1) Article 35 (1), Article 47(1) & (2), Article 50(1),50(2)(c) and50(2)(j) of the Constitution.
- f. A declaration that the Pre-trial adverse publicity of evidentiary documents, images of the Petitioner and properties searched and seized from the Petitioner orchestrated by the Respondents in the electronic media at <http://www.facebook.com/copliberty>, contravened the Petitioner's inherent, inalienable, universal, fundamental, legal and constitutional right to be presumed innocent until proven guilty and the Right to Privacy enshrined in Articles 31, the Right to Fair hearing in Articles 50(1) and 50(2) and further contravened Section 79 (2) Evidence Act Cap .80 of the laws of Kenya, Sections 13, 20, 121 and 130 of Proceeds of Crime



and Anti Money Laundering Act, sections which provide for preservation of secrecy and control, access and use of such privileged information obtained in the course of investigations and trial.

- g. A declaration that the Respondents' confiscation of Petitioner's properties, Motor Vehicles Registration No. KBK 500A and KCD 645P is inhumane, demeaning and degrading treatment in contravention of Article 40(1) of *the Constitution*.
- h. A declaration that the Respondents' confiscation of the Petitioner's Original Academic certificates and refusal to return them heretofore has violated his Right to work, to free choice of employment based on his academic capabilities and to protection against unemployment as enshrined in Article 31(a) and (b) of *the constitution*, Article 28, 43(1) and 47(2) of *the Constitution* and Article 23 (1) of the United Nations Declaration of Human Rights.
- i. A declaration that the Respondents' use of force and threats for the petitioner to sign and accept documentary evidence to be used in High Court Civil Suit No. 45 OF 2017 Carl Douglas Rusnell Fernwood Developments Limited-Versus-Joseph Bushebi while in Muthaiga Police cells without allowing him to read and understand their contents, violated the Petitioner's rights to dignity (Art. 28), rights of a detained person, arrested and persons held in custody (Art. 49 (1d) & 51), and an abuse of Article 157(11) of *the Constitution* and Section 193A of the *Criminal Procedure Code*.
- j. A declaration that the Respondents have manipulated and abused the mechanisms of the Criminal Justice system Milimani Criminal Case No. 1315 of 2016 Republic Vs Joseph Bushebi & Cecilia Nyambura and related Miscellaneous criminal proceedings to aid the civil cause in High Court Civil Suit No. 45 of 2017 Carl Douglas Rusnell Fernwood Developments Limited-Versus-Joseph Bushebi contrary to Article 157(11) of *the Constitution*.
- k. A declaration that it is not constitutionally permissible and in accordance with the rule of law, public interest and public policy for the 3rd Respondent to pursue civil forfeiture of alleged Proceeds of Crime or realizable assets charged in Milimani Criminal Case No. 1315 of 2016 Republic Vs Joseph Bushebi & Cecilia Nyambura, namely a Block of Apartments at Utawala registered as LR NO. 6845/72/36, Property Registered as Nairobi/118/859, Leased Plot at No. 209/28/1, 2 Motor Vehicles Reg. No. KBK 500A make Toyota Land cruiser and KCD 645P make Toyota Axio.
- l. A declaration that, the only body corporate with the legal mandate of combating money laundering is the Assets Recovery Agency as established under Section 53 of the *Proceeds of Crime and Anti-Money Laundering Act* No.9 of 2009 and Section 131 of the *Proceeds of Crime and Anti-Money Laundering Act* No.9 of 2009.
- m. A declaration that the Petitioner is entitled to damages as redress in respect of each of the above rights that were and continue to be breached by the Respondents.
- n. An order of stay of the Milimani Criminal Case No. 1315 of 2016 Republic Vs Joseph Bushebi & Cecilia Nyambura pending the hearing and determination of this petition.
- o. An order of prohibition do issue directed to the 4th Respondent prohibiting it and/or any other Court of concurrent jurisdiction from hearing, proceeding with and determining Milimani Criminal Case No. 1315 of 2016 Republic Vs Joseph Bushebi & Cecilia Nyambura.
- p. An Order of certiorari be issued removing into this Court and quashing the entire proceedings and the charge sheet against the Petitioner before the Chief Magistrates Court at Milimani Law



Courts in Milimani Criminal Case No. 1315 of 2016 Republic Vs Joseph Bushebi & Cecilia Nyambura.

- q. A Judicial Review order by way of an order of Certiorari be issued to remove into this Court and quash the ex parte warrants namely Criminal Miscellaneous Application no. 2508 of 2016; Criminal Miscellaneous Application no. 2722 of 2016; Criminal Miscellaneous Application No. 2390 of 2016; Criminal Miscellaneous Application No. 2391 of 2016; Criminal Miscellaneous Application No. 1916(A) of 2017 and Criminal Miscellaneous Application No. 1916(B) of 2017.
- r. An Order of mandamus be issued compelling the Respondents to return to the Petitioner his Academic Certificates and any documents taken from him, within 14 days of this Order, namely: Original Fulbright FLTA Certificate dated 2010 from Syracuse University; Original Fulbright FLTA Certificate of Attendance dated 13th December, 2009; Original transcripts for academic year 2009-10 from Syracuse University, New York; Original Degree certificate from Kenyatta University; Original Academic transcripts for years 1, 2, 3 and 4, from Kenyatta University; Original Computer studies Certification & Transcripts from Line and Circle Institute of Kenya dated December, 2000; Original Computer studies Certification & transcripts from Horizon Technology Institute of Kenya, dated November, 2000; Original KCSE School Leaving Certificate (1998); Original KCSE result slip issued by KNEC; Original KCPE School Leaving Certificate (1994) issued by KNEC; Original KCPE result slip issued by KNEC.
- s. An Order of mandamus be issued compelling the Respondents to return to the Petitioner his Motor Vehicles Registration Nos. KBK 500A and KCD 645P seized from his residence, within 14 days of this Order.
- t. A Permanent prohibitory injunction is issued against the 3rd Respondent from using documentary evidence obtained directly from Milimani Criminal Case No. 1315 of 2016 Republic Vs Joseph Bushebi & Cecilia Nyambura and related ex parte proceedings to support his civil claims.
- u. An Order for exemplary and punitive damages be issued against the 1st, 2nd and 3rd Respondents individually, jointly, and severally on account of their gross violation of the Petitioner's fundamental freedoms and rights as enumerated in the Petition.
- v. The 1st, 2nd and 3rd Respondents be directed to bear the costs of this Petition individually, jointly and severally.
- w. Further, or other relief, direction, writ or order that the Court may consider appropriate for the purpose of enforcing or securing the enforcement of the provisions of *the Constitution* that the Petitioner has identified as having been, are being, or are likely to be contravened by the Respondents.

Petitioner's Case

- 4. The Petitioner depones that he presented himself to the 2nd Respondent on 30th January 2017. This was in view of a complaint lodged by one, Henrich Neuwirth from Canada on 26th May 2016. The Petitioner was then arrested and arraigned before the 4th Respondent on 31st January 2017.
- 5. The Petitioner alleges that on the same day, the Chief Inspector of Police, Abel Ongeru alongside a private investigator and the Director of Advanced Forensics Ltd, Sebastian Omboto, came to the police cell and forced him to sign some documents while threatening him with dire consequences if he failed



- to do so. He alleges that these documents were in relation to the suit in Milimani Criminal Case No. 1315 of 2016 Republic Vs Joseph Bushebi & Cecilia Nyambura which had been instigated against him and his wife, the Interested Party herein.
6. The Petitioner depones that the 1st Respondent on 3rd February 2017 recommended that he be charged in the matter for various counts being, Count I: Conspiracy to defraud contrary to Section 317 of the Penal Code, Count II: Stealing by Directors Contrary to Section 282 of the Penal Code and Count III: Money Laundering contrary to Section 4 as read with Section 16 (I) (a) of the Proceeds of Crime and Anti-Money Laundering Act 2011.
 7. He argues that these are false and malicious charges as no proper investigations were carried out prior to this. Moreover, that the suit matter was instigated to aid the 3rd Respondent's interests, despite this party never having been in Kenya. The Petitioner asserts that the 4th Respondent's indulgence of this unknown and unverified person who went on to issue his testimony in Court against him in the alleged illegal criminal proceedings, violated his right under Article 50 of the Constitution.
 8. He informs that following Henrich Neuwirth's complaint a series of applications were filed by the 2nd Respondent's officers before the 4th Respondent wherein court warrants were issued. The Petitioner asserts that these warrants were utilized by the 2nd Respondent's officers to violate his rights. He adds that he was not issued with the Court proceedings and copies of warrants in the said matter thus violating his right to be issued with reasons and to lodge an appeal.
 9. The Petitioner further decries that the police officers who conducted the search at his residence at Kamulu, Nairobi, pursuant to Criminal Miscellaneous Application no. 2508 of 2016, Republic Versus Joseph Bushebi, did not account for the items that they seized. He claims that one of the investigation officers, Walter Oginga uploaded images of the seized items on his personal facebook platform without any Court Order.
 10. As a result, he argues that this subjected his private affairs to the public in breach of his and family's rights and was also in breach of Sections 13, 20, 121 and 130 of Proceeds of Crime and Anti Money Laundering Act which provide for preservation of secrecy and control of access and use of such privileged information acquired during investigations and trial.
 11. Furthermore, the Petitioner asserts that the search warrants issued in the said matter, restricted the police officers on the items to be searched for and taken possession of, being, documents, stamps, seals and computers in relation to the alleged committed offenses. It is however stated that on 17th August 2016, the 2nd Respondent's officers led by Chief Inspector Abel Ongeru and Inspector Walter Oginga defied the Court Order and carried away items and documents which were not sought in the said order.
 12. Particularly, the officers confiscated all of the Petitioner's original Academic Certificates and college transcripts without any justification. His attempts to get these documents back is said to have been futile. As a result, he argues that he is not able to secure meaningful employment. In addition, the Petitioner depones that the officers also seized his Motor Vehicles Reg. No. KBK 500A and KCD 645P which were also not covered in the issued warrant.
 13. The petitioner depones that subsequently, the 3rd Respondent instigated a civil suit against the Petitioner in High Court Civil Suit No. 45 of 2017 Carl Douglas Rusnell & Fernwood Developments Limited-Versus-Joseph Bushebi in order to pursue the laundered assets as charged in Milimani Criminal Case No. 1315 of 2016 Republic Vs Joseph Bushebi & Cecilia Nyambura. Specifically, these are: A Block of Apartments at Utawala registered as LR NO. 6845/72/36, Property Registered as Nairobi/118/859, Leased Plot at No. 209/28/1, Motor Vehicles Reg. No. KBK 500A make Toyota Land cruiser and Motor Vehicles Reg. No. KBK 500A KCD 645P make Toyota Axio.



14. The Petitioner claims that to sustain this civil suit the 3rd Respondent relied on the evidence obtained by the 1st and 2nd Respondent's in the ongoing criminal proceedings before the 4th Respondent. On this premise, the Petitioner postulates that the 3rd Respondent colluded with the 1st and 2nd Respondent to commence the criminal proceedings against him.
15. Furthermore, the Petitioner is aggrieved that the documentary evidence being utilized is part of the privileged prosecution evidence seized on various dates on account of the warrants that were issued. He asserts that instead of returning to Court to file a return of the seized evidence, the 2nd Respondent's officers proceeded to supply the same to the 3rd Respondent. He additionally contends that he was never supplied with these documents and neither was he given the 3rd Respondent's complaint that instigated the criminal matter.
16. The Petitioner is grieved that the initiated criminal proceedings are malicious with the key aim of aiding the 3rd Respondent's civil suit not necessarily to punish the alleged crimes therein. In this regard, the Petitioner contends that the Respondents acted ultra vires and contrary to their constitutional duty and acted ultra vires.
17. The Petitioner further argues that the said civil suit seeks forfeiture of the subject assets, yet such a claim ought to have been filed under the provisions of [Proceeds of Crime and Anti-Money Laundering Act](#), by the director of the Assets Recovery Agency not the 3rd Respondent.
18. In this regard, he further claims that the 3rd Respondent enlisted the help of one, Kennedy Ogetto and the Chairperson of the Anti-Money Laundering Advisory Board, at the time, to pursue civil forfeiture of the alleged proceeds of crime. According to him, the Chairman improperly influenced and furthered the private interests of the 3rd Respondent.
19. In light of the foregoing averments, the Petitioner is certain that his constitutional rights were violated by the Respondents and thus brings this suit against them seeking the sought relief.

1st Respondent's case

20. The 1st Respondent in response filed Grounds of Opposition dated 12th April 2023 on the premise that:
 - i. No evidence has been advanced by the Petitioner and the Interested Party to demonstrate that the charges levelled against them in Milimani CMCC No 1315 of 2016 is an abuse of both the 1st Respondent's prosecutorial powers and an abuse of the court process.
 - ii. The Petitioner and the Interested Party have not demonstrated to this court the prejudices they will suffer in the ongoing prosecutions of Milimani Criminal Case Number 1315 of 2016. They must demonstrate that substantial injustice would otherwise result if the criminal proceedings are not stayed. The trial court is an impartial arbiter and should be given an opportunity to determine the impugned lower court matter on merit.
 - iii. The 1st Respondent made a decision to charge in accordance with Article 157 (6), thereby upholding the provisions of Article 157 (10) & (11) of [the Constitution](#). Therefore, Criminal Case Number 1315 of 2016 is constitutional and properly instituted.
 - iv. The 1st Respondent made decision to charge the Petitioner and the Interested Party based on overwhelming evidence on the prosecution file. Therefore, the trial court should be left alone to weigh the prosecution evidence on the scales of justice for the guilt to be convicted and punished and the innocent, if any, to be acquitted.



- v. The Petitioner and the Interested Party have not demonstrated that the decision by the Respondent to charge them is illegal, unfair and irrational, therefore unconstitutional.
- vi. The Petitioner and the Interested Party have not persuaded this court that their Petition raises a serious issue worth the determination of this court.
- vii. A complaint was made to the police by the 3rd Respondent and it is in the public interest that such complaints made to the investigative agency be investigated and the perpetrators of crimes are charged and prosecuted.
- viii. The Director of Public Prosecutions made decision to charge while having regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process as per Articles 47, 48 and 157 (11) of *the Constitution*.
- ix. The accuracy and correctness of evidence or facts in a prosecution file can only be assessed and tested by the trial court which is best placed to analyze the quality and sufficiency of the evidence to be adduced in support of the charges in Milimani Criminal Case number 1315 of 2016.
- x. The charge against the Petitioner and the Interested Party are known in law under Section 317 and 282 of the *Penal Code* and Section 4 and 16 (1) (a) of The Proceeds of Crime and Anti-Money Laundering Act.
- xi. It is lawful for both civil and criminal proceedings to run concurrently under Section 193A of the *Criminal Procedure Code* which provides; 'Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings'.
- xii. The Petitioner has not adduced any iota of evidence to the effect that the 1st Respondent aided officers of the 2nd Respondent to seize documents of the Petitioner and furnished them on the 3rd Respondent so as to commence civil proceedings against the Petitioner.
- xiii. The Petitioner has not adduced any iota of evidence to the effect that the 1st Respondent seized documents and motor vehicles registration numbers KBK 500A and KCD 645P, the property of the Petitioner and went away with them.
- xiv. The orders and declarations sought are therefore not tenable against the 1st Respondent as the Petitioner and the Interested Party have not shown how the criminal proceedings in Criminal Case Number 1315 of 2016 are unconstitutional and how the 1st Respondent has infringed on their constitutional rights worth calling for the orders sought.
- xv. The Petition is without merit and should be dismissed with costs.

2nd and 4th Respondents' Case

21. These Respondents' in opposition to the Petition filed their Grounds of Opposition dated 5th May 2023 on the basis that:
 - i. Arrest and detention of a person are legal processes provided for by law with specific constitutional safeguards, and do not amount to infringement on the fundamental rights and freedoms of the Petitioner.



- ii. The Petitioners' rights under Article 27, 28, 31, 35, 39, 40, 43, 47, 47, 49, 50 and 51 of the Constitution are not absolute and are subject to limitations contemplated under Article 24 of the Constitution.
- iii. By dint of section Article 245(4)(a) and (b) of the Constitution and section 24, 27 and 35 of the National Police Service Act Cap 84, the 2nd Respondent has a constitutional and statutory duty to investigate offences.
- iv. The petition runs afoul to the authority and exercise of constitutional and statutory powers and functions vested upon the 2nd Respondent under Article 245 of the Constitution and relevant provisions of the National Police Service Act Cap 84.
- v. In exercise of their constitutional powers and functions, the Respondents are bound by the national values and principles of governance as provided for under Article 10 and the duty to comply with constitutional standards of human rights and fundamental as provided for under Article 244 of the Constitution.
- vi. The constitutional and statutory mandate conferred upon the respondents can only be interfered with by the Court where it has been sufficiently demonstrated that they have acted arbitrarily and contrary to their constitutional powers and mandates.
- vii. No evidence has been adduced before this Court demonstrating any prejudice, damage, harm or injury suffered by the Petitioner as a result of the arrest, detention, charge or other alleged illegal actions of the 2nd and 4th Respondents.
- viii. Both the Application and petition are based on mere apprehension and unfounded fears; they preempt the presentation of evidence and are presumptive of the finding by the trial court; the Petitioner by dint of Article 50 of the Constitution can challenge the veracity of the evidence against him including whether the evidence was properly obtained.
- ix. Grant of the reliefs sought in the circumstances of this case will frustrate, rather than advance the rule of law. The Petitioner's constitutional safeguards in respect of his rights while undergoing trial are still guaranteed.
- x. Grant of the reliefs sought potentially threatens the Petitioners' right under Article 50, in particular, the right to have the trial begin and conclude without unreasonable delay.
- xi. He who alleges must prove. The petitioner has failed to evidentially demonstrate how the 2nd Respondent acted illegally, arbitrarily, unjustly, irregularly or oppressively in conducting investigations against him or how any of his rights so far have been violated or are being threatened with violation by the on-going prosecution against him.
- xii. On the strength of Section 193A of Criminal Procedure Code, the Petitioner's Application and petition are a non-starter, untenable and misconceived. The fact that there exist civil proceedings emanating from the same subject matter is not a bar to institution and continuation of criminal proceedings.
- xiii. Section 34 of the Evidence Act Cap 80 allows for the admission of evidence in judicial proceedings in subsequent proceedings, including those of a civil nature.
- xiv. The Petitioners are merely apprehensive having failed to demonstrate that the trial magistrate is or will be biased, not accord them a fair hearing, has acted contrary to the constitution, the



criminal procedure code or any other written law or has acted contrary to judicial code of conduct therefore not able to dispense justice accordingly.

- xv. The criminal process provides for a process of an appeal where the accused if aggrieved by the decision in question, can pursue. Furthermore, the petitioner can pursue compensation by way of a claim for malicious prosecution.
 - xvi. The Petitioner's Application and Petition are unmeritorious, an abuse of the court process and an attempt by the Petitioner to delay the hearing and determination of the criminal case against him.
22. The 2nd Respondent additionally filed a Replying Affidavit sworn by its officer in the Economic and Commercial Crimes Unit, Francis Mulinga on 3rd May 2023.
 23. He depones that the 2nd Respondent has been investigating the allegations of fraud lodged by the 3rd Respondent through the High Commission of Canada in Nairobi on 26th May 2016.
 24. He stated that the 3rd Respondent a Canadian citizen lodged a complaint of fraud to the Royal Canadian Mounted Police who carried out their investigations and referred the matter to the High Commission of Canada in Kenya. The Commission conversely forwarded the matter to the 2nd Respondent for further investigations being that the alleged crime had occurred in Kenya.
 25. To commence its investigations, the 2nd Respondent's officers obtained several applications in Court so as to investigate the matter. Particularly, the financial trail on how the money had been deposited and withdrawn. He informs that the investigations team also recorded statements from owners of hardware's whom invoices had been used and sent to the 3rd Respondent by the Petitioner.
 26. It is stated that the investigations unearthed that the 3rd Respondent had transferred Kshs.62,233,650 into account No.XXXXXXXXXXX at Family Bank, under the name of Bushnell Developers Limited wherein the Petitioner and the 3rd Respondent are the directors. To procure these monies, the Petitioner had told the 3rd Respondent that the amount was going to be used for construction of warehouses which they would thereafter lease and get revenue.
 27. He avers that the Petitioner sent several warehouse rental lease agreements to the 3rd Respondent purporting that the warehouses had been completed and leased to various companies. The investigations however established that no such warehouses had ever been constructed. Instead, the Petitioner used the monies to build a bungalow for his residence registered under plot No.LR. No.6845/72/36, several rental units along Thika Road and also purchased the two seized vehicles. The Petitioner in addition edited the said account to account number XXXXXXXXXXXXX under the name Wekesa Consultants.
 28. It is claimed that when the Petitioner became aware of the instant investigations, he went into hiding for six months. The Petitioner later resurfaced after the Interested Party had been arrested and arraigned in Court as one of his accomplices.
 29. He refutes the Petitioner's claims that the 2nd Respondent's officers went to his cell and forced him to sign various documents. He notes that the Petitioner had a right to lodge a complaint in that regard with the OCS however no evidence was adduced to indicate that such a complaint was made.
 30. He makes known that the 3rd Respondent was sick and frail hence could not make a flight to Kenya to testify physically. As a result, the 2nd Respondent applied for a video link testimony so that he could testify. He informs further that all the evidence obtained in this matter was supplied to the Petitioner



in 2018 and received by his Counsel who signed the inventory. As such, the claim otherwise is said to be false.

31. In like manner an inventory of the seized items from the Petitioner's house was supplied and signed by the parties present and filed in Court. The seized vehicles are said to have been confiscated as were procured from proceeds of crime and money laundering, which the Petitioner has already been charged with before the criminal court.
32. He asserts in light of the foregoing that the Petitioner has not demonstrated how the criminal justice system was manipulated. As a consequence, he reasons that the Petition is vexatious and an abuse of the court process.

3rd Respondent's Case

33. The 3rd Respondent in reaction to the Petition filed his Replying Affidavit sworn on 23rd March 2023. On the onset, he makes known that the Petitioner has filed numerous applications before the High Court and Magistrates Court in an effort to frustrate the criminal and civil suits instigated against him. He asserts therefore that the instant suit is an abuse of the Court process and has not been brought in good faith. Additionally, he points out that Section 193A of the Criminal Procedure Code contrary to the Petitioner's argument, allows concurrent criminal and civil proceedings.
34. He depones that upon discovering that the Petitioner had defrauded him Ksh.100,000,000, he lodged a complaint on 21st January 2016 with the Royal Canadian Mounted Police. He states that by virtue of the Victims Protection Act, his complaint and investigative package was transmitted to the Canadian Embassy then to the 2nd Respondent through the liaison officer Henrich Neuwirth. In the correspondence, the Canadian Police requested further investigations into the matter with a view of charging the Petitioner.
35. Opposing the Petitioner's allegations, he notes that through the investigative package and engagement with Constable Jacques Constantin of the Royal Canadian Mounted Police, the 1st and 2nd Respondent were able to verify and authenticate his identity. He avers that in August 2016, charges were preferred against the Petitioner and the Interested Party.
36. He depones furthermore that, through his advocates, he engaged the services of a private investigator, Sebastian Omboto, to investigate the account of matters that led to the systematic fraud by the Petitioner. He depones that upon obtaining sufficient evidence from this investigation, he instituted Commercial Suit No.45 of 2017 in pursuit of recompense of the colossal amount lost through the fraudulent scheme.
37. He makes known that the Petitioner was supplied with all the documents that the prosecution intended to rely on in September 2018 as is clear from the adduced inventory which was acknowledged and received by his Advocate.
38. As a whole, he argues that the Petitioner has not discharged his burden of proof on the myriad allegations as required in law and also how the proceedings against him are an abuse of the Court process.

Interested Party's Case

39. The Interested Party in support of the Petition filed her Replying Affidavit sworn on 28th March 2023.
40. The Interested Party informs that she is the 2nd accused person in Milimani Criminal Case No. 1315 of 2016 Republic Vs Joseph Bushebi & Cecilia Nyambura which she echoes is an abuse of the



- criminal justice process. She asserts that the institution, maintenance and prosecution of the said suit is oppressive, malicious and an abuse of the Court process contrary to Article 157(11) of *the Constitution*.
41. She depones that on 17th August 2016, the 2nd Respondent's officers led by Abel Ongeri raided their home at Nairobi Block/118/859 in Kamulu, seized and carried away several items, including inter alia original academic certificates belonging to the Petitioner as well as motor vehicles Registration No. KBK 500A and KCD 645P.
 42. The Interested Party asserts that after completion of the search, the officers asked her to accompany them to the 2nd Respondent's Headquarters to record a statement. Upon her arrival, she avers that the officers interrogated her concerning the Petitioner and the 3rd Respondent. She states that when she informed them that she did not know their dealings or the 3rd Respondent, the officers proceeded to threaten and harass her with charges arguing that she was concealing the facts of the matter and the Petitioner's whereabouts.
 43. She depones that true to their threats, they on 24th August 2016 charged her with several offences being: Count I: Conspiracy to defraud contrary to Section 317 of the *Penal Code*, Count III: Money Laundering contrary to Section 4 as read with Section 16 (I) (a) of the *Proceeds of Crime and Anti-Money Laundering Act*.
 44. It is emphasized that the impugned criminal proceedings were instigated in the absence of proper factual basis. She asserts that there is no record of the Occurrence Book number which details the formal complaint to the police, the complainant and the details of suspects. She adds that the charges against her are false as up to the time of filing this reply, she had not been furnished with any material or witness statement naming her as a suspect and thus is just a victim of circumstances. In this regard, she avers that the 1st Respondent failed to uphold the principles set out under Article 157(11) of *the Constitution*.
 45. The Interested Party further takes issue with the complainant as she claims he is unknown yet testified in Court from Edmonton City, Canada on 27th February 2024 and from Mesa City, in Arizona USA on 14th March 2023, before the 4th Respondent. For this reason, she decries the 4th Respondent's reliance on testimony from an unverified person obtained virtually and whose identity is unknown.
 46. In view of the foregoing, the Interested Party is convinced that the impugned criminal prosecution was mounted with the ulterior motive of tarnishing her name by disseminating prosecution documents in social media and maliciously disclosing her private affairs.
 47. It is alleged moreover that the 3rd Respondent is employing the criminal process to assist him in advancing his civil recovery pursuits. She stresses that it is a travesty of justice for the police to be involved in the pursuit of a civil dispute.
 48. To this end, she maintains that the Respondents have violated her rights under Articles 22, 23, 24, 25, 29, 31, 49, and 50 of *the Constitution* and thus orders sought are merited.

Petitioner's Submissions

49. The Petitioner filed submissions dated 6th March 2023 and further submissions dated 16th February 2024 in support of his case. He identified the issues for determination as: whether the Respondents violated his constitutional rights under Articles 27, 28, 31, 35, 39, 40, 43, 47, 49, 50 and 51 of *the Constitution*, whether the Criminal Case was commenced in the absence of proper factual basis contrary to Article 157 (11) of *the Constitution*, whether, the Respondents have abused the Criminal justice system by employing it for purposes of Civil Discovery, contrary to Article 157 (11) of *the*



Constitution and Section 193A of the Criminal Procedure Code, whether evidence, obtained in pending criminal proceedings, or as part of criminal investigations, can be used in concurrent or subsequent civil cases that involve the same facts and/or parties vis-a-vis Articles 50(2)(a), Section 34 of the Evidence Act 79 (2) Evidence Act and Sections 13, 20, 121 and 130 of Proceeds of Crime and Anti Money Laundering Act and whether it is constitutionally permissible for a complainant in Anti-money laundering proceedings to privately pursue the forfeiture of alleged Proceeds of Crime or realizable assets charged in the criminal case, in view of Part VII and VIII of the POCAMLA Act.

50. On a preliminary note, the Petitioner argued that the 1st Respondent in its Grounds of Opposition had raised facts which were not supported by any evidence. For this reason, he stated that failure by the 1st Respondent to respond to the Petition by way of a replying affidavit rendered the averments in the Petition unchallenged and uncontroverted.
51. Reliance was placed in Daniel Kibet Mutai & 9 others v Attorney General [2019] eKLR where it was noted that:

“As stated earlier the Respondents did not file any Replying Affidavit to challenge and/or controvert the sworn averment by the Petitioners that they were victims of the post-election violence. Ground of Opposition which were filed are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath.”
52. Additional dependence was placed in Kennedy Otieno Odiyo & 12 Others v. Kenya Electricity Generating Company Limited [2010] eKLR.
53. On the first issue, the Petitioner submitted that the guise of initiating, investigating and prosecuting Criminal Case Number 1315 of 2016 as elaborated in his averments in his affidavits, makes it plain that the Respondents violated his cited constitutional rights.
54. In a nutshell, he noted that the Respondents in filling multiple applications and concealing information from him violated his right under Article 27(1) and 35(1)(a) of the Constitution. By publishing the seized documentation and information during the search on social media, his right under Article 31 of the Constitution was breached. By seizing his motor vehicles, his right to property under Article 40 of the Constitution was violated.
55. Likewise, by seizing his academic qualifications, the 2nd Respondent violated his right to work in violation of Article 43(1) of the Constitution. Additionally, the manner in which he was arrested, detained and interrogated violated his rights under Article 28, 49 and 51 of the Constitution.
56. Similarly, he contended that the investigations and ongoing proceedings are in violation of his right to a fair hearing under Article 50 of the Constitution yet it is a non-derogable right under Article 25 of the Constitution and affirmed in John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR) by the Supreme Court.
57. On the second issue, the Petitioner submitted that the prosecution of Milimani Criminal Case No. 1315 of 2016 does not meet the threshold under Article 157(11) of the Constitution since it was commenced in the absence of proper factual basis. He claimed that in prosecuting the matter as evidenced in his affidavits, the Respondents had deliberately departed from the Criminal Procedure Code and the rules and principles of procedure according to which the law require a criminal trial to be initiated.



58. Reliance was placed in *R vs. Attorney General exp Kipngeno Arap Ngeny* High Court Civil Application No. 406 of 2001 where it was held that:
- “A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable”.
59. Like dependence was placed in *Ex-Parte Floriculture International Ltd*, Nairobi High Court Misc. Civil Application No. 114 Of 1997 (Unreported) and *State of Maharashtra & Others –vs- Arun Gulab Gaurali & Others*, Criminal Appeal No. 590 of 2007.
60. In like manner, the Petitioner in the third issue submitted that the Respondents in using the criminal justice system to aid a civil claim, degraded the criminal process to a pawn for gathering information for the 3rd Respondent’s civil case, which is not the legitimate expectation and purpose of a criminal trial. According to him, the criminal process should never be used for civil discovery purposes as there are civil mechanisms which the 3rd Respondent can utilize to search and seize documents.
61. Reliance was placed in *Commissioner of Police & the Director of Criminal Investigation Department & another v Kenya Commercial Bank & 4 others* [2013] eKLR where it was held that:
- “Clearly, the company and the guarantor through their directors were employing criminal process to assist them in resolving their civil dispute. While the law (Section 193A of the [Criminal Procedure Code](#)) allows the concurrent litigation of civil and criminal proceedings arising from the same issues...What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings?” 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...Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations.”
62. Equal dependence was placed in *Republic vs. Chief Magistrates Court at Mombasa Ex Parte Ganijee & another* [2002] 2 KLR 703, *Lee Mwathi Kimani v Director of Public Prosecutions & 2 others* [2014] eKLR and *Kuria & 3 Others V A.G* (2002) 2KLR 69.
63. Flowing from this, the Petitioner in the fourth issue submitted that evidence obtained in pending criminal proceedings, or as part of criminal investigations, cannot be used in concurrent civil cases that may involve the same facts or parties. To buttress this point, the Petitioner relied in Section 34 of the [Evidence Act](#) arguing that it is clear that evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding, and not in a concurrent separate proceeding. Furthermore, he argued that there is common law privilege against disclosure of evidence in other proceedings before formal proof, so as to prevent the accused from suffering substantial and irreparable prejudice and harm as a result of such a disclosure.
64. On the final issue, the Petitioner submitted that according to Section 53 of [Proceeds of Crime and Anti-money Laundering Act](#), the Assets Recovery Agency is the only body with the mandate of combating money laundering through identification, tracing, freezing, seizure and confiscation of proceeds of crime.



65. The Petitioner is however grieved that the 3rd Respondent, with the help of the Chairman of Anti-Money Laundering Board, lodged the civil suit HCCC 45 of 2017 wherein he seeks civil forfeiture of the seized assets dubbed, proceeds of crime. He asserted that this is in error as under the Act, the 1st Respondent is required to report cases of this nature to the Asset Recovery Agency to file recovery proceedings in respect of the alleged assets. In this way, he argued that the 1st Respondent deliberately failed to do so, so as to allow the 3rd Respondent to pursue civil forfeiture through the civil proceedings.
66. To buttress this point reliance was placed in *Ruth Wendy Wambui v Republic* [2016] eKLR where it was held that:
- “It seems....as far as restraint and seizure orders are concerned, the provisions of the *Proceeds of Crime and Anti-Money Laundering Act*, must prevail. The latter Act assigns the role of making relevant applications for restraint and seizure to the Assets Recovery Agency. Secondly the law prescribes the application of the Civil Procedure to such applications.”
67. Like dependence was placed in *Lee Mwathi Kimani v Director of Public Prosecutions & 2 others* [2014] eKLR.

1st Respondent’s Submissions

68. Counsel, Achochi Henry Nyabuto, filed submissions dated 5th March 2024. Counsel referring to the charges preferred against the Petitioner submitted that charges require scientific proof by way of expert evidence, which evidence can only be adduced at the trial court. Counsel added that the issues of innocence raised by the Petitioner will also be proved before the trial court.
69. Counsel stressed that the 1st Respondent acted within the law in making the decision to charge the Petitioner and thus the prayers sought are an attack on the constitutional mandate of the 1st Respondent. Counsel stated that the 1st Respondent in making its decision to charge, was guided by Article 157(11) of *the Constitution* and its independent discretion as empowered under Article 157 (10) of *the Constitution* not an ulterior motive or influence by the 3rd Respondent as alleged by the Petitioner.
70. Counsel was certain therefore that the criminal charges against the Petitioner and the Interested Party passed the set threshold for it to be instituted against them. In line with this, Counsel submitted that the Petitioner and the Interested Party had not demonstrated the prejudice they would suffer if the proceedings in *Milimani Criminal Case Number 1315 of 2016* continue.
71. To this end, Counsel submitted that trial court is an impartial arbiter and should be given an opportunity to determine the impugned matter on merit.

2nd Respondent’s Submissions

72. State Counsel, E. Makori filed submissions dated 5th July 2024 and identified the issues for discussion as: whether the Court has jurisdiction to determine this matter, whether the 2nd Respondent violated fundamental rights and freedoms of the Petitioner, whether the Petitioner has demonstrated how her constitutional fundamental rights and freedom have been contravened and whether the Petitioner has satisfied the grounds required for granting the sought reliefs.
73. Relying on the opine in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* (1989) KLR 1, Counsel stressed that jurisdiction is everything and, in this matter, the same had been invoked



- prematurely. This is because the Petitioner seeks to have this Court declare that his rights under Articles 27,29,28,35 and 49 of the Constitution were violated and thereafter be granted compensation.
74. On the second issue, Counsel submitted that the Petitioner had not adduced any evidence to show how the authority and exercise of powers and functions of the offices of the 2nd Respondent violated her fundamental rights and freedom under Articles 27, 28, 29, 31, 35, 39, 40, 43, 47, 49, 50 and 51 of the Constitution.
75. In fact, Counsel submitted that the instant Petition is offensive to the 2nd Respondent's authority and exercise of powers and functions of the offices as stipulated under Articles 157,245(4), 259(3) of the Constitution and sections 34 and 35 of National Police Service Act respectively.
76. Following, the 3rd Respondent's complaint, Counsel stressed that the 2nd Respondent exercised its authority and power as mandated by the Constitution and the law. Counsel further noted that the investigations as deponed in its replying affidavit revealed that there was indeed a probable cause that the Petitioner had defrauded the 3rd Respondent. Considering this, Counsel contended that the 2nd Respondent had acted in good faith not malice as claimed.
77. Counsel moving to the next issue argued that the Petitioner had not demonstrated how his constitutional fundamental rights and freedom have been contravened by the 2nd Respondent. Furthermore, Counsel stated that the Petition does not disclose any constitutional issues but seeks to enforce a claim for alleged malicious prosecution which remedy can be obtained in an ordinary civil suit.
78. Reliance was placed in David Kathande Mutura Vs Republic (2017) eKLR where it was held that:
- “The Petitioner has cited that his rights under Article 25, (that is right to freedom from torture, crime and inhuman treatment among others) and Article 29 (which guarantees freedom and security) have been infringed. However, he has not given the specifics of how those rights were infringed and /or laid evidence before to demonstrate how the Respondent or any organ of the state infringed on any of his rights during or after trial. It is important to note that those rights are not absolute but limited under Article 24 of the Constitution and so where a person has committed a crime and found guilty through a fair and legal process, he cannot claim that his rights have been infringed.”
79. Similar dependence was placed in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2013) eKLR, Mohamed Mire Vs Attorney General & another (2016) eKLR and Prof.Tom Odhiambo Ojienda SC v Director of Public Prosecutions & 3 others (2020) eKLR.
80. On this premise, Counsel submitted in the last issue that the Petitioner was not entitled to the relief sought.

3rd Respondent's Submissions

81. Ogetto, Otachi and Compnay Advocates for the 3rd Respondent filed submissions dated 25th January 2024 where Counsel identified the issues for discussion as: burden of Proof; requisite threshold to prove malice and abuse of court process in order to stay and/or prohibit progression of the criminal suit, concurrent civil & criminal suits and the Right to a Fair Hearing.
82. Counsel submitted that the threshold and standard of proof required in order to justify the quashing of criminal proceedings are quite high and that the person challenging them ought not to merely state



that there are violations of their rights but to specifically prove that which they allege in order to attain a successful challenge to criminal prosecution.

83. Counsel submitted that in this matter the Petitioner had failed to establish its claim and that the allegations contained in the impugned Petition are incapable of being addressed by the trial court. Furthermore, Counsel submitted that the Petition indicates a lack of evidentiary materials to prove the existence of bad faith and malicious tactics in the actions of the Respondents.
84. Reliance was placed in Henry Aming’a Nyabere v Director of Public Prosecutions & 2 others; Sarah Joslyn & another (Interested Parties) [2021] KEHC 5610 (KLR) where the Court observed that the considerations to consider are:
- “i) where there is no ostensible complainant in respect to the complaint
 - ii) the prosecution fails to make the witness statements and exhibits available without any justification,
 - iii) there is selective charging of suspects or
 - iv) an advocate is unfairly targeted for rendering professional services in a matter.”
85. Like dependence was placed in Republic vs Ministry of Planning & Another ex-parte Professor Mwangi Kaimenyi HC Misc. Appl. No. 179 of 2003 and Captain Moses Kariuki Wachira v Joseph Mureithi Kanyita & 3 others [2013] eKLR.
86. Equally, Counsel submitted that the owing to Section 193A of the *Criminal Procedure Code*, concurrent civil and criminal proceedings are permissible in law in that, notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings as echoed in Amir Lodges Ltd & another v Mohammed Omar Shariff & another [2022] eKLR.
87. Counsel submitted that the Supreme Court of India in Natasha Singh vs CBI (2013) 5 SCC 741 held that a fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right.
88. Accordingly, Counsel submitted that the core of a fair trial includes the grant of fair and proper opportunities to all persons concerned in the suit to present their respective cases. As such, Counsel argued that the Petitioner’s pursuit to halt the criminal suit was in effect denying the 3rd Respondent the chance to be heard and to present his case.

Interested Party’s Case

89. In support of the Petition, the Interested Party through Momanyi Magare and Company Advocates filed submissions dated 1st December 2023.
90. Counsel submitted in view of violation of their constitutional rights, the Interested Party had corroborated the Petitioner’s accounts of violation under Articles 27, 28, 31, 35, 39, 40, 43, 47, 49, 50 and 51 of *the Constitution*. Specific emphasis was focused on the right to a fair hearing as it was alleged that the 4th Respondent had failed to follow the laid down guidelines to the detriment of the Petitioner.



91. Dependence was placed in *Livingstone Maina Ngare V Republic* [2011] eKLR where it was held that:
- “The instruments for video conferencing in this case would be set up within the trial court in Nairobi, and at the Embassy of Kenya in Washington D.C. A judicial officer would be commissioned to be present in Washington D.C. to ensure that the witnesses are present, and that none of the said witnesses was either coached, harassed or otherwise interfered with. The judicial officer would administer the oath to the witness before he commenced his testimony. Meanwhile, the trial court would set up itself, in the presence of the accused person, his advocate and the prosecutor.”
92. Additional dependence was placed in *Joseph Ndungu Kagiri v Republic* [2016] eKLR.
93. Counsel further echoed that the criminal suit had been commenced in the absence of proper factual basis and investigations as the criminal complaint was not recorded in the Occurrence Book as required in law and that the police never recorded the 3rd Respondent’s witness statement. Counsel submitted that in *Republic v Director of Criminal Investigations & 2 others; Resilient Investments Limited & 3 others (Interested parties); Limited (Exparte)* ([2022] KEHC 43 (KLR), the Court held that investigating officers are required to record statements of persons acquainted with the facts and that failure to do so is a serious matter and that there must be sufficient evidence to mount a prosecution.
94. Similar dependence was placed in *Reuben Mwangi v Director of Public Prosecutions & 2 others; UAP Insurance & another (Interested Parties)* [2021]eKLR.
95. Additionally, it was argued that the 1st Respondent arbitrarily abused his discretion in preferring charges against the accused without carrying out proper investigations contrary to Article 157(11) of *the Constitution*.
96. Bearing this in mind, Counsel submitted that a criminal prosecution commenced in abuse of the court process such as the impugned suit, ought to be quashed as it is evident that the Petitioner will not receive a fair trial. Counsel relied in *G.V. Odunga, J in Republic v Chief Magistrate’s Court Nairobi & 4 others* [2013] eKLR where it was held that there is a high public policy factor that *the Constitution* and the law are respected and followed by the Respondents in the investigation and prosecution of criminal cases.

Analysis and Determination

97. It is my considered opinion that the issues that arise for determination are as follows:
- i. Whether the Petitioner’s rights under Articles 27, 28, 31, 35, 39, 40, 43, 47, 49, 50 and 51 of *the Constitution* were violated by the Respondents.
 - ii. Whether the prosecution instigated against the Petitioner is malicious.
 - iii. Whether the Petitioner is entitled to the reliefs sought.

Whether the Petitioner’s rights under Articles 27, 28, 31, 35, 39, 40, 43, 47, 49, 50 and 51 of *the Constitution* were violated by the Respondents.

98. The Director of Public Prosecutions (DPP), the 1st Respondent mandate is anchored on Article 157 of *the Constitution*. The key sub-sections defining the authority of the DPP are as follows:



- (4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.
- (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—
- a. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
 - b. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
 - c. subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).
- (10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.
- (11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall 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.
99. In *Denis Joseph Shijenje & another v Kenya Revenue Authority & 2 others* [2021] KEHC 12572 (KLR) the Court discussing the DPP’s mandate held as follows:
- “37. I find that the office of the Director of Public Prosecution being an independent institution established under *the Constitution*, the court can only interfere with or interrogate its actions where there is contravention of *the Constitution*. In the case of *Paul Ng’ang’a Nyaga v Attorney General & 3 others* (2013) eKLR, it was held that “this court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they acted in contravention of *the Constitution*.”
100. Furthermore, in *Francis Anyango Juma vs The Director of Public Prosecutions and another* [2012] KEHC 2618 (KLR) the Court observed that:
- “Clearly, the intention under *the Constitution* was to enable the Director of Public Prosecutions to carry out his constitutional mandate without interference from any party. This court cannot direct or interfere with the exercise by the DPP of his power under *the Constitution* or direct him on the way he should conduct his constitutional mandate, unless there was clear evidence of violation of a party’s rights under *the Constitution*, or violation of *the Constitution* itself.”
101. Similarly, the Court of Appeal in *Diamond Hasham Lalji & another v Attorney General & 4 others* [2018] KECA 856 (KLR) opined as follows:
- “(41) Thus, the exercise of prosecutorial discretion enjoys some measure of judicial deference and as numerous authorities establish, the courts will interfere with the exercise of discretion sparingly and in the exceptional and clearest of cases.



However, as the Privy Council said in *Mohit v Director of Public Prosecutions of Mauritius* [2006] 5LRC 234:

“these factors necessarily mean that the threshold of a successful challenge is a high one. It is however one thing to conclude that the courts must be sparing in their grant of relief to seek to challenge the DPP’s decision to prosecute or to discontinue a prosecution, and quite another to hold that such decisions are immune from any such review at all...”

In *Regina v. Director of Public Prosecutions ex-parte Manning and Another* [2001] QB 330, the English High Court said partly at para 23 page 344:

“At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the tests were too exacting, an effective remedy could be denied.”

Although the standard of review is exceptionally high, the court’s discretion should not be used to stultify the constitutional right of citizens to question the lawfulness of the decisions of DPP.

(42) The burden of proof rests with the person alleging unconstitutional exercise of prosecutorial power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision.”

102. Turning to the 2nd Respondent, this is a Department within the National Police Service which forms part of the National security organs envisaged under Article 239 (1) (c) of *the Constitution* and is established under the *National Police Service Act*.

103. The Court in *Daniel Ogwoka Manduku v Director of Public Prosecutions & 2 others* [2019] KEHC 12121 (KLR) discussing the mandate of the 2nd Respondent cited with approval a number of authorities and noted as follows:

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

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

“42. It is however my view that the police are clearly mandated to investigate the commission of criminal offences and in so doing they have powers inter alia to take statements and conduct forensic investigations. In order for the applicant to succeed he must show that not only are the investigations which were being done by the police are being carried out with ulterior motives but that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the predominant purpose is to further some other ulterior purpose and as long as the prosecution and those charged with the responsibility of



making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.”

104. In like manner, in *Kenya Commercial Bank Ltd & 2 Others vs Commissioner of Police and the Director of Criminal investigations Department & Another Interested Party benjoh Amalgamated Ltd* [2012] eKLR the Court speaking to both mandates held that:

“ 25. The Office of the Director of Public Prosecutions 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 for 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*.”

105. It must however be appreciated that where there are valid reasons requiring Court’s intervention, the Court will not hesitate to take action as held in *Kuria & 3 Others Vs. AG* (2002) 2 KLR 69 as cited with approval in *Raymond Kipchirchir Cheruiyot & another v Republic* [2021] KEHC 6790 (KLR) where it was held thus:

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

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tolls for personal score-settlings or vilification of issues not pertaining to that which the system was even formed to perform..... The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta.

.....

34. In *Kuria & 3 Others vs. AG* (supra) the court held that:-

“...The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution...A prerogative order should only be granted where there is an abuse of the process of the law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution... It is not enough to state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the Applicant are under serious threat of being undermined by the criminal prosecution. In the absence of concrete grounds.... it is not mechanical enough that the existence



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

106. Accordingly, for the Petitioner’s claim to succeed he must demonstrate the manner in which these Respondents acted contrary to the law by deviating from what is expected of them by the law. The Court in *Nganga & 12 others v Kahu* [2024] KEELC 7067 (KLR) observed as follows:

“22. It is trite that he who alleges must prove. The burden of proof in civil cases is on a balance of probabilities. It would be recalled that even in uncontested suits, the burden of proof on a claimant is not lessened in any way. See the case of *Kenya Power and Lighting Company Limited Vs. Nathan Karanja Gachoka & another* [2016] eKLR...

24. The Court of Appeal in the case of *Mbuthia Macharia v Annah Mutua Ndwiga & Another* [2017] eKLR explained that the legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. That constitutes evidential burden. The learned Judges cited with approval the same principle of law as amplified by the learned authors of the leading Text Book; - *The Halsbury’s Laws of England*, 4th Edition, Volume 17, at paras 13 and 14:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14. The legal burden of proof normally rests upon the party desiring the Court to take action; thus a claimant must satisfy the Court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

107. In respect of the matter before the Court, the Petitioner and the interested contend that this criminal case was commenced in the absence of proper factual foundation hence is an abuse of the Criminal Justice process and contravention of the Petitioner’s Constitutional Rights to freedom and security of the person, the Right to freedom of movement and the Right to secure protection of the law.

108. The 3rd Respondent, who is the complainant in the criminal case, Carl Douglas Rusnell swore an exhaustive affidavit on 23rd March, 2023 where he gives a detailed explanation constituting the complaint he lodged against the Petitioner. He alleges that the Petitioner defrauded him a colossal amount of money amounting to Kshs. 100,000,000 through a fictitious venture he had encouraged him to join as co-shareholder for development of warehouses for hire under a Company known as Bushnell Developers. The complaint was first lodged with the Royal Canadian Mounted Police and transmitted through the Canadian Embassy to be acted upon by the 2nd Respondent (Directorate of Criminal Investigations) which proceeded to conduct further investigations.



109. On its part, the 2nd Respondent through the affidavit of Francis Muringa, an investigator with the Directorate of Criminal Investigations (DCI) confirmed receipt of that request from the Royal Canadian Mounted Police that had been forwarded by the High Commission of Canada in Nairobi as an investigation package in relation to the 3rd Respondent complaint to enable the 2nd Respondent carry out further investigations.
110. The ensuing investigations involved obtaining applying for search warrants from the Court and recording of statements from witnesses. That those investigations revealed that Carl Rusnell (the 3rd Respondent herein) had in fact transferred Kshs.62,233, 560 into an account number XXXXXXXXXXXXX held at Family Bank under the name Bushnell Developers Limited which the Petitioner for purposes of undertaking construction of warehouses through the under Bushnell Developers Limited but no warehouses were constructed. Rather, not the said monies were diverted to construct a bungalow residence under plot number LR 118/859 and rental apartments in Utawala on LR 6848/72/36, several rental houses along Thika Road and purchase of motor vehicles KBK 500A and KCD 645P using the said amounts. That the Petitioner further edited account number XXXXXXXXXXXXX and changed its contents to account number XXXXXXXXXXXXX, with the name of Account Bushnell Developers Ltd that had details of expenditure of the received sums operating under the name of Wekesa Consultants. That further, despite the Petitioner preparing and sending rental leases for the warehouses to the Petitioner purporting warehouses and leased to various companies, no such warehouses existed on the ground.
111. In my humble view, detailed factual account by the 3rd Respondent and which the investigator corroborated regarding the complaint if fraud clearly establishes that there reasonable factual basis to mount an investigation and displaces the Petitioner's claim that there was no factual basis to commence the investigation.
112. In my humble view, an investigation is a legal process to establish the commission of an offence which does not amount to infringement of the rights or fundamental freedoms of the Petitioner. An inconvenience only may not constitute a sufficient ground to declare a lawfully carried out investigation process unconstitutional. For the Court to intervene a clear violation of a right must be established. In this regard, the following decision of the Court of Appeal in *Dande & Others v Inspector General National Police Service & 2 others (Civil Appeal 246/2016) (2022) KECA 170* which cited the Supreme Court decision is relevant. The Court explaining the circumstances that the Court can intervene held:

“25. The Supreme Court of Kenya... further identified the guidelines for review of prosecutorial powers in *Cyrus Shakhhalanga Khwa Jirongo vs Soy Developers Ltd & 9 others [2021] eKLR* as follows:

“Furthermore, the Supreme Court of India in *R.P. Kapur v State of Punjab AIR 1960 SC 866* laid down guidelines to be considered by the Court on when the High Court may review prosecutorial powers. They are as follows:

Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice; or

Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction; or



Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; or

Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.”

26. Arising from the fact that the powers and processes of the police to arrest and investigate are regulated by the law identified hereinabove, the exercise of the said powers and processes will be found to be unlawful and illegal on review, if the applicable constitutional and legal provisions are not observed and complied with.

On the application of the other grounds for review, and arising from decided cases on these grounds, including those cited by the parties herein, we posit the following guidelines.

- a. An arrest and investigation is vexatious if it is possible to demonstrate that it is unwarranted and without basis, and it would tend to or is being made with an intention to cause worry, upset, annoyance or embarrassment.
- b. It is oppressive if it can be demonstrated that it is being made because the complainant or the police have a personal issue or prejudice with the individual they are complaining about, and that they are using the criminal process to settle scores with the individual.
- c. Likewise, it is made with ulterior motives and in bad faith where it can be demonstrated that the police are being misused or manipulated to influence another process or outcome.
- d. Lastly, it is unreasonable, if a complaint is so outrageous that no reasonable person would have given credence to it or acted on it. The likelihood of an arrest or investigation not being upheld is however not a reason to consider it unreasonable.

113. In my view, as already observed, the Petitioner has not satisfied any of these grounds as already shown.

114. The Petitioner further complained that various ex parte warrants namely: Criminal Miscellaneous Application no. 2508 of 2016, Republic Versus Joseph Bushebi; Criminal Miscellaneous Application no. 2722 of 2016, Republic Versus Rafiki Bank DTM Ltd; Criminal Miscellaneous Application No. 2390 of 2016 Republic Versus Equity Bank Ltd; Criminal Miscellaneous Application No. 2391 of 2016, Republic Vs Family Bank; Criminal Miscellaneous Application No. 1916(A) of 2017 Republic Versus Rafiki Microfinance, Joseph Bushebi, Cecilia Nyambura and Carl Rusnell; Criminal Miscellaneous Application No.1916(B) of 2017 Republic Versus Rafiki Microfinance, Joseph Bushebi, Cecilia Nyambura Gachuri and Carl Rusnell and Criminal Miscellaneous Application No. Republic -Versus-Joseph Bushebi and Cecilia Nyambura, were applied for and issued to investigate, search and seize properties, documents and items belonging to the Petitioner which was in breach of the Petitioner’s rights and fundamental freedoms under the provisions of Article 27 (1) (2), Article 35 (1), Article 47(1) & (2), Article 50(1), 50(2)(c) and 50(2)(j) of *the Constitution*.



115. The Respondents in reply countered that these were legal processes invoked to facilitate investigations into the alleged offence under the law and were thus not a violation of rights of the Petitioner.
116. I understand the Petitioner to complain that because the search warrants were obtained *ex parte* then his rights under Article, 35 (1) on the right of access to information, 27 (1) on the right to equal protection before the law, 47 on the right to fair administrative action and 50 on fair hearing were infringed by reason of the investigation and in particular, issuance of *ex parte* orders in form of search warrants. This is a matter that was addressed by the Supreme Court decision in *Ethics and Anti-Corruption Commission & Anor v Tom Ojienda, Sc T/A Prof. Tom Ojienda and Associates Advocates and 2 Others* Petition 30 & 31 of 2019 (Consolidated) [2022] KESC 59 (KLR) which held that a criminal investigation does not fall with the realm of ‘administrative actions’ and is thus not covered by Article 47 of *the Constitution* or the *Fair Administrative Action Act*. Instead, such investigations are covered by special legal regime designed for attainment of that purpose and if the process is strictly executed within that law then it cannot be unlawful.
- “ 57. By stipulating that the legislation so contemplated has to among other things, promote efficient administration, *the Constitution* leaves no doubt that an ‘administrative action’ is not just any action or omission, or any exercise of power or authority, but one that relates to the management of affairs of an institution, organization, or agency. This explains why such action is described as ‘administrative’ as opposed to any other action. The Concise Oxford Dictionary (9th Ed) defines the word ‘administrative’ as concerning or relating to the management of affairs “Black’s Law Dictionary” (11 Ed) defines “administrative action” to mean “a decision or an implementation relating to the government’s executive function or business management.” Burton’s Legal Thesaurus (4th Ed) defines the adjective “administrative” to mean among others, “directional, guiding, managerial, regulative, supervisory.
58. Does the 1st Appellant investigative powers fall within the corners of this definition? Part IV of the ACECA specifically provides for the 1st appellant’s investigative powers. The powers granted therein include powers, privileges and immunities of a police officer under Section 23 (3) to search premises under Section 29, to apply for surrender of travel documents under section 31, to arrest persons under Section 32 among others. Strictly speaking, these powers when exercised cannot be described as “administrative action” within the meaning of Article 47. For example, how can “conducting a house search” or “effecting an arrest” be considered as exercising administrative action? On the contrary, these are special powers conferred by specific legal regime, to be exercised for a special purpose...”
117. The Petitioner further claimed that the Respondents did not file returns in the Chief Magistrate’s Court Milimani pursuant to search warrants issued in the Miscellaneous Criminal Miscellaneous Applications in contravention of Section 121 of the *Criminal Procedure Code*. With due respect, that is a matter raised in the trial Court or the Court that issued where such applications were made, not this Court.
118. The Petitioner further alleged that there was pre-trial adverse publicity of evidentiary documents, images of the Petitioner and properties searched and seized from the Petitioner posted by the



Respondents in the electronic media which went against the presumption of innocence and could potentially jeopardize the right to fair hearing in Articles 50(1) and 50(2) of *the Constitution*.

119. I am not persuaded that a competent Court presided over by professionally trained and qualified magistrate would be swayed by such extraneous factors. Such reports are a daily occurrence in this country and this has not interfered with adjudication processes in Court. I am emboldened in this regard by the following observation made by the Court in *William S.K. Ruto & Another v Attorney General*, HC Civil Suit No. 1192 of 2005 where the Court held:

“... The applicants will be tried by qualified, competent and independent judicial officers who are not easily influenced by statements made by politicians to the press. In our country today, such statements are the order of the day and it is our view that the courts will rise above such utterances. We find no basis for the applicant’s fears...”

120. In the overall analysis, the inescapable conclusion and finding is that there is no merit in this Petition which I dismiss with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12TH DAY OF JUNE, 2025.

.....

L N MUGAMBI

JUDGE

