



**Njagi v Chief Magistrate’s Court at Milimani-Nairobi & 3 others; Investments
(Interested Party) (Petition E061 of 2023) [2024] KEHC 184 (KLR)
(Constitutional and Human Rights) (19 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 184 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E061 OF 2023
LN MUGAMBI, J
JANUARY 19, 2024**

BETWEEN

PETER NYAKI NJAGI PETITIONER

AND

**CHIEF MAGISTRATE’S COURT AT MILIMANI-NAIROBI .. 1ST RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT
INSPECTOR GENERAL OF POLICE 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT**

AND

SIMFA INVESTMENTS INTERESTED PARTY

JUDGMENT

Background

1. The Petition arises out of the arraignment of the Petitioner before the Chief Magistrate Court at Milimani Criminal Case Number 065 of 2022-Republic v Peter Nyaki Njagi for the offence of obtaining money by false pretences. The offence is premised on sale of certain parcel of land, I.R. 162123, L.R. 8119/171 that the Petitioner had charged with African Banking Corporation (hereinafter known as The Bank). The Petitioner alleges that his prosecution is driven by bad faith and abuse of the criminal process as the criminal case aims to compel him to refund a deposit paid under a contract yet under the contractual provisions it is not recoverable because it was lawfully forfeited in line with default clause.



2. The respondents refute these allegations. They asserted that the all the actions taken against the Petitioner were properly done within their constitutionally specified mandate.
3. On 12th March, 2022; the Court directed that the Notice of Motion Application dated 10th February, 2021 will be subsumed in the Petition and both shall be heard together.
4. The Petition is dated 10th February, 2022 and seeks the following reliefs:
 - a) A declaration that the Petitioner's constitutional right to Fair Administrative Action was violated by the 2nd and 3rd Respondents
 - b) A declaration that the 2nd and 3rd Respondents failed to follow the due process of the law in investigating, arresting and instituting criminal proceedings against the Petitioner
 - c) A declaration that the Prosecution of the Petitioner in Chief Magistrate's Court at Milimani's Criminal Case No. E065 of 2022 was brought for extraneous purposes and amounts to an abuse of the process of the court.
 - d) A declaration that the Court is under a duty to exercise its inherent jurisdiction to protect against an abuse of its processes
 - e) An order of certiorari to move the Court to quash the entire proceedings in Chief Magistrate's Court at Milimani Criminal Case No. E065 of 2022 and the proceedings therein.
 - f) An order of prohibition directed to the Respondents prohibiting further proceedings in Chief Magistrate's Court at Milimani Criminal Case No. E065 of 2022 and further prohibiting the 2nd and 3rd Respondents from instituting any future charges against the Petitioner in respect to the subject.
5. The Honourable Court be pleased to grant any relief that it may deem fit and just to grant in the interest of justice and/or that may become apparent and necessary in the course of the proceedings
6. The costs of the Petition.

The Petitioner's Case

7. The Petition stated that on 26th July, 2016; he charged his property I.R. 162123; L.R. 8119/171 which is situate in Nairobi as security for a loan with the African Banking Corporation (the Bank).
8. In early November, 2017, the petitioner approached the Bank and informed it about his wish to dispose the charged property. The Bank advised him to write a letter in that respect and appoint an Advocate from the Bank's Panel so that Bank's interests can be secured.
9. The Petitioner met a potential buyer, one Charles Ngugi in early November, 2017.
10. On 27th November, the Petitioner wrote a letter dated 27th November, 2017 and appointed Kipkenda & Company Advocates to act for him in the transaction. The firm of Lucy Mwai & Company Advocates acted for the purchaser.
11. They agreed on sale of the Petitioner's charged property. The price was Kenya Shillings Thirty-Two Million (Kshs.32,000,000). The purchase price was to be paid as follows:
 - i) A deposit of Twenty Million (Kshs.20,000,000) to be paid directly to the loan account held with African Banking Corporation Limited to defray the outstanding loan and facilitate the issuance of the original certificate of title.



- ii) The balance of Kenya Shillings Twelve Million (Kshs. 12,000,000) to be paid upon completion which was (60) days from the date of execution.
12. Even before the agreement could be executed by both parties on these terms as agreed, the Petitioner was informed by his Advocate that the purchaser's advocate had forwarded agreements executed by the interested party dated 15th December, 2017 together with RTGS payment slip showing payment of Kenya Shillings Three Million and Two hundred Thousand into the loan account (Kshs 3,200,000). The Petitioner alleges since the purchaser had changed the terms of the agreement, he refused to sign it insisting that the agreed amount of money be paid as agreed to enable the Bank release the documents as it was reluctant to do so without being paid all the outstanding amount or an undertaking on payment to that effect. Nevertheless, the Petitioner's Advocate at the time and the purchaser (Mr. Charles Ngugi) persuaded him to sign the agreement assuring him the rest of the payment would be made to the Bank.
13. The said payment of Kenya shillings Three Million and Two Hundred Thousand went directly into defraying the loan as it was paid directly into his loan account. The purchaser's advocate was thereafter asked to deposit the remainder of the purchase price into a stakeholder account pending the conclusion of the transaction but the interested party refused to do that. Consequently, it was the Petitioner's stand that is the interested party (Purchaser) that frustrated the contract; firstly, acting unilaterally paying depositing money contrary to what they had agreed and secondly, refusing to revive the transaction after he was given a second chance to do so.
14. In April, 2018, the Interested Party's Advocate (Purchaser) sent a demand letter giving notice that the Interested Party would institute legal proceedings for recovery of its Kshs.3,200,000/= that was paid as a deposit. The Petitioner instructed his Advocate to liaise with the Bank about the issue. Further, in view of the potential conflict of interest between the Petitioner and the Bank in the event of any litigation ensuing, the Petitioner decided to instruct independent Counsel to represent his interests.
15. In October, 2018, he found another buyer and entered into an agreement with him and sold the said property with the approval from the Bank.
16. In early 2021, the Petitioner was summoned to Nairobi Regional Police Headquarters and interrogated about the matter. This was followed by series of harassment requiring him to pay Kenya shillings three million and two hundred thousand or he would be prosecuted on a criminal charge. In early 2022, he was charged at Milimani Chief Magistrate's Court after he got tired of the harassment and protested. He was charged with the offence obtaining by false pretences contrary to section 313 of the Penal Code in Criminal case number E065 of 2022 whose particulars are that on 15th December, 2017, at Nairobi City within Nairobi County, with intent to defraud, he obtained Kshs.3,200,000/- from Simfa Investments by falsely pretending he was in a position to sell a piece of land L.R. 8119/171 [1R 11097] Nairobi, a fact he knew to be false.
17. He stated that throughout his dealings with the interested party, he made it clear that he was the proprietor of the charged property and never pretended contrary to the allegations in the charge sheet. He also stated that he did not obtain money by false pretences because it is the interested party that frustrated the contract by refusing to comply with the agreed terms and the conditions specified by the Bank to enable completion of the contract. That the purpose of the criminal case is to compel him to refund Kenya shillings three million two hundred thousand that was applied by the Bank to defray the outstanding loan. The Petitioner claimed that this is an extraneous purpose which violates Articles 245 and 157 of *the Constitution*.



18. The Petitioner further contended that the Petitioner's constitutional rights were violated through the failure by 3rd Respondent to properly analyse the investigation file. In the supplementary affidavit sworn in June, 2022; the Petitioner swears that although it is alleged he defrauded the complainant, Simfa Investments on 15th December, 2017; the said complainant was non-existent by that date as per the letter from the Registrar of 3rd January, 2018 (PNN 001). In essence, he was charged for committing an offence against a non-existent entity, a fact that the investigator did not consider.
19. That further despite the Respondent recording statement of his former advocate at Kipkenda and Company Advocates that had acted for him in the initial sale, one Jessica M'Mbetsa, it deliberately omitted to forward the said statement to the 2nd Respondent which denied the 2nd Respondent the opportunity to review all relevant material before making the decision to charge.

Petitioner's Submissions

20. The Petitioner's Advocate filed written submissions dated 20th June, 2022. He began reiterating the facts and the constitutional provisions under which the petition is premised.
21. The Petitioner's main challenge is on the decision to charge him that caused him to be arraigned before Milimani Chief Magistrate's Court in Criminal case number E065 of 2022. The Petitioner argued that it is the responsibility of the court to protect its processes from abuse and ensuring those vested with power use in in the proper manner. To buttress this submission, he cited the case of *Cyrus Shakalanga Kwa Jirongo v Soy Developers Ltd & 9 Others* [2021] eKLR where the court stated:

“...guidelines to be considered...when the High Court may review prosecutorial powers...are as follows:

- i) 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
- ii) Where it manifestly appears there is a legal bar against the institution or continuance of the said proceedings e.g. want of sanction; or
- iii) Where the allegations in the first information report or the compliant taken at their face value and accepted in their entirety, do not constitute the offence alleged; or
- iv) 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.”

22. The Petitioner further relied on the case of *Stanley Munga Githunguri v Republic* (1986) where the Court held:

“...It is as much public interest that breaches of the law are punished, as it is to ensure that in the process of doing so the people are not bashed about so that they lose respect for the law. If the law falls into disrepute it will have a shattering effect upon the society's sense of security of their personal freedom and property. The court is the final arbiter of how the public interest is to be preserved...”



23. The Petitioner further pointed out that none of the Respondents or the Interested Party filed a replying affidavit in response to the averments contained in the Petition or the supplementary affidavit despite being given leave to do so, as the all the matters deposed by him became uncontested facts.
24. In that regard, the Petitioner submitted that the complainant did not legally exist at the point the complaint was lodged which in itself is a legal bar to the validity of the charge he is facing. He relied on certified copy of registration certificate and a letter sent by Business registration Service to the Directorate of Criminal Investigations on 25/2/2020 (annexure PN001) showing the date of interested party as 3rd January, 2018 yet the offence allegedly committed against the Interested Party was on said to have occurred on 15th December, 2017. The Petitioner stated that this was not a victimless crime as it had a direct victim. The Petitioner referred to the definition of Section 313 of the Penal Code that defines false stipulates the offence as follows:
- “Any person who by false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen...”
25. The Petitioner thus contended that decision to charge was unreasonable and amounted to an unfair administrative decision citing the case of *Pastoli v Kabale District Local Government Council & 2 Others* [2008] 2 EA 300 where irrationality was defined:
- “when there is such unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision.”
26. The Petitioner submitted that interested Party lodged the criminal complaint upon realization that there was a legal bar to any civil claim due to lack of legal capacity at the time of entering into the transaction. Further that the agreement in question had in clause 8 dispute resolution mechanisms which the Interested Party has never utilized.
27. That neither the complaint nor the statements dispute that the Petitioner was not the registered proprietor of LR 8119/171 [1R 11097] the subject matter of the charge of false pretence.
28. That the sale agreement, clause 5 had set out the completion period of 60 days and specified that in the event of default, the interested party would lose 10% of the purchase price per clause 12.1. That the parties did not complete the transaction and the Interested Party was to blame hence was required to forfeit 10% of the deposit being Kenya Shillings Three Million, Two Hundred Thousand. Despite the forfeiture of the said deposit, the Interested Party has never raised the issue of forfeiture with the Petitioner. It just rushed to lodge a criminal complaint with the intention of compelling the Petitioner to refund the said 10% of the Purchase Price against the stipulation of the agreement that they had entered into which amounts to abuse of the criminal process.
29. The Petitioner submitted that the 3rd Respondent forwarded the investigation file to the 2nd Respondent that did not include or disclose the statement of the Petitioner’s Advocate, one Jessica N. M’Mbestsa yet she had been summoned on 10th November, 2020 and recorded. According to the Petitioner, this was deliberately intended to deny the 2nd Respondent important material it would have used in applying the evidential test principle which is a key step in discharging its constitutional



mandate on decision to charge. The Petitioner cited the case of Director of Public Prosecutions v Attorney General & 12 Others [2022] KECA 397 (KLR) (Civ) where the court said:

“...In prosecuting matters, the Director acts on behalf of the community. Prosecutors have strikingly been called ministers of justice, a phrase which sums up the position of the prosecutor in the criminal justice system... The prosecutor must always act with fairness and detachment with the objective of establishing the whole truth and ensuring a fair trial. In the exercise of powers conferred by Article 157, the appellant shall have regard to the guiding principles enumerated under section 4 of the ODPP Act including promotion of public confidence in the integrity of the office, the need to discharge the functions of the office on behalf of the people of Kenya and the need to serve the cause of justice, prevent abuse of the legal process and public interest...”

30. That further, the Jessica’s said statement was not even furnished to the Petitioner after he was charged in Criminal Case No. E065 of 2022 which again was a violation of Article 50 (2) (k) of *the Constitution*.

Respondents’ case

31. In the grounds of opposition dated 21st March, 2022; the Respondents contend that the Petition lacks precision for the failure to particularize the alleged violations against specific articles of *the Constitution* hence falls short of standard required of a constitutional petition as per the case of Anarita Karimi Njeru V R (1976-1980) KLR 1272.
32. That the Petition is an attempt to curtail the constitutional mandates of the 1st, 2nd and 3rd Respondents under Article 159, 157 and 247 of *the Constitution*.
33. That the actions complained of were undertaken in good faith, are lawful and founded on reasonable grounds. That the Petitioner’s arrest and prosecution is lawful and does not infringe on Petitioner’s rights and fundamental freedoms. That the constitutional and statutory mandate of the 1st, 2nd and 3rd Respondents can only be interfered with by the Court only if it is sufficiently demonstrated that they acted arbitrarily or contrary to their constitutional powers and mandate.
34. That the petitioner has not demonstrated by evidence that 1st, 2nd and 3rd respondents acted ultra vires, illegally, arbitrary, unjustly or oppressively.
35. That the independence of the 1st Respondent is guaranteed under Article 160 (1) and (2) of *the Constitution*.
36. That Section 193 of the Criminal Procedure Code allows criminal proceedings to continue concomitantly with the civil proceedings if any matter in the criminal proceeding is also directly in issue in civil proceedings hence this cannot be a ground for staying, prohibiting or delaying a criminal matter.
37. That a prosecution does not deprive the Petitioner his right of innocence until proven guilty and has not demonstrated by evidence that he has suffered prejudice, damage or violation of right under *the Constitution* hence the Petition does not disclose any justifiable legal claim or right against the 1st, 2nd and 3rd Respondent.

Submissions by the 1st and 4th Respondent’s submissions

38. The 1st and 4th Respondents filed submissions dated 22nd June, 2022.
39. Reacting to the submission claim that the 1st Respondent had allowed its processes to be abused through the institution of criminal case number E065 of 2022 for extraneous purposes thus allowing



judicial authority to be applied in an improper and unfair manner, the Respondent submission was that it was important as held in *Anarita Karimi Njeru v R (1976-1980) KLR 127* a Petitioner sets out with reasonable degree of precision that which he complains, the provisions said to be infringed and the manner which they are alleged to be infringed. To this extent, the Respondent argued that the Petitioner had not demonstrated how his rights were violated by the 1st Respondent as he did not demonstrate how the 1st Respondent has allowed its process to be used.

40. That judicial authority is vested by Article 159 of *the Constitution* thus the 1st Respondent has a constitutional mandate to hear and determine cases before it guided by *the constitution* and the relevant statutory instruments which among others require the court to ensure accused' s right to fair hearing under Article 50 of *the Constitution* is upheld.
41. The Respondent referred to the case of *Muchanga Investments Limited v Safaris Unlimited (Africa) LTD & 2 Others Civil Appeal No. 25 of 2002 [2009] EKLR 229* and submitted that the Petitioner had not demonstrated abuse of the process of the court within the test ascribed by the court in that case, which held thus:

“...The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent ...it is a term generally applied to a proceeding which is wanting in bonafide and frivolous, vexatious or oppressive...”

42. The 1st Respondent argued that the Petitioner had misconstrued the 1st Respondent's role in executing judicial functions and the Petition lacked specificity and precision in regard to violation alleged against the 1st Respondent hence should be dismissed.

Analysis and Determination

43. From the review of the pleadings, affidavits and submissions by the parties, it is apparent that the following are the issues for determination:
1. Whether non-registration of the Interested Party invalidates the criminal complaint made against the Petitioner and the resultant criminal case against him.
 2. Whether the failure to supply the Petitioner with the statement of one Jessica N. M'Mbesta, an advocate who acted for him and whose statement was recorded by the 3rd Respondent amounts to violation of Article 50 (2) (k) for which this court should intervene and invalidate the criminal trial.
 3. Whether the Petition should be dismissed for lack of reasonable degree of precision of the alleged constitutional violations.
 4. Whether the 3rd Respondent withheld the Petitioner's Advocate's recorded statement by failing to forward it to the 2nd Respondent for an objective making of decision to charge.
 5. Whether the lodging of the criminal complaint and subsequent institution of the criminal case is an abuse of the court process.
 6. Whether the Petitioner is entitled to reliefs sought.

1. Whether non-registration of the Interested Party invalidates the criminal complaint made against the Petitioner and the resultant criminal case against him.

44. The Petitioner through the supplementary affidavit dated 16th June, 2022 swore that at the time of the commission of the alleged offence of obtaining money by false pretences contrary to Section 313



of the Penal Code, of which particulars allege that on 15th December, 2017 at Nairobi, he obtained Kshs.3,200,000/- from Simfa Investents by falsely pretending that he was in a position to sell a piece of land LR 8119/171 (IR 11097); the complainant who is stated in the charge sheet was non-existent. He went ahead and annexed a certified copy of registration certificate from Registrar of Companies dated 25th February, 2020 showing that the date of registration as 3rd January, 2018.

45. According to the Petitioner, this entity was legally non-existent as at the time of the alleged commission of the offence and cannot thus claim to have been a victim of the alleged crime as stated in the charge sheet. He thus contended:

“...That the non-existent of the complainant at the time of the alleged complaint was a matter known to the 3rd Respondent servants who had been duly furnished by business Registration Service with details of the interested party, including date of registration as per documents supplied by myself in pre-trial. That the circumstances are clear, I am charged of committing an offence against non-existent entity which is an illogical proposition...”

46. The respondents did not swear any affidavit to controvert this fact. In any case, it is evident from the annexed certified copy of registration that indeed, the said entity was in fact registered on 3rd January, 2018. The date of the alleged offence is 15/12/2017, way before it was registered.

47. Does this invalidate the charge? That aspect makes the charge defective. However, I do not think that the avenue for dealing with a defective charge is bringing up the matter as constitutional question. That is a matter should have been raised and addressed by the trial court under the relevant provisions of the Criminal Procedure Code Cap 75. As was held in *John Harun Mwau v Peter Gastrow & 3 Others* (2014) eKLR

“...Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if the remedy is available to an applicant under some other legislative provision or some other basis...it is established practice that where a matter can be disposed of without recourse to *the Constitution, the Constitution* should not be invoked at all...”

48. In the instant case, the Respondent had a duty to raise this matter as a preliminary issue before the trial court for determination so that it could consider if it were fatal or is a matter which could be cured by amendment under Section 214 of the Criminal Procedure Code. As it were, I find the jurisdiction of this Court is being unnecessarily invoked yet the matter is already before a competent forum that can adequately address the issue.

49. That said, it is important to address the issue of who is a complainant in a criminal case. Is it the direct victim who reported the offence? In reality, criminal cases are instituted and continued in the name of the Republic. They are not maintained in the name of individuals who reported such crimes. The State is more interested in punishing forbidden criminal conduct that the society in general does not condone rather than lay emphasis on the single direct victim. In *DPP V. NAIROBI CHIEF MAGISTRATE’S COURT AND ANOR* in Petition Number 21 of 2015 the Judge held as follows:

“...interpreting of the word ‘complainant’ to exclude the DPP would be, in this and other cases, detrimental to the ends of justice for the public whom the DPP represents. In this respect, such an interpretation is insupportable in law and I so find...”

50. This means that the DPP can institute and sustain charges in the name of the Republic to protect public interest where evidence discloses that indeed an offence was committed as long as the conduct complained of can attract the application of criminal law.



2. Whether the failure to supply the Petitioner with the statement of one Jessica N. M'Mbesta, an advocate who acted for him and whose statement was recorded by the 3rd Respondent amounts to violation of Article 50 (2) (k) for which this court should intervene and invalidate the criminal trial.

51. The Petitioner contended that his own Advocate's statement, one Jessica N. M'Mbesta was recorded by the 3rd Respondent but it was never availed to him after he was charged. In my view, this is equally a pre-trial disclosure matter that ought to have been raised before the Court conducting the criminal trial. The Petitioner did not provide this court with lower court proceedings to demonstrate that he had raised the issue before the trial court and with what result. Just as the High Court is bound by the provisions of *the constitution* to facilitate a fair trial, so is the lower court which becomes the first port of call in ensuring that the rights to a fair trial are upheld in proceedings before it. Article 21 (1) states that:

“It is a fundamental duty of the State and every state organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.”

52. I therefore do not see why this court should be called upon to micro-manage a trial before another court on matters falling within its sphere as part of its trial process.

3. Whether the Petition should be dismissed for lack of reasonable degree of precision of the alleged constitutional violations.

53. The 1st and the 4th Respondents contended that the Petition does not meet the test of a Constitutional Petition as laid down in Anarita Karimi Njeru case (supra). Anarita Karimi Njeru's case (1979) 1 KLR 154 laid emphasis on parties to draw constitutional petitions with precision so that the party against whom violation of rights is alleged is able to adequately respond to the claims of made against it. This ties with the whole object of pleadings which is basically to narrow the parties to defined issues and eliminate the element of surprise that could cause delay and expense if the other side does not know the amount of testimony it may be required to marshal at the hearing.

54. In deciding whether this threshold has been met, the court need not look far, it only needs to examine the Petition.

55. I have carefully read through the petition. I find it contains allegations of violation by detailing the manner the various articles of *the constitution* were infringed through the actions of the respondent complained of. For instance, the Petitioner alleges that failure to supply the statements of Jessica N. M'Mbesta which the 3rd respondent recorded infringed on Article 50(2) (k) of *the Constitution*. He proceeds to aver that the criminal case was instituted against him for the sole purpose of compelling him to refund the deposit that had been paid under a contract which is an extraneous reason for instituting a criminal case for it is not for enforcement of private rights/civil disputes. He thus contended that it is contrary to the exercise of powers conferred on the Director of Public Prosecution by Article 157 of *the Constitution*.

56. The allegation therefore that the Petition lacks precision as regards the specific articles of *the Constitution* violated and the manner in which violation took occurred is thus incorrect. It is accordingly rejected.



4. Whether the 3rd Respondent withheld the Petitioner's Advocate's recorded statement by failing to forward it to the 2nd Respondent for objective making of decision to charge.

57. The Petitioner alleged that the 3rd Respondent did not forward the statement it recorded of Jessica N. Mbesta to the 2nd Respondent for consideration by the 2nd Respondent when making the decision to charge yet evidential test principle forms a critical part of that process. In that regard, the petitioner argued that the decision was not based on complete information that ought to have been presented before the 2nd Respondent.
58. Although the 2nd Respondent did not deny or confirm that allegation, it was the responsibility of the Petitioner to prove that assertion. Under the *Evidence Act* Section 107, he who alleges must prove. In *Christian Juma Wabwire vs. Attorney General (2019) eKLR* citing the case of *LT. Col Peter Ngari KarumE & 7 Others vs. A.G Constitutional Application NO. 128 OF 2006* the court held:
- “...it is incumbent upon the Petitioners to avail tangible evidence of violation of their rights and freedoms. The allegations of violations could be true but the Court is enjoined by law to go by the evidence on record...”
59. The Petitioner made an assertion which he ought to have substantiated. Apart from making the allegation, no substantiation was provided by the Petitioner in respect of this allegation. The Court cannot act on the basis of pure speculation.

5. Whether the lodging of the criminal complaint and subsequent institution of the criminal case is an abuse of the court process

60. It is a requirement under Article 157 (11) for the Director of Public Prosecutions to have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.
61. Abuse of the legal process means the institution of court proceedings for a different purpose other than their actual intended purpose. In *Meme v Republic & another [2004] 1 KLR 637*, the court explained the phrase ‘abuse of court process’ as follows:
- “An abuse of the Court’s process would, in general, arise where the Court is being used for improper purposes, as a means of vexation and oppression, or for ulterior purposes; that is to say, Court process is being misused.”
61. The Petitioner claims that the purpose of the criminal case was to force him to pay the deposit he had received from the interested party and not necessarily prosecute him for committing a crime.
62. If indeed the Petitioner is being prosecuted not because committing a crime but to enforce a payment, that would be the wrong application of the criminal law whose main goal is the punishment of the offender.
63. An examination of the facts is thus necessary to be able to decide this question. The Petitioner alleged according to their agreement, the Interested Party was to pay 20,000,000 as a deposit into the Petitioner’s loan account so that the Bank could release the completion documents and thereafter the balance of 12,000,000 in 60 days’ time. However, this pleading differs with the written agreement which the Petitioner attached to the supporting affidavit executed between him and the Interested Party. The agreement reads Kshs.3,200,000/- was the agreed deposit. Further, contrary to



the Petitioner's assertion that the Interested Party acted unilaterally, all the parties are shown to have duly executed the agreement and their signatures have been witnessed by their Advocates.

64. It is also apparent that money was paid into an account which the Petitioner acknowledges was his loan account on the basis of the agreement that was duly executed. The Petitioner has already benefited from Kshs.3,200,000/- that was paid into his loan account which he says he forfeited pursuant to the default clause of the agreement. A reading of the agreement, clause 12.1 states:

“If the purchaser shall fail to complete the transaction or comply with his obligations under this agreement the vendor may give the purchaser twenty-one (21) days’ notice in writing to comply with the obligations and if the purchaser fails to comply with such notice, the Vendor shall be entitled to rescind the agreement. In such event, the purchaser shall forfeit a sum equivalent to 10% of the purchase price and the balance shall be refunded to the purchaser within 14 days of rescission.”

65. Although the contract states that the vendor may give notice. He has not demonstrated he gave a notice in accordance with clause 12 before forfeiting the said sum. In the Australian case of Johnson’s Tyre Foundry Pty LTD v Maffra Shire Council (1948) 77 CLR the court held that the interpretation given to the word ‘may’ could change depending on the context in which it is used, a position I fully subscribe to. The Court stated:

“...‘May’ unlike ‘Shall’ is not mandatory but a permissible word, although it may acquire a mandatory meaning from the context in which it is used, just as ‘shall’ which is mandatory word and may be deprived of the obligatory force and become permissive in the context in which it appears...”

66. Since the Petitioner did not give notice of rescission of the agreement then it is not clear at exactly what point the agreement was rescinded by him unilaterally to entitle him to forfeit the amount already paid. Was this forfeiture done accordance with the contract or was it a criminal deprivation of property through deceptive conduct?

67. I have also read copies of witness statements of the proposed witnesses in the criminal trial which the Petitioner attached. My view is that a full hearing in which cross-examination of witnesses will be accorded is the best way to get to the bottom of the matter so that a proper determination can be made as to whether the matter is purely a civil dispute or an offence of obtaining through deception.

68. Delving into this matter further risks leading this court to decide the question of existence or otherwise of criminal culpability of the Petitioner which is not its responsibility. That falls squarely on the trial court where the Petitioner has been charged. As was stated in Meixner & Another v Attorney General [2005]2 KLR:

“It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. It would be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.”

68. I find that this Petition has failed to establish any constitutional violation.

69. It is dismissed in its entirety.

70. Each Party shall bear its own costs of the Petition.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY JANUARY, 2024.



L N MUGAMBI
JUDGE

