



**Kipngetich v Station & 3 others (Petition E429 of 2020) [2023] KEHC 17265 (KLR)
(Constitutional and Human Rights) (12 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17265 (KLR)

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

PETITION E429 OF 2020

HI ONG'UDI, J

MAY 12, 2023

BETWEEN

EVANS KIPNGETICH PETITIONER

AND

**OFFICER COMMANDING STATION, NAIROBI AREA POLICE
STATION 1ST RESPONDENT
INSPECTOR GENERAL OF POLICE 2ND RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT
JONES BITANGE NYAMBARIGA 4TH RESPONDENT**

JUDGMENT

1. The petition dated 21st December 2020 was filed for the alleged violation of Articles 2(1), 10, 19 (2), 20 (2), 21 (1), 22 (1), 23 (1), 25 (a), 27 (1), 28, 29 (a) (b) (c) (d), 47 (1), 50 (1), 258 and 245 of *the Constitution*. Accordingly the petition seeks orders that:
 - i. A declaration be issued that the petitioner's rights under Articles 25 (a), 27 (1), 28, 29 (a) (b) (c) (d), 47 (1), and 50 (1) of *the Constitution* were violated.
 - ii. A declaration be issued that the intended prosecution of the petitioner herein, on the strength of the complaint of the 4th respondent herein, touching on the issues of Imap International Limited, is unconstitutional and therefore unlawful ab initio.
 - iii. The decision by the 3rd respondent to charge the petitioner with any offense that relates to Imap International Limited be quashed.



- iv. An order of prohibition be issued, prohibiting the respondents from proceeding with investigations, summoning, prosecuting or in any way harassing the petitioner herein.
- v. Costs be awarded to the petitioner.

The Petitioner's case

2. The basis of the petition as supported by the averments in the petitioner's affidavit of 21st December 2020 and supplementary affidavit dated 5th May 2022 is that the investigation conducted by the 1st respondent's officers was in violation of his fundamental rights and freedoms. He averred that IMAP International Limited was registered in 2012 with three directors i.e himself Kennedy Kibet Rotich and Catherine Wangeci Kunyiha. The directorship only changed in 2016 when Joyce Kamene Paul was appointed as a director. He deposed further that sometime in 2019, the 4th respondent under mysterious circumstances came on board as a director of the company with 50% shareholding. He even opened bank accounts for the company.
3. The petitioner's complaint started on 8th December 2020, when he was summoned to the Nairobi Area Police Station to record a statement on allegations of theft of IMAP International Limited's funds. It is the 4th respondent who raised the complaint. He informed the police of the genesis of the matter including the suit, Nairobi High Court Commercial Division being HCCC No. E133 of 2020; Jones Bitange Nyambariga -versus- Evans Kipnetich and Joyce Kamene Paul and Imap International Ltd (Interested Party) that had been filed by the 4th respondent on 6th May 2020. On top of this he shared all the documentation with reference to the matter.
4. He deposed that among the issues in contention (as raised in their replying affidavit in the cited suit), was the 4th respondent's directorship at Imap International Limited which had been procured through fraud and criminal acts. He further deposed that he let the police know that in October 2020, he had filed a complaint of forgery of the signature of his co-director one, Joyce Kamene Paul by the 4th respondent at Central police station. This act as alleged was geared towards fraudulently changing the particulars of the shareholding of Imap International Limited. As a result the 4th respondent was arrested and the matter is still under investigation. He equally reported the matter to the Registrar of companies.
5. The petitioner is aggrieved that despite presenting all these facts to the police officers, the same were ignored. This was despite the fact that the matter was in court and was also being investigated by the Registrar of companies. He was in the end arrested and held for 7 hours before being released on a police cash bail. He was to thereafter appear before the Chief Magistrate's Court at Milimani on 22nd December 2020 for plea taking under Criminal Case No. E5017 of 2020.
6. He brought this petition against the respondents because the impugned investigations were being conducted by three other bodies and the same had not been exhausted. Moreover, he was not accorded the right to fair hearing as the information and documentation he divulged was not considered. He was further discriminated against since the officers seemed to only consider the 4th respondent's information. He deposed that his eventual arrest on the material day when he had only been called to record a statement was in violation of his right to freedom and movement and violation of his right to dignity as a person.

The 1st, 2nd and 3rd Respondents' case



7. The 1st, 2nd and 3rd respondents filed their replying affidavit dated 12th February 2021 through Police Constable Simon Imera (No. 87877). He averred that he investigated the case with his colleague Corporal Lucas Juma (No. 86152). He deposed that on 4th September 2020, the office of the Regional Criminal Investigations Officer received a complaint from the 4th respondent who claimed that there had been theft of funds from IMAP International Limited. Further that he was a director in the company alongside two other persons namely, the petitioner and Joyce Kamene Paul. On 7th September 2020 the officers recorded the 4th respondent's statement where he made known that he joined the company on February 2019 and appointed as a director with 50% shares of the company.
8. He went on to inform them that on 15th March 2019, through a resolution signed by the three directors they opened a joint bank account in the name of IMAP International Limited at Equity Bank of Kenya Limited, Harambee Avenue Branch Account Number 0240278680533 where he was one of the signatories. That soon thereafter on 17th December 2019, the company was awarded a tender by the Ministry of Environment and Forestry for the provision of consultancy services to develop the Kenyan green public procurement framework under tender number MOE&F/ GGEP/ 003/2019-2020 at a total cost of Ksh.5,267,000/=. In addition, on 25th February 2020, the company was awarded another tender by the Communications Authority of Kenya for provision of consultancy services to undertake implementation of the National Addressing System under tender number CA/ PROC/RFP/13/2018-2019 at a total cost of Ksh.43,522,664/=. Both contracts were accordingly signed by the petitioner as the Managing Director.
9. He averred that they received information that deposits totaling Kshs.4,725,313/04 had been made by the Ministry of Environment & Forestry & the Communications Authority of Kenya in Account No. 01136307518300 Cooperative Bank of Kenya MTC Hilton branch. This information was never disclosed to the petitioner. Letters were then written to the Registrar of companies, on 9th September 2020 to ascertain the status of the company and the Cooperative bank account. The officer also wrote to the Ministry of Environment & Forestry and the Communications Authority of Kenya with regard to the awarded tenders. Thereafter a Miscellaneous application No. E2561/2020 was filed at Milimani seeking an order to investigate the said bank account at Cooperative Bank.
10. They received communication from the Ministry, the Communication Authority and the Bank. Details on how the bank account was opened and operated were given to them. The petitioner was implicated in all this including the removal of the 4th respondent's name from the bank account. With all this information they arrested the petitioner on 8th December 2020. He was to attend court on 29th December 2020 but he did not. The officer later learnt of the temporary conservatory orders issued herein. He was also aware of a Civil Suit No. E133 of 2020 at Nairobi High Court Commercial Division, Jones Bitange Nyambergi v. Evans Kipngetch and Joyce Kamene Paul & IMAP International Limited (Interested Party).

The 4th Respondent's case

11. The 4th respondent in opposition filed a replying affidavit dated 5th February 2021 and a further affidavit dated 9th July 2021. He began by stating that the petitioner's case was marred with non - disclosure of material and relevant facts which were not sufficient to stop the criminal proceedings. He deposed that on 26th August, 2020, he filed a suit(Civil Sit No.E133 of 2020)on behalf of Imap International Limited against the petitioner and Joyce Kamene Paul, for fraudulently removing him as a director of the company and a signatory to company's bank accounts.



12. He averred that his entry to the company as a director was as a result of the company meeting held on 15th February 2019. He explained what changes were effected as a result of the meeting. The Registrar of companies effected the changes. Soon after, the directors opened bank account No. 0240278680533 at Equity Bank where all the directors were signatories. It was deposed that the company's woes began when the company was awarded the two cited tenders. The petitioner and Joyce Kamene Paul fraudulently removed him as a director and majority shareholder through the company's eCitizen account without authority or adherence to the process required for removal of a director. Another bank Account No. 1760278734136 at Equity Bank, Syokimau Branch, was opened without his knowledge or involvement.
13. On becoming aware of all this he on 4th September 2020 filed a complaint at the office of Regional Criminal Investigations against the other two co-directors, Evans Kipngetich and Joyce Kamene Paul vide OB No. 83/17/3/2020 for the fraudulent transfer of the shares without his consent and involvement. He further averred that when the tender award monies were deposited into the company's account the petitioner proceeded to transfer the same (Kshs.3,172,456.14) to the new account where they are the only signatories. He did a letter of complaint to the Registrar of companies on 8th April 2020 about all these happenings. Despite the changes done by the Registrar the petitioner and co-director continued with their mischief.

The Petitioners' submissions

14. The petitioner through his advocates, Mckay & Company Advocates filed written submissions dated 12th October 2022. On the first issue on whether the arrest of the petitioner was illegal and unlawful hence violating his constitutional rights under Articles 25(a), 27(1), 28, 29(a)(b)(d), 47(1) and 50(1) of *the Constitution*, counsel submitted that the petitioner was arrested without an arrest warrant. Moreover, that there were parallel investigations being handled by other police with reference to his complaint, the 4th respondent's complaint, the High Court and Registrar of companies. Similarly, that the petitioner who had been summoned to only record a statement ended up being arrested.
15. Counsel contended that the police officers were under obligation to establish reasonable grounds to suspect the petitioner which duty they did not fulfill. In support he cited the case of Stanley Kimathi Raini v Traffic Base Commander, Runyenjes Police Station and 5 others; High Court at Embu; Constitutional Petition No.2A of 2019 where it was stated that wrongful arrest involves deprivation of a person's liberty, by arresting and holding a person without legal justification.
16. Additional reliance was placed on International conventions on human rights and the cases of Githunguri Dairy Farmers Co-operative Society Limited v the Attorney General; High Court Petition No.257 of 2015, Mohammed Feisal & 19 others vs Henry Kanie ,Chief Inspector of Police, OCS, Ongata Rongai Police Station and others; National Police Service Commission and another(interested party) (2018) eKLR, and Daniel Waweru Njoroge and 17 others v Attorney General (2015) eKLR. Counsel thus stressed that the arrest did not meet the threshold of arrest. He further submitted that the respondents had not shown that there was a reasonable cause for arresting the petitioner which is considered unlawful as held in the case of Libinus Oduor Juma V DPP and 2 others; High Court Criminal Petition No. 54 of 2019.
17. On the second issue, on whether the intended prosecution based on the 4th respondent's complaint is unconstitutional, counsel submitted that the petitioner's rights had been violated by the officers as they ignored the information he supplied in relation to the case while only taking on the 4th respondent's information. Additionally, he submitted that this court is allowed to block parallel proceedings where it is proved that the party instigating the same is acting in bad faith and using malicious tactics to



circumvent the due process. Counsel therefore submitted that the petitioner was entitled to an order of prohibition against the respondents to prevent violation of his constitutional rights.

The 1st, 2nd and 3rd Respondents submissions

18. M/s Becky Arunga counsel for the respondents filed written submissions dated 23rd January 2023. She begun by submitting that existence of civil proceedings is not a bar to institution of criminal proceedings as long as there is sufficient evidence to sustain a criminal charge. She added that the petitioner had failed to prove how the respondents violated his rights. Counsel further submitted that the instant petition does not raise constitutional issues. To support this she relied on the case of Peter O Ngoge vs Francis Ole Kaparo & 4 others (Nairobi HC. Misc. Application No. 22 of 2004 where it was observed that to demand an inquiry every time there is an allegation of constitutional violation would clog the court with unmeritorious constitutional references which would in turn trivialize the constitutional jurisdiction and further erode the proper administration of justice.
19. On whether the petitioner's rights were violated, counsel submitted that the petitioner had failed to demonstrate that the investigations were commenced in bad faith. It was asserted that the police had acted lawfully in conducting the investigations and the subsequent arrest of the petitioner. To buttress this point counsel referred to the case of Republic v The Commissioner of Police & the Director of Public Prosecution Ex parte Michael Monari & another Misc. Application No. 68 of 2011 where it was emphasized that the police have a duty to investigate every complaint presented to them. That the police only need to establish reasonable suspicion before preferring charges, while the rest is left to the trial court.
20. Counsel Further submitted that according to Section 193(A) of the Criminal Procedure Code Cap 75 any criminal proceedings whether directly or substantially in issue in any civil proceedings shall not be a ground for any stay, prohibition or delay in criminal cases. It was stated that the petitioner had not demonstrated that the criminal proceedings were instituted with the sole goal of making him to submit to the civil proceedings as held in the case of Republic v Chief Magistrate Criminal Division & another Ex-parte Mildred Mbuya Joel [2014] eKLR. In addition, counsel noted that the court in the cited case had noted that there was need to show how the process of the court is being abused or misused. There was also need to indicate or show the basis upon which the rights of the applicant were under serious threat of being undermined by the criminal prosecution.
21. Similar reliance was placed on the cases of Ismael Mohammed Gorat alias Korios vs. Senior Principal Magistrate Garissa & another [2012] eKLR, Kenya National Examination Council –vs- Republic, Ex-parte Geoffrey Gathenji Njoroge & Others and CA 266 of 1996, No. 537 of 2017 Stephen Oyugi Okero – Vs –Milimani Chief Magistrate's Court & DCI. Counsel stressed that the petitioner had failed to prove these elements. She submitted that the petitioner was not entitled to the reliefs sought.

The 4th Respondent's submissions

22. The firm of Otwal & Manwa Associate Advocates on behalf of the 4th respondent filed written submissions and a list of authorities dated 28th February 2023. On the issue as to whether civil proceedings can act as a bar to concurrent criminal proceedings, counsel submitted that the matter was well covered under Section 193A of the Criminal Procedure Code, Cap. 75. To buttress this point reliance was placed on the case of Nairobi High Court Constitutional Petition No. E033 of 2021 Maura Muigana vs. Stellan Consult Limited & 2 others (unreported) where it was noted that Section 193A of the Criminal Procedure Code permits concurrent proceedings, however, where the criminal proceedings are oppressive, vexatious and an abuse of the court process or amounts to a breach



of fundamental rights and freedoms, the High Court has the powers to intervene. Also see the case of Kuria & 3 others vs. AG (2002) 2 KLR. It was Counsel's contention that the petitioner had not demonstrated that the prosecution of the criminal case would result in violation of his rights or breach of *the Constitution*.

23. On the second issue as to whether the petitioner's rights had been violated by the respondents, counsel first stated that the 3rd respondent is mandated under Article 157 (10) of *the Constitution* to instigate criminal prosecution without control or direction from any person or body. This was appreciated in the case of Hon. James Ondicho Gesami vs The Attorney General & others, Petition No. 376 of 2011. Counsel noted that the decision to charge the petitioner was made at the conclusion of the investigations where it was found that there was sufficient evidence to do so. He submitted that the decision was based on a reasonable and probable cause and not actuated by any malice.
24. Counsel therefore submitted that the petitioner had failed to discharge the burden of proof with regard to the alleged violations of his fundamental rights as emphasized in the cases of: (i) Anarita Karimi Njeru -vs- The Republic [1976-1980] KLR 1272 (ii) Leonard Otieno vs Airtel Kenya Limited [2018] eKLR.
 - (iii) Glinsk v McIver [1962] AC 726, Cascade Company Limited vs Kenya Association of Music Production (KAMP) & Others, Petition No. 7 of 2014 (iv) Republic Vs Catherine Mutheu Ndung'a & another (2019) eKLR.
25. On whether the petitioner is entitled to the reliefs sought, counsel submitted that courts have consistently held that they ought not to usurp the constitutional mandate of the 1st, 2nd and 3rd respondents to investigate crimes and initiate criminal proceedings. This is as long as the same is done in a justifiable manner as held in the cases of: (i) Michael Monari & another vs Commissioner of Police & 3 Others, Misc. Application No. 68 of 2011 (ii) Ng'ang'a Nyaga vs Attorney General & 3 Others (2013) eKLR, (iii) Henry Aming'a Nyabere v Director of Public Prosecutions & 2 others; (iv) Sarah Joslyn & another (Interested Parties) [2021] eKLR, Raymond Kipchirchir Cheruiyot & another v Republic [2021] eKLR among others.
26. Counsel finally submitted that the petitioner had failed to prove his case, which should be dismissed.

Analysis and Determination

27. I have considered the pleadings and submissions of the parties herein and the authorities relied on. Consequently the issues that arise for determination are as follows:
 - i. Whether the petitioner's rights under Articles 25(a), 27(1), 28, 29(a)(b)(d), 47(1) and 50(1) of *the Constitution* were violated by the respondents;
 - ii. Whether criminal proceedings and civil proceedings can run concurrently in the context of this matter; and
 - iii. Whether the petitioner is entitled to the reliefs sought.

Issue No (i). Whether the petitioner's rights under Articles 25(a), 27(1), 28, 29(a)(b)(d), 47(1) and 50(1) of *the Constitution* were violated by the Respondents;

28. The petitioner alleged violation of his constitutional rights under Articles 25(a), 27(1), 28, 29(a)(b)(d), 47(1) and 50(1) of *the Constitution*. This is due to his arrest and intended prosecution by the respondents based on the 4th respondent's complaint. He contended that due process was not adhered to by the respondents in carrying out their mandate which in turn led to violation of his rights. This



allegation was opposed by the respondents who asserted that the 1st, 2nd and 3rd respondents had carried out their mandate within the confines of the law.

29. The organ charged with the maintenance of national security in Kenya under Article 239 (1) (c) of *the Constitution* is the National Police Service as established under Article 243 of *the Constitution*. The *National Police Service Act*, 2011 which gives effect to the operations of the National Police Service under *the Constitution*, provides under Section 24 (e) that one of the functions of the Police is the investigation of crimes. Further Section 35 of the Act provides that the functions of the Directorate of Criminal Investigations as follows:

- a. collect and provide criminal intelligence;
- b. undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cyber crime among others;
- c.
- d.
- e. apprehend offenders;
- f.
- g. conduct forensic analysis;
- h.
- i.
- j. investigate any matter that may be referred to it by the Independent Police Oversight Authority; and
- k.

30. The Court in the case of Daniel Ogwoka Manduku vs Director of Public Prosecutions & 2 others [2019] eKLR in discussing the mandate of the 2nd respondent noted the following while highlighting a number of authorities:

“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.”



31. On the other hand the 3rd respondent derives his authority from Article 157 of *the Constitution*. Specifically Article 157(6) (a) of *the Constitution* provides as follows:

- (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;

1. In carrying out his duty, Article 157 (10) informs that the 3rd respondent 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. Further under Article 157(11), the 3rd respondent in exercising his power is to pay regard to public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.
2. Speaking to prosecutorial power, the Court of Appeal in the case of *Diamond Hasham Lalji & another v Attorney General & 4 others* [2018] eKLR 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...”

“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.”

34. From the foregoing, it is certain that the 1st, 2nd and 3rd respondents have a legal duty to investigate any crimes and offences suspected to have been done by any person. At the conclusion of the investigation where a probable cause exists, they have a duty to instigate criminal prosecution. It is discernible that this mandate is to be exercised independently by the respective bodies without interference from other persons or institutions.



35. In light of this, it is necessary to emphasize that petitions such as the instant one, that challenge the mandate of the respondents should not deal with the merits of the case, involving interrogation of the evidence to be adduced and making a finding. This is exclusively done by the trial court where the evidence adduced is tried, tested and a verdict rendered. This court cannot therefore usurp this exclusive mandate of the trial court.
36. Accordingly, the role of this court in such a petition is an interrogation of the process adopted by the respondents in carrying out their mandate. The issue is whether, due process and protection of constitutional rights was upheld in the institution and continuation of the criminal proceedings. In view of this, courts will not be quick to interfere with the mandate of the 1st, 2nd and 3rd respondents where it is proved that the same was carried out within the confines of the law.
37. It is noted that the 1st, 2nd and 3rd respondent's replying affidavit as sworn by Police Constable Simon Imera alluded to a number of documents in the course of their investigations. These documents were not annexed to the affidavit as indicated in the affidavit. That said, the facts of this case as deposed therein indicate that the investigations were initiated by the 4th respondent's complaint. The averments therein continued to detail the chronology of events that took place thereafter until the arrest of the petitioner. These averments were corroborated by the 4th respondent's account as supported by the annexed documents.
38. The 4th respondent stated that he was one of IMAP International Limited directors. This was seen in the CR12 form marked as 'JBN 1'. From his annexure 'JBN 3' (Minutes), the 4th respondent in the presence of the petitioner and Joyce Kamene Paul was appointed as a director in the meeting held on 15th February 2019. The change in allotment of the shares was accordingly indicated in the revised CR20 form. The 4th respondent later on 17th March 2020 made a report to the police at Central Police Station on the crime of forgery. He similarly, reported the change of directorship to the Registrar of companies through his advocates, Otwal & Manwa Associates Advocates vide a letter dated 8th April 2020.
39. It was against this background that the 1st and 2nd respondents took on the matter through their investigating officers at the Directorate of Criminal Investigations. The chronology of events indicates that the 1st and 2nd respondents first carried out their investigations before summoning the petitioner to record a statement with the police on 8th December 2020 and thereafter arresting him.
40. As discussed in the preceding paragraphs one of the mandates of the police is to undertake investigations on serious crimes and prevent crime. They are empowered to arrest any person under Section 21(1) of the Criminal Procedure Code which states that:
- In making an arrest the police officer or other person making it shall actually touch or confine the body of the person to be arrested, unless there be a submission to custody by word or action.
41. The police are legally allowed to arrest a person suspected of a crime without warrant as seen under Section 36 Criminal Procedure Code. It reads as follows:
- When a person has been taken into custody without a warrant for an offence other than murder, treason, robbery with violence and attempted robbery with violence the officer in charge of the police station to which the person has been brought may in any case and shall, if it does not appear practicable to bring that person before an appropriate subordinate court within twenty-four hours after he has been so taken into custody, inquire into the case, and, unless the offence appears to the officer to be of a serious nature, release the person



on his executing a bond, with or without sureties, for a reasonable amount to appear before a subordinate court at a time and place to be named in the bond, but where a person is retained in custody he shall be brought before a subordinate court as soon as practicable.

42. In this case the petitioner was after being summoned to the police station, arrested and released on a cash bail on the same day. The officers then scheduled him to take a plea in court on 22nd December 2020. All these procedures were done in compliance with the law. The officers acted upon receipt of a complaint which they investigated. Reasonably at that point, it was deemed that a crime had been committed. The police contrary to the petitioner's assertions, carry out their investigations independently and hence are not inclined to make a decision solely based on the information supplied to them. It is clear that the officers after receiving the report from the 4th respondent proceeded to carry out further independent investigations.
43. In view of this, I find myself not agreeing with the petitioner's assertion that the police wholly relied on the 4th respondent's narrative. While the petitioner states that the criminal proceedings were instigated without reasonable and probable cause, he fails to show the details of the actions that are believed to have been unreasonable in carrying out their mandate. It is true that the criminal process was kicked off by the 4th respondent's complaint, which was thoroughly investigated. There is no indication that the 1st and 2nd respondents in making their decision, acted out of malice or unreasonableness, or outside the confines of the law. They acted within their mandate in the *National Police Service Act* and attendant laws. In light of these circumstances, I am satisfied that although the petitioner claimed that his constitutional rights were violated he failed to discharge the burden of proof showing that the conduct of the 1st, 2nd and 3rd respondents was contrary to the law.
44. It is my considered view that the investigation and arrest carried out by the 1st and 2nd respondents cannot therefore be condemned as it was both procedural and lawful. In fact, failure by these respondents to carry out the investigations and arrest would have amounted to violation of their constitutional mandate to safeguard national security. I am therefore satisfied that the respondents in this matter did not violate the petitioner's rights under Article 25(a), 27(1), 28, 29(a) (b)(d), 47(1) and 50(1) of *the Constitution*.

Issue No. (ii). Whether criminal proceedings and civil proceedings can run concurrently in the context of this matter

45. The petitioner in addition opposed the instigation of the criminal case whilst civil suit Nairobi High Court Commercial Division being HCCC No. E133 of 2020; Jones Bitange Nyambariga -versus- Evans Kipngetch and Joyce Kamene Paul and Imap International Ltd (Interested Party) is ongoing. The respondents challenged this notion stating that Section 193A of the Criminal Procedure Code, Cap. 75 allows concurrent civil and criminal proceedings in the same matter.
46. It is well established in law that criminal and civil proceedings can run concurrently. This is captured under Section 193 A of the Criminal Procedure Code which provides as follows:
- ‘Notwithstanding the provisions of written law, the fact that any matter in issue in any criminal proceedings is also directly in issue in any civil proceedings shall not be a ground for stay, prohibition or delay of the criminal proceedings.’
47. Be it as it may, although not automatic, where there is a justifiable reason owing to the circumstances of a case, a court may intervene to stay the criminal proceedings. The court in the case of Kuria & 3



others Vs. AG (2002) 2 KLR 69 as cited with approval in the case of Raymond Kipchirchir Cheruiyot & another v Republic [2021] eKLR expounds on this scenario as follows:

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 absense 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.”

48. It is perceivable that the petitioner took issue with the fact that the instant matter is being handled by parallel investigations. Considering the principles set out above, it was incumbent on the petitioner to not only point out the existence of concurrent proceedings but also prove that the parallel processes were being abused or misused and so his rights were under serious threat of being undermined by continuation of the criminal prosecution. Regrettably, owing to the adduced evidence and facts this was not demonstrated or proved by the petitioner, so as to move this court in his favour.
49. On the premise of the findings above, I find that the petitioner has failed to establish how continuation of the criminal proceedings is an abuse of the court process and as such a threat to his rights. Considering all the facts of this case, and the Law I do not find any good reason to make this court to stay the criminal proceedings or interfere with the mandate of the respondents.
50. The upshot is that the petition lacks merits and the petitioner is not entitled to the reliefs sought. The petition dated 21st December 2020 is therefore dismissed with costs.

Orders accordingly.



DELIVERED VIRTUALLY, DATED AND SIGNED THIS 12TH DAY OF MAY 2023 IN OPEN COURT
AT MILIMANI, NAIROBI.

H. I. Ong'udi

Judge of the High Court

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