



**Chemweno & 3 others v Director of Public Prosecutions & 3 others (Constitutional
Petition E012 of 2022) [2023] KEHC 20472 (KLR) (17 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20472 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CONSTITUTIONAL PETITION E012 OF 2022
RN NYAKUNDI, J
JULY 17, 2023**

BETWEEN

**LUKE KIPKEMOI CHEMWENO 1ST PETITIONER
IBRAHIM ODHIAMBO ADERO 2ND PETITIONER
MOSES KIPTOO RONO 3RD PETITIONER
BARNABAS ARAP KIPRONO 4TH PETITIONER**

AND

**THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT
THE DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT
THE NATIONAL POLICE SERVICE 3RD RESPONDENT
THE ATTORNEY GENERAL 4TH RESPONDENT**

Factors to consider in determining a petition in which an accused person sought to stop his/her prosecution

The petitioners challenged their intended prosecution for among other reasons being in violation of their fundamental rights and freedoms. The court held that one needed not wait for a violation of freedoms or rights to be breached to pursue an action under a constitutional petition. The court further highlighted factors to consider in determining petition in which an accused person sought to stop his/her prosecution. The court also held that whereas courts would be reluctant to interfere with the Director of Public Prosecutions' discretion to prosecute criminal offences, it was its duty to ensure that the discretion was not abused.

Reported by Kakai Toili

Constitutional Law – fundamental rights and freedoms – enforcement of fundamental rights and freedoms – where an accused person sought to stop his/her prosecution based on a claim of violation or threat of violation of his/her fundamental rights and freedoms - factors to consider in determining such a petition - what was the role of the court in such a petition – Constitution of Kenya, 2010, articles 2(1), 23, 157 and 244.



Brief facts

The petition challenged the manner in which the police and the Director of Public Prosecutions (the DPP) were discharging their respective duties in relation to a criminal complaint against the petitioners. It was the petitioners' case that their intended prosecution for any alleged offence arising from the allocation, purchase and registration of the suit property would be unlawful, oppressive, an abuse of the court process and the criminal justice system and in violation of the petitioners' fundamental rights and freedoms.

The petitioners contended *inter alia* that the criminal process initiated by the Director of Criminal Investigations (the DCI) and the National Police Service (the 2nd and 3rd respondents respectively) sought to investigate a possible fraud in connection with the suit property and its resultant subdivisions which was the subject of a valid judgment and that the criminal process was therefore a roundabout way for appealing the decision of the trial court through another forum.

The petitioners sought for among other orders; a declaration that their intended prosecution for any alleged offence arising from allocation, purchase and registration of the suit property and its resultant subdivisions would be unlawful, oppressive, an abuse of both the process of the court and the criminal justice system and in violation of their fundamental rights and freedoms.

Issues

- i. What were the factors to consider in determining a petition in which an accused person sought to stop their prosecution based on a claim of violation or threat of violation of their fundamental rights and freedoms?
- ii. What was the role of the court in a petition seeking to stop an accused person's prosecution based on a claim of violation or threat of violation of their fundamental rights and freedoms?

Held

1. The National Police Service was charged with *inter alia* the duty to carry out investigations into suspected criminal activities and to apprehend those culpable. The DPP exercised the State's power of prosecution of criminal cases. However, in carrying out their respective mandates, both were subject to the Constitution and the law.
2. The extraordinary process under article 165(6) and (7) of the Constitution on redressing wrongs considered alongside articles 19, 20, 21, 22, 23, 47 and 48 of the Constitution was far from a novelty, had a name appropriated to it in the language of Kenya's law and so much talked of and so little understood, it was breadth and bounds to provide a remedy where no other remedy was available.
3. Judicial review of decisions of an inferior public body was an equitable remedy and the court would only exercise its supervisory power if it was fair and equitable to do so. The equitable character of the power exercised by the High Court lay at the heart of a constitutional remedy under article 23 of the Constitution in cases that extended to a threat, infringement or violation of the Constitution to be specific protected rights laid down in the Bill of Rights.
4. In prosecutorial decision making the Constitution commanded in article 157(10) of the Constitution that the powers or functions of the DPP shall not be under direction or control of any person or authority. There was an irrebuttable presumption that he would discharge his function with certainty, consistency, and in absence of arbitrariness or free from caprice. The number of cases litigated in the superior courts revealed many troublesome issues surrounding the DPP's discretion to charge that seemed to be non-responsive to the Constitution. Sometimes one had the impression that the office holder may be constantly balancing his political survival with the public interest for protection in driving the prosecution within the conference of the Constitution.
5. A person who sought redress under the Constitution must state their claim with precision and demonstrate which provisions of the Constitution had been violated or infringed, and the manner of the alleged violations. Article 22 of the Constitution was clear that every person had the right to institute court proceedings, claiming that a right or fundamental freedom in the Bill of Rights had



- been denied, violated or infringed or was threatened. Article 258(1) of the Constitution was laid out in similar terms.
6. Under articles 22 and 258(1) of the Constitution, the petitioners had exercised their constitutional rights. The rights and freedom in issue in the petition were the right to human dignity, freedom, fair and administrative action among others.
 7. One needed not wait for a violation of freedoms of right to be breached to pursue an action under a constitutional petition, a threatened violation was sufficient for one to pursue an action in a constitutional petition. Under article 19(2) of the Constitution, the purpose of recognizing and protecting human rights and fundamental freedoms was to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings. Therefore, the rights and fundamental freedoms were inherent to the extent that they were not granted by the State and could only be limited as provided for by the Constitution.
 8. The petitioner in seeking various reliefs in the petition was justified to do so. The petitioner had demonstrated, that there was a reasonable possibility, that future violations were likely to occur for which the petitioner was not out of order to seek reprieve as per the petition.
 9. The legal basis for the exercise of prosecutorial powers in Kenya was the Constitution. Article 157 of the Constitution established the Office of the Director of Public Prosecutions (ODPP). The Office of the Director of Public Prosecutions Act No. 2 of 2013 was also enacted to give effect to articles 157 and 158 of the Constitution, other relevant provisions of the law and for connected purposes. Section 4 of the Office of the Director of Public Prosecutions Act provided for the fundamental principles which guided the DPP in prosecution of cases. The Office of the Director of Public Prosecutions Act, among other statutes, variously provided for the manner in which the DPP ought to discharge its mandate. Suffice to say, the exercise of prosecutorial powers by the DPP had been subjected to legal scrutiny and appropriate principles and guidelines developed.
 10. Whenever a petitioner sufficiently demonstrated the stifling of or threats of infringement of rights, fundamental freedoms, the Constitution and/or the law by the investigative and prosecutorial agencies, a court should not hesitate to intervene and stop such a prosecution. Such intervention by the courts should, however, be in the clearest of the cases like the one before the court.
 11. For the petitioner to succeed in his claim in the case, he must demonstrate the stifling of or threats of infringement of his rights, fundamental freedoms, the Constitution and/or the law by the investigative and prosecutorial agencies. The petitioner may also demonstrate that the prosecution of the criminal case was not in public interest or was not in the interests of the administration of justice or that the prosecution was in abuse of the legal process. Likewise, the petition may succeed if the petitioner proved that the investigations were undertaken contrary to article 244 of the Constitution, the National Police Service Act and the law in general.
 12. Whereas courts would be reluctant to interfere with the DPP's discretion to prosecute any criminal offences in Kenya as donated by article 157(10) of the Constitution it was also its duty to ensure that the discretion was not abused or improperly exercised for a collateral purpose. Article 157 of the Constitution on powers and functions of the DPP did not render the interpretation of the Bill of Rights moot. In article 2(1) of the Constitution the supremacy of the Constitution imperative was for the courts to construe and adopt a purposive interpretation to give to the claimants the full measure of the fundamental rights and freedoms referred to in the text invoked to grant appropriate remedies under article 23 of the same Constitution.
 13. The drafters of the Constitution in enacting article 157(10) did not mean to withhold the rights guaranteed within the scope of the Bill of Rights involved in any proceedings where a petitioner or claimant had discharged the burden of proof as demanded of the Constitution.
 14. The totality of the circumstances as particularized captured the elusive concept of justice where the DPP weighing his case on the same scale or continuum on the right to a fair trial in article 50 of the



- Constitution may act on a presumption on the powers to charge any suspects to a criminal offence that justice for those individuals may only be actualized within the realm of criminal law. Far from that the constitutional due process clauses' requirements and considerations were also manifested as of necessity in the hierarchy of civil and constitutional courts.
15. In choosing the Environment and Land Court the facets of adjudicative fact-finding, admission of evidence it's analysis compliance with procedure and rules with a final judgement delivered by the court, which for all purposes and intent was constitutionally adequate to provide the trajectory for the constitutional organs of State to remedy any fundamental unfairness on titling of the suit property without recourse to criminal law.
 16. Although there was a disclaimer that the court was not constituted as a trial court, a panoramic view of real evidence that would become part of the evidence in the case before the forum of convenience was a matter that should not be withheld from the legal lens of a constitutional court. The instant court seized of jurisdiction was entitled to investigate not on the merits the action of the public body or person with a view to seeing whether they had taken into account which they ought not to have taken into account or on the 2nd limb had refused to take into account or neglected to take into account matters which they ought to have taken into account.
 17. How the four corners of the judgements in Petitions No. 13 & 14 of 2015 and subsequent affirmation in Civil Appeal No. 165 of 2021 applied to the discretion by the respondents was moot. Whether the confines of criminal law statutorily concerned with *mens rea* and *actus reus* was the perfect forum to deal with any emerging issues on allocation and titling of the suit property was in the horizon of remoteness. It was often a delicate question as to how far the root title involving many actors some who may not be alive, or retired or inaccessible in particular circumstances to anchor the doctrine of common intention which may be relevant in such criminal litigation.
 18. The retrospective effect of the discretion and its relevance to the impugned decision remained uncontroverted by the respondents. Furthermore, the hard and fast distinctions on a title tainted with illegality, fatal defects, misrepresentation, fraud, had been found to be challenged and precisely ruled upon *ab initio* by various superior court and the concise concept of justice delivered to the parties.
 19. The use of the criminal justice system for other purposes amounted to an abuse and manipulation of the justice process itself. Further, in the absence of proper factual basis, the court had the jurisdiction and powers consistent with article 10, 19, 20, 21(1) 22, 23, 24, 47, 48, 165(6) and (7) of the Constitution to invoke the clause as a last resort where the specific circumstances demanded interference with the legal footing of the impugned decision made by the respondents as against the petitioners.

Petition allowed.

Orders

- i. *A declaration was issued that the intended prosecution of the petitioners for any alleged offence arising from allocation, purchase and registration of the suit property would be unlawful, oppressive, an abuse of both the process of the court and the criminal justice system and in violation of the petitioners' fundamental rights and freedoms.*
- ii. *An order of prohibition was issued, prohibiting the respondents jointly and severally from prosecuting the petitioners for any offence arising from the allocation, purchase and registration of the suit property.*
- iii. *A writ of certiorari was granted in respect of the petition.*
- iv. *Costs of the petition to be in the cause.*

Citations

Cases

Kenya



1. *Anarita Karimi Njeru v Republic* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR);KLR 154 - (Mentioned)
2. *Centre for Rights Education & Awareness (CREAW) v Attorney General & Commission on the Implementation of the Constitution (CIC)* Petition 182 of 2015; [2015] KEHC 7433 (KLR) - (Mentioned)
3. *D'Costa Peter Antony v Attorney General & another* Petition 83 of 2010; [2013] KEHC 5198 (KLR) - (Mentioned)
4. *Meme, Julius v Republic* Miscellaneous Criminal Application 495 of 2003; [2004] eKLR - (Mentioned)
5. *Mulinge, Bernard Mwikya v Director of Public Prosecutions & 3 others* Petition 14 of 2018; [2019] KEHC 9205 (KLR) - (Mentioned)
6. *Nakusa v Tororei & 2 others (No 2)* Petition No 4 of 2003; [2008] eKLR - (Mentioned)
7. *Nyabere Henry Aming'a v Director of Public Prosecutions Director of Criminal Investigations & 2 others ; Sarah Joslyn & another (Interested Parties)* Judicial Review Application Application 2 of 2020; [2021] KEHC 5610 (KLR) - (Mentioned)
8. *Republic v Attorney General & another Ex-Parte Kipng'eno Arap Ng'eny* Miscellaneous Application 406 of 2001; [2001] KEHC 746 (KLR) - (Explained)
9. *Republic v Director of Public Prosecution & Ethics and Anti-Corruption Commission Ex Parte Chamanlal Vrajlal Kamani & 2 others* Judicial Review Application 78 of 2015; [2015] KEHC 7666 (KLR) - (Mentioned)
10. *Trusted Society of Human Rights Alliance v Attorney General & 2 others; Matemu (Interested Party); Kenya Human Rights Commission & another (Amicus Curiae)* Petition 229 of 2012; [2012] KEHC 2480 (KLR) - (Mentioned)

South Africa

S v Mblungu [1995] ZACC 4; 1995 (3) SA 867 ; 1995 (7) BCLR 793 (CC) - (Explained)

United Kingdom

Associated Provincial Picture House Ltd v Wednesbury Corporation [1948] 1 KB 223; [1947] EWCA Civ 1 - (Applied)

Texts

Breitel, CD., (1960), *Controls in Criminal Law Enforcement* Spring: University of Chicago Law Review: Vol 27: Issue 3 437 - 435

Statutes

Kenya

1. Constitution of Kenya articles 15, 19, 21, 22, 23, 40, 47, 157, 158(1); 159; 165(d); 258- (Interpreted)
2. Environment and Land Court Act (cap 8D) section 13 - (Interpreted)
3. Fair Administrative Action Act (cap 7L) section 7(2)- (Interpreted)
4. National Police Service Act (cap 84) section 52- (Interpreted)
5. Office of the Director of Public Prosecutions Act (cap 6B) section 4 - (Interpreted)

Advocates

M/s Kogo for the petitioners

JUDGMENT

Introduction

1. There is no doubt that the National Police Service is charged with inter alia the duty to carry out investigations into suspected criminal activities and to apprehend those culpable. It is also not in doubt



that the Director of Public Prosecutions (hereinafter referred to as ‘the DPP’) exercises the state’s power of prosecution of criminal cases. However, in carrying out their respective mandates, both are subject to the Constitution and the law.

2. The petition subject of this judgment challenges the manner in which the police and the DPP are discharging their respective duties in relation to a criminal complaint lodged by Ben Muneria Wesonga (hereinafter referred to as ‘the complainant’) against the petitioners. The petitioners argue that the respondents are being used by the complainant to infringe and violate their fundamental rights and freedoms as enshrined under article 27(1), article 40, article 47 of the [Constitution](#) and section 7(2) of the [Fair Administrative Act](#).

The Petition

3. The petitioners filed a petition dated May 12, 2022 and filed on even date supported with an affidavit sworn by Luke Kipkemoi Chemweno, Ibrahim Odhiambo Adero, Moses Kiptoo Rono and Barnabas Arap Kiprono on 12-05-2022.
4. In further support to the petition, the petitioners filed written submissions dated February 21, 2023. The Petitioners sought the following orders:
 - i. A declaration that the intended prosecution of the petitioners for any alleged offence arising from allocation, purchase and registration of Eldoret Municipality Block 9/2810 and its resultant subdivisions Eldoret Municipality Block 9/3115 and Eldoret Municipality Block 9/3116 would be unlawful, oppressive, an abuse of both the process of the court and the criminal justice system and in violation of the petitioners’ fundamental rights and freedoms.
 - ii. An order of prohibition, prohibiting the respondents jointly and severally from prosecuting the petitioners for any offence arising from the allocation, purchase and registration of Eldoret Municipality 9/2810 and its resultant subdivisions Eldoret Municipality Block 9/3115 and Eldoret Municipality Block 9/3116.
 - iii. Costs of the petitions.

Background

5. Mr Charles Malakwen on his behalf and on behalf of the 1st, 2nd, and 4th petitioners applied via a letter dated 22-05-1991 to the commissioner of lands for allocation of un-surveyed residential plot “c” Eldoret Municipality and his application was approved.
6. Eldoret Municipal Council via a letter dated 14-04-1992 did communicate its approval and letter of no objection to the Commissioner of Lands to the allocation of un-surveyed residential plot “c” Eldoret Municipality to Mr Charles Malakwen.
7. Mr. Charles Malakwen, the 1st, 2nd, and 4th petitioners were subsequently issued with an allotment letter for residential Plot Block 9/28-10 – Eldoret Municipality on 09-04-1998 and did not make requisite payments of Kshs 333,318 to the Government of Kenya.
8. Mr Charles Malakwen, the 1st, 2nd and 4th petitioners were issued with a lease duly registered on 11-03-2003 for Plot Block 9/28-10 – Eldoret Municipality measuring approximately 3.400 Ha leasehold interest of 99 years with effect from 01-05-2002 at an annual rent of Kshs. 20,000.
9. Mr. Charles Malakwen, the 1st, 2nd and 4th petitioners subsequently sold Plot Block 9/28-10 – Eldoret Municipality measuring approximately 3.400 Hectares to Rehema Koriomatt Investment Ltd. Rehema Koriomatt Investment Ltd was registered as the proprietor of Plot Block 9/28-10 – Eldoret



- Municipality measuring approximately 3.400 Hectares leasehold interest of 99 years with effect from 01-05-2002 at an annual rent of Kshs 20,000/= and issued with a certificate of lease on 23-09-2005.
10. Rehema Koriomatt Investment Ltd purchased and was issued with a certificate of Lease for Eldoret Municipality Block 9/2810 on 23-09-2005 and applied to and was granted permission on 14-11-2006 by the Municipal Council of Eldoret to subdivide Eldoret Municipality Block 9/2810.
 11. The subdivision was endorsed in the letter dated 15-11-2006 by the Municipal Council of Eldoret to the Ministry of Lands and Housing approved by the Commissioner of Lands on 14-09-2007. Rehema Koriomatt Investment Ltd subdivided Eldoret Municipality Block 9/2810 into two portions being Eldoret Municipality Block 9/3116 measuring 0.407 Ha and Eldoret Municipality Block 9/3115 measuring 1.842 Ha.
 12. Rehema Koriomatt Investment Ltd. Sold Eldoret Municipality Block 9/3116 measuring 0.407 Ha to the 3rd petitioner.
 13. Rehema Koriomatt Investment Ltd sold Eldoret Municipality Block 9/3115 measuring 1.842 Ha to Kevin Kenneth Okwaro.
 14. On and about the year 2006 a criminal complaint was lodged by Ben Muneria Wesonga over Eldoret Municipality Block 9/2810 to the respondents herein and an inquiry file No. 8 (Ref: CID/C/CRI/6/6/Vol.X/10) on the allegations that the title was obtained by false pretenses. The 2nd respondent in a letter dated 7-11-2006 forwarded the inquiry file on its investigations and the 1st and 4th respondents in a letter dated 30-11-2006 having perused the inquiry file concluded as follows:

We have perused the statements in the file at the end of which we do not find evidence of any criminal offence committed.”
 15. Ben Muneria Wesonga further lodged a complaint over the properties known as Eldoret Municipality Block 9/3116 and Eldoret Municipality Block 9/3115 resultant subdivisions of Eldoret Municipality Block 9/2180 which resulted in a case Eldoret ELC Petition 14 of 2015 *Moses Kiptoo Rono & another v Chief Land Registrar & 5 others*.
 16. Ben Muneria Wesonga actively participated in Eldoret ELC Petition 14 of 2015 alleging particulars of fraud over Eldoret Municipality Block 9/2180 and its resultant subdivisions and the said allegations were dismissed by the Hon. Justice A. Obwayo.
 17. Ben Muneria Wesonga lodged Eldoret Civil Application No E165 of 2021 *Ben Muneria Wesonga versus Moses Kiptoo Kiproo and others* was dismissed by the Court of Appeal. He further proceeded and lodged a fresh complaint in the nature of fraud and or obtaining documents without authority at the 2nd and 3rd respondents office in Nairobi over Eldoret Municipality Block 9/2810 and its resultant subdivisions.
 18. Subsequently the respondents issued summons to the petitioners to record a statement on the basis that there existed “genuine cause to believe that a criminal offence may have been committed hence the need for me to call for an explanation from the suspects”.

Petitioners’ Case

19. It is the petitioners’ case that the intended prosecution of the petitioners for any alleged offence arising from the allocation, purchase and registration of Eldoret Municipality Block 9/3116 would be unlawful, oppressive, an abuse of the court process and the criminal justice system and in violation of the petitioners’ fundamental rights and freedoms.



20. The petitioners contended inter alia that the criminal process initiated by the 2nd and 3rd respondents seek to investigate a possible fraud in connection with Eldoret Municipality Block 9/2810 and its resultant subdivisions which is the subject of a valid judgment and the criminal process is therefore a roundabout way for appealing the decision of the learned trial Judge through another forum.
21. The 1st respondent does not oppose the petition dated 12-05-2022 but the 2nd, 3rd and 4th respondents filed a replying affidavit sworn on 02-02-2023 by PC Kennedy Lubembe in opposition to the petition.

2nd – 4th Respondents’ Case

22. The respondents hold the contrary position.
23. It is the 2nd – 4th respondents’ case that the summons were issued pursuant to section 52 of the *National Police Service Act* Cap 88 on the complaint by Ben Muneria Wesonga over Eldoret Municipality Block 9/2810 and its resultant subdivisions and they urged the court to dismiss the petition.

Analysis and Determination

24. I have carefully considered the petition, the submissions by counsel and the issues that arise for consideration can be summed as follows:
 - a. Whether the petitioners have established a case for infringement, violation or threat of the rights or fundamental freedom under the Bill of rights in particular under articles 20, 21, 22, 23, 159, 165 (d) and 258 of the *Constitution and freedoms (Prosecution Practice and Procedure Rules 2013)*.
 - b. Whether the court can intervene and prohibit prosecutions where there is outright and / or apparent violation and or infringement and or threat to rights and fundamental freedoms.

Whether the petitioners have established a case for infringement, violation or threat of the rights or fundamental freedom under the Bill of rights in particular under articles 20,21,22,23,159,165 (d) and 258 of the *Constitution and Freedoms (Prosecution Practice and Procedure Rules 2013)* .

25. This extraordinary process under article 165(6) & (7) of the *Constitution* of redressing wrongs considered alongside articles 19, 20, 21, 22, 23, 47, & 48 of the *Constitution* is far from a novelty, has a name appropriated to it in language of our law and so much talked of and so little understood, it is breadth and bounds to provide a remedy where no other remedy is available. Judicial review of decisions of an inferior public body is an equitable remedy and the court will only exercise its supervisory power its fair and equitable to do so. The equitable character of the power exercised by the High Court lies at the heart of a constitutional remedy under article 23 of the *Constitution* in cases that extend to a threat, infringement or violation of the *Constitution* to be specific protected rights laid down in the Bill of Rights.
26. In prosecutorial decision making the *Constitution* commands in article 157(10) that the powers or functions of the Director of Public Prosecution shall not be under direction or control of any person or authority. There is an irrebatible that he will discharge his function with certainty, consistency, and on absence of arbitrariness or free from caprice. It is instructive to note that the number of cases litigated in the superior courts reveals many troublesome issues surrounding the Director of Public Prosecution discretion to charge that seem to be non responsive to the *Constitution*. Sometimes one has this impression that the office holder may be constantly balancing his political survival with the public interest for protection in driving the prosecution within the conference of the *Constitution*.



The generality of the extent of the actors in the criminal justice system in Kenya may be in tandem with what learned author Breitel, Charles in an article [Controls in Criminal Law Enforcement](#). The University of Chicago Law Review v 27, no 3 437-435 Spring 1960:

“ If every policeman, every prosecutor, every policeman, every prosecutor, every court, and every postsentence agency performed his or its responsibility in strict accordance with rule of law, precisely and narrowly laid down, the criminal law would be ordered but I tolerable. Living would be a sterile compliance with Soul killing rules and taboos. By comparison, a primitive tribunal society would seem free, indeed.” This statement expresses the thesis of the discussion which is that the presence and expansion of discretion in crime control is both desirable ad inevitable in a modern democratic society. The author argues tht discretion may not be how to establish controls to avoid the unequal, the arbitrary, the discriminatory, and the oppressive.

Focusing on police discretion to arrest and the prosecutor’s discretion to charge the author notes that justified discretion is that which ameliorates the harshness of the literal criminal law. For instance, since criminal conduct is described in general terms, criminal law sweep together similar acts by markedly different actors amid infinitely variable circumstance. By exercising discretion, law enforcement personnel exempts those for whom criminal prosecution is neither appropriate nor necessary. Control in the area of discretion should only assure soundness and honesty in its exercise. To do more would not to control discretion, but to dictate the manner in which it is to be exercised. Proper control could include better internal administration, such as merit selection of personnel, training and prompt, effective internal sanctions for abuse of discretion. In addition, statewide, centralized, supervision and enforcement of standard, and administrative mechanisms to correlate the thinking and operations of all the agencies of crime control could provide the greatest and most effective control over –widening power of discretion. The author concludes on a note of skepticism. “Good men will use discretion wisely. Good men will control discretion wisely. Bad men will make a mess of discretion, they will also make a mess of rules of law.”

27. Let me begin by reiterating that this is a constitutional petition in which the petitioners allege violation of their constitutional rights. Underlying the issues identified above and the petitioners’ challenge to the exercise of the powers of the DPP and the DCI is the contention that these actions infringe upon or will result in infringement of their rights guaranteed under the [Constitution](#). It is therefore prudent to consider first the burden that is placed upon a party who alleges violation of constitutional rights under article 22 of the [Constitution](#), and who seeks redress from the court in respect of such violations.
28. It has been established in various decisions by our courts that a person who seeks redress under the [Constitution](#) must state his or her claim with precision and demonstrate which provisions of the [Constitution](#) have been violated or infringed, and the manner of the alleged violations. This principle was established in the case of [Anarita Karimi Njeru v Attorney General](#) [1979] KLR 154 in which the court held:

“We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the [Constitution](#), it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”



29. This principle was reiterated in the case of *Meme v Republic* [2004] eKLR. In its decision in *Trusted Society of Human Rights Alliance v AG & 2 others* [2012] eKLR the court re-stated the principle in *Anarita Karimi Njeru* which predated it in the following terms:

“We do not purport to overrule *Anarita Karimi Njeru* as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged.

- (a) The test does not demand mathematical precision in drawing constitutional petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the respondents in a constitutional petition are fashioned in a way that gives proper notice to the respondents about the nature of the claims being made so that they can adequately prepare their case.”

30. Article 22 of the *Constitution of Kenya 2010* is clear that every person has the right to institute court proceedings, claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. Article 258(1) of the *Constitution* is laid out in similar terms. From the contents of the said articles, it is clear, that the petitioners have exercised their constitutional rights. The rights and freedom in issue in this petition are the right to human dignity, freedom, fair and administrative action among others.

31. I am alive to the fact, that one need not wait for a violation of freedoms of right to be breached to pursue an action under a constitutional petition, for threatening is sufficient for one to pursue an action in a constitutional petition.

32. In this case, the petitioners submit that although the matter is not one where criminal proceedings have not been commenced, it is one where the risk of criminal proceedings hangs over the head of the petitioners.

33. In *Centre for Rights Education & Awareness (CREAW) v Attorney General & another* [2015] eKLR, the court reiterated the position, that a party does not need to wait for a violation to occur in order to seek reprieve from the court and stated at paragraph 68:

I fully agree with the sentiments of the Bench in the CORD case. A party need not wait for a violation of a right or a contravention of the *Constitution* to occur before approaching the court for relief. It appears to me that the intent behind the use of the word “threatened” in both articles 22 and 258 was to preempt the violation of rights, or of the *Constitution*. If a clear threat to either is made out, it cannot be properly argued that the petitioner should have waited for the violation or contravention to occur, and then seek relief. It is therefore my finding, and I so hold, that this petition is not premature, and is properly before me.”

34. In the wording of article 19(2) of the *Constitution* ‘the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to



promote social justice and the realization of the potential of all human beings. It is, therefore, for such reasons that the rights and fundamental freedoms are inherent, to the extent that they are not granted by the State, and can only be limited as provided for by the Constitution.

35. In view of the above, I find the petitioner in seeking various reliefs in the petition is justified to do so. I find that the petitioner has demonstrated, that there is a reasonable possibility, that future violations are likely to occur for which the petitioner is not out of order to seek reprieve as per the petition.

Whether the court can intervene and prohibit prosecutions where there is outright and / or apparent violation and or infringement and or threat to rights and fundamental freedoms.

36. The legal basis for the exercise of prosecutorial powers in Kenya is the Constitution of Kenya, 2010. Article 157 of the Constitution establishes the Office of the Director of Public Prosecutions (ODPP). The Office of the Director of Public Prosecutions Act No 2 of 2013 (the ODPP Act) was also enacted to give effect to articles 157 and 158 of the Constitution, other relevant provisions of the law and for connected purposes.

37. Section 4 of the ODPP Act provides for the fundamental principles which guides the DPP in prosecution of cases. The principles include; impartiality and gender equity; diversity of the people of Kenya; rules of natural justice, promotion of public confidence in the integrity of the office, the need to serve the cause of justice; prevention of abuse of the legal process and public interest; and, promotion of constitutionalism. The ODPP Act, among other statutes, variously provides for the manner in which the DPP ought to discharge its mandate. Suffice to say, the exercise of prosecutorial powers by the DPP has been subjected to legal scrutiny and appropriate principles and guidelines developed.

38. I associate myself with the sentiments expressed in *Nakusa vs Tororei & 2 others (No 2)* Nairobi HCEP No 4 of 2003 [2008] 2 KLR (EP) 565 to the effect that:

“The High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms. In interpreting the Constitution, the court is called upon to uphold and given effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend.”

39. The High Court in *Bernard Mwikya Mulinge v Director of Public Prosecutions & 3 others* [2019]eKLR had the following to say about the role of the Director of Public Prosecutions in prosecuting criminal offences: -

“It is therefore clear that the current prosecutorial regime does not grant to the DPP a carte blanche to run amok in the exercise of his prosecutorial powers. Where it is alleged that the standards set out in the Constitution and in the aforesaid Act have not been adhered to, this court cannot shirk its constitutional mandate to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this court would be an abhorrent affront to judicial conscience and above all, the Constitution itself.”

40. Long before the advent of the Constitution of Kenya, 2010 the High Court in *R v Attorney General exp Kipngeno arap Ngeny* expressed itself as follows: -

“Although the state’s interest and indeed the constitutional and statutory powers to prosecute is recognized, however in exercise of these powers the Attorney General must act



with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognized lawful parameters...The High Court will interfere with a criminal trial in the subordinate court if it is determined that the prosecution is an abuse of the process of the court and/or because it is oppressive and vexatious...A prosecution that is oppressive and vexatious is an abuse of the process of the court: there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds....”

41. In the case of *Republic v Director of Public Prosecution & Another ex parte Kamani*, Nairobi Judicial Review Application No 78 of 2015 while quoting the case of *R v Attorney General ex Kipngeno Arap Ngeny* High Court Civil Application No 406 of 2001; the court held;

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper ... there must be in existence material evidence on which the prosecution can say with certainty that it has 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 in actionable.”

42. In quashing a criminal prosecution on the basis of abuse of court process, the court in *Peter George Anthony Costa v Attorney General & another Nairobi petition No 83/2010* expressed itself thus: -

“The process of the court must be used properly, honestly and in good faith, and must not be abused This means that the court will not allow its function as a court of law to be misused and will summarily prevent its machinery from being used as a means of vexation or of oppression in the process of litigation. It follows that where there is an abuse of the court process there is a breach of the petitioner's fundamental rights as the petitioner will not receive a fair trial. It is the duty of the court to stop such abuse of the justice system.”

43. Finally, still on abuse of court process in using court to settle personal scores, the court in *Rosemary Wanja Mwangi & 2 others v Attorney General & 2 others*, Mumbi J (as she then was) stated that: -

“The process of the court must not be misused or otherwise used as an avenue to settle personal scores. The criminal process should not be used to harass or oppress any person through the institution of criminal proceedings against him or her. Should the court be satisfied that the criminal proceedings being challenged before it have been instituted for a purpose other than the genuine enforcement of law and order, then the court ought to step



in and stop such maneuvers in their tracks and prevent the process of the court being used to unfairly wield state power over one party to a dispute.”

44. Recently, the High Court in *Henry Aming'a Nyabere v Director of Public Prosecutions & 2 others; Sarah Joslyn & another (Interested Parties) [2021]* eKLR dealt with several instances where a court may intervene and stop a prosecution. They include where: -
- (i) There is no ostensible complainant in respect to the complaint;
 - (ii) The prosecution fails to avail witness statements and exhibits without any justification;
 - (iii) There is selective charging of suspects; or
 - (iv) An Advocate is unfairly targeted for rendering professional services in a matter.
45. It is, hence, a settled legal principle and position that whenever a petitioner sufficiently demonstrates the stifling of or threats of infringement of rights, fundamental freedoms, the Constitution and/or the law by the investigative and prosecutorial agencies, a court should not hesitate to intervene and stop such a prosecution. Such intervention by the courts should, however, be in clearest of the cases like the one before this court.
46. Drawing from the foregoing, for the petitioner to succeed in his claim in this case, he must demonstrate the stifling of or threats of infringement of his rights, fundamental freedoms, the Constitution and/or the law by the investigative and prosecutorial agencies. The petitioner may also demonstrate that the prosecution of the criminal case is not in public interest or is not in the interests of the administration of justice or that the prosecution is in abuse of the legal process. Likewise, the petition may succeed if the petitioner proves that the investigations were undertaken contrary to article 244 of the Constitution, the National Police Service Act and the law in general.
47. In the instant petition it buttresses distinct characteristics sufficient enough to absolve the petitioner of any accusations that may be labeled against him in any criminal court resulting from any transactions with regard to Eldoret Municipality Block 9/2810. Whereas it is trite that courts would be reluctant to interfere with the Director of Public Prosecution discretion to prosecute any criminal offences in Kenya as donated by article 57(10) of the Constitution it is also its duty to ensure that the discretion is not abused or improperly exercised for a collateral purpose. It must be emphasized that article 157 of the Constitution on powers and functions of the Director of Public Prosecution did not render the interpretation of the Bill of Rights moot. In article 2(1) of the Constitution the supremacy of the Constitution imperative is for the courts to construe and adopt a purposive interpretation to give to the claimants the full measure of the fundamental rights and freedoms referred to in the text invoked to grant appropriate remedies under article 23 of the same constitution. I do not think that the drafters of a constitution in enacting article 157 (10) with all respect was not meant to withhold the rights guaranteed within the scope of the Bill of Rights involved in any proceedings where a petitioner or claimant has discharged the burden of proof as demanded of the Constitution. As much as it is left to the courts to decide what would be appropriate relieve in any particular petition it is appropriate to bear in mind the *dicta* by the constitutional court in *Sv Mblungu* (CC) 1995 (3) SA 391 *para* 9 where the court states that:

“A constitution is an organic instrument, although it is enacted in the form of a statute it is sui generis. It must broadly, liberally and purposively be interpreted so as to avoid (what Lord Wilberforce called) the austerity of tabulated legalism” and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the



ideal and aspiration in the nations of the in the articulation of value bonding its people and in disciplining its government”

48. For purpose of this petition, the factual matrix paints the following plausible scenario as to the genesis where there is likelihood or a substantial risk to the fair trial or serious prejudice to the petitioners whichever angle one looks at the issues holistically. At first glance as averred in the uncontroverted affidavit evidence deposed by the petitioners Eldoret Municipality Block 9/2810 was in 1992 vide a letter issued by the Eldoret Municipal Council did approve on allocation to one allottee by the name Malakwen.
49. On March 11, 2003 1st allottee, together with the 1st 2nd & 4th petitioners were issued a lease of the aforesaid parcel of land having met all the condition precedent required by the commissioner of lands. It is this same parcel of land which was sold to Rehema Kariomatt Investmet Limited a company duly incorporated under the Companies Act. Subsequently a certificate of 99 year lease was effected in favour of registered proprietor Rehema Kariomat Investment. Following a subdivision of the property appropriately approved by the relevant institutions like the Eldoret Municipal Council and the Ministry of Lands and Housing the tenured Land Rights in article 40 of the Constitution remained domicile with Rehema Kariomatt Investment Limited. In opposition to the evidence by the petitioners the replying affidavit PC Luvembe may have made an even more telling objection to the formulations in the petition but the format presented is which is not equipped with sufficient guidelines to know what degree of belief to apply in the instant constitutional petition. The ambiguity therefore remains which renders the discretion by the Director of Public Prosecution to charge the petitioners more of a tool for review than an actual guide to decision making to initiate or commence any criminal proceedings as urged by the respondent.
50. What is even more astonishing is the jurisdiction exercised by superior courts under article 50(1), 162(2)(b) & section 13 (1) of ELC Act as read with article 164 of the Constitution, the same issues on the subject suit land were raised and litigated in Petition No 13 of 2015 consolidated with No 14 of 2015 in which the court declared as follows *inter alia*:
1. I do grant a declaration that the petitioners are the registered owners of a lease hold interests over land parcel Municipality/Bloc 9/3116 and Eldoret /Municipality block 9/3115 respectively as the record show tht the property is registered in the petitioners name.
 2. I do grant an order of *certiorari* to quash the decision of the 1st respondent to cancel the lease and certificate of lease for land parcel No Eldoret Municipality/Block 9/2810 which is the mother title of the tiles issued in (b) above and the decision to issue leases for Eldoret Municipality Block 9/2810 to the 6th respondent contrary to the right of the petitioner and to alter, vary and /change the records of land parcel Eldoret Municipality/Bloc 9/2810 at the Lands Registry in favour of the 6th respondent.
 3. I do further grant an order of *certiorari* to quash amendment of the registry Index map for land parcel Eldoret Municipality /Block 9/2810, by the 3rd respondent’s favor of the 6th respondent
 4. Lastly I do grant an order of *certiorari* to quash any title issued to the 6th respondent over Eldoret Municipality Block 9/2810 or any other title number that will affect the interest of the petitioner
51. As if the declarations drawn by an act of judgement formed in the light of a particular situation and with account taken of all the circumstances by the Judge of ELC court a further litigation was lodged to the Court of Appeal Referenced as Eldoret Civil Application No E165 of 2021 *Ben Muneria Wesonga v Moses Kiptoo & others* which was dismissed by the Court of Appeal.



52. Apparently, in this litigation one Ben Muneria Wesonga has featured as the main actor in the various fora agitating for rights which have been determined on the merits. The questions at hand would be whether there is a reasonable or probable cause on a continuum between suspicion and reasonable doubt for the criminal hypothesis to be pursued by the Director of Public Prosecution. Nothing in the affidavit demonstrate that the criminal elements of mens rea and actus reus likely to perplex the criminal court would in the context deliver probabilistic burden of proof of beyond reasonable doubt with certainty to warrant the validity of a charge initiated for the interest of justice. Needless to emphasize that there is a large difference between proof of guilty in a criminal cause and probable cause for arrest and indictment for a criminal offence. In dealing with probable cause as the very name suggest one is essentially dealing with probabilities. This is the troublesome line posed by the facts in the respondent's affidavit in this petition and one deponed by the petitioners. Nothing in the affidavit by the respondents can be understood by this court to allow a generalized cursory to commence an investigation and indictment reflective of lack of articulable probative evidence to subject the petitioners to a criminal trial likely to hang over their heads in the years to come.
53. The totality of the circumstances as particularized capture the elusive concept of justice where the Director of Public Prosecution weighing his case on the same scale or continuum on the right to a fair trial in article 50 of the Constitution may act on a presumption on the powers to charge any suspects to a criminal offence that justice for those individuals may only be actualized within the realm of criminal law. Far from that the Constitution due process clauses requirement and considerations are also manifested as of necessity in the hierarchy of Civil and Constitutional Courts. In choosing the ELC court the facets of adjudicative fact-finding, admission of evidence it's analysis compliance with procedure and rules with a final judgement delivered by the court which for all purposes and intent is constitutionally adequate to provide the trajectory for the constitutional organs of state to remedy any fundamental unfairness on titling of parcel No. Eldoret Municipality Bloc 9/2810 without recourse to criminal law.
54. The decisions criterion in a way exempts evidential adequacy from the criminal law scrutiny unless on the scales of criminal justice the genealogy of this allocation since 1991 *prima facie* places all the conspirators from the defunct Uasin Gishu County Council and the ministry of lands /settlement or housing have recorded statements with the Director of Criminal Investigations to place the petitioners Locus in quo of the supposed crime. Although there is a disclaimer that this court is not constituted as a trial court I think a panoramic view of real evidence that will become part of the evidence in the case before the forum of convenience is a matter that should not be withheld from the legal lens of a constitutional court. This court seized of jurisdiction is in my view entitled to investigate not on the merits the action of the public body or person with a view to seeing whether they have taken into account which they ought not taken into account or on the 2nd limb have refused to take into account or neglected to take into account matters which they ought to have taken into account. (see Associated Provincial Picture House Ltd v Wednesbury Corporation [1948] I KB 223.
55. How the four corners of the judgements in Petitions No 13 & 14 of 2015 and subsequent affirmation in Civil Appeal No 165 of 2021 apply to the discretion by the respondents is moot. The affidavits by the respondents places this court that the conclusion which may have been reached in the decision making under article 157(10) fails in the cause of that inquiry to comply with the canon that due regard to the action against the petitioners is tailored to serve public interest and fair administration of justice. Indeed, whether the confines of criminal law statutorily concerned with *mens rea* and actus reus is the perfect forum to deal with any emerging issues on allocation and titling of the subject suit land to me is in the horizon of remoteness. It is often a delicate question as to how far the root title involving many actors some who may not be alive, or retired or inaccessible in particular circumstances to anchor the



doctrine of common intention which may be relevant in such a criminal litigation. The retrospective effect of the discretion and its relevance to the impugned decision remains uncontroverted by the respondents. Furthermore, the hard and fast distinctions on a title tainted with illegality, fatal defects, misrepresentation, fraud, has been found to be challenged and precisely ruled upon *ab initio* by various superior court and the concise concept of justice delivered to the parties. These issues alluded to in this petition comprise matters of rationality, proportionality, and error in the exercise of discretion by the respondents which is hereby interfered with. Notwithstanding the general held view that the powers are absolute. Such usage in the wildest sense may be interpreted as covering all forms of abuse or misuse of power as well as excess of power and so indeed rendering dead the letter and the spirit of the *Constitution*. In the case at bar the criminal law pursuit asymmetry underpinned *ultra vires* the text of the two judgement is puzzling.

56. I believe I have said enough on the general exercise of prosecutorial powers and for the purposes of this case.
57. In sum, I agree with the petitioners' submissions that the use of the criminal justice system for other purposes amounts to an abuse and manipulation of the justice process itself. Further, in the absence of proper factual basis, this court has the jurisdiction and powers consistent with article 10, 19, 20, 21(1) 22, 23, 24, 47, 48, 165(6) & (7) of the *Constitution* to invoke the clause as a last resort where the specific circumstances demand to interfere with the legal footing of the impugned decision made by the respondents as against the petitioners. For those reasons the following declaration shall abide the decision of this court. That:
- (a) A declaration hereby issues that the intended prosecution of the petitioners for any alleged offence arising from allocation, purchase and registration of Eldoret Municipality Block 9/2810 and its resultant subdivisions Eldoret Municipality Block 9/3115 and Eldoret Municipality Block 9/3116 would be unlawful, oppressive, an abuse of both the process of the court and the criminal justice system and in violation of the Petitioners' fundamental rights and freedoms.
 - (b) An order of prohibition hereby issues, prohibiting the respondents jointly and severally from prosecuting the petitioners for any offence arising from the allocation, purchase and registration of Eldoret Municipality 9/2810 and its resultant subdivisions Eldoret Municipality Block 9/3115 and Eldoret Municipality Block 9/3116.
 - (c) A writ of *certiorari* is granted in respect of the petition
 - (d) Costs of the petition to be in the cause.

Orders accordingly.

DATED AND SIGNED AT ELDORET THIS 17TH DAY OF JULY, 2023

In the presence of:

M/s Kogo Advocate for the Petitioners.

R. NYAKUNDI

JUDGE

