



**Telcom Kenya Limited & 7 others v Attorney General & 5 others; Director of Public Prosecutions (Interested Party) (Petition E423 of 2021) [2024] KEHC 13406 (KLR) (Constitutional and Human Rights) (25 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13406 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION E423 OF 2021  
EC MWITA, J  
OCTOBER 25, 2024**

**BETWEEN**

**TELCOM KENYA LIMITED ..... 1<sup>ST</sup> PETITIONER  
MICHAEL GHOSSEIN ..... 2<sup>ND</sup> PETITIONER  
LOIS ALLELLA ..... 3<sup>RD</sup> PETITIONER  
MUGO KIBATI ..... 4<sup>TH</sup> PETITIONER  
EDDY NJOROGE ..... 5<sup>TH</sup> PETITIONER  
JINARO KIBET ..... 6<sup>TH</sup> PETITIONER  
DORCAS KOMBO ..... 7<sup>TH</sup> PETITIONER  
SAYYID SAID ..... 8<sup>TH</sup> PETITIONER**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT  
CHIEF MAGISTRATES COURT AT NAIROBI LAW COURTS .... 2<sup>ND</sup>  
RESPONDENT  
POSTEL HOUSING CO-OPERATIVE SOCIETY LIMITED ... 3<sup>RD</sup> RESPONDENT  
HENRY BELSOI ..... 4<sup>TH</sup> RESPONDENT  
AMSON KABII ..... 5<sup>TH</sup> RESPONDENT  
STEPHEN MAGOMA ..... 6<sup>TH</sup> RESPONDENT**

**AND**



## JUDGMENT

### Introduction

1. Kenya Posts and Telecommunication Corporation (KPTC) was the registered proprietor of the property known as Land Reference No. 7656 (Grant No. IR 8498) (the suit property) situate off Ngong Road, Nairobi.
2. KPTC entered into a conditional agreement dated 19<sup>th</sup> March 1993 with Postel for sale of 60 acres out of the suit property to Postel (herein agreement A) for purposes of building houses for staff members of Postel who were employees of KPTC.
3. It was a term of that agreement A, that consideration for the sale of the property was Kshs. 21 Million to be paid by Postel and the undertaking by Postel to construct houses on the property for use by employees of KPTC who were to be members of Postel.
4. On 28<sup>th</sup> January 1993, Postel entered into an agreement with Exclusive Estates Limited (Exclusive Estates) for the construction of houses on the property (herein agreement B). Postel however failed to pay Kshs. 21 million to KPTC or construct the houses on the property in accordance with agreement A.
5. In 1998, KPTC was dissolved, creating the Postal Corporation of Kenya, the Communication Authority of Kenya and Telkom Kenya. The suit property was vested in Telkom Kenya.
6. In 2001, Exclusive Estates filed a suit, Nairobi High Court COMM No. 1158 of 2001 (Commercial suit) against Telkom and Postel, seeking to recover its fees for coming up with the development plans for the construction of the housing project envisaged in agreement B. In 2004, Telkom Kenya notified Postel that it would no longer be bound by agreement A.
7. During the pendency of that suit, through an agreement dated 15<sup>th</sup> January 2009, Postel assigned its interest in the property to Exclusive Estates (by Deed of Assignment) as payment for services rendered by Exclusive Estates to it without the knowledge or consent of Telkom Kenya.
8. Exclusive Estates subsequently amended the suit to include an order compelling Telkom Kenya to transfer the property to it. On 27<sup>th</sup> May 2011, the suit was referred to arbitration. On 6<sup>th</sup> September 2019 the arbitrator published an award in favour of Exclusive Estates. The arbitrator ordered that the suit property be transferred to Exclusive Estates upon payment of Kshs. 21 million.
9. Aggrieved by that Award, Telkom Kenya and Afraco Limited, one of the parties in the arbitral proceedings, filed applications in the High Court seeking to set aside the arbitral Award. On 22<sup>nd</sup> April 2021, the High Court allowed the applications and set aside the arbitral award. The court further directed that parties were at liberty to set down the suit for hearing.
10. Through an application dated 25<sup>th</sup> July 2021 Nairobi Misc. Criminal Application No. E2366 of 2021, Postel Housing Co-operative Society & Others v The Director of Public Prosecution and others (Criminal Application), the 4<sup>th</sup> to 7<sup>th</sup> respondents sought leave of court to Institute private prosecution against the petitioners for the offence of illegal/fraudulent sale of the property on grounds that the property belonged to Postel. They also lodged a complaint with the office of the Director of Criminal Investigations (DCI) alleging that the petitioners were attempting to illegally sell the property.



11. In a ruling delivered on 8<sup>th</sup> October 2021, the 2<sup>nd</sup> respondent allowed the application and granted leave to the 3<sup>rd</sup> to 6<sup>th</sup> respondents to institute private prosecution against the petitioners. The 2<sup>nd</sup> respondent ordered that a charge sheet be drawn and served on the petitioners after which they would be summoned to answer to those charges.
12. In the meantime, the Government through the Ministry of Public Service, Youth and Gender Affairs, took over the property for purposes of building a stadium without Telkom Kenya's consent or involvement.

### **Petitioners' case**

13. Following these developments, the petitioners filed this petition seeking a declaration that the proceedings and orders issued in the Criminal Application No. E2366 of 2021, (Postel Housing Co-operative Society & others v The Director of Public Prosecution & others on 8<sup>th</sup> October 2021, are unconstitutional null and void. The petitioners also sought an order of certiorari to quash the decision dated 8<sup>th</sup> October 2021, granting leave to institute private prosecution and any other proceedings and or consequential action(s) arising from or in connection with those orders.
14. It is the petitioners' case that the intended prosecution violates or threatens to violate articles 10, 27, 28, 29, 47, 50, 163(7) and 232 of *the constitution*; the prosecution will be used for ulterior purposes and the decision to grant leave was erroneous and offended the principle of stare decisis.
15. The petitioners argued that the order granting leave to institute private prosecution against them threatens to violate their right to fair hearing and equality enshrined in article 50 and 10(1) and 2(b) of *the constitution*. They further argued that it had taken more than 10 years for the attempt to institute criminal proceedings to be made. Reliance was based on the decision in Githunguri v Republic (1986) eKLR and Cyrus Shakhhalagha Kwa Jirongo v Soy Developers Ltd & 9 others [2021] eKLR.
16. The petitioners posited that the 4<sup>th</sup> to 8<sup>th</sup> petitioners were not members in the board of directors of the 1<sup>st</sup> petitioner (on 5<sup>th</sup> July 2011) when the decision to sell the property was made. they further posited that the 2<sup>nd</sup> respondent's decision offends the principles set out in Cyrus Shakhhalanga Kwa Jirongo v Soy Developers Limited & 9 others [2021] eKLR.
17. The petitioners asserted that the attempt to initiate criminal prosecution was taken for improper motive and after the arbitral award was set aside. The criminal prosecution is a reaction to the unfavourable order setting aside the award and it is intended to intimidate and harass them into abandoning their pursuit of the claim in the commercial suit and compromise that suit in favour of Exclusive Estates and the 3<sup>rd</sup> respondent. The petitioners relied on Reuben Mwangi v Director of Public Prosecutions & 2 others; UAP Insurance & another (Interested Parties) [2021] eKLR to support this position.
18. The petitioners maintained that it was undesirable for the magistrate's court to determine issues that are pending before a hierarchically higher court. It would also be unfair to require them to defend themselves in both cases on the same issues. They relied on Bryan Yongo v Jacob Juma (2015) eKLR and Cyrus Shakhhalagha Kwa Jirongo v Soy Developers Ltd & 9 others (supra), among other decisions.
19. The petitioners took the view, that there being a live matter before the Commercial Division in which an arbitral award was set aside; Postel did not appeal against that decision and no steps had been taken to set down the matter for hearing.



20. According to the petitioners, one of the issues for determination in the commercial suit is whether agreement A is valid, binding and legally enforceable. Whether the 4<sup>th</sup> to 7<sup>th</sup> respondents have any right to the suit property can only be ascertained once the commercial suit is heard and determined.
21. The petitioners also argued that the current state of affairs is that the property is still registered in the name of Telkom Kenya and has never been transferred to Postel.
22. Based on the foregoing, the petitioners sought the following reliefs:
  - a. A declaration that the petitioners' rights under Articles 27, 28, 29, 47 and 50(1) of *the Constitution* have been threatened/ violated.
  - b. An order of certiorari to bring into the High Court for purpose of being quashed, the decision of the Hon. K. Cheruiyot dated 8<sup>th</sup> October 2021, and any other proceedings and consequential action arising from or in connection with the said order.
  - c. An order of prohibition restraining the respondents from instituting, proceeding with, and/or entertaining any criminal proceedings against the petitioners arising from the order made by Hon. Cheruiyot on 8<sup>th</sup> October 2021 and/or in respect of Land Reference No. 7656 (Grant No. IR 8498) situate off Ngong Road, Nairobi.
  - d. A declaration that the proceedings and order issued in Nairobi Misc. Criminal Application No. E2366 of 2021 Postel Housing Co-operative Society & others v The Director of Public Prosecution & Others and the orders issued on 8<sup>th</sup> October 2021 are unconstitutional, null and void.
  - e. General damages for breach of their constitutional rights and any consequential losses arising there from.
  - f. Costs of this petition.
  - g. Such other or further orders as this Honourable Court shall deem just.

### **The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Case**

23. The 1<sup>st</sup> and 2<sup>nd</sup> respondents did not file a response to the petition. The 1<sup>st</sup> respondent, however, filed written submissions. The 1<sup>st</sup> respondent argued that although section 28 of the Director of Prosecutions Act grants any person the right to institute private prosecution proceedings, there is no legitimate expectation that all complaints once investigated and forwarded to the ODPP must lead to prosecution. The discretion is exercised according to the well laid down guidelines in the National Prosecution Policy.
24. The 1<sup>st</sup> respondent took the view, that it is not the work of the DPP to give cases a public hearing where there is weak evidence. The ODPP is also not bound by the investigation findings in the police file because it exercises an independent decision to charge under article 157 of *the constitution*. Reliance was placed on Communication Commission of Kenya v Director of Public Prosecutions & 2 others [2018] eKLR.
25. The 1<sup>st</sup> respondent argued that the 3<sup>rd</sup> to 6<sup>th</sup> respondents did not adduce evidence before the 2<sup>nd</sup> respondent to show wilful refusal by the DPP to prosecute the petitioners. The magistrate was obligated to ensure that there was sufficient ground to warrant the private prosecution and that the DPP was unwilling to execute his mandate. The 1<sup>st</sup> respondent relied on Isaac Aluoch Aluochier v National Alliance & 440 others (2017) eKLR.



26. The 1<sup>st</sup> respondent posited that no extra ordinary failure by the office of the DPP was established and there was no demonstration that the police failed to investigate the alleged offences to warrant the 2<sup>nd</sup> respondent to grant the leave sought. The 1<sup>st</sup> respondent relied on the decision in *Otieno Clifford Richard v Republic* [2006] eKLR that the proceedings did not meet the proper threshold for granting leave.
27. The 1<sup>st</sup> respondent further relied on the decision in *Republic v The Chief Magistrate Court at Mombasa ex parte Ganijee & another* [2002] eKLR, that the petitioners informed the 2<sup>nd</sup> respondent about the nature of the civil dispute. The Magistrate ought to have considered whether the application was merited and the possibility of the abuse of the criminal justice system for ulterior motives.

### **3<sup>rd</sup> to 6<sup>th</sup> Respondents' Case**

28. The 3<sup>rd</sup> to 6<sup>th</sup> respondents filed a replying affidavit by Henry Belsoi opposing the petition. Through this affidavit, they asserted that members of the 3<sup>rd</sup> respondent paid Kshs. 21,000,000 in full through check off system. They stated that from the 3<sup>rd</sup> respondent's audited accounts for the year ended 21<sup>st</sup> December 2020, the cumulative amount deducted by the 1<sup>st</sup> petitioner from members of the 3<sup>rd</sup> respondent was Kshs. 22,545,561 towards the purchase of 60 acres out of the property.
29. They maintained that the petition is premature, anticipatory and presumptive since no charges had been filed in court to warrant grant of the reliefs sought in the petition. The 3<sup>rd</sup> to 6<sup>th</sup> respondents argued that the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners were involved in the disposal of the property to Afraco Ltd while the 4<sup>th</sup> to 8<sup>th</sup> petitioners as directors and board members, directly transacted with the Ministry of Public, Youth and Gender Affairs.
30. The 3<sup>rd</sup> to 6<sup>th</sup> respondents maintained that the 4<sup>th</sup> to 8<sup>th</sup> petitioners released the property through compulsory acquisition without compensating or consulting them. They also did not disclose to the Ministry of Public Service, Youth and Gender Affairs that the property belonged to the 3<sup>rd</sup> to 6<sup>th</sup> Respondents.
31. The 3<sup>rd</sup> to 6<sup>th</sup> Respondents Asserted that the petitioners had not demonstrated that they took steps to revoke the decisions made by the previous boards with regard to disposal of the property. This made them criminally liable and they (3<sup>rd</sup> to 6<sup>th</sup> Respondents) Were right in seeking to institute private prosecution against them.
32. The 3<sup>rd</sup> to 6<sup>th</sup> Respondents took the view, that there was no dispute that the KPTC board resolved to sell 60 acres out of 79 acres of the property to Postel, and a sale agreement was executed in favour of Postel on 19<sup>th</sup> January 1993 in respect of the 60 acres. Disposal of the 60 acres was published in the Special Gazette No. 59A dated 5<sup>th</sup> November 1999, Legal Notice No 158 of the Kenya Communication Act, 1998 titled the Vesting of Assets and Liabilities of Telkom Kenya. From those documents, the portion of land owned by Telkom Kenya is 19 acres out of 79 acres of the property. There is no evidence (resolution of the board or subsequent Gazette Notice) revoking those notices.
33. The 3<sup>rd</sup> to 6<sup>th</sup> respondents took the position, that the petition and application are prejudicial and bad for material non-disclosure and non-performance of the agreement between the 1<sup>st</sup> petitioner and the Government (annexure 7) compulsorily acquiring the suit property, which was used to obtain conservatory orders on 25<sup>th</sup> October 2021 and on which the petition is pegged on. The petition should therefore be dismissed and the conservatory orders vacated.



34. It was argued that the 2<sup>nd</sup> to 8<sup>th</sup> petitioners as directors of the 1<sup>st</sup> petitioner owed them (the 3<sup>rd</sup> to 6<sup>th</sup> respondents) a fiduciary duty to and the public in general which is personal and cannot be transferred to any other director who is not party to this petition (suit) or in the criminal Case.
35. The 3<sup>rd</sup> to 6<sup>th</sup> respondents argued that the fact that the 2<sup>nd</sup> to 8<sup>th</sup> petitioners directly participated in the disposal of the suit property to a third party was demonstrated in the criminal application. They refuted the claim of unfair discrimination by the 2<sup>nd</sup> to 8<sup>th</sup> petitioners since they were directly involved in the disposal of the suit property. The rights under articles 27, 28, 29 and 47 of *the constitution* are not absolute. Further, the allegations in the petition have not been substantiated. In any event, they also have rights that should be protected and that was why they were granted leave to initiate private prosecution.
36. The 3<sup>rd</sup> to 6<sup>th</sup> respondents argued that the petitioners should have appealed against the ruling in the criminal application. It is also their position that by virtue of section 193 A of the Criminal Procedure Code, concurrent criminal and civil proceedings cannot constitute an abuse of the process of the court.
37. The 3<sup>rd</sup>-6<sup>th</sup> respondents maintained that the petitioners were given a fair hearing in the criminal application because they fully participated during the hearing of the criminal application and they fulfilled the criteria set for private prosecution in *Frantik Nyamwaro Ogora v Elkanah Obwaya Nyandieka & 2 others* [2018] eKLR.
38. The 3<sup>rd</sup> to 6<sup>th</sup> respondents relied on *Andrew Nthiwa Mutuku v Court of Appeal & 3 others* [2021] eKLR, to submit that the proceedings in the criminal application were constitutional and adhered to all requirements as expected in an application for private prosecution. They again relied on section 193A of the Criminal Procedure Code and the decisions in *Director of Public Prosecutions v Kuldip Madan & another* [2019] eKLR and *Republic v Chief Magistrate's Court at Nanyuki & 2 others Ex parte David Mwenda Gitaru* [2017] eKLR for the argument that, both criminal and civil matters can proceed concurrently.
39. Further reliance was placed on *Republic v Chief Magistrate's Court at Nanyuki & 2 others Ex parte David Mwenda Gitari* (supra) and *Republic v Inspector General of the National Police Service & another Ex parte Beatrice Hilda Omunia; Peter Nganga Chege & 2 others (Interested Parties)* [2019] eKLR for the proposition that the intended prosecution is within the purpose of the law.

### **Interested Party's Case**

40. The interested party supported the petition through a replying affidavit sworn by Alice Mumbi Mathangani. The interested party took the position that the application for leave was based on material non-disclosure by the 3<sup>rd</sup> to 6<sup>th</sup> respondents.
41. The interested party argued that on 19<sup>th</sup> January 1993, and in consideration of Kshs. 21 million, KPTC entered into an agreement with Postel for sale of 60 acres out of 79 acres for purposes of building houses for members of Postel who were former employees of KPTC. After the dissolution of KPTC in 1998, the property was vested in Telekom Kenya.
42. According to the Interested party, the respondents did not disclose to the court during the hearing of the criminal application for leave, that before the transfer of the property, there were civil disputes where Exclusive Estates sued the 1<sup>st</sup> petitioner and 3<sup>rd</sup> respondent in the commercial suit to recover its fees for coming up with development plans for the housing project. The validity and enforceability of the sale agreement between KPTC and Postel is pending determination.



43. Further, the issues in dispute between the petitioners and the 3<sup>rd</sup> to 6<sup>th</sup> respondents are of civil nature and their determination is pending in the commercial suit which will resolve the entire dispute. The issue of compensation after compulsory acquisition will also be conclusively be dealt with in that court.
44. The 1<sup>st</sup> interested party relied on the decisions in Bahadurali Ebrahim Shamji v Al Noor Jamal & 2 others (1998) eKLR; Standard Ltd v Alfred Mincha Ndubi (2018) eKLR and Sita UK Group Holdings Ltd v Serruys [2010] EWHC 698 QB.
45. Further reliance was placed on Shamser Kenya Ltd v Director of Public Prosecutions & another (2017) eKLR to buttress the position that the criminal application was brought with ulterior motive to advance the claim in the suit property. The petition should, therefore, be allowed.
46. The interested party again relied on the decisions in Rufus Riddle Barger v Brian John Robbison [1959] EA 841 (pg 845) and Isaac Oluochier v Stephen Kalonzo Musyoka & 217 others [2017] eKLR, that the criminal application did not meet the threshold set in those decisions.

### **Determination**

47. I have considered the petition, responses, arguments by parties and the decisions relied on. The main issues before this court are whether the court should declare the proceedings and decision made on 8<sup>th</sup> October 2021 in Nairobi Misc. Criminal Application No. E2366 of 2021, (Postel Housing Co-operative Society & others v The Director of Public Prosecution & Others unconstitutional; issue an order of certiorari quashing the leave granted to institute private prosecution against the petitioners and any other proceedings and consequential action(s) arising from, or in connection with, that decision and a declaration that the petitioners rights under article 27 were violated and an award of damages for that violation.
48. The petitioners' argument, as I understand it, is that the intended prosecution threatens to violate articles 10, 27, 28, 29, 47, 50, 163(7) and 232 of *the constitution*; is being used for ulterior purposes and that the decision to grant leave is erroneous and offends the principle of stare decisis.
49. The petitioners reiterated that the order granting leave to institute private prosecution against them threatens to violate their right to fair hearing and equality enshrined in articles 50 and 10(1) and 2(b) of *the constitution*.
50. The petitioners again argued that there is a civil suit in the Commercial Division thus, the intended prosecution is aimed at achieving an ulterior purpose by to coercing them into compromising and settling the civil suit.
51. The 1<sup>st</sup> respondent and the interested party supported the petition.
52. The 3<sup>rd</sup> to 6<sup>th</sup> respondents opposed the petition. They contended that it is premature; anticipatory and presumptive since no charges have been filed in court to warrant granting the orders sought. They asserted that some of the petitioners were involved in the disposal of the suit property while others as directors and board members, directly transacted with the Ministry of Public, Youth and Gender Affairs which made them criminally liable. There was thus, justification in seeking leave to institute private prosecution.
53. The petitioners have asked this court to declare the decision of the 2<sup>nd</sup> respondent dated 8<sup>th</sup> October 2021 granting leave to institute criminal prosecution unconstitutional and quash that decision and any subsequent actions taken in compliance with that decision.



54. The petitioners have invoked several articles of *the constitution*. What is notable, however, is that the jurisdiction of this court under articles 22, 23 and 165(3) of *the constitution* has also been invoked. Article 23 (1) states that this court has jurisdiction in accordance with article 165(3) (d) (i) (II) to determine constitutional validity of laws and actions said to have been done in accordance with *the constitution* and or the law. In that regard, the petitioners have urged this court to declare the decision made on 8<sup>th</sup> October 2021 unconstitutional null and void.
55. I have read the petition and arguments by parties. An application was filed before the 2<sup>nd</sup> respondent where the parties involved were served and participated in those proceedings. After considering arguments by parties, the 2<sup>nd</sup> respondent issued a ruling on 8<sup>th</sup> October 2021, allowing the application and granted leave to institute criminal proceedings against the petitioners.
56. Following issuance of these orders, this petition was filed seeking the declarations and orders already reproduced in the body of this judgment. The 2<sup>nd</sup> respondent's decision was based on an application made invoking the powers of that court. The court heard parties and acted pursuant to provisions of the law conferring jurisdiction on it to determine that application.
57. The petitioners have not shown that the court acted ultra vires its powers. They have not even demonstrated that the court did not exercise its discretion judiciously as required of it and if so, how exercise of the discretion was erroneous.
58. The 2<sup>nd</sup> respondent exercised powers conferred on it by law. that decision was appealable to this court in the Criminal Division which supervises that court under both the Criminal Procedure Court and even article 165(6) of *the constitution*. Instead, the petitioners have invoked the constitutional court's jurisdiction urging this court to declare that decision unconstitutional.
59. The petitioners have not shown what is unconstitutional with the impugned decision given that the court exercised its powers. The petitioners have not demonstrated that the court did not have powers, acted outside its powered and that the decision was ultra vires. It is not enough for a party to seek a declaration that a decision of a court is unconstitutional. It can only be unconstitutional if it violated the constitutional provisions, which I do not find to be the case here.
60. The petitioner again argued that the decision was violative of their rights under article 27. Article 27 largely prohibits any kind of discrimination. Article 27 provides that every person is equal before the law and has the right to equal protection and equal benefit of the law which includes the full and equal enjoyment of all rights and fundamental freedoms.
61. A person pleading violation of article 27 rights must demonstrate that indeed there is violation to these rights. In this petition apart from so alleging, the petitioners did not attempt to show how the decision complained of violated or threatened to violate their article 27 rights. In other words, the petitioners did not demonstrate how equality before the law and the right to equal protection and equal benefit of the law and the full and equal enjoyment of rights and fundamental freedoms had been violated or threatened by that decision.
62. The petitioners must also appreciate that what is complained of Is a decision of a court of law rendered after parties were heard. The petitioners did not allege and do not seem to have argued, that they were not heard before the 2<sup>nd</sup> respondent made the impugned decision. Any argument that the threshold for granting leave to institute criminal proceedings was not met is a ground for appeal as opposed to reason for declaring the decision unconstitutional.
63. Furthermore, the 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents argued that even though leave had been granted, no action had been taken to initiate prosecution thus, the petition is premature. The decision was made on



8<sup>th</sup> October 2021 and this petition was filed soon after. That means the petition was filed to prevent any action being taken pursuant to that decision. It is not even clear whether the respondents would proceed with the intended prosecution.

64. The interested party supported the petition that the prosecution should not take place. The position taken by the interested party is not persuasive. Section 24 of the Office of the Public Prosecutions Act is clear that The DPP can take over prosecution at any stage. Section 24 states:
1. subject to *the constitution*, the director may take over a prosecution or appeal for the purposes of this act by giving notice in writing to the magistrate before whom the matters is being heard or the registrar and the affected persons, indicating the director's intention to take over the matter.
  2. Where the Director has taken over a matter pursuant to subsection (1), the Director shall become the prosecutor, appellant or respondent, as the case may be in such proceedings.
65. Further, section 25 allows the DPP to terminate proceeding stating that the Director may, with the permission of the court, discontinue a prosecution commenced by the Director, any person or authority at any stage before delivery of judgement.
66. The section goes on to state that pending the permission by the court in accordance with subsection (1), the Director may apply orally or in writing to the court for a stay of proceedings with a view that such proceedings may be taken over by the Director to prevent and avoid abuse of the legal process and to protect the public interest. Subsection (3) states that nothing in this section prevents the Director from continuing to conduct proceedings in the name of the person or authority that instituted those proceedings.
67. The law as it stands, the interested party has an avenue through which it may take action if there is justification to do so and, therefore, it is the proper channel to follow if indeed that is the interested [arty is of the view that proceedings ought not to continue.
68. The petitioners again argued that there is a civil case before the Commercial Division and thus, the intended criminal proceedings are intended to coerce the petitioners into settling the civil case.
69. Where criminal proceedings are instituted in response to civil proceedings already in court in order to force the petitioner settle the civil claim, would constitute an abuse of the legal process rather than serving the interest of justice.
70. In *Kuria & 3 Others v Attorney General* [2002] 2 KLR 69, it was held that the Court has power and is under duty to prohibit continuation of criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. "It is the duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform."
71. The court made it plain that an order of prohibition should be granted where "compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious."
72. As already stated, the criminal case has not been initiated. No intended chargesheet was attached to the petition to show the nature of the charges the petitioners are to face and how they relate to the civil suit.



73. In any case, section 193A of the Criminal Procedure Act allows concurrent criminal and civil proceedings stating:

Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.

74. In *Williams v Spautz* [1992] HCA 34; 174 CLR 509; 66 ALJR 585 it was stated that:

If a stay is sought to stop a prosecution which has been instituted and maintained for an improper purpose, it by no means follows that it is necessary, before granting a stay, for the court to satisfy itself in such a case, that an unfair trial will ensue unless the prosecution is stopped.

75. The Court emphasized that unless the interests of justice demand it, courts should refrain from exercising the jurisdiction, and persons charged with criminal offences should not obtain an immunity from prosecution.

76. In *Director of Public Prosecutions v Martin Mina & 4 others* [2017] eKLR, the Court of Appeal observed that it is not “the duty of the High Court...to evaluate the sufficiency of the evidence in the envisaged criminal proceedings, that is the function of the trial Court, or the High Court in a criminal appeal. A Judicial Review Court should not usurp the functions of a trial court, except in the clearest of the cases.”

77. In the present petition, there are no criminal proceedings pending before any court. It is difficult to determine whether the facts in the would-be criminal proceedings are substantially similar to those in the civil suit and what would be the effect if the criminal proceedings and civil proceedings continued concurrently. The petitioners have not shown that in the circumstances of this case, a fair trial would ensue if the prosecution is not stopped.

### **Conclusion**

78. Having considered the pleadings and arguments by parties, the conclusion I come to, is that the petitioners have not shown that the decision by the 2<sup>nd</sup> respondent is unconstitutional, that their constitutional rights are being violated or that there is any other reason why this court should intervene in the circumstances of this case.

79. Consequently, and for the above reasons, this petition is declined and dismissed. I make no order on costs.

**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF OCTOBER 2024.**

**E C MWITA**

**JUDGE**

