



Murunga v Director of Public Prosecutions & 2 others; Watili (Interested Party) (Constitutional Petition E010 of 2023) [2024] KEHC 14103 (KLR) (13 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14103 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CONSTITUTIONAL PETITION E010 OF 2023
AC MRIMA, J
NOVEMBER 13, 2024**

BETWEEN

JOAB ISAAC MURUNGA PETITIONER

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

AND

ABRAHAM MASIBO WATILLI INTERESTED PARTY

JUDGMENT

Background:

1. The Congregation of the Lord Jesus Christ Ministries [hereinafter referred to as ‘the Ministry’] is one of the faith-based societies duly registered in Kenya vide a Certificate of Registration No. 23295 dated 4th March 2004 issued by the Registrar of Societies under Section 10 of the *Societies Act*, Cap. 108 of the Laws of Kenya.
2. It appears that the Ministry has been engulfed in leadership wrangles since its registration. That state of affairs has yielded to several Court cases including Kitale Chief Magistrates Criminal Case No. E1974 of 2023 Republic vs. Joab Isaac Murunga [hereinafter referred to as ‘the criminal case’] wherein the Petitioner herein is the accused. The criminal case is still pending.
3. The Petitioner then moved this Court through a Petition dated 5th July, 2023 seeking several reprieves including the quashing of the proceedings in the criminal case on grounds that his rights under Articles 27, 47, 48, 49 and 50 of *the Constitution* were variously violated by the Respondents.



4. The Petition was vehemently opposed by the Respondents.

The Petition:

5. The Petition was supported by two Affidavits sworn by the Petitioner. They were a Supporting and Supplementary Affidavits.

6. The Petitioner was aggrieved by the Respondents' decision to investigate and prosecute him. Through the Petition dated 5th July 2023, it was his case that the 1st and 2nd Respondent were malicious and acted in total abuse of power.

7. It was the Petitioner's case that the Criminal Case has subjected him to a trial that is in violation of Article 50 and 157 of *the Constitution*.

8. He pleaded that his prosecution is a ploy to unlawfully acquire the Ministry's property which has, in the process, subjected him to cruel and degrading treatment contrary to Article 25 of *the Constitution*.

9. The Petitioner claimed that this Court has inherent power to stop and or prevent abuse of power by the Respondents. He prayed for the following reliefs;

- i. A declaration that the Respondents have infringed the Petitioner's constitutional rights contrary to Article 27, 47, 48, 49 and 50 of *the Constitution*.
- ii. A declaration that the Respondents have abdicated and or abused their authority by charging the Petitioner in MCCR/E1974/2023 on issues which are purely malicious.
- iii. An injunction restraining the Respondents either jointly or severally through any person claiming their authority from prosecuting the Petitioner in MCCR/E1974/2023 concerning possession of certificate of registration No. 23295.
- iv. A declaration that Certificate of Registration No. 23295 belongs to the church and not the Interested Party and as such, the 1st Respondent has n mandate to commence investigations or receive complainants in respect of it being held by the official of the Church.
- v. An order of certiorari bringing into this Court and quashing any and all proceedings by the Respondents purporting to investigate and or review the Petitioner's possession of certificate of Registration No. 23295.
- vi. Costs of the Petition be borne by the Respondents and the interested party.
- vii. And such other order(s) as this Honourable Court shall deem just in the circumstances.

The Petitioner's submissions:

10. In its written submissions dated 17th January 2024, the Petitioner embellished his case by asserting that the Respondents intentionally and flagrantly failed to accord him equal treatment before the law by opting to prefer charges against him and declining to act on his complaint.

11. The Petitioner submitted that the 2nd Respondent maliciously and blatantly refused and or ignored documents it supplied that dislodged the Interested Party's complaint including the letter from the Registrar of Societies dated 1st November 2023 which not only demonstrated that he was an official in the Ministry but also shows that no investigations were carried out before his arrest and prosecution.

12. It was his case that he was unfairly targeted in the criminal case. To that end, he referred to the decision in Henry Aminga Nyabere -vs- Director of Public Prosecutions & 2 Others Sarah Joslyn & Another



- (Interested Parties) where it was observed that a Court may intervene and stop prosecution where there is no ostensible complaint in respect to the complaint and where there is selective charging of suspects.
13. In submitting on the Kitale Chief Magistrates Civil Case No. 523 of 2004 [hereinafter referred to as the '2004 suit'], the Petitioner asserted that it was dismissed when the Court found out that the Interested Party was not an official of the Ministry.
 14. It was his case further that the institution of the Kitale Chief Magistrates Civil Case No. 227 of 2018 against Richard Paul Hammond & 7 Others including the Registrar of Societies and the Hon. Attorney General [hereinafter referred to as the '2018 suit'] was a result of material non-disclosure, forgery, wilful and deliberate omission by the parties in the suit just to defeat the judgment in the Criminal Case.
 15. In urging the Court to abide by the dictates of Article 50 support was drawn from the case of Francis Kirima M'ikunyua & 2 Others (suing as the chairman, Secretary and Treasurer on behalf of Zimmerman Settlement Scheme Society) -vs- Director of Public Prosecutions & 4 Others (2017) where it was observed that criminal justice system ought not to be used to score points against each other in order to assert rights of ownership.
 16. In the end, the Petitioner urged the Court to allow the Petition as prayed.

The Respondents' case:

17. The Respondents challenged the Petition through the Replying Affidavit of No. 49084 Senior Sergeant Samson Kataka, a Detective attached to the Directorate of Criminal Investigations within the Trans-Nzoia West Sub-County.
18. It was his deposition that the 2nd Respondent, pursuant to its mandate as provided for in Articles 10, 244 and 245 of *the Constitution* and Sections 24 and 35 of the *National Police Service Act*, opened an investigation following a complaint by the interested party.
19. He deposed that his investigation revealed that the complainant had indeed applied for the registration of the Ministry which was duly registered on the 7th March 2002, a time when the Petitioner was not even an official of the Ministry.
20. It was his case that he summoned the Petitioner to record a statement on 15th February 2022 and referred to the letter from the Registrar of Societies which indicated that the officials were Jesse Wafula Said, Christine Machanga, Chrisple Amudoli Sungu and Chrispo Osungu. It was their statement that the Petitioner was never elected as an official of the Ministry, but only the interested party who was the Chairman.
21. It was his further case that the Petitioner did not provide any document to demonstrate that he ever applied for the registration of the Ministry neither did he prove how the Certificate came into his possession.
22. He deposed that upon completion of the investigation, the Petitioner was found culpable for the offence of stealing contrary to section 273 as read with section 275 of the Penal Code. On the foregoing, it was his case that he forwarded his investigation file to the Director of Public Prosecutions, 1st Respondent herein, whereupon its review, formed the opinion that there was sufficient evidence to charge the Petitioner.
23. It, therefore, was his case that the Petitioner's claim that there was abuse of power was unfounded and much to the chagrin and disdain of the general public.



24. The Respondents maintained the stance that the Petitioner's unlawful actions not sanctioned by law violated the rights of the complainant and that the criminal case was rightly instituted.
25. In conclusion, it was the Respondents' case that it was premature for the Petitioner to seek this Court's protection to block a process that was in public interest.

The Respondents' submissions:

26. The Respondents filed joint written submissions dated 2nd March 2024. It was their case that the Petitioner's allegation that the investigation was based on falsified documents to justify malicious prosecution was untrue.
27. They submitted that their investigation established that the Petitioner was summoned by the 2nd Respondent and he acknowledged that he was not in possession of the Certificate of Registration for the Ministry.
28. The Respondents stated that the Petitioner did not provide documentation to demonstrate that he ever applied for the registration or how the Certificate came into possession. It was its case that it was, instead, the Interested Party who applied for the registration and was issued with a receipt of payment.
29. While speaking to the 2nd Respondent's power to investigate under Article 245(1)(b) and 245(4)(a) (b) of *the Constitution*, it was its case that its mandate can only be interfered by this Court where it is sufficiently demonstrated that it acted contrary or in violation of *the Constitution*. The Respondents urged the Court to draw persuasion from the case of Paul Ng'ang'a Nyaga -vs- Attorney General & 3 Others (2013) eKLR.
30. In conclusion, in urging the Court to dismiss the Petition, the 1st Respondent submitted that is an independent office and is only subject to the control of the Court based on principles of legality, rationality and procedural impropriety. It was its case that the instant Petition is an abuse of Court process since the Petitioner's rights have not been violated.
31. The Interested Party did not participate in this case.

Analysis:

32. Having patiently perused the Petition, the response, the Affidavits, the parties' written submissions and the decisions referred to, this Court finds that there is one fundamental issue for determination in this matter. The issue is whether, in totality of the evidence and the law, the intended prosecution of the Petitioner is in violation of his rights and fundamental freedoms guaranteed in the Bill of Rights and/or whether the said prosecution is also in violation of Article 157(11) of *the Constitution*.
33. As a precursor, suffice to remind ourselves that *the Constitution* is a solemn and sacred instrument which inter alia guarantees people's rights and fundamental freedoms as well as appropriate legal redresses in protecting *the Constitution* itself and the said rights and fundamental freedoms.
34. Perhaps the sovereignty of the people, guaranteed under Article 1 of *the Constitution*, seals the unalienable right for a litigant to invoke this Court's jurisdiction as established under Article 165 of *the Constitution*. There is indeed a calling on this Court to uphold and defend *the Constitution* as structured in Article 3 of *the Constitution*. Ultimately, a breach of *the Constitution* or any of the human rights and fundamental freedoms in the Bill of Rights is shunned and condemned.



35. The resolution of this issue calls for a scrutiny of the legal regime giving the 1st and 2nd Respondents the mandate to prosecute and investigate offences and whether they exercised those powers within the constitutional and legal limits.
36. This Court has previously and so broadly discussed this issue in Nairobi High Court Constitutional Petition No. E033 of 2021 Maura Muigana vs. Stellan Consult Limited & 2 Others (unreported) and also in Nairobi High Court Constitutional Petition No. E216 of 2020 Reuben Mwangi v Director of Public Prosecutions & 2 others; UAP Insurance & another (Interested Parties) [2021] eKLR.
37. As part of the introduction to the subject in Maura Muigana vs. Stellan Consult Limited & 2 Others case (supra), this Court acknowledged the many writings by legal scholars and decisions by Courts and appreciated that whereas it would have been desirable to come up with all the marvellous work on the issue in a ‘one-stop shop’, that was a tall order given the time constraints and the need for expeditious disposal of cases. The Court, however, rendered a concise discussion on the subject.
38. The Court then traced the legal basis of the exercise of prosecutorial powers in Kenya to the Constitution and the law. Article 157 of the Constitution establishes the Office of the Director of Public Prosecutions as under: -
1. There is established the office of Director of Public Prosecutions.
 2. The Director of Public Prosecutions shall be nominated and, with the approval of the National Assembly, appointed by the President.
 3. The qualifications for appointment as Director of Public Prosecutions are the same as for the appointment as a Judge of the High Court.
 4. The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.
 5. The Director of Public Prosecutions shall hold office for a term of eight years and shall not be eligible for re-appointment.
 6. The Director of Public Prosecutions shall exercise State powers of prosecution and may--
 - a. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
 - b. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
 - c. subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).
 - 7) If the discontinuance of any proceedings under clause (6) (c) takes place after the close of the prosecution’s case, the defendant shall be acquitted.
 - 8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.
 9. The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.



9. The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.
9. In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.
9. Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions.
39. There is, as well, the Office of Director of Public Prosecutions Act No. 2 of 2013 (hereinafter referred to as ‘the ODPP Act’). It is an Act of Parliament aimed at giving effect to Articles 157 and 158 of the Constitution and other relevant Articles of the Constitution and for connected purposes. The ODPP Act provides in Section 4 the guiding principles in prosecution of cases as follows:
- (4) In fulfilling its mandate, the Office shall be guided by the Constitution and the following fundamental principles—
- (a) the diversity of the people of Kenya;
 - (b) impartiality and gender equity;
 - (c) the rules of natural justice;
 - (d) promotion of public confidence in the integrity of the Office;
 - (e) the need to discharge the functions of the Office on behalf of the people of Kenya;
 - (f) the need to serve the cause of justice, prevent abuse of the legal process and public interest;
 - (g) protection of the sovereignty of the people;
 - (h) secure the observance of democratic values and principles; and
 - (i) promotion of constitutionalism.
40. The ODPP Act, among other statutes, variously provide 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.
41. Further, relevant to this discussion is Article 243 of the Constitution which establishes the National Police Service. Article 244 of the Constitution provides for the objects and functions of the National Police Service which are striving for the highest standards of professionalism and discipline among its members; prevention of corruption and promotion and practice of transparency and accountability; compliance with constitutional standards of human rights and fundamental freedoms; training of staff to the highest possible standards of competence and integrity and the respect to human rights and fundamental freedoms and dignity and fostering and promotion of relationships with the broader society.
42. Article 245(8) of the Constitution provides for enactment of legislation to give full effect to constitutional imperatives within the police service. That legislation is the National Police Service Act, No. 11A of 2011 (hereinafter referred to as ‘the Police Act’). The preamble to the Police Act provides



that it is an Act of Parliament giving effect to Articles 243, 244 and 245 of *the Constitution* and provides for the operations of the National Police Service and for other connected purposes.

43. Sections 24, 27 and 35 of the Police Act provides for the functions of the Police service, the Administration service and the Directorate of criminal investigations respectively. In the main, the three entities work towards maintaining law and order, investigation of crimes, protection of life and property and the general wellbeing of the people within the Kenyan borders.

44. Whereas the DPP and the National Police Service are mandated to independently carry out their functions, they must always keep within *the Constitution* and the law. Many a times, Courts have dealt with the manner in which such entities ought to operate. For instance, the Supreme Court in Petition No. 38 of 2019 Cyrus Shakhhalanga Khwa Jirongo v Soy Developers Ltd & 9 others [2021] eKLR discussed some of the applicable parameters. On whether the High Court exceeded its jurisdiction in interfering with the prosecutorial mandate of the Director of Public Prosecutions contrary to *the Constitution*, the Supreme Court stated as follows: -

(79) The High Court in its finding, prohibited the Respondents from proceeding with any criminal proceedings against the Appellant in relation to the suit property or any subject matter and transaction connected to the suit property. The Court of Appeal reversed this judgment by holding that the High Court had interfered with the discretion given to the Director of Public Prosecutions (DPP) to initiate and conduct prosecution. Essentially, the Court of Appeal found that the High Court went against public interest in preventing investigation and prosecution of allegations relating to fraudulent transfer and acquisition of the suit property and that the learned Judge interfered with the prosecutorial mandate of the DPP to decide on whether to charge or not to charge an individual.

[80] The 5th, 6th and 7th Respondents on their part, maintain the position that the decision to commence investigations against the Appellant was consistent with the provisions of Article 157 of *the Constitution* and Section 6 of the Office of Director of Public Prosecutions Act. They also submitted that the decision to institute criminal proceedings by the DPP is discretionary and that such exercise of power is not subject to the direction or control by any authority as provided for under Article 157(10) of *the Constitution*.

(81) Under Article 157(6) of *the Constitution*, the DPP is mandated to institute and undertake criminal proceedings against any person before any Court. Article 157(6) 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.”

Article 157(4) provides that:

(4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

However, Article 157(11) stipulates that:

(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the



administration of justice and the need to prevent and avoid abuse of the legal process.

- (82) Although the DPP is thus not bound by any directions, control or recommendations made by any institution or body, being an independent public office, where it is shown that the expectations of Article 157(11) have not been met, then the High Court under Article 165(3)(d)(ii) can properly interrogate any question arising therefrom and make appropriate orders.
- (83) In that regard, the Court of Appeal in the case of Commissioner of Police & Another v Kenya Commercial Bank Ltd & 4 Others [2013] eKLR persuasively found that the High Court can stop a process that may lead to abuse of power and held that: -

Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, it is too fairly well settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why courts in this country have consistently held that it would be an unfortunate result for courts to interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The courts must wait for the investigations to be complete and the suspect charged.

By the same token and in terms of Article 157 (11) of *the Constitution*, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution. See Githunguri v Republic [1985] LLR 3090.

It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See Ndarua v. R. [2002] 1EA 205. See also Kuria & 3 Others V. Attorney General [2002] 2KLR. (emphasis supplied)

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



- (I) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice; or
- (II) Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction; or
- (III) Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; or
- (IV) Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.

(85) We are persuaded that this is a good guide in the interrogation of alleged abuse of prosecutorial powers and read alongside Article 157(11) of *the Constitution*, we have sufficiently expressed ourselves elsewhere in this Judgment to show that the unconstitutional continuance of the criminal proceedings against the Appellant amounts to abuse of Court process and that, balancing the scales of justice, the weight would favor the Appellant and not the Respondents.

45. On public interest, the Supreme Court expressed itself as follows: -

- (86) On public interest, what is in issue is a dispute arising from a commercial transaction 24 years ago where the complainants have not denied receiving part payment of the purchase price. There is hardly any public interest element in such a transaction save the wide interest of the law to apprehend criminals.
- (87) The learned Judge of the High Court, in our view, was well within his mandate under Article 165(3)(d)(ii) as read with Article 157(11) of *the Constitution* to curtail the Appellant's prosecution and the DPP'S powers have not in any way been interfered with, outside the constitutional mandate conferred on the High Court.

46. This Court summed up the instances in which a Court may intervene and stop any prosecutions against a person in *Maura Muigana vs. Stellan Consult Limited & 2 Others*; as in the following instances: -

- (i) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court;
- (ii) Where the quashing of the impugned proceedings would secure the ends of justice;
- (iii) Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction;
- (iv) Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged;
- (v) Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.
- (vi) The prosecution is not in public interest;
- (vii) The prosecution is not in the interests of the administration of justice;



- (viii) The prosecution is oppressive, vexatious and an abuse of the court process;
 - (ix) The prosecution amounts to a breach of rights and fundamental freedoms;
 - (x) The investigation and prosecution amount to abuse of power and discretion and is aimed at achieving an ulterior or improper motive;
 - (xi) The investigation and the prosecution are tainted with illegality, irrationality and procedural impropriety;
 - (xii) The investigation and prosecution are in gross contravention of *the Constitution* and the law;
47. It is, therefore, not contested that Courts have the powers to speak against a prosecution. However, in doing so, a Court must not lose focus of the required balance created by *the Constitution* and the law to the extent that lawful organs must be accorded space to discharge their mandates and that in doing so, such discharge must be within *the Constitution* and the law.
48. With the above regulatory framework, this Court will now ascertain if the Petitioner's rights and fundamental freedoms as guaranteed under Articles 27, 47, 48, 49 and 50 of *the Constitution* were impugned as alleged. The Petitioner contended that the Respondents grossly abused their powers in the manner in which the investigations were carried out and the prosecution mounted.
49. This Court has captured the background of this matter in the foregoing parts of this judgment. The crux thereof is the interlink between the criminal case and the pending civil proceedings and whether both ought to be mounted at the same time. In Kenya, the aspect of concurrent civil and criminal proceedings is provided for in Section 193A of the Criminal Procedure Code. The provision states as follows: -

Concurrent criminal and civil proceedings:

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.

50. In an Article titled 'Unjust Justice in Parallel Proceedings: Preventing Circumvention of Criminal Discovery Rules, the author, Randy S. Eckers, defines concurrent proceedings as independent, simultaneous investigations and prosecutions involving substantially the same matter and parties. More often than not, the currency of the twin proceedings is challenged before Courts. In the above article, the author reiterates that a determination to either stay or allow the continuation of parallel proceedings depend on existence of certain requirements. He observes thus: -

The Courts only block parallel proceedings in special circumstances. A defendant may move for a stay to block parallel proceedings, which will be granted only if the defendant can prove either that the government is acting in bad faith and using malicious tactics to circumvent the strict criminal discovery rules, or that there is a due process violation....

Even if a defendant meets one of these requirements, a stay is not guaranteed. The Court takes many other factors into account in deciding whether a stay is appropriate in a specific situation. These factors include the commonality of the transaction or issues, the timing of the motion, judicial efficiency, the public interest, and whether or not the movant is intentionally creating an impediment." Absent special circumstances, both cases will probably proceed.



51. It is, hence, deducible that the quest to stay concurrent proceedings must first be premised on the fact that there is in existence two or more active cases of civil and criminal nature in respect of the same entity, person or subject matter. While discussing the general principles applicable in such scenarios, the Supreme Court of Appeal of South Africa in *Law Society of the Cape of Good Hope v MW Randell* (341/2012) [2013] ZASCA 36 (28 March 2013) stated as follows: -

...it applies where there are both criminal and civil proceedings pending which are based on the same facts. The usual practice is to stay the civil proceedings until the criminal proceedings have been adjudicated upon, if the accused person can show that he or she might be prejudiced in the criminal proceedings should the civil proceedings be heard first....

52. The Learned Judges of the Supreme Court of Appeal further stated that it was not automatic for an Applicant to be awarded stay of the civil proceedings. It found support in numerous English decisions among them, *Jefferson Ltd v Bhetcha* [1979] 2 All ER 1108 (CA) and *R v BBC, x p Lavelle* [1983] 1 All ER 241 (QBD) and observed as follows;

[24]. In dismissing the application, the Court emphasized that there was no established principle of law that if criminal proceedings were pending against a defendant in respect of the same subject matter, he or she should be excused from taking any further steps in the civil proceedings which might have the result of disclosing what his defence or is likely to be, in the criminal proceedings.

[25]. *Jefferson* was followed in *R v BBC, x p Lavelle* [1983] 1 All ER 241 (QBD) at 255 where Woolf J stressed that there should be no automatic intervention by the court. The learned judge pointed out that while the court must have jurisdiction to intervene to prevent serious injustice occurring, it will only do so in very clear cases in which the applicant can show that there is a real danger and not merely notional danger that there would be a miscarriage of justice in criminal proceedings if the court did not intervene.

53. Closer home, our Courts have also had the occasion to address the issue of parallel proceedings. Before the Court of Appeal in Nairobi Civil Appeal No. 181 of 2013, *Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others* [2018] eKLR was the contention whether the High Court was right in granting orders restraining the Inspector General of Police, as well as the Director of Criminal Investigations from commencing, sustaining or proceeding with any investigations against *Investments & Mortgages Bank Limited* in connection with an alleged criminal conduct of its officers on account of a charge instrument whose execution was the subject of contention in a pending civil suit.

54. In determining the issue, the Learned Judges of Appeal acknowledged that the Office of the Director of Public Prosecutions is an independent constitutional office. However, that office is subject to the control of the Court in appropriate instances where illegality, irrationality and procedural impropriety is demonstrated. The Court referred to the decision of the Supreme Court of India in Criminal Appeal No. 590 Of 2007, *State of Maharashtra & Others -vs- Arun Gulab & Others* where the power of the Court in checking excesses of the prosecutorial agency was discussed as follows: -

The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction to the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can



neither intervene at an uncalled for stage nor can it soft-pedal the course of justice at a crucial stage of investigation/proceedings.

The provisions of Articles 226, 227 of *the Constitution* of India and Section 482 of the Code of Criminal Procedure, 1973 (hereinafter called as “Cr.P.C.”) are a device to advance justice and not to frustrate it. The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of power of the Court, but the more the power, the more due care and caution is to be exercised in invoking these powers.

55. The Appellate Court further discussed limitations Courts ought to impose on Section 193A of the CPC, the provision that allows parallel prosecution of civil and criminal cases and remarked as follows:

[47]. In terms of Section 193A of the Criminal Procedure Code, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings does not bar the commencement of criminal 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. But this power has to be exercised very sparingly as it is in the public interest that crime is detected and suspects brought to justice.

56. The Learned Judges cited with approval its earlier decision in Commissioner of Police & the Director of Criminal Investigation Department & another -vs- Kenya Commercial Bank Ltd & 4 others [2013] eKLR, where the role of the Court in ensuring prosecutorial powers are exercised while having regard to public interest, the interests of administration of justice and to avoid abuse of legal process was discussed as under:

...in terms of Article 157(11) of *the Constitution*, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution.

57. Further, the Court of Appeal in Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others Nairobi Civil Appeal No. 56 of 2012 [2013] eKLR held that:

While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be



involved in the settlement of what is purely dispute litigated in court. This is case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations”

58. The High Court in *Kuria & 3 Others vs. AG (2002) 2 KLR* appreciated the validity of existence of concurrent civil and criminal proceedings when it made the following findings: -

... The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution...A prerogative order should only be granted where there is an abuse of the process of the law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution... It is not enough to state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the Applicant are under serious threat of being undermined by the criminal prosecution. In the absence of concrete grounds.... it is not mechanical enough that the existence of a civil suit precluded the institution of criminal proceedings based on the same set of facts. The effect of criminal prosecution on an accused person is adverse but so also are their purpose in the society, which are immense... an order of prohibition cannot also be given without any evidence that there is manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial. (emphasis added).

59. Returning to the matter at hand, the Petitioner and the Interested Party have either been directly or otherwise entangled in many litigations since 2004 when the ministry was registered. Since then the contention by the Interested Party has been that he is the founder of the Ministry in that he successfully applied for its registration, but surprisingly the Certificate thereof was fraudulently handed over to a third party who in turn passed over the administration of the Ministry to the Petitioner. To that end, the Interested Party unsuccessfully instituted some civil proceedings in 2004 in Kitale Chief Magistrates Civil Case No. 523 of 2004 [hereinafter referred to as the ‘2004 suit’] against one Richard Paul Hammond. The suit was struck out for want of capacity to sue on behalf of the Ministry.
60. The Interested Party did not tire. He then filed Kitale Chief Magistrates Civil Case No. 227 of 2018 against Richard Paul Hammond & 7 Others including the Registrar of Societies and the Hon. Attorney General [hereinafter referred to as the ‘2018 suit’]. In paragraphs 10 to 14 inclusive, the Interested Party pleaded his case as follows: -
10. On 7th March 2002, the plaintiff prepared and submitted an application to the Registrar of Societies for registration of the Congregation of the Lord Jesus Christ Ministries.
 11. The plaintiff paid all the costs connected to the registration of the Congregation of the Lord Jesus Christ Ministries and the receipts thereof issued to him as the chairman of Director/ Chairman of the Society.
 12. When the plaintiff went to collect the registration certificate of the said society from the Registrar of Societies, the 7th defendant herein, the plaintiff was informed that the said



certificate has been issued to the 1st defendant herein who presented himself as the agent and Bishop and Chairman of the Congregation of the Lord Jesus Christ Ministries.

13. The Plaintiff avers the search results from the 7th defendant through the letter dated 1st March 2016 on which the 1st defendant rely indicates completely different results of the officials of the Congregation of the Lord Jesus Christ Ministries from the search results dated 21st December 2016 which shows the officials as at the date of registration.
 14. In view of the foregoing, it is the plaintiff's case that the 7th defendant acted fraudulently, negligently and illegally in issuing the certificate of registration of the Congregation of the Lord Jesus Christ Ministries issued to the 1st defendant on or about 4th March 2004.
62. In the 2018 suit, the Interested Party sought the following prayers: -
- a. A declaration that the meeting held by the 1st to 6th defendants on 15th April 2015 through which in which new management of the Congregation of the Lord Jesus Christ Ministries was wrongful, fraudulent, illegal, null and void.
 - b. An order compelling the Registrar of Societies, the 7th defendant herein, to cancel the certificate of registration issued to the 1st defendants herein on or about 4th March 2004 and re-issues another certificate of registration of the Congregation of the Lord Jesus Christ Ministries to the plaintiff herein.
63. From the record, it seems that the 2018 suit was finalized and a judgment in favour of the Interested Party rendered on 12th June 2023. However, the Ministry, as an Applicant, filed a Notice of Motion dated 14th November 2023 seeking inter alia the setting aside of the judgment, an opportunity to be heard and a stay order against the cancellation of the Ministry's certificate of registration. It was not controverted that the trial Court stayed the implementation of the impugned judgment and that the application is pending.
64. As the 2018 suit was awaiting determination, the Interested Party in 2022 lodged a complaint against the Petitioner with the police in Kitale over the same subject matter; the ownership of the Ministry. The Petitioner was summoned by the police where he recorded a statement and the Ministry's Certificate was confiscated. Going by the manner in which the investigations were conducted, the Petitioner lodged complaints with the Police Internal Affairs Unit a result of which the Certificate was eventually returned to him. The Petitioner was, however, arrested and charged in the criminal case in 2023.
65. The Petitioner faced only one charge in the criminal case. It was the offense of Stealing contrary to section 273 as read with section 275 of the Penal Code. The particulars of the offence were as follows: -
- On diverse dates between 7th March 2002 and the year 2004, at the registrar of societies offices Nairobi, within Nairobi County, having interest [sic] a certain certificate, stole certificate of registration No. 23295 in the name of Congregation Of The Lord Jesus Christ Ministries the property of the said Church which was to be collected by Abraham Masibo Watilili.
66. It is instructive to note that the dates on which the Petitioner was alleged to have stolen the Certificate at the Registrar of Societies in Nairobi in the charge sheet were the same as those in issue in the 2018 suit. However, the Interested Party stated on oath in paragraph 12 of the 2018 suit that it was one Richard Paul Hammond who stole the Certificate. Therefore, on one hand, the Interested Party, being well aware that the Certificate was stolen by the said Richard Paul Hammond filed the 2018 suit, sustained it and obtained favourable judgment which is yet to be vacated or set-aside. On the other hand, the Interested Party lodged a complaint with the police during the pendency of the 2018 suit that it was



the Petitioner that stole the Certificate and had the Petitioner was eventually charged. The Interested Party seems to be quite lucky in having it his way, all the time.

67. It is on record that the Petitioner through his Counsel wrote to the Respondents on the state of affairs and raised concerns in the manner in which the investigations were conducted. Counsel gave a detailed chronology of the events and litigation since 2004 and also forwarded copies of the support documents. As such, it is apparent that the DPP was well aware of the above status by the time it gave the consent to charge the Petitioner with the criminal case.
68. One glaring question that calls for an answer is what the status of the criminal case will be if, in the fullness of time, the Court in the 2018 suit [including any appellate Court thereto] finds that the said Richard Paul Hammond was rightfully entitled to the ownership of the Ministry and that the said Richard Paul Hammond lawfully handed over the mantle to the Petitioner. Differently put, can one steal what lawfully belongs to him/her/it? It is obvious and indeed beyond peradventure that this was a matter in which the DPP ought not to have sanctioned the criminal case so as to accord the civil process to, in the first instance, determine the ownership of the Ministry given that by the time the complaint was lodged with the police in 2022, the 2018 suit had already been in Court for 4 years and more so, given the conflicting versions by the Interested Party on who allegedly stole the Certificate.
69. In the unique circumstances of this case, this Court finds and hold that the police did not carry out proper and independent investigations over the complaint. Further, this Court finds and hold that the DPP, by sanctioning a prosecution in such circumstances, did not have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. As such, the DPP, therefore, contravened Article 157(11) of *the Constitution*.
70. The combined effect of the actions by the Respondents no doubt infringed the Petitioner's rights as guaranteed under Articles 27, 47, 48, 49 and 50 of *the Constitution*.

Conclusion:

71. From the foregoing discussion, this Court believes that it has said enough to demonstrate that the Petitioner was not treated within the constitutional and legal confines by the Respondents. The Petition is, hence, successful in that the Petitioner's rights were variously infringed by the Respondents and further the DPP acted in flagrant contravention of Article 157(11) of *the Constitution*.
72. This is a matter in which this Court would have granted substantial damages, even against some actors in person, had the Petitioner sought for any. However, since no such prayer was made, the matter shall rest there.

Disposition:

73. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 and later elected to the Judicial Service Commission thereby mostly being away from the station. Apologies galore.
74. In the end, the Petition is hereby determined as follows: -
 - (a) A declaration hereby issues that the arrest, charging and prosecution of the Petitioner violates the Petitioner's rights and fundamental freedoms as enshrined in Articles 27, 47, 48, 49 and



50 of *the Constitution*. Additionally, the Petitioner's prosecution contravenes Article 157(11) of *the Constitution*.

- (b) An Order of Certiorari do hereby issue bringing into this Court the charge in Kitale Chief Magistrates Criminal Case No. E1974 of 2023 Republic vs. Joab Isaac Murunga to be quashed. The said charge is hereby quashed and the criminal proceedings terminated forthwith. However, for clarity, the Respondents will be at liberty to prefer any charges against the Petitioner once the Kitale Chief Magistrates Civil Case No. 227 of 2018 against Richard Paul Hammond & 7 Others is finally determined including appeals, if any.
- (c) The Respondents shall jointly and severally bear the costs of the Petition.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 13TH DAY OF NOVEMBER, 2024.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Ochieng, Learned Counsel for the Petitioner.

No appearance for Miss Jepkemei, Learned Counsel for the Respondents.

Chemosop/Duke – Court Assistants.

