



**Maina v Inspector General of the National Police Service & 3 others; Kamau
(Interested Party) (Petition E288 of 2023) [2024] KEHC 15728 (KLR)
(Constitutional and Human Rights) (13 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15728 (KLR)

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

PETITION E288 OF 2023

LN MUGAMBI, J

DECEMBER 13, 2024

BETWEEN

PURITY MBETE MAINA PETITIONER

AND

**INSPECTOR GENERAL OF THE NATIONAL POLICE
SERVICE 1ST RESPONDENT**

DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

AND

AGNES WAHURA KAMAU INTERESTED PARTY

JUDGMENT

Introduction

1. The Petition dated 1st August 2023, is supported by the Petitioner’s affidavit in support of even date and a further supplementary affidavit dated 22nd January 2024.
2. The gravamen of this Petition as supported by the averments in the Petitioner’s affidavit is that the investigation and prosecution against her by the 1st, 2nd and 3rd Respondents was prompted by the Interested Party’s unsubstantiated and malicious complaint in violation of her constitutional rights under Articles 27, 29 (a), 47(1), 157(11) and 239(3)(a) of *the Constitution*.



- i. A declaration that the arrest and prosecution of the Petitioner vide Milimani Criminal Case No.623 of 2023 is unlawful and a violation of her constitutional rights.
- ii. An order quashing the criminal proceedings against the Petitioner in Milimani Criminal Case No.623 of 2023.
- iii. A permanent injunction be issued restraining the Respondents either by acting by themselves, or their agents, employees, servants, assigns or any other person whomsoever from arresting, detaining, charging and/or prosecuting the Petitioner in relation to her participation in Nairobi Environment and Land Court Appeal Case No. E051 of 2020 or any other proceedings relating to her late husband's estate.
- iv. General damages and compensation for the unlawful arrest and prosecution.
- v. Costs of this Petition.
- vi. Any other appropriate relief in the circumstances that this Court deems fit and just to award.

Petitioner's Case

3. The Petitioner states that she is 60 years old and has three children with her late husband, James Maina Gathigo. She avers that her late husband was presumed dead after going missing for a long time and could not be traced.
4. As a consequence, she embarked on taking stock of his assets and manage his properties which included a commercial plot in Umoja area in Nairobi. That was not without its challenges since the Interested Party who claims that she was also his wife claimed the property. In fact, the Interested Party alleged that she was the sole owner of one of the properties Nairobi/Block 107/1442 and Nairobi/Block 107/1443.
5. For this reason, it is alleged that the Interested Party proceeded to institute a civil suit, Milimani Chief Magistrates Court Environmental and Land Court Case No.618 of 2018 claiming that the Petitioner was interfering with the property. She asserts that this matter was afterward heard and determined on 4th November 2020. The Court in dismissing the suit affirmed that the property belongs to the late, James Maina Gathigo. The decision was subsequently appealed and the High Court's decision affirmed by the Court of Appeal.
6. It is averred that dissatisfied, the Interested Party went ahead to use the criminal system to harass and intimidate her. She asserted that to begin with, there was no proof that the alleged report was made that is in the form of an OB number. Further she states that she received summons from the County Criminal Investigation to avail herself for questioning on 1st August 2023 in relation to the stated properties which she did.
7. She however asserts that she was not accorded an opportunity to be heard only informed that the investigation had been concluded. It is alleged that the officer proceeded to arrest her. She was however released on a police bond pending her arraignment in Court.
8. The Petitioner is aggrieved that the Interested Party is using the criminal justice system to intimidate her and in total disregard of the Court's pronouncement on the subject property and its rightful ownership. She is further distressed that the Interested Party has continually been inconsistent with her testimony even at Court. Equally, she is grieved that the Respondents in spite of these discrepancies commenced the criminal suit against her contrary to public interest. She adds that weaponization of the criminal justice system to settle civil disputes is an affront to the dignity of the judicial process.



1st, 2nd and 3rd Respondents' Case

9. In response, these Respondents filed an undated Replying Affidavit sworn by CPL Erastus Wambugu, the Investigation Officer in the impugned Criminal Case No. E263 of 2023.
10. He depones that the Interested Party lodged her complaint on 2nd October 2018 at the DCI City Hall, Nairobi. She reported that the Petitioner had issued notices to her tenants in the property at Umoja II Zone 8 to vacate.
11. He states that the investigation established that the Interested Party was allocated plot number 284 (formerly known as plot No.115 and 116) and issued with an allotment letter in her name, Reference No. HDD/64.PA/Umoja/NKM/MM/404 dated 17th July 2003 and a beacon certificate by the Nairobi City Council.
12. On the flipside, during the investigations the Petitioner adduced ownership documents namely: two allotment letters from the City Council of Nairobi; two lease agreements between City Council of Nairobi and the late, James Maina Gathogo; two beacon certificates for plot numbers 151 and 152 and two lease certificates from the ministry of lands for Nairobi/Block/107/1442 and Nairobi/Block 107/1443.
13. He however stated that they detected a number of discrepancies with the Petitioner's documentation. First the beacon certificate dated 10th December 2008 was not signed by the late, James Maina Gathogo instead his name was used as the signature. Further it did not indicate the boundary plots as is customarily done. Additionally, the investigators doubted the claim that the lease had been approved by the Chief Land Registrar on 26th May 1989 only to be registered in 2018. Further that the defunct City Council of Nairobi could not function as such in 2018 and neither had the land been surveyed in 1989 as alleged.
14. Moreover, the signatures of the late, James Maina Gathogo and the town clerk, Leboo Ole Morintat on the lease agreements were found to be forgeries. Likewise, the advocate who is said to have witnessed the signing of the lease, JKK Chemirmir died in 2004, 14 years before the documents were registered. Owing to these factors, it was suspected that these documents had been forged by the Petitioner in the name of her late husband.
15. At the conclusion of the investigation, he recommended that the Petitioner be charged with forgery contrary to Section 349 of the Penal Code and obtaining registration by false pretenses contrary to Section 320 of the Act. The file was then forwarded to the 3rd Respondent on 13th April 2023 who made the decision to charge the Petitioner. The Petitioner was subsequently arraigned in Court on 2nd August 2023.
16. That said, he contends in closing that Section 193 of the Criminal Procedure Code provides that existence of a civil suit does not bar instigation and maintenance of a criminal suit.

4th Respondent's Case

17. The 4th Respondent's response and submissions are not in the Court file or Court Online Platform (CTS).

Interested Party's Case

18. In reaction to the suit the Interested Party filed Grounds of Opposition dated 14th November 2023 on the premise that:



- i. The Application is frivolous, vexatious, an abuse of Court process and a waste of judicial time.
- ii. The 2nd and 3rd Respondent are independent bodies which derive their powers from *the Constitution* and relevant Acts of Parliament to investigate, charge and prosecute people as they deem fit and just.
- iii. The Interested Party lodged a complaint with the 2nd Respondent in October 2018 regarding a title she believed to be acquired by the Petitioner on behalf of James Maina Gathigo fraudulently.
- iv. Criminal proceedings are distinct and distinguishable from civil proceedings and the existence of one does not bar the commencement of the other.
- v. The evidence collected by the 2nd Respondent is compelling and the same ought to be examined by a court of competent jurisdiction on merit.
- vi. The Application is premature as it raises issues which would form part of the Petitioner's defense should the prosecution make a prima facie case against her.
- vii. The Application is misconceived and an attempt at evading the Judicial system and the same should be dismissed with costs.

Parties Submissions

Petitioner's Submissions

19. On 22nd January 2024, the Petitioner through Muthoga and Omari Advocates filed submissions where the issues for argument were identified as: whether the Court should quash the criminal proceedings instituted against the Petitioner and whether the Petitioner is entitled to the reliefs sought.
20. Acknowledging the Respondents constitutional and statutory mandate, Counsel submitted however that they are bound by the dictates of *the Constitution*. In this matter, Counsel argued that the Respondents had acted ultra vires by instigating the criminal proceedings on unsubstantiated claims. To support this, Counsel relied in Maina *§ 4 others v Director of Public Prosecutions § 4 others (Constitutional Petition E106 § 160 of 2021 (Consolidated))* [2022] KEHC 15 (KLR) where it was held that:

“A court could stop the prosecution of an accused when the institution/continuance of criminal proceedings against an accused could amount to the abuse of the process of the court, when the quashing of the impugned proceedings would secure the ends of justice; where it manifestly appeared that there was a legal bar against the institution or continuance of the proceedings, e.g., want of sanction; where the allegations in the First Information Report or the complaints taken at their face value and accepted in their entirety, did not constitute the offence alleged; where the allegations constituted an offence alleged but there was either no legal evidence adduced or evidence adduced clearly or manifestly failed to prove the charge; where the prosecution was not in public interest...”

21. Counsel in this regard submitted that the Interested Party dragged the Petitioner into a civil suit founded on malice and the Interested Party's greed. Dissatisfied with the Court's decisions it is argued that the Interested Party proceeded to lodge a criminal complaint to settle a civil score which is an abuse of the Court process thus against public interest. This is argued to be against the backdrop that the matter had been settled by the High Court and the Court of Appeal.



22. Furthermore, Counsel submitted that the Petitioner was not allowed to make any representations by the 1st and 2nd Respondent with reference to the complaint. It is argued that as a result of the Respondents actions, Counsel submitted that the Petitioner's rights under Article 27, 29(a),47(1), 157(11) and 239 (3)(a) of *the Constitution* had been infringed. Consequently, the criminal proceedings should be quashed.
23. On the second issue, Counsel agreed that the Petitioner was entitled to the reliefs sought in light of the circumstances of this case. Dependence was placed in Article 23(3) of *the Constitution* that empowers this Court to issue reliefs. Equally Counsel relied in *Dendy v University of Witwatersrand, Johannesburg & Others* (2006) 1 LRC 291 where it was held that:

“... The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context, an award of damages was a secondary remedy to be made in only the most appropriate cases.”
24. Similar reliance was also placed in *Erastus Maina Karanja v Machakos County Government* (2021) eKLR and *Rosemary Wanja Mwangi & 2 Others V Attorney General & 2 Others* (2013) eKLR.
25. Counsel further argued that since the Petitioner had demonstrated violation of her constitutional rights she was also entitled to any other appropriate relief and the costs of the Petition. In this regard dependence was placed in *Jasbir Rai Singh Rai vs Tarlochan Singh* (2014) eKLR where it was noted that costs follow the event.

1st, 2nd and 3rd Respondents' Submissions

26. Prosecution Counsel, N. Atina filed submissions for the Respondents dated 12th April 2024. Counsel highlighted the issues for consideration as: whether these Respondents exercised their statutory duties as envisaged in the law, whether the Petitioner is entitled to the orders sought and whether the Petition meets the precision threshold requirement to grant the orders.
27. Counsel in the first issue, relied in *Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another* (2012) eKLR where the Court held that:

“The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene”.
28. Counsel submitted that in this matter investigations were conducted and, in the end, the decision to charge made by the 3rd Respondent in line with Article 157 of *the Constitution*. Accordingly, it was argued that these Respondents were not coerced into instigating the criminal charges as the Petitioner argued.
29. Referring to the sought certiorari order seeking to quash the criminal proceedings, Counsel submitted that Section 193A of the Criminal Procedure Code permits prosecution of a civil and criminal suit simultaneously. Counsel submitted that even where the Court would be justified to halt the proceedings, the Petitioner had not established the common issues between the two suits and how the



criminal charge would affect the civil suit. In any case, it was argued that the Respondents had acted within their powers as provided in law.

30. Tying to this, Counsel on the order of prohibition, relied in *Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003* [2007] 2 EA 170 where it was held that:

“It is trite that an order of prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...”

31. On the third issue, Counsel contended that the Petition had not satisfied the constitutional threshold set out in the *Anarita Karimi Njeru vs Republic* (1979) KLR 154. This is since the Petitioner had not demonstrated how her constitutional rights had been violated by the Respondents. To buttress this point reliance was placed in *Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others* [2014] eKLR where it was held that:

“Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru vs. Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”

Interested Party’s Case

32. In support of the Interested Party’s case, Onesmus Githinji and Company Advocates filed submissions dated 16th April 2024. Counsel sought to discuss: whether the Court should quash, the criminal proceedings instituted against the Petitioner and whether the Petitioner is entitled to the reliefs sought.
33. Counsel on the first issue submitted that the National police have a constitutional and statutory mandate to investigate complaints lodged by persons. Reliance was also placed in the opinion in *Michael Monari* case (supra).
34. Following the Interested Party’s complaint, the police commenced the investigations into the matter. It was alleged that the Petitioner had failed to demonstrate how the 1st and 2nd Respondents acted without probable cause and neither was it shown that the officers had acted beyond their powers.
35. Correspondingly it is noted that the matter was forwarded to the 3rd Respondent for direction as guided by Article 157 of Constitution. In exercise of his discretion, the 3rd Respondent made the decision to charge the Petitioner. To buttress this point, Counsel cited the case of *Douglas Maina Mwangi vs Kenya Revenue Authority and Another* [2013] eKLR where it was held that:

“When dealing with, the decision as to whether or not to prosecute, the office of DPP exercises independent judgment and the court cannot interfere unless it is shown that the exercise is contrary to *the Constitution*, in bad faith or amounts to an abuse of process I



do not find any reason or ground to intervene in that decision nor is it the obligation of the court to supervise the minutiae of investigation and prosecution."

36. For these reasons, Counsel urged the Court not to interfere with the 1st, 2nd and 3rd Respondents' independent mandate. Reliance was placed in *Kipoki Oreu Tasur v Inspector General of Police & 5 others* (2014) eKLR where it was held that:

"The criminal justice system is a critical pillar of our society. It is underpinned by *the Constitution*, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior courts..."

37. Like dependence was placed in *R v BBC, x p Lavelle* (1983)1 All ER 241 (QBD).

38. Furthermore, Counsel submitted that Section 193A of the Criminal Procedure Code permits concurrent criminal and civil proceedings and that the same can only be halted if it can be shown that continuation of the criminal proceedings would violate the accused person's fundamental rights and freedoms. Counsel argued that this was not the case in this matter.

39. To this end, Counsel submitted that the Petitioner was not entitled to the reliefs sought. This is because as guided by the case of *Anarita Karimi Njeru* (supra) the Petitioner ought to demonstrate the existence of the alleged facts. Further, it is argued that the Petitioner did not adduce evidence to warrant grant of the relief sought. Be that as it may, Counsel argued that the Petitioner dissatisfied with the charges ought to have addressed the issues herein with the trial court not the constitutional court.

Analysis and Determination

40. It is my considered opinion that the issues that arise for determination are as follows:

- i. Whether the arrest and prosecution of the Petitioner is prejudicial to the interest of the administration of justice hence a violation of Article 157(11); and
- ii. Whether the Petitioner is entitled to the relief sought.

41. The Petitioner's central assertion is that her arrest and prosecution by the 1st, 2nd and 3rd Respondents is unjustified hence a violation of *the constitution* and petitioner's rights. The Petitioner claims that the 1st and 2nd Respondent objective in arresting and prosecuting her is aimed at persecuting her in favour of the Interested Party over a property dispute between them that has already been conclusively dealt in court of law.

42. The mandate of the police to investigate crimes has been subject of many Court decisions. Courts are hesitant to interfere with investigative powers of the police or the powers of DPP unless when it is patently clear that there is abuse of authority or mandate conferred on them has not been genuinely applied. In *Daniel Ogwoka Manduku vs Director of Public Prosecutions & 2 others* (2019) eKLR, the Court after citing with approval a number of authorities noted as follows:

"... It is therefore not possible to stop any criminal investigations unless the foundation of such investigations is malicious or is an abuse of power.



51. Odunga J. in *Isaac Tumunu Njunge v Director of Public Prosecutions & 2 others* [2016] eKLR, said with regard to the power of the police to investigate:

“42. It is however my view that the police are clearly mandated to investigate the commission of criminal offences and in so doing they have powers inter alia to take statements and conduct forensic investigations. In order for the applicant to succeed he must show that not only are the investigations which were being done by the police are being carried out with ulterior motives but that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the predominant purpose is to further some other ulterior purpose and as long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.”

In *Pauline Adhiambo Raget v. DPP & 5 Ors.*, (2016) eKLR, a case where breach of right to equality was alleged to have been violated by investigations of an offence, Onguto J. held, and I agree, that-

“I have also been unable to see how in investigating an alleged criminal conduct or activity there could be discrimination or a practice of inequality before the law. The respondents are enjoined to investigate any allegations of criminal activity or conduct both by statute as well as by *the Constitution*. The investigations may take them to anyone including the petitioner. They could investigate on their own prompting or upon being prompted by any member of the public as did the interested party in this case. In so doing, it is a legal mandate they would be undertaking.”

43. The 3rd Respondent derives his powers from Article 157 of *the Constitution* and that mandate is spelt out in the following sub-Articles:
- (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.
 - (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—
 - i. 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;
 - ii. 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
 - iii. 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).



- (10) 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.
- (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.
44. In *Denis Joseph Shijenje & another v Kenya Revenue Authority & 2 others* (2021) eKLR the Court discussing the mandate of the 3rd Respondent stated as follows:
- “37. I find that the office of the Director of Public Prosecution being an independent institution established under *the Constitution*, the court can only interfere with or interrogate its actions where there is contravention of *the Constitution*. In the case of *Paul Ng’ang’a Nyaga v Attorney General & 3 others* (2013) eKLR, it was held that “this court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they acted in contravention of *the Constitution*.”
45. Further in *Francis Anyango Juma vs The Director of Public Prosecutions and another* (2012) eKLR the Court observed that:
- “Clearly, the intention under *the Constitution* was to enable the Director of Public Prosecutions to carry out his constitutional mandate without interference from any party. This court cannot direct or interfere with the exercise by the DPP of his power under *the Constitution* or direct him on the way he should conduct his constitutional mandate, unless there was clear evidence of violation of a party’s rights under *the Constitution*, or violation of *the Constitution* itself.”
46. In like manner, in *Kenya Commercial Bank Ltd & 2 Others vs Commissioner of Police and the Director of Criminal investigations Department & Another Interested Party benjoh Amalgamated Ltd* [2012] eKLR the Court speaking to the mandate of the 1st and 3rd Respondents’ held that:
- “25. The Office of the Director of Public Prosecutions and Inspector General of the National Police Service are independent and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within the limits provided for by the law. But these offices are subject to *the Constitution* and the Bill of Rights contained therein and, in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under *the Constitution*.”



47. Be that as it may, where there is a justifiable reason a Court may intervene. The Court in *Kuria & 3 Others Vs. AG (2002) 2 KLR 69* as cited with approval in *Raymond Kipchirchir Cheruiyot & another v Republic [2021] eKLR* expounds on this as follows:

“ 30. Further in *Kuria & 3 Others Vs. AG (2002) 2 KLR 69* the court emphatically stated thus:

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tolls for personal score-settlings or vilification of issues not pertaining to that which the system was even formed to perform..... The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta.

.....

34. In *Kuria & 3 Others vs. AG (supra)* the court held that:-

“... The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution...A prerogative order should only be granted where there is an abuse of the process of the law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution... It is not enough to state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the Applicant are under serious threat of being undermined by the criminal prosecution. In the 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.”

48. The Petitioner has a duty to demonstrate the manner in which the Respondent violated her rights or *the Constitution*. In this respect, the Supreme Court in *Gwer & 5 others v Kenya Medical Research*



Institute & 3 others (Petition 12 of 2019) [2020] KESC 66 (KLR) (Civ) (10 January 2020) (Judgment) guided as follows:

- “(49) Section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
- (50) This Court in Raila Odinga & Others *v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”

49. Some of the outstanding facts put forth by the Petitioner in this case have not been disputed by either the Respondents or the Interested Party. The fact that the issue of ownership of the said property was the subject of litigation in the Environment and Land court case Number 618 of 2018 which the interested party had instituted against the Petitioner alleging ownership of the land in question has not been disputed. That the suit was dismissed in favour of the Petitioner on 4/11/2020 by the Court and further that the ELC’s Courts decision was upheld on Appeal is also not challenged. It also not in dispute that the criminal complaint is alleged to have been laid in 2018 (but without proof of record or the actual complaint being exhibited) and that it was not until August 2023, after the loss by the Interested Party in the civil case filed before the ELC Court that the criminal prosecution against the Petitioner was undertaken.
50. The interested Party chose to file the grounds of opposition in which she asserts that Criminal proceedings are distinct and distinguishable from civil proceedings and the existence of one does not bar the commencement of the other; The evidence collected by the 2nd Respondent is compelling and the same ought to be examined by a court of competent jurisdiction on merit; The Application is premature as it raises issues which would form part of the Petitioners defense should the prosecution make a prima facie case against her among other grounds.
51. The submissions by the Respondents amplify their independent mandate in carrying out their mandates and insist that they have compelling evidence that points forgery of the ownership documents pertaining to the disputed land parcel hence the commencement of the criminal case against the Petitioner despite the existence of the civil case as Section 193A of the Criminal Procedure Code allows the two cases to proceed concurrently.
52. The issue of the two cases proceeding concurrently does not arise. The civil case on ownership has already been determined conclusively and has settled the issue of ownership according to the facts that were neither contested by the Respondents nor the Interested Party.
53. The dispute as to ownership of land had been initiated by the Interested Party who filed the ELC case against the Petitioner asserting her right to ownership of that property but lost. If indeed there were allegations of forgery for which she had filed a criminal complaint, that would still have been an appropriate forum to allege forgery or fraud to defeat the claim of ownership by the Petitioner as she claims to have filed the criminal complaint way back in 2018. Why would she wait for the 2023 to



pursue the forgery through the criminal case yet she had an opportunity to present evidence of forgery to prop her civil case against the Petitioner in the ELC Court?

54. In my view, the Interested Party is being facilitated by the Respondents to make a mockery of justice under the guise applying Section 193A of the Criminal Procedure Code. The ELC Court, court has indisputably pronounced itself on matter of ownership of the land in question yet despite the existence of this Court decision, the police and the DPP want to prosecute a party for holding a title that the Court has after a hearing confirmed by alleging forgery which could not be asserted to defeat the claim of title in the ELC Court and on appeal. In my view, it is an attempt to besmirch the ELC Court judgment through backdoor tactics. There was opportunity to provide that evidence to the ELC Court and even if it was not available then, an opportunity for review still exists.
55. This court will not allow the manipulation of the legal process to permeate through and mock the administration of justice in this country. I hold and find that the prosecution of the Petitioner in the circumstances is a gross abuse of the prosecutorial discretion and is contrary to Article 157 (11) of *the Constitution*. It fails public interest test or the interest of administration of justice in the circumstances of this case. It amounts to abuse of the legal process under the guise of enforcing the law.
56. I allow this Petition and grant the following reliefs:
1. A declaration that the arrest and prosecution of the Petitioner vide Milimani Criminal Case No.623 of 2023 is unlawful and amounts to abuse of the legal process.
 2. An order quashing the criminal proceedings against the Petitioner in Milimani Criminal Case No.623 of 2023.
 3. A permanent injunction is hereby issued restraining the Respondents either by themselves, or their agents, employees, servants, assigns or any other person whomsoever from arresting, detaining, charging and/or prosecuting the Petitioner in relation to her participation in Nairobi Environment and Land Court Appeal Case No. E051 of 2020 or any other proceedings relating to her late husband's estate.
4. Each Party to bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF DECEMBER, 2024.

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L N MUGAMBI
JUDGE

