



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL PETITION NO 316 OF 2018**

**IN THE MATTER OF ARTICLES 22(1), 23(1) & (3), 165(3)**

**(B, D) AND 258 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION**

**OF ARTICLES 2(1) & (2), 3(1), 10(1), 10(2), 25(a), 27(1) & (2), 28, 29 (A,**

**B, C, D, F), 35, 36, 39, 47 & 157 OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**JANE NYABOKE NJAGI.....PETITIONER/APPLICANT**

**VERSUS**

**THE INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE...1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS (DPP).....3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**AND**

**STEVE MWENDWA.....1<sup>ST</sup> INTERESTED PARTY**

**EMMANUEL GATOBU.....2<sup>ND</sup> INTERESTED PARTY**

**JUDGMENT**

**PETITION**

1. The Petitioner through a Petition filed on 17<sup>th</sup> September, 2018 seeks the following reliefs:-

*a. A Declaration that resonating from the fundamental rights under the Constitution of Kenya, 2010 particularly the rights to information under Article 35 and right to Fair Administrative Action under Article 47 of the Constitution, the decision of the 2<sup>nd</sup> Respondent to deny the Petitioner information requested for purposes of understanding the purported complaint against her, and failing to hear the Petitioner's side of the story for purposes of thorough investigations into the allegations by the 1<sup>st</sup> Interested*

*Party is in violation of the Petitioner's fundamental rights under the Constitution of Kenya, 2010.*

*b. A declaration be and hereby issued that investigations on the Petitioner by the 2<sup>nd</sup> Respondent and the 3<sup>rd</sup> Respondent's intended institution of criminal proceedings against the Petitioner vide Police Case File No. 114/2018 (Parliament Police Station) violates the Petitioner's Constitutional rights, is an abuse of the process of the Court and therefore unlawful, null and void.*

*c. An order of Certiorari be and is hereby issued to quash the decision of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to institute purported criminal proceedings vide Police Case File No. 114/2018 (Parliament Police Station) against the Petitioner, and the intended arraignment before a Criminal Court.*

*d. An order of Prohibition be and is hereby issued prohibiting the Respondents from proceeding with the purported institution of purported criminal proceedings vide Police Case File No. 114/2018 (Parliament Police Station) against the Petitioner, and the intended arraignment before a Criminal Court.*

*e. An order of mandamus be and is hereby issued against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents compelling the investigation into the purported online money business in the name of One Coin, One Life being undertaken by the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties, and the loss of Kenya Shillings Eight Hundred and Sixty Seven Thousand (Kshs.867,000/=) by the Petitioner to the Interested Parties, and the purported investment of Kenya Shillings Two Million Two Hundred Thousand (Kshs.2,200,000/=) allegedly on behalf of the Petitioner.*

*f. Any other relief that this Honourable Court may deem fit and just to grant in the interest of justice.*

**g. Costs of the Petition.**

#### **THE 1<sup>ST</sup>, 2<sup>ND</sup> AND 3<sup>RD</sup> RESPONDENTS GROUNDS OF OPPOSITION**

2. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed grounds of opposition of the Petitioner's application setting out five grounds of opposition being as follows:-

*i) That the Director of Public Prosecutions received the recommendations forwarded by the 2<sup>nd</sup> Respondent and in exercise of his Constitutional mandate conferred by Article 157 of the Constitution, 2010 makes a decision to charge the Petitioner based on sufficiency of evidence and the public interest underlying prosecution of corruption cases. In this case the police commenced investigations against the Petitioner and the resultant file submitted to the DPP who is yet to make a decision and therefore this Petition is premature.*

*ii) That in making the said decision, the Director of Public Prosecutions does not abrogate, breach, infringe or violate any provision of the Constitution or any human and fundamental rights of the Petitioner or any other written law or regulations made there under.*

*iii) That the Petitioner has not demonstrated a prima facie arguable case on breach of any Constitutional provision or fundamental and human rights or any other provision of the law that would warrant grant of Conservatory orders.*

*iv) That the Petitioner has not demonstrated that unless Conservatory orders / stay of prosecution is granted at interlocutory stage then the intended prayers in the Petition will be rendered nugatory or irreparable loss.*

*v) That there are sufficient Constitutional safeguards available to the Petitioner during the process of the impending trial in the subordinate Court.*

3. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as per Court's record did not file grounds of opposition in respect of the Petition nor Replying Affidavit thereto.

#### **1<sup>ST</sup> INTERESTED PARTY'S RESPONSE**

4. The 1<sup>st</sup> Interested Party filed Replying Affidavit by Stephen Muriungi sworn on 24<sup>th</sup> May 2018 seeking that the Petition be dismissed and the Criminal proceedings against the Petitioner be allowed to proceed to hearing and determination.

#### **SUBMISSIONS**

5. The Petitioner filed submission in support of the petition dated 6<sup>th</sup> March 2019. The Interested Party filed submission in response dated 4<sup>th</sup> June 2019. The Respondent inspite of being served and having been afforded an opportunity to file respond to the Petition and submission did not file any submissions.

#### **PETITIONER'S CASE**

6. The Petitioner case is that sometimes in August 2018, the 1<sup>st</sup> Interested Party approached the Petitioner and introduced her to an online

money business duped One Coin One Life. The 1<sup>st</sup> Interested Party implored the Petitioner to invest in the business because according to the 1<sup>st</sup> Interested Party, the business was lucrative.

7. The Interested Party proceeded to demonstrate how profitable and promising the said business was and informed the Petitioner that inter alia;

*a) That the 1<sup>st</sup> Interested Party had invested a sum of Kshs.900,000/= in the business out of which he made a profit of about 47 million within a short time.*

*b) That prominent personalities including a sitting member of Parliament and a cabinet secretary had invested in the business and raked in huge profits.*

*c) That the business would go public by October 2018 and that the Petitioner could become a life member if she invested in the business.*

*d) That the 1<sup>st</sup> Interested Party was a shareholder in the business and that he was entitled to a 10% commission of the investment made by any member he recruited into the business.*

8. The 1<sup>st</sup> Interested Party took the Petitioner to the offices of the said business located at Norwich House, 3<sup>rd</sup> floor along Moi Avenue Nairobi. At the said offices, the Petitioner met the 2<sup>nd</sup> Interested Party who introduced himself as the CEO of the company that own the said business namely of One Coin One Life. The 2<sup>nd</sup> Interested Party explained to the Petitioner how the business operates. The 2<sup>nd</sup> Interested Party further informed the Petitioner that if she invested a sum of Kshs.777,000/= in the business, she could make a profit of about Kshs.1,600,000/= by 8<sup>th</sup> October, 2018.

9. The Petitioner bought the idea and she opted to invest in the business. On the advice of the 1<sup>st</sup> Interested Party, the Petitioner deposited a sum of Kshs.777,000/= in a Kenya Commercial Bank account Meru Branch in the name of Stephlinks Holdings Ltd. The Petitioner further deposited a sum of Kshs.90,000/= being fees for opening and operating an account with the business. The 2<sup>nd</sup> Interested Party acknowledged receipt of the said sums but to date, he has not issued the Petitioner with an official receipt despite numerous demands. The Interested Parties are also yet to supply to the Petitioner the account details if at all they opened one for the Petitioner.

10. It is Petitioner's position that in essence, the Petitioner does not know the status of the Kshs.777,000/= she deposited with the Interested Parties. The details of the account the Interested Parties promised to open on behalf of the Petitioner also remain unknown to the Petitioner. It is further stated by the Petitioner that one week later, the 1<sup>st</sup> Interested Party called the Petitioner and informed her that the 1<sup>st</sup> Interested Party had borrowed a sum of Kshs.2.2 million from his wife and invested the same in the business on behalf of the Petitioner. The 1<sup>st</sup> Interested Party thus demanded for a refund of the said sum on account of the purported investment.

11. The Petitioner averred that she informed the 1<sup>st</sup> Interested Party that she was unaware of the said debt because she had neither instructed the 1<sup>st</sup> Interested Party to borrow nor invest in the business in issue on the Petitioner's behalf. The Petitioner's refusal to refund the said monies purportedly borrowed on the Petitioner's behalf marked the genesis of her tribulations.

12. The Petitioner contacted the 2<sup>nd</sup> Interested Party to inquire about the 1<sup>st</sup> Interested Party's outrageous demand. The 2<sup>nd</sup> Interested Party informed the Petitioner that the 1<sup>st</sup> Interested Party was neither a shareholder nor an account holder in the business in issue.

13. The Petitioner states that the Interested Party has since been blackmailing the Petitioner with a view to forcing the Petitioner to acknowledge indebtedness to the tune of Kshs.2.2 million. Some of the 1<sup>st</sup> Interested Party's acts of black mail are said to include inter alia:-

*a) Threatening to expose the Petitioner as a fraudster through social media for allegedly failing to refund the said Kshs.2.2 million.*

*b) Threatening to cause the arrest of the Petitioner and invite the media to cover the arrest.*

*c) Threatening to use the 1<sup>st</sup> Interested party's uncle who is a sitting member of parliament to cause the Petitioner's arrest.*

*d) Threatening to inform members of the Petitioner's family that the 1<sup>st</sup> Interested Party lend the Petitioner the impugned sum but the Petitioner has refused to refund the same.*

14. The Petitioner aver that the 1<sup>st</sup> Interested Party has indeed actualized the said threats in various ways. First, on 1<sup>st</sup> September, 2018, the 1<sup>st</sup> Interested Party contacted the media to go to parliament Police Station where he had arranged with a police officer at the station to arrest the Petitioner and hold her at the post. Secondly, Police Constable one Mr. Kiprop of Telephone Number 0721-599799 based at Parliament Police Station kept calling the Petitioner and her Advocate one Lawrence Nyangito threatening to arrest the Petitioner if she did not refund the impugned sum. Thirdly, the 1<sup>st</sup> Interested Party caused the publishing of an extract of the Occurrence Book bearing the name of the Petitioner with a purported complaint of obtaining goods by false pretense on social media.

15. The 1<sup>st</sup> Interested Party fourthly, has consistently harassed the Petitioner and defamed her before members of the Petitioner's family and friends. Fifthly, the Petitioner was summoned to Parliament Police Station in connection with the said complaint where she was released on a

police cash bail and ordered to appear in Court on 13<sup>th</sup> September, 2018 to answer to the purported charge of obtaining goods by false pretense.

16. The Petitioner contend that on 6<sup>th</sup> September 2018 she had written to the 2<sup>nd</sup> Respondent giving her account of the story and requesting for thorough investigations before any action could be taken against her. However, it appears that 2<sup>nd</sup> Respondent was hell bent to prosecute the Petitioner because he ignored the call for investigations and proceeded to process the purported charges against the Petitioner. It is Petitioner's averment that evidently, the decision to summon the Petitioner over the aforesaid complaint was taken with an ulterior motive which was meant to prejudice and embarrass the Petitioner.

17. The Petitioner further aver that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have a statutory and constitutional mandate to inter alia investigate complaints and on deserved cases, process and prosecute the perpetrators of criminal activities as enshrined under **Article 157, 245(4)(a); 239 (3) and Article 16(1) of the Constitution.**

### **1<sup>ST</sup> INTERESTED PARTY'S CASE**

18. It is not disputed by the Petitioner and Interested Party that sometimes in July 2018, the 1<sup>st</sup> Interested Party met up with the Petitioner and as they were talking, the 1<sup>st</sup> Interested Party told the Petitioner that he had an account with One Coin One Life which had 500 coins that he was selling. The Petitioner was interested and said that she was willing to open an account and buy the coins from the 1<sup>st</sup> Interested Party.

19. On the 11<sup>th</sup> July 2018, the Petitioner and the 1<sup>st</sup> Interested Party headed to the offices of One Coin One Life which is located at Norwich Building, 3<sup>rd</sup> Floor, where she was taken through the crypto currency training and thereafter agreed to open an account under the 1<sup>st</sup> Interested Party's user name "Mcsteve". On opening the account, the 1<sup>st</sup> Interested Party proceeded to sell and transfer Kshs 500 coins from his account to the Petitioner's account after she transferred Kshs.777,000/= to the 1<sup>st</sup> Interested Party's company bank account. The agreed purchase price for the coins was Kshs.777,000/=.

20. That about two weeks later, Beatrice Cherono, the lady who had introduced the 1<sup>st</sup> Interested Party to One Coin One Life approached him wanting to sell one of her account with 1283 coins at a price of Kshs.2,252,000/=. The 1<sup>st</sup> Interested Party immediately called and informed the Petitioner that there was an account that was being sold to which she was interested in buying however she did not have the money. She then asked to be given two days to get the money and buy the account.

21. That Beatrice Cherono, the seller of the account was in urgent need of the money so the 1<sup>st</sup> Interested Party informed the Petitioner that he would pay Kshs.850,000/= which he borrowed from his wife on behalf of the Petitioner, and was to be refunded by the Petitioner after the two days to which she agreed. Two days later, the Petitioner called the 1<sup>st</sup> Interested Party to meet her at Nairobi West Barclays Bank. The two parties herein met and the Petitioner told the 1<sup>st</sup> Interested Party that the money she was expecting had been held up, so they agreed that the 1<sup>st</sup> Interested Party issue post dated cheques to Beatrice Cherono for the balance of the purchase price then the Petitioner would refund him once she gets the money.

22. It is stated further that thereafter, the Petitioner would come up with excuses for not refunding the 1<sup>st</sup> Interested Party and eventually started dodging his calls. The 1<sup>st</sup> Interested Party even went to the Petitioner's home and met her at the gate leaving the house. She told the 1<sup>st</sup> Interested Party she was going to the bank to get the money and that she would send it to him. However, that was not the case, instead the Petitioner continued ignoring the 1<sup>st</sup> Interested Party's calls and giving him false promises whenever they met.

### **ANALYSIS AND DETERMINATION**

23. Upon consideration of the Petition, the response, facts of the matter, rival submissions by the parties, I find only one issue arise for consideration:-

***a) Whether the Criminal Prosecution commenced against the Petitioner is based on proper factual foundation and without ulterior motive or improper purposes.***

24. The Petitioner herein urges that the foundation and basis upon which the alleged offences allegedly committed by her emanates from was a transition / investment in a company dealing in online money business purportedly run by the 2<sup>nd</sup> Interested Party. The 1<sup>st</sup> Interested Party presented himself as a shareholder and /or account holder who had successfully invested in the aforesaid company.

25. It is averred that the Interested Parties herein received a total of Kshs.867,000/= from the Petitioner for account opening and initial investment however the Interested Parties have never issued a receipt for the aforesaid money received by them. It is urged by the Petitioner that in a discriminatory manner and a clear abuse of power due to the connection of the 1<sup>st</sup> Interested Party with powers that be, the Respondents have thrown all caution out of the window and failed to look into the complete scenario before arriving at the decision to charge the Petitioner to achieve selfish purposes only known to the Interested Parties and the Respondents. This the Petitioner avers is discriminatory, an abuse of power and a clear violation of **Article 27 of the Constitution.**

26. **Article 50(1) (2) of the Constitution** provides that for fair hearing and states clearly that every person has the right to a fair trial, which includes the right to be informed of the Charge, with sufficient detail to answer it. The Petitioner contends that the intended Charge against her clearly lacks a proper factual foundation to give rise to criminal charges. It is contended that precise information has not been given to the Petitioner to even enable her take plea. The intended Charge is urged clearly flies in the face of clear Constitutional Provisions and is therefore oppressive and violates the Constitutional rights of the Petitioner. I find that there is no doubt that fundamental provisions

enshrined in the Constitution such as right to equality and provisions under **Article 50 of the Constitution** are condition precedent and the Respondents must comply with them from the start as there is no option out of it.

27. It is urged by Petitioner that her right to a fair trial has clearly been contravened by the fact that the Interested Party has threatened and actualized his threats to use the criminal justice system to embarrass the Petitioner, who is an Advocate of this Honourable Court.

28. Our Constitution clearly provides under **Article 28 of the Constitution** that every person has inherent dignity and the right to have that dignity respected and protected. The Petitioner's right to dignity, and to have that dignity including by virtue of being a Senior Advocate of this Honourable Court, is not being respected and protected. The Respondents and the 1<sup>st</sup> Interested Party have deliberately handled the Petitioner in a manner that undermines, humiliates and harasses the Petitioner. The 1<sup>st</sup> Interested Party has particularly caused the publication of harassment of the Petitioner, and particularly caused the publication of trumped up charges on social media with the sole intention to intimidate and harass the Petitioner who is a respectable member of the bar.

29. It is not disputed that the Petitioner herein as pleaded wrote to the 2<sup>nd</sup> Respondent explaining the circumstances pertaining to the purported complaint lodged by the 1<sup>st</sup> Interested Party. The 2<sup>nd</sup> Respondent, has however failed to fairly investigate the matter before forwarding the file to the 3<sup>rd</sup> Respondent, a situation that may cause the unwarranted arraignment of the Petitioner before a criminal Court. This with due respect is an infringement of the Petitioner's rights as guaranteed by the Constitution and is also an abuse of state machinery and agencies against the Petitioner. This is a clear manifestation of the violation of clear constitutional provisions, and the rights of the Petitioner.

30. It should be noted that **Article 157(1) of the Constitution** provides for the powers of the 3<sup>rd</sup> Respondent, the Director of Public Prosecutions. **Chapter 6 of the Constitutions** sets out the responsibilities of leadership. The 3<sup>rd</sup> Respondent is enjoined by the Constitution to ensure there is integrity in the process leading to arraignment of persons before a Criminal Court. The 3<sup>rd</sup> Respondent therefore must ensure that the file presented to his office for prosecution by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents based on the materials presented is sufficient to mount prosecution of a person before a criminal Court. I would like to point out that arraignment of a person before a Criminal Court for plea taking in itself, without sufficient cause or for ulterior motive amounts to violation of the Constitution, infringement of the rights of the Petitioner and an abuse of power by the Respondents.

31. In the instant Criminal Proceedings, it is clear that the matter arise out of either commercial transaction or investment initiated by the Interested Parties. This may surely be taken as a commercial transaction. The Respondents are presenting to Court the matter purportedly and on investigation as a case of obtaining through false pretenses at the instigation of the 1<sup>st</sup> Interested Party and the powers that be, and by so doing the Petitioner has been denied the equal protection of the law under the regime established by the law. In the matter of this nature, it cannot be said that the Respondents who have chosen not file response to the Petition or submissions, notwithstanding having been afforded such an opportunity are acting in good faith and not in a discriminatory manner by having the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' officers being used by the 1<sup>st</sup> Interested Party to achieve the 1<sup>st</sup> Interested Party's selfish purposes in criminal justice system.

32. The 1<sup>st</sup> Interested Party on his part contended that the Petitioner has not brought this matter to appropriate Court as the same should have been brought to Judicial Review and not the Constitutional and Human Rights Division.

33. The Constitutional and Human Rights Division being a division of the High Court has jurisdiction to hear and determine Judicial Review related matters. **Article 23(1) (a) and 3 (f) of the Constitution** provides:-

**“23. (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”**

23. (2) ....

**“23 (3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—**

**(f) an order of judicial review.”**

34. In view of the provisions of **Article 23(3)(f) of the Constitution** I find that even if the Petitioner was seeking orders under Judicial Review this Court would be appropriate Court to deal with the Petition. It is also noted the Petitioner is seeking redress of a denial; violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights hence the Petition is properly before this appropriate Court.

35. Under **Article 157(6) and (10) of the Constitution** it is provided:-

**“157.(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)."*

***"157.(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."***

36. It is not in dispute that the Director of Public Prosecution in exercise of state powers of prosecution shall not require the consent of person or authority for commencement of criminal proceedings nor shall he be under the direction or control of any person or authority but that does not give him authority to violate the provisions of the Constitution or any law or act with malice and the prosecution if any must accordingly be founded on factual and proper basis.

37. The Petitioner contends that any complaint must therefore be founded on a factual and proper basis before the Director of Public Prosecution can proceed to act on it. To buttress this proposition reliance is placed in the case of ***Republic v. Attorney General exp Kipngeno Arap Ngeny high Court civil Application No. 406 of 2001*** where the Court expressed itself thus:-

***"A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable."***

38. In the instant Petition, the duty to demonstrate before instituting the Criminal proceeding against the Petitioner there existed material evidence on which the prosecution can urge with certainty that the prosecution has prosecutable case lie with the prosecution. The Respondents herein have failed to demonstrate that the Criminal proceedings complained of are founded on a factual and proper basis. Further it has not been sworn that the prosecution has reasonable and probable chance of meriting a criminal prosecution. The Respondents have declined and/or neglected to file response to matters raised in the Petitioner's Petition. The failure is a demonstration that what the Petitioner has pleaded is uncontroverted and the prosecution could otherwise be malicious and brought in bad faith. It is my view that in allegations on serious and important matters as are raised in this Petition it is for the prosecution to ascertain the basis for the complaint lodged against any accused person before arresting and charging anyone with a criminal case.

39. In the instant Petition, the 1<sup>st</sup> Interested Party, complaint is pegged on an online money business venture that the 1<sup>st</sup> Interested Party presented himself as a shareholder in the said business and urged the Petitioner to invest in the same. Consequently, the Petitioner embraced the idea and invested in the business to the tune of Kshs.777,000/=. The 1<sup>st</sup> Interested Party has alleged that the Petitioner instructed him to borrow a sum Kshs.2.2 million and invest the same on behalf of the Petitioner in the business in issue. It is noted also that the Petitioner had submitted that earlier on that she deposited a total sum of Kshs.867,000/= with the interested parties in connection to the business in issue. The Petitioner has further submitted that despite making the said payment, the interested parties have failed to issue her with a receipt evidencing payment. They are also yet to supply her with details of the account they opened on her behalf if any.

40. From the aforesaid it turns out that the question regarding investigation by the 2<sup>nd</sup> Respondent arose before preferring of charges against the Petitioner; first to investigate whether the Petitioner instructed the 1<sup>st</sup> Interested Party to borrow a whopping sum Kshs.2.2 million and invest the same in the business in issue on behalf of the Petitioner. The Petitioner denies giving such instructions and accordingly calls upon the 2<sup>nd</sup> Respondent to tender evidence to prove otherwise. Secondly, whether indeed the 1<sup>st</sup> Interested Party, invested the impugned sum of Kshs.2.2. million in the business in issue and on behalf of the Petitioner. It is noted that there is no admission on part of the Petitioner, that the Interested Parties supplied her with details of the account they purportedly opened for her despite numerous demands. In view of the above, the question begs for answer that if without such an account, where were these monies deposited and for whose benefit?

41. It is further not demonstrated and shown to this Court the dates of the purported account and also evidence that such monies were ever deposited in the alleged account. I find without answer to these fundamental questions and being proved and answered, it cannot in my view, be said, that there are factual and proper basis for instituting Criminal proceedings against the Petitioner. Any change without such foundation may have no legs to stand on or walk with and is bound to fall flat to the ground.

42. In the instant Petition, there is no doubt that the Respondents have failed to investigate the aforesaid fundamental issues raised herein above and I find that they acted in a discriminatory manner in proceeding to prefer charges against the Petitioner. In my view this can be said to be a classic case of outright abuse of the criminal justice system and a violation of the provisions of ***Article 27 of the Constitution***.

43. It is additionally noted that the Respondents and 2<sup>nd</sup> Interested Parties were served with the Petition they decided not to file response to. I find that the failure to respond by the Respondents who have powers to charge and prosecute in accordance with the Constitution and relevant statute. I find that the fundamental issues raised by the Petition confirms the Petitioner's position that the charges herein, have been actuated by malice and ill motive. This may be termed as an abuse of power and an arbitrary exercise of authority to achieve a purpose unconnected with the rule of law or objective of the system of the administration of justice.

44. ***Article 50 of the Constitution*** provides that every accused person has a right to fair hearing including the right to be supplied with sufficient details of the charged preferred against such a person to enable them respond appropriately. In view of the clear Constitutional provisions and in view of the conduct exhibited in the Petition by the Respondents, I find that it is in the interest of justice for this Court to stop the intended charges, as without doing so, it is clear the Respondents are likely to violate the Petitioner's rights under ***Article 50 of the Constitution*** because despite numerous demands, the Respondents have blatantly refused to supply the Petitioner with precise information to enable her take plea. Further I need not reiterate that the security agencies when conducting criminal investigations are bound by the law and the decision to investigate a crime or prosecute must not be unreasonable or made in bad faith or with intention to achieve ulterior motives.

45. To buttress the above proposition reliance is placed in the case of *Commissioner of Police & Anor vs. The Kenya Commercial Bank & Others* where it was held as follows:-

**“a) Section 193A of the Criminal Procedure Code allows concurrent litigation of civil and criminal proceedings arising from the same issues. There can be no doubt that the field of investigations of criminal offences is exclusively within the domain of the police. However, those powers are designed to achieve public purpose of inquiring on alleged crimes and where necessary, calling upon the suspect to account before the law.**

**b) In the exercise of these powers, the director of public prosecutions should take into consideration the need to prevent and avoid the abuse of the legal process.**

**b) The Court can stop such a process if it is in serious abuse of power.**

**c) It is not in the public interest or in the interest of the administration of justice to use the criminal justice process as a pawn in civil disputes.” (Emphasis added)**

46. Similarly on Court’s power and duty to prohibit continuation of criminal proceeding it was clearly held in the case of *Kuria & 3 Others vs. Attorney General (2012) eKLR 69* that:-

**“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 tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to person... A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underline the society’s senses of fair play and decency and/or where the proceedings are oppressive or vexatious...”**

47. Upon consideration of the uncontroverted pleadings herein by the Respondents herein. I have no doubt that it turns out that the actions taken and/or threatened by the Respondents violates the Petitioner’s rights to security of person as provided for under **Article 29 of the Constitution** and equal protection and benefit of the law under **Article 27**. Further **Article 29** provides that every person has the right to the security of the person. There is clear demonstration by the Petitioner that there is imminent threat in the instant case of violation of the Petitioner’s right under **Article 29 of the Constitution** and in addition thereto **Article 27 of the Constitution** provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. I find that there is a threat of violation of the Petitioner’s right of equal protection of the law by the Respondents and Interested Parties.

48. I find further that the Petitioner herein has set out in detail the threats the 1<sup>st</sup> Interested Party made against her. All these threats have come to pass, a vindication that the Respondents might not be acting independently. I find further that unless the Respondents conduct their investigations and execute their mandate independently and objectively, the same can only be an abuse of power. Further the investigation that are being carried out against the Petitioner are in bad faith and with an ulterior motive for administration of justice for the reason, that there is no factual basis, that has been demonstrated to justify the same.

49. As regards the Petitioner’s right to dignity as provided under **Article 28** I find that the Petitioner has demonstrated that the same has been abused by the 1<sup>st</sup> Interested Party who is handling the Petitioner in a casual and humiliating manner. The 1<sup>st</sup> Interested Party, particularly caused the publishing of trumped up charges on social media with the intention of intimidating and harassing the Petitioner who is a respectable member of the bar.

50. As regards **Article 159 (2) (c) of the Constitution** the Court is enjoined to promote and protect the purpose and principles of the Constitution. The Petitioner is thus urging this honourable Court to exercise its powers and prohibit the intended abuse of the criminal process as the same departs from the goals of justice. The Court is urged to find that the intended prosecutions are inconsistent with the national values as enshrined at **Article 10 of the Constitution**.

51. I have considered the Petitioner’s submissions and pleadings as well as the 1<sup>st</sup> Interested Part’s submissions and I find that the Petitioner has demonstrated that the Respondents and 1<sup>st</sup> Interested Party through their conduct are determined to intimidate and victimize the Petitioner in the pretext of conducting investigations. The Respondents’ actions are discriminative, irrational and motivated by bad faith and thus an abuse of the process of the Court. In determining Respondents’ malice in these proceedings, I find that the Petitioner on 13<sup>th</sup> September 2018 obtained conservatory orders before this Court, inter alia; prohibiting the Respondents from preferring any criminal charges against the Petitioner in connection to the complaint herein. The Copy of the order was extracted and duly served upon the Respondents on 14<sup>th</sup> September, 2018. However despite the 2<sup>nd</sup> Respondent being notified of the said conservatory orders, the 2<sup>nd</sup> Respondent purported to charge the Petitioner in Court in absentia in *Milimani Criminal Case No. 1752 of 2018 (R vs. Jane Nyaboke Njagi)* and obtained warrants of arrest against the Petitioner.

52. The warrants obtained in absentia were only set aside on 21<sup>st</sup> September, 2018 when the Petitioner brought to the attention of the Court of the subsistence of the said conservatory orders. I find the Respondent could have explained this blatant disobedience of Court orders, if only they appeared to defend this Petition but in their absence, the Court is left to conclude that this amounts to an abuse of the process of the Court. The Court further concludes that the move was motivated by some ulterior motives well known to the Respondents. To buttress the aforesaid, the Petitioner places reliance in the case of *Oceanic Sun Line Special Shipping Company Inc versus Fay (1988) 165 CLR 197* where it was held that the Court is obligated to take extreme steps in order to protect its own process from being used for purpose alien to the administration of justice under the law.

53. Further in *Samuel Roro Gicheru & Another versus OCS Nanyuki Police Station & another Miscellaneous Criminal Application No.*

22 of 2014 eKLR, the Court held that criminal proceedings made to secure ulterior intentions should not be allowed to stand.

54. In the instant Petition the criminal proceedings seem to be made to secure ulterior intentions as it appears the Respondents are well bent to use the state machinery to intimidate and harass the Petitioner, which is a clear indication of violation of the Petitioners' rights and misuse of state resources. Further the Respondents are acting in bad faith and in a discriminatory manner by having the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' officers being used by the 1<sup>st</sup> Interested Party for his selfish purposes. In addition the Respondents have handled the matter under investigation as a case of obtaining through false pretence when it is purely a commercial transaction.

55. This Court note further that the Petitioner is a Senior Advocate of this Court of more than 40 years practice and her rights are likely to be infringed on flimsy and fictitious charges. Her reputation stands to be damaged before her clients on charges that are meant to achieve certain goals. I note further the Petitioner's right to practice as an advocate stand to be violated without justification because she risks being arrested and charged with an offence instigated by the 1<sup>st</sup> Interested Party with an aim of settling some ulterior scores.

56. In criminal proceedings meant to achieve a collateral purpose other than its legally recognized claim the court in case of **George Joshua Okungu & Anor vs. The Chief Magistrate Court Anti-corruption Court at Nairobi**, stated as follows:-

***“a) if criminal proceedings are being carried out or threatened breach of the Petitioner’s constitutional rights, the High Court will halt the proceedings.***

***d) The High Court will stop criminal proceedings meant to achieve a collateral purpose other than its legally recognized claim.***

***e) The machinery of criminal justice should not be used as a pawn in civil disputes and individual vendetta.***

***f) No one is allowed to use the machinery of justice to cause injustice.***

***g) Where a remedy is provided elsewhere and available to enforce an order of a civil Court in his favour, there is no valid reasons why he should be permitted to invoke the assistance of the criminal law for purposes of enforcement.***

***h) If in a criminal case, a person is put in jeopardy and his personal liberty is threatened or if the object is to over-awe by brandishing the sword of punishment, such an object cannot be countenanced by the Court.***

***i) The circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing.”***

57. Similarly the High Court can stop actual or contemplated criminal proceedings if they are oppressive, vexatious or amount to an abuse of the Court process and a breach of fundamental rights and freedom (See **Commission of Police and the Director of Public Prosecution vs. KCB (Supra)**).

58. On the other hand assuming that indeed the Petitioner borrowed from the 1<sup>st</sup> Interested Party the said sum of Kshs.2.2 million, this is a civil claim, that can be recovered as a debt through the Civil Court. A civil engagement cannot be criminalized where no evidence has been placed on record to warrant criminal culpability. A civil claim can only be handled before a Civil Court but not in a criminal Court.

59. To buttress the above proposition reliance is placed in case of **Mohammed Gulam Husseign Fazal Karmali & Another vs. Chief Magistrate’s Court Nairobi & Another [2006] eKLR**, where the Honourable Judge stated thus:-

***“I wish to repeat here what I said in my own judgment in the case of R Vs. Attorney General & Another Exparte Hussein Muodobe H.C. Misc. Civil Application No. 898 of 2003 (unreported) where I found that the Police in instituting criminal proceedings were being used by one of the parties to a written lease to criminalize the terms of lease and where I had no hesitation in frowning upon the practice by granting an order of certiorari and prohibition to stop the criminal proceedings. I had this to say at pages 9, 21, 22 respectively.***

***“It follows therefore that under the Constitution and our law, a civil right or obligation cannot be determined in a Criminal Court in view of (S 77(1) and S 77(9) of the Constitution and the definition of Court in the Civil Procedure Act. Any attempt to determine any such right or obligation in a Criminal Court, clearly in my opinion violates the Constitution and it would be therefore unconstitutional. A criminal Court does not have the necessary procedural safeguards which can lead to a fair trial”***

***“We must also remind ourselves that the reason why that independence was conceived, fought for and maintained in the first place was to enable us to hold the scales of justice in cases such as this between the power of the state on the one hand (to prosecute) and the liberty and freedom of the individual”***

60. ***The upshot is that the Petition herein is meritorious and is accordingly allowed in the following terms:-***

***a) A declaration be and is HEREBY issued that resonating from the fundamental rights under the Constitution of Kenya, 2010 particularly the rights to information under Article 35 and right to Fair Administrative Action under Article 47 of the Constitution, the decision of the 2<sup>nd</sup> Respondent to deny the Petitioner information requested for purposes of understanding the purported complaint against her, and failing to hear the Petitioner’s side of the story for purposes of thorough investigations into the allegations by the 1<sup>st</sup> Interested Party is in violation of the Petitioner’s fundamental rights under the Constitution of***

Kenya, 2010.

*b) A declaration be and is HEREBY issued that investigations on the Petitioner by the 2<sup>nd</sup> Respondent and the 3<sup>rd</sup> Respondent's intended institution of criminal proceedings against the Petitioner vide Police Case File No. 114/2018 (Parliament Police Station) violates the Petitioner's Constitutional rights, is an abuse of the process of the Court and therefore unlawful, null and void.*

*c) An Order of Certiorari be and is HEREBY issued to quash the decision of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to institute purported criminal proceedings vide Police Case File No. 114/2018 (Parliament Police Station) against the Petitioner, and the intended arraignment before a Criminal Court.*

*d) An order of Prohibition be and is HEREBY issued prohibiting the Respondents from proceeding with the purported institution of purported criminal proceedings vide Police Case File No. 114/2018 (Parliament Police Station) against the Petitioner, and the intended arraignment before a Criminal Court.*

*e) An Order of Mandamus be and is HEREBY issued against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents compelling the investigation into the purported online money business in the name of One Coin, One Life being undertaken by the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties, and the loss of Kenya Shillings Eight Hundred and Sixty Seven Thousand (Kshs.867,000/=) by the Petitioner to the Interested Parties, and the purported investment of Kenya Shillings Two Million Two Hundred Thousand (Kshs.2,200,000/=) allegedly on behalf of the Petitioner.*

*f) Costs of the Petition to the Petitioner against the Respondents and Interested Parties.*

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7<sup>TH</sup> DAY OF OCTOBER, 2021.

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J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA