REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

PETITION NO. E005 OF 2021

IN THE MATTER OF ARTICLES 1,2,3,19,20,21,28,29,40,47,48,50,60,

64,73,157,159,160,162,165,169,232,239 AND 258 OF THE CONSTITUTION OF KENYA

-AND-

IN THE MATTER OF SECTION 6 OF THE OFFICE OF

THE DIRECTOR OF PUBLIC PROSECUTIONS ACT, 2013

-AND-

IN THE MATTER OF SECTION 2 AND 4 OF THE FAIR

ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015

-AND-

IN THE MATTER OF SECTION 193A OF THE

CRIMINAL PROCEDURE CODE, CAP. 75

-AND-

IN THE MATTER OF NYAHURURU CHIEF MAGISTRATE'S

COURT CRIMINAL CASE NO. E456 OF 2021

-AND-

IN THE MATTER OF PROSECUTION COMMENCED

FOR VEXATIOUS PURPOSES AND/OR PROCEEDINGS

-BETWEEN-

IBRAHIM MACHARIA MWANGI.....1ST PETITIONER

DAVID MAINA WAIGWA.....2ND PETITIONER

-AND-

NYAHURURU CHIEF MAGISTRATE'S

COURT.....1ST RESPONDENT

DIRECTOR PUBIC PROSECUTIONS.....2ND RESPONDENT

-AND-

DANIEL K. CHEMON.....3RD RESPONDENT

JUDGMENT

1. The Petitioner through a Petition dated 28th May 2021 prayed for various reliefs being as follows:

2. An order of certiorari do issue quashing ***Nyahururu Chief Magistrate's Court Criminal Case No. E456 of 2021 R vs Ibrahim Macharia Mwangi & David Maina Waigwa***.

3. An order of prohibition do issue prohibiting Daniel K. Chemon either by himself or acting through the Director of Public Prosecutions or any other person acting on his behalf from further prosecuting the Petitioners in ***Nyahururu Chief Magistrate's Court Criminal Case No. E456 of 2021 R Vs Ibrahim Macharia Mwangi & David Maina Waigwa*** or further charging the Petitioners in any court in the Republic of Kenya with any offence premised on the same facts as is impugned criminal case herein.

4. That cost of this Petition be provided for together with interest thereon at court rate.

PETITIONERS' CASE:

5. The facts of the Petition as outlined by the Petitioners are that the Petitioners were allocated **LR Nyahururu Municipality Block 8/602** jointly vide allotment letter **Ref No. 250IIIXXV** when the said demised parcel of land was unsurveyed and was known and referred to as **UNS. Residential Plot No. B – Nyahururu Municipality** and became the demised parcel of land after survey was carried out and the area registry map was amended to reflect as much.

6. That the Petitioners complied with the terms and conditions of the allotment letter and/or letter of offer, were registered as proprietors of the demised property and were ultimately issued with a certificate of lease in that regard and as a result, the Petitioners are currently registered as the absolute and indefeasible owners of the demised parcel of land subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate of lease.

7. That in or about the month of March 2020, the Petitioners together with their agents visited the demised parcel of land with a view to commence development by way of fencing the demised property, when the interested party appeared with a team of goons who threatened violence against the Petitioners and their agents causing them to flee the scene for their lives the said the events led to the filing of ***Nyahururu Chief Magistrate's Court CMELC No. 23 of 2020 Ibrahim Macharia Mwangi & David Maina Waigwa vs Daniel Chemon*** by the Petitioners.

8. That the Petitioners were able to obtain interim court orders of temporary injunction restraining the interested party from interfering with their quiet possession and use the demised property.

9. That the interested party during the pendency of the said matter proposed an out of court settlement of the said mater and when the parties could not agree on the terms and conditions of the said out of court settlement, the interested party caused the arrest of the Petitioners where the Petitioners were charged in ***Nyahururu Chief Magistrate's Court Criminal Case No. E456 of 2021 R vs Ibrahim Macharia Mwangi & David Maina Waigwa*.**

10. That the Petitioners were charged with making a document without authority contrary to **Section 357 (a) of the Penal Code**, forgery contrary to **Section 349 of the Penal Code**, conspiracy to defraud contrary to **Section 317 of the Penal Code** and obtaining registration by false presence contrary to **Section 320 of the Penal Code.**

11. That the said criminal case is coming up for hearing on the 21st day of June 2021 while the civil matter is coming up for hearing on the 3rd day of June 2021.

12. That in any court proceedings, there should be one suit, one decision which is enough and there should not be many decisions in regards of the same suit and where a court has decided based on facts, it is final and should not vex open by same parties in subsequent litigation.

13. That the arrest of the Petitioners based on the interested party's complaint on disputed ownership of the subject parcel of land therefore was a gross abuse of the criminal justice system, police powers and functions and public prosecution function therefore an upfront to ***Articles 19, 20, 21, 22, 25, 47, 50, 64, 73, 75, 157, 159, 162 & 232 of the Constitution of Kenya.***

14. That the criminal justice system in ***Nyahururu Chief Magistrate's Court Criminal Case No. E456 of 2021 R Vs Ibrahim Macharia Mwangi & David Maina Waigwa*** is being used to settle what is otherwise a civil dispute which has been subject of ***Nyahururu Chief Magistrate's CMELC no. 23 of 2020 Ibrahim Macharia Mwangi & David Maina Waigwa vs Daniel Chemon.***

15. That the continued prosecution of the Petitioners is not only vexatious but also oppressive and an abuse of the court process which is also intended to harass Petitioners into either abandoning ***Nyahururu Chief Magistrate's CMELC No. 23 of 2020 Ibrahim Macharia Mwangi & David Maina Waigwa vs Daniel Chemon*** or giving in to the interested party proposal to have them include the interested party into ownership of the subject property.

16. That the hallmark of such a proceeding is that its effect is to subject the Petitioners to inconvenience, harassment and expense which is so

great, that is disproportionate to any gain likely to accrue to the Petitioners and that it involves an abuse of the court process and that this honorable court has a duty to ensure that its processes are not abused or otherwise used to perpetuate injustice or for improper motives.

17. In conclusion, the Petitioners averred that the criminal proceedings are an upfront to express provisions of the Constitution of Kenya, 2010 as well as statutes that derive their existence from the said Constitution of Kenya

18. The Petitioners also filed a Supporting Affidavit by David Maina Waigwa reiterating the facts outlined in the Petition.

19. Moreover, the Petitioner filed a supplementary affidavit dated 17th September 2021 in further support of the Petition and in response to the 2nd Respondent's replying affidavit.

20. The Petitioners averred that whereas the state appears to be the complainant in the criminal case, the state per se does not ordinarily lodge complaints to the investigative agencies and that in the ordinary order of affairs complaints are lodged by either natural persons of legal entities.

21. That it is the person who or the entity which appears in the body of the charge sheet under the column of complainant and address and that in this case the charge sheet indicates Daniel K. Chemon but the 2nd Respondent has not by way of evidence demonstrated that the interested party herein ever made a report to the D.C.I Nyahururu or at all, and when the same was made.

22. That the 2nd Respondent has not placed before this honorable court any request by the interested party to the said D.C.I Nyahururu, to file criminal charges against anyone who may be implicated in any fraud or any material and/or finding of the said D.C.I Nyahururu that informed the arrest and charging of the Petitioners thus leaving the question as to whether Daniel K. Chemon is a complainant stricto sensu in the criminal case.

23. The Petitioners asserted that as a result of the foregoing there is no complainant in the criminal case and that the failure of the 2 nd Respondent to supply this court with the material and/or finding that caused it to charge them, there is no evidence placed before the court implicating them in any way.

24. That the 2nd Respondent in its replying affidavit and charge sheet annexed thereto has only attempted to demonstrate that the impugned allotment letter was not authored, issued and signed by Mr. S.K. Mburugu on behalf of the commissioner of lands but they did not take steps towards connecting the Petitioners with the impugned allotment letter.

25. That the Petitioners reiterated that the investigations and subsequent charging in the criminal case were inclined towards a premeditated goal being at all costs to implicate the Petitioners in order to intimidate and/or harass them to drop their civil case filed before the chief magistrate and in effect therefore drop their interests in the subject parcel of land.

26. That the 2nd Respondent has dwelt so much on the issue of jurisdiction of the Magistrate's Court as well as the mandate of the Director of Public Prosecutions which are not the issues in controversy herein and that the real issue in controversy is whether the 1st Respondent's jurisdiction as well as the 2nd Respondents mandate have been invoked within the confines of public interests, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process

27. That clearly looking at the Petitioners' plaint in ***Nyahururu Chief Magistrate's Court ELC No.23 of 2020*** which was filed on 2nd June 2020 while the interested party is said to have discovered that they had an adverse claim against him over the subject parcel of land sometime in the year 2020 but he only made the first report to the DCC in March 2021. That it is not stated when he reported the matter to the DCI Nyahururu but the Petitioners were arrested and charged on 16th February 2021 way after instituting the civil matter.

28. That the interested party herein cannot be said to have been in possession of the subject land courtesy of an allotment letter to an unsurveyed parcel of land as an allotment letter is only of transient value and not title to property and therefore could not have been the owner of the parcel of land until the same was registered in his name and a certificate of lease issued.

29. The Petitioners contended that even assuming that the interested party was the complainant in the criminal case, then his clear intention is to assert ownership rights over the property in question and therefore ousting the jurisdiction of the criminal court and hence an abuse of the legal and court process in our charging in court by the 2nd Respondent.

2ND RESPONDENT'S RESPONSE:

30. The 2nd Respondent filed a replying affidavit by Fridah Kainga, prosecution counsel sworn and filed on 15th July 2021.

31. The 2nd Respondent contended that on 23rd January 1995 Daniel Kipyakwai Chemon the interested party herein was issued with a letter or allotment for Unsurveyed Residential Plot B Nyahururu Municipality measuring five acres. That the allotment letter was signed by S.K. Mburugu who was the Commissioner of Lands then.

32. That based on the letter of allotment the interested party accepted the offer through a letter dated 6th August 2019 and went to pay land rates amounting to kshs. 123,300 as he awaited for issuance of titles. That he took one Joseph Wanderi to be a caretaker in the plot.

33. That sometimes in the year 2020, he was informed by the caretaker that some people had encroached on the plot of land and he then

made a report at the Deputy County Commissioner's office in March 2021.

34. That sometimes in the year 2020 he was called by the court process server who informed him that there was an order barring him from entering into the plot of land.

35. That he was not aware of any pending civil case before any court touching on Unsurveyed Residential Plot B Nyahururu Municipality and that he has never proposed an out of court settlement to any party.

36. That the matter had been reported at DCI Nyahururu which carried out investigations into allegations of encroachment on the plot of land and after investigations, the Petitioners were arrested and charged before the Magistrate's Court with:

i. Making a document without authority contrary to Section 357 (a) of the Penal Code.

ii. Forgery contrary to Section 345 as read with Section 349 of the Penal Code.

iii. Conspiracy to defraud contrary to Section 317 of the Penal Code.

iv. Obtaining registration by false pretense contrary to Section 320 of the Penal Code.

37. The 2nd Respondent deponed that the issues in the criminal case pending before the Chief Magistrate Court in Nyahururu are very different from the ones in ELC Case No. 123 of 2020 as they touch on fraud and the criminal charges are premised on the way the title deed of the plot of land was acquired while the civil suit deals purely with ownership of the said plot.

38. Reliance was placed on ***Article 162(4) and 169(2) of the Constitution of Kenya*** and ***Section 5 and 6 of the Magistrates Courts Act.***

39. That as far as being a court of first instance in criminal matters, the Magistrate Court in Nyahururu has the jurisdiction to hear matters of law and fact. Thus by virtue of the fact that the issue of how the tile deed were acquired has not been canvassed before any court of concurrent or superior jurisdiction, the trial court is well within its power.

40. That this court ought not to usurp the constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution is exercise of the discretion conferred upon that office.

41. Further, the 2nd Respondent asserted that the mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail is not ground of halting those proceedings by way of a constitutional Petition since constitutional proceedings are not concerned with the merits but with the decision making process.

42. That the pertinent question that this court should address is whether a constitutional Petition can competently evaluate the evidence or statements of witnesses in a criminal court to see if the prosecution has a prima facie case against a person charged; this is a function ad jurisdiction of a trial court whose work is actually to access the evidence pursuant to the provisions of ***Sections 210 and 211 of the Criminal Procedure Code.***

43. That even though the Petitioner herein may have a good defense in the criminal case against him, it is not a ground that ought to be relied upon by this court in order to halt the criminal process since that defence is open and available to the Petitioner in trial.

44. It was the 2nd Respondent's averment that the concurrence of criminal proceedings alongside civil proceedings would not ipso facto constitute an abuse of court process.

45. That the law of equity demands for one to come with clean hands and I this instance the Petitioner has chosen to omit some material facts from the court.

46. In conclusion, the 2nd Respondent deponed that the Petitioner has failed to demonstrate that the 2nd Respondent either acted ultra vires, usurped its powers or acted contrary to the law and that it is in the interest of justice and public interest that the orders herein be declined.

47. In their written submissions dated 18th October 2021, the 2nd Respondent asserted that constitutional Petitions cannot and should not as a matter of procedure be used by suspects in criminal proceedings to prove their innocence, whereas an applicant may very well be correct that there are several factors which go to show their innocence these are not proper proceedings in which correctness of the evidence or truthfulness of the witness is to be gauged this task is solely reserved for the trial court which is constitutionally bound to determine the proceedings in accordance with the law.

ANALYSIS AND DETERMINATION:

48. I have carefully considered the Petition, the responses thereto, the parties' submissions and the decisions referred to. I find the following two issues are for determination:

a. Whether this court should quash and prohibit proceedings in Nyahururu Chief Magistrate's Court Criminal Case No. E456 of 2021 R vs Ibrahim Macharia Mwangi & David Maina Waigwa

49. The Petitioner asserted that in any court proceedings, there should be one suit, one decision which is enough and there should not be many decisions in regards of the same suit and where a court has decided based on facts, it is final and should not vex open by same parties in subsequent litigation thus raising the argument of the doctrine of res judicata. In rejoinder, the 2nd Respondent deponed that the issues in the criminal case pending before the Chief Magistrate Court in Nyahururu are very different from the ones in ***ELC Case No. 123 of 2020*** as they touch on fraud and the criminal charges are premised on the way the title deed of the plot of land was acquired while the civil suit deals purely with ownership of the said plot.

50. The doctrine of *"res judicata"* is provided for under ***Section 7 of the Civil Procedure Act*** in that: -

> ***"No court shall, try, any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or issue in which such issue has been subsequently raised, and has been heard and finally decided by such court."***

51. In ***Republic v Chief Magistrate's Court at Milimani Law Courts; Director of Public Prosecutions & 2 others(Interested Parties); Ex-parte Applicant: Pravin Galot [2020] eKLR*** it was stated that:-

> ***"The doctrine of res judicata is provided for in Section 7 of the Civil Procedure Act and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of Section 7 therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The Conditions are:- (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit."***

52. Guided by the above conditions, I find that the doctrine of res judicata does not hold in the instant Petition. It is my opinion that the Petitioner has not proven that the five conditions contemplated in the aforementioned case are in coexistence. I agree with the 2nd Respondent's assertion that while the criminal charges touch on fraud and are premised on the way the title deed of the plot of land was acquired, the civil suit deals purely with the issue of ownership of the said plot. In any case, the matters in issue in both cases have not been heard and finally decided.

53. Additionally, the Petitioners' argued that the criminal justice system is being employed to settle an otherwise civil dispute therefore an abuse of court process. However, I find that their argument is misplaced. In the ***Republic -vs- Director of Public Prosecution & 2 Others Ex-parte Francis Njakwe Maina & Another [2015] eKLR,*** it was expressed that:

> ***"The burden was therefore upon the applicants to place before the Court, not by mere allegations, but also by way of available evidence that the Respondent's conduct in preferring the criminal charges in the face of existing civil proceedings is reprehensible and an abuse of the Court and legal process and ought to be arrested. As I have said the applicants have failed to produce the crucial evidence in support of their allegations that the evidence presented by the complainant proves their case that the criminal process was put into motion with a view to intimidating them into admitting liability in the civil suit.***
>
> ***It must always be remembered that the mere fact that criminal proceedings are being undertaken at the same time as the civil proceedings does not ipso facto amount to an abuse of the court process. The applicant ought to go further and show that the dominant motive for the institution of the criminal proceedings is to scuttle the civil process or force the applicant into abandoning his civil claim or force the applicant into submitting to the civil claim. If it is shown that the object of the prosecutor is to over-awe the Respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court. In other words the prosecutor must be actuated more by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose in such circumstances would be to further that ulterior motive and that is when the High Court steps in."***

54. Additionally, ***Republic v Attorney General & 4 others Ex-Parte Diamond Hashim Lalji and Ahmed Hasham Lalji (2014) eKLR***, the court further held:

> ***"The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore, the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. Section 193A of the Criminal Procedure Code on this issue provides: 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."***

55. At the center of this Petition, is the Petitioners' allegations is that the DPP is being used to perpetuate injustice of improper motives by instituting criminal proceedings against the Petitioners therefore amounting to an abuse of court process.

56. The Petitioners raised the critical argument that their continued prosecution is not only vexatious but also oppressive and an abuse of the court process which is also intended to harass them into either abandoning ***Nyahururu Chief Magistrate's CMELC No. 23 of 2020 Ibrahim***

Macharia Mwangi & David Maina Waigwa vs Daniel Chemon or giving in to the interested party's proposal to have them include the interested party into ownership of the subject property.

57. The Petitioners averred that the hallmark of such a proceeding is that its effect is to subject the Petitioners to inconvenience, harassment and expense which is so great, that is disproportionate to ay gain likely to accrue to the Petitioners and that it involves an abuse of the court process and that the criminal proceedings are an upfront to express provisions of the Constitution of Kenya, 2010 as well as statutes that derive their existence from the said Constitution of Kenya.

58. The High Court is empowered by the Constitution of Kenya to grant remedies such as certiorari, prohibition, mandamus or permanent stay of proceedings in order to advance the rule of law. The court is mandated to meet the ends of justice while ensuring not to allow proceedings that would be an abuse to the court process. In the leading case of ***Bennet vs Horseferry Magistrates Court & Another {1993} All E.R 138, 151, House of Lords***, the court confirmed that an abuse of process justifying the stay of a prosecution could arise in the following circumstances:

> ***i. Where it would be impossible to give the accused a fair trial; or;***
>
> ***ii. Where it would amount to a misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.***

59. The Court of Appeal in ***Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others [2018] eKLR*** referred to the Supreme Court of India in ***State of Maharashtra & Others v. Arun Gulab & Others, Criminal Appeal No. 590 of 2007,*** where the Court stated:

> ***"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.***
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> ***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."***

60. Further, 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.***
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> ***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.***
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> ***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."***

61. In ***Meme -vs- Republic & Another (2004) eKLR***, the Court of Appeal discussed abuse of the court process thus: -

> ***"An abuse of the court's process would, in general, arise where the court is being used for improper purpose, as a means of vexation and oppression, or for ulterior purposes, that is to say, court process is being misused."***

62. It is well established that the Court ought not to usurp the constitutional mandate of the Director of Public Prosecutions (DPP) to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution. However, the DPP is required to be independent in the exercise of its functions and should not be perceived to be acting under the solicitation

or persuasion of any other body and/or person. The DPP must serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law. The independence of the office of the DPP is provided under ***Article 157 (10) of the Constitution*** which declares that the DPP shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his powers or functions, shall not be under the direction or control of any person or authority. This provision is replicated in ***Section 6 of the Office of the Director of Public Prosecutions Act*** which provides that pursuant to ***Article 157 (10) of the Constitution,*** the Director of Public Prosecutions shall-

· ***not require the consent of any person or authority for the commencement of criminal proceedings;***

· ***not be under the direction or control of any person or authority in the exercise of his powers or functions under constitution, this Act or any other written law; and***

· ***be subject only to the Constitution and the law.***

63. ***Article 157(6) of the Constitution of Kenya***, mandates the DPP 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."

64. ***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."

65. 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."

66. The abuse of legal process through criminal prosecution was widely discussed in ***Kuria & 3 others vs A.G. (2002) 2KLR*** *where* the court held 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 perform...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 underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilization is far that which the courts indeed the entire system is constitutionally mandated to administer... It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilize the procedures has already been made. It has never been be argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law...In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilized. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed...There is nothing which can stop the Court from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already"

67. Moreover, in ***Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703***, it was held that:

"It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth...When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the Respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court...In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in..."

68. I wish to point out that judicial review proceedings are concerned with the process rather than merits of the challenged decision or proceedings. The core issue here is for this court to determine the circumstances under which the High Court in exercise of its vast jurisdiction can halt, stop, prohibit or quash a criminal prosecution. Therefore, this court is not entitled to make definitive findings on matters which go to the merit of the impugned proceedings as was stated in ***Republic v Attorney General & 4 others Ex-Parte Diamond Hashim Lalji and Ahmed Hasham Lalji (supra)*** where the Court expressed itself a follows:

"Before dealing with the issues raised herein, it is my view that the principles guiding the grant of the orders in the nature sought herein ought to be reiterated. Several decisions have been handed down which in my view correctly set out the law relating to circumstances in which the Court would be entitled to prohibit, bring to a halt or quash criminal proceedings. It is however always important to remember that in these types of proceedings the Court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings. As judicial review proceedings are concerned with the process rather than merits of the challenged decision or proceedings the court is not entitled to make definitive findings on matters which go to the merit of the impugned proceedings. In determining the issues raised herein the Court will therefore avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial Court. The Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings."

69. From the individual facts of this case, although the Petitioners have made a lot of allegations concerning the alleged abuse of court process, I find that they have not proven that the interested party or anyone else is coercing the DPP to mount prosecution against them in order to harass them into dropping the civil suit neither have they proven that that it would be impossible for the court to given them a fair trial. I adopt the position of the court in ***Republic -v- Director of Public Prosecution & 2 others Ex-parte Francis Njakwe Maina & another [2015] eKLR*** where it was expressed:

"The burden was therefore upon the applicants to place before the Court, not by mere allegations, but also by way of available evidence that the respondent's conduct in preferring the criminal charges in the face of existing civil proceedings is reprehensible and an abuse of the Court and legal process and ought to be arrested. As I have said the applicants have failed to produce the crucial evidence in support of their allegations that the evidence presented by the complainant proves their case that the criminal process was put into motion with a view to intimidating them into admitting liability in the civil suit. It must always be remembered that the mere fact that criminal proceedings are being undertaken at the same time as the civil proceedings does not ipso facto amount to an abuse of the court process. The applicant ought to go further and show that the dominant motive for the institution of the criminal proceedings is to scuttle the civil process or force the applicant into abandoning his civil claim or force the applicant into submitting to the civil claim. If it is shown that the object of the prosecutor is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court. In other words the prosecutor must be actuated more by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose in such circumstances would be to further that ulterior motive and that is when the High Court steps in."

70. Furthermore, I find that there are no concrete grounds raised by the Petitioners to prove the alleged abuse of court process other than the fact that there is an ongoing civil dispute; which is not evidence of any ulterior motive by the DPP. The Petitioners asserted that the criminal justice system in ***Nyahururu Chief Magistrate's Court Criminal Case No. E456 of 2021 R Vs Ibrahim Macharia Mwangi & David Maina Waigwa*** is being used to settle what is otherwise a civil dispute which has been subject of ***Nyahururu Chief Magistrate's CMELC no. 23 of 2020 Ibrahim Macharia Mwangi & David Maina Waigwa vs Daniel Chemon***. However, in ***Kuria & 3 others Versus the Attorney General (supra)*** the court held: -

"It is not enough to simply 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 absence of concrete grounds for supposing that a criminal

prosecution is an "abuse of process", is a "manipulation", "amounts to selective prosecution" or such other processes, or even supposing that the applicants might not get affair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts. The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a 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...In the circumstances of this case it would be in the interest of the applicants, the Respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names."

71. Consequently, I find that there is no evidence of any extraneous matters divorced from the goals of justice on the part of the Respondents. It is also not for this court to dictate the sufficiency or otherwise of the evidence before the prosecution. It is for the DPP to decide independently and act accordingly. The Petitioners have failed to prove to allow the prosecution to continue would amount to an abuse of the process of the court or infringement of their fundamental rights.

72. The 2nd Respondent stated that criminal case pending before the Chief Magistrate Court in Nyahururu are against the Petitioners touch on fraud and the illegality in obtaining of registration of the suit land. The 2nd Respondent attached the corresponding copy of the Charge Sheet. There is no evidence adduced to prove that the commencement of the criminal charges against the Petitioners is intended for malicious gains and harassment of the Petitioners. It is my opinion that the charges have basis in law and are therefore not vexatious or intended to purely inconvenience the Petitioners. I believe that the DPP in this case are acting in public interest and for the promotion of public good as is their constitutional mandate. In ***Kuria & 3 Others vs. Attorney General (supra),*** the court stated that:

"The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a 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..."

73. In the upshot, I find that the Petitioners have not sufficiently demonstrated the stifling of or threats of infringement of rights, fundamental freedoms, the Constitution and/or the law by the investigative and prosecutorial agencies against them. Further, they have not demonstrated that the criminal case against them violates or threatens their constitutional rights or is an abuse of court process. It is therefore my finding that the Petitioners have not satisfied this court for the grant of the orders sought. Thus I make the orders that;

i. The Petition, is hereby dismissed with no costs.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 4TH DAY OF NOVEMBER, 2021.

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CHARLES KARIUKI

JUDGE