



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
MILIMANI LAW COURTS
CONSTITUTIONAL PETITION NO. E 233 OF 2019

**IN THE MATTER OF: ARTICLES 2, 10, 21, 22(1) (3) (4), 23, 25, 27, 28, 35, 47, 50, 73, 157 (11),
159 (2), 232 & 239 (3) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010;**

AND

**IN THE MATTER OF : AN APPLICATION BY MANI PRODUCTIONS LIMITED,
KOLLENGONDE LAKSHMINARAYAN PADMANABHAN & KOLLENGONDE
LAKSHMINARAYAN VENKATRAGHVAN;**

AND

**IN THE MATTER OF: ABUSE OF POLICE POWERS,
THE CONSTITUTION AND THE COURT PROCESS;**

BETWEEN

MANI PRODUCTIONS LIMITED.....1ST PETITIONER
KOLLENGONDE LAKSHMINARAYAN PADMANABHAN.....2ND PETITIONER
KOLLENGONDE LAKSHMINARAYAN VENKATRAGHVAN.....3RD PETITIONER

VERSUS

INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE.....1ST RESPONDENT
THE DIRECTOR, CRIMINAL INVESTIGATIONS DEPARTMENT.....2ND RESPONDENT
THE OFFICE OF THE ATTORNEY GENERAL.....3RD RESPONDENT
THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS.....4TH RESPONDENT
THE CHIEF MAGISTRATES COURT - KIBERA.....5TH RESPONDENT

AND

JUDGMENT

THE PETITION

1. The Petitioners through their amended Petition dated 2nd June, 2020, seek the following orders:-

a) A DECLARATION be and is hereby issued that the 1st and 2nd Respondent conduct and actions jointly and severally contravene the constitution and/or are likely to contravene or infringe upon the petitioners' fundamental rights and freedoms guaranteed under Articles 2(1), & (2), 3(1), 10(1), 10 (2), 25 (a), 27 (1) & (2), 28, 29 (a,b,c,d,f), 35, 39, 47, 48 and 49 of the Constitution of Kenya, 2010;

b) A DECLARATION be and is hereby issued that the 1st and 2nd Respondent's conduct and actions which are complained of in the Petition, jointly and/or severally, singularly and/or cumulatively against the Petitioners are oppressive, unfair, unreasonable, irrational, illegal and an abuse of power and the criminal justice system and process;

c) AN ORDER OF PROHIBITION directed to all the Respondents jointly and severally prohibiting any and all of them from carrying out, maintaining and/or proceeding with any further and/or investigations into or in connection with the contract dated 7th January, 2019 between the petitioners and the interested party;

d) AN ORDER OF PROHIBITION directed to all the Respondents jointly and severally prohibiting any and all of them from reopening or purporting to reopen, mounting, bringing, instigating, carrying out and/or proceeding with any criminal proceedings or charges against the petitioners in connection with the Contract dated 7th January, 2019 between the Petitioners and the Interested Party;

i) A DECLARATION that the complaint filed under OB67/07/06/2019 against the Petitioners is irregular and an abuse of due process hence cannot stand.

e) Costs of the Petition be borne by the Interested Party;

f) Any other relief that this Honourable Court may deem fit and just to grant in the interest of Justice;

THE PETITIONERS' CASE

2. The Petition herein arises out of an investment agreement dated 7th January, 2019 between the Petitioners and the Interested Party.

3. The above contract was entered into by the 2nd and 3rd Petitioners as directors of the 1st Petitioner in their capacity as event organizers and the interested party as the investor of the program.

4. Parties agreed that the investor (the interested party herein) was to make a deposit of Kshs. 3,000,000.00 (Three Million Kenya Shillings) towards the "*Nakash Aziz Live In Concert*".

5. The parties agreed further they were to share the profits and/or losses therefrom and that the 1st petitioner would operate their existing account for the show as provided in the contract.

6. The full and final investment sum was to be deposited on or about the 31st of January, 2019 and the investor was to bring on board a title sponsor for the show valued at Kenya Shillings One Million Two Hundred Thousand Only (Kshs. 1,200,000/=).

7. There was also an arrangement that any dispute with respect to the contract was to be settled in the Civil Courts.

8. The Petitioners aver that the interested party made the first installment of Kshs. 2,000,000.00 (Kenya Shillings Two Million) on or about the 7th January, 2019 and the petitioners immediately commenced the arrangement for organizing the show.

9. The Petitioners aver that the interested party failed to honour the contract by depositing the balance of the investment sum by 31st of January, 2019, hence breaching the contract and the Petitioners' advocate wrote a demand letter to that effect.

10. The Petitioners aver that on or about the 7th June, 2019 at about 1000 Hrs, while on their personal errands, the 2nd and 3rd Petitioners were ambushed and arrested by persons they suspected to be police officers and were whisked to Parklands Police Station and later to the 2nd Respondent's station at Nairobi Area near Integrity Centre.

11. The 2nd and 3rd petitioners were informed that they were under arrest for obtaining money by false pretense and therefore tried to prove their innocence to no avail.

12. The 2nd and 3rd Petitioners were later released on a cash bail of Kenya Shillings Seventy Five Thousand (Kshs. 75,000/-) with threats of

criminal prosecution by the 1st and 2nd Respondents if they failed to refund the said monies.

13. For the abovementioned reasons, the Petitioners now seek this honourable Court's intervention to stop the intended criminal proceedings on the basis of being malicious, irregular and unconstitutional.

THE INTERESTED PARTY'S RESPONSE

14. The Interested Party filed his answer to the petition on the 1st November, 2019 and a replying affidavit sworn by Sanneh Neejay Raikundalia on 3rd December, 2019 opposing the Petition.

15. The Interested Party's position is that he entered into an agreement with the Petitioners on the 7th January, 2019 and another one dated 9th January, 2019 for the performance of a concert labeled Nakash Aziz Concert that was to take place sometime in March, 2019.

16. The interested party avers that he was able to pay Kshs. 2,000,000.00 on 9th January, 2019 but was unable to deposit the balance of Kshs. 1,000,000.00 owing to some clarification issues but reached an understanding with the petitioners and deposited the said balance on the 6th of February, 2019 into the petitioners' account.

17. The interested party avers that the petitioners turned a cold shoulder and refused to acknowledge receipt of the said final deposit.

18. The Interested Party contend that he later received an email for breach of contract from the Petitioner's lawyer who equally threatened to sue him.

19. The Interested Party avers that his father and brother proceeded to Nairobi Area police station on 18th April, 2019 and made a formal complaint against the Petitioners, since they were the fund providers of the Interested Party.

20. The Interested Party states that he genuinely believed he had been defrauded by the petitioners of his money under the context of false pretense and also the belief that the petitioners had used his investment funds for their personal errands thereby justifying the said complaint.

21. The Interested Party avers that the Petitioners were later arrested and released on cash bail after which they rushed to this Court to stop further arrest and stifle ongoing criminal investigations against them.

THE PETITIONER'S SUBMISSIONS

22. The Petitioners vide their submissions dated 25th February, 2021 supports the Petition.

23. The Petitioners have responded on the issues of jurisdiction and averred that this Honourable Court has original jurisdiction to entertain any matter whether criminal or civil as provided under the Constitution.

24. The Petitioners places reliance in the case of ***Rueben Gachukia & another vs Inspector General of the National Police Service & 4 others*** in support of their assertions.

25. The Petitioners averred that where a criminal prosecution would be considered an abuse of the Court process, the Court is required to move with haste to stop it.

26. The Petitioners contention is based in the manner in which the Interested Party lodged the complaint and further that the 1st and 2nd Respondents acted with impunity in a selective and discriminatory manner to conduct the impugned investigations.

27. Reliance is placed in the case of ***Thuita Mwangi & 2 others vs Ethics and Anti-Corruption Commission & others*** in support of their averments.

28. The Petitioners submitted that the petitioners' rights would be infringed if the criminal proceedings are left unstopped.

29. The Petitioners pray that the Court allow their Petition.

THE 1ST, 2ND and 4TH RESPONDENTS' SUBMISSIONS

30. The 1st, 2nd and 4th Respondents are opposed to the Petition vide their submissions dated 10th May, 2021.

31. On the first issue the respondents submitted that the prayers sought by the petitioners are unconstitutional as they seek to prevent the ODPP and DCI from exercising their mandate as provided for by the law.

32. The Respondents placed reliance in the case of ***Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272*** in support of their assertions.

33. It is submitted by the Respondents that pursuant to ***Article 24(1) of the Constitution***, fundamental rights and freedoms were limited by

law subject to being reasonable and justifiable.

34. On the second issue the Respondents contended that the DCI is functionally independent and can only take directions to investigate from the ODPP and no other authority. The Respondents further submitted that the Petitioners had not provided any written directive to the DCI by any other authority to justify their claim that the investigations have been commenced for a collateral purpose, and therefore not acting on discharge of their lawful authority.

35. The Respondents placed reliance in the case of *Dr. Alfred N. Mutua vs The Ethics and Anti-Corruption Commission & Others, Misc. Application No. 3 of 2016* in support of their case.

36. The Respondents categorically averred that the 2nd respondent were prompted to investigate an alleged offence of obtaining money by False Pretence contrary to **Section 313 of the Penal Code** following a complaint made by the interested party vide **OB 3/11/05/2019**.

37. The Respondents urged the Court to be guided by the case of *Republic v The Commissioner of Police & the Director of Public Prosecution Ex parte Michael Monari & Another Misc. Application No. 68 of 2011, Nairobi*, in determining whether the 2nd and 4th Respondents had abused their statutory and constitutional powers.

38. On the third issue, the respondents submitted that **Article 157 of the constitution** and **Section 5 of the Office of Director of Public Prosecutions Act** vests powers of prosecution upon the 4th Respondent's office.

39. The Respondents submitted that the primary test of making a prosecutorial decision is whether or not the materials gathered meet the evidential and public interest threshold as was held in the case of *Pauline Raget Adhiambo Agot v DPP and 5 others (2010) Petition No. 446 of 2015*.

40. The Respondents position is that lodging complaints or reporting incidents of criminal activity does not equate to giving directions to the 2nd and 4th Respondents as if it were so then an aggrieved party would never receive justice. They relied on the case of *AG vs AG & 3 Others Ex parte Thomas Nga'ng'a Munene (2014) Petition No. 166 of 2013* to support their averments.

41. On the fourth issue with respect to the doctrine of separation of powers, the respondents averred that for orderly functioning of state organs, each arm of government was supposed to be allowed to exercise its powers without interference from any of its other arm.

42. The Respondents therefore prayed that the Honourable Court do dismiss the Petition with costs to the 2nd and 4th Respondents.

THE INTERESTED PARTY'S SUBMISSIONS

43. The Interested Party vide his submissions dated 26th October, 2020 opposed the Petition.

44. He raised four issues for determination by this Court.

45. On the first issue, the interested party averred that it is trite law that a person who alleges a violation of a right or fundamental freedom, must state the specific rights violated and the manner in which such right has been violated.

46. He relied in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] e KLR* in support of his proposition.

47. The Interested Party submitted that petitioners had failed to demonstrate in a precise manner, how their constitutional rights had been violated. He urged further that the 1st and 2nd Respondents are constitutional institutions mandated with the obligations of investigating a crime and that they were lawfully discharging their functions.

48. On the second issue of jurisdiction, the interested party averred that the petitioners were inviting the constitutional court to transcend into matters which a trial court would be best placed to determine, such as averring in their petition that they are the aggrieved party in an alleged breached investment contract.

49. The Interested Party relied on the case of *Ronald Leposo Musengi vs Director of Public Prosecutions & 3 others [2015] eKLR* in support of his averments.

50. On the third issue, the interested party averred that the 1st and 2nd Respondents are independent constitutional entities as per **Article 245(2) (b) of the Constitution** which safeguards the independence of the 1st Respondent.

51. Further, the Interested Party submitted that **Article 157(10) of Constitution** gives the 4th Respondent autonomy in making decisions of whether or not to prosecute a person. Reliance was placed in the case of *Douglas Maina Mwangi vs Director of Public Prosecutions & another [2013] eKLR*.

52. On the last issue, the interested party requested the court to exercise its discretion in awarding costs and concluded by asking the court to dismiss the petition with costs.

BACKGROUND OF THE PETITION

53. The Petition herein arise out of an investment agreement dated 7th January, 2019 between the Petitioners and the Interested Party.
54. The above contract was entered into by the 2nd and 3rd Petitioners as directors of the 1st Petitioner in their capacity as event organizers and the interested party as the investor of the program.
55. The Petitioners and Interested Party agreed that the investor was to make a deposit of Kshs. 3,000,000.00 (Three Million Kenya Shillings) towards the “*Nakash Aziz Live In Concert*”;
56. The parties agreed further they were to share the profits and/or loss therefrom and that the 1st Petitioner would operate their existing account for the show as provided in the contract.
57. The full and final investment sum was to be deposited on or about the 31st of January, 2019 and the investor was to bring on board a title sponsor for the show valued at Kenya Shillings One Million Two Hundred Thousand Only (Kshs. 1,200,000/=).
58. There was also an arrangement that any dispute with respect to the contract was to be settled in the Civil Courts.
59. The Petitioners aver that the interested party made the first installment of Kshs. 2,000,000.00 (Kenya Shillings Two Million) on or about the 7th January, 2019 and the Petitioners immediately commenced the arrangement for organizing the show.
60. The Petitioners aver further that the Interested Party failed to honour the contract by depositing the balance of the investment sum by 31st of January, 2019, hence breaching the contract and the Petitioners’ advocate wrote a demand letter to that effect.
61. The Petitioners aver that on or about the 7th June, 2019 at about 1000 Hrs, while on their personal errands, the 2nd and 3rd Petitioners were ambushed and arrested by persons they suspected to be police officers and were whisked to Parklands Police Station and later to the 2nd Respondent’s station at Nairobi Area near Integrity Centre.
62. The 2nd and 3rd Petitioners were informed that they were under arrest for obtaining money by false pretence and therefore tried to prove their innocence to no avail.
63. The 2nd and 3rd Petitioners were later released on a cash bail of Kenya Shillings Seventy Five Thousand (Kshs. 75,000/-) with threats of criminal prosecution by the 1st and 2nd Respondents if they failed to refund the said monies, thereby necessitating the institution of this Petition.

ANALYSIS AND DETERMINATION

64. Having carefully considered the amended Petition dated 2nd June, 2020, the responses, rival submissions I find that, the following issues arise for determination:-

- a) *Whether the Petition is properly before this court;*
- b) *Whether the Petitioners’ Constitutional rights have been violated;*

A. WHETHER THE PETITION IS PROPERLY BEFORE THIS COURT

65. The issue on whether this petition is properly before this court is of utmost importance. The petitioners submitted that this court has original jurisdiction to entertain any matter whether Criminal or Civil as provided under the Constitution. They further submitted that this court is equally seized with authority to stay criminal proceedings and/or prosecution intended against the Petitioners.
66. The interested party on the other hand contended that this Petition seek to invite the constitutional court to transcend into matters that are best placed in the jurisdiction of a trial court such as interrogating the terms of the investment contract between the Petitioners and the Interested Party.
67. The Interested Party further submitted that the Petition raises issues that could be best determined in a criminal trial. This is also the position taken by the 1st, 2nd and 4th Respondents.
68. The constitutional question is therefore of a vital role in the determination of the dispute herein.
69. The jurisdiction of the High Court has been well established under *Article 165 of the Constitution of Kenya* which states;

(1) There is established the High Court, which—

(a)

(b)

(2)

(3) states; Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government;”

70. Further Article 23(1) of the Constitution provides;-

“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.”

71. Looking and analyzing the aforementioned Articles, it is clear that the jurisdiction of this Court has been confined to interpretation of any constitutional question as well as redress for violations and infringements of constitutional rights and fundamental freedoms.

72. The Petitioner in this Petition seek a declaration that the 1st and 2nd respondent’s conduct, and actions, jointly and severally contravene the constitution and are likely to infringe fundamental rights and freedoms guaranteed under **Articles 2(1), & (2), 3(1), 10(1), 10 (2), 25 (a), 27 (1) & (2), 28, 29 (a,b,c,d,f), 35, 39, 47, 48 and 49 of the Constitution of Kenya, 2010.**

73. I do agree with the Petitioners that to the extent of determining whether the petitioners’ fundamental rights and freedoms have been violated by the respondents and interested party, this court is clothed with the jurisdiction to determine whether indeed there are constitutional violations and infringements occasioned to the Petitioners by the adverse parties herein.

74. This position was affirmed in the case of **C N M v W M G [2018] eKLR**, where this Court weighed in on the constitutional question as follows;

“A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.

The court went on further to state;

“When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values. [\[17\]](#) .

21. The question of what constitutes a constitutional question was ably illuminated in the South African case of *Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others*[\[18\]](#) in which Justice O’Regan recalling the Constitutional Court’s observations in *S vs. Boesak*[\[19\]](#) notes that:-

“The Constitution provides no definition of “constitutional matter.” What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions ofthe Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State....., the interpretation, application and upholding of the Constitution are also constitutional matters. So too,....., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.”[\[20\]](#)

22. Put simply, the following are examples of constituting constitutional issues; The constitutionality of provisions within an Act

of Parliament; the interpretation of legislation, and the application of legislation. [21] At the heart of the cases within each type or classification is an analysis of the same thing – the constitutionally entrenched fundamental rights.”

75. I find that going by the aforementioned arguments and equally to the extent of this court’s interrogation and enquiry as to whether the Petitioners’ constitutional rights and fundamental freedoms have been violated by the respondents and interested party, this Petition is properly before this Honourable Court.

B. WHETHER THE PETITIONERS’ CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED

76. The Petitioners averred that their constitutional rights under *Articles 2(1), & (2), 3(1), 10(1), 10 (2), 25 (a), 27 (1) & (2), 28, 29 (a,b,c,d,f), 35, 39, 47, 48 and 49 of the Constitution of Kenya, 2010* have been violated by the Respondents and the interested party and are also more likely to be violated if the orders in this petition are not granted. This therefore calls for this Court to proceed to examine the veracity of the alleged constitutional violations.

77. The Petitioners averred further that the 1st and 2nd Respondents violated *Article 10 of the Constitution* by failing the test of good governance, integrity and accountability basing on the manner in which the 2nd and 3rd Petitioners were arrested.

78. The Petitioners aver further that their freedom of movement was curtailed contrary to *Article 39 of the Constitution*, they therefore seek to stop criminal investigations and proceedings against them by the 1st, 2nd and 4th Respondents.

79. From the evidence on record, I find that it is not in dispute that there were investment contracts dated 7th January, 2019 (see the Amended petition List and bundles of documents pages 1-3) and (See Annexure SNR-1 of the Interested Party’s replying affidavit). This is therefore a bonafide evidence of an existing contractual relationship between the petitioners’ and the Interested Party.

80. I further find that it is equally, not in dispute that the interested party made a deposit of Kshs. 2,000,000/-(Kenya Shillings Two Million) on or about the 7th January, 2019 towards the fulfillment of the investment contract for a planned concert dubbed the “**Nakash Aziz Live In Concert**” (paragraph 3.3 page 3 of the Amended Petition) and (paragraph 8 of the interested party’s replying affidavit).

81. It is also not in dispute that the concert did not take place nor was the money paid by the interested party refunded by the petitioners resulting to a complaint being lodged in the office of the 2nd Respondent by the Interested Party’s affiliates and/or agent acting on his instructions (**Annexure SNR-4** of the Interested Party’s Replying Affidavit).

82. Therefore, as a result of a dispute in an investment contract, there are impending criminal investigations and proceedings against the 2nd and 3rd Petitioners which they hereby seek to stop. The Court is therefore called upon to proceed to examine whether there is justification to stop criminal investigations and proceedings in favour of the Petitioners.

83. The 1st, 2nd and 4th Respondents, vide their submissions averred that the 2nd Respondent was prompted to investigate a complaint of obtaining money by false pretense made by the interested party vide **OB 3/11/05/2019**, to which they acted on by arresting the 2nd and 3rd Petitioners.

84. As regarding mandate of the Director of Public Prosecution (DPP) the Court dealing with related matter in the case of **REPUBLIC v COMMISSIONER OF POLICE & another EX-PARTE MICHAEL MONARI & another [2012] eKLR**, the honourable Court observed;

“Under Article 157(4) of the Constitution, the Director shall have power to direct police to investigate any information or allegation of a criminal conduct and it is mandatory for the police to comply with any directions or instructions given by the Director of Public Prosecution. Under Article 157(10) of the Constitution, the Director of Public Prosecution shall not require the consent of any person or authority for commencement of criminal proceedings and shall not be under the direction or control of any person. It is also clear in my mind that the police have a duty to investigate on any complaint once a complaint is made. In deed the police would be failing in their constitutional mandate to detect and prevent crime. The Police only need to establish reasonable suspicion before preferring charges.”

85. Considering the instant Petition herein, I find that the 2nd Respondent did not act on its own volition, rather, its actions to arrest the 2nd and 3rd Petitioners on the or about the 7th June, 2019, was based on a complaint filed by the Interested Party who felt defrauded after depositing sums of Kshs. 3,000,000.00 to the Petitioners’ bank account as title sponsors for an investment agreement, that did not materialize (see Annexures SNR-3 and SNR-4 of the Interested party’s replying affidavit dated 3rd December, 2019).

86. The issue for consideration in this Petition is when can this court interfere with criminal investigations or proceedings against a Petitioner? This is an issue that was espoused by the Court of Appeal in the case of **Alfred N. Mutua v Ethics & Anti-Corruption Commission (EACC) & 3 others [2016] eKLR**, where the Appellate Court held;

“Is threat of arrest or arrest with reasons given a violation or threatened violation of fundamental rights and freedoms? We think not. What the law seeks to prevent is arbitrary arrest without probable cause. An objective justification must be shown to validate arrest of any individual. The Kenya Constitution recognizes that if a criminal offence is committed, investigation arrest and prosecution might ensue. In this context, the Constitution anticipates arrest of individuals and that is why Articles 49 and 50 (2) make provision for the rights of arrested persons. In our view, a threat of arrest or any arrest per se is not unconstitutional so long as due process of law is followed and the rights of the arrested person are observed.” (Emphasis added)

87. It has been demonstrated therein above that the 2nd Respondent acted on the complaint of the interested party coupled with real evidence that there was a belief that he had been defrauded of his money by the petitioners. Further, the petitioners do acknowledge in **paragraph 7** of their supporting affidavit dated **13th June, 2019**, that they were released on a police cash bail of **Kshs. 75,000/=**. This therefore means that the 2nd and 3rd petitioners are not in custody and also that the 2nd and 4th respondents have not made a decision to charge them formally in criminal proceedings. There is no evidence that the due process of law was not followed in Petitioners arrest nor that their rights were infringed.

88. On the issue of stoppage of DPP in discharging his mandate reliance is placed in the case of **Attorney General v Attorney General for and on Behalf of Inspector General of Police & 3 others ex-parte Thomas Ng'ang'a Munene [2014] eKLR**, where this Court reasoned;

“It is not for this Court to stop the DPP in his tracks simply because the Court believes that the DPP ought to have done better. The constitutional discretion given to the DPP ought not to be lightly interfered with especially if on the evidence in his possession if true may well sustain a prosecution. Trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on his defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of an appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words I am not satisfied based on the material before me that the applicant will not receive a fair trial before the trial court more so as no allegations are made against the 5th respondent towards that direction. Therefore the mere insufficiency of evidence does not in my considered view justify the halting of a criminal trial.”

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.” (Emphasis mine)

89. Further, in the case of **Republic v Attorney General & 4 others Ex-Parte Kenneth Kariuki Githii [2014] eKLR**, this Court held;

“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.

The Court held further 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.” (Emphasis mine)

90. The Petitioners herein vide their Amended Petition are seeking judicial review orders of prohibition to prohibit the Respondents from carrying out and proceedings with further investigations against them (prayer c of the Amended Petition) and also from proceeding with any criminal proceedings or charges in connection with the contract dated 7th January, 2019 (prayer d of the Amended Petition).

91. From the above prayers, and upon considering the prayers as sought by the Petitioners, it is my view that this Honourable Court should not be concerned with merits or demerits of the investment contracts between the Petitioners and the Interested Party, rather the Court can only examine the process under which the 2nd and 3rd Petitioners were apprehended and from my findings, upon perusal of the pleading of the Petitioners, the Respondents and Interested Party, it turns out that, the 2nd Respondent was only discharging its functions under **Articles 245 (4) (a) of the Constitution** to investigate a reported offence, while the 4th Respondent has a constitutional mandate under **Article 157 (6) (a) of the Constitution** to institute and undertake criminal proceedings against any person before any Court in respect of any offence alleged to have been committed.

92. I find that the arguments by the Petitioners, as to who lodged the complaint against them, are immaterial since the Interested Party has clearly demonstrated, that such persons were acting on his directions, upon reasonable suspicion of fraud of his monies, that were and still are in the custody of the Petitioners.

93. I am alive to the fact, that this Court ought to be very cautious while exercising its discretionary power in halting or preventing criminal investigations and proceedings to an aggrieved party.

94. Having carefully considered the rival submissions and pleadings, I am not satisfied that, the Petitioners have demonstrated that their constitutional rights and fundamental freedoms have been violated, rather, it is the Interested Party who has been aggrieved by the actions of the Petitioners, where he invested monies in an investment contract that has not materialize and which monies have not been refunded to him by the Petitioners. I do agree with the Interested Party in the sense that, if the Petitioners were indeed aggrieved by the actions of the interested party, why haven't they refunded the monies they acknowledge they received from the interested party?

95. I find that it is not for a Constitutional Court to delve into matters that would be best determined by a trial Court. I find in such situation its prudent for the doctrine of constitutional avoidance to be invoked as was stipulated in the case of **Matatu Welfare Association & another v Invesco Assurance Co. Ltd & 3 others [2019] eKLR**, where the Court stated in part;

“...I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is, the course which should be followed.” (Emphasis mine)

96. I find the Petitioners cannot be prejudiced by declining to stop criminal proceedings as the Petitioners herein, will be given an opportunity should they be charged in criminal proceedings by the 4th Respondent to defend themselves, give their side of the story and equally challenge and adduce evidence as against the Interested Party. In such an instance, a criminal Court would be the best placed court in determining the issues the Petitioners raise herein, upon which, they would be at liberty to even pursue a claim for malicious prosecution or even appeal the decision of the trial Court should they feel aggrieved.

97. I find further, the petitioners have another avenue of pursuing the interested party through civil proceedings and seek compensation for breach of contract, where the Civil Court will examine the evidence adduced and determine their case on a balance of probability. They can equally proceed to appeal the decision, should they feel aggrieved. The Petitioners appear to have already instituted civil proceedings against the interested party (Annexure KVL-6 is defense of Civil Case no. HCC E234 OF 2020 filed by the 1st petitioner against the Interested Party).

98. Upon consideration of the evidence in this matter I find that there was no arbitrary arrest of the 2nd and 3rd Petitioners by the 2nd Respondent. The Petitioners were even issued with police cash bail hence are free and out on bail. Further, the 4th Respondent has not made a formal decision to institute criminal proceedings against the 2nd and 3rd Petitioners. The Petitioners have equally not been charged of any criminal offence. This therefore implies that the judicial review orders sought by the Petitioners are not appropriate at this juncture and in this forum.

99. *In light of the abovementioned analysis and findings, I opine that the Petitioners' constitutional rights and fundamental freedoms are intact and have not been violated by the Respondents and the Interested Party.*

100. *This Constitutional Petition is therefore not merited and accordingly, fails. The Petition stands dismissed with costs to the Respondents and Interested Parties.*

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

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J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA