



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**JUDICIAL REVIEW CASE NO. E001 OF 2021**

**IN THE MATTER OF: AN APPLICATION BY JUMA NYATIEKO, WILLIAM OCHIENG OYOKO AND JAPHETH OTIENO ODERA FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION AGAINST THE RESPONDENTS HEREIN**

**AND**

**IN THE MATTER OF: ARTICLES 27, 40, 47, 48, 49, 50, 157 AND 244 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: SECTIONS 8 AND 9 OF THE LAW REFORM ACT (CAP 26 OF THE LAWS OF KENYA) AND ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010**

**AND**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF: AN APPLICATION BY THE EX-PARTE APPLICANTS TO CHALLENGE THE DECISION OF THE 1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS TO CHARGE THEM WITH THE OFFENCE OF FRAUD CONTRARY TO SECTION 103 OF THE LAND REGISTRATION ACT, 2012 BEFORE THE 3<sup>RD</sup> RESPONDENT**

**BETWEEN**

**JUMA NYATIEKO.....1<sup>ST</sup> EX-PARTE APPLICANT**

**WILLIAM OCHIENG OYIEKO.....2<sup>ND</sup> EX-PARTE APPLICANT**

**JAPHETH OTIENO ODERA.....3<sup>RD</sup> EX-PARTE APPLICANT**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTION.....1<sup>ST</sup> RESPONDENT**

**NATIONAL POLICE SERVICE, SIAYA.....2<sup>ND</sup> RESPONDENT**

**THE CHIEF MAGISTRATES (SIAYA) LAW COURT.....3<sup>RD</sup> RESPONDENT**

**MAURICE ONYANGO OKETCH.....INTERESTED PARTY**

**JUDGMENT**

1. Pursuant to leave granted by this court on the 7.7.2021 the *exparte* applicants brought an application for judicial review dated 13.7.2021 and filed on the 14.7.2021 seeking the following orders:

**a) An Order of Certiorari to remove to this Honourable Court to be quashed the decision of the Director of Public Prosecution,**

*Siaya and National Police Service, Siaya, the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein, to charge the Ex-Parte applicants with the offence of fraud contrary to Section 103 of the Land Registration Act, 2012 before the 3<sup>rd</sup> Respondent.*

*b) An Order of Prohibition prohibiting the respondents herein by themselves, their agents/and or assigns acting jointly and/or severally from proceeding with the intended prosecution of the Ex parte applicants herein.*

*c) The costs of and incidental to these proceedings be borne by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.*

*d) Any such other, further, or incidental orders or directions as the Honourable Court may deem just and expedient in the circumstances.*

2. The application is brought under the provisions of Order 53 Rule 3(1) and 4(1) of the Civil Procedure Rules, 2010, Section 3A of the Civil Procedure Act and Section 8 & 9 of the Law Reform Act.

### **Ex-Parte Applicants' Case**

3. It is the ex-parte applicants' case that they are the registered proprietors of land parcels known as SIAYA/NYAJUOK/2686, 2634, 2481 & 2388, and that on the 25.9.2020, the Land Registrar Siaya, through a notice published at page 3744 Of the Kenya Gazette No. 7482 unilaterally and arbitrarily purported to cancel the aforementioned title deeds.

4. The ex-parte applicants state that on the 16.12.2020 they filed an application for leave to apply for Judicial Review of the Land Registrar's action at Kisumu in HCC JR No. E004 2020, which leave was granted the following day by Justice A.O. Ombwayo, and which leave acted as stay of the impugned decision of the Land Registrar pending the full hearing and determination of their substantive application.

5. It is their case that subsequently, the interested party herein lodged a complaint of alleged fraud in respect of registration of title deeds of the land parcels known as SIAYA/NYAJUOK/2686, 2634, 2481 & 2388 leading to the summoning of the ex-parte applicants to Siaya Police Station where they were interrogated and arrested on suspicion of fraud contrary to Section 103 of the Land Registration Act, 2012.

6. They further state that they were each eventually released on police cash bail of Kshs. 20,000 for the 1<sup>st</sup> and 2<sup>nd</sup> Ex-Parte applicants and Kshs. 50,000 for the 3<sup>rd</sup> Ex-Parte applicant and booked for plea taking on Saturday the 24.4.2021 for the 2<sup>nd</sup> and 3<sup>rd</sup> Ex-Parte applicants and on the 26.4.2021 for the 1<sup>st</sup> Ex-Parte applicant.

7. The Ex-Parte applicants stated that other than having varying dates on which to take plea including a Saturday, the cash bail receipts issued by the 2<sup>nd</sup> respondent did not bear the Police Case File numbers and neither was their arrest recorded in the 2<sup>nd</sup> respondent's Occurrence Book. They further state that their arrest and intended prosecution have their genesis in circumstances pertaining to the registration of titles for land parcels known as SIAYA/NYAJUOK/2686, 2634, 2481 & 2388 that are subject to proceedings of Kisumu HCCJR No. E004 of 2020.

8. It is their case that when they appeared before the 3<sup>rd</sup> respondent with their advocate on the 26.4.2021, the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not have a charge sheet and were not in any way prepared to proceed with the case yet the 2<sup>nd</sup> respondent continues to hold the Ex-Parte applicants' cash bail.

### **Respondent's Case**

9. Through a replying affidavit deposed by Chief Inspector Victoria Owoko on the 11.8.2021 and filed in court on the same date, the respondents stated that a report was made vide OB No. 20/19/3/2019 by the interested party herein regarding the fraudulent transfer and change of ownership of land parcel No. Nyajuok/153.

10. She further deposed that preliminary investigations revealed that the land was registered in the names of five deceased brothers namely; Ayinga Omolo, Oyoko Omolo, Ayinga Auoma, Daniel Orinda and Okech Otuoma and that after the demise of the aforementioned brothers, the land was sub-divided and transferred to the ex-parte applicants herein without due process as no probate proceedings were commenced to effect the said transfer.

11. Chief Inspector Owoko further deposed that the Land Registrar cancelled the titles after realizing that the same had been obtained fraudulently and this was the basis of the police investigations which were yet to be completed as some documents were still missing.

12. She further deposed that the 1<sup>st</sup> respondent had not yet made a decision to charge the ex-parte applicants as investigations are yet to be completed and that since the applicants were the main suspects of the alleged offence, they were arrested and released on cash bail pending completion of investigations. She thus deposed that the instant application by the ex-parte applicants was premature as no formal charges had been brought against them

13. Chief Inspector Owoko further deposed that under section 193A of the Criminal Procedure Code, the existence of civil proceedings was no bar to the commencement of criminal proceedings.

### **Ex- Parte Applicants' Submissions**

14. Relying on the provisions of Articles 22 (1) and 23 (1) of the Constitution, it was submitted that it was the *ex parte* applicants' right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights had been denied, violated or infringed and that this Court was vested with jurisdiction to entertain such proceedings.

15. The Ex- Parte applicants further submitted that it was imperative, in a constitutional democracy like ours, for the citizens to have confidence and trust in the institutions established to safeguard the rule of law and as such it was expected that police officers would be fair in carrying out their duties which duties must be carried out within constitutionally permissible parameters as was held in the cases of **Republic v Dakes 1986 1SCR 103** and that of **Keroche Industries Ltd v Kenya Revenue Authority & 5 Others 2007 2 KLR**.

16. Accordingly, it was submitted that the intended prosecution was malicious and abuse of discretion and that the 2nd respondent ought to have taken into account that the intended prosecution had its genesis and circumstances in matters before the court in Kisumu HCJR No. E004 of 2020.

17. It was submitted that their intended prosecution was malicious as there was no legal reason for instituting the proceedings as the same were based on ulterior motive, malice and abuse of process contrary to Article 244 (c) of the constitution that requires the 2nd respondent to constitutional standards of human rights and fundamental freedoms in the exercise of its powers.

18. It was submitted further that the intended prosecution was an abuse of court process as the interested party was using the criminal process to intimidate and coerce the ex-parte applicants as a result of their civil suit in Kisumu HCJR No. E004 of 2020 and further that the criminal justice system was being used to achieve collateral aims over a matter that was purely civil in nature and active before a superior court.

19. Relying on the cases of **Jared Benson Kangwana v Attorney General Misc. Application 446 of 1996**, **Vincent Kibiego Maina v The Attorney General Misc. Applications Nos 839 and 1085 OF 1999 UR** and **Samuel Kamau Macharia & Another v Attorney General & Another, Misc. Application 356 of 2006**, it was submitted that there was no foundation for criminalizing the registration of title deeds.

20. The ex-parte applicants further relied on the case of **Republic v Director of Public Prosecutions & 2 others Exparte Praxidis Namoni Saisi (2016) eKLR** and **Bitange Ndemo v Director of Public Prosecutions & 4 others [2016] eKLR** where it was held that neglect to make a reasonable use of sources of information available before instituting proceedings and to take into account exculpatory evidence is indicative of malice and abuse of process.

21. The Exparte applicants further submitted that the institution of criminal charges against them on matters of a civil nature instead of pursuing the available civil remedy was intended to deny them a right to fair hearing guaranteed under Article 50 (1) and 2 (a) (b) (c) (j) and (k).

22. It was submitted that the intended criminal proceedings were unfair, irrational, unreasonable, malicious and amounted to selective prosecution. Reliance was placed on the case of **Njuguna v Ethics & Anti-Corruption Commission (EACC) & 3 others [2018] eKLR** where it was held that there are circumstances where there is need for scrutiny of the decision to charge. Further the Exparte applicants relied on **Judicial Review No. 429 of 2016** where the Court noted that it was logical to stay criminal proceedings until the civil proceedings were determined.

### **Analysis & Determination**

23. I have considered the application for judicial review orders, the response thereto and submissions and authorities cited. The first question to be addressed is whether the arrest of the *ex parte* applicants was unlawful or unjustified. As a general rule, an arrest of a suspect should not be made unless and until his or her case has been investigated and the arresting officer believes there are reasonable grounds for suspecting that the suspect has committed an offence. The only exception to this rule is where a suspect is arrested while in the process of committing an offence. This is the minimum statutory criteria set out under **Section 29 of the Criminal Procedure Code**. The section empowers a police officer to make an arrest without warrant in the following terms:

***“29. A police officer may, without an order from a magistrate and without a warrant, arrest—***

***(a) any person whom he suspects upon reasonable grounds of having committed a cognizable offence;”***

24. Section 58 of the National Police Service Act gives a police officer power to arrest without warrant in exactly the same terms as section 29 Criminal Procedure Code. In **Daniel Waweru Njoroge & 17 others v Attorney [2015] eKLR** the court described a false arrest as follows:

***“False arrest which is a civil wrong consists of an unlawful restraint of an individual’s personal liberty or freedom of movement by another person purporting to act according to the law. The term false arrest is sometimes used interchangeably with the tort of false imprisonment, and a false arrest is one method of committing a false imprisonment. A false arrest must be perpetuated by one who asserts that he or she is acting pursuant to legal authority, whereas a false imprisonment is any unlawful confinement. Thus, where a police officer arrests a person without probable cause or reasonable basis, the officer is said to have committed a tort of false arrest and confinement. Thus, false imprisonment may be defined as an act of the defendant which causes the unlawful confinement of the plaintiff. False imprisonment is an intentional tort.”***

25. Therefore, a false arrest will depend on the reasonableness of the suspicion of the police officer. In **Jackson Muthui Maluki & another v Attorney General [2020] eKLR**, **Mwongo J** held that having a ‘reasonable suspicion’ presupposes the existence of facts or information which would justify an objective observer to consider that the person concerned may have committed the offence. Further, that what may be regarded as ‘reasonable’ will, as earlier noted, depend upon all the circumstances. In **Anthony Njenga Mbuti & 5 others v Attorney**

**General & 3 others [2015] eKLR**, the petitioners were arrested and brought to court without any charges. They were bonded for various amounts to keep the peace. Most were unable to raise the bonds and were remanded. The proceedings were subsequently nullified by the High Court. Not all petitioners were offered an explanation for their arrest, and that in some cases, no entries were made with regard to their arrest in the Occurrence Book; further, the duty officer stated that the arrested person was not being charged with any offence; and only that the arrest was in connection with investigations into a robbery/burglary. Mumbi J held thus concerning the arrests:

***“That the conduct by law enforcement officers profiling suspects on mere suspicion, arresting and detaining them with no evidence of crime committed is arbitrary and discriminatory guaranteed in our constitution.”***

26. Examining the circumstances prevailing in the present case, the applicants were arrested following a complaint lodged by the interested party who alleged fraud in respect of registration of title deeds of the land parcels known as SIAYA/NYAJUOK/2686, 2634, 2481 & 2388. The applicants state that they were summoned to Siaya Police Station where they were interrogated and arrested on suspicion of fraud contrary to Section 103 of the Land Registration Act, 2012. They further state that they were eventually released on police cash bail of Kshs. 20,000 for the 1st and 2nd Ex-Parte applicants and Kshs. 50,000 for the 3rd Ex-Parte applicant and booked for plea taking on Saturday the 24.4.2021 for the 2nd and 3rd Ex-Parte applicants and on the 26.4.2021 for the 1st Ex-Parte applicant. It is their case that other than having varying dates on which to take plea including a Saturday, the cash bail receipts issued by the 2nd respondent did not bear the Police Case File number and neither was their arrest recorded in the 2nd respondent’s Occurrence Book.

27. Chief Inspector Victoria Owoko for the respondents swore an affidavit on behalf of the Respondents to the effect that the applicants were arrested following a complaint lodged by the interested party over fraudulent transfer and change of ownership of land parcel no. Nyajuok/153 which preliminary investigations revealed that the parcels of land were registered in the names of some deceased persons and subsequently sub-divided and transferred to the applicants herein without due process of succession being followed. She further deposed that the applicants’ titles had been cancelled by the Land Registrar on account of alleged fraud which formed the basis of the ongoing investigations.

28. On the basis of the above circumstances as explained by the Respondents, I have no reason to doubt that prima facie, the police had reasonable suspicion to arrest the applicants herein considering the allegations brought by the interested party and further, the action taken by the Land Registrar to *suo moto* cancel the titles given to the applicants on account of alleged fraud. I therefore find that the applicants’ arrest was not unlawful.

29. The applicants further submitted that their intended prosecution is actuated with malice and ought to be prohibited. In **Gitau v Attorney General [1990] KLR 13, Trainor, J** had this to say:

***“To succeed on a claim for malicious prosecution the plaintiff must first establish that the defendant or his agent set the law in motion against him on a criminal charge. Setting the law in motion” in this context has not the meaning frequently attributed to it of having a police officer take action, such as effecting arrest. It means being actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal charge against another before a magistrate. Secondly he who sets the law in motion must have done so without reasonable and probable cause...The responsibility for setting the law in motion rests entirely on the Officer-in-Charge of the police station. If the said officer believed what the witnesses told him then he was justified in acting as he did, and the court is not satisfied that the plaintiff has established that he did not believe them or alternatively, that he proceeded recklessly and indifferently as to whether there were genuine grounds for prosecuting the plaintiff or not. The Court does not consider that the plaintiff has established animus malus, improper and indirect motives, against the witness”.***

30. In **Stephen Gachau Githaiga & another v Attorney General [2015] eKLR** it was held that:

***“The third element which must be proven by a plaintiff — absence of reasonable and probable cause to commence or continue the prosecution — further delineates the scope of potential plaintiffs. As a matter of policy, if reasonable and probable cause existed at the time the prosecutor commenced or continued the criminal proceeding in question, the proceeding must be taken to have been properly instituted, regardless of the fact that it ultimately terminated in favour of the accused.”***

31. For this court to prohibit, bring to a halt or quash the intended criminal proceedings against the applicants, it must establish whether the respondents acted within their respective mandates in their investigation and subsequent institution of a criminal charge against the applicant. Concomitant with this issue would be to answer the question of whether the applicants’ rights have been violated in the manner that they claim and finally, whether the applicants are deserving of the reliefs sought.

32. Revisiting the circumstances under which the Court will grant an order quashing or prohibiting the commencement or continuation of a criminal trial process, the factors which a court ought to consider are now well settled in various judicial pronouncement. First, the court ought to be extremely cautious in making its determination so as to avoid prejudicing the intended or pending criminal proceedings. Secondly, the court ought not to usurp the constitutional and statutory mandate of the Director of Public Prosecutions and neither should it curtail with the investigatory mandate accorded to the Directorate of Criminal Investigation. However, the court may intervene were the said discretion is exercised unlawfully and in bad faith, for instance where the discretion is being abused or being used for achievement of some collateral purpose which are not geared towards the vindication of the commission of a criminal offence.

33. In **George Joshua Okungu & Another v The Chief Magistrates Court, Nairobi & another [2014] eKLR** it was held that:

***“The law is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions or the authority charged with the prosecution of criminal offences to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. 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. That a petitioner 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 always open to the petitioner in those proceedings. However, if the Petitioner demonstrates that the intended or ongoing criminal proceedings constitute an abuse of process and are being carried out in breach of or threatened breach of the petitioner's Constitutional rights, the Court will not hesitate in putting a halt to such proceedings. 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 Petitioner 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 recognized aim. In the exercise of the discretion on whether or not to grant an order of prohibition, the court takes into account the needs of good administration. See R vs. Monopolies and Mergers Commission Ex Parte Argyll Group Plc [1986] 1 WLR 763 and Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)."*

34. In **Republic v Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR** the High Court held:

*"The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene"*

35. The prosecutorial powers of Director of Public Prosecutions are constitutionally and statutorily provided for under Article 157 (10) of the Constitution and Section 4 of the Office of the Director of Public Prosecutions Act No. 2 of 2013, which provides that the DPP does not require the consent of any person or authority to commence any criminal proceedings and in exercise of his/her powers and functions, shall not be under the direction or control of any person or authority. The exercise of that power is however subject to Article 157 (11) and Section 4 of the DPP Act, which provides that in exercise of the said power, the DPP shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of legal process. Only in circumstances where it is manifest that the DPP acted unlawfully by failing to exercise their own independent discretion; acting under the control and direction of another person; failing to take into account public interest or interest of the administration of justice in all their manifestations; abusing the legal process; and by acting in breach of fundamental rights and freedoms of an individual, will the High Court intervene.

36. With the litany of judicial pronouncements on the threshold for interfering with the discretion of the investigative and prosecutorial agencies in mind, I now turn to the *ex parte* applicants' gravamen. According to the *ex parte* applicants, the decision to charge and prosecute them amounts to an abuse of the legal process and a breach of their right as the dispute between the applicants and the interested parties was purely of civil nature and further that the civil proceedings ought to precede the intended criminal proceedings.

37. In my analysis, the applicants claim to be aggrieved by the improper conduct of investigations against their actions. However, not a scintilla of evidence has been provided to show how prejudicial to the applicants such investigations were. The DCI had the mandate to investigate the applicants as provided for in Section 35 of the National Police Service Act, No. 11 of 2011.

38. The Director of Public Prosecutions too cannot be faulted for exercising his discretion to initiate criminal charges against the *ex parte* applicants as no file has been forwarded to the 1<sup>st</sup> respondent DPP since as deposed by Chief Inspector Victoria Owoko, in the replying affidavit sworn on the 11.8.2021, investigations are still ongoing to establish whether the alleged fraud can be proved.

39. It therefore follows that for the intended prosecution to be deemed as being unfounded, it must first exist and subsequently be so manifestly weak so as to not disclose a prosecutable case or have no prospect for conviction. This is not the case here where the *ex parte* applicants were questioned after a report was made vide OB No. 20/19/3/2019 by the interested party herein regarding the alleged fraudulent transfer and change of ownership of land parcel no. Nyajuok/153. In the case of **Republic v PC George Okello & another [2012] eKLR** the court held:

*"I can find no better words to capture this conclusion than those used by the South African Constitutional court in Sanderson as regards appropriate relief: Even if the evidence he has placed before the court had been more damning, the relief the appellant seeks is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins –and consequently without any opportunity to ascertain the real effect of delay on the outcome of the case –is far reaching. Indeed, it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will be seldom warranted in the absence of significant prejudice to the accused... Ordinarily and particularly where the prejudice alleged is not trial related, there is a range of "appropriate" remedies less radical than barring the prosecution. These would include a mandamus requiring the prosecution to commence the case, a refusal to grant the prosecution a remand, or damages after an acquittal arising out of the prejudice suffered by the accused. A bar is likely to be available only in a narrow range of circumstances, for example where it is established that the accused has probably suffered "irreparable prejudice as a result of delay."*

40. I therefore find and hold that the 1<sup>st</sup> Respondent acted within their mandate in launching investigations into the report made by the interested party concerning an alleged fraud on the part of the *ex parte* applicants. As there is no prosecution mounted against the *ex parte* applicants, I find the attempt to quash any intended prosecution and which I find not to be malicious is premature at this stage. There is nothing to be quashed.

41. As to whether the *ex parte* applicants' rights were violated as alleged, the Court of Appeal in the **Mumo Matemu v Trusted Society of Human Rights Alliance and others [2013] eKLR** held:

***“We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not conterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point...Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The Principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.”***

42. In **Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] eKLR** the High Court held:

***“In our view, it would be within the mandate of an investigative body to receive complaints and to investigate them. Such bodies or entities cannot be faulted for acting on the complaints as in so doing, they would be acting within their constitutional and statutory duty. It was stated in Josephat Koli Nanok & another v Ethics and Anti-Corruption Commission (2018) eKLR, that by undertaking investigations an investigating entity does not violate any constitutional rights, and that violation of rights may only occur in the manner in which the investigative mandate is executed. In that event, the Petitioner would be under an obligation to demonstrate that his or her rights have been violated by the manner of investigation and attendant processes.”***

43. I further concur with the holding in **Kenneth Kanyarati & 2 others v Inspector General of Police Director of Criminal Investigations Department & 2 others [2015] eKLR** that:

***“I am satisfied that it is not the business of the court to identify the points of investigation. Neither is it the business of this court to wander into the merits and demerits of any intended or prospective prosecution. As was stated in R v Commissioner of Police and Another Ex parte Michael Monari & Another (2012) eKLR .The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges.”***

44. I am therefore not persuaded that the continuing/pending investigations and intended prosecution of the applicants violated their constitutionally guaranteed rights and do hold as much.

45. On whether the applicants are entitled to the reliefs sought, in **Joram Mwenda Guantai v The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170** the Court of Appeal held:

***“It is trite that an Order of Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings... Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.”***

46. In light of the preceding authorities to which I am fully aligned, I find that it was incumbent upon the applicants to demonstrate to the satisfaction of this Court that the respondents had somehow abused, overstepped or exercised their respective mandates unlawfully in carrying out the said investigations and in intending to prosecuting the *ex parte* applicants in order for the reliefs sought to avail to them, which they have failed to do.

47. The *ex parte* applicants did not demonstrate any unlawful actions, excess or want of authority, evidence of malice, evidence of intimidation or even of manipulation of court process so as to seriously impede the likelihood of them getting a fair trial as provided for under Article 50 of the Constitution. In the absence of such proof, I am unable to find that the intended criminal proceedings against the applicants ought to be brought to a halt. Furthermore, the fact that there are any pending civil proceedings or that the dispute could be settled as a civil claim *per se* cannot be a reason for quashing or prohibiting the criminal investigations and or the intended prosecution of the *ex parte* applicants herein. Section 193A of the Criminal Procedure Code is clear in this respect that a criminal charge can co-exist with a civil suit over the same subject matter, as is the case here where it is the *ex parte* applicants who have approached the Environment and Land Court to challenge the unilateral decision of the Land Registrar to cancel the registration of the *ex parte* applicants as proprietors of the land subject of the investigations on account of fraud allegedly committed on land Parcel No. Nyajuok/153.

48. Consequently, I find and hold that this Judicial Review application dated 13.7.2021 is devoid of any merit and the same is hereby dismissed.

49. Each party to bear their own costs of this application and the application for leave.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 17TH DAY OF NOVEMBER, 2021**

**R.E. ABURILI**

**JUDGE**