



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

(CORAM: R. MWONGO, J)

CONSTITUTIONAL PETITION NO. 14 OF 2018

IN THE MATTER OF

NAIVASHA CHIEF MAGISTRATE CRIMINAL CASE NO 294 OF 2018

AND IN THE MATTER OF

LOIS WAMBUI THUO.....1ST PETITIONER/APPLICANT

JAMES WAGEMA RUITHA.....2ND PETITIONER/APPLICANT

IRENE WANJIRU WAGEMA.....3RD PETITIONER/APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

INSPECTOR-GENERAL OF POLICE..... 3RD RESPONDENT

CHIEF MAGISTRATE NAIVASHA LAW COURTS.....4TH RESPONDENT

LYDIA BOSIBORI ANYEGA.....5TH RESPONDENT

JUDGMENT

Background & Parties' Cases

1. The Petitioners are the accused persons charged jointly and severally in *Naivasha Criminal Case No 284 of 2018 R v James Wagema Ruiitha, Lois Wambui Thuo Benson Ayuka Mankone & Irene Wanjiru Wagema* (hereinafter the "Criminal Case"). They face twelve counts of forgery under sections 345 and 350 of the Penal Code (Cap 63) as read with sections 45(1) and 45(2) of the Law of Succession Act (Cap 160).

2. The Petitioners are alleged to have forged documents with regard to parcels of land, namely, Moi Ndabi/ Settlement Scheme/1287 and 1288 (the "Land Parcels") . The alleged forgeries are said to have been to the detriment of the Estate of the late Johnson Keriago Sangaka; and are for the illegitimate benefit of the 2nd and 3rd Petitioners, who are presently the registered owners of the said Land Parcels and are in possession thereof.

3. The complainant in the Criminal case is the 5th Respondent herein. She has never been the registered owner of the said Land Parcels. However, she claims a beneficial right to the Land Parcels by way of inheritance as the widow of the deceased's only son, Fred Bundi Kiriago, and the daughter in law of the deceased. Further, she is the plaintiff in *Nakuru ELC Civil Suit No 110 of 2018 Lydia Bosibori Anyega (Suing as the legal Administrator of the estate of the late Jonson Kiriago Sangaka) v James Wagema Ruiitha, Irene Wanjiru Wagema & District Land Registrar, Naivasha* (hereinafter "the Land Suit"), against the 2nd and 3rd Petitioners. In that case, the plaintiff seeks that the said two Land Parcels be restored into the names of the late Johnson Sangaka and that the respondents be permanently restrained from trespassing upon or dealing in any way with the Land Parcels.

4. The petitioners filed a notice of motion dated 15th May, 2019 under certificate seeking interlocutory conservatory orders. The application was premised on the grounds that the DPP had irregularly and as a means of intimidating the petitioners, commenced criminal proceedings in a matter wherein civil proceedings had already been commenced by the 5th respondent for the same matter. The court ordered service on the respondents, and responses to be filed to the application.

5. At the hearing on 16th October, 2019, following exchange of pleadings, this court issued a temporarily conservatory order staying the **Criminal Case Naivasha No 284 of 2018** for ninety (90) days pending judgment herein. Thereafter, it was agreed to proceed with the substantive petition.

6. The Petitioners were represented by Dr Khaminwa; the 1st Respondent was represented by Ms Maingi; 3rd Respondent was represented by Mr. Ombonyi, and the 5th Respondent's counsel was Mr. Nyang'au.

7. The petition filed under the said certificate seeks the following prayers:

1. Conservatory orders to stay the Criminal Case Naivasha No 284 of 2018 R v James Wagama Ruitha and 3 Others;

2. A declaration that by their acts and omissions the 1st, 3rd and 5th Respondents have breached the petitioners' fundamental rights and freedoms;

3. A declaration that by the acts and omissions of the respondents the petitioners are deserving of damages;

4. An order of certiorari to bring to the High Court for the purpose of quashing the charge sheets brought by the 1st Respondent against the petitioners in Criminal Case in Naivasha No 284 of 2018

8. The petitioners' grounds in this case are simply: that the criminal proceedings against the petitioners is an abuse of the criminal justice process as they are commenced for the 5th Respondent who is not a beneficiary of the estate of the deceased Johnson Kiriago Sangaka; that the said criminal proceedings were commenced in bad faith with the sole aim of intimidating and coercing the 2nd and 3rd petitioners into abandoning the properties; that the 5th Respondent has no valid claim to the Land Parcels and therefore that she cannot be a legitimate complainant in the criminal case which is thus an abuse of the court process.

9. In addition, the petitioners claim that they are entitled under Articles 25(a) and 29(d) of the Constitution and section 4 of the Prevention of Torture Act 2017 not to suffer psychological torture; that they have a right to be treated in a humane and dignified manner; a right to fair administrative action under Article 47 Constitution and to a fair public hearing and trial under Article 50; and that as the registered owners of the Land Parcels they are entitled to the rights and privileges of ownership under Sections 25 and 26 of the Land Registration Act, 2012.

10. The applicants relied on the following authorities: **Centre for Rights Education and Awareness (CREAW) & 7 Others Petition No 16 of 2011; Gitau v Attorney General [1990] KLR 13; Rep v AG & 4 Others Ex parte Kenneth Kariuki Githii [2014] eKLR; R v DPP & Commercial Bank of Africa Ltd Ex parte Patrick Kangethe Njuguna & 4 4 Others HC JR No 429 of 2016; Godfrey Mutahi Ngunyi v DPP & 4 Others Petition No 428 of 2015; Malik's Criminal Investigations Practice Procedure, Proceedings, Techniques, 2019 Delhi Law House; and De Smith's Judicial Review, 6th Edition, 1997.**

11. The respondents oppose the petition. The 1st respondent filed grounds of opposition. All the respondents were further granted an opportunity to file submissions, which they did in opposition to the petition. The substantive petition was heard on 12th November, 2019, when all parties made their submissions.

12. In their grounds of opposition and replying affidavit of Police Constable Meshack Ombongi, the DPP argues that the 5th respondent filed a complaint on 15th November, 2017, when she discovered that the Lands Office Naivasha that the Land Parcels which had been registered in her late father in law's name had been transferred to the 2nd and 3rd respondents; that when they investigated the complaint the IDs of the perpetrators of the transfers were found to be fake; that the letters of consent purporting to approve the consent were forged; that the sale agreements were purported to have been entered into after the deceased had long died; that the and Control Board Chairman's signature had been forged; that the Land Control Board Consent forms had serial numbers not emanating from the Land Control Board; and generally discovered that a massive fraudulent transaction had occurred through forgery.

13. The DPP further asserted that after independently analyzing the evidence provided in the police file, the witness statements, and documentary evidence and exhibits, they concluded that this was a proper case for prosecution; that since dead persons cannot transact land deals, their decision to prosecute was fully informed by the evidence alone and nothing more; and that the petitioners had not shown how their constitutional rights had been violated.

14. The DPP concluded, that the petitioners' application amounted to an attempt to asking the court to interfere with their independence; or to seek to pre-empt the presentation of duly gathered and analysed evidence to give immunity to the petitioners from criminal prosecution. Finally, that under Article 40(6) of the Constitution protection of property rights does not extend to property unlawfully acquired.

15. The 1st Respondent relied on the following authorities: **DPP v Nairobi Chief Magistrate's Court & Another [2016] eKLR; Republic v Commissioner of Police & Another Ex parte Michael Monari [2012] eKLR; Republic v DPP & 2 Others Ex parte Francis Njakwe Maina & Another [2015] eKLR;**

Issues for determination

16. I have carefully considered the documents availed by the parties, their respective submissions and the numerous authorities referred to by the parties. I will refer to some of them herein, as facts and relevance dictate.

17. The underlying issue for determination is whether the 1st Respondents – in common with the other respondents – have abused their constitutional and statutory powers in any manner so as to impugn on the constitutional rights of the petitioners in such manner as to warrant the intervention of this court.

Analysis and Determination

18. The overall thrust of the Petitioner's case is that the criminal case herein was commenced and instigated against the Petitioners with a view to intimidating the Petitioners and frustrating the civil dispute concerning the Land Parcels between the 5th Respondent and the Petitioners. This is underlined in the Applicant/Petitioners Further written submissions filed on 12th November, 2019, where they state at paragraph 3:

“3. The 5th Respondent instead proceeded to commence the Civil Suit and thereafter as a means of intimidation proceeded to instigate the Criminal Proceedings against the said Applicants” (Underlining added).

19. I think it is important to trace the chronology of the criminal case juxtaposed against that of the civil suit and assess the interrelation between the two. Dates and timeframes will thus be important in determining the 1st and 5th Respondents' motives and malice if any. This is how the situation panned out.

20. The criminal investigation of this matter commenced with the complaint by the 5th Respondent, when her four-page statement was recorded by the police on 15th November, 2017. This is not in dispute at all. The 5th Respondent's said statement is exhibited as “LWT 6” in the affidavit of the 1st Petitioner Lois Thuo, in support of the petition. The 1st Petitioner asserts in paragraph 15 of her affidavit that the complainant's statement does not raise any valid grounds for the prosecution of the petitioners. That, however, is not a matter for this court to determine but for the criminal court. Suffice it to say that the 5th respondent complained that the Land Parcels belonging to her deceased father in law and which were to be inherited by his only son – her deceased husband – had been inexplicably transferred to the 2nd and 3rd petitioners.

21. The affidavit of PC Meshack Ombongi deposed in support of the 1st respondent's grounds of opposition confirms the start of the criminal investigation. The DPP further explains how the investigators visited the District Lands Office in December 2017 and the discoveries they made concerning the irregularities in transfer of the Land Parcels; that the proprietor of the Land Parcels had died in 2006; that agreements and transfers were done in 2011 long after the deceased had died; that the transferees – the 2nd and 3rd petitioners – did not in fact attend the Land Control Board consent and approval meetings; that forged papers and false ID documents were used to effect the improper transactions; and that the Land Control Board Chairman had denied the authenticity of the Land Control Board papers used for the alleged transfer.

22. After the complaint was filed in 2017, was there any rationale for the police to take any notice of it? In **R v Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR** it was 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.”

Thus, there is no basis for the police not to act upon a complaint, unless it can be shown that the exercise of the DPP's discretion to commence investigations was improperly exercised and unreasonable.

23. The 1st Petitioner exhibited as “LWT 7” a Release Order in respect of cash bail paid in *CMs Criminal Case No 294 of 2018 R v Lois Wambui Thuo* showing that the said 1st Petitioner had been charged in the criminal case by the DPP, and had been bailed out by one Joy Kabura Thuo. The Release Order was given on 2nd March, 2018, and the accused was required to attend court on 15th March, 2018. The Release Order demonstrates that the Criminal case had been commenced by 2nd March, 2018.

24. It appears from “LWT 1” filed by the 1st Petitioner, that in the meantime on 12th March 2018, the 5th Respondent filed *Civil Suit No 110/2018 in Nakuru Environment and Land Court Lydia Bosibori Anyega v James Wagama Ruitha, Irene Wanjiru Wagama and the District Land Registrar, Naivasha*. In that suit, the 5th Respondent sought orders to restrain the 2nd and 3rd petitioners from any dealings with the Land Parcels.

25. When was the criminal justice process commenced? In **Petition No 428 of 2015 Godfrey Mutahi Ngunyi v DPP and 4 Others**, Onguto J, had this to say on the issue:

“76. An investigation process basically kicks off the substantive criminal justice process. It commences whether there is a complaint or not, but only once the investigating agency is satisfied that there is need to interrogate certain action further and there is a basis for such investigation. The reasoning for a need for a foundation is simple. An investigation will inconvenience parties. It will interfere with the most basic of rights, the right to privacy. The process of investigation takes various forms, it could simply be a preliminary effort with no binding decision being made by the investigator but rather only non-binding

recommendations which are subject to review by the recipient of such recommendations”

26. The Petitioners are thus inaccurate in suggesting that the Criminal Case was commenced *after* the civil suit **“as a means of intimidation”**, because clearly, the criminal case had already been commenced by the complaint at any rate before the civil suit commenced. Criminal Case No 294, impugned herein and sought to be stayed, commenced on or before 2nd March, 2018 when the 1st Petitioner was the only accused.

27. I note, further, that the Charge Sheet exhibited as “LWT 2” by the 1st Petitioner is dated 24th September, 2018. In addition, I note that the said Charge Sheet includes the 2nd and 3rd Petitioners and one Benson Ayuka as accused persons, in addition to the 1st Petitioner. The Court file is referenced as the same case file *CMs Criminal Case No 294/2018* in which the 1st Petitioner had earlier been charged and then been bailed out. Thus, one can reasonably state that the latter accused persons were later enjoined as joint accused persons in the same case that had been previously commenced in respect of the 1st Petitioner.

28. The petitioners argued that the Criminal Case begun when the charge sheet was read on 24th September, 2018. To accept that argument would to disregard in toto the fact that Criminal Case No 294 of 2018 had commenced on or before 2nd March, 2018 with the 1st Petitioner as the accused. It is clear from the Replying Affidavit by the DPP that on receipt of the 5th Respondent’s complaint, they begun investigations. These apparently took time as they pieced together the documentation. This is not unusual for investigative work which requires that before proceeding with adverse action against a party, there should be a good foundation in fact.

29. The investigation disclosed that a Sale Agreement for the Land Parcels was allegedly entered into with the deceased Johnson Kiriago Sangaka on 22nd March 2011, which is five years after he had died. By a letter dated 22nd January 2018 to the National Registration Bureau, the DCI sought the registration particulars of individuals involved in the transactions, and received a reply in a letter dated 30th January, 2018 attaching Identification Reports; the DCI on 6th September, 2018 received a Forensic Document Examination Report in respect of one Benson Ayuka Anyieka who signed the Sale Agreement on behalf of the deceased owner of the Land Parcels,. It concluded that the signatures were done by different authors; they obtained the Statement of Mr Khalif Dol Abdullahi, the then Senior District Officer in 2011 who allegedly signed the Land Control Board Consent form used for the said transfer. He asserted that the said form was fake and his signature was forged.

30. It appears plausible that it was after this investigative work that the 2nd and 3rd Petitioners were included as joint accused persons in the charge sheet in Criminal Case No 294/2018 which had undoubtedly already been commenced earlier, on or about 2nd March 2018.

31. The legal position has always been that the object of a criminal case must never be to help any party advance their civil intentions or frustrate any actions in a civil dispute. This was clearly and aptly stated in **Republic v Chief Magistrate’s Court at Mombasa Exparte Ganijee & Another [2001] 2 KLR 703**, where the court aptly held:

“It is not the purpose of a criminal investigation or prosecution to help individuals in the advancement of frustrations of their civil cases. That is and 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 a 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 dominant purpose is to further that ulterior motive and that is when the High Court steps in.”

32. I do not see evidence availed herein to demonstrate that the DPP had or was abusing their power in respect of commencing the criminal proceedings. Instead, what I see is an independent investigation that took its time and followed the course of facts. I see no evidence of influence by the complainant; none has been adduced of such activity.

33. It is also clear that the criminal proceedings and the civil case are running simultaneously, which may give the suggestion that the former is intended to bolster the latter, and to ensure that there is a squeeze put on the petitioners through the criminal case. That was the essential submission of the petitioners. In their submissions filed on 16th October, 2019, at paragraph 6, the petitioners argued that by the fact of the complainant filing a civil suit on 12th March, 2018:

“...in the Superior Court, she invoked her right under the provisions of Article 50(1) of the Constitution and sought to seek a civil remedy to her dispute between herself and the herein 2nd and 3rd Respondents”

34. Accordingly, the petitioners argue at paragraph 7, 8 and 11 of the said submissions that:

“7. The 5th respondent cannot proceed to seek a civil remedy to her dispute and then thereafter elect to instigate criminal proceedings against the persons that she has a civil dispute with.

8. It is the submission of the Applicants that the criminal proceedings are a tool to intimidate the herein Applicants to give up the rightful claim of the 2nd and 3rd Respondents (sic: Applicants) to their property being Nakuru/Moi Ndabi/1287& 1288 of which they are the registered proprietors....

11.The Applicants state that if the herein 5th Respondent elects to commence civil proceedings she cannot thereafter during the pendency of those proceedings proceed to instigate criminal proceedings for that action affects the Applicants' right to a 'fair hearing' [under Article 50(1) Constitution]

35. The Petitioners' position is clearly that the 5th Respondent having elected a civil suit for resolution of their dispute are now not entitled to instigate criminal proceedings to resolve the same dispute. Such a course, the petitioners argue, denies them their constitutional right to a fair hearing. It has already been seen from the chronology herein, however, that the complaint in the Criminal Case was in fact lodged in 2017, well before the civil case in the Environment and Land Court was. So the Petitioners' argument is short on that point.

36. Where both forms of proceedings are concurrent, what is the position? It appears to me that there is nothing in law to suggest that where civil and criminal proceedings run concurrently, there is, ipso facto, a presumption that the criminal proceedings are intended to pre-empt or coerce certain actions in relation to the civil case. This issue has been dealt with by the courts too.

37. In **R v Attorney General & 4 Others Exparte Kenneth Kariuki Githii [2014]eKLR** it was stated by Odunga J , correctly in my view, as follows:

“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 recognized aim” (Emphasis supplied)

38. Further, under **section 193A** of the **Criminal Procedure Code** there is no statutory bar to the existence of concurrent civil and criminal proceedings. That section provides as follows:

“Notwithstanding the provisions of any other written law, that fact that any matter in issue in criminal proceedings is also directly in issue in any civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings”

39. Dr Khaminwa referred to the treatise **Malik's Criminal Investigations- Practice Procedure Proceedings, Techniques & Trials, 2019, Pg 8** where the author states:

“In crime, therefore, one finds that the normal marks are that the State has power to control the procedure, to remit the penalty, or to inflict punishment. Many crimes are also wrongs against particular individuals only indirectly if at all. Thus it may be seen that special rules apply because the State is one of the parties to the relationship there is the power of the State to punish and the liability of the prisoner to be affected.”

40. Dr Khaminwa was making the proposition that because crimes fall under the purview of public law, the state has power to control the procedure and suggested that the 5th respondent reverted to the state after commencing the civil proceedings. That the court should not assist the complainant to press upon the state's coercive power to resolve her dispute with the 2nd and 3rd respondents.

41. Dr Khaminwa had also likened this case to that of **Republic v DPP & Commercial Bank of Africa Exparte Patrick Kangethe Njuguna & 4 Others HC Judicial Review Case No 429 of 2016**. There the applicants were accused of offering fake titles and charge instruments to the bank and the criminal trial was put in abeyance by the High Court. The bank instituted criminal proceedings after civil proceedings for default in loan repayments had been instituted. One case had been filed in the ELC (Suit No 13 of 2016) on 6th February, 2016, and the Bank subsequently lodged a criminal complaint against the applicants in August 2016. The court found and concluded that:

“108....In this case it is clear that the civil proceedings seeking recovery of the alleged fraud were instituted before the criminal process was commenced.....

....

112 in the circumstances of this case, it is my view that the proceedings which were commenced first in time ought to be permitted to proceed to their logical end

113 Accordingly, it is my view and I hold that the criminal proceedings ought to be suspended in the meanwhile.” (Emphasis supplied)

42. The **Kangethe case** is clearly distinguishable from the present case. Here, the criminal complaint was in fact lodged months before the civil case was filed, and indeed commenced, albeit with the 1st petitioner only, on or before 2nd March 2018.

43. At the core of it all, my considered view is that where criminal proceedings have commenced it is for the applicant to show, for example, that the 1st Respondent (DPP) has abused the court process; or that there was insufficient material evidence on which to commence the criminal proceedings; or that there was an ulterior purpose in the commencement of the criminal proceedings; or that there was

unreasonableness or absence of a public interest object in commencement of the criminal proceedings; or that the criminal prosecution was commenced in the absence of a proper factual foundation or basis. In respect of all these examples there will always be justifiable suspicion for imputing improper motive, absence of good faith, or improper purpose as against the prosecutor. In such cases the High Court will have no option but to interfere with the continuation of such a criminal case.

44. It is always for the applicant to satisfy the court that the heavy duty and discretion given to the DPP under Article 157 of the Constitution is being abused or misused. That burden demands that the applicant place before the court real evidence, not by mere allegations. This was emphasized in **Kuria & 3 Others v Attorney General** (supra):

“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 need to show how the process of the court is being abused or misused and the 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.....it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts..... 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.... 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 manipulation, abuse or misuse of court process or that there is danger to the right of the accused person to have a fair trial.”

45. My conclusion is that in this particular case, no evidence has been put forth to lay the ground for the suggestion that the DPP has improperly exercised his constitutional power to investigate the complaint or to commence the criminal proceedings. There is also nothing to suggest that there is no foundation for the institution of the criminal proceedings herein.

46. Unlike in the **Patrick Kangethe** case the present criminal proceedings commenced earlier than the civil proceedings. I agree with Odunga J in **Kangethe’s** case, therefore, that ***“the proceedings which were commenced first in time ought to be permitted to proceed to their logical end”***.

47. Equally, nothing has been laid before me to ascertain that Criminal Case No 294 of 2018 was commenced after the institution of *Nakuru ELC Civil Suit No 110 of 2018 Lydia Bosibori Anyega (Suing as the legal Administrator of the estate of the late Jonson Kiriago Sangaka) v James Wagemu Ruitha, Irene Wanjiru Wagemu & District Land Registrar, Naivasha*. I have however noted that the criminal charges against the 2nd and 3rd Petitioners were brought to court in September, 2018 after the civil case had been instituted against them, but when the criminal case against the 1st Petitioner had already been ongoing. So that the 2nd and 3rd Petitioners were enjoined in the criminal case soon after the civil case had been filed.

48. If I had been minded to stay the prosecution case in any event, such stay would only have been in respect of and affected only the 2nd and 3rd petitioners for the reason only that the charges against them were brought when the civil suit had already been filed. That however, would have the effect of crippling the existing criminal case against the 1st petitioner as the evidence in the criminal case would then become disjointed and incongruous if it continues or it would be delayed for inexpedience and impropriety to proceed without the collaborative evidence in respect of the 1st and 2nd Petitioners.

49. Thus, I must also consider the overall administration of justice, and the public interest elements thereof, and the promotion and protection of the constitution when determining my course of action herein.

50. In **Malik’s** treatise (supra) at page 6, the author instructively points out that:

“Criminal and Civil law overlap, and many acts or omissions and not only ‘wrongs’ for which the person injured is entitled to recover compensation for his own personal injury or damage, but also ‘offences’ for which the offender may be prosecuted and punished in the interest of the state”

51. I consider this a case in which there is evidence that the complainant has potentially been injured. But also there is no doubt that the public and the state have also been injured in that the Lands Office being a public office may potentially have been defrauded through the actions of the petitioners. That, in my view, was a satisfactory basis for the state to entertain the prosecution in the public interest. I need not go any further in this regard, as the substantive matter is before the lower court.

Disposition

52. In light of all the foregoing, the Petitioners’ petition fails, and the court sees no rationale for interfering with the criminal trial in the court below.

53. The earlier orders issued by this court staying the proceedings of the lower court are hereby discharged

54. Orders accordingly

Dated and Delivered at Naivasha this 22nd Day of January, 2020.

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Ms Anyango holding brief for Khaminwa for the Petitioners
2. Ms Maingi for the 1st Respondent
3. No representation for the for the 2nd Respondent
4. No representation for the 3rd Respondent
5. No representation for the for the 4th Respondent
6. No representation for the 5th Respondent
7. Court Clerk - Quinter