



Inchape Kenya Limited v Directorate of Criminal Investigations & 3 others (Constitutional Petition E470 of 2024) [2025] KEHC 13946 (KLR) (Constitutional and Human Rights) (12 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13946 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E470 OF 2024**

B MWAMUYE, J

SEPTEMBER 12, 2025

IN THE MATTER OF ARTICLES 2(1) & (2), 19, 20(1), (2), (3) & (4), 21(1), 22(1) & (2), 23(1) & (3), 24(1), (2) & (3), 25(C), 27(1), (2) & (4), 31, 35, 40(1) & (3), 47(1) & (2), 50(2), 165, 258, 259 (1)(A) & (B) AND 259(3) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF SECTION 52(1) NATIONAL POLICE ACT, NO 11A OF 2011

AND

IN THE MATTER OF SECTION 4(2) OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015

AND

IN THE MATTER OF THE COMPANIES ACT, NO. 17 OF 2015

AND

IN THE MATTER OF AN INQUIRY BY THE DIRECTORATE OF CRIMINAL INVESTIGATIONS ON THE COMPLAINT OF MOSES OTIENO MAGERO

BETWEEN

INCHAPE KENYA LIMITED PETITIONER

AND

THE DIRECTORATE OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT

INSPECTOR GENERAL, NATIONAL POLICE SERVICE 2ND RESPONDENT



JUDGMENT

1. The Petitioner approached this Court vide Petition dated 12th September 2021, seeking protection for violation of rights under Article 27, 47(1) & (2) and Article 50(2)(1) of *the Constitution* of Kenya.
2. The Petitioner is therefore seeking the following orders: -
 - a. A declaration be and is hereby issued declaring that the 1st and 2nd Respondent's Requisition to compel attendance dated 5th September 2024 violates/ threatens to violate the right of the Petitioner, and of the Petitioner's Directors named therein to equality and freedom from discrimination under Article 27 of *the Constitution* of Kenya, 2010;
 - b. A declaration be and is hereby issued declaring that the that the 1st and 2nd Respondent's requisition to compel attendance dated 5th September 2024 violates/ threatens to violate the right of the Petitioner, and of its Directors named therein to privacy under Articles 31(c) and 31(d) of *the Constitution* of Kenya; 2010;
 - c. A declaration be and is hereby issued declaring that the 1st and 2nd Respondent's Requisition to compel attendance dated 5th September 2024 violates/threatens to violate the rights of the Petitioner and of its Directors named therein to fair administrative action under Articles 47(1) and (2) of *the Constitution* of Kenya, 2010;
 - d. A declaration be and is hereby issued declaring that the 1st and 2nd Respondent's requisition to compel attendance dated 5th September 2024 violates/ threatens to violate the right to freedom of the Petitioner, and of its Directors named therein against self-incrimination guaranteed under Article 50(2) of *the Constitution* of Kenya, 2010;
 - e. A declaration be and is hereby issued declaring that 1st and 2nd Respondent's requisition to compel attendance dated 5th September 2024 is illegal, null and void in breach of Section 52 of the *National Police Service Act* Cap 84 Laws of Kenya.
 - f. A permanent injunction be and is hereby issued restraining the 1st and 2nd Respondents whether by themselves, their officers, servants, agents and/ or otherwise from enforcing the requisition to compel attendance dated 5th September 2024;
 - g. An order of certiorari be and is hereby issued to remove into this Honourable Court for purposes of being quashed the 1st and 2nd Respondent's requisition to compel attendance dated 5th September 2024;
 - h. Any other relief this Honourable Court deems fit to grant to meet the ends of justice;



- i. Costs of this Petition; and
 - j. Interest on relief (i) above at Courts rates from the date of filing this Petition until payment in full. “
3. The Petition was accompanied with a Supporting Affidavit sworn by Yulia Vershinskaya, the Managing Director of Inchcape Kenya Limited, the Petitioner herein. He averred that the 1st and 2nd Respondents herein issued a requisition to compel attendance which was dated 5th September 2024 and that required the attendance of the persons named therein at the 1st Respondent’s Offices at OC DCI Parklands, Westlands, Nairobi on 6th September, 2024 to provide information relating to an offence of conspiracy to defraud contrary to Section 393 of the Penal Code.
 4. He avers further that the said requisition was not served formally on the Petitioner or any of the persons therein but was sent electronically through WhatsApp messaging service by the 1st Respondent’s officer named Charles Kariuki.
 5. He states that on 6th September 2024, the Petitioner requested for and was granted more time to comply with the requisition. The summons were then deferred to 12th September 2024 but the time for appearance was not specified. According to him no other formal requisitions to compel attendance were issued for the new date of 12th September 2024. The deferral was communicated informally between the 1st Respondent and the Petitioner’s advocates.
 6. According to the deponent herein, the requisition and any subsequent appearance by the persons named therein before the 1st and 2nd Respondents is illegal, irregular and in excess of jurisdiction which is in breach of the Petitioner’s constitutional rights and those of its directors.
 7. In response to the Petition, Respondents filed a Replying Affidavit dated 21st January 2025 sworn by PC Sammy Shamalla who averred that the 2nd Respondent is an independent office established under Article 245 of *the Constitution* and that the Directorate of Criminal Investigations is established under Section 28 of the *National Police Service Act* No. 11A of 2011 and its functions outlined pursuant to Section 35 whose functions includes investigations, upon which the file is forwarded to the Office of Director of Public Prosecution.
 8. He averred that pursuant to the complaint by the Interested Party, the 1st Respondent commenced investigations on a case of an alleged offence of conspiracy to defraud contrary to Section 393 of the Penal Code as reported under OB No. 62/14/08/2024.
 9. He further stated that they summoned sales Executive Ms. Camilla Natasha and Anthony Ndambuki who declined the summons and upon follow-up, the two referred them to the Petitioner’s Managing Director one Charles Kariuki for direction and further communications regarding the matter.
 10. He further stated that the 2nd Respondent summoned 3 of the Petitioner’s employees through the Managing Director’s Whatsapp on 16th August 2024. The Petitioner’s Managing Director one Charles Kariuki honored the summons and recorded a statement on 20th August 2024 at their offices at Directorate of Criminal Investigations (DCI) Parklands and upon inquiring on the whereabouts of his juniors Camilla and Antony, he informed them that the two employees were fired and if they were required, the 2nd Respondent should contact them directly.
 11. He states that on 5th September, 2024 they summoned the Petitioner’s Directors vide Business Registration Service Record letter dated 22nd August 2024 capturing particulars of the of the Company’s Directors which was served through the Managing Director, Charles Kariuki.



12. He states further that he received a phone call from an individual who introduced himself as Mr. Angwenyi, an Advocate acting for the Petitioners. Mr. Angwenyi confirmed that the company was in receipt of summons to their directors but lamented over the summoning of high-ranking members in the company and a director who had resigned from the Company by the name Leah Muthoni.
13. The deponent herein averred that on 12th September 2024, the purported resigned director one Leah Muthoni appeared before the 1st Respondent accompanied by Ronald Wakhisi Makokha, an advocate acting for the Petitioner, who was deemed unfit to record a statement due to his health condition.
14. The Respondents contend that it is a mockery to the Constitution and a paradox for the Rule of Law for the Petitioner to blatantly refuse to honour summons but then goes ahead to instruct Mr. Ronald Wakisi Makokha to accompany Leah Muthoni to DCI Parklands for statement recording, a director they allege to have resigned from Inchcape Kenya Limited, a year ago.
15. They further contend that they are yet to conclude their investigations and have the file forwarded to the Office of Director of Public Prosecutions for perusal and advice.
16. The Respondents contend that the Petitioner has failed to establish how its rights and fundamental freedoms under the Bill of Rights have been violated, infringed, or threatened. Specifically, it has not been demonstrated how the mere act of being summoned to a police station to record a statement amounts to a violation of constitutional rights, discrimination, or any form of illegality. Moreover, the Petitioner has not provided any evidence to show that its directors, upon complying with the summons, would be subjected to unfair treatment or that such attendance would result in a violation of their rights. The Respondents further assert that the Petitioner has not demonstrated the existence of any imminent or real threat to its directors' rights that would justify the grant of the reliefs sought.
17. According to the Respondents, this Court lacks supervisory jurisdiction to intervene in, direct, or otherwise oversee the operations of other constitutional bodies including the Respondents themselves in the exercise of their constitutional and statutory mandates, save in exceptional and clearly established circumstances where such intervention is necessary to prevent impairment of a co-equal constitutional function. They therefore argued that, in the interest of justice, the Court should refrain from interfering with the ongoing investigations and allow the investigative process to proceed, culminating in the forwarding of the investigation file to the Office of the Director of Public Prosecutions for appropriate action.
18. The Interested Party filed a Replying Affidavit dated 3rd March 2025 sworn by Moses Otieno Magero who averred that on 8th August 2024, he lodged a complaint against the Petitioner and its directors at Parklands Police Station vide OB No. 62/14/ 08/ 2024.
19. He stated that the Petitioner and its sale representative were aware that the motor vehicle they sold to him did not have critical safety features but they intentionally and fraudulently induced him to purchase the said motor vehicle, which led to him lodging a complaint against the Petitioner on 14th August, 2024.
20. He asserted that that he has been advised upon receiving a complaint, the police are empowered to investigate crime to establish whether there is any evidence to charge a subject. He is further advised that in furtherance of Section 24 of the National Police Service Act, the police are empowered under Section 52(1) of the Act to compel any person whom the police officer has reason to believe that he has information which may assist in an investigation of an alleged offence to appear before him at a police station and record a statement.



21. He further asserted that he believed to be true that the Petition has failed the specificity test required of Constitutional Petitions since the Petitioner and its directors allege violations of Articles 27, 47(1), (2) and 50(2) of *the Constitution* yet they have not explained to a reasonable degree of precision the manner in which they allege these rights have been infringed.

Petitioner's Submissions

22. The Petitioner filed submissions dated 27th March 2025 and analyzed 3 issues for determination namely:
- a. Whether this Honourable Court has the jurisdiction to hear and determine the Petition herein;
 - b. Whether the investigative process initiated by the 1st and 2nd Respondents was vexatious and violated the Petitioner's constitutional rights; and
 - c. Whether the reliefs sought in the Petition should be granted.
23. On the first issue, the Petitioner submitted that the Respondents are obliged to carry out their functions in a manner that respects, protects and promotes *the constitution* and the Bill of Rights in accordance to Article 2 and 19 of *the Constitution* of Kenya 2010. Further and in accordance with the Rule of Law, the 1st and 2nd Respondents in exercise of their functions are obliged to comply with the strict dictates of *the Constitution* and all other applicable laws, including the *National Police Service Act*. Reliance was placed on the case of Geoffrey K. Sang v Director of Public Prosecutions & 4 others [2020] eKLR and Muslims for Human Rights (MUHURI) & Another vs Inspector – General of Police & 5 others [2015] eKLR.
24. The Petitioner further submitted that in instituting the investigations against it and proceeding in the manner they have done so far, the 1st and 2nd Respondents violated the Petitioner's rights in particular, freedom from discrimination under Article 27, right to privacy under Article 31, right to property under Article 40, right to fair administrative action under Article 47 and the right to fair trial under Article 50 of *the Constitution* of Kenya, 2010.
25. In respect of the second issue, the Petitioner submitted that the matter before the Court does not concern the legality of the power to issue requisitions per se, but rather the underlying basis for the specific requisitions compelling the attendance of the Petitioner's agent and employees on 16th August 2024 and 5th September 2025. The Petitioner contends that the ongoing investigation is vexatious and is being conducted at the instigation of the Interested Party, not for genuine criminal inquiry, but as a means to undermine the Petitioner's accrued proprietary interest in the sale proceeds of a motor vehicle. It is the Petitioner's position that the dispute is essentially contractual in nature and ought to be pursued through a civil claim for breach of contract, rather than through the criminal investigative process. Reliance was placed on Republic v Director of Public Prosecutions & 2 others; Evanson Muriuki Kariuki (Interested Party); Ex Parte James M. Kahumbura [2019] KEHC 884 (KLR) and Republic vs Chief Magistrate's Court at Mombasa ex-parte Ganjee & Another.
26. The Petitioner contends that it is a well-established principle that the initiation of criminal proceedings for the purpose of advancing civil disputes or grievances constitutes an abuse of the court process. According to it, the Interested party had already initiated a civil process to pursue the desired refund and rather than continuing with the civil claim until it was resolved, the Interested Party elected to weaponize the criminal justice system against the Petitioner. They assert that the actions of the 1st and 2nd Respondents and the Interested Party are a gross abuse of the criminal justice system that ought



to be countenanced by this Court. Reliance was placed on the case of Republic vs Chief Magistrate's Court at Mombasa ex-parte Ganijee & Another [2002] KEHC 1120 (KLR).

27. On the third issue the Petitioner submitted that the investigations carried out by the 1st and 2nd Respondents were conducted to advance private interests at the expense of the Petitioner and in violation of its constitutional rights therefore the appropriate remedy is to quash the requisitions as requested in the Petition and for this court to issue a permanent injunction prohibiting the Respondents from further violating its rights. They cited the case of Kuria & 3 Others vs Attorney General [2002] 2KLR 69.

Respondent's Submissions

28. The Respondents on the other hand filed submissions dated 29th April 2025 based on two issues namely:
- a. Whether the Petitioner's rights under Articles 27, 31, 47 and 50 of *the constitution* have been violated; and
 - b. Whether the Respondents acted within their constitutional and statutory mandate in investigating the alleged fraud and summoning the Petitioner's Directors.
29. On the first issue, the Respondents submitted that the alleged violations of Articles 27, 31, 47, and 50 arise from a requisition to compel attendance dated 5th September 2024, which was issued in the course of an investigation initiated pursuant to a complaint by the Interested Party. They contend that the summons issued to the Petitioner's director formed part of a routine investigative process by the 1st Respondent and was not discriminatory or targeted in any unlawful manner. They place reliance on several cases including Kenya Tea Development Agency Holdings Limited & Another v Directorate of Criminal Investigations & 2 others (Petition E060 of 2023) [2024] KEHC 8899 (KLR) (Constitutional and Human Rights) (19 July 2024) (Judgment), Ethics and Anti-Corruption Commission & another v Ojienda, SC t/a Prof Tom Ojienda & Associates Advocates & 2 others, Chepkoi v Ethics and Anti-Corruption Commission & Another [2024] KEHC 10389 (KLR) and David Gathu Thuo v Attorney General & Another [2021] eKLR.
30. On the second issue, the Respondents submitted that Article 243 establishes the National Police Service which is under the command of the office of the Inspector General as per Article 245 of *the Constitution*. Furthermore, the Directorate of Criminal Investigations is established under Section 28 of the *National Police Service Act* and is mandated to undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime among others. They cited the case of Republic v Commissioner of Police & Another Ex-Parte Michael Monari & Another (2012) KEHC 4595 (KLR).
31. They further submitted that while *the Constitution* allows the Cabinet Secretary to give guidelines on policy matters, it precludes any person from directing the Inspector General with respect to investigations of any particular offence. Moreover, the need for independence in matters touching on investigation of crime was emphasized in the case of Isaac Tumunu Njunge v Director of Public Prosecutions & 2 others [2016] eKLR. According to the Respondents, the Petitioner's prayer for permanent injunction would be an interference of the Respondents' mandate to investigate the matter.
32. They contend that the summons issued to the Petitioner and its Directors were in accordance with Section 52(1) of the *National Police Service Act*, which grants the police power to summon individuals who may have relevant information regarding an investigation and therefore valid. Furthermore, the Petitioners have not indicated any prejudice that will be suffered if they comply with the requisition



and have also not shown that the summons were issued arbitrarily or with malicious intent thus the requisition is valid and lawful. Reliance was placed on the case of Kenya Tea Development Agency Holdings Limited & Another v Director of Criminal Investigations & 2 others (Petition E060 of 2023) [2024] KEHC 8899 (KLR) (Constitutional and Human Rights) (19 July 2024) (Judgement).

Interested Party's Submissions

33. The Interested Party filed written submissions dated 9th April 2025 which outlined three issues for determination namely:
 - a. Whether the requisitions to compel attendance dated September 5th 2024 are proper;
 - b. Whether the Interested Party is attempting to misuse the criminal justice system to gain an unfair advantage against the Petitioner in a civil dispute; and
 - c. Whether the Petition is merited and the prayers therein ought to be granted.
34. On the first issue, the Interested Party submitted that it is common ground that the 1st and 2nd Respondents have jurisdiction to issue requisitions to compel attendance as such powers are conferred upon police officers under Section 52(1) of the *National Police Service Act*. Accordingly, criminal investigations can only be interfered with if it is sufficiently demonstrated they are being used as an abuse of power which in the present case, it was not. Reliance was placed on the following cases which include inter alia: Republic v Commissioner of Police & Another Ex-Parte Michael Monari & Another (2012) KEHC 4595 (KLR), Daniel Ogwoka Manduku vs Director of Public Prosecutions & 2 others [2016] eKLR, Agricultural Development Corporation of Kenya vs Nathaniel K. Tum & Another [2014] eKLR.
35. He further submitted that the Petitioner and its Directors have alleged a violation of their rights in *the constitution* but have merely cited the provisions without reasonably demonstrating how the said provisions have been infringed and/or threatened falling short of the principles set out in the case of Anarita Karimi Njeru vs. Republic [1979] eKLR.
36. On the second issue, the Interested party submitted that the only justifiable basis for interfering with a criminal justice process is when it is sufficiently demonstrated that the process is being perpetuated for ulterior motives and in the present case the Directors have not demonstrated and/or adduced any evidence of dishonesty or malice on the part of the Respondents and that the subject requisition notice was issued in the normal course of investigations.
37. He further submitted that the question that should be answered is whether the dispute between parties constitutes an offence under the Laws of Kenya and should the answer be in the affirmative, to which they submit in the present instance, then the Petitioner and its directors ought to be subjected to the due process of the law and be given an opportunity to make a case for themselves.
38. The Interested party stated that the mere fact that a complaint is lodged does not mean that a criminal case will be instituted. The police have the duty to investigate on any complaint once a complaint is made in a bid to establish whether proper factual foundations exist to commence criminal prosecution. They relied on the case from the Court of Appeal in India; Lalchand Fulchand Shah vs Investments & Mortgages Bank Limited & 5 others [2018] eKLR.
39. On the final issue, it was his submission that he has demonstrated that the Petition is devoid of merit and no basis has been evidenced to justify the grant of the prayers sought. He further asserted that the Petitioner and its Directors will not suffer any prejudice should they comply with the requisitions and it is against public interest to prohibit the police from investigating crimes.



Analysis And Determination

40. I have considered the pleadings, arguments by parties and the decisions relied on. The issue that arises for determination is whether the investigation by the 1st and 2nd Respondents as against the Petitioner amounts to violation of the Petitioner's rights and an abuse of the court process.
41. The threshold of a constitutional petition was clearly formulated in the case of Anarita Karimi Njeru vs the Republic (1976-1980) KLR 1272. It should be noted that the aforesaid case has been relied upon from time to time again to demonstrate the said threshold.
42. In the instant Petition, I note that the Petitioner has quoted various provisions of *the Constitution* which in its view have been violated or threaten to be violated and they have gone ahead to explain how the said provisions have been violated or are threatened to be violated and the injuries they are likely to cause. Further it is clear from reading the Petition in totality, that the Constitutional right that the Petitioner alleges to have been threatened to be infringed upon by the Respondents is the violation of right to equality and freedom from discrimination provided under Article 27 of *the Constitution*, the right to fair trial which includes the right to refuse giving self-incriminating evidence provided under Article 50(2)(1) of *the Constitution* and a violation to its right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair as provided under Article 47 of *the Constitution* of Kenya, 2010.
43. This Court is clothed with immense powers to protect arbitral threat to and violation of fundamental rights and freedoms of the Petitioner who has demonstrated that the instant petition is premised on violation of its rights by the Respondents acts of conducting criminal investigations upon it and its directors thus granting this Court jurisdiction to determine the matter.
44. In the pronouncement of Olao J which I find persuasive in the case of Martin Wanyonyi C.E.O Centre for Human Rights Organization) & another v County Government of Bungoma & 2 others [2019] eKLR wherein it was held;
- “However, I do not see the Anarita and Mumo Matemtu cases (supra) as laying down a hard rule that a Petition which does not set out which particularity the Constitutional provisions alleged to have been infringed must suffer the fate of dismissal or striking out. Indeed, the Mumo Matemtu case (supra) refers to “reasonable precision” while the Anarita Karimi Njeru case (supra) talked about a “reasonable degree of precision.” The Anarita Karimi Njeru case (supra) also emphasizes the need “to ensure that justice is done.” The view I take of the matter is that whereas it is important to follow the guidelines and draw proper pleadings because they are the background upon which Constitutional Petitions and indeed all other claims are determined, transgressions that do not prejudice the opposing party should not in themselves be employed to defeat a claim...”
45. Article 165(3)(d) of *the Constitution* empowers the High Court to determine the constitutionality of any law or the conduct of any person or entity in purported exercise of constitutional power. Furthermore, under Article 23(3), the High Court may grant appropriate reliefs in proceedings brought under Article 22. It is therefore incontestable that this Court has the jurisdiction to adjudicate on the present dispute and grant appropriate measures for the protection of constitutional rights and values.
46. The instant case is a constitutional petition in which the Petitioner and its directors allege violation of their constitutional rights. The underlying issue is the Petitioner's challenge to the exercise of the



powers of the DCI and the National Police in contention that their actions have threatened to the infringement of its rights under *the Constitution*.

47. This petition concerns the enforcement of fundamental rights and freedoms specifically the Petitioner's right to equality and freedom from discrimination, the right to privacy, the right to fair administrative action and the right to fair trial. The Petitioner and its directors are entitled, under Article 22 of *the Constitution* to move this court for relief where the facts disclose an actual or threatened violation. This court is entitled to act quia timet where the circumstances call for it to act and as such it cannot be said that the mere issuing of a requisition by the police under Section 22 of the Police Act does not entitle the Court to act. The court can and will act when it is satisfied that fundamental rights and freedoms are threatened.
48. The National Police Service is a creature of *the Constitution* of Kenya 2010 under Article 239 (1) (a), (b) and (c) which provides that: -
- “The National Security organs are the Kenya Defence Forces, the National Intelligence Service and the National Police Service.”
49. Section 28 of the *National Police Service Act* No. 11 of 2011 stipulates that: -
- “There is established the Directorate of Criminal Investigations which shall be under the direction, command and control of the Inspector General.”
50. Article 245 (2) (b) of *the Constitution* of Kenya further provides that: -
- “The Inspector General shall exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation.”
51. The 1st and 2nd Respondents are a creation of Article 243 of *the Constitution* which establishes the National Police Service. Article 243(4) of *the Constitution* provides that: -
- “Parliament shall enact legislation to give full effect of this article.”
52. The relevant statutory instrument enacted pursuant to Article 243(4) is the *National Police Service Act* No. 11a of 2011. Under Section 24 of the said Act, the functions of The National Police Service are provided for and include investigations, detection and prevention of crimes among others. That is, the police have statutory mandate to discharge in the performance of their functions, namely to investigate complaints reported to them regarding commission of crime. This is a statutory duty the law has placed on the police and which they have an obligation to discharge.
53. Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, this Court has the powers to halt such a process if the intended criminal proceedings are oppressive, an abuse of the court process and amount to breach of fundamental rights and freedoms.
54. An oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The Court has inherent power to interfere with such investigation or prosecution process.



55. According to the Interested Party's Replying Affidavit, he averred that he made a deposit of Kes. 10,950,000.00 towards the purchase of the motor vehicle BMW X7 XDrive 40i and the balance of the purchase price of Kes. 12,000,000.00 was cleared by KCB Bank Kenya on 15th February, 2024. He further averred that the Petitioner's representatives allegedly proposed Tirupati on window Films and Car Paint protection solutions to work on his window films and paint protection.
56. He asserts that he went for two road tests with the said motor vehicle and on 13th March, 2024, he wrote a letter to the Petitioner's Managing Director highlighting the discrepancy between the delivered motor vehicle and the assurance given by the Petitioner's sales representatives in the absence of which he would not have purchased the motor vehicle.
57. According to the letter, the Interested party proposed two options to either resolve the issue or fully refund the amount incurred on purchase of the vehicle.
58. The Petitioner issued a reply to the demand dated 19th March 2024, which proposed two counters to the demand which were the trade in option and the offer to sale on behalf option. Similarly, vide letter dated 7th May, 2024, the Petitioner stated that they will not be able to accede to the Interested party's request for a refund as the damages complained about were not there at the time of inspection and taking of the motor vehicle. They averred that once the payment was made the Interested party collected the motor vehicle. According to the Petitioner the exact specifications of the motor vehicle were in the specification sheet shared with the Interested party and that the Petitioner was unable to agree to the demand to have a fixed sell by date of the motor vehicle. They however agreed to still sell the vehicle on the Interested party's behalf at an agreed value subject to entering into the sale-on-behalf agreement or trade in option which after valuation the amount collected after selling the motor vehicle would be used as a deposit towards the purchase of a new vehicle that will meet some of the Interested party's desired specifications when the next model becomes available.
59. There is no dispute that the Interested party then proceeded to lodge a complaint with the police service through the 1st Respondent. The Petitioner however states that the process is being used for the wrong purpose and is being abused. The Petitioner contends that the matter is a civil suit and there is even an ongoing civil matter between the parties. The Petitioner further contends that the summons to appear before the investigators is meant to put pressure on the Petitioner to settle the suit and issue a refund to the Interested party.
60. Section 193A of the Criminal Procedure Code (Chapter 75 Laws of Kenya) however provides that,
"Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings."
61. This matter is one where a criminal matter have not been commenced and also one where the risk of criminal proceedings hangs over the head of the Petitioner and its directors. It is recognized even in light of Section 193A of the Criminal Procedure Code, the High Court may stop proceedings where such proceedings, actual or contemplated, are oppressive, vexatious and abuse of the court process and a breach of fundamental rights and freedoms. This power though must be exercised sparingly as it is in the public interest that crime is detected and those suspected of criminal conduct are brought to face the consequences the law prescribes.



62. I however appreciate that, the mere fact that there are civil proceedings pending or that the cause of action can be subject to civil proceedings does not bar criminal proceedings from being commenced where it is shown that criminal offence has been committed.

63. The Court of Appeal in *Commissioner of Police and Director of Criminal Investigations Department vs Kenya Commercial Bank and Others* Nairobi Civil Appeal No. 56 of 2012 [2013] eKLR held thus:

“While the law (Section 193A of the Civil Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court. This is case more suitable for determination in the civil court where it has been since 1992, than in criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations.”

64. Where there is an abuse of the criminal justice process the court has powers to intervene just in the same way it does in civil proceedings and stay such process to ensure that a proper administration of justice is attained and the public confidence in the process of litigation whether in criminal or civil, is also maintained.

65. Criminal proceedings ought not to be invoked to settle personal scores or to advance personal interest. In *David Mathenge Ndirangu vs Director of Public Prosecutions & 3 Others* [2014] eKLR at para 37 & 39 in which the case of *R vs Chief Magistrate’s Court at Mombasa Ex Parte Ganijee & Another* [supra] was cited with approval, the court was clear that:

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement or frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but 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 in the criminal process. No one is allowed to use machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth... When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to overawe 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 word of punishment under the criminal



law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the high court steps in...”

66. While being careful not to interrogate the matter in great depth, so as not affect any possible and future civil proceedings, it is clear from the undisputed facts, and the commonly agreed background between the Petitioner and the Interested Party, the background and factual position articulated in Paragraphs 55 – 58 clearly lends to civil proceedings rather than criminal ones. There is nothing disclosed that would warrant a criminal action on the basis of the facts as presented by the Petitioner and the Interested Party. The dispute between those two parties is best resolved in civil proceedings, rather than the use of criminal proceedings to in effect potentially coerce the Petitioner to accede to the Interested Party’s position.
67. In *Joram Mwenda Guantai vs The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003* [2007] 2EA 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 to continue proceedings therein in excess of jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. 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 an 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.”
68. I am equally guided by the decision in *Kuria & 3 Others vs. Attorney General* [2002] 2 KLR 69 where the High Court held:
- “The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution in extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score -settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental rules of justice which underlie the society’s senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta...”
69. I am satisfied that the present case fits perfectly into the scenario of a potential misuse of criminal justice proceedings to potentially favour a party that ought to proceed to civil court, if the matter remains unresolved to that Party’s satisfaction. In addition, I further find that the institution or continuation of criminal proceedings in light of what is clearly a civil dispute among parties would be a clear abuse of the court process in these circumstances and further action on that front must be halted.
70. I am also mindful that the Petitioner would likely suffer considerable reputational harm in the event that a criminal action on the basis of the facts as presented was instituted; and that reality fortifies



the position that the institution of the same would deny the Petitioner the right to fair trial and put immense pressure on them to accede to the Interested Party's position.

71. From the foregoing, it is clear, that the Petitioner's rights to a fair hearing, due process, and non-discriminatory action that is based on the proper exercise of the constitutional and statutory authority vested in the Police and the Prosecution have been imperiled. The Petition must therefore succeed.
72. While the Petition has succeeded, I decline to grant the winning party costs, or to condemn the Respondents and/or the Interested Party to bear the same. It is important for this matter to be deescalated and a platform for open and good faith exploration of a possible out-of-court resolution fostered. An award of costs would not lend to that, nor would it be in the interest of justice in the circumstances of this case.
73. As I conclude, it would be remiss of me not to draw the gaze of the Petitioner and the Interested Party to the multi-door approach to justice in Kenya, and the many alternative forms of dispute resolution as articulated in Article 159(2)(c) of *the Constitution*. While this dispute may ultimately call for adjudication in civil proceedings, I encourage the Petitioner and the Interested Party to first earnestly explore the possibility of a pacific resolution of the dispute between them.
74. In the premise I find merit in the Petition. Consequently, I grant the following orders;
 - A. A declaration be and is hereby issued that the anticipated and continued investigation of the Petitioner and its directors by the Respondents in relation to matters concerning the dispute between Inchcape Kenya Limited, the Petitioner herein, and Moses Otieno Magero, is an unconstitutional interference with a civil law matter and outside the constitutional authority of the Respondents;
 - B. An Order of Certiorari be and is hereby issued removing into this High Court for the purposes of quashing the requisition to compel attendance dated 5th September 2024 issued by the 1st and 2nd Respondents, and the same be and is hereby quashed;
 - C. An order of Prohibition be and is hereby issued prohibiting the Respondents, either by themselves, their servants and agents, are restrained from investigating, summoning or arresting the Petitioner's officers and/or employees or in any way howsoever from investigating any matter in respect of the dispute between the Petitioner, Inchcape Kenya Limited, and the Interested Party, Moses Otieno Magero.
 - c. Each Party shall bear its own costs.

Orders accordingly. File closed accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12TH DAY OF SEPTEMBER 2025.

BAHATI MWAMUYE

JUDGE

