



**Maina v Obiero (Criminal Miscellaneous Application E009 of 2024)
[2025] KEHC 13341 (KLR) (25 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13341 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL MISCELLANEOUS APPLICATION E009 OF 2024
WM KAGENDO., J
SEPTEMBER 25, 2025**

BETWEEN

IRENE MAINA APPLICANT

AND

CHARLES ATHIAMBO OBIERO RESPONDENT

RULING

Background

1. Before the court is an application by way of a Notice of Motion dated 25th January, 2024, which is particularized to brought under Article 10, 22, 23, 25, 27, 29, 39(1) of *the Constitution* of Kenya, 210, and Rule 10 of the High Court Practice and Procedure Rules.
2. Save for the spent reliefs, the applicant moved this court for the following substantive Orders;
3. That the Honourable Court be pleased to issue stay of proceedings in the subordinate court, plea taking, reading out of charges, continued prosecution of the 1st and 2nd petitioners/applicants vide Criminal Case No. E090 Of 2024 Republic Versus- David Mureithi Kanyi And Irene Berndette Waithira pending the hearing and determination of this petition.
4. That the Honourable Court be pleased to issue an interim declaration that the plea taking, reading out of charges, continued prosecution of the 1st and 2nd petitioners/applicants vide Criminal Case No. E090 Of 2024 Republic Versus- David Mureithi Kanyi And Irene Berndette Waithira are unfounded, malicious, oppressive and otherwise unconstitutional, on the same breath, the summons to attend court for purposes of plea on the 30th day of January and all consequential orders fail the constitutional threshold hence stand terminated pending the hearing and determination of this petition.
5. That the Honourable Court be pleased to issue such further or other orders in the interests of justice.



Applicant's case

6. The application is propped by the grounds on its face and the affidavit of the 1st applicant; Irene Bernadette Waithira.
7. She deposed that the backdrop of the matter is in relation to a sale and purchase (conveyance) of all parcel of land known as Subdivision Number Mn/I/343 designated for development of Massionate Number 35, (hereinafter the suit property) a Low-Cost Housing project promulgated by the 2nd and 3rd petitioners/applicants ordinarily purchased on off-plan basis which modules were in the knowledge of all stakeholders.
8. Vide a sale agreement drawn by the 1st applicant, the 2nd and 3rd applicants entered a conveyance with the 4th respondent for the purchase of the suit property, at which instance the 1st applicant acting as an advocate for both parties witnessed the execution of the sale agreement, and having transmitted the respective purchase funds to the 2nd and 3rd applicants extinguished her role in the conveyance.
9. A crucial term in the parent agreement under clause D stipulated that in the event of construction delays due to exigencies beyond the control of the parties in the conveyance, the 4th respondent was offered an alternate maisonette / a re-sell alternate and a possible refund schedule.
10. That, despite an arbitration clause in the conveyance of the suit property, the 4th respondent proceeded to file several suits before the subordinate courts vide CMCC E440 OF 2020 and CMELC E192 OF 2023.
11. Further, that 4th respondent in cahoots with the 1st, 2nd and 3rd respondents lodged a complaint and filed Disciplinary proceedings with the Advocates Complaints Commission, The Advocates Disciplinary Committee against the 1st applicant to which quasi-criminal proceedings entered a plea of not guilty.
12. That, in propagation of the doctrine of double jeopardy the 1st and 2nd respondent sought to arrest the 1st and 2nd petitioners, to which the 2nd petitioner was arrested, on trumped up charges of Obtaining Monies by False pretences contrary to Sec 313 of the Penal Code Cap 63. Laws of Kenya, whereafter instituted Criminal Case No. E090 OF 2024 Republic - Versus- David Mureithi Kanyi & Irene Bernadette Waithira, which is slated for plea taking.
13. That, through their advocates the 1st and 2nd petitioners lodged complaints to the 3rd respondents over initial stages of arrest and their coercion, but there is yet to be disclosed an offence that would justify their arraignment in the criminal matter, and it is indicative that the same is borne of malice and ill-will from the respondents, aimed at arm-twisting the 1st and 2nd petitioners into realms out of the confides of the terms of the conveyance agreement.
14. Further, that to proceed with the prosecution of the said criminal case shall erode public confidence and is abhorrent to the criminal justice system.

Respondent's case

15. The 1st, 2nd and 3rd opposed the application through a Replying Affidavit sworn by one I.P Stephen Agutu, a police officer and an investigator with the Directorate of Criminal Investigations, at the Regional office in Mombasa, and is the investigating officer on conduct in the present matter.
16. He deposed that the instant application is misleading and malicious as the applicants have not demonstrated or substantiated how their constitutional rights and freedoms have been violated by the criminal case instituted against them and the same was influenced by ill will.



17. That, a formal complaint was lodged by the 4th respondent at Nyali Police Station OB NO.47/28/08/2023, which the 1st, 2nd and 3rd respondents were obligated to consider, investigate and review, respectively.
18. That, the particulars of the complainant was that on 18/6/2019 the 2nd petitioner entered in a sale agreement with the 4th respondent for the purpose of selling to the latter the suit property in off-plan basis at an agreed purchase price of kshs.2,800,000/- only and an additional kshs.52,000/-, which agreement was attested by the 1st petitioner acting for both parties and the monies periodically deposited through the advocates account.
19. However, the 4th respondent later realized that the agreed construction period of one year had long lapsed, yet he could not see any development taking place in the suit property and the developer could not offer satisfactory reasons why the agreement was breached. The 4th respondent began following up with the applicants both verbally and in writing, but they were evasive and declined to pick his calls prompting his lodging of a formal complaint to the police, after the petitioners committed to refund all his monies.
20. Following the complaints they undertook investigations, recorded statements of the petitioners, sought and obtained court orders to access crucial information in the case including bank records and registration status of the 3rd petitioner/company.
21. That, it was unearthed that the 3rd petitioner did not exist and that both the 1st and 2nd applicants were signatories to the bank account which the 4th respondent deposited the purchase price, which information he was not aware. After conclusion of the free and fair investigations, the investigation file was forwarded to the office of the Director of Public Prosecutions, who reviewed the findings and recommendations and thereby approved the proposed charges, and the matter registered in court for plea taking.
22. It was respondents' position that all investigations were undertaken within the dictates of *the constitution*. Further, the pendency of civil proceedings or proceedings at the Advocates Disciplinary Commission is not a bar to concurrent criminal proceedings being undertaken.

Written submissions

23. As at the making of this determination neither of the parties had filed any written submissions on record.

Analysis and determination

24. The only issue for determination is whether the applicants are entitled to the orders sought?
25. From the onset, there is no doubt that there are constitutional and statutory regimes under Article 244 of the COK and Sec 35 of the National Police Act, respectively, which vests the criminal investigative role and the power to arrest those culpable on the National Police Service of which the 1st and 2nd respondents are part of.
26. On the same breath the Director of Public Prosecutions is empowered to institute criminal proceedings in his/her discretion and such exercise of power is not subject to the direction or control by any authority as provided for under Article 157(10) of the COK.



27. This notwithstanding, Article 157(11) stipulates that:

“(11) In exercising the powers conferred by this article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.” (Emphasis added)

28. It would follow that although the DPP is not bound by any directions, control or recommendations made by any institution or body, by dint of its status as an independent public office, where it is shown that the expectations of the cited Article 157(11) have not been met, then this court is well within its mandate under Article 165(3)(d)(ii) to properly interrogate any question arising therefrom and make appropriate orders.

29. Article 165(3)(d) (ii) of *the constitution* provides that

“Subject to clause (5), the High Court shall have—

...

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

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

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

30. In the instant, the applicants in a nutshell seeks the quashing of the charges and proceedings in Criminal Case No. E090 Of 2024 Republic -versus- David Mureithi Kanyi And Irene Berndette Waithira on the pretext that the same are unfounded, malicious, oppressive and otherwise unconstitutional and an abuse of the court process.

31. The backdrop of the dispute as deduced from the parties herein is that the 4th respondent/purchaser entered into a sale/purchase agreement with the 2nd applicant/vendor for the purchase of all the suit property off-plan on the attestation of the 1st applicant as their then advocate. The part-terms were that upon payment of the consideration the 2nd applicant would commence and complete construction of the said property within one (1) year. As it would appear, despite the payment of the considerations the property was never developed within the timelines as agreed or ever developed.

32. The 4th respondent being understandably agitated by the breach sought answers from the applicants, which answers were not forthcoming. However, as per the terms of the agreement the applicants sought to activate the contractual reparations in instances of delayed constructions inter alia refund of the purchase price, but the 4th respondent had other plans.

33. As the record shows, the 4th respondent sought refuge in our hallowed Magistrates courts and instituted two (2) civil cases; Chief Magistrates Court Civil Case E440 Of 2020 And Chief Magistrates’ Environment And Land Case No E192 Of 2023.

34. Further, he lodged a complaint and filed Disciplinary Proceedings with the Advocates Complaints Commission And The Advocates Disciplinary Committee as against the 1st applicant/advocate.



35 However, the respondents' further institution of the aforementioned criminal proceedings is what aggrieved the applicants herein, which proceedings they term as vexatious and an abuse of the court process reeking of malice and ulterior motives.

36 I am alive to the dictates in Section 193A of the Criminal Procedure Code on this issue which 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.”

37. However, this, in my view ought not be cast in stone. Should the courts fold their arms and lay to rest when criminal justice is at risk of mockery through abuse of court processes and vexatious proceedings aimed at vilification, settling scores or propagating ulterior motives devoid of public interest? I do not think so.

38 In that regard, the Court of Appeal in the case of Commissioner of Police & Another v Kenya Commercial Bank Ltd & 4 others [2013] eKLR held as follows:

“While the law (section 193A of the Criminal 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 that power must be exercised responsibly, in accordance with the laws of the land and in good faith.

...It is not in the public interest or in the interest of the administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court. This is a case more suitable for determination in the civil court where it has been since..., than in a criminal court.”

39. The Supreme Court of Kenya in *Jirongo v Soy Developers Ltd & 9 others* (Petition 38 of 2019) [2021] KESC 32 (KLR) agreed with Court of Appeal's position in the cited *Commissioner of Police & Another v Kenya Commercial Bank Ltd & 4 others* [supra] and added as follows;

We respectfully agree and adopt this position in this case but must add that where it is obvious to a court, as it is to us and was to the learned Judge of the High Court, that a prosecution is being mounted to aid proof of matters before a civil court or where the hand of a suspect is being forced by the sword of criminal proceedings to compromise pending civil proceedings, then section 193A of the Criminal Procedure Code cannot be invoked to aid that unlawful course of action. Criminal proceedings, whether accompanied by civil proceedings or not, cannot and should never be used in the manner that the 2nd and 3rd respondents have done.”

40. Having thus held, the Supreme Court of Kenya borrowed from the Supreme Court of India in *RP Kapur v State of Punjab AIR 1960 SC 866* and expressed itself on the criteria to be used by the High Court before terminating any criminal prosecution or reviewing prosecutorial powers as follows:

1. Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice; or



2. Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction; or
 3. Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; or
 4. Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.
41. In weighing the above guidelines against the present scenario, the subject criminal proceedings are due for suppression, as the same amounts to an abuse of the court process. Why do I say so? The applicant has made every effort to make good the breach or the grievances the 4th respondent had. Not only was he offered an alternative property and compensation but the applicant were willing to sit down and hear him out. His adamant refusal to honor the mediation agreement appears to point at some other motive.
 42. Ordinarily ,this court would not interfere with the mandate of the other players in the justice sector but in this case, guided by the above authorities , especially the dicta in the Jirongo case , this court finds that the prosecution herein is aimed toward aiding in the civil cases or stealing the match in the civil cases by waving the prosecutorial wand.
 43. A prima facie consideration of the facts deduces that the matter is purely civil in nature under doctrine of breach of contract, allegations of which two (2) civil cases are already ongoing at the Magistrates Court.
 44. For what is worth, it is on record that prior to the institution of all material proceedings herein, the applicants in the spirit of their written agreement and the terms therein, contemplated to activate the contractual reparations including a refund of the purchase price but the same did not materialize as the 4th respondent was unbecoming.
 45. Further, this court in upholding the provisions of Article 159 (2) of *the Constitution*, granted leave to the parties to engage in mediation and hopefully amicably settle their disputes. However, despite both the advocates for the 2nd applicant and the 4th respondent reaching compromises and drafting a suitable Deed of settlement, the Mediation report dated 23rd July, 2025 indicated that 4th respondent failed to execute the deed of settlement and in certain instances failed to give full instructions to his advocate over the compromises.
 46. It is therefore deducible that the criminal proceedings are simply a means to an ulterior end. It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. Prosecution of criminal cases by the DPP must not be unreasonable or made in bad faith or used as a tool for personal score-settling. And when a prosecution is no longer impartial or when is it being used to further a civil case, the court must put to a halt to the criminal process.
 47. Accordingly, I find merit in the application to the end that:
 1. A declaration be and is hereby made that the plea taking, reading out of charges, continued prosecution of the 1st and 2nd petitioners/applicants vide Criminal Case No. E090 Of 2024 Republic Versus- David Mureithi Kanyi And Irene Berndette Waithira are unfounded,



malicious, oppressive and otherwise unconstitutional, and all consequential orders therein fail the constitutional threshold hence stand quashed and terminated.

2. The parties in dispute are liberty to ventilate their grievances in the civil jurisdiction and/or proceed with their civil proceedings if need be.
3. There shall be no orders as to costs.
4. The file be closed.

48 It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 25TH DAY OF SEPTEMBER, 2025.

W. K. MICHENI JUDGE

In The Presence Of;

For The Applicant(s).....Mr Egunza.....

For The Respondent(s).....Mr Sirima.....

Court Assistant.....Ms Bebora.....

Signed By/for:

HON. LADY JUSTICE WENDY MICHENI

