

IN THE HIGH COURT OF KENYA AT KAKAMEGA
CONSTITUTIONAL PETITION NO. E007 OF 2021

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER THE ARTICLES 27, 28, 29, 40 AND 50
OF THE CONSTITUTION

AND

IN THE MATTER OF: KAKAMEGA CHIEF MAGISTRATE'S COURT MCL
AND E CASE NO. E004 OF 2021

BETWEEN

GAITANO LISUTSA MUKOFU.....PETITIONER

VERSUS

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

THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....2ND
RESPONDENT

CLEMENT AKHANYALA KHAYUMBI.....3RD
RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH
RESPONDENT

JUDGMENT

1. This Judgment pertains to a Petition dated 15th September 2021, in which the Petitioner, seeks redress for the alleged violation of his fundamental rights and freedoms. The core of the dispute revolves around a parcel of land, ISUKHA/MUKHONJE/1751, and the subsequent institution of criminal proceedings against the petitioner by the 1st and 2nd Respondents.
2. The petitioner's case, as set out in his Supporting Affidavit, is that he purchased the land from the 3rd respondent. The process involved the

3rd respondent sub-dividing his original land parcel, ISUKHA/MUKHONJE/1591, to create the Suit Land and another portion, ISUKHA/MUKHONJE/1752. The necessary consents from the Land Control Board were obtained, and the transfer was duly registered, with the Petitioner being issued a title deed.

3. The relationship between the parties soured in January 2021 following the death of the 3rd respondent's son. The 3rd respondent sought to bury his son on the suit land, a move the petitioner successfully challenged by obtaining an injunction from this Court in Kakamega Chief Magistrate's Court MCL & E Case No. E004 Of 2021. The parties subsequently recorded a consent allowing the burial to take place on a different parcel of land.
4. The Petitioner contends that shortly after this civil dispute, the 3rd respondent lodged a criminal complaint with the 2nd respondent. This led to the Petitioner being summoned, interrogated, and ultimately arrested and charged with the offences of obtaining land registration by false pretence, making a false document, and uttering a false document. The petitioner avers that these criminal charges are a retaliatory measure, instigated by the 3rd Respondent for the purpose of pressuring him to abandon his civil suit and relinquish his title to the land. He argues this constitutes an abuse of the criminal justice process and a violation of his constitutional rights.

5. The 1st, 2nd, and 4th Respondents, in their replying affidavits, contend that their actions are based on legitimate investigations which revealed criminal conduct. They allege that the petitioner, used his expertise to fraudulently acquire the title. Their investigations found that the 3rd respondent's son sold portions of the land to the petitioner without the 3rd respondent's knowledge or consent, and that the process leading to the duplicate title and subsequent transfer was marred by forgery and manipulation. They maintain that the existence of a civil suit does not oust their constitutional and statutory mandate to investigate and prosecute crime.
6. The 3rd respondent aligns himself with the state's respondents' position, denying that he lawfully sold the entire Suit Land to the Petitioner.
7. From the pleadings and submissions, the following issues fall for determination:
 - a. Whether the criminal proceedings against the petitioner constitute an abuse of the court process and are being pursued for an ulterior purpose.
 - b. Whether the institution of criminal proceedings in the context of a pending civil dispute over the same subject matter violates the petitioner's fundamental rights and freedoms.
 - c. The remedies the petitioner entitled to,

Analysis

8. This court has the mandate to hear and determine cases in a manner that upholds the constitution of Kenya. In the case of **Nakusa vs. Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565** the court said:-

“the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system..... In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of Domnic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003 is that interpretation of the Constitution has to be progressive and in the words of Prof M V Plyee in his book, Constitution of the World: “The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time..... In our role as “sentinels” of fundamental rights and freedoms of the citizen which are founded on laissez-faire conception of

the individual in society and in part also on the political-philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent “sentinels” of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right.”

9. On the aspect of abuse of process, the central question before this Court is whether the criminal process has been weaponized to achieve a collateral purpose outside its legitimate scope. The petitioner alleges that the prosecution is malicious and initiated to settle a civil score. The respondents argue they are merely performing their statutory duties.

10. The concept of ulterior motive in prosecution is well-established in common law. Where it is alleged, the burden rests on the person alleging its existence to prove it. In **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69**, the High Court held:

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if 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 principles 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. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far that which the courts indeed the entire system is constitutionally mandated to administer..."

- 11.** In the case of **Ndung'u & another v Attorney General & 2 others (Civil Appeal 37 of 2019) [2024] KEHC 9838**, it was held that:

“It is insufficient to simply state that the criminal proceedings were motivated by malice. There is a need to establish how the court's procedure is being abused or exploited, as well as to indicate or show the foundation on which the respondent's rights were seriously threatened by the criminal prosecution. In the absence of concrete evidence that a criminal prosecution was a "abuse of process," a "manipulation," "amounts to selective prosecution," or any other process”

12. That the existence of parallel criminal and civil proceedings per se is not a ground to stay either set of proceedings. However, a stay may be granted where the defendant in the criminal case demonstrates a real danger of prejudice.

13. According to the Constitution and the National Police Act, the police, as an essential component of the criminal justice system, are tasked with various roles, including crime prevention, upholding law and order, and conducting criminal investigations. In this petition, I will concentrate on the function of the police in crime investigation and the degree to which the court may intervene in this role, considering that the police's endeavors to investigate crimes and gather evidence form the cornerstone of the criminal justice system. Article 157 (4) and (11) of the constitution highlights this importance. It states that:

“4.The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to

investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

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.”

14. Whereas **Article 157(10)** of the Constitution provides that the Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority, **Article 157(11)** provides:

“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”.

15. It is clear that in exercising their discretion to charge a person, both the police and the DPP’s office must take into account and must exercise the discretion on the evidence of sound legal principles. As was held by **Ojwang, J (as he then was) in Nairobi HCCC No. 1729 of 2001 Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another:**

“...policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense...I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State’s prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes”.

16. Apart from that, section 4 of the Office of Public Prosecutions Act, No. 2 of 2013 provides:

In fulfilling its mandate, the Office shall be guided by the Constitution and the following fundamental principles:

(a) the diversity of the people of Kenya;

(b) impartiality and gender equity;

(c) the rules of natural justice;

(d) promotion of public confidence in the integrity of the Office;

(e) the need to discharge the functions of the Office on behalf of the people of Kenya;

(f) the need to serve the cause of justice, prevent abuse of the legal process and public interest;

(g) protection of the sovereignty of the people;

(h) secure the observance of democratic values and principles;
and

(i) promotion of constitutionalism.

17. The crimes of forgery and fraud require proof beyond reasonable doubt under criminal law. Because these offences are considered serious, investigating officers acted within their authority in requesting the petitioner's arrest, viewing such action as necessary to uphold legal standards and ensure proper accountability during the investigation process at hand. This was held in the case of **Rao v Inspector General of Police & another (Petition E071 of 2024) [2025] KEHC 15485 (KLR) (Constitutional and Human Rights)** where the court determined that:

“Police officers under the command of 1st respondent undertake investigations pursuant to powers conferred on them by the National Police Service Act to investigate any reported crimes. In that respect, the 1st respondent’s officers discharge statutory mandates in the performance of their functions when investigating complaints made...In that regard, the 1st respondent’s officers have to exercise their powers and discharge their functions subject to the constitutional

safeguards of human rights and fundamental freedoms guaranteed by the 2010 constitution. The 1st respondent's officers can investigate complaints of a criminal nature with a view to ascertaining whether a crime has been committed but must do so in compliance with Constitution and the law. Should investigations concluded that crime has been committed, the investigation is forwarded to the 2nd respondent to make a decision on whether the evidence gathered is sufficient to mount a prosecution"

18. The circumstances when a Court can intervene in a criminal prosecution was also the subject of the decision in **R vs. Attorney General exp Kipngeno Arap Ngeny, High Court Civil Application No. 406 of 2001** wherein it was held that:

"A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable".

19. The cases of **Peter Ngunjiri Maina v DPP & 2 Others (2017) eKLR**, and **R v DPP & 2 Others Ex parte Nomoni Saisi (2016) eKLR** identified various scenarios that would require interrogation to warrant a review of the unfettered discretion of the Director of Public Prosecutions as follows:

“a. Where there is an abuse of discretion;

b. Where the decision-maker exercises discretion for an improper purpose;

c. Whether decision-maker is in breach of the duty to act fairly;

d. Whether decision-maker has failed to exercise statutory discretion reasonably;

e. Where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power;

f. Where the decision-maker fetters the discretion given;

g. Where the decision-maker fails to exercise discretion;

h. Where the decision-maker is irrational and unreasonable.”

20. On whether criminal proceedings are an abuse of process, the guiding principles were stated in in **Republic v Public Procurement Administrative Review Board & 2 others Ex parte Rongo University [2018] Eklr** held as follows;

“The power of the Court to Review an administrative action is extraordinary. It is exercised sparingly, in exceptional

circumstances where illegality, irrationality or procedural impropriety has been proved. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair.

“In Council of Civil Service Unions v. Minister for the Civil Service Lord Diplock enumerated a threefold classification of grounds of Judicial Review, any one of which would render an administrative decision and/or action in concern, ultra vires. These grounds are; illegality, irrationality and procedural impropriety. Later judicial decisions have incorporated a fourth ground to Lord Diplock’s classification, namely; proportionality. What Lord Diplock meant by “Illegality” as a ground of Judicial Review was that the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it. His Lordship explained the term “Irrationality” by succinctly referring it to “unreasonableness” in Wednesbury Case. By “Procedural Impropriety” His Lordship sought to include those heads of Judicial Review, which uphold procedural standards to which

administrative decision-makers must, in certain circumstances, adhere.”

21. In the case of **Diamond Hasham Lalji and another vs Attorney General and 4 others [2018] eKLR** the court of appeal extensively considered in detail the applicable law and circumstances under which the court could interfere with the exercise of prosecutorial discretion by the DPP. Among the guiding principles outlined in section 4 of ODPP’S Act No. 2 of 2013 and the National prosecution policy formulated by the DPP pursuant to section 5(1)(c) of the ODPP Act are that;

“The decision to prosecute as a concept envisages two basic components namely; that the evidence available is admissible and sufficient and that public interest requires a prosecution to be conducted”

75. Paragraph 4 (B)(2),of the said policy provides ; “the Evidence test- public prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction. In other words, public prosecutors should ask themselves; would an impartial tribunal convict on the basis of the evidence available”

Findings

22. The investigations undertaken revealed:

- a. Probable forgery,
- b. Fraudulent acquisition of title,
- c. Use of falsified police OB entries, and
- d. No payment to the true proprietor.

These are criminal offences under the Penal Code and the Land Registration Act.

23. The existence of a civil dispute does not bar a criminal prosecution where criminal conduct is evident. In analyzing Section 193A , the Court of Appeal in the case of **Commissioner of Police and Director of Criminal Investigations Department v Kenya Commercial Bank and Others, Nairobi Civil Appeal No. 56 of 2012 [2013]** eKLR, stated that:

“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 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 a case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations.”

24. Further, in the case of **Kuria & 3 Others v AG [2002] 2 KLR**, the following was stated:

“.... The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution ... A prerogative order should only be granted where there is an abuse of the process of the law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution It is

not enough to 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 a need to show how the process of the court is being abused or misused and a 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 the absence of concrete grounds it is not mechanical enough that the existence of a civil suit precluded the institution of criminal proceedings based on the same set of facts. The effect of criminal prosecution on an accused person is adverse but so also are their purpose in the society, which are immense ... 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 a danger to the right of the accused person to have a fair trial. [emphasis added]."

25. There is no demonstrable malice, no ulterior motive, and no abuse of power. The investigators were acting on valid complaints made by the 3rd Respondent. Therefore, there was no abuse of process.

26. On the allegations of violation of constitutional rights, the petitioner claimed violations of Articles 27, 28, 40, 47, and 50 of the Constitution.

27. Under Article 40(6), protection of the right to property does not extend to property obtained unlawfully.

“(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

28. The Petitioner was notified of the investigations, interviewed, and granted his constitutional rights

29. No evidence of unlawful arrest, detention, torture, discrimination, or bias was demonstrated.

30. Thus, the Petitioner has not proved any constitutional violation.

31. On whether the interim orders should be set aside, given the court’s findings that:

- a. The land acquisition was prima facie fraudulent, and
- b. The criminal case is lawful and justified,
- c. the interim orders suspending prosecution cannot stand.

32. The DPP retains independence under Article 157 and may prosecute where evidence discloses criminality.

Conclusion

33. After considering all material and the law:

- a. The Petition lacks merit.

- b. The interim conservatory orders issued on 24 March 2023 are hereby set aside.
- c. The Director of Public Prosecutions and Directorate of Criminal Investigations are at liberty to proceed with the criminal investigations and/or prosecution of the Petitioner.
- d. Each party shall bear its own costs.
- e. Right of Appeal 30 days.
- f. File closed.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 26TH DAY OF NOVEMBER, 2025.

S.MBUNGI

JUDGE

In the presence of:-

CA: Angong'a

Ms Osoro for the DPP present, others absent though aware of the Judgment date.