



REPUBLIC OF KENYA



**Ndegwa v Director of Public Prosecutions; Kiarie (Interested Party) (Petition E074 of 2025) [2026] KEHC 488 (KLR) (26 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 488 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
PETITION E074 OF 2025  
DR KAVEDZA, J  
JANUARY 26, 2026**

**IN THE MATTER OF ARTICLE 50 OF THE CONSTITUTION OF KENYA 2010  
IN THE MATTER OF ARTICLES 50 & 157 (11) OF THE CONSTITUTION OF KENYA 2010  
IN THE MATTER OF SECTION 4 OF THE DIRECTOR OF PUBLIC PROSECUTION ACT**

**BETWEEN**

**DAVID KINYUA NDEGWA ..... PETITIONER**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT**

**AND**

**CHARLES MWANGI KIARIE ..... INTERESTED PARTY**

**JUDGMENT**

1. This judgement relates to the Petition dated 25<sup>th</sup> April 2025, in which the Petitioner has sought the following reliefs;
  - a. A declaration that the decision by the Respondent to charge the petitioner herein with the offence of obtaining by false pretences vide Kibera criminal case number E128 of 2023 is unconstitutional and in contravention to articles 10,47 and 157(6)(a) and 157(11) of *the constitution*.
  - b. A Declaration that the actions of the 1<sup>st</sup> Respondent to charge the petitioner herein is unconstitutional and ultra vires the provisions of section 4 of the ODPP Act.
  - c. An order of certiorari to be issued against the Respondent quashing/setting aside the decision to charge the Petitioner.



- d. An Order of prohibition be issued against the Respondent from further prosecuting, trying or taking any further action on Kibera chief magistrates criminal case number E128 of 2023.
  - e. A declaration that the Respondent by their acts and/or omissions have infringed the petitioner's constitutional rights and freedoms and is deserving of damages to be assessed by this Honourable Court.
  - f. An order that the Respondent do pay the costs of the Petition.
2. The Petition is supported by the grounds set out on the face of it and the affidavit of the Petitioner, sworn on even date.
  3. For proper perspective, I will summarise here below the facts giving rise to the dispute between the Petitioner and the Interested, which then culminated into the criminal charges in Kibera Criminal case Number E128 of 2023, Republic vs David Kinyua, instituted by the Respondent.
  4. The factual background of this matter is largely uncontested and arises from an off-plan property transaction between the Interested Party and Property Dynamics Consultants Limited, a company in which the Petitioner is a director. On or about 24<sup>th</sup> May 2018, the Interested Party, together with his spouse, entered into an agreement for sale with the Petitioner for the purchase of four residential apartment units within a development known as Junction Suites, erected on Title No. Dagoretti/Riruta/1062. Pursuant to the agreement, the Interested Party made various payments toward the purchase price.
  5. Sometime in 2019, it is alleged that the Petitioner unilaterally reduced the number of units available to the Interested Party from four to two. Despite objections, the Interested Party continued with the transaction and by October 2020, he had paid a total sum of Kshs. 7,000,000/-, which the parties agree represented the full purchase price for two units. The Petitioner thereafter reallocated the Interested Party different unit numbers from those initially agreed upon, which move the Interested Party accepted in the circumstances.
  6. However, in January 2021, the Petitioner, through its advocates, notified the Interested Party that it was unable to complete the project and proposed to refund the monies paid. Subsequent correspondence between the parties did not yield a resolution, and although the Petitioner committed to refund the sums received, the refund was not completed. It is common ground that some repayment was made by the Petitioner. However, the extent thereof is disputed, with the Petitioner asserting that Kshs. 4,000,000/- has been refunded, while the Interested Party acknowledges receipt of only approximately Kshs. 2,100,000/-.
  7. Following the collapse of the transaction and the failure to either deliver the apartments or fully refund the purchase price, the Interested Party lodged a complaint with the police. This culminated in the charging of the Petitioner in Kibera Criminal case Number E128 of 2023 Republic vs David Kinyua, for the offence of cheating contrary to section 315 of the Penal Code.
  8. It is this criminal prosecution that triggered the present constitutional petition, in which the Petitioner contends that the dispute is purely contractual and civil in nature and ought not to be canvassed in criminal proceedings.

### **Petitioner's Case**

9. In a nutshell, the Petitioner's case is on infringement, denial and threats to his fundamental rights with respect to Kibera Criminal case Number E128 of 2023, where the Interested Party herein is the



Complainant. It is Petitioner's case that the said criminal case is based on a purely civil dispute that has mutated into a criminal process, amounting to an abuse of the criminal jurisdiction of the court.

10. The Petitioner further avers that even though the Respondent, the Director of Public Prosecutions is acting in exercise of their constitutional powers under Article 157 of *the Constitution*, the Respondent is abusing that authority as the matter does not fall within the mandate set out in the said article since the facts giving rise are purely civil in nature.

### **Interested Party's Case**

11. In response to the Petition, the Interested Party filed a Replying Affidavit sworn by Charles Mwangi Kiarie on 18<sup>th</sup> June 2025.
12. It is the Interested Party's averment that the decision to criminally charge the Petitioner was purely under the discretion of the Respondent and were it not for the charges, the Interested Party would probably have lost everything. That the civil nature of the matter does not bar the ODPP from exercising its constitutional mandate against criminals.
13. The Respondent did not file a response to the Petition, neither did they actively participate in the hearing of the case.
14. At the close of the respective parties' cases, the court directed parties to file written submissions. Both the Petitioner and the Interested party have filed their respective submissions.
15. Having considered the petition, the responses and the arguments for and against the petition, the only issue for determination is:
  - a. Whether the institution of Kibera Magistrate's Court Criminal Case No. E128 of 2023 amounts to an abuse of the criminal justice process and a violation of the Petitioner's constitutional rights.
16. At the outset, Article 157(6) of *the Constitution* of Kenya, 2010 (hereafter "*the Constitution*") vests in the Director of Public Prosecutions (DPP) the State power to institute and undertake criminal proceedings against any person before any court, other than a court martial, in respect of any offence alleged to have been committed. This constitutional mandate is to be exercised independently, impartially, and free from the direction, control, or influence of any person or authority.
17. Further, Article 157 (11) of *the Constitution* further provides thus;

"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."
18. The import of the foregoing provisions is that indeed, the DPP has an independent mandate to institute criminal proceedings against anyone. However, this mandate ought to be exercised in the interest of the administration of justice and further, in a manner that does not abuse the legal process.
19. It is in the exercise of these powers that the Respondent herein preferred charges against the Petitioner herein in Kibera Criminal case Number E128 of 2023.
20. The petitioner has argued that the decision to charge him is clearly a misapplication and an abuse of the Respondent's prosecutorial powers, contending that the criminal process is being invoked to settle what is essentially a civil and commercial dispute.



21. On the other hand, the Interested Party has submitted that notwithstanding the nature of the dispute being prima facie civil in nature, nothing bars the DPP to exercise its constitutional mandate in instituting criminal proceedings over the same issues. The Interested party has relied on Section 193A of the Criminal Procedure Code (CPC), which confers concurrent jurisdiction on civil and criminal matters over the same dispute. The section provides;
- “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.”
22. The question that begs in the instant petition is whether the DPP’s decision to charge the petitioner in Kibera Criminal case Number E128 of 2023 was an abuse of prosecutorial powers under Article 157 of *the Constitution*, and in light of the provisions of Section 193A of the CPC.
23. While I acknowledge that the DPP indeed has the independent mandate to institute criminal proceeding against an individual, this power ought to be exercised in a manner that serves to meet the ends of justice.
24. The dispute between the Petitioner and the Interested Party arose from an off-plan sale agreement for the purchase of residential apartments, pursuant to which the Interested Party made substantial payments toward the purchase price. However, the transaction collapsed, and the Petitioner undertook to refund the sums paid, leading to disagreements between the parties as to performance, termination of the agreement, and the extent of any refund made.
25. The Interested party has indeed acknowledged that the parties agreed to terminate the sale and subsequently, the Respondent was to refund the sums paid to him by the Interested Party. It is common ground that some repayment was made; however, the extent thereof is disputed. While the Petitioner asserts that Kshs. 4,000,000/- has been refunded, the Interested Party acknowledges receipt of only approximately Kshs. 2,100,000/-. What is however not in doubt is that there were efforts by the parties to resolve the matter through repayment following the collapse of the transaction.
26. By the very nature of this transaction, the parties’ relationship was governed by contractual obligations freely undertaken, with rights and remedies arising from performance or breach thereof. In my view, questions relating to non-completion of the sale transaction, refund of purchase monies, and any outstanding balances are matters that ordinarily fall for determination within the civil jurisdiction, unless clear evidence is demonstrated that the conduct complained of transcends a mere breach of contract and discloses a criminal offence.
27. The question that I wish to pose at this juncture is this; was it proper for the Petitioner to be charged with a criminal offence in a bid to enforce the sale agreement and/or subsequent agreements by parties thereof? To answer this pertinent question, I will consider some authorities.
28. In the case of *Peter Macharia Ruchachu v Director of Public Prosecution & another* [2014] eKLR, the criminal case against the applicant stemmed from a dispute between him and the complainant in the criminal trial over performance of a contract. One of the issues for determination was whether a dispute over performance of a contract could form a basis to prosecute one of the parties to the dispute. Ngaah J held as follows:

“Upholding criminal justice through a criminal prosecution as opposed to misusing the prosecution as an instrument to bring pressure to bear upon a party to settle a civil dispute



is a question that has engaged the minds of learned judges in our courts on numerous occasions. Apparently, whenever such a question has arisen in cases before them, the learned judges have been consistent and are in agreement in their decisions that the institution of a criminal case for a purpose other than upholding the criminal justice is an abuse of the criminal process and it is upon the courts, whenever such scenario emerges, to rise to the occasion and halt such criminal proceedings.....When I consider totality of the circumstances comprising the background of the dispute between the complainant and the applicant, the manner of the applicant's arrest and finally the charge which was preferred against him, I am persuaded that the prosecution of the applicant was influenced by ulterior motives; in other words, the criminal case against him was for a purpose other than upholding the criminal law. It is meant to bring pressure to bear upon the applicant to settle a civil dispute. Such a trial cannot be allowed to proceed.”

29. The Interested Party has submitted that under Section 193A of the CPC, the fact that another dispute resolution mechanism exists or that civil or commercial proceedings would be more preferable is not a ground to challenge criminal proceedings under Article 157 of *the Constitution*.

30. While the Interested Party's position is not by any means misguided, the Court of Appeal in *Commissioner of Police & Director of Criminal Investigation Department & another v Kenya Commercial Bank Ltd & 4 others* [2013] KECA 182 (KLR) was confronted by a similar question on the extent of the provisions in Section 193A of the CPC and 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. 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 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 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. We have no doubt in our minds that the belated involvement of the police in this purely civil dispute is an abuse of their power. The police should direct their energies and resources to prevention of crime which we all know is rampant in this country and is about to get out of control.”

31. In light of the foregoing, I am persuaded that the nature of the present dispute between the Petitioner and the Interested Party falls squarely within the category of matters contemplated by the Court of Appeal in the above decision. The dispute arises from a contractual relationship and centres on non-completion of a commercial transaction and the refund of purchase monies, issues which are amenable to resolution through the civil process.

32. In the circumstances of this case, it was neither necessary nor proper to invoke the criminal justice machinery where the matters in contention could well be settled through civil proceedings.

33. Suffice to note that, by the time the Petitioner was charged, he had already made efforts towards settling the repayment arrears. While the exact amount repaid remains contested (and is a matter capable of determination by a civil court), the fact that repayment efforts were ongoing is not in dispute. In



- my view, the criminal court is not the proper forum for the enforcement of such contractual and commercial obligations.
34. From the background of this case, it is clear that the institution of the criminal proceedings against the Petitioner was meant to compel him to settle a civil debt.
  35. However, I hasten to state that 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. This is an abuse of the process of the court and an abuse of the powers conferred upon the Respondent on the decision to charge.
  36. However serious the criminal charges may appear, they cannot be permitted to stand where it is evident that their predominant objective is to advance an ulterior purpose. Criminal proceedings are not intended to be used as a tool for the enforcement or advancement of a civil claim by either party to a dispute, but must be undertaken impartially and solely in the wider interest of the administration of justice and the public at large.
  37. Taking into account the totality of the foregoing analysis, this Court is satisfied that the decision to institute and sustain the criminal proceedings against the Petitioner in Kibera Criminal case Number E128 of 2023, Republic vs David Kinyua amounted to an abuse of the Respondent's prosecutorial powers.
  38. What orders, then, are appropriate for issuance by this Court in the circumstances of this case?
  39. In the case of *Kuria & 3 Others v Attorney General* [2002] 2 KLR 69, the court, while addressing similar issues as in the instant case, held thus in terms of the orders to issue:

“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.....The invocation of the law, by whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far from that which the courts indeed the entire system is constitutionally mandated to administer...In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely to bear pressure on the applicants in order to settle the civil dispute”.

40. Accordingly, and guided by the foregoing analysis as well as the holding in *Kuria & 3 Others v Attorney General* (supra), I am persuaded that the continued prosecution of the Petitioner would amount to an abuse of the criminal justice process.
41. As such, I am inclined to issue an order of prohibition restraining the Respondent from continuing with or further prosecuting Kibera Criminal case Number E128 of 2023.

### **Final Orders**

42. Therefore, and for the reasons set out hereinabove, this Court makes the following orders:



- a. A declaration be and is hereby issued that the institution and continued prosecution of Kibera Criminal case Number E128 of 2023, Republic vs David Kinyua constitutes an abuse of the legal and prosecutorial process as contemplated under Article 157(11) of *the Constitution* of Kenya, 2010.
- b. An order of prohibition be and is hereby issued restraining the Respondent, being the Director of Public Prosecutions, from continuing with or further prosecuting Kibera Criminal case Number E128 of 2023, Republic vs David Kinyua.

Orders accordingly.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 26<sup>TH</sup> DAY OF JANUARY 2026**

**D. KAVEDZA**

**JUDGE**

In the presence of:

Ms. Maithya for the Petitioner

Mr. Kimiti for the Interested party

Mr. Mutuma for the Respondent

Karimi Court Assistant.

