



**Law Society of Kenya & another v Director of Criminal Investigations & 4 others;
Wamunyoro Investments Limited & 5 others (Interested Parties) (Petition E212 of 2023)
[2026] KEHC 1002 (KLR) (Constitutional and Human Rights) (5 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 1002 (KLR)

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

PETITION E212 OF 2023

EC MWITA, J

FEBRUARY 5, 2026

BETWEEN

THE LAW SOCIETY OF KENYA 1ST PETITIONER

MOSES ABONG'O OWUOR 2ND PETITIONER

AND

THE DIRECTOR OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

CHIEF MAGISTRATE COURT, MILIMANI LAW COURTS .. 5TH RESPONDENT

AND

WAMUNYORO INVESTMENTS LIMITED INTERESTED PARTY

JOHN MICHAEL OHAS INTERESTED PARTY

COLUMBUS TWO THOUSAND LIMITED INTERESTED PARTY

THE CHIEF LAND REGISTRAR INTERESTED PARTY

JAMES HILLARY PAUL OTHIENO OHAS INTERESTED PARTY

BENARD ABERE OGECHI INTERESTED PARTY



JUDGMENT

Petitioner's case

1. This petition arises from the investigations, arrest and intended prosecution of the 2nd petitioner, an advocate of the High Court of Kenya. The 2nd petitioner was arrested within the precincts of the Court in the course of providing professional services to his clients. The petitioners have sought various reliefs, including quashing of Milimani Chief Magistrates Criminal Case No. E424 of 2023-Republic v James Hillary Paul Othieno Ohas & 2 others. The petition is supported by the affidavits of Florence Muturi and the 2nd petitioner.
2. The facts giving rise to this litigation, were that on 28th January 2022, the 2nd petitioner was instructed through the Firm of MMA Advocates LLP, to take over representation of the 2nd and 3rd interested parties in Nairobi Environment and Land Case No. E019 of 2021 (ELC E019 of 2021), Michael John Ohas & another v Rigathi Gachagua & others from the firm of Ochangu & Co. Advocates. The matter was in relation to a dispute over property known as L.R No. 209/ 12077 (the suit property).
3. The pleadings including the plaint and accompanying documents and a Notice of Motion application all dated 18th January 2021 had been filed by the firm of Ochangu & Co. Advocates on behalf of the 2nd and 3rd interested parties. The 2nd petitioner filed a Notice of Change of Advocates taking over representation from the firm of Ochangu & Co. Advocates to the firm of MMA Advocates LLP in which firm the 2nd petitioner practiced at the time.
4. On 20th July 2022, the 1st interested party through the firm of Nyachoti & Company Advocates, filed pleadings in Nairobi ELC No. E242 of 2022, Wamunyoro Investments Limited v John Michael Ohas & 2 others, seeking among others, a declaration that the 1st interested party is the lawful registered owner of the suit property.
5. On 25th July 2022, the 2nd petitioner was again instructed by the 2nd and 3rd interested parties, (the 1st and 2nd defendants in ELC E242 of 2022), to represent them in that suit. He filed a Memorandum of Appearance dated 25th July 2022 under the firm of MMA Advocates LLP.
6. Upon leaving the firm of MMA Advocates LLP, the 2nd and 3rd interested parties instructed the 2nd petitioner to continue acting for them in the aforementioned suits under the firm of Ombok & Owuor Advocates LLP. The 2nd petitioner filed a Notice of Change of advocates dated 20th September 2022.
7. On 14th November 2022, the 2nd petitioner filed a statement of Defence and Counterclaim dated 10th November 2022 on behalf of the 2nd and 3rd interested parties seeking, among others, a declaration that the 3rd interested party was the lawfully registered owner of the suit property and disputed the validity and legality of the purported title held by the 1st interested party.
8. After filing the statement of Defence and counterclaim together with other relevant documents, the 4th respondent issued directives to the 1st and 2nd respondents directing them to order their officers to summon the 2nd and 3rd interested parties along with key witnesses in the dispute, including the 5th and 6th interested parties.
9. Police officers resorted to harassing and intimidating the 2nd and 3rd interested parties and their witnesses. On 15th March 2023 and 28th March 2023, the 2nd petitioner wrote to the 1st respondent protesting the interference with the proceedings in ELC No. E242 of 2022 by its officers.



10. On 15th June 2023, the 2nd petitioner was called by the 5th interested party's family informing him that the 5th interested party, had been lured to DCI offices at Kiambu Road by the 1st and 2nd respondents' officers on the pretence that they wanted clarification over statements recorded on 9th and 16th March 2023. The 5th interested party was detained at Muthaiga Police Station and was to be arraigned before the Milimani Chief Magistrates Court the following day.
11. On 16th June 2023, the 2nd petitioner went to Milimani Law Court's basement where the 5th interested party was being held, but was immediately arrested and informed that he was to be charged as a co-accused. The 2nd petitioner was not informed of the charges he was to face; had not been asked to record a statement in relation to any matter and was not furnished with a copy of the charge sheet.
12. The 2nd petitioner only became aware of the charges preferred against him after his advocates obtained a copy of the Charge Sheet from the prosecutor, just before taking plea. Counts 1, 2 and 3 were in relation to Making a Document without Authority Contrary to section 357(a) of the Penal Code. He was accused of making a letter from the National Land Commission Ref 157048 dated 23rd March addressed to the Director of Survey; making a letter ref. PPD/42/14/IX/96 dated 14th November 2019 addressed to the Chief Land Registrar from the Ministry of Lands and Physical Planning and making a letter Ref. CID/SEC/4/4/VOL/233 dated 26th January 2018 addressed to the Chief Land Registrar from the Directorate of Criminal Investigations DCIO Central respectively, purporting them to be genuine.
13. In count 7, he faces the offence of uttering a false document contrary to section 353 read with section 349 of the Penal Code. He was accused of uttering a letter dated 23rd March 2017 addressed to the Directorate of Survey, a letter Ref. PPD/42/14/IX/96 dated 14th November 2019 addressed to the Chief Land Registrar from the Ministry of Lands and physical planning and a letter Ref CID/SEC/4/4/VOL/233 dated 26th January 2018 addressed to the Chief Land Registrar from the Directorate of Criminal Investigations DCIO Central.
14. The petitioners stated that the documents, the subject of the charges against the 2nd petitioner, related to the two suits before the ELC. All the documents to which the charges related were supporting documents filed by the 2nd petitioner, on behalf of the 2nd and 3rd interested parties, in his capacity as an Advocate of the High Court of Kenya.
15. According to the petitioners, count 2 related to a document filed in E242 of 2022 through the 2nd and 3rd interested parties' List and Bundle of Documents dated 10th November 2022 and is also part of the supporting documents in ELC No. E019 of 2021.
16. The petitioners contended that in both cases, the 2nd petitioner is neither the maker, witness nor party to the proceedings. The letter was authored by Z. M. Ndege on behalf of the Chairman of the National Land Commission and was addressed to the Director of Survey confirming that the property was allocated by the Commissioner of Lands through letter ref. No. 88767/IV/142 dated 3rd February 1994 and PDP No. 42/14/93/14 and makes reference to a letter from the Director of Survey ref. No. 34/65/292 dated 7th March 2017 and attached certified copies of the allotment which had not been challenged in the civil cases or in the criminal charges. It was a correspondence between two government offices in the ordinary course of duty and had not been authored by the 2nd petitioner. The certified copies of the allotment attached were not challenged either in the ELC cases or the criminal case.
17. Count 3 related to a document filed as part of the List and Bundle of Documents in support of the Defence in ELC E 242 of 202. It was also part of the supporting documents filed in ELC E019 of



2021 through an affidavit in support of a Notice of Motion dated 18th January 2021 filed by the firm of Onchangu & Co. Advocates. The letter was authored by the National Director of Physical Planning and addressed to the Chief Land Registrar. It was authored long before the 2nd petitioner came on record for the 2nd interested party and was a formal correspondence between two government officials in the usual course of their duties.

18. Count 4 related to a document filed in ELC No. E 242 of 2022 in the Supplementary List & Bundle of Documents dated 6th March 2023. It was also filed as part of the supporting documents in ELC E019 of 2021 through an affidavit in support of Notice of Motion Application dated 18th January 2021 and was part of the List and Bundle of Documents filed by Onchangu & Co. Advocates.
19. The petitioners posited, that the document was authored by the DCIO Central and addressed to the Chief Land Registrar reporting the outcome of investigations into possible fraud in the purported registration of the property in favour of the 1st interested party. It was an official correspondence between two government officials in the ordinary conduct of their duties and was not authored by the 2nd petitioner.
20. Count 7 related to documents referred to in counts 2, 3 and 4 which were on the production of the purported false or fraudulent documents in the court registry in the ELC cases filed in court. It was the petitioners' contention, that the ELC is properly seized of the matter and has the jurisdiction to test each averment and evidence produced by witnesses in the civil suits.
21. The petitioners asserted that the 2nd petitioner's role in the proceedings is solely that of an advocate representing the plaintiffs in Nairobi ELC E 019 of 2021 and the 1st and 2nd defendants in Nairobi ELC E 242 of 2022. That notwithstanding, he was arrested and presented before the Chief Magistrates Court at Milimani for plea and prosecution.
22. It was the petitioners' case, that the 1st, 2nd, 3rd and 4th respondents' actions were in violation of the 2nd and 3rd interested parties' rights to legal representation and access to justice; the rights of the 2nd petitioner to fair hearing, human dignity, freedom and security of the person, fair administrative action and access to justice; abuse of office; ultra vires and in contravention of the overriding purpose and essence of court processes. It was a deviation from international best practice and standards of independence of the Bar and principles of treating members of the 1st petitioner.
23. The petitioners asserted that the 1st, 2nd, 3rd and 4th respondents' actions had violated articles 10, 25, 28, 29, 47 50, 73, 75, 157 (4) and 245(2) and (4) of *the Constitution*; section 4 of the *Fair Administrative Action Act* and article 16, 17 and 20 of the United Nations Basic Principles on the Role of Lawyers. The actions were thus, illegal, ultra vires and an abuse of power and discretion. The actions were biased; marred with procedural impropriety; unreasonable and irrational and violated their legitimate expectation.
24. The petitioners maintained that the actions violated the *Law society of Kenya Act* since the 2nd petitioner was discharging his duties since the documents were filed in support of ELC cases where the 2nd petitioner was not a party, witness or maker of the documents.
25. Based on the foregoing, the petitioners sought several declarations and orders against the respondents.

1st, 2nd and 4th respondents' case

26. The 1st, 2nd and 4th respondents opposed the petition through a replying affidavit sworn by Chief Inspector Godfrey Mburugu. The 1st, 2nd and 4th respondents stated through CI Mburugu, that investigations were conducted over criminal culpability of the 2nd petitioner and the parties to Nairobi



ELC No. 242 of 2022. The file was forwarded to the 3rd respondent who exercised his mandate under articles 157(6) and (10) of *the Constitution* and instituted the prosecution.

27. The 1st, 2nd and 4th respondents asserted that veracity of the evidence gathered in the investigations to establish the 2nd petitioner's culpability will be tested during trial. They contended that issues in ELC E019 of 2021 and ELC No. E242 of 2022 are also directly in issue before the trial court in Criminal Case No. E424 of 2023, which is a court with competent jurisdiction to try and determine the criminal case.
28. The 1st, 2nd and 4th respondents asserted that Inspector General of Police cannot be directed by any person or authority how to discharge his mandate except the 3rd respondent under article 157(4) of *the Constitution* to investigate any information or allegation of criminal conduct. The 4th respondent has no role to play in the Criminal justice system.
29. The 1st and 2nd respondents performed their duties in accordance with section 24 of the *National Police Service Act*, hence this court should only interfere if it is demonstrated that criminal proceedings had been instituted for reasons other than enforcement of criminal law or is an abuse of the court process. They denied that the petitioners had discharged the burden of proof.

3rd respondent's case

30. The 3rd respondent opposed the petition through grounds of opposition and a replying affidavit sworn by Vera Omollo-Hamisi.

Grounds of opposition

31. The 3rd respondent asserted through the grounds of opposition, that the criminal case was instituted against the 2nd petitioner after being satisfied that the evidence presented was sufficient. The 3rd respondent denied that the decision to charge and prosecute was ultra vires, unreasonable or illegal. He maintained that he acted in accordance with his mandate under articles 157 of *the Constitution*.
32. The 3rd respondent contended that this court can only interfere where it has been shown that criminal proceedings had been instituted for reasons other than enforcement of criminal law or otherwise are an abuse of the court process in violation of article 157(11) of *the Constitution*.

Replying affidavit

33. In the replying affidavit, the 3rd respondent stated through Ms. Hamisi, investigations over the complaint regarding registration of the suit property established that the 3rd interested party was allocated an un-surveyed industrial plot by the Commissioner of Lands through letter ref.88767/IV/142 dated 2nd February 1994. The allotment was based on a Part Development Plan Number 42/14/93/14 prepared by the Department of Physical planning.
34. The 3rd respondent asserted that part of the conditions in the letter were that acceptance and payment be received within 30 days failure to which the offer would lapse. The 3rd interested party did not accept the offer or make payment within the timelines until 7th May 1996 when the 3rd interested party wrote accepting the offer.
35. The parcel of land was therefore allocated to Nduati Mbugua, Pauline Mulinge and Karandi Farms Limited as IR 90923/1 dated 31st December 2002. According to the records held at the Nairobi Central Registry, land LR. No.209/12077 IR. No. 90923 was registered on 31st December, 2002 pursuant to a



grant issued by the Commissioner of Lands for a term of 99 years from 1st May 1999 at an annual rent of Kshs. 110,800. The land is delineated on Survey Plan Number 192966.

36. The 3rd respondent stated that despite the fact that a grant to the suit property had earlier been processed and issued to Peter Nduati Mbugua, Pauline Mulinge and Karandi Farms Limited as IR 90923/1, the office of the Commissioner Lands went ahead and processed another title in favour of the 3rd interested party. The second registration as IR 213652 would therefore be irregular, null and void.
37. The 3rd respondent asserted that the register held at the Nairobi Central Land Registry was reported missing and a reconstruction of the register initiated through Deed of indemnity registered on 26th April 2011. The Chief Land Registrar requested for the verification of Title IR 90923, LR No. 209/12077 and it was confirmed that the 1st interested party had genuine title and forms part of the Land Registry's Records.
38. The office of the Chief Land Registrar had learnt that in 2019 another Lease in respect of the same land was prepared in favour of the 3rd interested party for a term of 99 years from February, 1994 at an annual rent of Kshs 138,400 and on 11th September 2019, a Certificate of Title- IR 213652 I.R. No. 209/12077 issued in favour of the 3rd interested party. From the records, it was noted that Deed Plan Number 192966 used to prepare the Title for the 3rd interested party was a Certified Copy of the original Deed Plan annexed to the 1st interested party's Title.
39. The 3rd respondent, upon analyzing the documentary evidence in the investigations file noted that the 2nd petitioner was at all times counsel for the 3rd interested party and he rendered services to his client in respect of the suit property. He therefore should take responsibility for every document relating to transactions surrounding the suit property that investigations revealed was fraudulently acquired.
40. The 3rd respondent maintained that in making the decision to charge the 2nd petitioner, he relied on the evidence from the investigations which established the 2nd petitioner's culpability which should be tested during trial. The 2nd petitioner having not denied knowledge of the documents and having presented the documents culminating into the fraudulent registration of the certificate of lease to his clients, should undergo trial with the co-accused in the Criminal case.
41. The issues the 2nd petitioner has raised before this court are issues that relate to the ELC cases over the suit property have little relation with the Criminal Case, hence are separate and distinct to this petition.

2nd and 3rd interested parties' case

42. The 2nd and 3rd interested parties filed a replying affidavit sworn by John Michael Ohas in support of the petition. They stated that there was a land ownership dispute involving the 3rd interested party and the 1st interested party over L.R No. 209/12077.
43. In 1993, the 2nd interested party submitted an application for allocation of land on behalf of the 3rd interested party through the Commissioner of Lands and Settlement Schemes. The application was considered and approved in 1994 and the 3rd interested party was issued with an Allotment Letter. Payment of Kshs. 50,000, part payment for the allotment was made and receipted through receipt No. D448385. Further payments of Kshs. 814,550 was made through cheque No. 150995, file No. 157048 on 16th May 1996.
44. The 3rd interested party was also issued with copies of a memo, valuation form drawing and Part Development Plan under Ref No. PPD/42/14/IX/96 from the Ministry of Lands and Physical Planning. Letter of acceptance of the allotment was submitted intended to complete the process of allotment and give way to processing of survey and registration of the lease.



45. The 3rd interested party contracted Victoria Land Surveyors Limited to undertake the survey and draw the survey plan to enable preparation of a Deed plan. The Survey Plan was submitted to the Director of Survey of Kenya for preparation of the Deed Plan. The Director of Survey developed and issued Deed Plan No. 192966 to the 3rd interested party on 25th January 1995 which was submitted at the Ministry of Lands for preparation and registration of the Lease. The Director of Land Registration prepared the Indent Letter.
46. The 2nd and 3rd interested party contended that the Deed Plan represented a binding document signifying that allotment had been completed and was ready for registration by the Commissioner of Lands. It was therefore inexcusable that the Commissioner of Lands issued a grant over the same property to Peter Nduati Mbugua, Pauline Mulinge and Karandi Farm Limited.
47. The 2nd and 3rd interested parties maintained that there was no gazette notice or advertisement on the reallocation of the property. The 3rd interested party was not given notice over cancellation of the allotment neither was the money paid towards the allotment of the land refunded.
48. According to the 2nd and 3rd interested parties, in September 2017, file No. 157048 with respect to the 3rd interested party's registration said to have been lost at the Lands Registry resurfaced but without the original Deed Plan in favour of the 3rd interested party. The missing Deed Plan was later used to register the property in favour of the 1st interested party. Following a request by the 4th interested party, the 1st respondent conducted investigations which revealed that the registration in favour of the 1st interested party was marred with fraud and recommended that it be revoked to enable the 3rd interested party proceed with registration of its property. These findings were communicated by the 1st respondent to the 4th interested party through letter dated 26th January 2018 and which is subject of count 4 in the criminal proceedings.
49. The 2nd and 3rd interested parties asserted that they proceeded with the process of registering Title in favour of the 3rd interested party; applied for certified copies of the Deed Plan from the Director of survey through the Licensed Surveyor who conducted the survey for the 3rd interested party and certified copies were issued. Neither the Deed nor the certified copies had been contested or impugned at any point in the ELC or criminal cases.

5th interested party's case

50. The 5th interested party, one of the directors of the 3rd interested party also filed a replying affidavit in support of the petition. He is a joint donee of the Specific Power of Attorney by the 2nd interested party dated 21st September 2021.
51. The 5th interested party stated that it was the 6th interested party who collected the Title and he believed that registration of the property was legally and procedurally done. The 5th interested party stated that he is not a party in the EL cases. His interest is strictly as a director of the 3rd interested party under which circumstances he cannot be held personally liable for any controversy.
52. The 5th interested party asserted that he was kept aware of the progress and proceedings in both civil suits in the event he was required to stand in for the 2nd interested party in his capacity as director and witness for the 3rd interested party. This made him a target for harassment and threats from the 1st, 2nd, 3rd and 4th respondents on behalf of the 1st and 4th interested party.
53. The 5th interested party stated that on 9th and 16th March 2023, he was summoned to the 1st respondent's offices to record a statement regarding his directorship and the power of attorney donated



to him which he did. The 2nd petitioner protested through letters dated 15th March 2023 and 28th March 2023 over the interference with court proceedings in ELC No. E242 of 2022.

54. On 15th June 2023, the 1st respondent's officers asked him to go to their offices on pretext that they wanted clarification over statements he had previously recorded but instead, he was arrested and detained overnight at Muthaiga Police station.
55. On 16th June 2023, he was taken the Milimani Law Courts Basements Cells awaiting to be arraigned before the 5th respondent. The 2nd petitioner went to court to represent him but was arrested.
56. The 5th interested party asserted that the criminal charges preferred against the 2nd petitioner, 6th interested party and himself are unfair, biased and intended to harass and intimidate them to defeat the 3rd interested party's claim over the property. The charges further violate their constitutional rights.

6th interested party's case

57. The 6th interested party filed a replying affidavit stating that he had always performed duties with integrity and professionalism and had never been authorized by the Director of Surveys in the line of duty to carry out survey; alter or delete any mark on survey documents; search for files containing survey plans; retrieve computation files and prepare registrable documents with respect to the suit property.
58. The 6th interested party maintained that he had never been the Land Administrator or Officer of the National Land Commission. He was therefore not in the business of allocating land and did not take part in the allocation of the suit property to the 3rd interested party. He stated that he is not a Land Registrar and did not have authority to register Title and issue Certificates of Title and/or Lease Documents. He was not party to the registration of Title in favour of the 3rd interested party.
59. The 6th interested party stated that on 24th February 2023, he was summoned by police officers who informed him that they were investigating registration of the suit property and wanted him to record a statement on the matter. On 16th June 2023, he learnt through the 2nd petitioner that the 5th interested party and the 2nd petitioner had been arrested and charged and that he was to be charged as a co-accused.
60. The 6th interested party contended that the allegations that he authored or doctored documents, the subject of the impugned charges, are malicious since he had never been under the employment of any of the offices from which the alleged forged documents emanated. On 23rd June 2023 police officers contacted him and asked him to go to their offices to collect summons in relation to the charges.
61. He requested the 2nd petitioner's Law firm to represent him and collect the summons. The 2nd petitioner contacted the police officers concerned and informed them that the summons would be collected by an advocate in due course.
62. On 29th June 2023, the 6th interested party appeared before the 5th respondent together with the 2nd petitioner and the 5th interested party. The 6th interested party asserted that the 4th interested party is the custodian of all files relating to registration of titles and the documents contained in the files on whose basis land transactions are completed and he had nothing to do with the accusations leveled against him with regard to the suit property.

Submissions

63. The petition was disposed of through written submissions with brief oral highlights



Petitioners' submissions

64. The petitioners argued that the decision to institute criminal proceedings though a discretionary power, must be exercised in accordance with article 157(10) of *the Constitution*. This was not, however, the case because investigations leading to the arrest and charge the 2nd petitioner, the 5th and 6th interested parties were conducted at the behest of the 4th respondent. Such a decision cannot result in a fair trial for the 2nd petitioner thus, the court should interfere with the decision by the DPP. They relied on the decision in *Walton v Gardiner* (1993) 177 CLR 378.
65. The petitioners argued that the criminal case is based on matters which the ELC is seized of and which it should be left to determine. The criminal proceedings are therefore an abuse of power. They relied on the decisions in *Rosemary Wanja Mwagiru & others v Attorney General & 3 others* [2013] eKLR and *Diamond Hasham Lalji & another v Attorney General & 4 others* [2018] eKLR.
66. The petitioners cited article 47 of *the Constitution*, section 7(2) of the *Fair Administrative Action Act* and the decisions in *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR and *Alfred Nyandieka v Director of Public Prosecutions & 2 others* [2020] eKLR for the position that in initiating the criminal prosecution against the 2nd petitioner who was merely discharging his professional duties as an advocate, the respondents violated *the Constitution* and the law.
67. The petitioners again relied on article 28 of *the Constitution* and the decisions in *S v Makwanyane and another* (CCT3/94) [1995] ZACC 3; *MWK & another v Attorney General & 4 others*; *Independent Medical Lega Unit (IMLU) (Interested Party); The Redress Trust (Amicus Curiae)* [2017] KEHC 1496 (KLR) and *Republic v Attorney General Ex parte Kipngeno Arap Ngeny* [2001] eKLR to contend that the respondents' actions had tarnished the 2nd petitioner's image and reputation by violating his inherent dignity.
68. The petitioners argued that the charges in the criminal case relate to supporting documents filed in the ELC cases which had been pending in court for some years. The same documents had previously been relied on and were filed by advocates other than the 2nd petitioner and had never been the subject of any criminal investigation for more than 10 years during which ownership of the suit property had been in dispute. What is before court is weaponization of prosecutorial power to settle personal scores which this court should not allow.
69. The petitioners relied on among others, the decision in *Alfred Nyandieka v Director of Public Prosecutions & 2 others* (supra) for the position that the court should allow the petition and award the 2nd petitioner damages.

1st, 2nd and 4th respondents' submissions

70. The 1st, 2nd and 4th respondents submitted that they acted within *the Constitution* and the law and the onus was on the petitioners to prove otherwise. They relied on articles 243 and 245 (1), (2) and (4) of *the Constitution* and section 24 of the *National Police Service Act*. They maintained that the 2nd petitioner was properly charged based on the evidence collected during investigations and the 3rd respondent was satisfied on the threshold of that evidence in deciding to prosecute.
71. It was the 1st, 2nd and 4th respondents' position that the 3rd respondent discharged his mandate within *the Constitution*. They relied on the decision in *Diamond Hasham Lalji & another v Attorney General & 4 others* (supra). The petitioners had not demonstrated that instructions came from the 4th respondent.



72. The 1st, 2nd and 4th respondents again argued that the petitioners had not demonstrated that the trial court would not be impartial. They maintained that the documents complained of were directly in issue before the trial court in the criminal case and as a court with competent jurisdiction, it would determine the issues before it.
73. The 1st, 2nd and 4th and respondents maintained that this Court, whether sitting as a constitutional court or judicial review court, should only interfere with exercise of the 3rd respondent's mandate where it is shown that criminal proceedings have been instituted for reasons other than enforcement of criminal law or is otherwise an abuse of the court process. They relied on *Diamond Hasham Lalji* case (supra).
74. The 1st, 2nd and 4th respondents maintained that the petitioners had not discharged the burden of proof and relied on the decisions in *Kenya Bus Services Ltd & 2 others v Attorney General & 2 others* [2005] eKLR; *Matiba v Attorney General HC Misc Appl 666 of 1990* and *Cyprian Kubai v Stanley Kaiyongi Mwenda* [2002] eKLR and urged the court to dismiss the petition.

3rd respondent's submissions

75. The 3rd respondent submitted, relying on articles 22 and 23 of *the Constitution* and the decisions in *Anarita Karimi Njeru v Republic* (supra) and *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR, that the petition does not meet the threshold as a constitutional petition.
76. The 3rd respondent maintained that he had not violated the 2nd petitioner's rights and that the decision to charge and prosecute was made following due process. According to the 3rd respondent, the mere fact that the 2nd petitioner had been retained to represent the 2nd, 3rd, 5th and 6th interested parties, did not immune him from investigations and prosecution where it had been established that he committed a criminal offence. He urged the court to dismiss the petition with costs.

2nd, 3rd and 5th interested parties' submissions

77. The 2nd, 3rd and 5th interested parties urged that there was abuse of power thus, the court should intervene. They asserted that investigations and the subsequent arrest and arraignment of the 2nd petitioner, 5th and 6th interested parties was sanctioned by the 4th respondent in violation of article 156 of *the Constitution*. They relied on the decisions in *Mohammed Edin Adan v Director of Public Prosecutions & another* [2022] eKLR and *Republic v Attorney General; Law Society of Kenya (Interested party); Exparte: Francis Andrew Moriasi* [2019] eKLR.
78. The 2nd, 3rd and 5th interested parties again relied on the decision in *Geoffrey K Sang v Director of Public Prosecutions & 4 others* [2020] eKLR in urging the court to review the 3rd respondent's decision charge the 2nd petitioner, 5th and 6th interested parties since it was made because of outside influence and interference.
79. The 2nd, 3rd and 5th interested parties further relied on the decision in *Diamond Hasham Lalji & another v Attorney General & 4 others* (supra) and *Anthony Murimi Waigwe v Attorney General & 4 others* [2020] eKLR to submit that the decision to charge the 2nd petitioner, 5th and 6th interested parties had ulterior motive and legal impropriety. The 3rd respondent did not conduct the evidentiary or public interest assessment in arriving at his decision to charge.
80. The 2nd, 3rd and 5th interested parties relied on *Meme v Republic & another* [2004] eKLR for the contention that although section 193 A of the CPC allows concurrent civil and criminal proceedings,



the process should only be used for a proper purpose. They cited the decision in Rosemary Wanja Mwangiru & 2 others v Attorney General & 3 others [2013] eKLR to support this position.

81. The 2nd, 3rd and 5th interested parties further relied on the decision in Reuben Mwangi v Director of Public Prosecutions & 2 others; UAP Insurance & another (Interested parties) [2021] eKLR in urging the court to allow the petition.

6th interested party's submissions

82. The 6th interested party argued that investigations leading to the decision to arrest and charge him, the 2nd petitioner and 5th interested party were conducted at the behest of the 4th respondent. The 3rd respondent's decision to prosecute was also based on the 4th respondent's instructions and is thus, ultra vires, illegal and bad in law and will not result in a fair trial.
83. The 6th interested party argued that institution of the criminal case was made in bad faith and was intended to achieve purposes other than criminal justice based on a genuine complaint. He urged the court to be guided by the decisions in Anthony Murimi Waigwe v Attorney General & 4 others [2020] eKLR; Bitange Ndemo v Director of Public Prosecutions & 4 others [2016] eKLR; Rosemary Wanja Mwangiru & others v Attorney General & 3 others [2013] eKLR and Diamond Hasham Lalji & another v Attorney General & 4 others (supra) and quash the criminal proceedings.
84. The 6th interested party maintained that the criminal proceedings were based on facts in the ELC proceedings and the decision to prosecute was not made in good faith. He relied on article 47 of *the Constitution* and the decision in Judicial Service Commission v Mbalu Mutava & another (supra). He invited the court to also consider the decision in Republic v Attorney General Exparte Kipngeno Arap Ngeny (supra) and allow the petition.
85. The 1st and 4th interested parties did not take part in these proceedings.

Determination

86. I have considered the petition, the responses, arguments by parties and the decisions relied on. The issue that arises for determination is whether investigations and the decision to prosecute the 2nd petitioner, the 5th and 6th interested parties in Criminal Case No. MCCR E424 of 2023, Republic v James Hillary Paul Othieno Ohas & 2 others, violated *the Constitution*, the law and rights and fundamental freedoms and should therefore be halted.
87. The facts of this petition are largely not in dispute. The 2nd petitioner is an advocate of this Court. He was, at the time of arrest, representing the 2nd and 3rd interested parties in civil case pending before the ELC, namely: ELC E019 of 2021, Michael John Ohas & another v Rigathi Gachagua & others, having taken over the conduct of that case through the Firm of MMA Advocates LLP from the firm of Ochangu & Co. Advocates. The case was over ownership of parcel of land known as L.R No. 209/12077.
88. The 2nd petitioner took over the conduct of the civil case after it had been filed and all the documents in that case were filed by the previous advocates, Ochangu & Co Advocates, including a Notice of Motion application dated 18th January 2021 on behalf of the 2nd and 3rd interested parties. The 2nd petitioner filed a Notice of Change of Advocates taking over representation from the firm of Ochangu & Co. Advocates to the firm of MMA Advocates LLP where the 2nd petitioner was then practising.
89. The 2nd and 3rd interested parties again instructed the 2nd petitioner to represent them in ELC E242 of 2022 and he duly filed a Memorandum of Appearance still under the firm of MMA Advocates



LLP. The 2nd petitioner later took over the conduct of the two cases upon leaving the Firm of MMA Advocates LLP.

90. Later on, the 5th interested party was arrested over issues relating to the suit property and the 2nd petitioner was instructed to represent him. When the 2nd petitioner went to Milimani Law Courts with a view to representing the 5th interested party, he was arrested within the court precincts and was to be charged together with the 5th interested party. The 2nd petitioner was not informed of the charges he was to face and had not been asked to record a statement in relation to any matter. He later learnt from the charge sheet that he was to be charged with offences relating to documents that had been filed in the ELC cases by previous advocates.
91. The petitioners argued that the arrest and intended prosecution was malicious and was made with ulterior motive and bad faith as a way of intimidating the 2nd petitioner from discharging his professional duties. It was the petitioners' case, that the charges preferred against the 2nd petitioner and the 5th and 6th interested parties were malicious and the prosecution was being pushed by the 1st interested party. It was also in violation of the 2nd petitioner's rights and fundamental freedoms and violates article 157(11) of *the Constitution*.
92. The respondents denied that they had acted in violation of *the Constitution*, the law or rights and fundamental freedoms. The respondents maintained that they acted lawfully following a complaint lodged with the police and investigations disclosed that an offence had been committed. It was for that reason that the DPP approved arrest and prosecution of the 2nd petitioner together with the other accused persons.
93. Section 24 of the Police Service Act provides for the functions of the Police Service. These include; investigating crime, maintenance of law and order and protection of life and property. That is, the police are mandated to investigate complaints reported to them over commission of crimes. This is a statutory duty placed on the police which they have an obligation to discharge.
94. One of the objects and functions of the National Police Service under article 244 of *the Constitution* is to comply with constitutional standards of human rights and fundamental freedoms. In the discharge of their mandate, therefore, the police are required to do so subject to these constitutional safeguards of human rights and fundamental freedoms.
95. Police officers can investigate a complaint of a criminal nature to ascertain whether a crime has been committed. Once investigations are concluded and the police are of the opinion that a crime had been committed, the investigation file is forwarded to the DPP to make a decision on whether to prosecute. If, however, investigations conclude that no offence was committed, the file is closed and that is the end of the matter.
96. Article 157(6) confers on the DPP constitutional mandate and discretion to initiate, continue and or terminate criminal prosecutions. When exercising this discretion, the DPP does not require permission or consent from any person or authority. However, article 157(11) commands that when exercising his powers, the DPP should do so in a manner that has regard to public interest, interests of administration of justice and prevents and avoids abuse of the legal process. (See *Director of Public Prosecutions v Martin Mina & 4 others* [2017] eKLR).
97. In that regard, therefore, the law is settled that where the police are investigating crime, or the DPP is exercising constitutional discretion conferred on that office, courts will rarely interfere with that mandate.



98. In *Republic v Director of Public Prosecution & 2 others Ex parte Francis Njakwe Maina & another* [2015] eKLR, it was observed that courts should not usurp the constitutional mandate of the DPP to undertake prosecution in exercise of the discretion conferred on that office. The Court pointed out, however, that if a party demonstrates that the criminal proceedings constitute an abuse of process, the court will not hesitate in putting a halt to such proceedings.
99. Similarly, in *Paul Ng'ang'a Nyaga v Attorney General & 3 others* (2013) eKLR, it was held that the court will only interfere with, and interrogate acts of other constitutional bodies, if it is demonstrated that those bodies acted or are acting in contravention of *the Constitution*, the law or rights and fundamental freedoms.
100. In this premise, the intention of *the Constitution* was to enable the DPP carry out constitutional mandate of that office without interference from anybody. The Court cannot therefore direct or interfere with the DPP's exercise of constitutional powers unless there is clear evidence of violation of *the Constitution* itself or a party's rights. (*Francis Anyango Juma v The Director of Public Prosecutions and another* [2012] eKLR).
101. In the persuasive decision of *Williams v Spautz* [1992] HCA 34; 174 CLR 509; 66 ALJR 585, the Court stated:
- If a stay is sought to stop a prosecution which has been instituted and maintained for an improper purpose, it by no means follows that it is necessary, before granting a stay, for the court to satisfy itself in such a case, that an unfair trial will ensue unless the prosecution is stopped.
102. The decisions referred to above emphasise the point that the DPP's discretion to charge should only be interfered with where there is evidence of abuse, malice or ulterior motive in mounting a prosecution. That is, institution of criminal prosecution which exhibits abuse of discretion or undermines the essence of criminal justice system, will be interfered with.
103. In the present petition, the petitioners argued that the criminal prosecution was instituted in bad faith and was intended to intimidate the 2nd petitioner in the performance of his professional duties. This, they argued, was because the documents alleged to have been forged were filed by a different firm of advocates and existed long before the 2nd petitioner took over conduct of the civil cases. The petitioners' position was that the arrest and intended prosecution was instituted to aid one side of the competitors in the civil cases.
104. The petitioners further argued that the 2nd petitioner could not have committed forgery as the impugned documents were filed in court by the previous firm of Advocates, a fact that was clear from the record in those cases. The source of the documents is also clear in those files.
105. I have considered the arguments by parties and perused the record. The issue here is whether the court should stop the 2nd petitioner's prosecution. The 2nd petitioner is an advocate. He was arrested in the course of his duties within the court precincts and is being pursued over documents that existed before he was instructed to take the conduct of the ELC cases.
106. The petitioners explained how the documents, the basis of the 2nd petitioner's intended prosecution, were obtained. Investigations by police could also tell when the documents were obtained; who filed those documents in court; who may have committed the offence(s), if any, and against whom any prosecution should have to be.



107. The respondents did not explain why they zeroed in on the 2nd petitioner at the time they did and in court and despite the documents having been filed by a different firm of advocates and had been out there for several years even before the 2nd petitioner took over the conduct of the civil cases. The respondents did not also explain why they arrived at the conclusion that it was the 2nd petitioner who was responsible and should be prosecuted yet he was only acting as an advocate for some of the parties in the land dispute. It was not even made clear to this court whether any investigations faulted the previous firm of advocates that filed the documents in court and why prosecution focused on the 2nd petitioner at the time when the land cases were to be heard so that the advocate for some of the parties involved in the dispute had to be charged and prosecuted for forging the documents. It was also not explained why the 2nd petitioner, an advocate for some of the parties was arrested, even without seeking to hear from him over the issue and if the police doubted the 2nd petitioner's explanation on how the documents came about.
108. From the record, the respondents did not dislodge the petitioners' explanation regarding the impugned documents; could not justify the sudden decision to arrest and charge the 2nd petitioner as the one who forged the documents yet he was not the advocates who filed those documents in court. In that case, the petitioners' contention that there was bad faith on the part of the respondents cannot be wished away.
109. I have considered the charges the charges the 2nd petitioner is to face. Although the issue may be of fact, this court cannot ignore the fact that the 2nd petitioner could not forge documents he even had no knowledge about. The petitioners' explanation that the documents were filed in the proceedings by advocates previously on record though well within the respondents' knowledge, was ignored without explanation and or justification.
110. In *Diamond Hasham Lalji & another v Attorney General and 4 others* [2018] eKLR, the Court of Appeal stated (at paragraph 42) that: "The burden of proof rests with the person alleging unconstitutional exercise of prosecutorial power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision."
111. The Court then stated:
- (45) In considering the evidential test, the court should only be satisfied that the evidence collected by the investigative agency upon which the DPP's decision is made establishes a prima facie case necessitating prosecution. At this stage the courts should not hold a fully-fledged inquiry to find if evidence would end in a conviction or acquittal. That is the function of the trial court. However, a proper scrutiny of facts and circumstances of the case are absolutely imperative. (emphasis)
112. In *Njuguna S. Ndung'u v Ethics & Anti-Corruption Commission (EACC) & 3 others* [2018] KECA 47 (KLR), the Court of Appeal referred to, among others, paragraph 4B(1) of the DPP's National Prosecution Policy 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..."
113. The Court further referred to paragraph 4 B (2) of the Policy on the evidential test which states:
- 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?



114. The Court at paragraph 24 of the judgment, faulted the High Court for failing to “scrutinize the charges, the relevant documents and reach a conclusive and objective decision on whether or not the charges had any legal or factual foundation and also a realistic prospect of conviction.”

In other words, when dealing with a challenge to the DPP’s decision to prosecute, the Court should examine the charges for any legal foundation and the prospect of conviction thereby determine whether or not to stop such prosecution.

115. Taking into account the legal positions espoused in the above decisions, and considering the facts in this petition, and upon evaluating the documents relied on and their evidential value, there can be no other conclusion than that an objective evidential test was not conducted to demonstrate that there was prospect of conviction if prosecution was mounted against the 2nd petitioner. There was no nexus between the alleged forged documents and the 2nd petitioner or that the 2nd petitioner forged the documents. There was also no reason for not seeking to hear from the 2nd petitioner before arresting and charging him, or for ignoring the 2nd petitioner’s explanation that the documents had been filed in the ELC case by a different firm of advocates before the 2nd petitioner took over the conduct of the case. There was also no explanation or justification for arresting the 2nd petitioner within the court precincts where he had gone to see his client ready to represent him in court.
116. Article 50(2) of *the Constitution* guarantees every accused person the right to a fair trial which includes the right to be presumed innocent until the contrary is proved; to have adequate time and facilities to prepare his defence and to choose, and be represented by, an advocate, and to be informed of this right promptly. In other words, the 2nd petitioner’s client (the 5th interested party) had a right to be represented by an advocate of his choice, and had picked the 2nd petitioner to be such advocate.
117. The right to fair trial is one of the non-derogable rights under Article 25 (c) of *the Constitution*. The respondents could not interfere with this right by arresting the 2nd petitioner and purport to charge him as a way of preventing him from representing the 5th interested party in court. Allowing the respondents’ quest to arrest and prosecute the 2nd petitioner for performing his professional duties under the guise of committing forgery, is to countenance interference with the process of fair trial and independence of the Bar, a direct violation the rule of law. (See Alfred Nyandieka v Director of Public Prosecutions & 2 others (supra).
118. I must also point out, that although section 193A of the Criminal Procedure Code permits concurrent civil and criminal proceedings arising from the same set of facts, this should be allowed where criminal proceedings will not result into prejudice to one of the parties to the civil proceedings.
119. In the circumstances of this petition, the issue of who owns the suit property was at the centre of the dispute before the ELC and that court would have to determine if the documents were fraudulent; how the property was acquired and any relevant issue regarding the ownership of that property. Labelling the documents forged when the ELC is seized of the matter and was yet to pronounce itself on the ownership of that property, prosecuting the criminal case would be prejudicial to one side and may appear to favour another side thereby surreptitiously aiding one of the parties to the dispute.
120. This court is satisfied that the police did not comply with its mandate to discharge their functions subject to the constitutional safeguards of human rights and fundamental freedoms. The DPP also failed to comply with the principles in article 157(11) of *the Constitution* so that the exercise of his powers and discretion should be done in a manner that has regard to public interest, interests of administration of justice and prevents and avoids abuse of the legal process.



121. The petitioners' concerns that the prosecution was motivated by ulterior factors; was based on bad faith and was meant to intimidate the 2nd petitioner not to represent his clients in the ELC cases as the reason for pushing for the 2nd petitioner's prosecution, were not dislodged by the respondents.

Conclusion

122. Having carefully considered the petition; the responses; submissions and the authorities relied on by parties and those cited by the court, and considering the material placed before this court, *the Constitution* and the law, the conclusion I come to, is that there was no basis for arresting the 2nd petitioner within the court precincts with a view to prosecuting him given that he was discharging professional duties as opposed to having deliberately committed a criminal offence.

123. Police officers' conduct was unlawful and reproachable in the circumstances of this case mores, in the manner they arrested the 2nd petitioner and purported to prosecute him. The DPP could not support police actions without appearing to compromising the 2nd petitioner's clients' right to a fair trial given that the issue of ownership of the land was before the ELC for determination which court would also decide any issues regarding forgery of any of the documents relating to the suit property.

124. The petitioners prayed for damages for violation of fundamental rights and freedoms. I am not persuaded that compensation is justified. There is no evidence that the 2nd petitioner had been prosecuted. There was only an attempt to charge him and no more. There would therefore be no basis or justification for awarding compensation in the circumstances of this petition.

125. Consequently, and for the above reasons, the petition has merit and is allowed. The court makes the following declarations and orders it considers appropriate.

1. A declaration is hereby issued that the decision to arrest and purport to charge and prosecute the 2nd petitioner is a threat violate the 2nd petitioner's fundamental rights and freedoms guaranteed under articles 47 and 50(1) (2) of *the Constitution*.
2. A declaration is hereby issued that the decision to arrest the 2nd petitioner in court and purport to prosecute him while performing professional duties was unfair, unreasonable, irrational, and amounted to abuse of power and criminal justice system.
3. A declaration is hereby issued that the purported investigations into the alleged forgery of documents attached to pleadings filed in Environment and Land Case No. E242 of 2022, a matter that the Environment and Land Court was seized of were malicious and intended to interfere with fair hearing of the civil case.
4. An order of certiorari is hereby issued quashing the entire proceedings in Milimani Criminal Case No. MCCR E424 of 2023 -Republic v James Hillary Paul Othieno Ohas and 2 others in relation to the dispute over property known as LR No. 209/12077, the subject of Nairobi ELC E019 of 2021 and Nairobi ELC E242 of 2012.
5. An order of prohibition is hereby issued prohibiting the respondents, their agents and or servants from arresting and or prosecuting the 2nd petitioner, the 2nd, 5th and 6th interested parties in Criminal Case No E424 of 2023 -Republic v James Hillary Paul Othieno Ohas and 2 others or any other case in relation to facts arising from ownership of Property known as LR No. 209/12077.
6. Costs being discretionary, each party shall bear their own of this petition.

DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF FEBRUARY 2026



E C MWITA

JUDGE

DELIVERED AND COUNTERSIGNED THIS 5TH DAY OF FEBRUARY 2026

L N MUGAMBI

JUDGE

