



Muangi & another v Inspector General, National Police Service & 4 others; Somoni (Cross Petitioner); Inspector General of Police & 5 others (Respondent) (Environment and Land Petition E018 of 2023) [2025] KEELC 5632 (KLR) (29 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5632 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND PETITION E018 OF 2023

OA ANGOTE, J

JULY 29, 2025

IN THE MATTER OF: ARTICLES 2, 10, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 48, 50 AND 159 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTION 6 OF THE CIVIL PROCEDURE ACT

AND

IN THE MATTER OF: THE VIOLATION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS OF THE PETITIONER UNDER ARTICLES 25, 27, 28, 47, 48 AND 50 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: BREACH OF FAIR ADMINISTRATIVE ACTIONS ACT 2015

AND

IN THE MATTER OF: BREACH OF THE OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS ACT 2013

AND

IN THE MATTER OF: UNLAWFUL AND IRREGULAR PROSECUTION IN RELATION TO IR. 78123

AND

IN THE MATTER OF RULES 4 AND 23 OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS) (PRACTICE & PROCEDURE) RULES, 2013

BETWEEN

SAMMY MUSILI MUANGI 1ST PETITIONER



WINFRED KANINI MBONDO 2ND PETITIONER

AND

INSPECTOR GENERAL, NATIONAL POLICE SERVICE 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

THE DIRECTOR, DIRECTORATE OF CRIMINAL INVESTIGATION 3RD
RESPONDENT

THE HON. ATTORNEY GENERAL 4TH RESPONDENT

JOYCE BOSIBORI SOMONI 5TH RESPONDENT

AND

JOYCE BOSOBORI SOMONI CROSS PETITIONER

AND

THE INSPECTOR GENERAL OF POLICE RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

THE DIRECTOR, DIRECTORATE OF CRIMINAL
INVESTIGATIONS RESPONDENT

THE HON. ATTORNEY GENERAL RESPONDENT

SAMMY MUSILI MUANGI RESPONDENT

WINFRED KANINI MBONDO RESPONDENT

JUDGMENT

1. Vide a Petition dated 6th October 2023, the Petitioners have prayed for the following reliefs:
 - a. A declaration that the ongoing investigations by the Respondents over the suit properties which are subject matters in disputes pending determination before superior courts is in contravention and violation of the sub judice rule.
 - b. A declaration be and is hereby issued that the Respondents have violated the Petitioner's rights guaranteed under Articles 25, 27, 28, 40, 47 and 50 of *the Constitution* of Kenya 2010.
 - c. A declaration be and is hereby issued that the 1st, 2nd, 3rd and 4th Respondents have in the manner in which they have investigated and handled complaints filed with them by the 5th Respondent in respect of ownership of properties namely IR No. 78123, Land Reference No. Nairobi/Block 1/1081, Land Reference No. Nairobi 1/1079, Land Reference No. Nairobi/Block 1/1072, Land Reference No. Nairobi/Block 1/173, Land Reference No. Nairobi/Block 209/3138, Land Reference No. Nairobi 7785/996, Land Reference No. Ngong/Ngong/27/343 and Land Reference No. Ngong/Ngong/27/344 violated Article 10 of *the Constitution* of Kenya, 2010.
 - d. A declaration that the investigations complained of have the effect of directly interfering with the integrity of proceedings in Milimani High Court Family Division Matrimonial Case No.



E051 of 2023, Kajiado ELC E083 of 2022 and Milimani ELC E343 of 2022 and as such are unconstitutional.

- e. An order of prohibition directed to all Respondents prohibiting them from opening or purporting to reopen, bringing, instigating, instituting or prosecuting any criminal proceedings against the Petitioners in relation to the suit properties known as IR No. 78123, Land Reference No. Nairobi/Block 1/1081, Land Reference No. Nairobi/Block 1/1079, Land Reference No. Nairobi/Block 1/1072, Land Reference No. Nairobi/Block 1/173, Land Reference No. Nairobi/Block 209/3138, Land Reference No. Nairobi/Block 7785/996, Land Reference No. Ngong/Ngong/27/343 and Land Reference No. Ngong/ Ngong 27/344.
 - f. Such other orders as the Honourable Court may deem fit.
 - g. That costs of this petition be awarded to the petitioner.
2. The facts of this Petition, as asserted by the 1st Petitioner in his affidavit, are that the 1st Petitioner and the 5th Respondent were married in 2002 under Kamba and Kisii customary Law. It is further averred that the 1st and 2nd Petitioners are siblings who work together within Nairobi.
 3. The 1st Petitioner avers that during the marriage, he acquired various properties including:
 - i. IR No. 78123;
 - ii. Land Reference No. Nairobi/ Block 1/1081;
 - iii. Land Reference No. Nairobi/ Block 1/1079;
 - iv. Land Reference No. Nairobi/Block 1/1072;
 - v. Land Reference No. Nairobi/Block 1/173;
 - vi. Land Reference No. Nairobi/Block 209/3138;
 - vii. Land Reference No. Nairobi/Block 7785/996;
 - viii. Land Reference No/ Ngong/Ngong/27/343 and
 - ix. Land Reference No. Ngong/Ngong/27/344 (the suit properties).
 4. According to the 1st Petitioner, he solely acquired the above properties during the course of the marriage and had them registered either jointly with the 5th Respondent or under the name of the 5th Respondent or under his company's name, in full agreement with the 5th Respondent.
 5. The 1st Petitioner stated that in 2022, he separated with the 5th Respondent, a development which gave rise to several legal disputes concerning the matrimonial properties in question and that the 5th Respondent instituted Kajiado ELC E083 of 2022 and Milimani ELC E343 of 2022 against him, wherein she alleged forgery and fraudulent transfer of certain matrimonial properties.
 6. The 1st Petitioner averred that, on his part, he filed Milimani Divorce Cause No. E209 of 2023 and Milimani High Court Family Division Matrimonial Case No. E051 of 2023 seeking the dissolution of the marriage and division of the matrimonial properties and that these four matters remain pending hearing and determination before their respective courts.
 7. It was further indicated that in both Milimani High Court Family Division Matrimonial Case No. E051 of 2023 and Milimani ELC E343 of 2022, the courts issued express orders preserving the status



- quo in respect of all the contested matrimonial properties, pending the hearing and determination of the respective suits.
8. The 1st Petitioner asserted that since the issuance of the said orders, he has fully complied therewith and has neither sold, transferred, purported to sell nor otherwise interfered with the subject properties, pending the court's intervention and final determination.
 9. The 1st Petitioner contended that, in defiance of the said court orders, the 5th Respondent lodged frivolous complaints with the DCI Nairobi, DCI Kajiado North and DCI Kyumbi, with the intention of harassing and intimidating him, and that as a result, the 1st and 2nd Petitioners were summoned to appear before the SCCIO Kajiado on 9th August 2023 and before the SCCIO Kyumbi on 16th August 2023 in connection with allegations of forgery.
 10. The 1st Petitioner asserted that these actions were calculated to extort money from him, and interfere with the ongoing court cases. This, he urges, was in contravention of the sub judice rule, set out in Section 6 of the *Civil Procedure Act* and in contempt of court.
 11. It was averred by the 1st Petitioner that following the said summons, he lodged a complaint vide a letter dated 15th August 2023 to the 4th Respondent, through his advocates, over police harassment and called to their attention the respective court orders issued in Milimani High Court Family Division Matrimonial Cause No. E051 of 2023 and Milimani ELC E343 of 2022.
 12. In response, it was deposed, the 4th Respondent issued a letter dated 16th August 2023, which was copied to SCCIO Kyumbi and SCCIO Kajiado North. However, the 1st Petitioner asserted that the criminal investigations all remain ongoing.
 13. The 1st Petitioner further averred that the conduct of the 1st, 2nd, 3rd and 5th Respondents, in pursuing investigations against them over alleged forgery in respect of the suit properties, which are the subject of pending and part-heard civil cases, constitutes contempt of court and amounts to unlawful interference with the integrity of the civil proceedings.
 14. He contended that the doctrine of separation of powers requires that there be no unreasonable or undue interference by one arm of the government in matters before another arm of government.
 15. It was the Petitioners' contention that the actions by the Respondents are unlawful, in contempt of the court orders, an abuse of the criminal justice system and a violation of the fundamental rights and freedoms as guaranteed by *the Constitution* of Kenya 2010. He argued that, in view of the court orders issued in Milimani Matrimonial Case No. E051 of 2023 and Milimani ELC E343 of 2022, the purported investigations and intended criminal charges against them are unconstitutional, discriminatory, amount to abuse of court process and statutory powers and constitute illegal exercise of discretion.
 16. The Petitioners therefore urged this court to intervene and to put a stop to the irregular and illegal investigations, particularly in light of the persistent harassment, threats and intimidation directed at the Petitioners by officers from the Directorate of Criminal Investigations.
 17. The Petitioners further contended that the principles of procedural fairness required the 5th Respondent to ventilate her grievances through the ongoing civil cases by filing appropriate pleadings and supporting documents, and not to unlawfully steal a march by instituting criminal proceedings against them over the same subject matter.



18. The Petitioners averred that the actions of the 1st, 2nd, 3rd and 5th Respondents and their intended prosecution amount to a violation and intended infringement of their constitutional rights in breach of Articles 19(1) & 2(2), 20(1), 25(c), 27(1) & (2), 28, 47 and 50(1) of *the Constitution* of Kenya.
19. The 2nd Respondent opposed the Petition through Grounds of Opposition dated 24th October 2023. He averred that the 2nd Respondent has not undertaken any action in relation to the subject matter of this Petition that would warrant the intervention of this court and that the Petitioners have failed to produce any evidence demonstrating that the alleged investigations were initiated pursuant to his directions.
20. The Director of Public Prosecution, the 2nd Respondent, further indicated that the Petitioners had not established that he has acted without or in excess of the powers conferred upon him by Article 157(4) of *the Constitution*, or any other law or that has infringed, violated, contravened or failed to comply with the provisions of *the Constitution* as alleged.
21. It was the 2nd Respondent's position that pursuant to Article 245(4) of *the Constitution* and Section 14 of the Police Act, the police are mandated to investigate any complaint brought to their attention, with a view to determining whether a criminal offence has been committed. He emphasised that not every matter investigated by the 1st and 3rd Respondents culminates in prosecution, as the fundamental objective of an investigation is to establish the veracity or otherwise of the complaint.
22. The 2nd Respondent further averred that at the time he filed the Grounds of Opposition, he was yet to receive any investigation file from the 1st and 3rd Respondents concerning the subject matter of this Petition.
23. The 2nd Respondent additionally stated that he was not party to the civil suits cited by the Petitioners and as such, he could not be lawfully accused of violating or interfering with processes to which he was not a party to.
24. The Director of Public Prosecution stated that in any case, Section 193(A) of the *Criminal Procedure Code* provides that notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any civil proceedings shall not be a ground for any stay, prohibition, or delay in criminal cases.
25. The 2nd Respondent stated that this Petition has been filed in bad faith, misconceived, premature and an abuse of the court process and calculated to derail and defeat the ends of justice.
26. It was averred that the accuracy and correctness of evidence or facts obtained in the course of investigations can only be tested and adjudicated upon by the trial court where an applicant is assured of fair trial and protection of the law, and which is best equipped to assess the quality and sufficiency of evidence gathered and properly adduced in support of intended charges.
27. The 4th Respondent opposed the Petition by way of a Replying Affidavit sworn by Martin Munene, a State Counsel in the Office of the Attorney General. In his affidavit, Martin Munene averred that the Attorney General, by a letter referenced AG/L&E/MLS/62/22 dated 4th April 2024, wrote to the Director of Public Prosecutions seeking to know the directions issued by the Directorate of Criminal Investigations in respect of DCI Inquiry File No. 2/2020 through a letter Ref. DCI/NBI/SEC/2/3/VOL/42/103.
28. Martin Munene further averred that the Office of the Director of Public Prosecutions responded to the said letter by the Office of the Attorney General by way a letter dated 18th April 2024 and that in the response, the Office of the Director of Public Prosecutions confirmed that upon receipt and careful



consideration of DCI Inquiry No. 2/2020 and upon review of the evidence on record, he duly noted the existence of several ongoing civil cases and the orders issued in those proceedings.

29. It was averred that the Director of Public Prosecution, having considered the subsisting court orders in the pending civil matters, formed the view that it would not be in the interest of justice to proceed with any prosecution in relation to the subject matter and that the DPP accordingly directed that the issues surrounding the disputed properties be determined by the competent Civil Courts seized of the matters, as they were properly vested with the jurisdiction and authority to adjudicate the disputes.
30. It was averred that this decision had been formally communicated to the Director of Criminal Investigations vide a letter Ref. ODP/ HQ/CAM/2/180 dated 25th March 2024 and the duplicate inquiry to the Directorate of Criminal Investigations for their appropriate action.

The 5th Respondent's Cross Petition

31. The 5th Respondent/ Cross Petitioner has through a Cross-Petition dated 11th September 2024, prayed for the following reliefs:
 - a. A Declaration that the 2nd Respondent's decision made by way of its letter dated 25th March 2024 violated Articles 10, 157(11) and 232 (1) of *the Constitution*.
 - b. A Declaration that the 2nd Respondent's decision made by way of its letter dated 25th March 2024 violated the cross-petitioner's rights under Articles 27, 40, 47 and 50 of *the Constitution*.
 - c. Damages for breach of the cross-petitioner's rights under Article 27, 40, 47 and 50 of *the Constitution*.
 - d. Any other remedy that the court will consider fit and just in the unique circumstances of this Cross Petition.
 - e. The cost of the Cross Petition.
32. The 5th Respondent averred in the Cross Petition that she cohabited with the 1st Petitioner as husband and wife for twenty years until in 2024 when their union was dissolved by the Chief Magistrates Court Milimani in a judgement delivered on 9th January 2024.
33. She confirmed that during the subsistence of their union, the parties acquired various properties, either jointly or individually, depending on each party's contribution towards the acquisition thereof and that it was their mutual agreement that properties acquired by an individual's sole effort and resources would be registered in that individual's name, while those jointly acquired properties would be registered in the names of both parties.
34. The Cross Petitioner averred that among the properties acquired solely through her effort and contribution were the following:
 - i. LR No. Ngong/Ngong 27343 located in Ngong Kajiado County;
 - ii. LR No. Ngong/Ngong 27344 located in Ngong Kajiado County;
 - iii. LR No. 1/1081 (Original Number 1/222/4) located in Kilimani Nairobi City County;
 - iv. LR No. 7785/996 (Original Number 7785/10/773 located in Runda, Nairobi County and
 - v. LR No. 209/3138 located in Kileleshwa Nairobi County.



35. She further/affirmed that these properties were registered in her name with the full knowledge of the 1st Petitioner. However, she deposed, in 2022, she discovered that the original title deed of one of her properties was missing from their matrimonial home in Runda and that upon inquiring from the 1st Petitioner, she received no satisfactory explanation, prompting her to report the loss at Runda Police Station under OB/13/22/03/2022.
36. The Cross Petitioner/5th Respondent asserted that upon conducting searches at the relevant land registries, she was shocked to discover that the 1st Petitioner, through fraud and forgery, had unlawfully transferred the suit properties to himself and to companies owned by him and his sister, without her knowledge, authority or consent.
37. Consequently, she averred, she filed Kajiado ELC No. E083 of 2022 seeking to protect her interests in the Ngong properties, being, LR Nos Ngong/Ngong 27343 and Ngong/Ngong 27344 and that the court, upon her application, issued orders on 1st November 2022 barring the Petitioners from dealing with the said properties pending the hearing and determination of the said suit.
38. She averred that she similarly filed Nairobi ELC No. E343 of 2022 to protect her interest in the Nairobi properties, being Land Reference Numbers 1/1081, 7785/996 and 209/3138 and that the court, upon reviewing documents filed by both parties, issued orders on 24th January 2023, barring the Petitioners from dealing with the said properties pending the hearing and determination of the suit.
39. She further averred that, recognizing the complex and concealed nature of the fraudulent dealings orchestrated by the Petitioners, she wrote to the Directorate of Criminal Investigations on 24th April 2024 reporting the fraud and requested the DCI to undertake investigations and that in response, the SCI, through a letter dated 23rd May 2023, asked the Regional Criminal Investigation Officers for Nairobi, Machakos and Kajiado Counties to investigate the complaint.
40. Through these investigations, the 5th Respondent deposed, the RCIO Nairobi obtained copies of the transfer documents purportedly executed by her, which indicated that she had transferred the Nairobi properties to the 1st Petitioner and his accomplices and that she learnt that the transfers falsely bore her signature.
41. The 5th Respondent averred that the disputed documents were subjected to forensic examination by the government's document examiner, who in his report dated 25th July 2023, concluded that the signatures on the transfer forms did not belong to her.
42. It was deposed that investigations further revealed that Ndung'u Alex Karanja Advocate, the lawyer who allegedly witnessed the alleged transfers in 2018 had passed away on 31st August 2017; that this fact was confirmed by the law firm of Kabugu & Co. Advocates, which had been nominated by the late Alex Karanja Ndung'u to take over his files and that the law firm also confirmed that the stamp impressions appearing on the transfer forms were markedly different from the known official stamps of the late Advocate and were therefore forgeries.
43. The Cross Petitioner further averred that the Registrar of Companies also confirmed that the Petitioner had transferred LR No. 7785-1996 located in Nairobi to Sinai Vision Investment Agencies, a company in which the Petitioner has a controlling stake, as the only adult shareholder and director.
44. It was averred by the 5th Respondent that she also established that she learnt that the Ngong properties were transferred to the 1st Petitioner's name using forged transfer forms, which were purportedly witnessed by the same deceased advocate in 2019, and that the 1st Petitioner also forged her signature



- which he used to apply for and obtained the Land Control Board Consent from the Kajiado North Land Control Board.
45. The Cross Petitioner stated that the government's document examiner confirmed through forensic analysis, that the signatures on the forged transfer forms and the Land Control Board application forms were not hers; that furthermore, the Kajiado North Land Control Board disowned the purported application and consent, confirming that no such documents emanated from the board and that the alleged consent was a forgery.
 46. It was further averred that Land Reference Number 19878 located in Machakos, and jointly registered in their names, was fraudulently transferred to Sinai Investment Limited without her knowledge, authority or consent; that the forgery of her signature on the transfer was confirmed by DCI Machakos, following their forensic examination of the transfer documents and that the forged transfer was once again purportedly witnessed by the deceased advocate in 2019.
 47. The Cross Petitioner stated that upon completion of the investigations, the DCI forwarded their investigation files and the draft charges to the 2nd Respondent for his review and the decision on whether to charge the Petitioners and that in a letter dated 18th August 2023, the 2nd Respondent confirmed that the evidential test had been met in respect of the proposed charges and there existed a realistic prospect of securing convictions against the Petitioners.
 48. The 5th Respondent stated that thereafter, the Petitioners interfered with the investigation and sought to obstruct justice; that vide a letter dated 15th August 2023, the Petitioners' Advocates informed the 4th Respondent that the Petitioners would not present themselves before the 1st and 3rd Respondents and that on the following day, on 16th August 2023, the 4th Respondent directed the 1st and 3rd Respondents not to prefer charges against the Petitioners citing the existence of ongoing civil suits.
 49. The 5th Respondent/Cross Petitioner, stated that after this Petition was filed and the 2nd Respondent filed Grounds of Opposition, her advocates inquired whether the 2nd Respondent would be filing a replying affidavit and that she later learnt on 23rd May 2024 that the 2nd Respondent had reversed its earlier decision to prosecute the Petitioners citing that such prosecution would constitute an abuse of the court process.
 50. Aggrieved by this decision, she deposed, she wrote to the 2nd Respondent on 6th May 2024 protesting the refusal to prosecute, and to the Solicitor General on 30th April 2024, decrying the 4th Respondent's alleged partisan conduct in shielding the Petitioners.
 51. She maintained that the acts of forgery, the fraudulent use of a deceased advocate's name and stamp to affect the fraudulent transfers were criminal offences which ought to have been investigated and prosecuted. She argued that her decision to institute civil proceedings to protect the properties did not and could not bar the criminal justice process where investigations had established clear evidence of crime.
 52. The Cross Petitioner further averred that neither the Environment and Land Court nor herself possessed the technical competence or the requisite statutory and constitutional mandate to investigate the complex web of fraud and forgery that the Petitioners weaved to fraudulently deprive her of her properties and that it is the 1st and 3rd Respondents, as the competent investigative authorities, who are mandated to handle such crimes.
 53. The Cross Petitioner asserted that she was aggrieved by the 2nd Respondent's decision dated 25th March 2024 which she contended was made in collusion with the 4th Respondent, and which effectively denied her justice. She decried the said decision as a gross miscarriage of justice, contending that both



- the 2nd and 4th Respondents had trivialized and disregarded her grievances on account of her gender and had misused their constitutional powers and mandate to frustrate her legitimate quest for justice.
54. The Cross Petitioner further maintained that Section 193A of the *Criminal Procedure Code* expressly provides that the existence of civil proceedings is not a bar to the institution or continuation of criminal proceedings. She argued that the existence of parallel suits before the Environment and Land Court did not, in law, preclude the commencement or conduct of criminal proceedings, and that both processes could and ought to proceed concurrently.
 55. She further contended that the insistence by the 2nd and 4th Respondents that the Petitioners could not be prosecuted owing to pending civil suits was not only misleading but amounted to a deliberate misstatement and misapplication of the law, calculated to shield the Petitioners from lawful prosecution.
 56. The Cross Petitioner contended that the decision made by the 2nd Respondent on 25th March 2024 was opaque and discriminatory as it was premised solely on representations made by the 4th Respondent and the Petitioners, without according her an opportunity to be heard.
 57. She argued that this amounted to a grave affront to the rule of law and a violation of national values and principles of governance under Article 10(2) of *the Constitution* which are binding on the 2nd and 4th Respondents under Article 10(1).
 58. The 5th Respondent further alleged that the dismissal of her complaint regarding the forgery of her signature and the fraudulent transfer of her properties, was based on a retrogressive and discriminatory attitude that all her properties belongs to the Petitioners because she was his wife. This, she contended, was a violation of her right to equal treatment as provided under Article 27(1) and (3) of *the Constitution* and an infringement of her right to property as guaranteed by Article 40 of *the Constitution*.
 59. The Cross Petitioner further averred that the 2nd Respondent's decision of 25th March 2024 endorsed and encouraged the Petitioners' actions of arbitrarily depriving her of her properties through outright fraud and forgery.
 60. She contended that this decision contravened Article 45(3) of *the Constitution* which provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the time of the dissolution of the marriage.
 61. In addition, the Cross Petitioner contended that, as the decision by the 2nd and 4th Respondents not to prosecute the Petitioners was founded solely on the representations of the Petitioners, and her views having not been taken into account, the decision made on 25th March 2024 was in violation of Article 47 on the right to fair administrative action and Article 50, on the right to fair hearing.
 62. She additionally averred that despite the 2nd Respondent initially finding that the evidential threshold had been met and there existed a realistic prospect of convicting the Petitioners, the 2nd Respondent inexplicably reversed this decision based on the presentations by the 4th Respondent and the Petitioners.
 63. This, she contended, was founded on the spurious ground that there are pending civil cases, in contravention of Article 157(1) of *the Constitution* which mandates the 2nd Respondent to have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the court process.



64. The Cross Petitioner averred that the decision not to prosecute the Petitioners was not in the public interest as it is in the interest of justice that crime should be investigated, prosecuted and the culprits punished.
65. She argued that the attempt by the 2nd and 4th Respondents to use their constitutional powers to shield the Petitioners from prosecution was an abuse of their powers and a violation of Article 157 and of Article 232, which stipulates the values and principles of public service including high standards of professional ethics, responsive, prompt, effective, impartial and equitable provision of services, accountability for administrative acts and transparency and provision to the public of timely and accurate information.
66. The Petition was canvassed vide written submissions.

Submissions

67. Petitioners' Counsel relied on the Supreme Court Judgement of *Cyrus Shakhlanga Khua jirongo vs Soy Developers Ltd, and others*, Petition NO. 38 of 2019, where the Apex court upheld the supremacy of the DPP in making the decision on whether or not to prosecute.
68. It was submitted that the Supreme Court however cautioned against the use of the criminal justice process to assist a litigant in civil proceedings, and that the Supreme Court cited with approval the Court of Appeal's decision in the case of *Commissioner of Police and the Director of Criminal Investigations & Another vs Kenya Commercial Bank and 4 others* (2013) eKLR.
69. Counsel for the 2nd Respondent submitted that the sole issue for determination is whether there is a competent Petition against the 2nd Respondent that meets the threshold established in the case of *Anarita Karimi vs Republic (No.1)* (1079) 1 KLR 154 and *Mumo Matemu vs Trusted Society of Human Rights Alliance* [2013] eKLR.
70. Counsel submitted that it is settled law that a constitutional Petition making reference to a breach of constitutional rights and freedoms should indicate with reasonable degree of precision that which the Petitioner complains, the provisions said to have been infringed or violated and that it should be clearly demonstrated how the said provisions have been infringed or violated by the relevant party.
71. The 2nd Respondent's Counsel submitted that from the Petition, the matters complained of are matters within the province of the police and all the Petitioners' complaint relates to the 3rd and 5th Respondents.
72. It was submitted that under Section 24 as read with Section 35 of the *National Police Service Act* 2011, it is the duty of the police to, among other duties, prevent and detect crime, collect criminal intelligence, investigate crime and apprehend offenders.
73. Counsel argued that there is therefore no way that the 2nd Respondent can be called upon to answer on matters that are constitutionally and statutorily within the mandate of the 3rd Respondent.
74. Counsel submitted that under Article 157 of *the Constitution* as read with the ODPP Act 2013, the 2nd Respondent's mandate is primarily to carry out prosecution after the police have investigated a matter and that upon completion of investigation by the 3rd Respondent, the investigation file is submitted to the 2nd Respondent to establish whether there is sufficient evidence that can sustain the proposed charges.
75. Counsel submitted that at the time of the institution of the Petition, no such file had been availed for decision making by the 2nd Respondent.



76. It was submitted that there is no cause of action that has been established by the Petitioners against the 2nd Respondent. Further, that Petitioners failed to disclose and indicate with a reasonable degree of precision that which they complain and the provisions of *the Constitution* which they claim have been violated by the 2nd Respondent.
77. Counsel for the 5th Respondent/Cross Petitioner submitted that the DPP's decision to discontinue criminal proceedings despite overwhelming evidence of fraud and forgery constitutes a clear contravention of Article 157(11) of *the Constitution*.
78. It was submitted that this decision was not only irrational but also undermined judicial integrity and public confidence. Counsel relied on the cases of Republic vs Chief Magistrate, Kilgoris; ex parte Applicant: Johana Kipngeno Langat [2021] eKLR, Maina & 4 others vs Director of Public Prosecutions & 4 others [2022] KEHC 15 (KLR) and Reuben Mwangi vs Director of Public Prosecutions & 2 others; UAP Insurance & another (Interested Parties) [2021] eKLR.
79. Counsel submitted that the threshold for prosecutions is well established. Reliance was placed on the case of Republic vs Director of public Prosecutions & 2 others: Ayoo (Ex parte Applicant)[2023] KEHC 23733 (KLR) where the court held that judicial review is permissible where the DPP's decision is irrational, illegal or influenced by extraneous considerations.
80. Counsel also relied on the decision in Mwangi vs *Director of Public Prosecutions & Another; JNM (Interested Party) (Petition E118 of 2023)* [2024] KEHC 7282 (KLR) where it was held that the DPP's powers are not absolute and must conform to constitutional safeguards.
81. It was Counsel's submission that discontinuing the case without justification, particularly where investigations confirm forgery rendered the decision ultra vires and irrational under the Wednesbury principles of reasonableness.
82. It was submitted that the DPP's erroneous reliance on pending civil matters to halt prosecution was addressed in Maina & 4 others vs Director of Public Prosecutions & 4 others [2022] KEHC 15 (KLR) where it was held that fraud cuts across both criminal and civil cases.
83. The Cross Petitioner's Counsel submitted that the DPP and AG's dismissal of the Cross Petitioner's complaint perpetuates gender stereotypes implying that marital disputes are non-criminal. It was contended that this violates Article 27(3), which guarantees equal treatment of women and Article 45(3) which mandates equality in marriage.
84. It was further submitted that the fraudulent transfer of the Cross Petitioner's properties constituted an arbitrary deprivation of property under Article 40(1) of *the Constitution*, and that the Respondents' actions also violate Articles 27 and 45(3) of *the Constitution* and also flouts binding precedents from Kenya's apex courts. Counsel urged this court to intervene to uphold constitutional supremacy and restore the Cross Petitioner's rights.

Analysis and Determination

85. Having considered the pleadings and submissions filed by the parties to this suit, the issues for this court's determination are:
 - a. Whether the investigations by the 1st and 3rd Respondents contravened the sub judice rule.
 - b. Whether the Petition satisfied the test of specificity set out in the Anarita Karimi case, and if so, if it is merited.



- c. Whether the 2nd Respondent's decision on 25th March 2024 violated the Cross Petitioner's Constitutional rights.
86. This Petition concerned various properties acquired during the subsistence of the marriage between the Petitioner and the Cross Petitioner, spanning the period between 2002/2004 and 2024. The said properties were registered either jointly in their names, in their individual names or in the names of companies associated with the 1st Petitioner.
87. The Cross Petitioner instituted two civil suits, namely Kajjado ELC E083 of 2022 and Milimani ELC E343 of 2022, seeking to safeguard her interests in several properties situated in Ngong and Nairobi. These properties are Ngong/Ngong 27343, Ngong/Ngong 27344, L.R. No. 1/1081, L. R. No. 7785/996 and L. R. No. 209/3138, which she alleged had been fraudulently transferred by the 1st Petitioner to himself and companies affiliated to him.
88. Subsequently, the 1st Petitioner filed Milimani Divorce Cause No. E209 of 2023 and Milimani High Court Family Division Matrimonial Case No. E051 of 2023 seeking the dissolution of the marriage and division of the matrimonial properties.
89. The present Petition arises from criminal investigations undertaken by the Directorate of Criminal Investigations following a complaint lodged by the 5th Respondent/Cross Petitioner, alleging that the 1st Petitioner had fraudulently transferred six properties into his name, including one located in Machakos.
90. In the Petition, the Petitioners contended that the investigations undertaken by the 1st, 2nd, 3rd and 5th Respondents, concerning allegations of forgery related to the suit properties, which are the subject of pending and part-heard civil cases, constituted contempt of court and amounted to unlawful interference with the integrity of the civil proceedings.
91. The Petitioners argued that the Cross Petitioner ought to have pursued her grievances within the framework of the ongoing civil proceedings, rather than seeking to pre-empt those matters through parallel criminal proceedings based on the same subject matter. It was further contended that the intended prosecution amounted to a violation and threatened infringement of their constitutional rights, in particular those guaranteed under Articles 19(1) & 2(2), 20(1), 25(c), 27(1) & (2), 28, 47, and 50(1) of *the Constitution* of Kenya.
92. In response, the Cross Petitioner, maintained that pursuant to Section 193A of the *Criminal Procedure Code* the existence of civil proceedings is not a bar to the institution or continuation of criminal proceedings.
93. Through her Cross-Petition, the Cross Petitioner/5th Respondent averred that the decision made by the 2nd Respondent on 25th March 2024 not to prosecute the Petitioners violated Articles 10, 157(11) and 232 (1) of *the Constitution* and infringed her fundamental rights under Articles 27, 40, 47 and 50 of *the Constitution*. It was her contention that the 2nd Respondent acted with bias in this determination because the only reason adduced was the pendency of the civil suits, which is not barred under the law.

Whether the investigations by the 1st and 3rd Respondents contravened the sub judice rule

94. The Petitioners contended that the criminal investigations undertaken by the Respondents were in contravention of the sub judice rule and were an abuse of court process.



95. Section 6 of the *Civil Procedure Act* articulates the sub judice rule as follows:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

96. The Supreme Court considered the purpose of the sub judice rule in the case of Kenya National Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] KESC 54 (KLR), in which they stated:

“The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

97. Guided by these definitions, it is evident that investigations, by their very nature, cannot be said to be sub judice. The sub judice rule, as contemplated under Section 6 of the *Civil Procedure Act*, applies strictly to proceedings before a court of law and does not extend to investigative processes undertaken by law enforcement agencies in the exercise of their constitutional and statutory mandate. Further, as asserted by the 2nd Respondent, no criminal case has been instituted by the 2nd Respondent against the 1st Petitioner.

98. In any case, as rightly asserted by the Cross Petitioner, concurrent civil and criminal proceedings are not prohibited by law. This is provided for under Section 193A of the *Criminal Procedure Code* which states that:

“Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

99. This court finds in the negative, that the investigations undertaken by the 1st and 3rd Respondents did not contravene the sub judice rule.

Whether the Petition satisfied the test of specificity set out in the Anarita Karimi case, and if so, if it is merited.

100. The 2nd Respondent contended that the Petition failed to satisfy the threshold of specificity required in constitutional petitions, as established in Anarita Karimi Njeru vs Republic (1979) eKLR. The court



in *Anarita Karimi Njeru vs Republic* (1979) eKLR set out the legal threshold for a Constitutional Petition thus;

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

101. This principle was restated in *Mumo Matemo vs Trusted Society of Human Rights Alliance & 5 Others*(2013) eKLR by the Court of Appeal as follows:

“We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru* (supra).

In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st Respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior Court below to lament that the petition before it was not the “epitome of precise, comprehensive or elegant drafting, without remedy by the 1st respondent. It is our finding that the petition before the High Court was not pleaded with precision as required in Constitutional Petitions. Having reviewed the petition and supporting affidavit we have concluded, that they did not provide adequate particulars of the claims relating to the alleged violations of *the constitution* of Kenya and the *Ethics and Anti-corruption Commission Act, 2011*, accordingly the petition did not meet the standard enunciated in the *Anarita Karimi Njeru* case.”

102. In the same vein, the Supreme Court in *Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 Others* [2014] eKLR stated as follows:

“Although article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic* (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”

103. This Petition is anchored on the criminal investigations undertaken by the 1st and 3rd Respondents, pursuant to the complaint lodged by the 5th Respondent. As earlier observed, no criminal charges have been instituted by the 2nd Respondent against the Petitioners.

104. Indeed, the 2nd Respondent did inform the parties that the parties herein should pursue their claims in the Environment and Land Court, and declined to prefer any charges against the Petitioners.

105. Consequently, and to the extent that the Petition seeks reliefs against the 2nd Respondent, who has stated that he has no intention of charging the Petitioners in respect of the parcels of land that are pending in the Environment and Land Court, it follows that the Petition, in so far as the 2nd



Respondent is concerned, fell short of meeting the threshold of specificity as established in the celebrated authority of *Anarita Karimi Njeru vs Republic* (1979) eKLR. Consequently, the Petitioners failed to demonstrate, with particularity, how the 2nd Respondent infringed upon their constitutional rights or acted in excess or abuse of the powers conferred upon that office.

106. As to the investigations by the 1st and 3rd Respondents, Section 24 (e) of the *National Police Service Act* stipulates that one of the functions of the National Police Service is the investigation of crimes. The functions of the Directorate of Criminal Investigations are also set out in Section 35 of the *National Police Service Act* to include detection and prevention of crime as well as conducting forensic analysis.
107. The Petitioners did establish that the 1st and 3rd Respondents indeed undertook investigations, and witness statements were recorded. After the said investigations, the 1st and 3rd Respondents forwarded the report to the 2nd Respondent recommending the charging of the Petitioners.
108. The Petitioners asserted in the Petition that the officers of the 1st and 3rd Respondents acted maliciously, oppressively, in bad faith, or otherwise abused their statutory or constitutional powers in the discharge of their investigative mandate.
109. In evidence, the Petitioners adduced the Plaints in Nairobi ELC 343 of 2022 and Kajiado ELC E083 of 2022; the Petition in Divorce Cause No.209 of 2023; the Originating Summons in Matrimonial Cause No. 51 of 2023 on the division of matrimonial property; orders issued by Justice Maureen Odero on 26th July 2023 in Matrimonial Cause No. E051 of 2023 and orders issued by Justice L. Mbugua on 24th January 2023 in Milimani ELC No. E343 of 2022.
110. The Petitioners also adduced into evidence summons by the SCCIO Kajiado North and DCI Kyumbi; a letter dated 15th August 2023 from the Petitioners' Counsel to the Attorney General and a letter from the Attorney General to the Director of Criminal Investigations, DCI Nairobi, DCIO Kyumbi, SCCIO Mavoko and SCCIO Ngong.
111. It is well established that investigative bodies are constitutionally and statutorily empowered to inquire into complaints brought to their attention, and courts will only intervene where it is clearly demonstrated that such investigations are being conducted in contravention of the law, or are actuated by bad faith, ulterior motives, or amount to an abuse of the legal process.
112. In the case of *Republic vs Commissioner of Police and Another ex parte Michael Monari & Another* [2012] eKLR, it was held:

“the police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.”
113. The court in *Ololoso & another vs Inspector General of Police & another* [2023] KEHC 25855 (KLR) demonstrated instances in which investigations may be utilized abusively or oppressively:

“The exercise of the function of investigation should not be oppressive or in abuse of the process and purpose of criminal investigation to bring suspects to book. Oppression may take many and different forms depending on the circumstances of each case. But, may include, use of much or excessively intrusive tools, methods and techniques not permitted or



authorized in law or which by their nature completely routs the protection of fundamental freedoms and rights in the Bill of Rights such as torture or threat to torture methods. Abuse include; to procure or force a settlement of a civil claim or debt or personal scores; and in some cases, to cover police failures or merely to please or sooth a curious public or political audience.”

114. The Petitioners have presented a cogent case with evidence to boot, to show the investigations that were undertaken by the 1st and 3rd Respondents despite the existence of civil cases in respect of the suit properties. Indeed, courts have the power to stop a process that may lead to abuse of power, and especially where there is in existence civil suits in respect to the same issue, commenced much earlier, which in this case, was acknowledged by the 2nd Respondent, thus his refusal to charge the Petitioners.
115. In *Commissioner of Police & Another v Kenya Commercial Bank Ltd & 4 others* [2013] eKLR it was held that:

“Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, it is too fairly well settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why courts in this country have consistently held that it would be an unfortunate result for courts to interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The courts must wait for the investigations to be complete and the suspect charged.

By the same token and in terms of article 157(11) of *the Constitution*, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution. See *Githunguri v Republic* [1985] LLR 3090. It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See *Ndarua v R* [2002] 1EA 205. See also *Kuria & 3 others v Attorney General* [2002] 2KLR.”

116. In the case of *Republic vs Commissioner of Police and Another ex parte Michael Monari & Another* [2012] eKLR, it was held:

“The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the



prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.”

117. In view of the evidence presented by the Petitioners showing the existences of three civil suits in respect of the suit property, and the DPP having found that the two processes are an abuse of process on the part of the 1st and 3rd Respondents, which position this court agrees with, this Court finds that a basis has been established by the Petitioners for the court to interfere with or question the investigations undertaken by the 1st and 3rd Respondents warranting the grant of the orders in the Petition.
118. This Court now turns its attention to the grievances advanced by the Cross Petitioner, which concern the decision by the 2nd Respondent communicated on 25th March 2024 not to prosecute the Petitioners.
119. The Cross Petition solely concerns the decision by the 2nd Respondent dated 25th March 2024 which was communicated to the Cross Petitioner on 23rd May 2024. This was notably during the pendency of this Petition. The said letter was in response to an inquiry by the Cross Petitioner as to whether the 2nd Respondent would be filing a substantive response to the Petition.
120. The Cross Petitioner learnt that Vera Omollo Hamisi, the Head of Lands and Environment Divisions in the Director of Public Prosecutions had through the letter to the Director of Criminal Investigations dated 25th March 2024, indicated that the ODPP had exercised its powers under *the Constitution* to take into consideration directives issued by the courts in ELC E343 of 2022 , Matrimonial Case E051 of 2023 and in this case, ELC Petition E018 of 2023.
121. Ms. Hamisi noted that the ODPP found it undesirable, and not in the interest of justice to pursue prosecution of the complainants as the same would amount to an abuse of the legal process. She also indicated that the ODPP contended that criminal investigations and prosecutions should be applied judicially and not to aid any party in achieving any ulterior end as it is not in the interest of justice to use criminal process as a pawn in civil disputes.
122. The Cross Petitioner has contended that the decision by the 2nd Respondent not to prosecute the Petitioners contravened Article 157(11) of *the Constitution*, which stipulates that:
 - “(11) In exercising the powers conferred by this article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”
123. Under this provision, this court can interfere with the powers of the Director of Public Prosecutions if they are exercised without regard to the public interest, or against the interest of the administration of justice, or where the power is exercised in violation or abuse of the court process.
124. In the case of *Diamond Hasham Lalji & Another vs Attorney General & 4 others* [2015] eKLR, the Court of Appeal restated the position in law as follows:-
 - “From the foregoing, there cannot be any doubt that the prosecutorial discretion of the DPP is not absolute. It is limited by Article 157(11) which specifies the mandatory considerations that underlie the exercise of discretion; by the constitutional principles to which we have referred and by statute.”



125. Similarly in the case of *Philomena Mbete Mwilu vs Director of Public Prosecutions & 3 others*; *Stanley Muluvi Kiima* (interested party); International Commission of Jurists Kenya Chapter (*amicus curiae*) [2019] eKLR it was held:-

“We agree that there is a real danger of courts overreaching if they were to routinely question the merit of the DPP’s decisions. However, there are circumstances where the type of scrutiny set out in the majority decision of *Njuguna S Ndungu* (*supra*) is called for. Should there be credible evidence that the prosecution is being used or may appear to a reasonable man to be deployed for an ulterior or collateral motive other than for advancing the ends of justice, then a scrutiny of the facts and circumstances of the case is not only necessary but desirable. This is because it would enhance the administration of justice if the challenged charges were to be properly tested so that any fears of ill motive are dispelled.

To be underscored is that judicial review of the foundational basis of a charge should only be undertaken when an applicant has first established that there are reasonable grounds that the challenged proceedings are a vehicle for a purpose other than a true pursuit of criminal justice. To allow a willy-nilly and casual review of the foundational basis of criminal charges would be to turn judicial review proceedings into criminal mini-trials, a prospect that anyone keen to stop a criminal trial would relish. The question is whether the present case fits into the latter scenario.”

126. But can the DPP be compelled by the court to prosecute in a case where he has found that it will be unlawful for him to do so? The constitutional mandate of the Office of the Director of Public Prosecutions (ODPP) is anchored under Article 157(6) of *the Constitution* and further amplified under Section 5(1)(b) of the *Office of the Director of Public Prosecutions Act*.
127. The provision vests the DPP with the authority to institute and undertake criminal proceedings against any person before any court, to take over and continue any such proceedings, and to discontinue the same at any stage prior to judgment.
128. While Article 157(10) of *the Constitution* enshrines the independence of the DPP, stipulating that the office shall not require the consent of any person or authority, nor be subject to direction or control in the discharge of its functions, that independence is not absolute, nor is it unaccountable.
129. Courts have cautioned that judicial interference with the DPP’s decision not to prosecute should be approached with great circumspection. In *Republic vs Director of Public Prosecutions & another Ex-Parte Communications Commission of Kenya* [2014] KEHC 7648 (KLR), the Court observed, while citing *Sharma vs Brown-Antoine and Others* [2006] UKPC 57, that although courts possess the power to review such decisions, the power must be exercised sparingly. Notably, the Court stated:

“Although the Court has powers to review the Respondent’s decision that power must be exercised sparingly-see the decision of the Privy Council in *SHARMA v BROWN-ANTOINE AND OTHERS* [2006] UKPC 57. In the Kenyan context there is a strong reason why the courts should, only in very extreme cases, intervene with the decision of the Director of Public Prosecutions not to prosecute. The reason is that a complainant aggrieved by the decision of the DPP has the remedy of commencing private prosecution and that prosecution can only be taken over by the DPP with the permission of the complainant–Article 157(6)(b) of *the Constitution*. A person dissatisfied with the decision of the DPP not to prosecute is therefore not left without a remedy. However, the Court cannot altogether abdicate its supervisory powers over the exercise of the prosecutorial



mandate by the Respondent. Where an applicant demonstrates that judicial review is the best remedy for checking abuse of prosecutorial powers by the Respondent, I do not see why the Court should not grant appropriate orders to such an applicant.”

130. Therefore, a party aggrieved by a decision of the DPP not to prosecute may approach the Court through judicial review, or lodge a private prosecution. However, the burden lies on the applicant to demonstrate that the DPP acted unreasonably, irrationally, or in breach of the legal duty imposed upon that office.

131. In *Joel Okocha Ogillo vs Director of Public Prosecutions & 2 others* [2017] KEHC 6029 (KLR), the court declined to interfere with the DPP’s decision not to prosecute, as it found no evidence that the impugned decision was so unreasonable or irrational as to constitute a breach of public duty.

132. Where the court finds that the DPP has unlawfully exercised his discretion where or not to prosecute, the Court can only remit the matter back to the DPP for reconsideration in view of the findings of the Court.

133. As held in *Republic vs Director of Public Prosecutions & Another Ex-Parte Communications Commission of Kenya* [2014] KEHC 7648 (KLR), citing the Privy Council decision in *Mohit vs Director of Public Prosecutions of Mauritius* [2006] UKPC 20, the Court is not to substitute its view for that of the DPP, but may require the DPP to make the decision afresh in a lawful, rational, and procedurally fair manner. The Privy Council noted:

“Recognition of a right to challenge the DPP’s decision does not involve the courts in substituting their own administrative decision for his: where grounds for challenging the DPP’s decision are made out, it involves the courts in requiring the decision to be made again in (as the case may be) a lawful, proper or rational manner.”

134. Consequently, while courts are empowered to review and, where appropriate, set aside decisions of the DPP that are unlawful or irrational, they cannot direct the DPP to prosecute. That discretion remains with the ODPP, an office presumed by law to possess the requisite institutional capacity, technical skill, and evidentiary appreciation to determine whether a prosecution has a realistic prospect of conviction.

135. The role of the Court is not to supplant that discretion, but to ensure it is exercised within the bounds of legality, rationality, and fairness.

136. Indeed, in exercising his mandate under Article 157 of *the Constitution*, the Office of the Director of Public Prosecutions is enjoined to consider not only the interests of the public, or whether the prosecution will enhance public confidence, but also whether the case can be easily resolved by civil process without putting an individual’s liberty at risk. This was the position in *Republic vs Attorney General & another Ex-Parte Kipng’eno Arap Ng’eny* [2001] eKLR.

137. This position was reaffirmed by the Court of Appeal in *Commissioner of Police & the Director of Criminal Investigation Department & Another vs Kenya Commercial Bank Ltd & 4 others* [2013] eKLR, where it was held that:

“...In terms of Article 157(11) of *the Constitution*, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been



a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution.”

138. The High Court in *Kuria & 3 Others vs AG* (2002) 2 KLR acknowledged the validity of existence of concurrent civil and criminal proceedings, but warned that criminal prosecutions should not be deployed as instruments of oppression in civil disputes. The Court observed:-

“... 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.”

139. In *Republic vs Chief Magistrate, Kilgoris; Ex-Parte Johana Kipngeno Langat* [2021] KEHC 9509 (KLR), the Court intervened to stay criminal proceedings upon finding that the charges were actuated by extraneous purposes rather than the ends of justice.

140. Similarly, the Court of Appeal in *Commissioner of Police & The Director of Criminal Investigation Department & another vs Kenya Commercial Bank Limited & 4 others* [2013] (supra) cautioned against the use of the criminal justice system as a pawn in civil disputes. It stated that it was neither in the public interest nor in the interest of the administration of justice to adopt this practice.

141. The High Court in *Maina & 4 others vs Director of Public Prosecutions & 4 Others* [2022] KEHC 15 (KLR) elaborated the principle, noting:

“We respectfully agree and adopt this position in this case but must add that where it is obvious to a court, as it is to us and was to the learned judge of the High Court, that a prosecution is being mounted to aid proof of matters before a civil court or where the hand of a suspect is being forced by the sword of criminal proceedings to compromise pending civil proceedings, then section 193A of the *Criminal Procedure Code* cannot be invoked to aid that unlawful course of action. Criminal proceedings, whether accompanied by civil proceedings or not, cannot and should never be used in the manner that the 2nd and 3rd respondents have done. It is indeed advisable for parties to pursue civil proceedings initially and with firm findings by the civil court on any alleged fraud, proceed to institute criminal proceedings to bring any culprit to book...”



142. There are also instances where courts have deferred criminal trials to allow the Environment and Land Court to first determine disputes relating to land ownership. This approach was adopted in *Araka & 2 Others vs Republic* (Criminal Appeal E025 of 2022) [2023] KEHC 26783 (KLR) and *Siele & another vs Republic* (Miscellaneous Criminal Application E016 of 2024) [2025] KEHC 606 (KLR), where the court found that to avoid conflicting findings and to safeguard the integrity of both proceedings. It was prudent to await the ELC's pronouncement on the substantive land issues.
143. This court has noted the reasons given by the DPP vide his letter dated 25th March 2024 which was communicated to the Cross Petitioner on 23rd May 2024 not to proceed with the prosecution of the Petitioners. The said decision by the 2nd Respondent was notably during the pendency of this Petition.
144. According to the letter to the Director of Criminal Investigations dated 25th March 2024, the DPP indicated that he had exercised his powers under *the Constitution* to take into consideration directives issued by the courts in ELC E343 of 2022, Matrimonial Case E051 of 2023 and in this case, ELC Petition E018 of 2023.
145. It was the DPP's position that he had found it undesirable, and not in the interest of justice to pursue prosecution of the Petitioners as the same would amount to an abuse of the legal process and that the criminal investigations and prosecutions should be applied judicially and not to aid any party in achieving any ulterior end as it is not in the interest of justice to use criminal process as a pawn in civil disputes.
146. This court is in agreement with the above position. The court is aware that there are civil cases going on in this court and the High Court where injunctive orders have been made conserving the suit properties. It will therefore not be in the interest of justice for one party to use the criminal process as a pawn in the ongoing civil process.
147. In any event, as already noted above, this court cannot supplant the DPP's position not to prosecute with its own decision, which is what the Cross Petitioner has prayed for in the Cross Petition.
148. Further, even if the DPP had decided to prosecute the Petitioners, the court has found that the said decision would have been unfair and irrational in view of the pending civil cases and the conservatory orders that have already been granted in those cases by the superior courts.
149. For those reasons, the court makes the following final determination:
- **a. A declaration be and is hereby issued that the 1st and 3rd Respondents have violated the Petitioners' rights guaranteed under Articles 25, 27, 28, 40, 47 and 50 of *the Constitution* of Kenya 2010.**
 - **b. A declaration be and is hereby issued that the investigations complained of have the effect of directly interfering with the integrity of proceedings in Milimani High Court Family Division Matrimonial Case No. E051 of 2023, Kajiado ELC E083 of 2022 and Milimani ELC E343 of 2022 and as such are unconstitutional.**
 - c. **An order of prohibition is hereby directed to all the Respondents prohibiting them from opening or purporting to reopen, bringing, instigating, instituting or prosecuting any criminal proceedings against the Petitioners in relation to the suit properties known as IR No. 78123, Land Reference No. Nairobi/Block 1/1081, Land Reference No. Nairobi/Block 1/1079, Land Reference No. Nairobi/Block 1/1072, Land Reference No. Nairobi/Block 1/173, Land Reference No. Nairobi/Block**



**209/3138, Land Reference No. Nairobi/Block 7785/996, Land Reference No. Ngong/
Ngong/27/343 and Land Reference No. Ngong/ Ngong 27/344.**

****d. The Cross Petition is hereby dismissed.****

****e. Each party to bear its own costs.****

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 29TH DAY OF JULY, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Muthama for Petitioners

Mr. Allan Kamau for 1st, 3rd and 4th Respondent

Court Assistant: Tracy



ELCT PET. NO. E018 OF 2023

JUDGMENT

