

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HIGH COURT CIVIL PETITION NUMBER E004 OF

2025

JULIUS L. MARTEN-----

PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION-----1ST

RESPONDENT

THE INSPECTOR GENERAL
THE NATIONAL POLICE-----2ND

RESPONDENT

THE DIRECTOR
OF CRIMINAL INVESTIGATIONS-----3RD

RESPONDENT

CHIEF MAGISTRATE'S COURT, NAIVASHA-----4TH

RESPONDENT

RULING

1. By a notice of motion application dated 10th June 2025, brought under Article 23, (3) of the Constitution of

Kenya 2010 and Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms), Practice and Procedure Rules 2013 and all enabling provisions of the law, the applicant is seeking for the following orders:

a) Spent

b) Spent

c) Spent

d) That a conservative order be and is hereby issued staying the criminal proceedings against the petitioner, Julius L. Marten, in Naivasha Chief Magistrate's Court Criminal Case Number E856 of 2024, pending the hearing and determination of the petition filed herewith.

e) That this honourable court be at liberty to grant any further or other relief that it may deem just and expedient to grant.

f) That the cost of this application be borne by the first and second respondent.

2. The application is supported by the grounds thereto and an affidavit of even date sworn by the applicant. He avers that he was a defendant in Nakuru ELC Case No. 18 of 2014 filed by Caleb Chelimo Arap Rotich concerning land parcel Naivasha/Oljjorai phase 2/II/831, wherein the judgment was delivered in his favour finding the sale agreement dated, 30th August 2009, to be valid and dismissing all the allegations of fraud and forgery.
3. However, despite the conclusive judgment in the ELC Case, he has been charged in Naivasha Chief Magistrate Court Criminal Case No. E856 of 2024, with conspiracy to defraud, forgery uttering a false document, perjury and forcible detainer, all relating to the same land and documents that were exclusively litigated in the ELC Case.
4. That the said Caleb Chelimo Arap Rotich passed away well before the current criminal charges were preferred against him. Further, the criminal case is scheduled to

commence on 15th September 2025, which necessitates the urgency in this application.

5. That a forensic document examiner report CID/ORG/8/3/1 /615/2023 dated 19th July 2023 was obtained after the ELC judgment and indicates the signatures attributed to Caleb Chelimo Arap Rotich and witnesses of the questioned sale agreements were made by different authors.
6. That the criminal proceedings directly relegate the issues already finally determined by a Superior court and the continuation of the criminal proceedings constitute grave abuse of the court process, as they are oppressive and aimed at coercing him to abandon his lawful possession of land.
7. That this Honorable court has inherent power to intervene and quash such proceedings to prevent miscarriage of justice and protect his fundamental rights guaranteed under article 27, 28 40, 47 and 50 of the constitution.

8. Further there has been no undue delay in bringing the petition and therefore it is in the interest of justice that the order sought be granted to prevent further abuse of the legal process, uphold the rule of law and protect his rights.
9. The application was opposed through a replying affidavit dated 2nd July 2025, sworn by Shirley Chepkonga, Principal Prosecution Counsel, who averred that the first respondent received the investigation file together with all requisite documents made and a decision to charge the petitioner, in line with Article 157 of the Constitution of Kenya which gives the ODPP the mandate to institute, continue or discontinue criminal charges against the petitioner.
10. That the first petitioner does not require any consent from any entity to institute criminal prosecution against a party where a crime has been committed. That the allegation by the petitioner that the complainant in the criminal matter is deceased and that the charges ought

not to have been instituted is misconceived as the State is the complainant in any criminal proceedings.

11. That the matters raised are best left to the trial court as it would not only have the benefit of the evidence adduced but will weigh it against the elements of the offence in issue. Further while the petition asserts that the criminal charges were preferred after they had successfully defended their property rights in civil proceedings via ELC No. 18 of 2014 this temporal sequence does not in itself establish improper purpose.
12. It is averred that criminal investigations often take time and the timing of charges may reflect the natural progress of the investigation process rather than any proper design. That criminal proceedings can be instituted even after the dismissal of a related civil case and this does not prevent the State from pursuing criminal charges based on the same underlying facts.
13. That the civil proceedings in ELC case was governed by civil procedure rules with different evidential and legal standards being that of preponderance of evidence.

While the criminal case herein is governed by Criminal Procedure Code with different set of evidential standards and outcome being beyond reasonable doubt.

14. Further that the petitioner has failed to demonstrate that the Director of Public Prosecution whose decisions they are challenging have done something which they had no lawful authority under the Constitutional or Statute to do. Furthermore, that the petitioner has failed to demonstrate how his Constitutional rights and freedoms have been violated by the 1st respondent in exercising his Constitutional mandate.
15. That the petitioner has also not demonstrated any prejudice he will suffer if the criminal proceedings are allowed to proceed as he has the opportunity to defend himself in the criminal matter before the trial court. That the decision to prosecute the petitioner was done on the basis of evidence provided and the decision is not illegal or an abuse of the prosecutorial powers. The

respondent urged the court to allow the criminal case to proceed to its final conclusion.

16. The appeal was disposed of vide filing of submissions wherein by submissions dated 8th July, 2025 the applicant referred the court to the case of; *Gitarau Peter Munyua vs Dickson Mwenda Kithinji & 2 Others (20140 eKLR (SCK)* where the principles that govern grant of conservatory orders were discussed and reiterated in the case of; *Nubian Rights Forum & 2 others vs Attorney General & 6 Others; Child Welfare Society & others (Interested Parties); Centre for Intellectual Property & Information Technology (Proposed Amicus Curiae) Petition Nos 56, 58 & 59 of 2019 [2019] eKLR* that the applicant to the demonstration of an arguable prima facie case with likelihood of success; the likelihood to suffer prejudice in absence of orders, the enhancement of constitutional values and objects of a specific right or freedom, whether the petition or its substratum will be rendered

nugatory, and exercising its discretion the court should consider public interest and the material facts.

17. The petitioner argued that the criminal proceedings in Naivasha Chief Magistrate's Court Criminal Case No. E856 of 2024 are grounded on the same facts that were conclusively determined vide the judgment delivered 30th April 2020 in Nakuru Environment and Land Court (ELC) in ELC Case No. 18 of 2014 and that there has been no appeal against the said decision.
18. That the forensic report relied on was obtained three (3) years after the ELC judgment, coupled with the timing of the institution of the charges amount to a deliberate attempt to circumvent the finality of the civil court's decision and invoked for ulterior motives, potentially to pressure him, to abandon the lawful possession of the land. The case of; Centre for Rights Education and Awareness (CREAW) vs Speaker of the National Assembly [2017] eKLR was relied on
19. That the criminal charges herein constitute a direct threat to his constitutional rights of; a fair trial under

Article 50, human dignity under Article 28, protection of property under Article 40 and fair administrative action under Article 47 of the Constitution of Kenya.

20. Further, that the stress, reputational damage, emotional toll, and legal costs he will suffer are significant and cannot be quantified or compensated post facto. Further, if tried and convicted he will suffer damage even if such conviction is subsequently overturned.

21. The petitioner submitted that allowing a potentially unconstitutional criminal trial to continue would undermine public confidence in the judiciary and the Constitution. That, the principle of constitutionalism requires all government organs including the Director of Public Prosecutions (DPP) to operate within legal bounds and judicial finality as held in the case of; *Njoya & 6 others vs Attorney General & 3 others [2004] 1 EA 194.*

22. Finally, the petitioner urged the court to exercise its discretion under section 27 of the Civil Procedure Act in

his favour and award him costs of the application as it was necessitated by the respondents' actions and that the 2nd, 3rd and 4th respondents have not opposed the application.

23. However, the 1st respondent in submissions dated 8th July 2025, also cited the case of; Gatirau Peter Munya vs Dickson Mwenda kithinji & 2 others (Supra) where the Supreme Court set out factors to consider where a conservatory order is sought for.

24. The 1st respondent argued that criminal proceedings can be instituted even where civil proceedings have been concluded and cited section 193A of the Criminal Procedure Code (Cap 75) Laws of Kenya. That the fact that ELC No. 18 of 2014 was decided in the petitioner's favour does not prevent the 1st respondent from pursuing criminal charges based on the same underlying facts.

25. That civil proceedings are governed by the Civil Procedure Rules with legal and evidential standards on a balance of probabilities, while criminal proceedings

are governed by the Criminal Procedure Code with an evidential standard of beyond reasonable doubt.

26. Further, that the petitioner has not demonstrated any prejudice that he will suffer if the case is allowed to proceed. That proof or otherwise of an offence are questions of fact largely depending on the evidence adduced. Further the petitioner will be accorded a fair trial in accordance to Article 50 of the Constitution as he will have an opportunity to defend himself and rebut the prosecution's evidence.

27. That in the circumstances the petition is frivolous with no chance of success as the veracity of the petitioner's claim can only be tested through a trial. Furthermore, that it is in public interest that prosecution should follow where evidence discloses a contravention of law.

28. That in the instant case investigations revealed the sale agreements relied on by the petition in the civil case were forgeries leading to the arrest and charging of the petitioner. That the court has power to stay criminal charges where it is shown that investigators and/or

prosecutors have overstepped their mandate or there are extraneous matters as held by the Court in the case of Kuria & 3 others vs Attorney General [2002] 2 KLR but not the case herein.

29. That the power to stay investigations and prosecution is discretionary and courts ought to exercise restraint so as to avoid stopping investigators and prosecutors from carrying out their duties mandated by the Constitution and relevant legislation as held in the case of Richard Muhindi Nyoka & 3 others vs David Langat & 6 others [2020] eKLR.

30. The 1st respondent argued that the decision to prosecute the petitioner herein was done on the basis of evidence provided and is therefore not illegal or an abuse of the prosecutorial power.

31. At the conclusion of the arguments by the parties and considering the prayers in the notice of motion application, the grounds and affidavit in support and the replying affidavit, the court finds that there is only one issue to determine and that is, whether the

conservatory order sought for in prayer (d) should be granted to stay the proceedings in the criminal case herein pending the hearing and determination of the petition filed alongside this notice of motion.

32. In considering the same, I note that conservatory orders are court orders aimed at preserving the status quo (*in situ*) of a matter, preventing violations of fundamental rights and freedoms pending the final determination of a petition, as empowered by Article 23(3)(c) of the Constitution. These orders protect the "substratum of the matter"—ensuring that the outcome of a case is not rendered useless (nugatory).

33. The threshold and/or principles that guide the grant of conservatory orders were laid down by the Supreme Court of Kenya in the case of; *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others (supra) eKLR* where the Court noted four-part test for that require the applicant to establish: A prima facie case with a likelihood of success, that denial of conservatory relief would cause irreparable harm, that the balance of

convenience favours the grant of the order and that public interest considerations justify the order.

34. Pursuant to the afore a prima facie case is the establishment of a legally required rebuttable presumption, meaning "at first sight" or "on its face" in Latin. It represents the minimum amount of evidence necessary to prove a claim or charge, allowing a case to proceed to trial or warrant a defence.

35. In that regard Giella v Cassman Brown & Co. Ltd [1973] EA 358 is the foundational case law for granting temporary injunctions. It established three key principles: a prima facie case with a probability of success, irreparable injury that cannot be compensated by damages, and, if in doubt, the balance of convenience.

36. To revert back to this matter, the petitioner wants the criminal proceeding stayed on the ground that subject matter of this proceedings is the same subject matter that was determined vide Nakuru ELC No. 18 of 2014.

He has annexed to the affidavit in support of the application a copy of the judgment in that matter.

37. A perusal thereof indicates that the issue of validity of the sale agreement in relation to land Naivasha/Ol jorai Phase II/831 was canvassed. The charge sheet in the trial court presented indicates the charges therein, relate inter alia on the validity of the sale agreements of the same land. It is therefore clear that the both proceeding relate to the same subject matter

38. This court is alive to the fact that it cannot delve into the merit of the case at this interlocutory stage but on face value the petitioner has demonstrated the existence of a prima facie case.

39. The next question to consider is whether, the petitioner will suffer any prejudice if the conservatory order is not granted. If the conservatory order is not issued and the matter goes to a full hearing and at the end of the day the court comes to a conclusion that the criminal proceeding should not have been commenced then the petitioner will suffer prejudice. On the other part if the

petition is heard and the court finds that the criminal proceeding should be sustained, then the trial will go on to full conclusion.

40. Consequently, it the finding of this court the scale tilts in favour of granting the conservatory order, until the petition is heard and determined. In that case the court issues the following orders:

a) A conservatory order be and is hereby issued staying the criminal proceedings against the petitioner herein instituted vide Chief Magistrate Criminal Case No. E856 of 2024 pending the hearing and determination of the petition herein.

b) The petition be set down for hearing within thirty (30) days of the date of this order.

c) Costs shall be in the cause.

41. Those then are the orders of the court.

Dated, delivered and signed on this 30th day of March, 2026.

GRACE L. NZIOKA

JUDGE

In the presence of;

Mr. Magatta for the petitioner

Ms. Chepkonga for the 1st respondent

N/A for the 2nd, 3rd and 4th respondents

Ms. Hannah: Court Assistant