

THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E113 OF 2022

BETWEEN

TADAYO KIBABA MUYALA.....

.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC

PROSECUTIONS.....1ST RESPONDENT

INSPECTOR GENERAL OF

POLICE.....2ND RESPONDENT

DIRECTOR OF CRIMINAL

INVESTIGATIONS.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH

RESPONDENT

CPL CHRISPUS SHIVACHI.....5TH

RESPONDENT

AND

MOLU HALKANO.....1ST

INTERESTED PARTY

HADIJA BUTT2ND

INTERESTED PARTY

J U D G M E N T

Introduction

1. The Petition dated 21st March 2021, is supported by the Petitioner's affidavit in support of even date and a supplementary affidavit dated 21st July 2022.

2. The Petitioner challenges criminal investigation and intended prosecution against the Petitioner in a matter he claims he merely discharged his professional duties as an Advocate where he drew an Agreement of Sale over land parcel L.R. No. 1160/948 and was executed as between the 1st and 2nd Interested Parties. The Petitioner claims subsequently, a malicious investigation and intended prosecution was instigated against him at the behest of the 1st Interested Party (in violation of his constitutional rights) merely because the 2nd Interested Party had allegedly refused to part with the possession of the said land parcel of land to the 1st Interested party due to dispute that arose between them concerning payment, whereby the 2nd Interested Party asserts he paid the full purchase price whereas the 1st Interested Party denies the 2nd Interested Party denies that payment was completed.
3. The Petitioner thus states that he is being dragged into a criminal investigation and intended prosecution unfairly for discharging his professional duties in a matter of a purely a civil nature between the two interested parties.
4. On this premise, the Petitioner seeks the following relief:
 - i. A declaration that the arrest of the Petitioner by the 1st Interested Party on 17th March, 2022 was unlawful and a breach to the Petitioner's rights under Article 39(1) Article 49 (1) (a, c and d) of the Constitution.***

- ii. A declaration that the search conducted by the 5th Respondent on 18th March, 2022 at the offices of Wambo Muyala & Company Advocates 12th Floor, Uchumi House, Aga Khan Walk Nairobi City County was unlawful, illegal and the same breached the Petitioner's rights under Article 31 of the Constitution.**
- iii. The decision of the 1st Respondents or any other person to charge the Petitioner, alongside the 2nd Interested Party in at MILIMANI VIDE CM CRIMINAL CASE NO E339 OF 2021 REPUBLIC VERSUS HADIJA ASIF BUTT is malafides, irrational, unreasonable, illegal. an abuse of discretion by the 1st Respondent under Article 157(6) of the Constitution, a breach of the Petitioners' constitutional rights under the provisions of Articles 27(1), 35(1), 47(1), 50(2) (a), and 50(2) OJ of the Constitution, and a further violation to Article 157(11) of the Constitution, hence void for all intents and purposes.**
- iv. Judicial Review order of Certiorari to remove into the Court and quash the decision of the 1st Respondent, to charge the Petitioner, TADAYO KIBABA MUYAIA with 1 count of the offence of conspiracy to defraud and the 2nd count of fraud, in MILIMANI VIDE CM CRIMINAL CASE NO E339 OF 2021 REPUBLIC VERSUS HADIJA ASIF BUTT.**
- v. Judicial review order of certiorari to remove into the Court and quash the decision of the 1st Respondents, to charge the Petitioner, TADAYO KIBABA MUYAIA with 1 count of the offence of conspiracy to defraud and the 2nd count of fraud, with respect to the transaction of the sale of all the land known as L.R. No. 1160/948 situate at Karen area,**

Nairobi City County, between the 1st and the 2nd Interested Parties herein.

- vi. Judicial review by way of an order of prohibition directed to the Respondents, jointly and severally, and or directed to any other person, restraining the Respondents, jointly and severally, or any other person, from prosecuting the Petitioner TADAYO KIBABA MUYAIA, with 1 count of the offence of fraud in reference to the transfer of land dated 26th September, 2016 regarding all the land known as L. R. No. 1160/948.**
- vii. Costs of and incidental to this Petition.**
- viii. Any other order that this Court deems fit and just to grant in the circumstances.**

Petitioner's Case

- 5. The Petitioner an advocate with Wambo Munyala and Company Advocates depones that the Interested Parties were his clients in the sale of a land parcel known as L.R.No.1160/948 situated at Karen, Nairobi.
- 6. He avers that this parcel of land was the subject of a succession matter in **Kisumu High Court Succession Cause No.68 of 1986** in the estate of the late Otieno Aggrey Ambala which matter was later on appealed in **Kisumu Court of Appeal Civil Appeal No.116 of 2016.**
- 7. He states that the 2nd Interested Party purchased the parcel of land measuring 1 acre from one Chizzi Ambala who is said to be a beneficiary of the estate. He obtained the land

following grant of letters of administration on 29th June 2016 in the succession suit and later on executed the Deed of Assent on 20th August 2016 which led to distribution of the said estate as confirmed by the Court of Appeal.

8. The 2nd Interested Party thereafter sold this parcel of land to the 1st Interested Party, who is her brother in law for Ksh.32,000,000.00 The Petitioner avers that the 2nd Interested Party being the vendor claims that she only received Ksh.26,000,000.00 from the 1st Interested Party thus seeks the balance of Ksh.6,000,000.00.
9. In addition to this, the 2nd Interested Party claims that she paid Ksh.1, 000,000 on the 1st Interested Party's behalf as stamp duty with the promise that she would be paid this money later on. This too remains unpaid. As such, in total the balance is Ksh.7,000,000.00.
10. The Petitioner avers that on the flip side, the 1st Interested Party alleges that he paid Ksh.36,000,000.00 and asserts that he paid a sum of Ksh.4,000,000.00 in excess of the agreed price.
11. The Petitioners depones that the entire purchase price was credited to the 2nd Interested Party's bank account by the 1st Interested Party. He points out that none of this amount was paid through him or his firm. He notes that afterwards the 2nd Interested Party processed and transferred the registration of the property to the 1st Interested Party however refused to

give up physical possession of the land on account of the alleged balance.

12. In light of this, the 1st Interested Party lodged a complaint with the police wherein the 2nd Interested Party was charged with conspiracy to defraud and obtaining money by false pretenses in **Milimani Criminal Case No. E339 of 2021 Republic v Hadija Asif**. Equally, the 1st Interested Party filed a civil suit in **Milimani Elc Case No. E229 OF 2021 Molu Halkano v Hadija Asif Buti** seeking a refund of the purchase price. Both are pending hearing.
13. The Petitioner depones that on 17th March 2022, the 5th Respondent in view **Milimani Criminal Case No. E339 of 2021** arrested him from Mombasa, as the co-accused of the 2nd Interested Party. He was released on 18th March 2022 and asked to report back on 22nd March 2022. He informs that the 5th Respondent on 18th March 2022 proceeded to their office located at Uchumi House, Aga Khan Walk, Nairobi and conducted a search without an arrest warrant.
14. The Petitioner protests this action as he only acted as an advocate in the land purchase between the Interested Parties. He stresses that their firm was never involved in the negotiations or payments of the purchase price. The Petitioner further avers that *LR. No. 1160/948* exists and the 1st Interested Party is the registered owner, a fact that was also affirmed by the 1st Interested Party vide a letter dated 16th July 2018.

15. As such, he contends that his arrest is misuses of power by the 5th Respondent, intended to arm twist him. He also protests investigation of the matter by the 5th Respondent as the parcel land is situated in Karen and so ought to have been investigated by the area police station.
16. Equally, he argues that the Respondents aim is to have him testify against the 2nd Interested Party which is an affront to the Advocate- Client privilege by virtue of Section 143(1) of the Evidence Act and Articles 27(1), 47(1) and (2) and 50(1) and (4) of the Constitution.
17. Additionally, he accuses the 5th Respondent of conducting an unlawful search of his law firm without a warrant of arrest. He argues moreover that this dispute is a purely civil suit revolving around settlement of accounts and completion of sale of the cited parcel of land. He makes known that curiously, the 5th Respondent is listed as the 1st Interested Party's witness in **Milimani ELC Case No. E229 of 2021**.
18. The Petitioner similarly, attacks the 5th Respondent's response in this matter arguing that it contains falsehoods and unsubstantiated claims. He asserted additionally that the 5th Respondent's claims are speculative, displaying a lack of appreciation of the very facts that this matter is founded on.
19. The Petitioner depones that he raised this issue with the 1st Respondent vide a letter dated 1st September 2021. In view

of the foregoing, he contends that his continued prosecution without adherence to the Constitution and statutory guidelines is a travesty to justice and violation of his rights and the 2nd Interested Party. He adds that the prosecution is malicious and unlawful as his conduct as an advocate does not disclose any criminal activity which demonstrates that the criminal suit is solely geared toward intimidating and harassing him.

Respondents' and Interested Parties Case

20. The 1st, 2nd, 3rd, 4th and 5th Respondents as well as the interested parties did not file responses in answer to the factual averments pleaded in the Petition. However, the 1st, 2nd, 3rd and 5th Respondents filed submissions to the Petition.

Petitioner's Submissions

21. Kago Mburu and Associates Advocates for the Petitioner filed submissions dated 17th September 2022. Counsel identified the issues for argument as: *whether the arrest of the Petitioner on 17th March 2022 was unlawful, whether the search conducted on in the Petitioner's Offices by the 5th Respondent was unlawful, whether the intended prosecution of the Petitioner is lawful under Article 157(11) of the Constitution and whether the 5th Respondent violated Advocate-client privilege.*
22. On the first issue, Counsel submitted that the Petitioner's arrest was unlawful as is based on his attestation of the transfer of the parcel of land *L.R.No.1160/948*, in his

capacity as an advocate. Counsel pointed out that the Petitioner performed his legal duty and, in the end, the 1st Interested Party obtained proper registration of the title in the parcel of land. Counsel pointed out that the Interested Parties were well aware as admitted by the 5th Respondent, that the parcel of land was subject of succession proceedings and thereafter subject of **Civil Appeal No.116 of 2016** yet still continued with the transaction.

23. Counsel argued that the intention of the criminal suit is to intimidate the Petitioner and the 2nd Interested Party to agree to cede the parcel of land to the 1st Interested Party despite him having failed to clear the remaining balance. On this basis, Counsel argued that the arrest and detention of the Petitioner and the 2nd Interested Party seeks to aid an illegality by the 1st Interested Party, which is an abuse of the legal process. Counsel submitted that the law is clear that arrests, investigations or detentions must be done within the precincts of the Constitution.
24. To buttress this point reliance was placed in **Mohamed Feisal & 19 others v Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 others; National Police Service Commission & another (Interested Party) [2018] eKLR** where it was held that:

“The Petitioners only need prove that the arrest or detention was illegal which they did in this case. They do not have to prove that the Respondents had intention to act illegally or to cause harm. In order to establish the lawfulness of an arrest without a warrant,

the onus of proof resides with the Respondents to show probable cause or reasonable suspicion. In exercising the power to arrest, he must act as an ordinary honest man would act. On suspicions which have a reasonable cause.. However, the suspicion need not be a matter of certainty, or even probably, it must not at the other extreme, be vague, remote or tenuous. It if a question of a feasibility possibility, a matter of likelihood..."

25. Similar reliance was placed on **Moses Tengey A Omweno V Commissioner Of Police & Another Civil Appeal 243 Of 2011 [2018]eKLR** and **Akusala A. Boniface V Ocs Langata Police Station &. 4 Others [2018]eKLR.**

26. On the second issue, Counsel submitted that the 5th Respondent unlawfully entered the Petitioner's offices and conducted an unlawful search without a warrant of arrest in breach of Section 57 and 60 of the National Police Service Act and Article 31 of the Constitution. Counsel added that while the right to privacy is not absolute the National Police Service under Section 57, 60(1) and 60 (3) read together with Section 118, 119 and 120 of the Criminal Procedure Code guide on the procedures to be followed while conducting a search and obtaining a search warrant, which the 5th Respondent failed to adhere to.

27. Reliance was placed in **Samura Engineering Limited And Others V Kenya Revenue Authority [2011] eKLR** where it was held that:

"The right to privacy enshrined in our Constitution Includes the right to not to have one's person or home searched, one's property searched or possessions seized Since searches infringe the right to privacy, they

must be concluded in terms of legislation which must comply with the provisions of Article 24. It has been said that the existence of safeguards to regulate the way in which state officials enter the private domains of ordinary citizens is one of the features that distinguish a democracy from a police state.”

28. Additional reliance was placed on **Standard Newspapers Limited & Another V Attorney General & 4 Others [2013] eKLR.**
29. Moving on, Counsel submitted that the circumstances of this case make it plain that the Petitioner is being maliciously prosecuted in **Criminal Case No. E339 of 2021** as the 5th Respondent has not brought any evidence to justify the offense of conspiracy to defraud and obtaining money by false pretenses. Equally, Counsel argued that the 5th Respondent had not adduced any evidence that indicate that the Petitioner was acting outside his duty as an advocate or even participated in the purchase price negotiations and payment in the transfer of the parcel of land.
30. Counsel stressed therefore that it is malicious for the 1st Interested Party to institute criminal proceedings and join the Petitioner in a dispute between the Interested Parties herein over an incomplete transaction of sale of land. To buttress this point reliance was placed in **Samson John Nderitu Vs The Attorney General [2010]eKLR** where it was held that:

“It is trite and this Court, has judicial notice that before an accused person is taken to court, and arraigned in court for criminal prosecution, the prosecuting authority

namely the police or whatever unit, whose functions fall under the office of the Defendant, usually carry out investigations, record statements from potential witnesses, analyze the facts to determine if the facts disclose an offence before arraigning such a person in a court of law."

31. Additional support was placed on **Republic V Commissioner Of Police And Another Ex Parte Michael Monari & Another [2012]eKLR** and **Chrspine Otieno V Attorney General (2014) eKLR**.

32. Counsel argued therefore that it is paramount as guided by the UN Basic Principles on the Role of Lawyers that an advocate enjoys protection from such suits. Reliance was placed in **Henry Aming'a Nyabere V Director Of Public Prosecutions & 2 Others; Sarah Joslyn & Another (Interested Parties) [2021]eKLR** where it was held that:

"The persecution of lawyers for their advocacy work on behalf of their clients is one of the surest ways of stifling a vibrant democracy. It is like severing the aorta of the independent bar. Its inimical effects on the society cannot be overemphasized..."

33. Comparable reliance was placed in **R. V. Attorney General Exp. Kipngeno Arap Ngeny (High Court Civil APP. No. 406 of 2001)**.

34. On the final issue, Counsel submitted that the Petitioner was issued with proper title documents for *L.R.No.1160/948* and relied on the same in the transfer of the suit property and thus his conduct well within the confines of the law, his duty

as an advocate and within the confines of the advocate-client relationship.

35. Counsel submitted therefore that the 5th Respondent in seeking to have the Petitioner testify against the 2nd Interested Party was not founded on any reasonable cause to justify waiving of the advocate - client privilege which is protected under Section 134 of the Evidence Act, Section 28(10) of the Anti-Corruption and Economic Crimes Act and Rule 7 of the Law Society of Kenya Code of Ethics and Conducts for Advocates. On this premise, Counsel argued that the 5th Respondent's actions are an affront to the advocate-client privilege between the Petitioner and the Interested Parties.

36. To buttress this point reliance was placed in **Strathmore Research Center And Consulting Center V Paul Maina Gacari [2012]eKLR** where it was held that:

"Duty not to disclose or misuse information-The employment of counsel places him in a confidential position, and imposes upon him the duty not to communicate to any third person the information which has been confided to him as counsel to his client's detriment. This duty continues after the relation of counsel and client has ceased..."

37. More reliance was placed on **Mohammed Salim Balala & Anor Vs Tor Allan Safaris Ltd [2015]eKLR** and **Tom Ojienda T/A Tom Ojienda & Associates Advocates V Ethics And AntiCorruption Commission & 5 Others [2016] eKLR**.

1st, 2nd, 3rd and 5th Respondents' Submissions

38. On 12th May 2023, Senior Assistant Director of Public Prosecutions filed these parties' submissions and underscored the issues for discussion as: *whether the decision to charge the petitioner is sound and lawful, whether the petitioner was arrested wrongfully and whether the search conducted by the 5th Respondent was illegal and unlawful.*
39. Counsel submitted on the first issue that the Petitioner had failed to demonstrate that his arrest and prosecution was the subject of an anomaly. Counsel submitted that the decision to institute criminal charges against the Petitioner was informed by the evidence that was presented to the 1st Respondent by the police after the investigations were carried out. Furthermore, Counsel submitted that the decision was guided by the law as well as the prosecution policies. Counsel underscored that the Petitioner had also not demonstrated that this decision was influenced by another person or in disregard of public interest or interest of administration of justice. On this basis, Counsel argued that the 1st Respondent's decision was lawful.
40. Reliance was placed in **Ezekiel A. Omollo v Director of Public Prosecution & 2 others [2021] eKLR** where it was held that:

"The prosecutorial powers of DPP are constitutionally and statutorily provided for under Article 15 7 (j) of the Constitution and Section 4 of the Office of the

Director of Public Prosecution Act No. 2 of 2013, which provides that the DPP does not require the consent of any person or authority to commence any criminal proceedings and in exercise of his/her powers and functions, shall not be under the direction or control of any person or authority. The exercise of that power is however subject to Subsection (11) of Article 15 7 and Section 4 of the DPP Act, which provides that in exercise of the said power, the DPP shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of legal process. Only in circumstances where it is manifest that the DPP acted unlawfully by failing to exercise their own independent discretion; acting under the control and direction of another person; failing to take into account public interest or interest of the administration of justice in all their manifestations; abusing the legal process; and by acting in breach of fundamental rights and freedoms of an individual will the High Court intervene. "

41. Equally, Counsel argued that the issues raised herein can ably be canvassed in the lower Court during the trial. To buttress this point reliance was placed in **Bernard Mwikya Mulinge v Director of Public Prosecutions & 3 others [2019] eKLR** where it was held that:

"An applicant who alleges that he or she has a good defence in the criminal process ought to ventilate that defence before the trial court and ought not to invoke the same to seek the halting of criminal proceedings undertaken bona fides since judicial review court is not the correct forum where the defences available in a criminal case ought to be minutely examined and a determination made thereon."

42. Counsel in the following issue referring to Section 29 and 36 of the Criminal Procedure Code as read with Section 58 of the National Police Service Act submitted that the law permits an arrest. Counsel accentuated that a wrongful

arrest involves deprivation of a person's liberty and consists of arresting and holding of a person without legal justification as held in **Mohamed Feisal & 19 others [supra]**.

43. In this matter, Counsel argued that the Petitioner was arrested lawfully and the charge premised in a well-founded investigation. That said, Counsel argued that in the case of an unlawful arrest it is incumbent on the Petitioner to prove that the arrest had no legal basis as there were no reasonable grounds inevitably leading to violation of the Petitioner's rights.
44. Counsel contended moreover that the Court ought not to interfere with other state organs unless it can be shown that they acted in breach of the Constitution as held by the Court of Appeal in **Commissioner of Police & The Director of Criminal Investigation Department & Another v Kenya Commercial Bank Ltd & 4 Others [2013 eKLR]**. That notwithstanding, Counsel pointed out that the Petitioner had been arrested and released on police cash bail so as to appear before Court to take plea. As such, it was argued that the arrest process was procedural and lawful.
45. On the last issue, Counsel submitted that the Petitioner's allegation of an unwarranted search of their offices at Uchumi House, Aga Khan walk, were unsubstantiated as no evidence was adduced to prove the same. Counsel noted that according to the 5th Respondent's replying affidavit

(none was found in the CTS or Court file) no such search was conducted as alleged.

Analysis and Determination

46. It is my considered opinion that the issues that arise for determination are as follows:

- i. Whether the Respondents' upheld their constitutional and statutory mandate in this matter.***
- ii. Whether the Petitioner's constitutional rights under Articles 27(1), 31, 35(1), 39(1), 47(1), 49(1) (a, c and d), 50(2)(a) and (2)(j) were violated by the Respondents.***
- iii. Whether the Petitioner is entitled to the relief sought.***

Whether the Respondents' upheld their constitutional and statutory mandate in this matter.

47. The 1st Respondent, the Director of Public Prosecution draws his mandate from Article 157 of the Constitution which, among others, stipulates thus:

- (4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.***
- (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—***

- a) *institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;*
- b) *take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and*
- c) *subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).*

(10) *The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.*

(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.*

48. In **Isaac Tumunu Njunge v Director of Public Prosecutions & 2 others [2016] KEHC 2673 (KLR)** the Court citing with approval a number of authorities observed as follows:

“39. It was pursuant to the foregoing that Majanja, J expressed himself in Thuita Mwangi & Anor vs. The Ethics and Anti-Corruption Commission & 3 Others Petition No. 153 & 369 of 2013 as hereunder:

“The decision to institute criminal proceedings by the DPP is discretionary.

Such exercise of power is not subject to the direction or control by any authority as Article 157(10)...These provisions are also replicated under Section 6 of the Office of the Director Public Prosecutions Act, No. 2 of 2013...In the case of Githunguri -vs- Republic (Supra at p.100), the Court observed...The Attorney General of Kenya...is given unfettered discretion to institute and undertake criminal proceedings against any person “in any case in which he considers it desirable so to do... this discretion should be exercised in a quasi-judicial way. That is, it should not be exercised arbitrarily, oppressively or contrary to public policy ...”

40. In my view, the discretion to be exercised by the DPP is not to be based on recommendations made by the investigative bodies. Therefore, the mere fact that the DPP’s decision differs from the opinion formed by the investigators is not a reason for interfering with the constitutional and statutory mandate of the DPP as long as he/she believes that he/she has in his/her possession evidence on the basis of which a prosecutable case may be mounted and as long as he takes into account the provisions of Article 157(11) of the Constitution as read with section 4 of the Office of Public Prosecutions Act, No. 2 of 2013.

41. Conversely, the mere fact that the investigators believe that there is a prosecutable case does not necessarily bind the DPP. As is rightly recognised by Sir Elwyn Jones in Cambridge Law Journal - April 1969 at page 49:

“The decision when to prosecute, as you may imagine is not an easy one. It is by no means in every case where a law officer considers that a conviction might be obtained that it is desirable to prosecute. Sometimes there are

reasons of public policy which make it undesirable to prosecute the case. Perhaps the wrongdoer has already suffered enough. Perhaps the prosecution would enable him present himself as a martyr. Or perhaps he is too ill to stand trial without great risk to his health or even to his life. All these factors enter into consideration.”

42. It is however my view that the police are clearly mandated to investigate the commission of criminal offences and in so doing they have powers inter alia to take statements and conduct forensic investigations...”

49. Equally in **Denis Joseph Shijenje & another v Kenya Revenue Authority & 2 others [2021] KEHC 12572 (KLR)** the Court stated as follows:

“37. I find that the office of the Director of Public Prosecution being an independent institution established under the Constitution, the court can only interfere with or interrogate its actions where there is contravention of the Constitution. In the case of Paul Ng’ang’a Nyaga v Attorney General & 3 others (2013) eKLR, it was held that “this court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they acted in contravention of the Constitution.”

50. Nevertheless, despite the wide-ranging powers of the DPP, the Court has a constitutional duty to interfere where it demonstrated that the DPP has acted in a manner that is not in tandem with the Constitutional principles. The Court in **Kuria & 3 Others Vs. AG (2002) 2 KLR 69** as cited with approval in **Raymond Kipchirchir Cheruiyot & another v**

Republic [2021] KEHC 6790 (KLR) expounded on this as follows:

“30. Further in Kuria & 3 Others Vs. AG (2002) 2 KLR 69 the court emphatically stated thus:

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tolls for personal score-settlings or vilification of issues not pertaining to that which the system was even formed to perform..... The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta.

.....

34. In Kuria & 3 Others vs. AG (supra) the court held that:-

“....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...”

51. On the other hand, the 2nd Respondent forms part of the national security organ created by virtue of Article 239 (1) (c) of the Constitution while Article 243 of the Constitution creates the National Police Service (2nd Respondent). The National Police Service Act, 2011 which operationalizes this Article provides under Section 24 (e) that one of the functions of the police service among other functions is the investigation of crimes. The 3rd Respondent is a Department of the National Police Service.
52. Courts have equally have had the occasion to consider the lawful exercise of the powers granted to the 2nd and 3rd Respondents and have variously expressed themselves on the same in judicial precedents. With reference to the 2nd Respondent, the Court in **Republic vs. Commissioner of Police & Another Ex-Parte Michael Monari & another (supra)** held as follows:

“It is also clear in my mind that the police have a duty to investigate on any complaint once a complaint is made. In deed the police would be failing in their constitutional mandate to detect and prevent crime...”

53. Further in the **Pauline Adhiambo Raget v Director of Public Prosecutions & 5 others [2016] KEHC 7138 (KLR)** the Court held that:

“46. ...The Respondents are enjoined to investigate any allegations of criminal activity or conduct both by statute as well as by the Constitution. The investigations may take them to anyone including the Petitioner. They could investigate on their own prompting or upon being prompted by any member of the public as did the Interested Party in this case. In so doing, it is a legal mandate they would be undertaking.”

54. Nevertheless, the Court of Appeal in **Commissioner Of Police & The Director Of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others [2013] KECA 182 (KLR)** cautioned thus:

“...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 (...) 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.”

55. Further, in **Republic v Director of Public Prosecution & 2 others Ex parte Modyphine Chemos Sakong; Maurine Chebet Sakong & another (Interested Parties) [2021] KEHC 1307 (KLR)** the Court held:

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

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

25. Therefore, the police and prosecutors are expected to be professional in the conduct of their investigations and prosecutorial duties and ought not to be driven by malice or other collateral considerations. Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution...

27. In my view, to permit the prosecutor to arbitrarily exercise his constitutional mandate based on ulterior motives as is alleged in these proceedings would amount to the court abetting abuse of discretion and power and criminality...”

56. Consequently, although the Constitutional mandate of the police and the DPP is secured by the Constitution, it must also be discharged in a manner that accords with the laid down constitutional principles for it to enjoy judicial protection and it would therefore not be immune to judicial scrutiny where it is established the power is being exercised outside the parameters set out by the Constitution against any person.
57. In the present case, the Petitioner distinctly deponed facts stating that the investigation against him is malicious because it targeting him for only discharging his duties as an Advocate when he never played any other role apart from executing his clients instructions in the transaction, that he was not party to any payments nor did any monies pass through him in the alleged purchase and that the only dispute that has led to institution of the criminal case in which he has been joined is because both parties- 2nd and 1st interested Party are unable to agree on whether the entire purchase price was cleared, an pure civil dispute between the two- which has led to non-delivery of the possession of the land in question.
58. Neither the Respondents nor the Interested Parties have specifically addressed or rebutted the factual assertion made by the Petitioner or given any alternative set of facts that clearly demonstrates the reasonableness of commencing a criminal investigation against the Petitioner. They simply filed submissions which in my view cannot constitute a

rebuttal of factual assertions. The Respondents thus, in my view, failed to demonstrate the existence of a genuine and reasonable grounds anchored on facts that could justify the alleged police action and subsequent prosecution against the Petitioner.

59. In **Dande & Others v Inspector General National Police Service & 2 others (Civil Appeal 246/2016) (2022) KECA 170**, the Court of Appeal citing the Supreme Court identified the circumstances which may cause the Court to intervene and halt a prosecution as follows:

“25. The Supreme Court of Kenya... further identified the guidelines for review of prosecutorial powers in Cyrus Shakhalanga Khwa Jirongo vs Soy Developers Ltd & 9 others [2021] eKLR as follows:

“Furthermore, the Supreme Court of India in R.P. Kapur v State of Punjab AIR 1960 SC 866 laid down guidelines to be considered by the Court on when the High Court may review prosecutorial powers. They are as follows:

Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice; or

Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction; or

Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; or

Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.”

Arising from the fact that the powers and processes of the police to arrest and investigate are regulated by the law identified hereinabove, the exercise of the said powers and processes will be found to be unlawful and illegal on review, if the applicable constitutional and legal provisions are not observed and complied with.

On the application of the other grounds for review, and arising from decided cases on these grounds, including those cited by the parties herein, we posit the following guidelines.

- a. An arrest and investigation is vexatious if it is possible to demonstrate that it is unwarranted and without basis, and it would tend to or is being made with an intention to cause worry, upset, annoyance or embarrassment.**
- b. It is oppressive if it can be demonstrated that it is being made because the complainant or the police have a personal issue or prejudice with the individual they are complaining about, and that they are using the criminal process to settle scores with the individual.**
- c. Likewise, it is made with ulterior motives and in bad faith where it can be demonstrated that the police are being misused or manipulated to influence another process or outcome.**

d. Lastly, it is unreasonable, if a complaint is so outrageous that no reasonable person would have given credence to it or acted on it. The likelihood of an arrest or investigation not being upheld is however not a reason to consider it unreasonable.

60. Advocates are ministers of justice and play a fundamental role in the administration of justice. They must be protected when they discharge their professional duties honestly and in good faith from intimidation and unnecessary harassment. That does not mean that they are immune from investigation or prosecution where it can be established that they have engaged in criminality. Indeed, advocate-client privilege under Section 134 of the Evidence Act which protects client's confidentiality is not a shield of impunity, it is not intended to protect an advocate from investigation or prosecution for criminal acts committed in the course of or under guise of discharging professional duty.
61. However, initiation of criminal investigation must be justified by the existence genuine, objective and reasonable grounds not malice, rumours or caprice. The investigator must be able to justify the objective basis of commencing an investigation from a reasonable man's perspective which is lacking in the instant case considering that there is not even a rebuttal of the factual assertions deponed by the Petitioner.

62. This Court therefore finds that the investigation and prosecution of the Petitioner is in the circumstances of this case is an abuse of the criminal justice process.

63. The upshot is that this Petition succeeds. I thus grant the following orders:

- 1. A declaration is hereby issued that the arrest of the Petitioner on 17th March, 2022 was unlawful and a breach to the Petitioner's rights under Article 29(a) of the Constitution.**
- 2. A declaration is hereby issued that the decision of the 1st Respondents to charge the Petitioner, alongside the 2nd Interested Party in at MILIMANI VIDE CM CRIMINAL CASE NO E339 OF 2021 REPUBLIC VERSUS HADIJA ASIF BUTT is malafides, irrational, unreasonable, illegal and unconstitutional.**
- 3. Judicial Review order of Certiorari is hereby issued quashing the decision of the 1st Respondent, to charge the Petitioner, TADAYO KIBABA MUYAIA with all the criminal charges in MILIMANI CM CRIMINAL CASE NO E339 OF 2021 REPUBLIC VERSUS HADIJA ASIF BUTT.**
- 4. Costs of this Petition.**

Dated, signed and delivered virtually at Nairobi this 16th day of April, 2026.

.....

L N MUGAMBI

JUDGE

ORIGINAL