



Musembi & 2 others v Chief Magistrate Court, Milimani Law Courts & 12 others; Owino & 5 others (Interested Parties) (Environment & Land Petition E019 of 2023) [2024] KEELC 256 (KLR) (25 January 2024) (Ruling)

Neutral citation: [2024] KEELC 256 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E019 OF 2023**

OA ANGOTE, J

JANUARY 25, 2024

IN THE MATTER OF: ARTICLES 2, 10, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 31, 48, 49, 50, 53 AND 159 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: THE CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS OF THE PETITIONERS UNDER ARTICLE 25, 27, 28, 40, 47, 48 AND 50 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: RULES 4, 23 AND 24 OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS (PRACTICE & PROCEDURE) RULES, 2013

AND

IN THE MATTER OF: SECTION 4, 6 AND 12 OF THE FAIR ADMINISTRATIVE ACTIONS ACT, NO. 4 OF 2015

BETWEEN

CISSY KALUNDE MUSEMBI 1ST PETITIONER

PRISCA NZULA WAMBUA 2ND PETITIONER

ANTONY MASENO ANABAKA 3RD PETITIONER

AND

THE CHIEF MAGISTRATE COURT, MILIMANI LAW COURTS 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATION 3RD RESPONDENT



THE HON ATTORNEY GENERAL	4TH RESPONDENT
DAVID NJENGA SAMSON KURIA	5TH RESPONDENT
HENRY NJOROGE NJENGA	6TH RESPONDENT
SAMUEL NJUGUNA CHEGE	7TH RESPONDENT
HORIZON HILLS LIMITED	8TH RESPONDENT
AUREUM LIMITED	9TH RESPONDENT
JIMMY RICHARD WANJIGI	10TH RESPONDENT
IRENE NZISA WANJIGI	11TH RESPONDENT
NICOLAUS OSURI OTIENO	12TH RESPONDENT
THE CHIEF LAND REGISTRAR	13TH RESPONDENT

AND

CATTWRIGHTS JACOB OWINO	INTERESTED PARTY
VALENTINE JELIMO KIBIRE	INTERESTED PARTY
LAWRENCE NJOGU MUNGAI	INTERESTED PARTY
KEPHA ODHIAMBO OKONGO	INTERESTED PARTY
MARTIN ESAKINA PAPA	INTERESTED PARTY
KENROID LIMITED	INTERESTED PARTY

RULING

1. Before this court is the Petitioners' Notice of Motion application dated 2nd May 2023, in which they have sought for the following orders:
 - a. This Honourable Court be pleased to issue a conservatory order staying the proceedings in Milimani Chief Magistrate Criminal Case No. E1264 of 2021- Republic v Cissy Kalunde Musembi and Milimani Chief Magistrate Criminal Case No. E289 of 2023- Republic v David Njenga Samson Kuria & 9 others or the arresting and charging of the Petitioners by the Respondents in relation to property L.R. 1870/II/200 pending and until hearing and determination of this Petition.
 - b. This Honourable Court be pleased to issue a temporary injunction restraining the Respondents either by themselves or through their agents, juniors, servants or representatives from reopening or purporting to reopen, bringing, investigating, instituting or prosecuting any criminal proceedings against the Petitioners in onnection with the transaction of the Property known as Land Reference Number 1870/II/200 IR No. 65800 pending and until hearing and determination of this Petition.
 - c. Such other orders as may appear to the Court to be just and convenient.
 - d. Costs to be borne by the Respondents.



2. The application is based on the grounds on the face of the application and the supporting affidavit sworn by the 1st Petitioner, who deposed that the 1st Petitioner is, through the Certificate of Registration No. C. 110776, the legal and registered owner of the suit property, Land Reference No. 1870/II/200 IR No. 65800 measuring 0.3314 Ha situated at General Mathenge Road, Westlands Nairobi County.
3. The 1st Petitioner deposed that the suit property was registered in her favour by virtue of a sale agreement dated 12th September 2018 between herself and Horizon Hills Limited at a consideration of Kshs. 220,000,000 and that the agreement was preceded by reasonable due diligence conducted by the firm of Wambua & Luseno LLP Advocates, which is managed by the 2nd and 3rd Petitioners.
4. The Petitioners aver that subsequently, Kenroid Limited filed a suit against Aureum Limited in Nairobi ELC Case No. 100 of 2019 and enjoined the 1st Petitioner as the 9th Defendant, claiming purchaser's interest over the suit property; that the suit was pursuant to a Sale Agreement between Kenroid Ltd and Aureum Limited at a consideration of Kshs. 280,000,000 and that this suit is still pending before this court.
5. The 1st Petitioner deposed that she is in possession and occupation of the suit property pursuant to the injunctive orders issued by Obaga J on 17th September 2019, restraining the Defendants from constructing, developing or transferring the suit property pending the hearing and determination of the suit in ELC 100 of 2019, and that the court further directed the Chief Land Registrar not to entertain any transfer or subdivision of the suit property pending hearing and determination of the suit.
6. It is the Petitioners' case that on 28th September 2021, the 3rd, 5th, 6th and 7th Respondents conspired to arrest and charge the Petitioners in Milimani CMCC No. E1234 of 2021 on unfounded charges of conspiracy to defraud contrary to Section 317 of the Penal Code; obtaining registration of land by false pretense contrary to Section 320 of the Penal Code; and forcible detainer contrary to Section 91 of the Penal Code.
7. They assert that the arrest and prosecution of the Petitioners is illegal and a violation of the Petitioners' rights and freedoms, especially as the DCI officers are aware of the orders issued by Obaga J prohibiting the conclusion of any conveyance in respect of the suit property by any party.
8. Further, that contrary to the DCI Investigations' Report dated 3rd May 2021, DCI Officers obtained arrest warrants against the 1st-3rd Petitioners, 5th-7th Respondents and 1st-5th Interested Parties and arraigned them in court on 27th April 2021 before the 1st Respondent in Nairobi Criminal Case No. E289 of 2023; that these parties have been charged with various charges including conspiracy to defraud Aureum Limited contrary to Section 317 of the Penal Code; forgery contrary to Section 345 of the Penal Code; uttering a forged document contrary to Section 353 of the Penal Code, giving false information to a person employed in public service contrary to Section 129(b) of the Penal Code and procuring registration of land by false pretense contrary to Section 320 of the Penal Code.
9. The 1st Petitioner submits that the charges are selective, partial, unreasonable and constitute an illegal exercise of discretion; that the DCI seems to be impartial, supporting some of the alleged title owners at the expense of other persons interested in the suit property and that the criminal process relates to the ownership of the suit property, with the competing land owners using the DCI officers to intimidate and silence the other side, while conspiring to alienate the property and circumvent the orders issued in ELC Case No. 100 of 2019.



10. The 1st Petitioner argued that the criminal case and the two civil cases are based on similar facts and background, with the civil cases relating to the existence of a fraudulent grant allegedly issued over the suit property, while in the criminal case, the Petitioners were all charged with conspiracy to defraud contrary to Section 317 of the Penal Code. They also argued that the Petitioners' case satisfies the three requirements for the grant of the temporary orders sought.
11. The 11th Respondent opposed the application vide a Replying Affidavit deposed on 30th May 2023. She averred that she is a director of the 9th Respondent and has the authority of the 10th Respondent to swear the affidavit on his behalf and that the application and Petition are mischievous and an abuse of the court process, meant to undermine the judicial process in light of previous proceedings before competent courts that have been filed by the Petitioners on this matter.
12. The 11th Respondent stated that the Criminal Procedure Code does not bar the institution of criminal proceedings against a party merely because there are existing civil proceedings on the matter and that the Petitioners cannot therefore rely on the existence of civil proceedings as a basis to challenge their intended prosecution for the crimes alleged to have been committed.
13. It was the 11th Respondent's averment that it is not true that the prosecution of the Petitioners in the criminal proceedings will have a bearing on the civil proceedings; that the Petitioners have not demonstrated any basis for the grant of the sought conservatory orders, nor have they alleged that they will not be accorded a fair hearing when the trial commences and that the Petitioners have not disclosed any act of abuse or misuse of the state's investigative and prosecutorial powers that would warrant intervention by the Court.
14. According to the 11th Respondent, the state investigative agencies having conducted their own investigations, have established probable cause that the Petitioners and others are culpable for criminal offences and that these proceedings are meant to undermine the due process of the law and to delay the fair and just determination of the proceedings against them.
15. The 3rd, 4th and 5th Respondents opposed the application through a Replying Affidavit dated 5th July 2023, and sworn by detective Corporal Nicolaus Osuri Otieno, a police officer attached to the Directorate of Criminal Investigations, and one of the investigating officers in the subject matter case.
16. Nicolaus Osuri asserted that it was not true that the 1st Petitioner is the legal and registered owner of the suit property; that the suit property is owned by the 9th Respondent, whose director is the 11th Respondent; that the 2nd and 3rd Petitioners are facilitators of fraud through a fraudulent conveyance process to deprive the 9th Respondent of the suit property and that the 5th-7th Respondents have never been the directors of Horizon Hills Limited, the 8th Respondent.
17. It was deposed by corporal Osuri that the records of the Certificate of Registration No. C.110776 at the Registrar of Companies belong to Bosorana Limited and not Horizon Hills Limited and that the Aureum Limited of Certificate of Registration No. C.131937 changed its name to Horizon Hills Limited.
18. Detective Osuri averred that an investigation by the DCI revealed that the suit property is owned by the 11th Respondent following lawful purchase from the genuine directors of Horizon Hills Limited c.131937, being Mohamed Hassanali, Kaneez Noorani and Mohamed Hussein Noorani; that on 23rd November 2021, the 1st Petitioner was arrested and arraigned in court Milimani Criminal Case No. 1264 of 2021 and that the 5th-7th Respondents could not transfer the suit property to the 1st Petitioner as all the purported conveyance records were investigated and found to be forged.



19. The deponent averred that the provisions of Section 193A of the Criminal Procedure Code allows concurrent criminal and civil proceedings. Further, that the Petition has not satisfied the legal criteria for grant of leave to commence the Petition, and is for dismissal.
20. The 5th Interested Party filed an affidavit in support of the application dated 16th May 2023. He deponed that the genesis of the Petition is a charge sheet dated 23rd April 2023 from which the 2nd and 3rd Respondents have moved to charge the 5th Respondent and other parties in this suit and that he is a qualified forensic documents examiner, who was engaged by the 2nd Petitioner to review the validity of certain documents, in relation to ELC 227 of 2019.
21. The 5th Interested Party deposed that he prepared a report, which was filed as part of the documents filed in support of the 1st Petitioner's case and that he later realized that the documents were also related to another ongoing case before this court, ELC Suit No. 100 of 2019- Kenroid Limited vs Aureum Limited and 8 others.
22. In the Further Affidavit sworn on 19th July 2023, the 1st Petitioner deponed that while the 11th Respondent has made a claim of sub judice, they have failed to present evidence of a suit pending in another court involving the same parties and involving the same subject matter.
23. It was deposed that while the Criminal Procedure Code does allow concurrent civil and criminal litigations, the exception is where proceedings are meant to illegally secure the outcome of civil proceedings, as in this case, and that the criminal proceedings will have a bearing on the civil matters.

Submissions

24. Counsel for the Petitioners submitted that the sole issue for determination is whether the Petitioners met the threshold for grant of the orders sought. They relied on the case of Board of Management of Uhuru Secondary School vs City County Director of Education & 2 Others [2015] eKLR, where the court set out the principles for grant of conservatory orders. They also sought to rely on the Supreme Court case of Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others (2014) eKLR.
25. Counsel submitted that criminal proceedings are being used to lend a hand to the 5th- 11th Respondents in the civil matters and that the 9th to 12th Respondents, in collusion with the 3rd Respondent, are trying to criminalize the transaction between the 1st Petitioner and the 5th to 7th Respondents. Counsel relied on the case of Centre for Rights Education and Awareness (CREAW) & 7 Others vs Attorney General [2011] eKLR where it articulated what amounts to a prima facie case for a party seeking conservatory order.
26. They submitted that if at the end of the civil matter, any fraud is confirmed, the court trying the cases will have powers to issue appropriate orders, including recommending criminal investigations and prosecution of any person deemed to be culpable.
27. They submitted that the criminal investigation and prosecution of the Petitioners is an abuse of the legal process by the Respondents, and that unless the investigations and prosecution are stopped, the 5th-13th Respondents will continue to abuse the criminal process and disable the Petitioners from enjoying their right to fair trial under Article 50, the right to property under Article 40 and the right to fair administrative action under Article 47 of *the Constitution*.
28. The Petitioners relied on the case of Lalchand Fulchand Shah vs Investments & Mortgages Bank Limited & 5 Others [2018] eKLR, where the Court of Appeal held that the Court could interfere with criminal investigations that are conducted with the sole purpose of otherwise determining a matter before a civil court.



29. Counsel also relied on the case of Henry Aming'a Nyabere vs Director of Public Prosecutions & 2 Others; Sarah Joselyn & Another (Interested Parties) [2021] eKLR, where the court stipulated several instances where a court may intervene and stop a prosecution, including in the instance of selective prosecution.
30. Counsel submitted that unless the orders sought are granted, the Petitioners' constitutional rights will be irredeemably and irreversibly lost, and there will be no need to further pursue the main Petition. They relied on the Court of Appeal decisions of Stanley Kangethe Kinyanjui vs Tony Ketter & 5 Others and Alfred N. Mutua vs Ethics and Anti-Corruption Commission (EACC) & 4 Others [2016] eKLR.
31. It was Counsel's submission that it is not in the public interest or in the interest of the administration of justice to use the criminal justice process as a pawn in civil disputes. They urged that the criminal investigations are not genuine and they do not advance the cause of justice, but are calculated to help the 5th- 11th Respondents to advance their cases in the civil matters.
32. Lastly, the Petitioners' Counsel relied on the holding in Michael Osundwa Sakwa vs Chief Justice and President of the Supreme Court of Kenya & Another [2016] eKLR, where the court held that conservatory orders bear a public law connotation to facilitate orderly functioning within public agencies and to uphold the adjudicatory authority of the Court in the public interest.
33. Counsel for the 5th Interested Party submitted that the 5th Interested Party did not participate in the transaction; that he was contracted by the Petitioners in his professional capacity to examine some documents and render his opinion on the authenticity of signatures; that he handed over the report, which was filed in court in ELC No. 100 of 2019 and that he was subsequently summoned at DCI headquarters in March 2020 to explain the contents of his report, which was seemingly against the findings of the DCI Investigation's faction led by the 12th Respondent.

Analysis and Determination

34. The Petitioners/Applicants have sought for conservatory orders to stay the proceedings in Milimani Chief Magistrate Criminal Case No. E1264 of 2021- Republic vs Cissy Kalunde Musembi and Milimani Chief Magistrate Criminal Case No. E289 of 2023- Republic vs David Njenga Samson Kuria & 9 Others.
35. They have also sought for temporary orders of injunction to stay any investigations or prosecution by the Respondents against them in connection with the transaction of Land Reference Number 1870/II/200 IR No. 65800, pending the determination of the Petition.
36. The Petitioners claim that the prosecution of the Petitioners in Milimani Chief Magistrate Criminal Case Nos. E1264 of 2021 and E289 of 2023 is not impartial and is being used to further the two civil cases before this court, being ELC 100 of 2019 and ELC 227 of 2019.
37. They claim that by choosing to charge some of the parties in the mentioned civil cases, the DCI and DPP have determined the matter of ownership of the property before the two suits are heard and determined and that the Respondents have irreparably infringed upon the Petitioners' right to fair administrative action, access to justice, access to information, fair hearing and equal treatment.
38. The Petitioners have therefore sought declaratory reliefs that the Respondents have violated their rights; that the criminal cases are unfounded, malicious and oppressive; an order prohibiting the Respondents from continuing the criminal matters pending hearing and determination of the earlier filed civil suits; and an order of certiorari quashing the decision to charge and institute criminal proceedings against the Petitioners.



39. Through her application, the 1st Petitioner has sought for conservatory orders to stay the two criminal cases pending before Milimani Chief Magistrates Criminal Court, being Criminal Case Nos. E1264 of 2021 and E289 of 2023, pending the hearing and determination of this Petition.
40. The Respondents have opposed the application on grounds that the law allows for concurrent criminal and civil proceedings. Further, that it was not true that the prosecution of the Petitioners in the criminal proceedings will have a bearing on the civil proceedings; and that the Petitioners have not demonstrated any basis for the grant of the sought conservatory orders, nor have they alleged that they will not be accorded a fair hearing when the trial commences before the 1st Respondent.
41. Conservatory orders in constitutional Petitions are in the context of public law as they are applied in the public's interest. The Supreme Court in *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others* [2014] eKLR articulated this position as follows:
- “Conservatory orders bear a more decided public-law connotation; for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory stay orders therefore are not, unlike interlocutory injunctions, linked to such private party issues as “the prospects of irreparable harm’ occurring during the pendency of a case; or ‘high probability of success’ in the Applicant’s case for orders of stay. Conservatory orders consequently should be granted on the inherent merit of a case bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”
42. The court in *Invesco Assurance Co. Ltd vs MW (Minor suing thro’ next friend and mother (HW))* [2016] eKLR defined a conservatory order as follows: -
- “A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.”
43. In *Judicial Service Commission vs Speaker of the National Assembly & Another* [2013] eKLR the Court had the following to say about the nature of conservatory orders:
- “Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under *the Constitution*, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”
44. The conditions for consideration by the court in granting conservatory orders were persuasively set out in *Board of Management of Uhuru Secondary School vs City County Director of Education and 2 Others* (2015) eKLR as follows:
- a) First, an Applicant must demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he/she is likely to suffer prejudice.
- b) The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.



- c) Thirdly, the Court should consider whether, if an interim conservatory orders is not granted, the Petition or its substratum will be rendered nugatory.
- d) The final principle for consideration is whether the public interest will be served or prejudiced by the decision to exercise discretion to grant or deny a conservatory order.”
45. The Petitioners contends that they have established a prima facie case with a likelihood of success; that there are two civil cases involving the parties herein, where the ownership of the suit property is in contention; that the criminal process relates to the ownership of the suit property and that the criminal proceedings seek to circumvent the status quo orders issued in ELC Case No. 100 of 2019: Kenroid Limited vs Aureum Limited & 8 others.
46. In support of their case, the Petitioners have produced a bundle of documents, which contains, among other things, a Certificate of Title in the 1st Petitioner’s favour; an agreement of sale between the 1st Petitioner and Horizon Hills Limited; a Supporting Affidavit sworn by the 2nd Petitioner with copies of Search Certificate from the Land Registry and Registrar of Companies and a letter from the Ministry of Interior and Co-ordination of National Government verifying the identities of the 5th and 6th Respondents herein.
47. The Petitioners have also exhibited a professional undertaking by the 2nd and 3rd Petitioners’ law firm to Horizon Hills Limited with respect to the purchase of the suit property; duly executed transfer documents in favour of the 1st Petitioner; receipts for payment of rates from the Nairobi City County; Rent Clearance Certificate; the Plaint in ELC 100 of 2019; status quo orders issued by Justice Obaga on 17th September 2019; the Plaint in ELC No. 227 of 2019, amongst other documents.
48. The Petitioners also exhibited a report from the DCI to the 1st Petitioner’s Counsel dated 3rd May 2021, which found the 1st Petitioner’s title to be valid and indicated that the 9th Respondent’s title would be held for the purpose of prosecution in criminal proceedings and a report to the Attorney General from the DCI dated 21st January 2021, which recommended that the 11th Respondent, the directors of Horizon Hills Limited C.131937, a registrar of titles among others, be prosecuted for the participation and role in the generation of the questioned grant registered in favour of Aureum Limited.
49. The 11th Respondent has averred that the 1st Petitioner has not established a prima facie case; that the law allows concurrent criminal and civil proceedings; that the findings in the criminal matters are unlikely to affect the outcomes in the civil suits; and that the state investigative agencies having conducted their own investigations, have established probable cause that the Petitioners and others are culpable for criminal offences.
50. In the bundle of documents, the 11th Respondent annexed the following documents: a report from the Office of the Director of Prosecutions to the DCI dated 4th April 2023, in which the DPP found that the 9th Respondent was the bona fide proprietor of the suit property and directed that the 1st Petitioner, 5th- 7th Respondents and 1st- 5th Interested Parties be charged for various crimes.
51. The 11th Respondent also annexed a Certificate of Title in the 9th Respondent’s favour; transfer documents executed by Velji Premchand Dodhia and Himanshu Velji Doshia in favour of Horizon Hills Limited, whose directors are indicated as Mohammed Hussein Noorani and Mohamed Hassanali; and a certificate from the Companies Registry indicating that the directors of Aureum Limited are the 11th Respondent and Tyl Limited.



52. As has been asserted by the 11th Respondent, the law indeed allows concurrent civil and criminal proceedings as set out in Section 193 A of the Criminal Procedure Code as follows:

“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.”

53. The Court of Appeal in *Commissioner of Police & The Director of Criminal Investigation Department & Another vs Kenya Commercial Bank Limited & 4 Others* [2013] eKLR stated that Section 193A should be exercised responsibly, lawfully and in good faith. The court stated as follows:

“While the law (Section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that that power must be exercised responsibly, in accordance with the laws of the land and in good faith.”

“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.”

54. In *Alfred Lumiti Lusiba vs Pethad Ranik Shantilal & 2 Others* [2016] eKLR, Ngaah J opined as follows with respect to the applicability of Section 193 A of the *Civil Procedure Act*:

“But even so, the viability of a cause of action in a civil claim does not necessarily stem from the conviction of a defendant in a criminal trial. Further still, the success or failure of a civil suit based on facts similar to those that a criminal prosecution is mounted does not



necessarily depend on the conviction or acquittal of the defendant in the criminal trial; the outcome of a civil suit is independent from that of a criminal trial largely because the standard of proof required of a prosecutor in criminal prosecution is higher than that required of a claimant in a civil suit. To sustain a conviction, the prosecution must discharge the burden of proof beyond all reasonable doubt that the accused committed the offence with which he is charged. On the other hand, the claimant in a civil suit will only need to demonstrate on a balance of probability that the defendant is the tortfeasor and as a result of his tortious act or omission, the claimant suffered some sort of loss or damage that would warrant a remedy...The law is clear that the pendency of a civil suit is not a bar to criminal proceedings; it acknowledges the fact that the trial of the tortfeasor in a criminal prosecution need not be affected by the pending civil action against him. It is implied, therefore, that a civil suit cannot be stayed because of the prosecution of the tortfeasor for the obvious reason that the cause of action is neither rooted in the prosecution of the tortfeasor nor in his subsequent conviction.... the conclusion that one can draw from Section 193A of the Criminal Procedure Code together with the decisions of the learned judges in aforementioned cases is that both civil and criminal jurisdictions can run parallel to each other and that neither can stand in the way of the other unless either of them is being employed to perpetuate ulterior motives or generally to abuse of the process of the court in whatever manner.”

55. As stated in the above decisions, the pendency of a criminal suit is not a bar to civil proceedings, provided that such concurrent matters are filed and pursued lawfully and in good faith.
56. Courts have held that there are indeed certain instances where a superior court could interfere with criminal proceedings, provided that such power is exercised with due caution. The Court of Appeal in *Lalchand Fulchand Shah vs Investments & Mortgages Bank Limited & 5 Others* [2018] eKLR, quoted with approval the Supreme Court of India in the case of *State of Maharashtra & Others vs Arun Gulab & Others*, Criminal Appeal No. 590 of 2007, where it stated:

“The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction to the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor can it soft-pedal the course of justice at a crucial stage of investigation/proceedings.

The provisions of Articles 226, 227 of *the Constitution* of India and Section 482 of the Code of Criminal Procedure, 1973 (hereinafter called as “Cr.P.C.”) are a device to advance justice and not to frustrate it. The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of power of the Court, but the more the power, the more due care and caution is to be exercised in invoking these powers.”



57. In *Rosemary Wanja Mwangi & 2 Others vs Attorney General & 2 Others*, the court held that a court ought to step in and prevent unfairly wielded power, where it is satisfied that criminal proceedings have been instituted for a purpose other than genuine enforcement of law. It held that:

“Thus, the office of the DPP is an independent office and the court will in ordinary circumstances be reluctant to restrain the exercise of its powers. That notwithstanding, the process of the court must not be misused or otherwise used as an avenue to settle personal scores. The criminal process should not be used to harass or oppress any person through the institution of criminal proceedings against him or her. Should the Court be satisfied that the criminal proceedings being challenged before it have been instituted for purpose other than the genuine enforcement of law and order, then the court ought to step in and stop such manoeuvres in their tracks and prevent the process of the court being used to unfairly wield State power over one party to a dispute.”

58. Recently, the High Court in *Henry Aming'a Nyabere vs Director of Public Prosecutions & 2 Others; Sarah Joslyn & another (Interested Parties)* [2021] eKLR dealt with several instances where a Court may intervene and stop a prosecution. They include where: -

- “(i) There is no ostensible complainant in respect to the complaint;
- (ii) The prosecution fails to avail witness statements and exhibits without any justification;
- (iii) There is selective charging of suspects; or
- (iv) An Advocate is unfairly targeted for rendering professional services in a matter.”

59. In *Chris Ochieng & 3 Others vs Director of Public Prosecutions & another; Jude Anyiko (Interested party)* [2021] eKLR the court outlined a comprehensive list of instances where a Court ought to exercise its discretion and stop a prosecution. These instances are where it is demonstrated that: -

- (i) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court;
- (ii) Where the quashing of the impugned proceedings would secure the ends of justice;
- (iii) Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction;
- (iv) 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;
- (v) 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.
- (vi) The prosecution is not in public interest;
- (vii) The prosecution is not in the interests of the administration of justice;
- (viii) The prosecution is oppressive, vexatious and an abuse of the court process;
- (ix) The prosecution amounts to a breach of rights and fundamental freedoms;



- (x) The investigation and prosecution amounts to abuse of power and discretion and is aimed at achieving an ulterior or improper motive;
 - (xi) The investigation and the prosecution are tainted with illegality, irrationality and procedural impropriety;
 - (xii) The investigation and prosecution is in gross contravention of *the Constitution* and the law.”
60. The Petitioners have presented a report with respect to Inquiry File No. 119 of 2019 from the DCI to the Attorney General dated 21st January 2021 and a similar report dated 3rd May 2021 to the 1st Petitioner, prepared by P.M. Khayemba. The complainants are listed as Cissy Kalunde Musembi and Kenroid Limited.
 61. This report indicates that comprehensive investigations were conducted, the conclusion of which was to recommend that the 11th Respondent, among other persons ought to be charged for the role they played in the generation of the grant registered in the name of Aureum Limited.
 62. In the letter dated 4th April 2023, the complainant in Inquiry File Number 119 of 2019 is listed as Aureum Limited. In the said letter, the DPP notes that an initial investigations team, which included Corporal Nichollas Osuri, was replaced for unknown reasons and was substituted by another team that arrived at the decision to charge the 11th Respondent among others.
 63. The DPP states that the initial team appeared to him to be objective, and articulated the correct position in the matter. He further states that Aureum Limited had the legal title to the suit property and directed that Court File number E051 of 2022 be withdrawn against the 10th and 11th Respondents among other third parties. He thereafter directed that the Petitioners, the Interested Parties and the 1st to 5th Respondents be charged.
 64. In his annexed documents, corporal Osuri has presented what he purports to be an audit report from the Registrar of Companies, which appears to have extractions with respect to the registration of Horizon Hills Limited C. 131937 and C. 110776. The validity of this report cannot be established on the face of them. He also produced a letter from Joyce Koech, Assistant Registrar of Companies, which was purportedly impugned in the 2021 DCI report to the Attorney General.
 65. The Detective further produced two Forensic Document Examiner’s Reports and a letter from the Government Printer dated 25th April 2019 stating that the 9th Respondents title is genuine and the 1st Petitioner’s is not. This report was in the 2021 DCI report disregarded.
 66. Neither the 3rd, 4th, 11th or 12th Respondents have established any reasons for disregarding the evidence set out in the 2021 report. Instead, the Respondents’ evidence is scant in comparison and appears, prima facie, selective.
 67. Indeed, the recommendation to charge and prosecute the Petitioners, the 1st-5th Interested Parties and the 1st to 5th Respondents seems to be a complete turnabout from the DCI’s recommendation in 2021 and must be fully expounded during the civil trial. At this point in time, the arrest and charge of the parties in the suit appears, prima facie, to be irrational and procedurally improper.
 68. On this basis, this court is satisfied that the Petitioners have established that they have a prima facie case and that if the sought orders of conservation are not granted, their right to fair hearing and to property will be infringed.



69. It is also clear that if the conservation orders of stay against the criminal suits and the temporary injunction to stay further investigations are not granted, the Petitioners will suffer prejudice and the Petition will undoubtedly be rendered nugatory.

70. The Petitioners' application dated 2nd May 2023 is therefore allowed as follows:

- a. A conservatory order be and is hereby issued staying the proceedings in Milimani Chief Magistrate Criminal Case No. E1264 of 2021- Republic v Cissy Kalunde Musembi and Milimani Chief Magistrate Criminal Case No. E289 of 2023- Republic v David Njenga Samson Kuria & 9 others or the arresting and charging of the Petitioners by the Respondents in relation to property L.R. 1870/II/200 pending and until hearing and determination of this Petition.
- b. A temporary injunction be and is hereby issued restraining the Respondents either by themselves or through their agents, juniors, servants or representatives from reopening or purporting to reopen, bringing, investigating, instituting or prosecuting any criminal proceedings against the Petitioners in connection with the transaction of the Property known as Land Reference Number 1870/II/200 IR No. 65800 pending and until hearing and determination of this Petition.
- c. The costs of the application to be in the course.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 25TH DAY OF JANUARY, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Allan Kamau for Attorney General

Mr. Achochi for 2nd and 3rd Respondent

Mr. Omulloh and Musyoki for Petitioner/Application

Court Assistant: Tracy

