



**Doshi & 2 others v Director of Public Prosecution & 6 others (Environment & Land Petition E017 of 2023) [2024] KEELC 5792 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5792 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION E017 OF 2023**

**OA ANGOTE, J**

**JULY 31, 2024**

**IN THE MATTER OF: MCCR E257 OF 2023 (POLICE CASE NO. 121/120/2023)  
REPUBLIC -VS- ASHOK LABHSHANKER DOSHI & 2 OTHERS IN THE MATTER  
OF: ARTICLES 2, 3, 10, 19, 20, 21, 23, 27, 29, 40, 47, 50, 157, 159, 258 & 259 OF THE  
CONSTITUTION OF KENYA, 2010 AND IN THE MATTER OF: VIOLATION OF  
ARTICLES 10, 27, 29, 40, 47, 50, 157 OF THE CONSTITUTION OF KENYA, 2010 AND  
IN THE MATTER OF: BREACH OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015**

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

**IN THE MATTER OF: BREACH OF THE LAND REGISTRATION ACT, 2012**

**IN THE MATTER OF: UNLAWFUL AND IRREGULAR  
CANCELLATION OF TITLE TO PARCEL NO. L.R. NO. 209/3850**

**IN THE MATTER OF: UNLAWFUL EVICTION OF THE  
PETITIONER FROM PARCEL NO. L.R. NO. 209/3850**

**BETWEEN**

**ASHOK LABHSHANKER DOSHI ..... 1<sup>ST</sup> PETITIONER  
PRATIBHA ASHOK DOSHI ..... 2<sup>ND</sup> PETITIONER  
MAGNUM PROPERTIES LIMITED ..... 3<sup>RD</sup> PETITIONER**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION ..... 1<sup>ST</sup> RESPONDENT  
DIRECTORATE OF CRIMINAL INVESTIGATION ..... 2<sup>ND</sup> RESPONDENT  
INSPECTOR GENERAL, NATIONAL POLICE SERVICE ..... 3<sup>RD</sup> RESPONDENT  
CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> RESPONDENT  
ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**



**RULING**

1. The Petitioners have filed a Notice of Motion application dated 25<sup>th</sup> April 2023, in which they have sought for the following orders:
  - a. Spent
  - b. That pending the hearing and determination of this Petition inter partes, a conservatory order be issued staying the continued prosecution of the 1<sup>st</sup> and 3<sup>rd</sup> Petitioners in MCCR E257 of 2023 Republic v Ashok Labhshanker Doshi & 2 others.
  - c. Spent
  - d. That pending the hearing and determination of this Petition inter partes, a prohibitive injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from harassing and arresting the 2<sup>nd</sup> Petitioner on the same facts arising from MCCR E257 of 2023 Republic v Ashok Labhshanker Doshi & 2 others.
  - e. Spent
  - f. That pending the hearing and determination of this Petition inter partes, a conservatory order be issued prohibiting the 7<sup>th</sup> Respondent from any development, alteration and or disposal of the subject property parcel L.R. No. 209/3850 situated along Processional Way.
  - g. Spent
  - h. That pending the hearing and determination of this Petition inter partes, a conservatory order be issued restraining the 4<sup>th</sup> Respondent from altering and or issuing any titles or making any entries on the register pertaining the subject parcel L.R. No. 209/3850 situated along Processional Way.
  - i. That the costs of this Application be provided for.
2. The grounds of the application are that on 17<sup>th</sup> April 2023, the 1<sup>st</sup> Petitioner, together with the 3<sup>rd</sup> Petitioner, were arrested and arraigned before the 6<sup>th</sup> Respondent, the Chief Magistrates Court, and charged with forgery of a Stamp Duty Receipt No. C409683, in the acquisition of the suit property by the Petitioners from the 7<sup>th</sup> Respondent.
3. The Petitioners aver that their arrest and prosecution is a gross abuse of the state's prosecutorial powers entrusted to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents; that their prosecution in MCCR E257 of 2023 is a violation of the National Prosecution Policy as the case fails to meet the evidential test and that the 7<sup>th</sup> Respondent has irregularly and unlawfully acquired title to the suit property and has dispossessed the Petitioners of the same. They urge that the 1<sup>st</sup> Respondent was not guided by any objective and points to undue influence.
4. The Petitioners assert that they lawfully purchased the suit property from the 7<sup>th</sup> Respondent in 1992; that the 3<sup>rd</sup> Petitioner settled the stamp duty fees of KShs. 1,200,000 and that the company was issued



- Receipt No. C40963 as proof of payment that was paid as stamp duty fees and Kshs. 5,513,860 as stand premium fees as indicated in the receipt No. C410606 issued by the Department of Lands.
5. According to the Petitioners, the 7<sup>th</sup> Respondent thereafter sought to reverse the conveyance transaction citing sentimental reasons, which the Petitioners declined to accede to. They assert that the 7<sup>th</sup> Respondent subsequently devised several schemes to irregularly take back ownership of the suit property, including drafting a fraudulent second agreement and purporting that the Petitioners had neglected to pay the purchase price balance of Kshs. 100 million.
  6. It was deponed that the 7<sup>th</sup> Respondent also wrote several complaints to the Ministry of Lands and the Attorney General, claiming that receipt No. C409683 for the payment of stamp duty and receipt for payment of the stand premium was forged. Various investigations conducted between 2015 and 2020 found that the receipts were fraudulent, and the 4<sup>th</sup> Respondent cancelled the entries in the suit title through which the suit property was registered in the name of the Petitioners.
  7. The Petitioners depone that on 3<sup>rd</sup> March 2020, a new lease and certificate of title were irregularly issued to the 7<sup>th</sup> Respondent dated 5<sup>th</sup> March 2020; that Jennifer Nthenya filed a complaint at the Capitol Hill Police Station claiming that the Petitioners had forcibly taken possession over her property, and sought police assistance in evicting the Petitioners, and that the OCS Capital Hill Police Station proceeded to the suit property where he arrested five of the Petitioners' employees for trespass.
  8. The Petitioners contend that the 2<sup>nd</sup> Respondent indicated to the 1<sup>st</sup> Respondent, through a letter dated 24<sup>th</sup> May 2013, that the second agreement was indeed a forgery and the 2<sup>nd</sup> Respondent recommended that Jennifer Nthenya be charged with offences included giving false information to a person in public office and forgery, and that these recommendations were however never acted upon by the 1<sup>st</sup> Respondent.
  9. According to the Petitioners, the finding of fraud by the 2<sup>nd</sup> Respondent was made before the directorate received the correspondence file in respect to the transaction form lands office and without feedback from the government printers and that the 2<sup>nd</sup> Respondent later received the correspondence file from the Land Registry which contained government receipt numbers C410606 and C409683 as genuine documents.
  10. The Petitioners deposed that on various dates in 2021, the government printer issued letters confirming that both receipts were issued by the Ministry of Lands and Housing on 25<sup>th</sup> May 1992 and were genuine and valid; that the 2<sup>nd</sup> Respondent in a report therefore recommended the withdrawal of charges against the Petitioners' employees for trespass, and the prosecution of Jennifer Nthenya for various offences including those recommended in the letter dated 24<sup>th</sup> May 2013.
  11. The 1<sup>st</sup> Respondent opposed this application vide a Replying Affidavit sworn by Naomi Atina, a Senior Principal Prosecution Counsel at the Office of the Director of Public Prosecutions, who deposed that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents conducted investigations into a complaint lodged in respect of the Petitioners' conduct regarding the 7<sup>th</sup> Respondent.
  12. It was deponed that the 1<sup>st</sup> Respondent independently reviewed the investigation file and established that there was sufficient evidence to institute criminal charges against the Petitioners, and that the 1<sup>st</sup> Respondent acted within its constitutional mandate and the Petitioners have not demonstrated how they have been discriminated against.
  13. The 7<sup>th</sup> Respondent, through the Replying Affidavit sworn by Jennifer Nthenya Wambua, that the application is not merited as the 7<sup>th</sup> Respondent was allocated the suit property by the Government on 13<sup>th</sup> March 1986 by way of an allotment.



14. It was deposed by the 7<sup>th</sup> Respondent that in July 1992, she was unable to pay the balance of the allocation fee and identified the 1<sup>st</sup> Petitioner, through his company, the 3<sup>rd</sup> Petitioner, as a buyer and that the suit property was to be sold at the price of KShs. 120 million, but the said sum was never received.
15. Ms. Jennifer Wambua deposed that the Petitioners fraudulently obtained title to the suit property yet they were not allottees of the said property; that she thereafter made complaints to the Ministry of Lands and investigations established that the receipt for the payment of stamp duty was a forgery; that no constitutional rights of the Petitioners were violated and that the recommendation to prosecute the Petitioners was made following lengthy and extensive investigations.

### Submissions

16. Counsel for the Petitioners submitted that the conservatory orders should be granted and that this court is clothed with jurisdiction to grant the conservatory orders sought as provided under Article 23 of *the Constitution* as read with Article 165(3)(d)(ii) of *the Constitution*.
17. Counsel relied on the case of Invesco Assurance Co. Ltd vs MW (Minor suing thro' next friend and mother (HW) [2016] eKLR, where the court defined a conservatory order. They further relied on the case of Centre for Rights Education and Awareness (CREAW) & 7 Others vs Attorney General [2011] eKLR where it was held that the court need not examine closely the merits of a case when considering whether to grant conservatory orders or not.
18. Counsel further sought to rely on the case of Board of Management of Uhuru Secondary School vs City County Director of Education & 2 others [2015] eKLR, Wilson Kaberia Nkunja vs the Magistrates and Judges Vetting Board and Thers [2016] eKLR and the Supreme Court case of Peter Gatirau Munya vs Dickson Mwenda Kithinji & 2 others [2014] eKLR.
19. Counsel submitted that the applicants have a prima facie case with a likelihood of success as defined in Mrao vs First American Bank of Kenya Limited & 2 Others (2003) KLR 125, Habib Bank AG Zurich vs Eugene Mariou Yakub (Nairobi Civil Application No. 43 of 1982)(Unreported) and Kevin K. Mwiti & Others vs Kenya School of Law & 2 others [2015] eKLR.
20. They argue that the decision to arrest and arraign the 1<sup>st</sup> and 3<sup>rd</sup> Petitioners has since been disproved by the 2<sup>nd</sup> Respondent after conducting extensive and conclusive investigations and that this violated the 1<sup>st</sup> and 3<sup>rd</sup> Respondents' right to freedom and security of the person under Article 29(a) of *the Constitution* as the prosecution was instituted arbitrarily and without cause.
21. Counsel for the Petitioners submitted that the malicious prosecution has subjected the 2<sup>nd</sup> Petitioner to mental anguish as she reasonably believed she too would be apprehended and detained and that this violated the 2<sup>nd</sup> Petitioner's right to freedom of security not to be subjected to psychological torture, enshrined in Article 29(d).
22. Counsel submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have undertaken the Petitioners' prosecution in a discriminatory manner because while there are recommendations by the 2<sup>nd</sup> Respondent for the prosecution of the 7<sup>th</sup> Respondent's director for various offences, the said recommendations are yet to be rescinded or quashed.
23. On the other hand, it was submitted, the 1<sup>st</sup> and 3<sup>rd</sup> Petitioners have been arrested and prosecuted for offences that have since been disproved, and that the parties have not been treated equally before the law, contrary to Article 27(1) and (2) as read with Article 10(1) and (2) of *the Constitution*.



24. Counsel further submitted that the 4<sup>th</sup> Respondent's actions of cancelling the 2<sup>nd</sup> Petitioner's title over the suit property on the basis of the alleged fraudulent receipts, which have since been authenticated, is in violation of the Petitioner's right to property under Article 40 and that the 4<sup>th</sup> Respondent also violated the Petitioners' right to fair administrative action under Article 47 of *the Constitution*, as it was ultra vires.
25. The Petitioners' counsel argued that it is only a court of law that could issue orders as to the cancellation of title, as was held in *Harrison Kiambuthi Wanjiru & Another vs District Land Registrar Nairobi & 3 others* [2022] eKLR.
26. Counsel further urged that if this application is not allowed, the substratum of the Petition will be lost and rendered nugatory. He relied on the Court of Appeal case of *Alfred N. Mutua vs Ethics & Anti-Corruption Commission (EACC) & 4 others* [2016] eKLR.
27. Counsel additionally submitted that public interest weighs in their favor, as it is in the public interest that all state agencies and state officers, be guided by the law and constitutional values and principles in undertaking their mandate.
28. Counsel for the 1<sup>st</sup> Respondent submitted that the Petitioners did not demonstrate the manner in which the 1<sup>st</sup> Respondent has infringed on their rights as espoused in the *Anarita Karimi Njeru vs Republic* [1979] eKLR, and that the Petitioners have not placed any evidence before this court to suggest that the 1<sup>st</sup> Respondent acted ultra vires their constitutional mandate.
29. Counsel submitted that Article 50 of *the Constitution* provides safeguards to be observed during criminal prosecution; that the trial court is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge, and that it would be a subversion of the law regulating criminal trials if this court was to usurp the function of the trial court.
30. It was Counsel's submission that public interest demands that complaints to the police are well investigated and should sufficient evidence be found, prosecution ought to be mounted. The 1<sup>st</sup> Respondent's Counsel submitted that the Petitioners have failed to demonstrate the prejudice they stand to suffer if the stay order is not granted.
31. Counsel further submitted that while this court is clothed with powers to check the excesses of the 1<sup>st</sup> Respondent, such powers are only to be exercised where there is evidence that extraneous matters guided the institution of the criminal proceedings. Counsel relied on the case of *Joram Mwenda Guantai vs The Chief Magistrate* [2007] eKLR where the court held that the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a criminal court and considers himself to be a victim of oppression.
32. Counsel also relied on Section 193(A) of the Criminal Procedure Act which provides for concurrent civil and criminal proceedings. They relied on the Supreme Court's determination in *Edwin Harold Dande & 3 Others vs DPP and 2 Others* [2022] eKLR, *AG vs AG & 3 Others ex parte Thomas Ng'ang'a Munene* [2014] eKLR and *Republic vs Commissioner of Police and another ex parte Michael Monari & another* [2012] eKLR.

### **Analysis and Determination**

33. This court has considered the pleadings and submissions filed by the parties. The issues for determination are as follows:



- a. Whether conservatory orders should issue to stay the criminal proceedings in MCCR E257 of 2023.
  - b. Whether conservatory orders should issue to prevent the 7<sup>th</sup> Defendant from dealing with the suit property.
  - c. Whether conservatory orders should issue to prevent the 4<sup>th</sup> Defendant from making any entries on the register altering or issuing any titles.
34. The background to this suit is that the 1<sup>st</sup> and 3<sup>rd</sup> Petitioners have been charged with offences in MCCR E257 of 2023 Republic v Ashok Labhshanker Doshi & 2 others; that the decision to arrest them was discriminatory because although the 2<sup>nd</sup> Respondent has recommended the prosecution of the 7<sup>th</sup> Respondent, the same has not been effected and that the 4<sup>th</sup> Respondent cancelled the Petitioners' title on the basis of a fraudulent receipt which has been disproven.
35. The Petitioners seek declaratory orders that their prosecution is malicious and in violation of their constitutional rights; that their eviction by the General Service Unit from the suit property without a court order violated their right to property; that orders of prohibition do issue against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in respect of MCCR E257 of 2023 and that an order of certiorari quashing the 4<sup>th</sup> Respondent's decision to cancel the 3<sup>rd</sup> Petitioner's title do issue.
- Whether conservatory orders should issue to stay the criminal proceedings in MCCR E257 of 2023.
36. 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.”
37. 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.”
38. 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.”

39. 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 order 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.”

40. In considering whether this court should issue conservatory orders to stay criminal proceedings, this court must first determine whether the Applicants/ Petitioners have a prima facie case and if they are likely to suffer prejudice if the orders sought are not granted.

41. Courts have settled the definition of a prima facie case in respect of civil applications. In the case of *Mrao vs First American Bank of Kenya Limited & 2 Others* (2003) KLR 125 the Court defined a prima facie case to mean: -

“... In a civil application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”

42. In *Republic vs Public Procurement Regulatory Authority Ex parte EAA Company Limited; Kenya Bureau of Standards & 2 others (Interested Parties)* [2021] eKLR, the court considered the tests for granting interlocutory injunctions in a public law setting as follows:

“In this regard, the extent to which the tests for the grant of interlocutory injunctions are applicable in a public law setting was considered by the House of Lords in the case of *R v Secretary of State for Transport, ex parte Factortame Ltd (No 2)* (Case C-213/89) [1991] 1 A.C. 603. Lord Goff in that case recognised that Lord Diplock in *American Cyanamid Co vs Ethicon Ltd* (1975) AC 396 had approached the question of whether to grant an injunction in two stages: first the availability of an adequate remedy in damages and, secondly, where that stage did not provide the answer, it will be necessary for the court to proceed to the second stage, concerned with the balance of convenience.

Lord Goff was in this regard of the view that since public authorities are not generally liable in damages in respect of ultra vires acts, this element of the *American Cyanamid* test did not provide much assistance in public law cases. As regards the balance of convenience, Lord Goff opined that the court had to look more widely, and take into account the public in general to whom an authority owed duties, and held as follows in this regard:

“... the court should not restrain a public authority by interim injunction from enforcing an apparently authentic law unless it is satisfied, having regard to all the circumstances, that the



challenge to the validity of the law is, prima facie, so firmly based as to justify so exceptional a course being taken.”

43. In MCCR E257 of 2023, the 1<sup>st</sup> and 3<sup>rd</sup> Petitioners (the Petitioners) have been charged with forging a receipt for payment of stamp duty. According to the Petitioners, this is despite the validity of the receipt having been proved through the 2<sup>nd</sup> Respondent’s letter dated 24<sup>th</sup> May 2013.

44. The 1<sup>st</sup> Respondent asserts that concurrent civil and criminal proceedings is provided for under Section 193A of the Criminal Procedure Code, which provides 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.”

45. The 1<sup>st</sup> Respondent contend that in charging the Petitioners, he was acting within his constitutional mandate and that this court should refrain itself from usurping the functions of the trial court, which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charges against the Petitioners.

46. Indeed, the mandate and functions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents is prescribed under *the Constitution*. These powers are however not absolute and courts do exercise oversight over the functions of the Office of the Director of Public Prosecution and the Director of Criminal Investigations. All the same, the power of a court to stay or interfere with an investigation or a prosecution ought to be sparingly called upon, and only in the clearest of cases, especially at an interlocutory stage.

47. In an article titled ‘Unjust Justice in Parallel Proceedings: Preventing Circumvention of Criminal Discovery Rules’, the author, Randy S. Eckers, argues that a determination to either stay or allow the continuation of parallel proceedings depend on existence of certain requirements. He observes as follows:

“...The Courts only block parallel proceedings in special circumstances. A defendant may move for a stay to block parallel proceedings, which will be granted only if the defendant can prove either that the government is acting in bad faith and using malicious tactics to circumvent the strict criminal discovery rules, or that there is a due process violation....

Even if a defendant meets one of these requirements, a stay is not guaranteed. The Court takes many other factors into account in deciding whether a stay is appropriate in a specific situation. These factors include the commonality of the transaction or issues, the timing of the motion, judicial efficiency, the public interest, and whether or not the movant is intentionally creating an impediment.” Absent special circumstances, both cases will probably proceed.

69. . In the case of Commissioner of Police & the Director of Criminal Investigation Department & Another vs Kenya Commercial Bank Ltd & 4 others [2013] eKLR, it was articulated that a court should only interfere with the 1<sup>st</sup> and 2<sup>nd</sup> Respondents functions where there has been a serious abuse of power.

“...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.”

48. The High Court in *Kuria & 3 Others vs AG (2002) 2 KLR* appreciated the validity of existence of concurrent civil and criminal proceedings when it made the following findings:-

“.... The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution...A prerogative order should only be granted where there is an abuse of the process of the law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution... It is not enough to state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the Applicant are under serious threat of being undermined by the criminal prosecution. In the absence of concrete grounds... it is not mechanical enough that the existence of a civil suit precluded the institution of criminal proceedings based on the same set of facts. The effect of criminal prosecution on an accused person is adverse but so also are their purpose in the society, which are immense... an order of prohibition cannot also be given without any evidence that there is manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial.”

49. In this case, the Petitioners have presented copies of the contract between themselves and the 7<sup>th</sup> Respondent for the sale of the suit property and a copy of the letter dated 20<sup>th</sup> December 2021 from the 2<sup>nd</sup> Respondent to the 1<sup>st</sup> Respondent, in which the DCI recommended the arrest and prosecution of Jennifer Nthenya Wambua, as the stamp duty receipt was found to be valid, amongst other documents.
50. This court takes due notice that this dispute has been the subject of multiple civil cases over the years. From the annexed documents, the 7<sup>th</sup> Respondent, Greenview Lodge Limited filed two suits, Milimani ELC Case No. 559 of 2011 Green View Lodge Ltd v Harit Shet T/A Harit Sheth Advocates and Magnum Properties Limited, which was dismissed on 9<sup>th</sup> October 2018 following the failure by Greenview Ltd to deposit KShs. 10 million as security for costs.
51. There is also Milimani ELC Misc Judicial Review Application No. E005 of 2022 Republic v Chief Land Registrar, Director of Criminal Investigations ex parte Greenview Lodge Limited and the Director of Public Prosecution, Ashok Doshi and Pratiba Ashok Doshi (Interested Parties). This suit, which was before Wabwoto J, was withdrawn by Greenview Lodge Limited on 26<sup>th</sup> January 2023.
52. The Petitioners on their part have filed three suits on the subject matter. They filed Milimani Judicial Review Misc Application N0. 46 of 2020, where they sought to quash the Land Registrar’s decision to cancel entries 1 to 15 in the register of the suit property and prohibitory orders against the Chief Land Registrar to prohibit them from interfering with the ownership of the suit property.



53. The matter was marked as closed on 2<sup>nd</sup> November 2021 by Mbugua J following the Petitioners' non-attendance and failure to prosecute their suit.
54. The Petitioners had also filed an identical application in Mombasa Judicial Review Misc. Application No. 14 of 2020, which was later transferred to Nairobi and issued with a new case number Milimani ELC Miscellaenous Application No. 66 of 2020. This suit was dismissed by a ruling dated 18<sup>th</sup> February 2021 in which Obaga J upheld a preliminary objection raised by the Chief Land Registrar and found that the parties had engaged in forum shopping and the suit was an abuse of judicial process.
55. Lastly, there is the Mombasa Petition No. 44 of 2020 Ashok Labshanker Doshi and Pratibha Ashok Doshi v Director of Public Prosecutions, Director of Criminal Investigations, Inspector General of the National Police Service, Attorney General and Greenview Lodge Limited (Interested Party).
56. In this case, the Petitioners sought a declaration that the intended arrest, prosecution and investigation of the Petitioners on account of fraud related to the ownership and payment of stamp duty of the suit property is unconstitutional and an abuse of the criminal justice system.
57. This suit was dismissed as the court found that the Petition had not been proved to the required legal standards. Ogola J, while declining to grant the order to stop criminal proceedings, held that the Petitioners will get a fair hearing in the criminal court.
58. The High Court Judge further found that to purport to stop the Petitioners' prosecution would impair the Interested Party's right to know the outcome of the allegations of fraud in a fair and procedural criminal forum provided for by the law.
59. Having reviewed the pleadings and Judgment in the said Petition, it does not escape this court's notice that the matter before this court bears striking resemblance to Mombasa Petition No. 44 of 2020 which sought for a declaration that the investigations and prosecution of the Petitioners was unconstitutional and an injunction against the Respondents to restrain them from prosecuting the allegations of fraud with respect to the suit property.
60. It is then apparent that the Petitioners have filed a multiplicity of suits with the aim of staving off criminal prosecution. In some of those suits, the Petitioners have challenged the cancellation of the title which is currently registered in favour of the 7<sup>th</sup> Respondent.
61. The multiple suits filed by the Petition challenging the powers of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, and the 7<sup>th</sup> Respondent's title, can only be termed, prima facie, as an abuse of court process. The Respondents have rightly argued that adequate protection is provided for under Article 50 of *the Constitution*, which articulates the right to fair hearing. This court is persuaded as to this position.
62. Any intervention in the prosecution of the Petitioners at this point would undoubtedly be a usurpation of the functions of the trial court, whose duty is to weigh the evidence before it and determine whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have discharged their constitutional mandate.
63. Indeed, it would appear that the Petitioners only raised the issue of the existence of a civil dispute in respect to the suit property with a view of stopping the prosecution in this very Petition. As I have pointed out above, there was no existing civil suit in respect of the suit property when the Petitioners filed this suit, all the previous suits having been struck out for one reason or the other.
64. The continuance of the criminal matter is not likely to prejudice the Petitioners in a civil suit, considering that no civil suit was in existence as the time the Petitioners were charged in the lower court.



65. Having already found that the Petitioners have failed to establish a prima facie case with respect to the orders sought to stay the criminal proceedings, the next issue is whether the Petitioners have established a case for this court to issue conservatory orders to prevent the 7<sup>th</sup> Respondent from any development, alteration and or disposal of the subject property pending the hearing of the Petition.
66. It is trite that conservatory orders are in the nature of public law and sought in the public's interest. This was noted by the Supreme Court in *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others* [2014] eKLR where it held that 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.
67. In this instance, the orders have been sought against an individual citizen to restrain her from dealing with private property. The circumstances herein point to private party issues, and not matters concerning public authorities or the interests of the general public. Public interest will neither be served nor prejudiced by the decision of this court to grant or deny a conservatory order against the 7<sup>th</sup> Respondent.
68. The Petitioners would have been better placed to seek injunction orders as by their nature, conservatory orders are ill-suited to be issued. In any case, this court is well guided that a prima facie case is established where there is a right that has apparently been infringed by the opposite party, so as to call for a rebuttal from such party. This was the definition proffered by Bosire JA in *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125.
69. The Petitioners assert that they lawfully purchased the suit property from the 7<sup>th</sup> Respondent in 1992. However, since then, the Petitioners assert that the 7<sup>th</sup> Respondent has irregularly and unlawfully acquired title to the suit property, through cancellation of entries in the title. This court notes that the suit property is currently registered in the 7<sup>th</sup> Respondent's name. Section 26 of the [Land Registration Act](#) provides that a certificate of title is prima facie proof of ownership of the suit property.
70. While the Petitioners have presented various correspondences in support of their case, this court is not persuaded that, prima facie, the cancellation of the entries in the title register was in itself fraudulent or unprocedural. This court therefore finds that the Petitioners have not established a prima facie case and therefore have not satisfied the first principle for this court to grant conservatory orders.
71. 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. At this point, the Petitioners have not established that they have a lawful right to the suit property.
72. The third principle is whether if an interim conservatory order is not granted, the Petition or its substratum will be rendered nugatory. This court notes that this suit concerns incidences that took place between 1992 and 2020, and that, according to the Petitioners, the 7<sup>th</sup> Respondent has been on the suit property since 2020.
73. In any case, conservatory orders are discretionary orders which are equitable in nature. It is a fundamental equitable principle that a person seeking equity must come to equity with clean hands. This court has found that the Petitioners have filed a multiplicity of suits in respect to the suit property, which have either been struck out or withdrawn. This court is therefore not persuaded to exercise its discretion in favour of the Petitioners.
74. The Petitioners have also sought orders against the 4<sup>th</sup> Respondent to prevent him from making any entries on the register. In *Chief Land Registrar & 4 others vs Nathan Tirop Koech & 4 others* [2018]



eKLR, it was held that there is a presumption that all acts done by a public official have lawfully been done and that all procedures have been duly followed.

75. This presumption is captured in the latin maxim “omnia praesumuntur rite esse acta,” which roughly translated means “all things are presumed to have been done rightly.” The Petitioners have not presented evidence to rebut the presumption of regularity.
76. This court also takes due notice that these issues were similarly raised in Milimani Judicial Review Misc Application N0. 46 of 2020, where the Petitioners sought to quash the Land Registrar’s decision to cancel entries 1 to 15 in the register of the suit property and prohibitory orders against the Chief Land Registrar to prohibit them from interfering with the Petitioners’ ownership of the suit property. The Petitioners, for reasons not disclosed to this court, did not prosecute their case and the matter was dismissed a year later.
77. The Chief Land Registrar was also a party to Mombasa Judicial Review Misc. Application No. 14 of 2020, which after its transfer became Milimani ELC Miscellaneous Application No. 66 of 2020. This suit was dismissed after the court found that the Petitioners were guilty of forum shopping.
78. In conclusion, this court finds that the Petitioners’ application dated 25<sup>th</sup> April 2023 is unmerited and is disallowed.
79. The Petitioners shall pay the costs of the application.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 31<sup>ST</sup> DAY OF JULY, 2024.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Mr. Okwatch for petitioners/Applicants

Allan Kamau for Attorney General

Mrs Arunga for DPP

Mr. Githinji for 7<sup>th</sup> Respondent

Court Assistant - Tracy

