



**Diamond Housing Limited & another v Director of Public Prosecutions
& 4 others; Irungu (Interested Party) (Constitutional Petition
E044 of 2024) [2025] KEHC 3957 (KLR) (28 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3957 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION E044 OF 2024**

J NGAAH, J

MARCH 28, 2025

BETWEEN

DIAMOND HOUSING LIMITED 1ST PETITIONER

OSMAN ERDINC ELSEK 2ND PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 3RD RESPONDENT

SCCIO NYALI 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT

AND

JOSEPH KINGORI IRUNGU INTERESTED PARTY

JUDGMENT

1. The petition before court is dated 4 August 2025. It is supported by the affidavit of Osman Erdinc Elsek, the 2nd petitioner, who has introduced himself as the director of the 1st petitioner.
2. According to Elsek, he and his co-petitioner have been engaged with various commercial banking institutions in Kenya for their banking services since 2008. Between 4 April 2014 and 31 July 2021, for instance, they engaged Equity Bank (Kenya) Limited for that purpose. On or around the same time, they had a total turnover of over Kshs. 170,000,000/-, free of any credit.



3. In August 2021, Elsek was introduced to the interested party by one Ebrahim whom he has described as “the branch manager of Equity Bank (Kenya) Limited”. He was informed that the interested party was the regional manager of Equity Bank (Kenya) Limited, coast region.
4. That aside, the 1st petitioner is said to have acquired part of Plot Number MN/III/736 (herein “the suit property”) in Kikambala area, beach front, registered as C.R. Number 16392 measuring about 5.5 Acres (2.22 Hectares) of the 9.746 Hectares (24.082 Acres) from one Zahid Iqbal Dean alias John Dean. Two separate leases and sale agreements are said to have been executed in this transaction. The two lease agreements were respectively dated 27 February, 2021 and 7 May 2021.
5. The 1st petitioner took possession of the suit property sometimes in February 2021 and undertook what the 2nd petitioner has described as extensive developments of three high-end restaurants, a hotel and fourteen villas. It also built 18 luxury rooms, a swimming pool, a spa, five underwater rooms, canal and recreation areas. The hotel development trades under the name and style Kilifi Pearl Beach Resort and has its on website indicated as www.kilifipearlbeachresort.com. The 2nd petitioner lives in one of the cottages at the Hotel.
6. According to the 2nd petitioner, the interested party had, on numerous occasions, visited the restaurant as well as the cottage and showed his willingness to have a similar cottage for himself. He particularly wanted to have his villa constructed on one side of the high-end restaurant, on the suit property. On 12 October 2021, the interested party approached the 2nd petitioner seeking the 1st petitioner to construct and sell to him a cottage, described as “cottage no. 5” on the suit premises. On even date, the 2nd petitioner gave him a letter of offer, in his capacity as the director of the 1st petitioner.
7. The purchase price for cottage no. 5 was agreed at Kshs. 12,000,000/- which amount was to be paid to the 1st petitioner’s bank account held at Equity Bank (Kenya) Limited domiciled at Mtwapa Branch in full before the interested party could take possession of the cottage.
8. On diverse dates between 25 August 2021 and 10 May 2022, the interested party paid the 1st petitioner and the 2nd petitioner a total sum of Kshs. 11,900,000/- at their bank counts at Equity Bank (Kenya) Limited, Mtwapa Branch. Somehow, according to the terms of the letter of offer, the 1st petitioner was to pay the interested party Kshs. 150,000/- as rent for the period between November 2021 and March 2022.
9. Further, between March 2022 to March 2023, the interested party was to be paid by the said company Kshs. 200,000/-, subject to renewal of some contract or until the property was handed over to the interested party. Indeed, the interested party confirmed having been paid by the 1st petitioner Kshs. 900,000/= being rent for the period between November 2021 to March 2022. The interested party also confirmed having been paid Kshs. 200,000/= for the month of April 2022. Acknowledgement of payment of these sums was by way of the interested party’s letter dated 14 December 2023.
10. By 30 March, 2022 cottage no. 5 was still under construction. Nonetheless, according to the terms of offer, the interested party was at liberty to take over possession of the cottage but he did not. It had been agreed that in the event the 1st petitioner failed to construct and deliver cottage no. 5 to the interested party on or before 30 March 2022, the interested party was at liberty to take the sample cottage which the 2nd petitioner resided in.
11. Upon completion of construction of cottage no. 5, the petitioners informed the interested party that the cottage was complete and ready for him to take possession but the interested party declined. He, instead, demanded Kshs. 24,400,000/= from the petitioners. Since then and on several occasions, the



- interested party has threatened the 2nd petitioner that he will have him deported if he did not give the petitioner his money and interest.
12. But on 19 September 2023, the 1st petitioner discovered that there was a court dispute over the suit property. On 20 September 2023, in particular, the 2nd petitioner received a letter from the advocate of a company called “Thousand Palms Beach Hotel Limited” demanding that the 2nd petitioner vacates the property failure of which a legal action against him would ensue. In the wake of this development, it is the petitioners’ position that they are ready and willing to refund the interested party the sum of Kshs. 14,100,000/-.
 13. Sometime in May 2024, the 2nd petitioner was telephoned by a police officer who identified herself as Ms. Jedidah and informed the 2nd petitioner that she was Deputy Officer Commanding Nyali police station, (OCS). She also informed him that the police were investigating a complaint against the petitioners for obtaining money by false pretences from the interested party. The latter had filed a complaint which had been captured in the Occurrence Book at the police station as no. 17/15/05/2024.
 14. The 2nd petitioner went to Nyali police station on numerous occasions and informed the Deputy OCS at Nyali police station, the nature and extent of the contractual relationship between the 1st petitioner and the interested party and, in particular, the amount the 1st petitioner owed the interested party.
 15. On 25 May 2024, the 2nd petitioner recorded a statement at the County Criminal Investigations Offices at Nyali and shed light on the contractual arrangement between the disputing parties. The 2nd petitioner was given a cash bail of Kshs. 150,000/= and directed to appear before Shanzu Law Courts on 6 June 2024 to be charged with the offence of obtaining money by false pretences.
 16. The petitioners’ advocates subsequently wrote to the 1st respondent a letter dated 3 June 2024 asking him to review the evidence on the police file and reconsider his decision to charge the petitioners because, according to the petitioners, the dispute between them and the interested party is a civil dispute and not a criminal offence. On 6 June 2024, the 2nd petitioner and his advocate, Mr. Daniel Wamotsa, appeared at Shanzu Law Courts for plea-taking but the investigations officer informed them that the 2nd petitioner would not be charged in court on that particular day since the 1st respondent’s officers at Shanzu Law Courts had called for the police file for purposes of review and directions, in response to the petitioners’ advocates letter dated 3 June 2024.
 17. In the meantime, the interested party filed a case in the magistrate’s court seeking recovery of his money from the petitioners. This case was registered as Mombasa Chief Magistrates Court Civil Case No. E811 of 2024; Joseph Kingori Ndungu versus Diamond Housing Limited and Osman Erdinc Elsek. Indeed, upon perusal of the court file, the 2nd petitioner confirmed that the interested party was demanding refund of his money plus interest.
 18. Judgment was apparently entered in default of appearance against the appellants. In the course of the proceedings in the case, the 2nd petitioner’s vehicle registration no. KDL 323 S was attached. The petitioners had, however, applied to have the execution of the judgment stayed and for the petitioners to be allowed to file their defence against the suit.
 19. By a letter dated 10 July 2024, the petitioners’ advocates informed the 1st respondent of the pending civil suit. However, in his letter dated 18 June 2024, the 1st respondent opined that the 2nd petitioner had fraudulently obtained the sum of Kshs. 11, 900,000/= and that the only issues to be resolved was for the 2nd petitioner to be allowed to refund this money before the charges against him could be preferred.



20. On 2 August 2024 the interested party, through his lawyers, Dagaye & Co. Advocates, wrote to the petitioners indicating that the amount owed to the interested party was now Kshs. 20,000,000/- and wanted the 2nd petitioner to sign an agreement allowing the bank to sale the petitioners' property in Kikuyu to recover the money. In that letter, it was expressly stated that interested party would cease pursuing his claim against the petitioners and also drop the criminal case, if the petitioners fully executed the agreement and made the 1st instalment. Further, the interested party would drop his civil claim in the magistrates' court if the petitioners paid the Kshs. 20,000,000/-.
21. Against this background, the petitioners believe that the interested party and the respondents are misusing the criminal justice to exert pressure on them to settle what is otherwise a civil debt. It is for this reason that the petitioners have instituted this case, praying for a series of orders, including; declarations that issues arising from the contract entered by the 1st petitioner and the interested party in the letter of offer dated 12 October 2021, are civil or commercial in nature; and, that the civil dispute arising from the contract entered by the 1st petitioner and the interested party has no elements of criminal offences the prosecution of which they are threatened with; that the 1st respondent's decision to charge and prosecute the 1st and the 2nd petitioners with the certain offences contained in the 1st respondent's letters respectively dated 18 June, 2024 and 12 July, 2024 is an abuse of state powers of public prosecution.
22. Among other prayers that the petitioners have sought are for an order of certiorari to remove and bring to this Honourable Court and to quash the 1st respondent's decision to charge and prosecute the 1st and 2nd petitioners with the offences of obtaining money by false pretence and the offence of money laundering contained in the 1st respondent's letters respectively dated 18 June 2024 and 12 July 2024. They have also sought a quashing order against the two letters and an order for prohibition prohibiting the 1st 2nd 3rd and 4th respondents and any of their officers from arresting or detaining the petitioners or arraigning them in connection with the offences of obtaining money by false pretence or money laundering, among other prayers.
23. The respondents have opposed the petition and, as far as the 1st respondent is concerned, he has filed a replying affidavit while the 2nd to 5th respondents have filed grounds of objection.
24. Ms. Maureen Anyumba, the principal prosecution counsel in the 1st respondent's office at Mombasa has sworn that the 3rd respondent investigated a case of obtaining money by false pretence following a complaint by the interested party.
25. The 3rd respondent recommended that the 2nd petitioner be charged with the offence of obtaining money by false pretence contrary to section 313 of the *Penal Code*. The 2nd petitioner was made aware of the investigations against him and given police bail pending his arraignment. Upon review of the evidence collected by the 3rd respondent, the 1st respondent agreed with the recommendations of the 3rd respondent that the petitioners were criminally culpable. The 2nd petitioner was informed accordingly.
26. In the grounds of objection filed on behalf of the 2nd to 5th respondents by the Attorney General, it is contended that the application and petition are misconceived, frivolous, vexatious and an abuse of the court process; that the 2nd, 3rd and 4th respondents are empowered by law to investigate and prosecute criminal offences pursuant to the provisions of section 24 of the *National Police Service Act* and articles 243 and 245 of the *Constitution*; and, that the petitioners have not demonstrated how the respondents will violate their constitutional rights.
27. It is also averred that even though the dispute between the petitioners and the complainant is civil in nature, there is no bar against the 2nd, 3rd and 4th respondents instituting criminal proceedings by dint



of the provisions of section 193A of the *Criminal Procedure Code*, cap. 75 under which criminal and civil proceedings can be taken concurrently.

28. It is further contended that the petitioners have merely alluded to constitutional provisions without demonstrating with precision how their rights and fundamental freedoms will be infringed as to warrant this Honourable Court's intervention. For the court to intervene, it must be satisfied that the criminal process has been initiated to compel the petitioners to settle the civil claim. It is the 2nd to 5th respondents' position that no evidence in this regard has been brought before the court. Neither have the petitioners demonstrated the basis of their fears that they will not get a fair trial.
29. As far as the 5th respondent is concerned, it is urged, she is only responsible for defending the government in civil litigation and has nothing to do with investigations and prosecution in criminal cases.
30. The submissions by the parties are, by and large, consistent with the pleadings and the affidavit filed in response to the application.
31. There is not much of a dispute on facts as deposed in the 2nd petitioner's affidavit. Of relevance to the determination of this application is the rather simple fact the 2nd petitioner is to face a criminal prosecution because he has failed to settle a civil dispute pending before court for determination.
32. The genesis of this fundamental fact is the agreement executed between the petitioners and the interested party culminating in a suit filed against the petitioners by the interested party in the Chief Magistrates Court at Mombasa as civil suit no. E811 of 2024. A summary of the events leading to the court case is well captured in the averments of the interested party's plaint which, to a greater degree, is reflective of the depositions by the 2nd petitioner in his affidavit in support of the petition.
33. To demonstrate this point, it is necessary that I reproduce those averments in the plaint to the extent that they are necessary in this application. They read as follows:

- “7. The Plaintiff met with the 2nd defendant and expressed his interest to buy one of the cottages which the 2nd defendant was in the process of constructing in Kikambala area near Mtwapa dubbed 'the Mtwapa Project'. The defendant agreed to sell to the plaintiff one cottage described as 'Cottage 5' on Title Number Mombasa/Block 111/736. The 2nd defendant issued the plaintiff with a copy of payment schedule for the project that clearly set out the purchase price of the said cottage at Kenya Shillings Twelve Million (Kshs.12,000,000/=) and made a provision for payment at the beginning of the project.
8. That the plaintiff and the defendant entered into an agreement in the form of an offer letter dated 12th October 2021 with intention of constructing a cottage on MOMBASA Block/111/736 through a Mtwapa Project on the said parcel of land while the plaintiff was an interested purchaser of one of the cottages particularly described as Cottage 5 on title Number Mombasa/Block 111/736 in the said 2nd defendant's Mtwapa Project.
9. That on or about 14th October 2021, the Plaintiff transferred funds to the 2nd Defendant's on diverse dates to the 2nd defendant's personal account of Kshs.12,000,000/= through the plaintiff's Equity bank account number 0170192891200 as per the agreement in the said letter of offer for purchase of the said cottage.



10. The Plaintiff states that he was assured by the 2nd defendant that the said project will be completed by January 2022. The Plaintiffs intention was to do business with the said cottage to generate income.
11. The plaintiff avers that it has since been three years since the said agreement was executed with the 2nd defendant having failed to do good his promise which is a material departure from the pre-contract agreement and a gross misrepresentation.
12. The plaintiff avers that he even sought to rescind and/or repudiate the said agreement between the parties and demanded a refund of the afforested amount of Kenya Shilling twelve Million Shillings (Kshs.12,000,000/=) paid as the purchase price for the said cottage after noticing that the 200 Defendant was being evasive and not responding to his calls.
13. The plaintiff avers that the 2nd defendant has failed, refused, and/or neglected to refund the sum of Kshs.12,000,000/= being the purchase price paid for the said cottages as per the agreement executed by the parties plus other costs arising therefrom in the form of rent expected.
14. The plaintiffs claim against the defendants is for the sum of Kenya Shillings Twelve Million (Kshs.12,000,000/=) being money due and owing from the defendant to the plaintiff which money was paid to the defendants by the plaintiff for purchase of cottage 5 standing on Title Number Mombasa/Block 111/736. The Plaintiff also claims for monies in the form of rent of KSH 5,000.000/- which was part of the agreement in the form of Ksh 200,000/ per month from May to date and Ksh 1, 200,000 in form of cash transfer through cheques numbers 192 and 193 arising from a cash transfer in May 2022 plus interest thereon at court's commercial rate from the date of filing of this suit till payment in full.”
34. The plaint is dated 30 May 2024 and an order obtained by the interested party to attach the 2nd petitioner's property before judgment shows that an application for that particular order was before Honourable Sogomo, principal magistrate, on 13 June 2024. There is, therefore, sufficient evidence that the interested party had lodged a suit for recovery of his money between 30 May 2024 and 13 June 2024.
35. It has not been denied that any of the respondents, and the 1st respondent, in particular, was aware of this case. A series of letters written by the 1st respondent in the wake of the interested party's suit shows that the 1st respondent was out to employ the criminal process to exert pressure upon the 2nd petitioner to settle the dispute.
36. In the letter dated 18 June 2024, for instance, the acting deputy Director of Public Prosecutions wrote to the acting senior assistant Director of Public Prosecutions, the Coast Regional Coordinator of the Office of the Director of Public Prosecutions and informed him, inter alia, that:
 - “ 3. The suspect should be allowed a grace period of thirty (30) days to refund the complainant of the sum of Kshs. 11,900,000/- owed before the prescribed charges can be preferred.



Kindly notify the suspect of the thirty (30) days grace period, from the date of receipt of this letter; failure to which he shall be prosecuted for the highlighted offences forthwith.”

37. In return, and apparently in response to this letter, the acting senior assistant Director of Public Prosecutions, the Coast Regional Coordinator of the Office of the Director of Public Prosecutions wrote to the Divisional Criminal Investigation Officer at Nyali and informed him, thus:

“We have received instructions to charge the suspect as per letter dated 18th June, 2024. He is, however, given a grace period of thirty days (which starts from the dated (sic) he is notified) to pay the complainant a sum of Kshs. 11,900,000/- before charges can be preferred. (Copy of the letter is enclosed for ease of reference). Proceed accordingly”.

38. In the meantime, the interested party sent an agreement to the 2nd petitioner for his signature, committing himself to dispose of a certain property and pay the interested the proceeds thereof in settlement of the amount he was seeking in the suit in court and part of which the 1st respondent had demanded that he pays lest he faced prosecution. For the avoidance of doubt, the terms in the agreement on this particular issue read as follows:

“8. That the payment period shall be done in 20 weeks commencing on week starting 5th August 2024.

9. That the creditor will cease pursuing his claim through the criminal justice system reported at Nyali Police Station upon fully execution of this agreement any payment of the first instalment.

10. The creditor also agrees to drop his claim in civil suit MCCE 881 of 2024 instituted in Mombasa. That this will only be done upon completion of the full amount owed and or an undertaking made/given by the financier on the instructions of the debtor.”

39. With this evidence, it is difficult to deny that this is a classic case of employing the criminal process to exert pressure on a party to settle a civil dispute. The criminal process has been invoked against the background of a contract executed between the complainant and the petitioners the basis of which the complainant alleges that the petitioners or the 2nd petitioner has breached the terms thereof. The complainant has gone a step further to file a suit for recovery of his money that is alleged to have been paid in satisfaction of his obligations under the contract. As a matter of fact, prior to the decision to charge the 2nd petitioner, he had not only obtained an order for attachment before judgment but had also attached the 2nd petitioner’s vehicle.

40. In the communications following the civil suit against the petitioners, the Director of Public Prosecutions does not mince his words that the petitioner has two options; either to pay the amount part of which the complainant is seeking in the civil suit or he faces prosecution. There can be no clearer case of abuse of prosecutorial powers than this. Without belabouring the point, it is in such situations that this Honourable Court has been called upon to stop the Director of Public Prosecutions in his tracks.

41. In *Peter Macharia Ruchachu versus Director of Public Prosecution & Another* (2014) KEHC 7508 (KLR) I noted that upholding criminal justice through a criminal prosecution as opposed to misusing the prosecution as an instrument to bring pressure to bear upon a party to settle a civil dispute is a question that has engaged the minds of judges from time to time. Whenever this question arises, judges



have been consistent that the institution of a criminal case for a purpose other than that of upholding the criminal justice is an abuse of the criminal process and it is upon the courts, to rise to the occasion and halt such criminal proceedings.

42. In *Stanley Munga Githunguri versus Republic* (1985) KLR 91, for instance, it was held that if the prosecution of a person is oppressive and malicious, it would amount to an abuse of the criminal process and, therefore, it would not be in the public interest to continue with that kind of prosecution. The court was emphatic that whenever such a situation arises, this Honourable Court has inherent power and duty to intervene and prevent the abuse of the due process of the court and to secure fair treatment for all persons who are brought before it or before a subordinate court.
43. And in *Samuel Kamau Macharia & Another versus Attorney General & Another*, Nairobi High Court Miscellaneous App. No. 356 of 2000, the court was emphatic that the Director of Public Prosecution's discretion to arraign a person in court should be exercised in a quasi-judicial way. In this case, the court halted the applicant's trial because in its view, the Director of Public Prosecutions was prodded to act and did not act independently and more so, the intention of the complainant was driven more by his quest for payment than a genuine intention to have the applicant face a criminal trial.
44. As I held in *Peter Macharia Ruchachu versus Director of Public Prosecution & Another* (supra), in which the petitioner was prosecuted in similar circumstances as the 2nd petitioner is threatened in the instant case, so I hold here, that the intended prosecution of the 2nd petitioner is for a collateral purpose and for ulterior motives. In other words, the criminal case against the 2nd petitioner is for a purpose other than upholding the criminal law. As I have noted, it is meant to bring pressure to bear upon the applicant to settle a civil dispute. Such a trial cannot be allowed to proceed.
45. In the fairly old decision of *Cruisair Ltd versus CMC Aviation Ltd (Ltd)*, (1978) KLR 131 which was cited with approval in Nairobi High Court Miscellaneous Application No. 839 and 1088 of 1999 *Vincent Kibiego Saina versus the Attorney General*, the Court of Appeal addressed this particular question on the abuse of prosecution in civil disputes and in winding up proceedings, in particular, and held that:

“...a winding up court is not to be used for debt collection purposes, or to exert pressure to force payment of a debt which is bona fide disputed and contested. A fortiori, to institute or sustain or prop criminal proceedings, like bring winding up proceedings, to exert pressure for the payment of a debt or sum which is disputed in good faith, that which is disputed on substantial and not insubstantial grounds, and the criminal proceedings cannot decide the disputed debt or sum, constitutes an abuse of the process of the court, is oppressive, mala fides...” (Underlining mine)
46. Based on the material before court, I am satisfied that the predominant purpose in the decision to institute and prosecute criminal proceedings against the 2nd petitioner is besides the purpose for which these proceedings are designed. Accordingly, this Honourable Court is enjoined to intervene and stop the proceedings.
47. Talking of abuse of the prosecutorial power, it has been held that where there is such a clear abuse of power by a public authority, as appears to have happened in the instant case, the court is bound to intervene and stop the authority in its tracks by way of an order of certiorari and prohibition. To this



end, I adopt the words of Lord Salmon in *D.P.P versus Humphrey's* (1976) 2 ALL ER 497 at 527-8 where he expressed himself as follows:

“A judge has not and should not appear to have any responsibility for the institution of prosecutions, nor has he any power to refuse to allow a prosecution to proceed merely because he considers that as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to interfere. Fortunately, such prosecutions are hardly brought but the power of the court to prevent them is, in my view, of great constitutional importance and should be jealously preserved”. (Emphasis added)

48. For the reasons I have given, I am persuaded that the prosecution of the petitioners or any of them would amount to an abuse of the process of the court. Considering that it is manifestly clear that the complainant seeks to achieve that which he has sought in the civil court, the intended prosecution is vexatious and oppressive to the petitioners and, for this reason, the court is enjoined to halt it.

49. In the same breath, I find the decision of this Honourable Court in *Kuria & 3 Others vs. Attorney General* (2002) 2 KLR 69 to be quite apt; in that case it was held as follows:

“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 tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far from that which the courts indeed the entire system is constitutionally mandated to administer.....”

50. The same point was expressed in *Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another* (2002) 2 KLR 703, where it was held as follows:

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and



go forth... When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court... The predominant purpose is to further that ulterior motive and that is when the High Court steps in...”

51. One other case that underscores the point that the court is entitled to intervene and stop abuse of the criminal process is the case of Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (2008) 2 EA 323 where it was held as follows:

“Whereas we appreciate the fact that the decision whether or not to prosecute the petitioners is an exercise of discretion this Court is empowered to interfere with the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable...”

52. Similarly, this court would interfere with the prosecution of the 2nd petitioner because the decision to prosecute him is tainted in almost every respect outlined in the above case. Apart from being a clear case of abuse of discretion by the Director of Public Prosecutions, it is also apparent that the latter has exercised his discretion in an improper manner and for a collateral or ulterior purpose.

53. For the forgoing reasons, I am satisfied that the petitioners have made out a case for grant of some of the prayers sought. I would, therefore, allow the petition to the extent of making the following orders:

- a. A declaration be and is hereby issued declaring that the 1st respondent’s decision to charge and prosecute the 1st and 2nd petitioners with the offence of obtaining money by false pretence contrary to section 313 of the *Penal Code*, Cap. 63 and the offence of money laundering contrary to section 4 (a) as read with section 16 (1) (a) of the *Proceeds of Crime and Anti-Money Laundering Act* No. 9 of 2009 contained in the 1st Respondent’s letter dated 18th June, 2024 and letter dated 12th July, 2024 is an abuse of State powers of public prosecution.
- b. A declaration be and is hereby issued declaring that the 1st respondent’s decision contained in the 1st respondent’s letter dated 18th June, 2024 and letter dated 12th July, 2024 ordering the 2nd petitioner to pay the interested party a sum of KShs. 11,900,000/- (Kenya Shillings Eleven Million Nine Hundred Thousand Only) and the 1st respondent’s threats directed at the 2nd petitioner to charge the 2nd petitioner with the offence of obtaining money by false pretence contrary to section 313 of the *Penal Code*, Cap. 63 and the offence of money laundering contrary to Section 4(a) as read with section 16 (1) (a) of the *Proceeds of Crime and Anti-Money Laundering Act* No. 9 of 2009 should the 2nd petitioner not pay the interested party the said sum of money is ultra vires and an abuse of the 1st respondent’s State powers of prosecution conferred upon him under the provisions of article 157 of the *Constitution* and the said decision is therefore unconstitutional, unlawful, null and void ab initio.



- c. An Order of certiorari to remove and bring to this Honourable Court and to quash the 1st respondent's decision to charge and prosecute the 1st and 2nd petitioners with the offence of obtaining money by false pretence contrary to Section 313 of the Penal Code, Cap. 63 and the offence of money laundering contrary to section 4 (a) as read with Section 16 (1) (a) of the Proceeds of Crime and Anti-Money Laundering Act No. 9 of 2009 contained in the 1st respondent's letter dated 18th June 2024 and letter dated 12 July, 2024 be and is hereby issued.
- d. An Order of certiorari to remove and bring to this Honourable Court and to quash the 1st respondent's decision contained in its letter dated 18th June 2024 and letter dated 12 July 2024 directing the 2nd petitioner to pay the interested party a sum of Kshs. 11,900,000/- (Kenya Shillings Eleven Million Nine Hundred Thousand Only) be and is hereby issued.
- e. An Order of certiorari to remove and bring to this Honourable Court and to quash the 1st respondent's decision contained in its letter dated 18 June 2024 and letter dated 12th July 2024 directing the 4th respondent to undertake further criminal investigation against the 1st and 2nd petitioners on the offence of money laundering contrary to Section 4 (a) as read with Section 16 (1) (a) of the Proceeds of Crime and Anti-Money Laundering Act No. 9 of 2009 or any other or further criminal investigation in connection with the contract entered by the 1st petitioner and the interested party vide letter of offer dated 12th October, 2021 be and is hereby issued.
- f. An order of prohibition be and is hereby issued prohibiting the 1st, 2nd, 3rd, and 4th respondents and any of their officers from arresting or detaining the 1st and 2nd petitioners or presenting the 1st and 2nd petitioners in court in connection with the offence of obtaining money by false pretence contrary to Section 313 of the Penal Code, Cap. 63 or the offence of money laundering contrary to Section 4 (a) as read with Section 16 (1) (a) of the Proceeds of Crime and Anti-Money Laundering Act No. 9 of 2009 contained in the 1st respondent's letter dated 18 June 2024 and letter dated 12th July 2024 based on the contract entered by the 1st petitioner and the interested party vide letter of offer dated 12th October 2021.
- g. An Order of prohibition be and is hereby issued prohibiting the 1st respondent and any of his officers from charging, arraigning or commencing criminal prosecution in court against the 1st and 2nd petitioners in connection with the offence of obtaining money by false pretence contrary to Section 313 of the Penal Code, Cap. 63 or the offence of money laundering contrary to Section 4 (a) as read with Section 16 (1) (a) of the Proceeds of Crime and Anti-Money Laundering Act No. 9 of 2009 contained in the 1st respondent's letter dated 18 June, 2024 and letter dated 12 July, 2024 based on the contract entered by the 1st petitioner and the interested party vide letter of offer dated 12 October, 2021.
- h. The petitioners shall have costs of the petition. It is so ordered.

DATED, SIGNED AND DELIVERED ON 28 MARCH 2025

NGAAH JAIRUS

JUDGE

