



Republic v Director of Public Prosecutions & another; Muiyuro & 10 others (Exparte Applicants); Realty Brokers Limited (Interested Party) (Judicial Review Application E070 of 2024) [2025] KEHC 7445 (KLR) (Judicial Review) (28 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7445 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E070 OF 2024**

RE ABURILI, J

MAY 28, 2025

BETWEEN

REPUBLIC APPLICANT

AND

**DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT
THE CHIEF MAGISTRATES' COURT, (MILIMANI) LAW
COURTS 2ND RESPONDENT**

AND

**DIANA NJERI MUIYURO EXPARTE APPLICANT
JAMES MBOTE GICHEHA EXPARTE APPLICANT
JOSEPH NJOROGE KIMANI EXPARTE APPLICANT
JOSEPH GICHOHI KINYANJUI EXPARTE APPLICANT
GLADYS WAMBUI MWANGI EXPARTE APPLICANT
MOHAMMED JIMALE ABDILLE EXPARTE APPLICANT
CHARLES WAITHAKA EXPARTE APPLICANT
GEORGE NDUNGU MUMBI EXPARTE APPLICANT
ANDREW ASERI KIRUNGU EXPARTE APPLICANT
JACOB CAT'WRIGHT OWINO EXPARTE APPLICANT
MWADI WOMEN ENTREPRENEURS LIMITED EXPARTE APPLICANT**

AND



JUDGMENT

1. On 3rd April 2024, the Applicants were granted leave to file these Judicial Review proceedings. The substantive Notice of Motion is dated 10th April 2024, brought under Order 53 Rules 3(1) and (3) and 4(1) of the Civil Procedure Rules, 2010, Section 3A of the Civil Procedure Act and Sections 8 and 9 of the Law Reform Act.
2. The applicants seek an order of Certiorari quashing the decision of the 1st Respondent herein, Director of Public Prosecutions to charge the Ex Parte Applicants with the offences of conspiracy to defraud, making false document, obtaining registration by false pretences and abuse of office. The charges are before the Nairobi Chief Magistrate's Court, Criminal Case No, E271 OF 2024 (R VS Diana Njeri Muiyuro & 9 others) before the 2nd Respondent.
3. The Applicants also seeks an order of prohibition against the Respondents herein from proceeding with the intended prosecution in Nairobi Criminal Case No E271 of 2024 (R vs. Diana Njeri Muiyuro & 9 others).
4. The applicants further pray for costs of and incidental to these proceedings to be borne by the 1st Respondent and also for any such other, further, or incidental orders or directions as the Honourable Court may deem just and expedient in the circumstances.
5. The grounds upon which the judicial review orders are sought are that the 11th Ex parte Applicant is the registered proprietor of land comprising L.R NO 209/10211 I.R no 231055/1 as evidenced by the certificate of official search attached to the affidavit verifying the facts of the application.
6. A brief background of the events leading to these proceedings as deposed by Ex parte Applicants is that on 6th February 2019, the 11th Ex Parte Applicant Mwadi Women Entrepreneurs Limited was allocated L.R No 209/10211 vide letter of allotment dated 6th February 2019. As a condition of acceptance of the said allotment, the 11th Ex parte Applicant paid the standard premium of Kshs. 3,801,150/=.
7. That subsequently, the survey process was undertaken and Deed Plan No. 446961 was issued. Thereafter, the 11th Ex parte Applicant was issued with the certificate of title and as such, the 11th Ex Parte Applicant has been paying Land Rates.
8. The Ex parte Applicants state that by the Judgement of Hon D.W Mburu in CMCC MISC Application No. E010 OF 2022 (O.S) Mwadi Women Entrepreneurs Ltd vs Al -Haiee Investment Limited & Others, the 11th Ex parte applicant's ownership was confirmed.
9. According to the Applicants, the Interested Party who is the complainant in the intended criminal proceedings was dissatisfied with the judgement and filed a review which was unmerited and decided to lodge a fresh suit in the Environment and Land Court ELCLC E009 OF 2023; Realty Brokers Limited vs Mwadi entrepreneurs & others under certificate of urgency and was issued with a temporary injunction staying the implementation and execution of subordinate court judgement.
10. That on 12th March, 2024, the 1st and 2nd Applicants herein were arrested without being summoned to appear by the DCI being summoned to appear by the DCI where they were interrogated and got arrested for a suspected offence of conspiracy to defraud contrary to section 317 of The Penal Code, making a false document contrary to section 347(d)(1) of The Penal Code, obtaining registration by



false pretences contrary to section 320 of The [Penal Code](#) and abuse of office contrary to section 10(1) of The [Penal Code](#).

11. The Applicants argue that after incessant pleas and request they were released on a police cash bail and were told to appear to plead on 13th March 2024 in Nairobi Criminal Case No. E271 of 2024 (R vs. Diana Njeri Muiyuro & 9 others). They further state that the other Applicants were served with summons via their WhatsApp to appear in court for plea on 13th March 2024. The plea taking was however, differed to 4th April 2024. The Applicants confirm that they managed to get a copy of the charge sheet though the same had not been formally handed to them as the plea was differed.
12. The Ex parte Applicant's contend that the impugned decision infringes on their fundamental rights and freedoms under inter alia Articles 27, 40, 47, 48 49 and 50 of [the Constitution](#) of Kenya, 2010 and sections 24, 25, 26, 79 and 80 of the [Land Registration Act](#), 2012.
13. It is the Applicants' case that it is unreasonable to charge them for the offences of Conspiracy to Defraud in relation to a registration of Title of Deed for land known as L.R NO 209/10211, which is the subject of an ownership contestation in ELCLC E009 OF 2023 Reality Brokers Limited vs Mwadi entrepreneurs & others.
14. According to the Applicants, the intended decision to charge them for the said offences is a perfect case of abuse of power and discretion and is in total disregard to the interest of the administration of justice by the 1st and 2nd Respondents as set out under Articles 157 and 244 of [the Constitution](#) of Kenya, 2010, respectively.
15. The Ex parte Applicants also filed a Supplementary Affidavit sworn on 26th June 2024 by the 6th Ex parte Applicant, in a rejoinder to the replying affidavit filed by the respondents. In the affidavit, it is deposed that in the said affidavit PC Antony Mwaura does not address the issue of the existence of a Judgment of the Lower Court.
16. It is the Ex parte Applicants' case that on instructions of the DCI, on 2nd August 2023, PC Mwaura the Investigating officer and officers at the Lands Fraud Unit proceeded to the impugned land and arrested the 11th Applicant's guards essentially removing them from the property and aided the Interested Party to take possession. The 11th Ex parte Applicant is said to have protested the move in a protest letter to the Inspector General of Police, but that to date, the DCI has never addressed this issue of direct involvement and conflict.
17. The Ex parte Applicants depose further that the DCI has sought to take a position to charge them without interrogating the Interested Party's root of ownership of the land in question. Further, that on 24th April, 2024, the Interested Party paid Kshs 8,000,000/= as stamp duty to seek to validate its title as being legitimate.
18. It is deposed that it is now evident more than ever that the Interested Party has no title within the meaning of the [Land Registration Act](#) having purported to obtain title on 1st April, 2019 and paying stamp duty on 24th April, 2024, 6 years after the fact and in the subsistence of these proceedings.
19. According to the Ex parte Applicants, PC Mwaura has not produced supporting documents in the form of wire transfers or acknowledgment receipts from the vendor and this is a testament of the vagueness in the investigations aimed at sanitizing the interested party's fraudulent title document.
20. It is the 6th Ex parte Applicant's deposition that the 10th Ex parte Applicant on 5th April, 2024 sought a review of the 1st Respondent's decision to charge and a further review was sought by the 10th Ex parte Applicant on 19th June, 2024 in view of the purported stamp duty payment. Subsequently, that the 1st



Respondent in its letter of 24th June, 2024 is said to have acceded to the request and directed the DCI to carry out further investigations.

21. The Ex parte Applicants further aver in their depositions that the investigating officer purported to only serve summons to the 10th Ex-Parte Applicant after the Criminal Proceedings had been filed. Further, that 10th Ex Parte Applicant was never called through the Chief Land Registrar or personally to record a statement.
22. It is deposed that the valuation of the parcel of land was never undertaken in blatant disregard of Section 10A of the Stamp Duty Act Cap 480, which therefore follows that stamp duty was never remitted at the time that the alleged transfer dated 12th March 2019 was allegedly registered. Further, that there are two transfer instruments one that was provided to the investigating officer and the other that was filed before the Environment and Land Court by the interested party.
23. The Applicants also maintain that without payment of stamp duty, the illegal registration of the purported transfer, which is not known, was invalidated as per Regulation 16 of the Land Registration Act No. 3 of 2012. Additionally, that the invalidated registration is subject to the provisions of Section 79(2) where the Land Registrar has powers to rectify an entry where the document has been obtained by fraud which is the case. They also assert that at the time that the 10th Ex Parte Applicant cancelled the registration, stamp duty had not been remitted as required by the law.
24. It is also averred in deposition that Bona Vacantia as is referred to by PC Mwaura does not serve the purpose of paving way to begin the process of registration. Rather, that it only reverts land back to the government.
25. According to the applicants, the corrigendum gazette notice relied upon by the investigating officer to reverse the NLC's earlier findings is unlawful. They cite Regulation 29(3) of the National Land Commission (Review of Grants and Disposition of Public Land) Regulations, which limit corrigenda to the correction of typographical errors and prohibits their use to alter substantive findings or to confer ownership.
26. They also invoke Regulation 30 of the same Regulations, which requires that any challenge to the National Land Commission findings be made by lodging an appeal within 14 days. The applicants maintain that there is no use of terms such as "protest" or "objection" in this context. They further assert that Eco Bank, being the registered proprietor and the subject of National Lands Commission's investigations, was the proper party to lodge any appeal not Realty Brokers Ltd and that Eco Bank initially disclaimed knowledge of the land, a position it has since reversed without explanation.
27. The applicants also state that the investigating officer failed to clarify whether the original allotment was ever cancelled before the corrigendum was published, which they say implies that the allotment remains valid. They also contend that the officer relied on legally unsupported assumptions, including an alleged timeline for making an entry/registration of a gazette notice on a title or issuance of a certificate of title. They argue that no law prescribes a time limit for such registration and invite the officer to produce any legal authority to that effect.
28. Moreover, the applicants allege selective and biased conduct by the investigating officer, who chose to charge officers from the State Department of Lands while excluding those from the NLC, even though the NLC issued the relevant gazette notices. They question the authenticity of documents relied upon in the investigations, noting that the said documents were not verified by any public body or by Eco Bank and were provided solely by the complainant.



29. The applicants assert that the legality of the land allocation and any claims of fraud fall within the jurisdiction of the Environment and Land Court, which is the only court competent to determine such issues and recommend further legal action. They rely on Article 157(11) of *the Constitution* to support their argument that the court has the power to supervise prosecutorial discretion and prevent abuse of legal process. In their view, the investigations and prosecution mounted against them are malicious, politically motivated and not in the public interest. They assert that these proceedings are being used to oppress them and to advance the interests of a complainant who has committed illegal acts without consequence.
30. The Applicants also filed written submissions dated 16th May 2024 to support their averments and depositions, relying on various court decisions.
31. In their submissions, they rely on the case of Judicial Review No. E062 of 2023 Fredrick Kimemia Kimani vs. DPP & Others 2024 eKLR where the court held that a party seeking judicial review must demonstrate and prove that the prosecution and those charged with the responsibility of making the decisions to charge acted in an unreasonable manner.
32. It is also their submission that as was held in the case of Meixuer & Another vs Attorney General (205)2 KLR 189 the role of judicial review is to consider the decision-making process.
33. They also rely on the case of Republic v Dakes (1986) ISCR 103, where the Supreme Court of Canada established a constitutional threshold for assessing the legality of offences and arrests in relation to Charter rights. The Court held that an offence must be materially connected to its objective and must not be arbitrary, unfair or based on irrational considerations. Secondly that even if there is a rational connection to a legitimate objective, the offence must impair rights or freedoms as minimally as possible. Thirdly, that there must be proportionality between the limiting effects of the offence on the right or freedom and the importance of the objective being pursued.
34. The Ex Applicants further rely on the case of Keroche Industries Ltd v Kenya Revenue Authority & 5 Others (2007) 2 KLR, where the court emphasized the importance of the rule of law and procedural safeguards in the exercise of state power. They submit that to arrest, detain or investigate must be carried out within constitutionally permissible parameters.
35. They rely on the cases of Chrispine Otieno Caleb vs. Attorney General [2014] eKLR where the court was guided by the findings of the judges of the East Africa Court of Appeal in Mbowa vs East Mengo District Administration [1972] EA 352 and the case of Patrick Nyamuke Etori vs National Police Service Commission & 2 Others [2019] eKLR and held that to establish a claim for malicious prosecution, one must demonstrate that the criminal proceedings were initiated without any lawful justification.
36. The Ex pare Applicants further submit that there can be no justification for the criminal investigations and prosecution on a matter of a lesser magnitude than that pursued through civil proceedings. They rely on the cases of Jared Benson Kangwana v Attorney General Misc. Application Nos 446 of 1996, Vincent Kibiego Maina v the Attorney General Misc. Application Nos 839 and 1085 of 1999 (UR) and Samuel Kamau Macharia & Another V Attorney General & Another, Misc. Application No. 356 of 2006 (UR) for the proposition that a civil matter cannot be the foundation of a criminal charge.
37. The Applicants submit that while they agree that it is now settled law that the existence of a civil suit is no bar to criminal proceedings or investigations, the commencement of the criminal proceedings in this case is meant to force them to submit to the civil claim.



38. Reliance is also placed on the case of Republic v Director of Public Prosecutions ex parte Praxidis Namoni Saisi (2016) eKLR and Bitange Ndemo v Director Public Prosecutions & 4 others (2016) eKLR, where the courts held that failing to consider available information and exculpatory evidence before prosecution may indicate malice and abuse of process.
39. They also rely on the cases of Peter Ngunjiri Maina v DPP & 2 Others (2017) eKLR, and R v DPP & 2 Others Ex parte Nomoni Saisi (2016) eKLR, where the courts outlined instances warranting review of the DPP's discretion, including abuse of power, acting for improper purposes, irrationality, and breach of fairness.
40. It is also their submission that instituting criminal charges in a matter that is essentially civil in nature, rather than pursuing civil remedies, violates the right to a fair hearing under Article 50 of *the Constitution*. The Applicants rely on Republic v Principal Kadhi, Mombasa Ex-parties Alibhai Adamali Dar & 2 others; Murtaza Turabali Patel (Interested Party) [20221 eKLR, to support the use of prohibition orders where jurisdiction is exceeded.
41. Reliance is also placed on the case of Njuguna S. Ndung'u v Ethics & Anticorruption Commission (EACC) & 3 Others (2018) eKLR, where the court recognized that prosecution motivated by ulterior purposes justifies scrutiny. As such, the Applicants contend that the intended prosecution is malicious, irrational, and contrary to the *Fair Administrative Action Act*.

The 1st Respondent's case

42. The 1st Respondent filed a Replying Affidavit sworn on 29th May 2024 by PC Anthony Mwaura one of the investigating officers in Milimani CMCR No.E271 of 2024.
43. In the affidavit, PC Mwaura deposes in opposition to the application, which alleges violation of the Applicants' rights under Articles 27, 40, 47, 48, 49, 50, 157, and 244 of *the Constitution* following their arrest and arraignment in Republic v Diana Njeri Muiyuro & 9 Others, Milimani Criminal Case No. E271 of 2024.
44. The deponent states that on 1st and 7th February 2022, the Directorate of Criminal Investigations (DCI), Land Fraud Investigations Unit, received complaints from Diro Advocates and Bill Simba & Associates on behalf of Mr. James Mugoya Isabirye and Mwadi Women Entrepreneurs Limited, each claiming ownership of LR No. 209/10211 but under different IR Numbers 69353 and 231055 respectively.
45. PC Mwaura deposes that investigations conducted revealed that James Mugoya Isabirye, Director of Realty Brokers Limited and an Interested Party in these proceedings, purchased the land from East African Building Society and that the transfer was delayed due to a missing Deed File at Ardhi House, during which period, the Society transitioned into East African Building Society Bank and later into Eco Bank Kenya Limited. The latter later executed Deeds of Indemnity to facilitate the transfer, which was effected on 12th March 2019, registering Realty Brokers Limited as the owner of the impugned parcel of land.
46. He also deposes that when the Applicants were invited to demonstrate their ownership, they stated that they had raised concerns with the National Land Commission on 14th April and 28th June 2016 regarding a fake title to the same parcel.
47. That on 17th July 2017, NLC published Gazette Notice No. 6862, declaring the land parcel a bona vacantia- "allocation was to a legal person who cannot be found" and that based on this declaration, the Applicants initiated steps to have the parcel registered in favour of the 11th Applicant and were



issued with an allotment letter dated 6th February 2019, followed by a lease and certificate of title LR. No.209/10211 IR No. 231055.

48. However, that Realty Brokers Limited challenged the Gazette Notice, prompting NLC to publish a Corrigendum Gazette Notice No. 1013 on 13th January 2018, which reaffirmed Realty Brokers Limited's ownership. That despite this, the 9th Applicant went ahead to issue a lease to the 11th Applicant on 2nd June 2021, and the 10th Applicant registered Gazette Notice No.6862 on 16th May 2019, more than a year after the corrigendum.
49. It is deposed in contention that one S.K. Mburugu, a former Land Administration Officer at NLC, denied authoring the allotment letter dated 6th February 2019 and upon forensic examination of the said letter, it became apparent that the letter was a forgery.
50. That following conclusion of investigations, the matter was forwarded to the 1st Respondent on 30th January 2024, with recommendations that the applicants be charged and that on 19th February 2024, the 1st Respondent directed that 1st to 7th Applicants be charged with conspiracy to defraud, forgery, and obtaining registration by false pretenses, and that 9th and 10th Applicants be charged with conspiracy and abuse of office.
51. That the charges were filed in Republic v Diana Njeri Muiyuro & 9 Others, Criminal Case No. E271 of 2024, and pleas by the 1st, 2nd, 3rd, 4th, 5th and 8th were taken on 17th April 2024 while the remaining Applicants were expected to take plea on 3rd June 2024.
52. The Respondents contend that the investigations and prosecution were carried out lawfully and within the powers conferred by law. That the Applicants were afforded an opportunity to present their side and did so by recording statements. Further, that the issues raised by the Applicants are factual and should be determined by the trial court.
53. The Respondents further argue that there is no evidence of discrimination, violation of constitutional rights, bad faith, or procedural impropriety. Further, that the application amounts to an abuse of court process and an attempt to use the High Court to subvert the criminal justice process. It is also the 1st Respondent's deposition that the issues in dispute are within the jurisdiction of the criminal trial court and do not justify interference by the High Court.
54. It is also contended that the application seeks to use the court to conduct a pretrial assessment of evidence, which is inappropriate and that the High Court should not interfere in the absence of exceptional circumstances such as bad faith, dishonesty, or abuse of process. Further, that mechanisms exist within the criminal procedure and *the Constitution* to protect the Applicants' rights at trial.
55. The Respondents conclude that the Applicants have not demonstrated that they are unlikely to receive a fair trial or that the trial would be conducted otherwise than in accordance with the law. The Respondents further state that the application is filed in bad faith, misconceived, and intended to defeat the course of justice. The Respondents pray that the application herein be dismissed with costs and that Republic v Diana Njeri Muiyuro & 9 Others, Criminal Case No. E271 of 2024, be allowed to proceed to its logical conclusion.
56. The 1st Respondent also filed written submissions dated 6th June 2024.
57. The Respondent submits that the Applicants' arraignment was lawful and it followed due process. Also, that under Article 157(6) of *the Constitution*, the Director of Public Prosecutions (DPP) is mandated to institute and undertake criminal proceedings before any court except a court martial.



58. The Respondent relies on the case of Pauline Raget Adhiambo Agot v DPP & 5 Others (2010) Petition No. 446 of 2015, where the court is said to have affirmed that the ODPP is free from interference and that only the DPP directs the police to investigate crime.
59. Reliance is also placed in the case of Republic v The Commissioner of Police & Director of Public Prosecution Ex parte Michael Monari & Another Misc. Application No. 68 of 2011, where the court emphasized that police must investigate complaints once made and only need reasonable suspicion to prefer charges.
60. The Respondents also referred to Article 157(4) of *the constitution* which empowers the DPP to direct the Inspector-General of Police to investigate allegations of criminal conduct and Article 157(11) which requires the DPP to consider the public interest, administration of justice and prevent abuse of legal process.
61. According to the 1st Respondent, the arraignment of the Petitioners followed due process, the DPP was presented with a full investigative file and made a considered decision to charge, consistent with *the Constitution*, ODPP Act 2012, and the Decision to Charge Guidelines (2019). Further, that investigations by the DCI established reasonable suspicion, justifying the referral to the DPP for review and prosecution directions, consistent with Michael Monari case (supra).
62. The 1st Respondent also relies on the case of Cascade Company Limited v Kenya Association of Music Production (KAMP) & Others Petition No. 7 of 2014, where the court held that as long as the enabling legislation is constitutional, actions by the ODPP and DCI are lawful unless shown to be ultra vires or in breach of their statutory mandate.
63. The 1st Respondent also relies on Section 193A of the *Criminal Procedure Code* which provides that civil proceedings may run concurrently with criminal matters, and the existence of civil proceedings is not a ground to stay criminal processes.
64. The Applicants it is submitted, have not shown that the DPP acted contrary to public interest, administration of justice, or failed to prevent abuse of process.
65. It is also submitted that while the Applicants have the right to not face unwarranted criminal proceedings, the DPP has a public duty to prosecute offences and to ensure accountability. This balance, according to the 1st Respondent, is recognized by the law and courts. This principle, it is submitted was underscored in Maina *§ 4 Others v Director of Public Prosecutions § 4 Others (Constitutional Petition E106 § 160 of 2021)* KEHC 15 (KLR).
66. Regarding any alleged violation of the Applicants' constitutional rights in initiating charges, the 1st Respondent submits that the principles in William and Others v Spautz [1993] 2 LRC 659 highlight that courts should exercise their jurisdiction to try criminal charges unless justice demands otherwise.
67. It is also submitted that it is an established principle that a party alleging breach of fundamental rights must clearly state the precise rights alleged to be infringed and provide evidence as was held by the court in the case of in Leonard Otieno v Airtel Kenya Limited [2018] eKLR, where the court is further said to have reiterated that decisions on constitutional violations must be based on clear evidence, not mere assertions or hypotheses. This was also the position in the case of Anarita Karimi Njeru v Republic (No.1) [1979] KLR 154 and in Mumo Matemo v Trusted Society of Human Rights Alliance [2014] eKLR.
68. In conclusion, the 1st Respondent submits that fundamental rights are not absolute and must be balanced against the rights of others and the public interest. It is submitted that the Applicants have



not clearly indicated which rights have been breached beyond listing constitutional articles. Also, that they have not demonstrated any violation warranting the court to exercise its powers to grant the orders sought.

The Interested Party's Response

69. The Interested Party filed a Replying Affidavit sworn on 12th July 2024 by James Isabirye Mugoya and written submissions dated 8th July 2024.
70. It is the Interested Party's case that contrary to the Applicants' assertions in Paragraph 4 of the Verifying Affidavit dated 2nd April 2024 and Paragraph 1 of the grounds set out in the Statutory Statement dated 2nd April 2024, none of the Applicants are registered as owners of the Parcel of Land Number L.R. 209/10211 IR 69353.
71. The Interested Party deposes that on 8th February 2006, they entered into an Agreement for Sale with Ecobank Limited for the suit property, which was later formalized by a Deed of Indemnity in 2018 to address a lost land register. Subsequently, Ecobank transferred full ownership rights to the Interested Party on 12th March 2019, and the Interested Party became the registered proprietor, holding a valid title to the property.
72. The Interested Party states that it intended to develop the land and applied for various approvals. That in February 2022, the 11th Applicant lodged a complaint with the Directorate of Criminal Investigations (DCI), alleging illegal occupation by the Interested Party. The Interested Party also lodged complaints regarding interference by the Applicants. It is deposed that there have been various Gazette Notices affirming its ownership, exposing attempts by the Applicants to fraudulently alter title documents.
73. The Interested Party asserts that together with the 11th Ex parte Applicant, they were summoned by the Chief Land Registrar on 23rd June 2022 to verify conflicting title documents, but the Applicants failed to appear or to present their case. That following the verification, the Chief Land Registrar cancelled the Applicants' purported title due to forgery suspicions and invited the DCI to investigate further. This cancellation was then formalized under Section 79(4) of the Land Registration Act through a Gazette Notice No.11288 of 23rd September 2022.
74. According to the Interested Party, the National Land Commission had previously regularized the property grant in favour of the Interested Party.
75. It is the Interested Party's case that the 11th Ex parte Applicant initiated civil proceedings being Nairobi Chief Magistrate's Court Miscellaneous Application Number E010 of 2022 Mwadi Women Entrepreneurs Ltd Versus Al-Hailee Investment Ltd & 2 Others, to claim ownership but failed to join the Interested Party, the lawful registered owner.
76. The Interested Party further challenges the Magistrate Court's jurisdiction due to the property's value exceeding the court's pecuniary jurisdiction. It is its case that this was confirmed in subsequent rulings, including those by the Environment and Land Court. That despite the jurisdictional defects, the lower court's judgment remains enforceable.
77. It is further submitted that the Interested Party only discovered the Applicants' fraudulent actions after the lower court's judgment had already been delivered. The Interested Party argues that dismissing the criminal case on the basis of a pending civil case is insufficient. It is also asserted that the Applicants must provide compelling evidence of abuse or threat to their rights, which they have not done.



According to the Interested Party, the allegations of unreasonableness, abuse of power and bad faith are unsubstantiated.

78. Further, that there is no statutory obligation for the DPP to consult the Applicants before prosecution. Moreover, that concurrent criminal and civil proceedings are permissible, as they address distinct issues and require different standards of proof in that whereas the criminal case concerns fraud culpability, the civil case determines ownership.
79. In its submissions, it is argued by the interested party that the Ex Parte Applicants' reliance on the judgment in Nairobi Chief Magistrate's Court Misc. Application No. E010 of 2022 – Mwadi Women Entrepreneurs Ltd v Al-Hailee Investment Ltd & 2 Others is fundamentally misplaced as the said judgment, which declared the 11th Ex Parte Applicant as the owner of land parcel L.R. No. 209/10211, IR 69353, was obtained without joining the Interested Party, the actual registered proprietor. This omission, it is contended, was deliberate and calculated to unlawfully dispossess the Interested Party of its title to land.
80. The Interested Party relies on the Court of Appeal decision in Phoenix of East Africa Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR, where it was held that a court must confirm jurisdiction before proceeding with a matter, and that any action taken without jurisdiction is a nullity that must be set aside ex debito justitiae. Similarly, reliance is placed on the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1, where the Court emphasized that jurisdiction is everything, and proceedings conducted without it are void.
81. It is contended that the Ex Parte Applicants failed to disclose to this Court that the magistrate's judgment they rely on has been invalidated for want of jurisdiction. This material non-disclosure undermines their entire case. Moreover, that judicial review is not concerned with the merits of a decision but only the legality of the process, as held in Meixuer & Another v Attorney General (2005) 2 KLR 189, where the Court stated that judicial review deals with whether decisions were made within the law and due process, not whether they were right or wrong on the merits.
82. The Interested Party submits that the grounds on which a court may interfere with prosecutorial discretion were laid out in Peter Ngunjiri Maina v Director of Public Prosecutions & 2 Others [2017] eKLR, Republic v Director of Public Prosecutions & 2 Others ex parte Nomoni Saisi [2016] eKLR, and recently affirmed in Kimani v Director of Public Prosecutions & 3 Others, Judicial Review Application No. E062 of 2023 [2024] KEHC 3269 (KLR) (Judicial Review) (3 April 2024).
83. These grounds are said to include abuse of discretion, acting for an improper purpose, breach of fairness, failure to act reasonably, frustration of statutory purpose, fettering of discretion, and irrationality. The Interested Party argues that the Ex Parte Applicants have not established any of these grounds.
84. Further submission by the Interested Party is that it was, in fact, the 11th Ex Parte Applicant who initially lodged a complaint with the DCI on 7th February 2022, alleging illegal occupation by the Interested Party and as such, it is illogical for the Applicants to claim that the criminal proceedings as initiated against them are maliciously instigated by the Interested Party.
85. On the issue of parallel criminal and civil proceedings, the Interested Party cites Section 193A of the *Criminal Procedure Code*, which permits such concurrent processes unless the criminal process is being used to achieve an ulterior motive. It relies on the case of Kimani v Director of Public Prosecutions & 3 Others supra to support this position.



86. In conclusion, the Interested Party submits that the Ex Parte Applicants have not demonstrated any abuse of prosecutorial discretion, illegality, irrationality, or procedural unfairness. They therefore urge the Court to dismiss the application for judicial review for being frivolous, vexatious, and an abuse of the court process, with costs to the Respondents and the Interested Party.

Analysis and Determination

87. I have carefully considered the pleadings, affidavits, written submissions, authorities cited by the respective parties and the applicable legal framework. The main issue for determination is whether the Applicants are entitled to the reliefs sought. The court will endeavour to resolve various questions that have been raised in this matter.

88. The Ex Parte Applicants herein, who are the accused persons in Nairobi Chief Magistrate's Criminal Case No. E271 of 2024, seek orders of certiorari to quash the said criminal proceedings and an order of prohibition to bar their continued prosecution. They contend that their prosecution is an abuse of court process, amounts to harassment, and violates their constitutional rights under Articles 47 and 50 of *the Constitution*.

89. It is their case that the impugned prosecution arises from alleged forgery and fraudulent dealings in respect of Land Parcel LR No. 209/10211, Nairobi. The Applicants assert that the charges are malicious and unsustainable in light of a prior civil judgment rendered in their favour by the Magistrates Court in CMCC Misc Application No. E010 OF 2022 (O.S) Mwadi Women Entrepreneurs Ltd vs. Al-Haiee Investment Limited & Others, where the court is said to have declared the 11th Ex parte Applicant as the registered owner of the subject land.

90. The 1st Respondent opposes the application and maintains that the charges were preferred following independent investigations and upon satisfaction that there was sufficient evidence to sustain a prosecution. The Interested Party supports the Respondents' position and argues that the existence of a civil judgment does not bar a criminal inquiry into how the title was acquired. It further argues that the Applicants were given an opportunity to appear and be heard before the Chief Land Registrar on 23rd June 2022 but they failed to show up and that neither did they send any representatives.

91. The first question is what is the scope of judicial review? The court in the case of Kapa Oil Refineries v Kenya Revenue Authority [2019] eKLR stated that:

“Judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. See the Commissioner of Lands –versus Hotel Kunste [1997] eKLR. The purpose of JR is to ensure that the individual is given fair treatment by the Authority to which he has been subjected. JR as a remedy is available, in appropriate cases, even where there are alternative legal or equitable remedies. See David Mugo t/a Manyatta Auctioneers –versus Republic – Civil Appeal No. 265 of 1997 (UR). JR being a discretionary remedy, it demands that whoever seeks to avail itself/himself/herself of this remedy has to act with candour or virtue and temperance. See Zakayo Michubu Kibwange –versus Lydia Kagina Japheth and 2 others [2014] eKLR. JR as a remedy may also be invoked where the issues in controversy as between the parties are contested. See Zakayo Michubu Kibwange case (Supra). The remedy of judicial review is only available where an issue of a public law nature is involved. Further, that a person seeking mandamus must show that he has a legal right to the performance of a legal duty by a party against whom the mandamus order is sought or alternatively, that he has a substantially personal interest and that the duty must not be permissive but imperative and must be of a public nature



rather than of a private nature. See Prabhulal Gulabuland Shah –versus Attorney General & Erastus Gathoni Mlano, Civil Appeal No. 24 of (1985) (UR). Following the promulgation of the Kenya Constitution, 2010, judicial review is available as a relief to a claim of violation of the rights and fundamental freedoms guaranteed in *the Constitution* of Kenya 2010. See Child Welfare Society of Kenya –versus- Republic and 2 others, *Exparte Child in Family Forces Kenya* [2017] eKLR.”

92. From the above, it is clear that the Court’s role is to supervise the exercise of public power to ensure that it is lawful, rational, and procedurally fair. This position was also reiterated in the case of *Republic v Director of Pensions, the Pensions Department, the National Treasury of the Republic of Kenya; Gewa & another (Exparte); Ouma (Interested Party)* [2024] KEHC 7652 (KLR).
93. In the instant, case the Applicants have invoked this court’s supervisory jurisdiction under Article 165(6) of *the Constitution*. The traditional grounds upon which a judicial review court may intervene to disturb decisions by administrative bodies, tribunals or subordinate courts were enunciated in *Council of Civil Service Unions versus Minister for the Civil Service* (1985) A.C. 374,410. In this case Lord Diplock outlined three heads which he referred to as “the grounds upon which administrative action is subject to control by judicial review”.
94. These grounds are illegality, irrationality and procedural impropriety which the learned judge defined as follows:

“My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call “illegality,” the second “irrationality” and the third “procedural impropriety.” That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of “proportionality” which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

By “illegality” as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By “irrationality” I mean what can by now be succinctly referred to as “Wednesbury unreasonableness” (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court’s exercise of this role, resort I think is today no longer needed to Viscount Radcliffe’s ingenious explanation in *Edwards v. Bairstow* [1956] A.C. 14 of irrationality as a ground for a court’s reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law



by the decision-maker. “Irrationality” by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as “procedural impropriety” rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all.”

95. The Applicants challenge the 1st Respondent’s decision to lodge criminal proceedings against them. Their case is that there is already an existing court order in CMCC Misc Application No.E010 OF 2022 (O.S) Mwadi Women Entrepreneurs Ltd vs. Al-Haiee Investment Limited & Others which order has been challenged before the Environment and Land Court and a temporary injunction staying the implementation and execution of the said order issued.
96. The Applicants also argue that the lower court Judgement declared that the 11th Ex parte Applicant was the bona fide registered owner of the subject land. It is their case that the 1st Respondent’s decision to charge them is malicious. They also argue that the issues that the 1st Respondent intends to determine are issues within the jurisdiction of the Environment and Land Court.
97. It is also their case that they were arrested without being summoned to appear by the DCI. They argue that the impugned decision infringes upon their fundamental rights and freedoms under Article 27,40,47,48,49 and 50 of *the Constitution*.
98. Courts have on several occasions addressed the discretion of courts to quash criminal proceedings. The Court of Appeal in Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others [2018] eKLR citing the Supreme Court of India decision in State of Maharashtra & Others v. Arun Gulab & Others, Criminal Appeal No. 590 of 2007, where the Court 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.”



99. In *Bernard Mwikya Mulinge v Director of Public Prosecutions & 3 others* [2019] eKLR, the High Court, Odunga J (as he then was) expressed himself as follows: -

“As has been held time and time again, the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions (DPP) to investigate and undertake prosecution in the exercise of the discretion conferred upon that once under Article 157 of *the Constitution*. The mere fact therefore that the intended or ongoing criminal proceedings are in all likelihood bound to fail, is not ipso facto a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. An applicant who alleges that he or she has a good defence in the criminal process ought to ventilate that defence before the trial court and ought not to invoke the same to seek the halting of criminal proceedings undertaken bona fides since judicial review court is not the correct forum where the defences available in a criminal case ought to be minutely examined and a determination made thereon...”

100. The Court in *Kipoki Oreu Tasur vs. Inspector General of Police & 5 Others* [2014] eKLR stated that:

“The criminal justice system is a critical pillar of our society. It is underpinned by *the Constitution*, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior Courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated...”

101. In *Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another* [2012] eKLR the Court held that:

“... the police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court...As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene...”

102. The above decisions reiterate 1st Respondent’s duty to charge the person accused of an offence upon investigations by the Director of Criminal Investigations.

103. Based on the material placed before this court and which I have assessed, it is this court’s humble opinion that the 1st Respondent’s is within the mandate provided under *the Constitution* and the law.

104. Courts should not interfere with the constitutional responsibility of the 1st respondent DPP to initiate criminal proceedings, as long as these actions are carried out in a justifiable manner. This position was restated in the case of *Michael Monari & Another vs Commissioner of Police & 3 Others*, Misc. Application No. 68 of 2011.

105. The 1st Respondent being independent and an office established under *the Constitution*, the Court can only interfere with or interrogate its actions or those of its officers where there is threatened or actual violation of rights and freedoms guaranteed by *the Constitution* or contravention of *the Constitution*.



106. In Paul Ng'ang'a Nyaga vs Attorney General & 3 Others [2013] eKLR, it was held that:

“... this court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they have acted in contravention of *the Constitution*.”

107. On the other hand, the existence of civil proceedings is not a bar to criminal charges based on the same facts. This is clearly stipulated in Section 193A of the *Criminal Procedure Code*. This court in the case of Oloo v Director of Public Prosecutions [2022] KEHC 14841 (KLR) observed as follows:

“Under section 193A of the *Criminal Procedure Code*, a civil suit is not a bar to criminal proceedings. In James Mutisya & 5 others v Alphayo Chimwanga Munala & 2 others [2021] eKLR it was held that:

“Firstly, that the fact that there exist civil proceedings emanating from the same subject matter is not a bar to institution and continuation of criminal proceedings. This is the dictate of section 193 A of the *Criminal Procedure Code* (Cap 75) Laws of Kenya it provides thus:

“Notwithstanding the provisions of any other written law the fact that any matter in issue in any criminal proceedings is also directly and substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings...”

As rightly submitted by the claimants, criminal and civil proceedings can run concurrently. We agree with the Holding of the court in the case of Alfred Lumiti Lusiba -vs- Pethad Pank Shantilal & 2 others[2010] eKLR that:

“...The conclusion that one can draw from section 193 A of the Civil Procedure Code together with the decisions of the learned Judges in the aforementioned cases is that both civil and criminal jurisdiction 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 the due process of the court in whatever manner..”

“We could not agree more with the holding of the court in the Alfred Lumiti Lasiba case above. These are civil proceedings governed by civil procedure rules and also different evidential and legal standards. On the other hand, Criminal Case No. 2066/18 is governed by the *Criminal Procedure Code* with a different set of evidential standard and outcome. While the central component of both cases is guarantorship, the legal burden of proof is totality different in both cases. It cannot this be said that these proceedings a sub-judice the criminal proceedings. We thus do not find merit in the notice of preliminary objection and the application dated January 23, 2020.”

108. Further in the case of Alfred Lumiti Lusiba v Pethad Ranik Shantilal & 2 others [2016] eKLR , the court held that:

“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. The upshot of this discussion is that the learned magistrate misdirected herself on law by staying the civil case against the respondents on the ground that the case was based on a judgment which was a subject of an appeal that was pending for determination. I find merit in the appellant's appeal and I hereby allow it. The appellant will also have the costs of the appeal."

109. It is not in contention that the 1st Respondent has the mandate to determine whether to prosecute based on the evidence gathered. The mere existence of a civil dispute or in our case a court's judgment or order does not deprive the 1st Respondent of his lawful mandate.
110. In any event, the civil determination of ownership does not preclude a criminal court from inquiring into whether the said ownership was procured through fraud or other unlawful means. If the applicants are indeed innocent, and they so remain until proven guilty, the criminal trial provides an adequate forum for a fair trial and it will be upon the prosecution to prove its case against them beyond reasonable doubt.
111. The applicants have not provided any evidence before this court that their right to a fair trial will be violated if the DPP pursues the proceedings before the criminal court. In any case, the applicants will have the opportunity to call witnesses to further corroborate their case, in the event that they are placed on their defence after the prosecution's case is closed.
112. Furthermore, in criminal cases, the burden of proof rests on the prosecution, which must prove the accused's guilt beyond reasonable doubt. This high threshold ensures that no one is convicted unless there is near certainty of guilt. Conversely, in civil cases, the burden is lower, requiring the plaintiff to prove their case on a balance of probabilities. This means that the outcome of a civil case might not necessarily dictate the outcome of related criminal investigations.
113. The Applicants have also alluded to violations of the constitutional rights through arrests without proper summons. This Court notes that it is not mandatory that the summons are issued before arrests provided that the arrest is unconstitutional or are not done in contravention of the law.
114. This court also notes that the Applicants were given an opportunity to present their sides of the story case before the Chief Land Registrar and despite being the first ones to lodge a complaint of land fraud with the DCI, they failed to appear to present their case and documents before the Chief Land Registrar. In this court's opinion, the applicants cannot claim to have been denied a right to be heard.
115. On the alleged constitutional violations, as has been stated by the 1st Respondent and the Interested Party, a party must plead constitutional violations with specificity and provide cogent evidence to support its claims.
116. In the present case, the court is not satisfied that the Applicants have met the threshold envisaged by the Court in the cases of *Anarita Karimi Njeru v Republic (No.1)* [1979] KLR 154 and *Mumo Matemo v Trusted Society of Human Rights Alliance* [2014] eKLR.
117. In *Leonard Otieno vs Airtel Kenya Limited* [2018] eKLR, the Court further rendered itself as follows:

"It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize *the Constitution* and inevitably result in ill-considered opinions.



The presentation of clear evidence in support of violation of constitutional rights is not a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.”

118. It must not be forgotten that judicial review remedies are discretionary and may be denied even where grounds for their issuance exist if the Applicant’s conduct is improper or if granting the orders would hinder the proper administration of justice.
119. This court in the case of Republic v Nairobi City County & another Ex parte Hema Virendra Kashyap [2016] KEHC 1089 (KLR) observed as follows;

“In Republic Vs Judicial Service Commission Exparte Pareno [2004] 1 KLR 203-209, the court was categorical and I agree that:

“Judicial Review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the court has to weigh one thing against the other and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles....”

Although this court is alive to the fact that Judicial Review remedies are now anchored in *the Constitution* at Article 47 and the provisions of the *Fair Administrative Action Act*, 2015, the court has not been shown how and what specific provisions of *the Constitution* and of the *Fair Administrative Action Act* have been breached in charging the exparte applicant.”

120. In this case, the Applicants have not demonstrated that the ongoing investigations and intended prosecution are driven by malice, bad faith, or ulterior motives. On the contrary, the 1st Respondent has provided material before this court supporting its decision to charge the Applicants.
121. In view of the foregoing, this court finds that the Applicants have failed to demonstrate that the 1st Respondent’s actions are illegal, irrational, or procedurally improper.
122. The judicial review application dated 10th April, 2024 is hereby found to be devoid of merit and is hereby dismissed.
123. Each party to bear its own costs.
124. This file is closed

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH MAY 2025

R.E. ABURILI

JUDGE

