



**Kanyotu v Director of Public Prosecution & another; Marriot Africa International Limited (Interested Party) (Petition E286 of 2023) [2025] KEHC 12494 (KLR) (Constitutional and Human Rights) (13 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 12494 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION E286 OF 2023**

**AB MWAMUYE, J**

**AUGUST 13, 2025**

**IN THE MATTER OF CONSTITUTIONAL INTERPRETATION, PROTECTION  
AND ENFORCEMENT OF HUMAN RIGHTS AND FUNDAMENTAL  
FREEDOMS UNDER ARTICLES 19,20,25,27,28, 48, 50, 157, 159 AND 163 OF  
THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ACT**

**AND**

**IN THE MATTER OF THE NATIONAL POLICE SERVICE ACT**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF  
RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**BETWEEN**

**WILLY KIHARA NJOKI KANYOTU ..... PETITIONER**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTION ..... 1<sup>ST</sup> RESPONDENT**

**THE DIRECTORATE OF CRIMINAL INVESTIGATIONS .... 2<sup>ND</sup> RESPONDENT**

**AND**

**MARRIOT AFRICA INTERNATIONAL LIMITED ..... INTERESTED PARTY**



## JUDGMENT

### Introduction And Background

1. The Petitioner, a beneficiary in the estate of the late James Kanyotu, challenges the 1<sup>st</sup> Respondent's decision to decline prosecution despite conclusive findings of forgery by the 2<sup>nd</sup> Respondent. The dispute concerns the fraudulent transfer of land registered under LR No. 11261/76 (the suit property), originally owned by Kangaita Coffee Estate Limited.
2. The Petitioner alleges that the suit property, formerly owned by Kangaita Coffee Estate Limited, a company in which the deceased held 99% shareholding, was illegally and fraudulently transferred to Trendsetters Investment Limited and subsequently to Marriot Africa International Limited (the Interested Party herein) using forged documentation including a sale agreement, Land Control Board consents, and acknowledgment letters.
3. The 2<sup>nd</sup> Respondent conducted investigations into the allegations, culminating in forensic reports that purportedly confirmed the use of forged documents. The said reports and file were forwarded to the 1<sup>st</sup> Respondent. However, upon perusal, the 1<sup>st</sup> Respondent declined to prosecute, opining that the matter was a family dispute best resolved through civil remedies.
4. The Petitioner asserts that the Respondents' refusal to prosecute, despite overwhelming evidence of criminal conduct, amounts to abdication of duty and a violation of his constitutional rights under Articles 27, 48, and 50 of *the Constitution*. The Petitioner thus sought the following reliefs from this court:
  - i. An order of Declaration declaring that the Respondents' actions of failing to institute criminal charges against parties who forged and uttered false documents in the transfer of parcel of land title number L.R 1126/76 is a breach of the Petitioners' constitutional rights;
  - ii. An order of Mandamus compelling the 1st Respondent to institute criminal charges against the culpable parties who forged and uttered false documents in the transfer of the parcel of land title number L.R 1126/76;
  - iii. An order directing the 1st Respondent to provide the Petitioner with a detailed report of how it arrived to the impugned decision of not instituting criminal charges against the parties who forged and uttered false documents in the transfer of parcel of land title number L.R 1126/76;
  - iv. An order for compensation for violation of the Petitioner's rights.
  - v. Costs of the petition
  - vi. Any other relief that this honourable court considers appropriate and just to grant.

### Petitioner's Case

5. The Petitioner, in his petition dated 7<sup>th</sup> August 2023 and Supporting Affidavit sworn on 7<sup>th</sup> August 2023, avers that he is a lawful beneficiary of the Estate of the late James Kanyotu, who held a majority shareholding in Kangaita Coffee Estate Limited. He contends that forged documents were used to transfer the suit property from Kangaita Coffee Estate Limited first to Trendsetters Investments Limited and thereafter to Marriot Africa International Limited, yet the same was subject to an ongoing succession cause, High Court Succession Cause Number 1239 of 2008; Estate of James Kanyotu (deceased).



6. The Petitioner contends that the conveyancing transaction involved forgery and use of fake documents; forged sale agreement, forged Land Control Board Consents and forged acknowledgement letters and argued that those acts constitute criminal fraud and the Respondents are obligated to prosecute those responsible.
7. It is averred that the Petitioner and other beneficiaries of the Estate of James Kanyotu lodged a complaint with the 2<sup>nd</sup> Respondent based on the criminal actions involved in the fraudulent transaction of parcel of Land title number L.R 11261/76. Pursuant to that complaint, the 2<sup>nd</sup> Respondent carried out investigations spanning over four years and presented reports, including forensic reports, which indicated that fake and forged documents were used to fraudulently transfer the suit property.
8. The Petitioner further averred that after the investigations were concluded, the 2<sup>nd</sup> Respondent forwarded the investigation reports to the 1<sup>st</sup> Respondent for further actions who in turn declined to prefer charges against the involved parties despite clear evidence that fake and forged documents were used to transfer the parcel of land but only advised that the dispute being a family dispute and not criminal should be settled in a civil court.
9. The Petitioner also alleges threats to his life, evidenced by mobile messages demonstrating the risk faced for pursuing justice. It is the Petitioner's case that despite multiple complaints and presentation of evidence, the 1<sup>st</sup> Respondent declined to prosecute. The Petitioner asserts that such refusal violates his constitutional rights under Articles 27, 48 and 50 and urged this Honourable Court to intervene.
10. In his further affidavit dated 8<sup>th</sup> November 2023, the Petitioner contends that the Respondent ignored or denied the existence of his core evidence, namely the forged sale agreement and Land Control Board consents. He challenges the accuracy of the Respondent's assertion that Mary Wanjiku Kanyotu was a director of Kangaita Coffee Estate Limited at the relevant time when his late father was alive.
11. The Petitioner also disputed the 1<sup>st</sup> Respondent's claim that Succession Cause No. 1239 of 2008 concluded on 10<sup>th</sup> February 2014, and argued that the same is still ongoing, noting ongoing applications evidenced by a Certificate of Partial Grant dated 20<sup>th</sup> July 2020. Additionally, the Petitioner denied ever taking part in High Court Civil Case Number 461 of 2012 as alleged by the Respondents and contends that the Respondents have only attached a ruling delivered on that matter and not a judgment as the same was dismissed for want of jurisdiction.
12. The Petitioner further contends that the alleged acknowledgement of Ksh.39 million is itself the product of forgery, as the letter of acknowledgement indicating he received the money has a forged signature. Additionally, he argued that he has never received money from either of those companies contending that he has sworn before in other proceedings that he received money from Kamlesh Pattini ex gratia for him to stop pursuing the illegal and criminal transfer of the suit property.
13. Further, he asserts his locus to sue as a direct victim of forgery; his signature having been forged. He emphasizes that the 2<sup>nd</sup> Respondent's forensic reports remain unaddressed, underscoring the need for judicial intervention, as this Petition does not interfere with or contradict the other related proceedings at the Environment and Land Court, as well as the High Court Succession Court.

### **Respondent's Case**

14. The Respondents opposed the Petition through a replying affidavit sworn by Naomi Isoe on 18<sup>th</sup> September 2023. It is averred that the DPP acted within the law and *the Constitution* in deciding not to prosecute. The decision, they contend, was based on careful evaluation of the evidence presented in



- the inquiry file submitted by the DCI. According to the Respondents, the material presented disclosed a civil dispute arising from family disagreements and succession claims.
15. The 1<sup>st</sup> Respondent contends that it properly exercised its discretion under Article 157 of *the Constitution* and Section 6 of the *Office of the Director of Public Prosecutions Act* by recommending closure of the file and advising the parties to seek civil remedy.
  16. It was deponed that the Petitioner failed to demonstrate that the 1<sup>st</sup> Respondent acted in bad faith, capriciously or abused the legal process. Further, it was argued that the Petitioner's intentions are questionable as the petition is an abuse of court process since the Petitioner knows very well that the issue on the sale of the suit property has been extensively addressed in HCC Civil Suit No. 461 of 2012; Trendsetters Investment Limited Vs the Principal Registrar of Titles & Attorney General and also in ELC Case No. 115 of 2019.
  17. Furthermore, it was averred that the Estate of the deceased has failed to explore the right avenue in civil courts to address their concerns which amounts to an abuse of court process. Additionally, the respondents challenged the locus standi of the Petitioner by arguing that he is neither company director nor estate administrator and thus lacks standing to institute the instant suit.
  18. It was also deponed that this court should only interfere with the independence of the 1<sup>st</sup> Respondent mandate if it is shown that the exercise of his power is contrary to *the Constitution*, is in bad faith or amounts to an abuse of process something which the Petitioner has failed to demonstrate and thus this Honourable Court is urged to dismiss the Petition with costs.

### **Interested Party's Case**

19. The Interested Party opposed the Petition through a replying affidavit sworn by Abdul Dawood Hassan on 15<sup>th</sup> July, 2024. It maintains that it is a bona fide purchaser for value without notice of any alleged irregularities. The Interested Party contends that the transaction leading to its acquisition of the suit property was valid, supported by resolutions of Kangaita Coffee Estate Ltd. It asserts that the transfer was conducted in accordance with all legal requirements, including registration and stamp duty compliance. The Interested Party argues that it should not be penalized for disputes that pre-date its involvement. It urges the Court to protect its proprietary rights and investments.
20. The Interested Party contests the Petitioner's assertion that the deceased's shareholding was ignored. It claims that company resolutions authorising the sale were passed by properly authorised directors and cannot be challenged collaterally in criminal proceedings. Additionally, the Interested Party maintains that the Petitioner received Kshs.39,000,000/= from Trendsetters Investment Limited as a final settlement of any claims or interests he has in the suit property.
21. Furthermore, it is argued that the Petitioner has failed to establish any connection between itself and the alleged forgery. It asserts that no evidence has been produced to demonstrate that the Interested Party participated in, facilitated, or possessed knowledge of any fraudulent activity. It contends that the DCI never summoned or questioned its officers regarding the complaint. It insists that it has been unjustly embroiled in a family dispute.
22. It was deponed that, despite the Interested Party's lawful ownership of the suit property, the Petitioner and others have trespassed on the property and threatened to evict the Interested Party and third parties who had already purchased subdivided portions of the property.
23. In addressing the forensic reports relied on by the Petitioner, it was argued that the reports are inconclusive and subject to judicial testing in appropriate forums. It contends that the conclusions in the reports do not link the Interested Party to any offence. It questions the reliability and probative



value of the reports, which were not subjected to cross-examination or procedural scrutiny. It further maintains that the Petitioner's reliance on those reports cannot override the decisions made by competent authorities. It asserts that the proper forum for determining questions of title and corporate authorization is the civil court.

24. With respect to the DPP's decision, the Interested Party aligns itself with the Respondents' case. It contends that the decision not to prosecute was well-founded and supported by evidence. It argues that prosecutorial discretion should not be interfered with lightly, especially in complex civil-commercial contexts. The Interested Party maintains that the DPP cannot be compelled to act where the evidentiary threshold has not been met. It underscores the importance of respecting institutional mandates and evidentiary standards, especially where no mala fides or illegality has been demonstrated.
25. It is contended that the Petitioner's accusations are speculative and unsupported. The Interested Party argues that the Petition is motivated by succession rivalries and an attempt to frustrate its legitimate title. Further, it is averred that it was not a party to the internal affairs of Kangaita Coffee Estate Ltd prior to the purchase. It maintains that the Petitioner has mischaracterized the legal and factual issues. It argues that the Petition amounts to an abuse of process.
26. In the end, the Interested Party urges the Court to dismiss the Petition since the Petitioner has not demonstrated any illegal or unconstitutional exercise of the powers conferred on the Respondents.

### **Petitioner's Submissions**

27. The Petitioner, in his submissions dated 8<sup>th</sup> November, 2023 contends that there has been a clear dereliction of duty by the Respondents. The Petitioner asserts that he is a son and beneficiary of the Estate of the late James Kanyotu, who held the majority shareholding in Kangaita Coffee Estate Limited, the registered proprietor of L.R No. 11261/76 situated in Ruiru Township. The Petitioner's central grievance is that this parcel of land was fraudulently and unlawfully transferred to third parties while it was subject to ongoing succession proceedings in High Court Succession Cause No. 1239 of 2008. He maintains that the transaction was tainted by forged instruments, including a sale agreement, Land Control Board consents, and acknowledgment letters, as confirmed by forensic reports prepared by the 2nd Respondent.
28. The Petitioner submitted that having lodged a complaint with the 2nd Respondent, the Directorate of Criminal Investigations, extensive investigations were undertaken over a period of four years, culminating in forensic confirmations of the fraudulent nature of the transfer documents. These findings, which included the impugned forged instruments, were forwarded to the 1<sup>st</sup> Respondent, the DPP with a view to initiating criminal proceedings against those involved. However, to the Petitioner's dismay, the DPP declined to prefer charges, instead opining that the dispute was of a civil or familial nature. The Petitioner contends that this decision was irrational and ignores the findings of the investigating authority.
29. It is further submitted that the Respondents' position, as captured in their replying affidavit, fails to address the core issue raised in the Petition, namely, the use of forged documents to facilitate a fraudulent transfer of land. The Petitioner takes issue with the Respondents' attempt to characterize the matter as a civil dispute, terming it a deliberate mischaracterization of criminal conduct. The Petitioner also points out that the Respondents' replying affidavit is replete with factual inaccuracies and deliberate misrepresentations, including the status of the pending succession cause and the misidentification of parties to earlier civil proceedings. These falsehoods, the Petitioner argues, underscore the Respondents' failure to act independently and diligently.



30. The Petitioner urges the Court to find that the Respondents' refusal to prosecute the persons found culpable constitutes a breach of his constitutional rights, under Articles 27 and 48.
31. Relying on the decisions in *Kuria & 3 Others v Attorney General* [2002] 2 KLR 69 and *Robert Waweru Maina & 4 Others v Director of Public Prosecutions & 3 Others* [2022] eKLR, the Petitioner argues that the DPP's discretion must be exercised in line with public interest, the administration of justice, and the need to prevent abuse of the legal process and the court ought to intervene where there is miscarriage of justice.
32. Further, the Petitioner invoked Section 193A of the Criminal Procedure Code, submitting that the pendency of civil proceedings in the Environment and Land Court or succession proceedings in the Family Division does not bar the institution of criminal proceedings. He submits that the criminal element, being the use of forged documents in the conveyancing process, remains unaddressed, and urges the Court to issue a writ of mandamus compelling the DPP to institute charges in light of the evidence on record. The Petitioner maintains that the decision not to prosecute is tainted by irrationality, bad faith, and abdication of constitutional responsibility.
33. In conclusion, the Petitioner contends that the Respondents' refusal to act on credible investigative findings undermines the administration of justice and emboldens impunity. He submits that the court's supervisory jurisdiction empowers it to intervene in instances where constitutional bodies have abdicated their duties. The Petitioner insists that this case presents such an occasion and urges the Court to grant the orders sought, particularly compelling the 1<sup>st</sup> Respondent to prosecute the persons found culpable for forgery and fraud as per the DCI's findings.

### **Respondents' Submissions**

34. The Respondents in their submissions dated 21<sup>st</sup> May, 2024 submitted that the Petition essentially seeks to challenge the DPP's discretion under Article 157(6) of *the Constitution* to determine whether or not to institute criminal proceedings. The Respondents contend that they acted within the bounds of *the Constitution* and that the DPP, after an independent review of the investigation file, lawfully directed that the dispute be addressed through civil processes. The Respondents assert that the decision not to prosecute does not amount to a violation of the Petitioner's rights.
35. The Respondents argue that the Petitioner has failed to particularize, with reasonable precision, how his constitutional rights under Articles 27, 48, and 50 have been violated, contrary to the principles set out in *Anarita Karimi Njeru v Republic* [1979] KLR 154. They submit that a mere reference to constitutional provisions without a clear demonstration of how those rights were infringed does not meet the threshold for a constitutional claim. Reliance was placed in *Leonard Otieno v Airtel Kenya Limited* [2018] eKLR to emphasize the importance of evidentiary clarity in constitutional litigation.
36. On the question of discrimination, the Respondents argued that the Petitioner has not provided any factual basis to demonstrate unequal treatment or the existence of a comparable group that has been treated more favourably. It was submitted that the Petitioner's grievance relates to dissatisfaction with the DPP's discretion and not discriminatory conduct. They contend that the DPP acted within the law and in good faith, and there is no evidence of arbitrary, capricious, or mala fide decision-making.
37. The Respondents asserted that the decision not to prosecute was made after a thorough review of the DCI Inquiry File and with due regard to Article 157(11) of *the Constitution*, which mandates the DPP to consider public interest, the interests of the administration of justice, and the need to prevent abuse of legal process. It was submitted that the DPP found the dispute to be rooted in contested succession



matters and civil ownership claims, which are best ventilated in the appropriate civil courts and thereby its decision was legal since it was made *intra vires* to [the constitution](#).

38. On the prayer for a writ of mandamus, it was submitted that the Petitioner has not demonstrated under the provisions of law that the DPP had a mandatory duty to prosecute any person regardless of the circumstances of the case. They emphasize that prosecutorial discretion is not a public duty that can be compelled by mandamus. Relying on *Republic v Kenya National Examinations Council ex parte Gathenji & Others*, Civil Appeal No. 234 of 1996, the Respondents submitted that mandamus cannot lie to compel the exercise of discretion in a particular manner, especially where an alternative remedy is available.
39. It was further submitted that the Petitioner ought to show that the DPP's decision was so manifestly wrong as to amount to an unreasonable, irregular or improper exercise of his power, which he failed to demonstrate. Reliance was placed in *Githunguri v Republic* [1986] LRC 618 and *Douglas Maina Mwangi v Kenya Revenue Authority and Another* High Court Constitutional Petition No. 528 of 2013.
40. In conclusion, the Respondents submitted that the Petition lacks merit, fails to meet the constitutional threshold for intervention, and constitutes an invitation to the Court to usurp the discretion conferred on the DPP. They argue that the Petitioner has not established any exceptional grounds such as bad faith, abuse of process, or manifest irrationality. They pray that the Petition be dismissed with costs as the DPP has acted constitutionally, reasonably, and within the scope of the law.

#### **Interested Party's Submissions**

41. The Interested Party, in its written submissions dated 15<sup>th</sup> July, 2024, associates itself with the Respondents' position and opposes the Petition in its entirety. It contends that the Petition is a disguised attempt to revisit succession and civil disputes previously litigated in other forums, including High Court Succession Cause No. 1239 of 2008 and ELC Case No. 115 of 2019. The Interested Party argues that the dispute over the suit property is grounded in civil claims concerning ownership and administration of the estate of the late James Kanyotu and does not disclose any criminal culpability necessitating prosecutorial intervention.
42. The Interested Party challenges the Petitioner's locus standi to institute the Petition. It was submitted that the Petitioner has not demonstrated any legal or beneficial ownership of the subject property, nor is he the administrator of the estate or a shareholder of Kangaita Coffee Estate Limited. It was submitted that under *Law Society of Kenya v Commissioner of Lands & 2 others* [2001] eKLR, a person must demonstrate sufficient interest in a matter to be heard. The Interested Party maintains that the Petitioner's lack of legal standing is fatal to the Petition.
43. On the criminal allegations, counsel for the Interested Party submitted that the dispute lacks the essential elements of a criminal case. It was emphasized that the Office of the Director of Public Prosecutions and the Directorate of Criminal Investigations properly evaluated the evidence and rightly determined that the matter was civil in nature. Citing Article 157 of [the Constitution](#) and Section 35 of the [National Police Service Act](#), it was asserted that both institutions acted within their constitutional mandates by declining to prosecute.
44. It was also submitted that there is no evidence of abuse of power by the DPP. Reliance was placed on the decision in *Justus Mwenda Kangethe v Director of Public Prosecutions & 2 others* [2014] eKLR to outline the standards for proving abuse of prosecutorial power. It was argued that no such threshold has been met in the present case. It maintains that the DPP did not act contrary to the public interest or administration of justice and that the decision not to prosecute was neither arbitrary nor malicious,



as the DPP acted at his discretion and under the provisions of Article 157 (6) and Section 5 of the [Office of the Director of Public Prosecutions Act](#).

45. On the court's power to interfere with prosecutorial discretion, the Interested Party acknowledges the court's supervisory jurisdiction but submits that such interference should only arise in exceptional circumstances, such as illegality, irrationality, or procedural impropriety. Referring to Regina v Director of Public Prosecutions ex parte Manning & Another [2001] QB 330 and Githunguri v Republic [1986] LRC 618, it was argued that judicial review should not be used to second-guess discretionary decisions made within the confines of the law.
46. In finality, it was submitted that the Petition is misplaced, founded on a misconstruction of the legal thresholds applicable to criminal prosecution, and constitutes an abuse of the court process. The interested party urged the Court to uphold the independence of the DPP as guaranteed in [the Constitution](#) and to dismiss the Petition with costs.

### Issues For Determination

47. Having reviewed the pleadings, affidavits, and submissions of the parties, the Court frames the following key issues for determination:
  - a. Whether the 1<sup>st</sup> Respondent improperly declined to prefer criminal charges.
  - b. Whether the actions of the Respondents violated the Petitioner's fundamental rights.

### Analysis And Determination

#### Whether the 1<sup>st</sup> Respondent acted in breach of [the Constitution](#) in declining to prosecute the alleged offences.

48. The legal basis for the exercise of prosecutorial powers in Kenya is [the Constitution](#) of Kenya, 2010. Article 157 of [the Constitution](#) establishes the Office of the Director of Public Prosecutions (ODPP). The [Office of the Director of Public Prosecutions Act](#) No. 2 of 2013 (the ODPP Act) was also enacted to give effect to Articles 157 and 158 of [the Constitution](#), other relevant provisions of the law and for connected purposes.
49. Section 4 of the ODPP Act provides for the fundamental principles which guides the DPP in prosecution of cases. The principles include; impartiality and gender equity; diversity of the people of Kenya; rules of Natural Justice, promotion of public confidence in the integrity of the office, the need to serve the cause of justice; prevention of abuse of the legal process and public interest; and, promotion of constitutionalism. The ODPP Act, among other statutes, variously provides for the manner in which the DPP ought to discharge its mandate. Suffice to say, the exercise of prosecutorial powers of the DPP has been subjected to legal scrutiny and appropriate principles and guidelines developed.
50. The DPP has constitutional mandate and discretion to initiate, continue and, or terminate criminal prosecutions. In doing so, the DPP does not require consent or permission from any person or authority. The DPP must, however, exercise his powers in a manner that has regard to public interest, interest of administration of justice and the need to prevent and avoid abuse of the legal process.
51. For the Petitioner to succeed, he has to show that the DPP, in deciding not to prosecute, the decision was not made in public interest and interest in the administration of justice, but that the decision is an abuse of the legal process.



52. It is important to note that the court must avoid exceeding the constitutional and legal authority of the Director of Public Prosecutions and should not interfere with the investigative powers granted to the Police. However, the court may intervene if that discretion is exercised unlawfully or in bad faith, such as when it is misused or employed for purposes unrelated to addressing the commission of a criminal offence.
53. In *Republic v Grace Wangari Bunyi (Sued as the Administrator of the Estate of the Late Obadiah Kuira Bunyi) & 7 others Exparte Moses Kirruti & 28 others* [2018] eKLR it was stated that:
- “It is important to note that the discretion given to the Director of Public Prosecutions to undertake investigation and prosecute criminal offences is not to be taken for granted or lightly interfered with and must be properly exercised. In the same respect, the court ought not to usurp the constitutional and statutory mandate of the Director of Public Prosecutions...”
54. The prosecutorial powers of DPP are constitutionally and statutorily provided for under Article 157 (10) of *the Constitution* and Section 4 of the Office of the Director of Public Prosecution Act No. 2 of 2013, which provides that the DPP does not require the consent of any person or authority to commence any criminal proceedings and in of his/her powers and functions, shall not be under the direction or control of any person or authority.
55. The exercise of that power is however subject to Subsection (11) of Article 157 and Section 4 of the DPP Act, which provides that in exercise of the said power, the DPP shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of legal process. Only in circumstances where it is manifest that the DPP acted unlawfully by failing to exercise their own independent discretion; acting under the control and direction of another person; failing to take into account public interest or interest of the administration of justice in all their manifestations; abusing the legal process; and by acting in breach of fundamental rights and freedoms of an individual will the High Court intervene.
56. In the case of *Diamond Hasham Lalji & Another v A.G. & 4 others* [2018] eKLR the Court of Appeal stated: -
- “(34) It is also indubitable that the constitutional prosecutorial power of DPP is reviewable by the High Court as Article 165(2) (d)(ii) of *the Constitution* ordains. However, the doctrine of separation of powers should be respected, and the courts should not unjustifiably interfere with the exercise of discretion by DPP unless it is exercised unlawfully by, inter alia, failing to exercise his/her own independent discretion; by acting under the control and direction of another person; failing to take into account public interest or interest of the administration of justice in all their manifestations; abusing the legal process; and by acting in breach of fundamental rights and freedoms of an individual. The DPP is entitled to make errors within his constitutional jurisdiction, and the decision will not be reviewed solely on the ground that it was based on a misapprehension of facts and the law. (*Matululu and Anor v. DPP* [2003] 4 LRC 712). Further, authority show that courts are generally reluctant to interfere with prosecutorial decisions made within jurisdiction.”



57. The National Police Service, on the other hand, is a creature of *the Constitution* of Kenya, 2010. Article 239 (1) (a), (b) and (c) of *the Constitution* of Kenya provides that: -
- “The National Security organs are the Kenya Defence Forces, the National Intelligence Service and the National Police Service.”
58. Section 28 of the *National Police Service Act* No. 11 of 2011 stipulates that: -
- “There is established the Directorate of Criminal Investigations which shall be under the direction, command and control of the Inspector General.”
59. Article 245 (2) (b) of *the Constitution* of Kenya further provides that: - “The Inspector General shall exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation.”
60. Notably, investigations are a mandate of the National Police Service (NPS). They are legal processes aimed at fact finding of commission of crime in our justice system and do not amount to infringement in the rights or fundamental freedoms of any person who is under investigations per se. It is an independent function that is to be carried out by the Inspector General without direction from any other person.
61. Section 51 of the *National Police Service Act* empowers a police officer to among others: collect and communicate intelligence affecting law and order, to detect offenders, and to bring them to justice in addition to investigating crime.
62. This court could also not purport to direct the 2<sup>nd</sup> Respondent on how to carry out investigations or when to institute criminal proceedings. Doing so would be tantamount to infringing on their mandate, which was well set out in *the Constitution* of Kenya. Merely feeling inconvenienced by investigations is not a sufficient reason for the court to interfere with the powers of the National Police Service. There must be clear cut violations to allow the court to jump in to avert any violations, breaches and/or infringements of *the Constitution* of Kenya.
63. As long as the investigations are carried out in accordance with the law and rules, the processes thereto must be allowed to run their course for proper administration of justice. Proof of violation, infringement or threat or contravention of a person’s right under *the Constitution* of Kenya required.
64. The Petitioner contends that the Director of Public Prosecutions failed to act on forensic evidence provided by the Directorate of Criminal Investigations, thereby abdicating the constitutional and statutory mandate to prosecute offences. He relies heavily on Article 157(6) and (11) of *the Constitution*, arguing that the DPP failed to uphold public interest and prevent abuse of the legal process.
65. However, Article 157(10) of *the Constitution* is unequivocal: “The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.” The import of this provision is that prosecutorial discretion is constitutionally protected.



66. The courts have consistently affirmed that this discretion is to be exercised independently unless it is shown to have been exercised in bad faith or in abuse of process. In *Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another* [2012] eKLR the court held: -
- “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.....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”.
67. The 1<sup>st</sup> Respondent's letter dated 25<sup>th</sup> October 2022, returning the investigation file to the 2<sup>nd</sup> Respondent, clearly articulates that the subject matter arose in the context of a complex and contested succession dispute and corporate ownership conflict. The 1<sup>st</sup> Respondent was not persuaded that the evidentiary threshold of criminal culpability had been met.
68. The DPP's discretion should only be interfered with where there is convincing evidence of bad faith, abuse of discretion or acting in a manner contrary to public interest. In the present case, no such evidence has been presented. The Petitioner's claim rests predominantly on the existence of a forensic report, which in itself is insufficient to form the basis for prosecution. Prosecution requires a realistic prospect of conviction, based on the totality of the evidence, not isolated findings.
69. The DPP's decision must be assessed against the evidentiary and public interest thresholds, and not merely on the existence of allegations. The record shows that the 1<sup>st</sup> Respondent did in fact consider the forensic report, the procedural history of the matter in various courts, including the Succession proceedings, and the evidence of meetings and resolutions by company directors authorising the sale. This evidences due diligence in the discharge of its duty.
70. Moreover, there exists concurrent civil litigation over the suit property, including Succession Cause No. 1239 of 2008 which is still ongoing. The High Court has jurisdiction under Article 165(6) and (7) to supervise public bodies, but not to supplant their decision-making when no illegality, irrationality or procedural impropriety is demonstrated.
71. This Court is alive to its supervisory jurisdiction, but equally cautious not to trench upon the prosecutorial discretion unless the high threshold set is met. The Petitioner has failed to establish that the DPP acted in bad faith, arbitrarily, or outside constitutional bounds.
72. Accordingly, the 1<sup>st</sup> Respondent's decision not to prosecute, as communicated in its letter of 25<sup>th</sup> October 2022, was within the lawful exercise of discretion and does not amount to a violation of *the Constitution*.

### **Whether the actions of the Respondents' violated the Petitioner's fundamental rights**

73. The Petitioner contends that the refusal by the Respondents to institute criminal charges against the parties allegedly involved in the fraudulent transfer of the suit property has infringed upon his constitutional rights under Articles 27, 48, and 50. He argues that this inaction amounts to discriminatory treatment, denial of access to justice, and infringement of his right to a fair hearing. The Respondents, however, maintain that they acted within their lawful discretion and that no constitutional right was violated. They argue that the Petitioner was afforded due process, including access to investigations, and that a reasoned decision was rendered. The Interested Party aligns with this position, asserting that prosecutorial discretion cannot be equated to a denial of rights.



74. To succeed in this claim, the Petitioner must demonstrate with specificity how the Respondents' decisions violated each of these rights. This threshold is well established in *Anarita Karimi Njeru v Republic* [1979] KLR 154 and reaffirmed in *Mumo Matem v Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR, where the Court held that a party alleging constitutional violation must demonstrate with precision the specific right violated and the manner in which the right was infringed.
75. In addressing a claim under Article 27, it is essential to establish whether the Petitioner was subjected to unfair discrimination. Article 27 guarantees equality before the law and equal protection and benefit of the law. However, equality does not imply identical outcomes in all cases. The DPP is not constitutionally bound to act on every complaint in the same manner, especially where the evidentiary thresholds or public interest considerations differ. In *Peter K. Waweru v Republic* [2006] eKLR, discrimination was defined in the following terms: -
- “...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to...restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex...a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”
76. The Petitioner has not demonstrated that similarly situated complainants received preferential treatment under comparable circumstances. No evidence was provided to support an allegation of discrimination or arbitrary conduct specific to the Petitioner. The Court is not persuaded that a mere disagreement with the outcome of prosecutorial discretion suffices to ground a violation of Article 27.
77. The right under Article 48 to access justice requires the State to ensure that individuals are not impeded in pursuing lawful remedies. However, this provision does not compel prosecutorial agencies to take action in every instance where a complaint is made. The Petitioner had access to the DCI, recorded statements, and benefited from a forensic inquiry.
78. Moreover, he has alternative recourse through civil or succession proceedings, which are actively ongoing. Access to justice does not mean access to a preferred outcome, but rather the opportunity to pursue remedies through lawful channels. On this basis, the Court finds no breach of Article 48 since the Petitioner was accorded the opportunity to present his complaint to the DCI, who carried out investigations and forwarded the file to the DPP, who advised the Petitioner on the proper channel to address his claim.
79. Furthermore, there is no evidence that the Petitioner was denied access to justice. The existence of ongoing proceedings in the Environment and Land Court and the Succession Cause No. 1239 of 2008, in which the Petitioner has actively participated, belies his claim that he has been denied a forum to pursue his grievances.
80. Article 50 guarantees the right to a fair hearing, particularly in criminal or civil proceedings where a party is accused or defending a claim. The Petitioner, however, is a complainant, not an accused person or litigant in a trial requiring personal adjudication of rights. The constitutional right to a fair hearing under Article 50 is thus not directly implicated in a decision by the DPP not to prosecute a third party. In *Republic v Attorney General & 4 Others Ex Parte Kenneth Kariuki Githii* [2014] eKLR, the court underscored that the right to fair hearing applies within the context of an actual trial, not during preliminary investigations or decisions to prosecute. The Petitioner retains the right to pursue



the alleged fraud through appropriate civil mechanisms. The Court therefore finds that Article 50 has not been violated in the circumstances.

81. Moreover, it is not in dispute that the 2<sup>nd</sup> Respondent investigated the complaint and generated forensic reports, which were transmitted to the 1<sup>st</sup> Respondent. The chain of administrative steps was completed in accordance with legal mandates, and the Petitioner has not established procedural unfairness or malice. A petitioner must show clear, demonstrable breaches of constitutional rights to warrant relief. Mere dissatisfaction with the decision or its consequences is not sufficient.
82. While the Petitioner may hold a legitimate expectation that his complaint would be pursued, the decision by the DPP not to prosecute was within the bounds of *the Constitution*. Judicial review of such discretion is limited to instances of illegality, irrationality, or procedural impropriety, none of which have been sufficiently demonstrated. The Respondents considered the materials presented and exercised their mandate without evidence of mala fides or arbitrary conduct. This Court cannot substitute its own view for that of the DPP where discretion has been lawfully and reasonably exercised. Prosecutorial discretion must be respected unless clearly abused. No such abuse is evident here.
83. In light of the foregoing, the Court finds that the Petitioner has failed to establish any violation of his constitutional rights under Articles 27, 48 or 50. The Respondents acted within their constitutional and statutory mandate, and the decision not to prosecute does not amount to an infringement of rights. The Petitioner retains alternative remedies in civil and succession forums, and his access to legal recourse has not been impeded. The Petitioner's grievances, though sincerely held, do not rise to the level of constitutional infractions requiring redress by this Court.
84. Consequently, this court finds the Petition lacks merit and is hereby dismissed in its entirety with no order as to costs.

It is so ordered. File Closed Accordingly.

**DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 13<sup>TH</sup> DAY OF AUGUST, 2025.**

**BAHATI MWAMUYE**

**JUDGE**

In the presence of: -

Counsel for the Petitioner – No appearance

Counsel for the 1<sup>st</sup> & 2<sup>nd</sup> Respondent – Mr Mulati

Counsel for the Interested Party – Mr. Bundi h/b Ms. Koech

Court Assistant – Ms. Lwambia

