



**Law Society of Kenya & another v Director of Criminal Investigations
& 2 others (Petition E015 of 2025) [2025] KEHC 12504 (KLR)
(Constitutional and Human Rights) (12 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 12504 (KLR)

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

PETITION E015 OF 2025

AB MWAMUYE, J

AUGUST 12, 2025

BETWEEN

LAW SOCIETY OF KENYA 1ST PETITIONER

NYARERU DAVID BOSIRE 2ND PETITIONER

AND

DIRECTOR OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS 2ND
RESPONDENT**

**CHIEF MAGISTRATES CRIMINAL COURT AT MILIMANI 3RD
RESPONDENT**

JUDGMENT

1. This Petition arises from the arrest and intended prosecution of the 2nd Petitioner, an advocate of the High Court of Kenya, in Milimani MCCR No. E1317 of 2024, over acts performed while acting on the instructions of his former client in a land transaction that is currently the subject of several civil proceedings. The Petitioners allege that the 1st and 2nd Respondents violated the 2nd Petitioner’s rights to dignity and fair administrative action as guaranteed under Articles 28 and 47 of *the Constitution*.
2. The core contention is that the prosecution of the 2nd Petitioner is not only unwarranted but also amounts to a gross abuse of legal process. The Petition is premised upon the protections afforded to legal professionals under *the Constitution* of Kenya, the *Fair Administrative Action Act*, and the Basic Principles on the Role of Lawyers adopted by the UN Congress in 1990.



3. The 2nd Petitioner was arrested and detained on 4th December 2024 by the 1st Respondent's agents at Muthaiga Police Station and later released on a cash bail. He was required to appear for plea taking on 20th January 2025 in Milimani MCCR No. E1317 of 2024 on charges relating to an alleged conspiracy to defraud the Agricultural Development Corporation (ADC).
4. The Petitioners aver that these charges are malicious, baseless, and calculated to intimidate the 2nd Petitioner and, by extension, his former client, from pursuing his legitimate interests in property known as Title Number Galana Ranch/Block 1/1. They allege that there is a well-documented civil dispute between the ADC and Sahal Agro-Holdings Limited, the company of the 2nd Petitioner's former client, which is the subject of ongoing litigation.
5. The Petitioner seek several reliefs from this court:
 - i. A Declaration be, and is hereby, issued that the institution of a criminal investigation/ case by the 1st & 2nd Respondents was tainted with ulterior motives, bad faith and against the public interest.
 - ii. A Declaration be, and is hereby, issued that the institution of a criminal investigation/ case by the 1st & 2nd Respondents is an abuse of discretion and the criminal justice process.
 - iii. A Declaration be, and is hereby, issued that the 1st & 2nd Respondents' actions of purporting to investigate, summon, arraign, charge and prosecute the 2nd Petitioner on matters that had been decided by the Courts; was capricious, oppressive, and actuated by malice/ bad faith.
 - iv. A Declaration be, and is hereby, issued that the 1st & 2nd Respondents' actions of purporting to investigate, summon, arraign, charge and prosecute the 2nd Petitioner on matters that had been decided by the Courts.
 - v. A Declaration be, and is hereby, issued that the prosecution of legal professionals, e.g. the 2nd Petitioner, for carrying out their duties on instructions of their clients, is unlawful, an abuse of process and violates the United Nations Principles on the Role of Lawyers and International Bar Association Standards for the Independence of The Bar.
 - vi. A Declaration be, and is hereby, issued that the 2nd Respondent, in making a decision to charge (and subsequently charging) the 2nd Petitioner for executing lawful instructions given to him by his client, in his capacity as an advocate, acted unreasonably and abused his discretion.
 - vii. An order of Certiorari be, and is hereby, issued CALLING into this Honourable Court, the Charge Sheet and the entire proceedings in Milimani Chief Magistrates Court Criminal Case Number E1317 of 2024, and by the same Order the said Charge & Proceedings be subsequently quashed.
 - viii. Costs be provided for.

Petitioner's Case

6. The Petitioner through the petition dated 15th January, 2025 together with their supporting affidavits dated 15th January, 2025 and supplementary affidavit dated 19th March, 2025 avers that the 2nd Petitioner, an advocate of over ten years' standing, was merely executing instructions from his former client, one Mr. Abdullahi Maalim Hassan of Sahal Agro-Holdings Limited, in collecting documents relating to a lease between ADC and Sahal Agro-Holdings Limited over Title Number Galana Ranch/Block 1/1 from the Mombasa Lands Registry.



7. It is the Petitioners' case that the said property has been the subject of multiple civil proceedings, including Malindi ELC Case No. 101 of 2013, Malindi MCCC No. E209 of 2022, Malindi ELC Case No. E036 of 2023, Malindi ELC Misc Appl No. E014 of 2024, Malindi HC Constitution Petition No. E003 of 2024 and Milimani HC Constitution Petition No. E709 of 2024.
8. The Petitioners contend that the criminal proceedings instituted against the 2nd Petitioner are a collateral attack on the positive orders issued in the said civil proceedings, and constitute an abuse of the criminal justice system.
9. According to the 2nd Petitioner, on 17th July 2021, he picked up lease documents from the Mombasa Lands Registry pursuant to instructions from his former client. He signed for them and had no involvement in the preparation or registration of the documents.
10. On 4th December 2024, the 2nd Petitioner was arrested by the 1st Respondent's agents, held overnight at Muthaiga Police Station, and later released on cash bail. He was directed to report back for plea-taking on 19th December 2024, which was deferred to 20th January 2025 due to medical reasons.
11. The Petitioners further assert that the charges levelled against the 2nd Petitioner are malicious and were instituted after the failure of ADC to obtain favourable orders in the civil courts, particularly in Malindi ELC Misc Appl No. E014 of 2024, where its application to rectify the register was dismissed.
12. The Petitioners invoke Articles 28, 47 and 157 of *the Constitution*, arguing that the Respondents failed to exercise their discretion lawfully, fairly and in the public interest. They contend that the impugned decision was influenced by improper motives and constituted unfair administrative action.
13. Further, reliance is placed on Principles 16 to 18 of the UN Basic Principles on the Role of Lawyers, which protect advocates from harassment or identification with their clients' causes by virtue of performing professional functions.
14. The Petitioners also draw the Court's attention to various conservatory orders granted by the High Court in the related constitutional petitions, which restrained the Respondents from arresting or prosecuting the 2nd Petitioner's former client and others associated with Sahal Agro-Holdings Limited.
15. According to the Petitioners, the 2nd Petitioner is being wrongly associated with alleged fraudulent conduct by his former client, despite having had no part in the creation, alteration or registration of the lease documents.
16. They argue that the continued prosecution is oppressive, vexatious, and serves no legitimate public interest, but is aimed at undermining the independence of the legal profession and intimidating officers of the court.
17. The Petitioners sought several reliefs from this court, including Declarations that the criminal proceedings are unconstitutional, an abuse of the legal process, and that the decision to charge the 2nd Petitioner should be quashed. They also seek an order of Certiorari to quash the charge sheet in Milimani MCCR No. E1317 of 2024 and an order of prohibition against any further prosecution.

1st Respondent's Case

18. The 1st Respondent opposed the Petition through a Replying Affidavit sworn by Sgt. Mohamed Abduba, on 31st January 2025, the investigating officer with the 1st Respondent, who outlined the circumstances and basis for the criminal investigation and subsequent charges against the 2nd Petitioner.



19. It is averred that the investigations were triggered by a formal complaint lodged by the then Acting Managing Director of the ADC, Dr. Wilson Tonui, on 23rd February 2024, alleging fraudulent registration of a lease concerning Title Number Galana Ranch/Block 1/1.
20. Following receipt of the complaint, the Directorate of Criminal Investigations opened Inquiry File No. 103/2024 and commenced investigations. The investigations entailed the retrieval and analysis of documents from the Mombasa Lands Registry and the ADC headquarters, as well as the recording of witness statements.
21. Sgt. Mohamed Abduba deponed that the investigations revealed that the lease in question, allegedly between ADC and Sahal Agro-Holdings Limited, was a false document, executed without the knowledge or authority of the ADC or its legal representatives, M/s Cheptumo & Company Advocates.
22. Further, he stated that the 2nd Petitioner, while not a signatory to the lease, presented himself at the Lands Registry and collected the original title and lease documents without any written authority from Cheptumo Advocates.
23. The 1st Respondent alleges that the false lease bore backdated signatures and dates inconsistent with the tenure of ADC's known officials, and that the entire transaction was facilitated through misrepresentation and forgery.
24. The investigations established that the application for registration of the lease had been submitted under the guise of Cheptumo Advocates, yet the firm had disowned any involvement in the execution or registration of the lease documents.
25. It is also averred that the collection of the original documents by the 2nd Petitioner was done on the strength of a forged application form without the authority of Cheptumo Advocates.
26. Upon completion of investigations, the findings were forwarded to the 2nd Respondent for perusal and legal advice. The DCI recommended that both Mr. Abdullahi Maalim Hassan and the 2nd Petitioner be prosecuted for conspiracy to defraud.
27. The 1st Respondent affirms that the investigations were conducted impartially, professionally, and in strict conformity with the law, and that the charges are supported by credible documentary and testimonial evidence.
28. It is contended that the prosecution is not driven by malice or any ulterior motive but is a lawful response to a criminal complaint, supported by the evidentiary material gathered.
29. The 1st Respondent avers that the 2nd Petitioner's professional status as an advocate does not place him above the law and cannot shield him from investigation or prosecution where criminal culpability is demonstrated.
30. In view of the above, the 1st Respondent prays that the Court dismisses the Petition, declines the orders sought, and allows the criminal justice process to proceed unhindered.

2nd Respondent's Case

31. The 2nd Respondent, the Director of Public Prosecutions, opposed the Application through Grounds of Opposition dated 31st January 2025. It is contended that the Petitioners have not met the threshold for the grant of the conservatory or final reliefs sought.



32. It is the 2nd Respondent's case that the Petitioners' case is premised on a misapprehension of the law as to the concurrent existence of civil and criminal proceedings. Additionally, it was averred that granting the prayers sought would not only amount to an unjustified interference with its mandate but would also amount to an overreach of the 3rd Respondent's mandate to hear and determine the intended criminal case.
33. It is also asserted that the Petition amounts to an attempt to curtail prosecutorial discretion and to circumvent the lawful criminal justice process by pre-empting and forestalling a valid trial, and urged the court to dismiss the Application in the interest of justice and public interest.
34. The Petition was canvassed by way of written submissions, the Parties complied by filing their respective submissions, save for the 3rd Respondent, which did not take part in the proceedings.

Petitioners' Submissions

35. The Petitioners, through their written submissions dated 21st March 2025, urge the Court to grant the reliefs sought in the Petition. They submit that the criminal proceedings instituted against the 2nd Petitioner amount to an abuse of the criminal justice system and violate his constitutional rights.
36. It is their submission that the 2nd Petitioner acted solely within the bounds of his professional responsibilities as an advocate, receiving documents from the Lands Registry on behalf of his former client. The Petitioners argue that the Respondents are improperly identifying the 2nd Petitioner with the alleged acts of his client, contrary to international legal principles governing the legal profession.
37. The Petitioners relied on the Basic Principles on the Role of Lawyers adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, particularly Principles 16 and 18, which affirm that lawyers should not be prosecuted or harassed for actions taken in the course of their professional duties.
38. Relying on the case of *Esther Gathoni Mwangi v Director of Public Prosecutions & 2 Others; William Charles Fryda & 3 Others* (Interested Parties [2022] eKLR, the Petitioners argued that the Court has the jurisdiction to quash criminal proceedings instituted to harass and intimidate legal practitioners for representing clients in contentious matters.
39. The Petitioners also relied on Article 47 of *the Constitution* and the *Fair Administrative Action Act*, contending that the 2nd Respondent failed to consider relevant facts and acted unreasonably and disproportionately in deciding to charge the 2nd Petitioner.
40. It was submitted that the Respondents ignored the 2nd Petitioner's explanations and failed to apply the evidentiary and public interest tests provided in the National Prosecution Policy and the Decision to Charge Guidelines. The petitioners relied on the case of *Paul Stuart Imison Another v The Attorney General & 2 Others* Petition No. 57 of 2009, *Kuria & 3 Others v Attorney General* [2002] 2 KLR 69, *Republic v Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another* [2002] 2 KLR 703, *Petition No. 461 of 2012 – Francis Kirima M'ikunyua & Others v Director of Public Prosecutions, R v Attorney General exp Kipngeno Arap Ngeny* High Court Civil Application No. 406 of 2001 and *Stanley Munga Githunguri v Republic* [1986] eKLR.
41. Further reliance is placed on Article 157(11) of *the Constitution*, which obliges the DPP to exercise prosecutorial powers with regard to public interest, the administration of justice, and to avoid abuse of the legal process.



42. The Petitioners argue that the prosecution was initiated only after ADC failed to obtain favourable outcomes in civil court, and is intended to settle civil scores using criminal proceedings, which is impermissible in law.
43. The Petitioners distinguish the facts of this case from genuine prosecutorial actions, submitting that no evidence links the 2nd Petitioner to the alleged forgery or fraud beyond his mere collection of documents from a public office.
44. The Petitioners submit that there was no criminal intent on the part of the 2nd Petitioner, and no proof that he knowingly engaged in any deceitful or unlawful conduct.
45. The Petitioners submitted that the intended prosecution is oppressive, in bad faith, and unsupported in law and urged this court to grant prayers sought in the petition and quash the charge sheet and intended criminal case against the 2nd Petitioner.

Respondents' Submissions

46. The Respondents filed joint submissions dated 21st March, 2025. It was submitted that the Petition is unmeritorious, speculative, and constitutes a collateral attack on criminal proceedings that were initiated after thorough investigations and upon satisfying the evidential and public interest thresholds.
47. They argue that the criminal justice system allows for the trial court to evaluate the merits of the evidence presented and that this Court should refrain from interfering with that jurisdiction unless exceptional grounds are demonstrated, which the Petitioners have failed to do.
48. The Respondents invoke the Supreme Court decision in *Praxidis Namoni Saisi & 7 Others v Director of Public Prosecutions* [2022] eKLR, in which the Court cautioned against turning judicial review proceedings into full-fledged trials, noting that disputed facts are best tested in a trial court.
49. They contend that the Petitioners have failed to demonstrate any impropriety, illegality, or irrationality in the 1st and 2nd Respondents' actions. Rather, they rely on generalized allegations of malice without evidentiary backing.
50. The Respondents assert that the investigation was instigated following a legitimate complaint from ADC, and that evidence gathered during the inquiry linked the 2nd Petitioner to the unlawful registration of a lease via impersonation of a law firm. Additionally, it was averred that where a complaint has been made to the 1st Respondent, criminal investigations are at the core of the rule of law and governance and should not be halted on the basis of unsubstantiated allegations, as are the contents of the Petition and the Affidavit in support thereof which amount to the highest mark of abuse of the rule of law. Reliance was placed on the case of *Republic v. Commissioner of Police and Another ex parte Michael Monari & Another* (Misc. Application No. 68 of 2011 [2012] eKLR).
51. They further argued that the threshold for quashing a prosecution has not been met in the present matter. The Respondents further submitted that the coexistence of civil proceedings involving the same property does not bar the institution of criminal proceedings where separate and distinct elements of criminality are present.
52. On the question of professional immunity, the Respondents argue that the fact that the 2nd Petitioner is an advocate does not immunize him from investigation and prosecution where his conduct is alleged to have facilitated or abetted a criminal act.



53. They submit that the reliance on international norms and UN principles does not override the domestic legal obligations and due process that allow for prosecution of any person reasonably suspected of committing a criminal offence.
54. The Respondents maintain that the Petition seeks to prematurely terminate a prosecution which is yet to proceed to trial and where the 2nd Petitioner has all avenues available under the law to defend himself.
55. In conclusion, the Respondents urge the Court to dismiss the Petition and allow the criminal trial to proceed to its logical conclusion before the competent trial court.

Analysis And Issues For Determination

56. Having considered the pleadings, affidavits, and submissions by the parties and decisions relied on, the following issues arise for determination:
 - i. Whether the 2nd Respondent exercised his prosecutorial discretion within the confines of Article 157 of *the Constitution*.
 - ii. Whether the conduct of the Respondents infringed the 2nd Petitioner's rights under Articles 28 and 47 of *the Constitution*.
 - iii. Whether this Court should intervene and quash the criminal proceedings in Milimani MCCR No. E1317 of 2024.

Whether the 2nd Respondent exercised his prosecutorial discretion within the confines of Article 157 of *the Constitution*

57. 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.
58. 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.
59. 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.
60. In cases where there is a petition to halt a criminal prosecution, the court must consider several established factors. Firstly, the court should exercise great caution in its decision-making to avoid interfering with ongoing or anticipated criminal proceedings. The court must refrain from overstepping the constitutional and legal authority of the Director of Public Prosecutions and should not interfere with the investigative powers granted to the Police. Nonetheless, the court may intervene if that discretion is exercised unlawfully or in bad faith, such as in situations where it is misused or employed for purposes unrelated to the objective of addressing the commission of a criminal offense.



In *George Joshua Okungu & Another V The Chief Magistrates Court, Nairobi & Another* [2014] eKLR it was held:

“ 50. The law is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions or the authority charged with the prosecution of criminal offences to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings. That a petitioner has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is always open to the petitioner in those proceedings. However, if the Petitioner demonstrates that the intended or ongoing criminal proceedings constitute an abuse of process and are being carried out in breach of or threatened breach of the petitioner’s Constitutional rights, the Court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore, the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the Petitioner to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. In the exercise of the discretion on whether or not to grant an order of prohibition, the court takes into account the needs of good administration. See *R v Monopolies and Mergers Commission Ex Parte Argyll Group Plc* [1986] 1 WLR 763 and *Re Bivac International SA (Bureau Veritas)* [2005] 2 EA 43 (HCK).”

61. Similarly, 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. The mere fact that their high chance of success as regards the intended or ongoing criminal proceedings does not count, it not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned merits of the case but to address defects in decision making process by a decision making body. However, the court may only intervene were the said discretion is exercised unlawfully and in bad faith, for instance where it is being abused or being used for achievement of some collateral purpose which are not geared towards the vindication of the commission of a criminal offence and the justice system such as with a view to forcing a party to submit to a concession of a civil dispute, the court will not hesitate to bring such proceedings to a court.”



62. In Republic v 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. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. 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”.

63. 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 as earlier stated, which provides that the DPP does not require the consent of any person or authority to commence any criminal proceedings and in exercise of his/her powers and functions, shall not be under the direction or control of any person or authority. 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.

64. 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 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.”

65. I further seek to associate myself with the decision in R v Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001 the Court held that:

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must



be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable".

66. The mandate of the respondents is well provided for in *the Constitution*. The National Police Service is established under article 243 of *the Constitution*. The *National Police Service Act*, 2011 which operationalizes the above article provides in section 24(e) that one of the functions of the police is the investigation of crimes. In *Daniel Ogwoka Manduku v Director of Public Prosecutions & 2 others* [2019] eKLR, the court in discussing the role of the police in investigation of crimes held:

“...The powers of the police to investigate a crime cannot be challenged because the police is there principally to combat crime. It is therefore not possible to stop any criminal investigations unless the foundation of such investigations is malicious or is an abuse of power...Odunga J in *Isaac Tumunu Njunge v Director of Public Prosecutions & 2 others* [2016] eKLR, said with regard to the power of the police to investigate:

“... 42.It is however my view that the police are clearly mandated to investigate the commission of criminal offences and in so doing they have powers inter alia to take statements and conduct forensic investigations. In order for the applicant to succeed he must show that not only are the investigations which were being done by the police are being carried out with ulterior motives but that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the predominant purpose is to further some other ulterior purpose and 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. With the litany of judicial pronouncements on the threshold for interfering with the discretion of the investigative and prosecutorial agencies in mind, I now turn to the petitioner’s gravamen. The Petitioners contend that the DPP acted arbitrarily, unreasonably and in bad faith by charging the 2nd Petitioner based on flimsy evidence and in disregard of his role as a legal representative acting on client instructions.
68. The DPP, on the other hand, maintains that its decision was informed by a comprehensive analysis of the investigative file submitted by the DCI, and that both the evidential sufficiency test and the public interest test were met before preferring charges.
69. The legal framework for prosecutorial decision-making is detailed in the *Office of the Director of Public Prosecutions Act* and the National Prosecution Policy. In particular, the DPP must be satisfied that there is a realistic prospect of conviction based on admissible evidence and that prosecution is required in the public interest.
70. It is not for the Court to delve into the sufficiency of evidence except in clear cases of abuse of power or where the evidence tendered is plainly unreasonable, irrational or actuated by malice.
71. The Petitioners’ argument centres on the premise that the DPP failed to take into account relevant factors, including the 2nd Petitioner’s limited role in the events under investigation and the ongoing civil litigation concerning the same property.
72. However, the Court finds that the Respondents have demonstrated that the decision to charge was preceded by a formal complaint, structured investigations, and legal review of the evidential material.



73. I must hasten to add that the fact that the DCI undertook investigations pursuant to which it arrived at a particular conclusion may be a factor to be considered by the DPP in deciding whether or not investigations or even prosecution ought to be carried out. However, the DPP is not necessarily bound by recommendations and conclusions arrived at by the Police.
74. A reading of article 157(4) of *the Constitution*, leaves me with little option but to associate myself with the decision of the High Court of Uganda in the case of *Uganda v Jackline Uwera Nsenga Criminal Session Case No. 0312 of 2013*, to the effect that:
- “...the DPP is mandated by *the Constitution* (See Art. 120(3)(a)) to direct the police to investigate any information of a criminal nature and report to him or her expeditiously... Only the DPP, and nobody else, enjoys the powers to decide what the charges in each file forwarded to him or her should be. Although the police may advise on the possible charges while forwarding the file to DPP...such opinion is merely advisory and not binding on the DPP (See Article 120(6) Constitution). Unless invited as witness or amicus curiae (friend of Court), the role of the police generally ends at the point the file is forwarded to the DPP.”
75. This position was similarly appreciated in *Charles Okello Mwanda v Ethics and Anti-Corruption Commission & 3 Others (2014) eKLR* in which Mumbi Ngugi, J held that:
- “I would also agree with the 4th Respondent (DPP) that the Constitutional mandate under 2010 Constitution with respect to prosecution lies with the 4th Respondent, and that the 1st Respondent has no power to ‘absolve’ a party and thereby stop the 4th Respondent from carrying out his constitutional mandate. Article 157(10) is clear...However, in my view, taking into account the clear constitutional provisions with regard to the exercise of prosecution powers by the 4th Respondent set out in Article 157(10) set out above, the 1st respondent (EACC) has no authority to ‘absolve’ a person from criminal liability...so long as there is sufficient evidence on the basis of which criminal prosecution can proceed against a person, the final word with regard to the prosecution lies with the 4th Respondent (DPP) ...”
76. In *Thuita Mwangi & Anor v The Ethics and Anti-Corruption Commission & 3 Others Petition No. 153 & 369 of 2013* the court underscored that:
- “The decision to institute criminal proceedings by the DPP is discretionary. Such exercise of power is not subject to the direction or control by any authority as Article 157(10)... These provisions are also replicated under Section 6 of the Office of the Director Public Prosecutions Act, No. 2 of 2013 ...In the case of *Githunguri –v- Republic (Supra at p.100)*, the Court observed...The Attorney General of Kenya...is given unfettered discretion to institute and undertake criminal proceedings against any person “in any case in which he considers it desirable so to do... this discretion should be exercised in a quasi-judicial way. That is, it should not be exercised arbitrarily, oppressively or contrary to public policy ...”
77. The DPP’s obligation under Article 157(11) does not impose a higher evidential threshold than is required at the charging stage. It is well established that proof beyond reasonable doubt is a standard reserved for trial not for preferring charges.
78. The Petitioners have not demonstrated that the DPP acted capriciously or ignored exculpatory evidence. While it may be debatable whether the charges will ultimately succeed, that is a matter for the trial court.



79. The constitutional court is solely mandated to hear and decide matters concerning infringement of an individual's constitutional rights, and in accordance with that constitutional court should refrain from usurping the statutory roles of independent offices established under *the Constitution*.
80. The DPP is such an office, and its decisions attract a presumption of regularity unless rebutted by cogent evidence of abuse or mala fides, which has not been shown in this case. There is no evidence that the DPP's decision was informed by an extraneous or improper purpose. The process followed appears to have been within the bounds of *the Constitution* and applicable statutory provisions.
81. While the Petitioners contend that the 2nd Petitioner was merely acting as an advocate under instructions, the documents in question were allegedly collected from the Lands Registry through misrepresentation. This, if proved, may establish culpability warranting trial, even if the individual is an advocate.
82. The Court also notes that the Petitioners did not demonstrate any procedural irregularities, illegality, or improper influence on the part of the 1st and 2nd Respondents. The mere coincidence of civil litigation and criminal charges, without more, is insufficient to establish abuse of process.
83. The criminal trial provides the proper forum to examine the veracity and reliability of the prosecution's case, including whether the 2nd Petitioner's conduct amounts to a criminal offence. Pre-empting this process undermines the constitutional role of the trial court.
84. Consequently, the Court finds no proof of bad faith, malice, or abuse of the criminal justice system by the Respondents. The Petitioners have not met the threshold required to justify judicial interference on this ground.
85. Accordingly, the Court finds that the 2nd Respondent exercised his prosecutorial discretion lawfully, reasonably, and within the constitutional parameters established by Article 157, and it cannot interfere with its mandate.

Whether the conduct of the Respondents infringed the 2nd Petitioner's rights under Articles 28 and 47 of *the Constitution*

86. Article 28 of *the Constitution* of Kenya provides that every person has inherent dignity and the right to have that dignity respected and protected. Article 47 further provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The Petitioners allege violations of both provisions in the manner the 2nd Petitioner was investigated, arrested, and charged.
87. The Court acknowledges the position that being subjected to a criminal process, especially one that is ill-founded or improperly motivated, may indeed implicate a person's dignity and the right to fair administrative action. However, whether such rights have been violated must be tested against the lawfulness and procedural regularity of the actions in question.
88. In the present case, the arrest and arraignment of the 2nd Petitioner followed a formal complaint by a third party, ADC and subsequent investigations by the DCI. The Respondents maintain that due process was followed and that the 2nd Petitioner was treated in accordance with legal procedures applicable to criminal investigations. However, the Petitioners contend that exculpatory material was ignored.
89. The Petitioners have relied on the United Nations Basic Principles on the Role of Lawyers, which require States to shield advocates from intimidation. This Court endorses those principles. However,



the Basic Principles do not confer blanket immunity upon advocates for all acts undertaken in a professional capacity. Where there is prima facie evidence of participation directly or indirectly in fraudulent alteration of registrable instruments, the shield yields to investigatory scrutiny.

90. The 2nd Petitioner's professional status does not place him above legal scrutiny. *The Constitution* and the *Fair Administrative Action Act* guarantee fairness, not immunity from investigative or prosecutorial procedures.
91. Turning to Article 47, the decision to charge is an "administrative action" as defined in Section 2 of the FAAA. Procedural fairness mandates notice of allegations and an opportunity to respond. The uncontroverted evidence is that the 2nd Petitioner recorded a statement, supplied documents, and sought postponement of plea due to ill-health, requests which were granted. Procedural fairness was thus observed.
92. Under Section 7 FAAA, the Court may review administrative action for irrationality, unreasonableness, malice, or ulterior motive. The Petitioners argue the presence of an ulterior motive, citing pending civil suits. While the timing may raise suspicion, coincidence alone does not constitute proof. A nexus must be established with cogent evidence, not mere conjecture.
93. Further, the 2nd Petitioner has argued that his arrest and prosecution constitute intimidation and an attempt to force his former client to abandon a civil dispute. While this argument raises valid concerns, the record shows there were previous civil proceedings and conservatory orders concerning the subject property. The presence of such orders does not, in itself, make the criminal charges unconstitutional.
94. What must be demonstrated is not merely the potential for injustice but a real, tangible violation of a specific right. The evidence tendered by the Petitioners, in the Court's view, does not demonstrate that the 2nd Petitioner's dignity or right to fair administrative action has been infringed in a manner that warrants constitutional intervention.
95. The Petitioners' evidence, including annexures and affidavit material, discloses contested issues of fact, particularly as to the extent of the 2nd Petitioner's involvement in the registration of the impugned lease. Such contested facts require ventilation in the trial court, not in a constitutional petition.
96. Furthermore, this Court takes judicial notice that criminal processes inherently involve the restriction of personal liberty and can result in stigma. However, the law contemplates and accepts such consequences where due process has been followed and where there exists a prima facie case to answer.
97. Consequently, the Court finds that the Petitioners have not established any breach of Article 28 or Article 47 in the manner alleged. The criminal process against the 2nd Petitioner, based on the material on record, is neither arbitrary nor irrational to the extent of infringing his constitutional rights.

Whether this Court should intervene and quash the criminal proceedings in Milimani MCCR No. E1317 of 2024.

98. The Petitioners seek orders of Certiorari to quash the charge sheet and prohibition to stop further prosecution of the 2nd Petitioner in Milimani MCCR No. E1317 of 2024. They invoke the Court's constitutional jurisdiction to prevent abuse of process and to protect fundamental rights.
99. It is well settled that judicial review and constitutional remedies can be invoked to quash criminal proceedings, but only in exceptional circumstances. The guiding test is whether there is clear abuse of discretion, breach of constitutional rights, or manifest illegality in the initiation or conduct of the prosecution.



100. In *Eunice Khalwali Miima v Director Public of Prosecutions & 2 others* [2017] eKLR the Court stated:

“The circumstances under which the Court will grant stay of a criminal process in these kinds of proceedings is now well settled. The Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail is not 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. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.”

101. The Petitioners argue that the 2nd Petitioner is being unfairly prosecuted for actions undertaken in his professional capacity as an advocate and that his involvement was limited to collection of documents. They also point to concurrent civil proceedings and previous conservatory orders in support of their case.

102. However, as earlier stated, the existence of civil proceedings touching on the same subject matter does not per se bar criminal prosecution. What must be shown is that the prosecution is motivated by malice, is without evidential basis, or is aimed at circumventing lawful judicial processes.

103. The 2nd Respondent has demonstrated that the decision to charge was based on findings made after investigations, and that the charge relates to the alleged misrepresentation and impersonation of a law firm to obtain documents from the Lands Registry.

104. Only the most compelling and cogent evidence will justify the Court’s interference on issues of this nature involving halting a prosecution of a suspected offender. This is what the Court had in mind in the case of *Rhodes (R on the application of) v Police & Crime Commissioner for Lincolnshire* [2013], the Court opined:

“The Court must not interfere simply because it thinks it would have made a different decision if it had been the primary decision-maker. Nothing less than *Wednesbury* unreasonableness will do. In other words, the Court must not interfere unless it is satisfied that the PCC’s decision is ‘irrational’ or ‘perverse’. The assessment of the PCC’s decision must be made by reference to the material he had available to him. This could include not only the materials he considered but also the materials he could and should have considered.”

105. The threshold set for the High Court to challenge the decisions of another constitutional entity due to improper motives, bad faith, or irrationality is so elevated that it requires the party presenting the facts to meet that burden based on a preponderance of evidence. It is my finding that the present Petition has not met that burden.

106. The DCI’s investigative report allegedly implicates the 2nd Petitioner not merely as a messenger but as a participant in a larger fraudulent scheme, albeit indirectly. Whether or not this is ultimately provable is a matter for trial court to determine, not for preliminary determination through constitutional petitions, as there has been no demonstrable abuse, impropriety, or illegality sufficient to justify the



drastic remedy of terminating criminal proceedings. The 2nd Petitioner retains the right to mount a defence before the trial court, where all the issues of fact and law may be ventilated.

107. The Court must exercise restraint to avoid descending into the arena of factual determination better suited for the trial court. The constitutional jurisdiction should not become a backdoor forum for challenging the merits of a criminal case.

108. For these reasons, the Court finds no basis upon which to grant the orders sought by the Petitioners. The Petition falls short of the legal threshold for judicial interference with ongoing criminal proceedings.

109. Accordingly, the Petition is hereby dismissed with no orders as to costs. File closed accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12TH DAY OF AUGUST, 2025.

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BAHATI MWAMUYE

JUDGE

In the presence of: -

Counsel for the Petitioners – Mr Onderi

Counsel for the 2nd Respondent – Mr Mukuti h/b Mr Owiti

Counsel for the 1st and 3rd Respondent –No appearance

Court Assistant – Ms. Neema

