



Chemonges & another v Director of Criminal Investigations & 3 others; Aspire Limited (Interested Party) (Petition E013 of 2023) [2025] KEHC 11567 (KLR) (1 August 2025) (Judgment)

Neutral citation: [2025] KEHC 11567 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

PETITION E013 OF 2023

JRA WANANDA, J

AUGUST 1, 2025

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 24, 25, 27, 29, 50, 73, 74, 75, 157, 165, 243, 244, 258 AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED VIOLATION, CONTRAVENTION AND/OR THE ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL AS GUARANTEED UNDER ARTICLE 27 (1), 29, 47, 48 AND 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE INTENDED PROSECUTION OF MARTIN SIWA CHEMONGES

AND

IN THE MATTER OF ACCESS TO JUSTICE, IMPARTIALITY AND FAIRNESS

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, 2006 AS READ WITH THE 6TH SCHEDULE TO THE CONSTITUTION MORE PARTICULARLY CLAUSE 19, TRANSITIONAL & CONSEQUENTIAL PROVISIONS

BETWEEN

MARTIN SIWA CHEMONGES 1ST PETITIONER



ZEDKA TECHNICAL SERVICE LIMITED 2ND PETITIONER

AND

DIRECTOR OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

AND

ASPIRE LIMITED INTERESTED PARTY

JUDGMENT

1. The Petition herein is dated 25/07/2023 and is filed through Messrs C.D. Nyamweya & Co. Advocates. Together with the Petition, the Petitioner had also filed a Notice of Motion seeking conservatory orders but it was later agreed by consent of the parties that to save on time, the conservatory orders would be issued and the parties would then proceed directly to canvassing the Petition. This consent was duly adopted, and pursuant thereto, I gave directions for hearing of the Petition.
2. However, before the Petition could be heard, the Interested Party, which had not initially been joined as a party in this matter, filed an Application seeking to participate in the Petition. After hearing the parties, by my Ruling delivered on 29/11/2024, I allowed the Application.
3. Back to the Petition, the same seeks a long list of orders but which when looked at closely, amounts to basically the same prayers merely framed in various different versions. The prayers are as follows:
 - i. A declaration order do issue that the Petitioner's rights have been violated as particularized in the Petition
 - ii. A declaration order that the 1st and 2nd Respondent in light of the allegations touching on his competence, integrity and suitability as well as conflict of interest for that office is in breach of *the Constitution* in particular Article 10 [1] and [2] and Article 73 [1] and [2] of *the Constitution*
 - iii. A declaration order that the 2nd Respondent as a public officer herein abused his powers contrary to Article 157[11] of *the Constitution* by unfairly intending to prosecute the Petitioners and constantly harassing the Petitioners yet they are the bonafide owners of Plot No Eldoret Municipality Block 8/527 thus stifling the administration of justice and should forthwith stop the prosecution of all matters relating to the aforementioned criminal cases
 - iv. A declaration order that the 2nd Respondent in light of allegations of the manner he has handled matters relating to intending to prosecute the Petitioners is acts of mission or commission by themselves and/or assigns be declared inconsistent with *the Constitution* and in particular Articles 73[1] and 86 [2] as read with Sections 12 and 22 of the *Public Officer Ethics Act*.
 - v. A declaration order that the actions, inactions, commissions and omissions of the 1st and 2nd Respondents in intending to prosecute the Petitioner in relation to Plot No Eldoret Municipality 8/527 violates the Petitioners rights to fair administrative action as guaranteed under article 47 of *the Constitution*.



- vi. A declaration order that the fundamental rights and freedoms of the Petitioners as guaranteed under Article 50 [1] of *the Constitution* has been violated.
 - vii. A declaration order do issue that the allegations against the Petitioners have no basis in law and any intended prosecution and ongoing prosecution against the Petitioners is bad in law and should be declared illegal.
 - viii. A declaration order do issue that any action of the Respondents that is inconsistent with *the Constitution* be voided to that extent.
 - ix. An order of mandamus directed against the 1st and 2nd Respondents to stop prosecuting any criminal case against the Petitioners in relation to Plot No Eldoret Municipality Blok 8/527.
 - x. Alternatively, a declaration that the Petitioners are entitled to the protection of the law as guaranteed under Article 27[1] of *the Constitution* of Kenya; and the abuse of power and subsequent office in the manner of investigation harassment and intended malicious prosecution of the Petitioners by the 2nd Respondent is a flagrant disregard of right to fair hearing as encapsulated in Article 50 [1] of *the Constitution*.
 - xi. Costs of the Petition
4. The Petition is supported by the Affidavit sworn by the 1st Petitioner, Martin Siwa Chemonges, who described himself as a director of the 2nd Petitioner. He deponed that sometime in 2013, the 2nd Petitioner entered into a Sale Agreement with one Johannah Kiprotich Chebiego of the Interested Party in respect to purchase of the parcel of land known as Eldoret Municipality Block 8/527 [hereinafter “the suit land”] for Kshs 11,500,000/- which amount was paid in full, in 3 instalments of Kshs 5,000,000/- upon signing of the Agreement, Kshs 2,000,000/- on 4/07/2013, and Kshs 4,500,000/- on 25/07/2013. He deponed that after the said transaction, the 2nd Petitioner was on 6/08/2013 issued with a Certificate of Lease by the Land Registrar for 99 years, and has been in occupation thereof since then, that sometime in July 2021, the 1st Petitioner was summoned to the DCIO Headquarters to be interrogated on how he acquired possession of the suit land and has since then been subjected to endless summons which he has come to learn is to aid unscrupulous individuals take possession of the suit land through criminal prosecution of the Petitioners. He deponed that he was later arrested and charged with the offence of forgery and obtaining land registration by false pretence under Eldoret Magistrate’s Court Criminal Case No. E3469/2021 in which one of the complainants’ witnesses, one Mark Muigai Wanderi, is the one who certified the Petitioners’ documents in respect to purchase of the suit.
5. He urged further that the Petitioners wrote a letter to the Director of Public Prosecutions [DPP] with a view to the case being withdrawn since the Land Registrar who claimed the 1st Petitioner had obtained the land registration by false pretence had been recommended by the DPP’s office to be charged with the offence of abuse of office and therefore could not be an impartial witness. He deponed that despite the DPP’s directives, the said Mark Muigai Wanderi has never been charged which prompted the 1st Petitioner, as the complainant, to seek a warrant of arrest against him which orders were obtained, that the said Mark Muigai Wanderi, upon realizing that there were pending warrants of arrest against him, proceeded to the High Court and filed an Application matter, namely, Eldoret High Court Miscellaneous Criminal No. E087 of 2022, which the Court dismissed. He prayed for this Court’s intervention to halt the illegality being perpetuated by the police with ulterior motives to deprive them of their rightfully acquired property. According to him, the Land Court is best suited to solve disputes regarding land matters before any criminal proceedings can be preferred subject to the final findings of the Court, and that the continued summons and the intended prosecution may result in a miscarriage



of justice. The rest of the matters deponed are basically arguments on issues of law and restatement of known legal principles, which should have been reserved for final Submissions, and thus I will not recount.

Respondent's Replying Affidavit

6. The Petition is opposed by the Respondents by way of the Replying Affidavit sworn by one Police Constable Antony Mwaura, who described himself as a Police Officer attached at Directorate of Criminal Investigations [DCI] Headquarters, Land Fraud Investigations Unit, and one of the Officers seized of the matter herein. He deponed that a complaint was made to his Office by one Ng'ang'a Kamau by the letter dated 11/01/2021 on behalf of the Interested Party and on his part, the Petitioner had also made a complaint at Naiberi Police Station, and this was established when the investigations commenced, and that to avoid parallel investigations, it was directed that the matter be taken over by DCI Headquarters Land Fraud Unit. He deponed that the investigations revolved around fraudulent documents regarding the suit land, Eldoret Municipality Block 8/527, which was initially owned by one John Rotich Limo who in the year 2006 sold and transferred the same to the Interested Party, and that the Petitioner's claim to the suit land is therefore fraudulent. He deponed further that the 2nd Petitioner was incorporated on 14/05/2015, and not 13/05/2011 as the Petitioner has averred in his Affidavit, that the claim that the Petitioners purchased the suit land from "Astire Limited" is not true as that is a non-existent company, and that the purported Certificate of Lease in the name of "Astire Limited" by Land Registrar Tom Mainja Chepkwesi was found to be a false document by the document examiner and the signature forged.
7. He urged further that the Certificate of Lease referred to by the Petitioners is also a false document as the purported signature of Land Registrar Caleb Sunguti was also found to be forged, that investigations also revealed that signatures appearing in the White Card for the suit land purporting to support the Petitioners' ownership thereof were all forgeries, and that the 1st Petitioner was charged after the file was forwarded to the 2nd Respondent [DPP] whose office analyzed the evidence and granted consent to prosecute. Regarding the said Land Registrar Mark Muigai Wanderi, he deponed that he [Mark Muigai Wanderi] merely provided certified copies of documents out of request by the DCI, and that the cause referred to by the Petitioners is totally a different one from the case the Petitioner was charged for. He deponed further that the 1st Petitioner was given the opportunity to support his claim, an impartial investigation was carried out and which followed all the dictates of law, that the charges are fair, just and known in law, the decision to charge the 1st Petitioner was informed by the sufficiency of evidence and the public interest, and that the presumption of innocence and the fundamental rights of the 1st Petitioner are guaranteed and protected by the trial Court.
8. He contended that granting of the orders sought herein will amount to arm-twisting and usurping powers of the trial Court, that the 1st Petitioner has not demonstrated that the trial Court will not safeguard his right to a fair trial, and that granting the orders will occasion great prejudice to the Respondents and the wider public as they will not have an opportunity to prove their case against the Petitioners. In conclusion, he urged that the Respondents have already been prejudiced by the stay orders and will be denied the right to exercise their Constitutional and statutory mandate, fair and speedy trial on offences bordering on forgeries. The other matters deponed in the Affidavit go deep into the merits of the criminal case said to be pending before the criminal Court, and which line of deponing may not really be very relevant to the issues before this Court, and which I have therefore not recounted at length.



Interested Party's Affidavit

9. The Application is also opposed by the Interested Party which relied on the Replying Affidavit sworn on 11/12/2024 by one Njeri Kamau, and filed through Messrs Kitiwa & Partners Advocates. She stated that she is a director of the Interested Party whom she deponed, is the legal and registered owner of the suit land, Eldoret Municipality Block 8/527, as evidenced by the exhibited Certificate of Lease. She deponed that the suit land was initially owned by one John Rotich Limo who on 20/11/2006 entered into an Agreement for Sale with the Interested Party and transferred the suit land to the latter. According to her therefore, the Petitioner's alleged ownership of the suit land is fraudulent and based on forged documents, including a purported Sale Agreement entered into with an entity named "Astire Limited", which is not the Interested Party.
10. She deponed that the Interested Party discovered the fraud and took immediate steps to report the matter to the Directorate of Criminal Investigations [DCI] in January 2021, which investigations established that the documents used to transfer the suit land to the Petitioners were forged, and that the signatures on the Certificate of Lease conferring ownership of the suit land to the Petitioners were made by different authors rendering the transfer fraudulent, null and void. Regarding the prosecution of the 1st Petitioner, she urged that he will not suffer any prejudice as he will be accorded a fair hearing in the criminal case in accordance with *the Constitution*, that the existence of the criminal case does not amount to violation of Constitutional rights and the trial process will allow the 1st Petitioner to present his case and contest evidence presented against him and that the existence of a civil dispute does not preclude the institution of criminal proceedings where fraud, forgery or any criminal conduct is alleged. She urged that be that as it may, the Interested Party also filed a claim in Court, namely, Eldoret Environment and Land Court Case No. 2 of 2021 against the Petitioners which is ongoing and is focussed on determining issues of ownership and title. She contended that the Petitioner's argument, if upheld, will delay the administration of justice, and create a dangerous precedent that allows alleged criminal conduct to be shielded under the guise of pending civil disputes.
11. As in the Affidavit by the Respondents, the Interested Party's Affidavit has also in some areas, extensively delved into matters that amount to arguing the merits of the criminal case, which I have therefore restrained myself from recounting at length.

Petitioners' Further Affidavit and Supplementary Affidavit

12. As observed above, the Respondent's and the Interested Party's Affidavit having in some portions, canvassed matters that are fit to be argued before the criminal trial Court, and not very relevant to the matters to be determined herein, the result is that it prompted the Petitioner to file a Further Affidavit and Supplementary to also substantively respond to the averments. Both sides therefore seem to some extent to have lost focus and deviated from what they needed to address before this Court. For this reason, I will also not recount the same as they relate to the merits and/or demerits of the criminal case.

Hearing of the Petition

13. The Petition was canvassed by way of written Submissions. The Petitioners had filed its Submissions dated 22/03/2024 much earlier even before the Interested Party had joined the matter. For this reason, I gave them leave to file Supplementary Submissions, if necessary, but I have not come across any.
14. On its part, the Interested Party, after being so joined, filed the Submissions dated 6/02/2025.
15. On the Respondents part, they failed to beat the timeline that had been set for filing of their Submissions, and were thus locked out from filing any, time having expired.



Petitioners' Submissions

16. The Petitioner's Counsel, after recounting the background of the case, cited the case of Republic versus the Director of Public Prosecution & 4 others ex-parte Victor Wafula Masibo, the case of Commissioner of Police & the Director of Criminal Investigation Department and Another v Kenya Commercial Bank Ltd & 4 others [2013] eKLR, and also the case of Kuria & 3 others v Attorney General [2002] 2 KLR 69. He then reiterated that the Petitioners purchased the suit land from a known person in 2013 for a consideration of Kshs 11,500,000/-, upon which the land was transferred to them and that they are therefore the current registered owners. He submitted that in the year 2021 while in the process of developing the land, they were sued in Eldoret Environment and Land Court [ELC] Case No. E002 of 2021, and after sometime, were also summoned to the DCI headquarters and interrogated on several occasions on how they obtained the suit land and eventually charged in Eldoret Magistrate's Court Criminal Case No. E3469 of 2021, which is the subject of this Petition. He contended that the Petitioners believe that their prosecution is intended to aid the Plaintiffs in the said Eldoret Environment and Land Court Case [ELC] No. E002 of 2021, as the statements and charge sheet to be used in the criminal case have also been filed as evidence in the ELC case, which case was filed much earlier than the criminal case.
17. According to Counsel, the intention of prosecution of the Petitioners is not to achieve criminal justice but rather, to obtain evidence to further the ELC case. He added that the seller of the suit land to the Petitioners has never been interrogated nor charged for any offence, yet that should have been the starting point before the criminal prosecution. Counsel urged further that the charges before the criminal Court are discriminatory and thus offend Article 27 of *the Constitution*, as there is no rational to charge one party so as to aid another in a civil case. In conclusion, he maintained that the Plaintiffs in the ELC case have never been the registered owners of the suit land and thus has no basis to mount the criminal prosecution of the Petitioners.

Interested Party's Submissions

18. Counsel for the Interested Party, too, after reciting the background to this matter and referring to Article 50[1] of *the Constitution*, which guarantees the right to a fair hearing, and referring to the Petitioners' claim that their fundamental rights and freedoms have been violated with the institution of Eldoret Chief Magistrates Court Criminal Case No. E3469 of 2021, submitted that the Petitioners have not demonstrated how their right to fair hearing has or will be violated as they have access to legal representation and also the opportunity to present their defence in the criminal proceedings. He cited the case of Republic Director of Public Prosecutions & Another; Ex-parte Patrick Ogola Onyango & 8 Others [2016] eKLR, in which he submitted, the Court held that criminal proceedings do not violate an accused persons' rights where due process is followed and that the appropriate forum for determining guilt or innocence is the trial Court. He also pointed out that a person is innocent until proven guilty, and the mere fact that one has been charged with a criminal offence does not constitute a violation of their rights unless there is clear evidence of abuse of legal process. He also urged that Article 157[6] of *the Constitution* empowers the Director of Public Prosecutions [DPP] to institute and undertake criminal proceedings and that Section 24 of the *National Police Service Act* mandates the DCI to investigate crimes, including fraud. He cited the case of Kenya Commercial Bank Limited & 2 Others Commissioner of Police & Another [2013] eKLR, in which, he submitted, the Court held that it is not the role of the Constitutional Court to interfere with criminal proceedings unless there is clear evidence of malice or abuse of power. According to him, the Petitioners have not provided any evidence of abuse of power, bad faith or ulterior motives to justify the intervention of this Court, and that the Respondents had sufficient evidence and grounds to institute criminal proceedings against



the Petitioners. Regarding the Petitioners' contention that disputes regarding ownership of land are to be determined by the Environment and Land Court [ELC], and not Courts of criminal jurisdiction, Counsel submitted that while the Interested Party does not dispute this fact in light of the provisions of Article 162[2][b] of *the Constitution*, the ELC equally has no jurisdiction to determine criminal liability.

19. He urged that be that as it may, the Interested Party instituted the said Eldoret ELC Case No. 2 of 2021, which is ongoing and is focused on determining the ownership dispute, and on its part, the criminal proceedings is to adjudicate on the allegations of fraud and forgery which falls far outside the jurisdiction of the ELC. He further submitted that the existence of the civil suit at the ELC, does not bar criminal proceedings arising from fraudulent dealings as there is sufficient evidence of criminality. He cited Section 193A of the *Criminal Procedure Code* and also the case of Republic Chief Magistrates Court at Mombasa; Ex-parte Ganijee & Another [2002] 2 KLR 703, and pointed out that criminal and civil proceedings can run concurrently as they serve distinct legal objectives.
20. Counsel also contended that the timing of the Petition reveals that it is merely an afterthought and a delay tactic by the Petitioners as the criminal case and the ELC case were both filed in 2021, yet the Petitioners only moved to file the instant Petition in July 2023, approximately 2 years later, that this prolonged delay raises serious doubts about the genuineness of their claims and strongly suggests that the Petitioners are seeking to frustrate the ongoing criminal proceedings rather than pursue legitimate Constitutional redress. He also reminded the Court that the Petitioners initially failed to join the Interested Party to the Petition herein despite it being the complainant in the criminal case and urged that this demonstrates a deliberate attempt to sideline the Interested Party from proceedings that directly affect its legal interests. According to him, the omission was not an oversight but a calculated move to unfairly obtain orders which would have been against the Interested Party, who could have been denied its right to be heard. He submitted that the Petition lacks merit, is legally untenable and an abuse of the Court process, that the criminal proceedings are lawful and justified as the trial Court is the proper forum to determine whether the fraud and forgery occurred, and therefore the Petitioners should allow due process to take its course instead of delaying justice. He quoted the statement in the case of Kuria & 3 others Attorney General [2022] 2 KLR 69, that "Courts should not be used to obstruct valid criminal proceedings unless there is clear evidence of abuse of power." In conclusion, Counsel urged that if at all the Petitioners are bona fide purchasers for value, then they do not have a reason to fear prosecution, and that however, their conduct suggests an ulterior motive of evading accountability rather than seeking justice.

Determination

21. The broad issue that arises for determination herein is "whether this Court should stop the ongoing criminal prosecution case against the 1st Petitioner on the ground that the same infringes or threatens his Constitutional rights, and also there being ongoing proceedings at the Environmental and Land Court over the same issues."
22. In answering the said issue, I will start by restating that the National Police Service is established under Article 243 of *the Constitution*, while the office of the Inspector-General of the National Police Service is established under Article 245[1].
23. The Inspector-General of the National Police Service is an independent office with the power to investigate any offence in Kenya and in respect thereto, Article 245[4] provides as follows:

"[4] The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector- General with respect to any matter of policy for the



National Police Service, but no person may give a direction to the Inspector-General with respect to—

- [a] the investigation of any particular offence or offences;
- [b] the enforcement of the law against any particular person or persons; or
- [c]

24. On the part of the *National Police Service Act*, Cap. 84, Section 24 then outlines the functions of the Service to include; [a] provision of assistance to the public when in need; [b] maintenance of law and order; [c] preservation of peace; [d] protection of life and property; [e] investigation of crimes; [f] collection of criminal intelligence; [g] prevention and detection of crime; [h] apprehension of offenders; [i] enforcement of all laws and regulations with which it is charged; and, [j] performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.

25. On its part, the office of the Director of Public Prosecutions [DPP] is established under Article 157 of *the Constitution* and its mandate is provided in sub-articles [4], [6], [10] and [11] as follows:

“[4] The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

[5]

[6] The Director of Public Prosecutions shall exercise State powers of prosecution and may—

- [a] institute and undertake criminal proceedings against any person before any Court [other than a Court martial] in respect of any offence alleged to have been committed;

.....

[10] 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.

[11] In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”

26. From the foregoing, it is clear that the Respondents are not subject to the control of any person or authority in the exercise of their mandate as conferred by *the Constitution* except in the manner set out therein. Nonetheless, in the exercise of those powers, the discretion must be exercised in accordance with the law. Where it is demonstrated that they have overstepped their mandate by misusing their powers, the High Court is empowered to, and should intervene. Abuse of such discretionary powers would include, for instance, the employment of extraneous factors to achieve ulterior goals separate



from ends of justice. On this point, I cite the case of *Kuria v Attorney General* [2002], in which the Court stated as follows:

“The court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is the duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform a stay [by an order of prohibition] should be granted where compelling an accused to stand trial would violate the fundamental principles which underlie the society’s sense of fair play and decency and/or where the proceedings are oppressive or vexatious”

27. Similarly, in the case of *Joram Mwenda Guantai v The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003* [2007] 2 EA 170, the Court of Appeal held as follows:

“... the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.”

28. In regard to prosecution of criminal cases, although the mandate thereon rests with the DPP as enshrined under Article 157 of *the Constitution*, in exercising this mandate, the DPP is required to review and determine the “prosecutability” of cases forwarded for his action. As aforesaid, the DPP is under obligation to exercise this discretion judiciously.

29. The procedure is that prosecution is preceded by an investigation which tackles the question whether there was an offence committed and *the Constitution* and the *National Police Service Act* give the Police the mandate to conduct such investigations. On this aspect, I refer to the following remarks of Warsame J [as he then was] made in the case of *Republic v Commissioner of Police and Another ex-parte Michael Monari & Another* [2012] eKLR:

“The Police have a duty to investigate 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.”

30. In *Douglas Maina Mwangi v KRA & Another*, 213 eKLR, Majanja J also addressed the same issue in the follow manner:

“15. The office of the Director of Public Prosecution under Article 157 of *the Constitution* is an independent office under *the Constitution* like its predecessor office, the office of the Attorney General under section 26 of the former Constitution. When dealing with the decision as to whether or not to prosecute, the office exercises independent judgment and this court cannot interfere unless it is shown that the exercise is contrary to *the Constitution*, in



bad faith or amounts to an abuse of process. This has been the holding of this court in several decided cases

31. As already stated therefore, this Court has the Constitutional mandate and power to stop any criminal prosecution which has been demonstrated to have been preferred maliciously, with ulterior or selfish reasons. That is not in doubt. However, in exercising that power, the Court must also be cautious and careful not to overstep or exceed its mandate by usurping or unduly interfering with the prosecutorial powers of the DPP similarly donated by the same Constitution.
32. For the need for such caution, I again refer to the case of Republic v Commissioner of Police and Another ex-parte Michael Monari [supra] where Warsame J [as he then was], expressed himself as follows:

“Under Article 157[4] of *the Constitution*, the Director shall have power to direct police to investigate any information or allegation of a criminal conduct and it is mandatory for the police to comply with any directions or instructions given by the Director of Public Prosecution. Under article 157[10] the Director of Public Prosecution shall not require the consent of any person or authority for commencement of criminal proceedings and shall not be under the direction or control of any person.

It is not the duty of the court to go into the merits and demerits of any intended charges to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and the merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment.”

33. Regarding the exercise of prosecutorial discretion by the DPP, the Court of Appeal in the case of Diamond Hasham Lalji & another v Attorney General & 4 others [2018] eKLR, also stated as follows:

“[41] Thus, the exercise of prosecutorial discretion enjoys some measure of judicial deference and as numerous authorities establish, the Courts will interfere with the exercise of discretion sparingly and in the exceptional and clearest of cases. However, as the Privy Council said in Mohit v Director of Public Prosecutions of Mauritius [2006] 5LRC 234:

“these factors necessarily mean that the threshold of a successful challenge is a high one. It is however one thing to conclude that the Courts must be sparing in their grant of relief to seek to challenge the DPP’s decision to prosecute or to discontinue a prosecution, and quite another to hold that such decisions are immune from any such review at all

34. Needless to state, the burden of proof rests with the person alleging unconstitutional exercise of prosecutorial power but if sufficient evidence is adduced to establish a breach, then the evidential burden shifts to the DPP to justify the prosecutorial decision.



35. In this case, the issue is the ownership of the suit land, namely, Eldoret Municipality Block 8/527. While the Petitioners claim that they purchased the suit land from an entity known as Astire Limited in July 2013 and obtained a title in the 2nd Petitioner's name in August 2013, the Interested Party terms this claim as outright fraud as the Interested Party has been the registered owner of the same suit land since 2006, holds the Certificate of Lease in its name, and has never sold it to anyone.
36. On the part of the Respondents, their narrative is that upon the above dispute being reported to them, investigations were conducted and it was found that the title held by the Petitioners is not genuine and the same was fraudulently obtained as the documents used to effect the purported transfer to the Petitioner were all forgeries. The Respondents also claim that the alleged vendor who purportedly sold the suit land to the Petitioners has never owned the suit land. Further, they claimed that the signature of the Land Registrar appearing in the Certificate of Lease held by the Petitioners is also a forgery. Even worse, it has been stated that the purported vendor described as "Astire Limited" is a fiction, as it does even not exist in the records kept by the Registrar of Companies. It is on this basis therefore that the Respondents charged or caused the 1st Petitioner, a director of the 2nd Petitioner, with the offence of forgery and obtaining land registration by false pretence, in Eldoret Chief Magistrate's Court Criminal No. 3469 of 2021.
37. According to the Petitioners, it is them who initially lodged complaints against the ODPP and officials from the Ministry of Lands that there was a plot to defraud them of the land, which complaint was acted on, and upon which warrants of arrest were sought and issued by the Court against a Land Registrar and another, in Eldoret Chief Magistrate Misc. Crim. Case No. E549 of 2022. According to him however, to date, the Warrants have never been executed. The thread running through the Petitioners' case is that the intention of the criminal prosecution is to assist the Interested Parties to succeed in the ELC case, and was instituted with the ulterior motive of aiding the Interested party to grab the suit land from the Petitioners.
38. In this case, the Petitioner's further complaint is against the Respondent's alleged intention to charge him on matters that, according to him, are civil in nature, and that the ELC case, which was commenced by the Interested Party before the criminal case should be allowed to take precedence.
39. It is however important to mention that Section 193A of the *Criminal Procedure Code* contemplates both civil and criminal proceedings proceeding side by side without interfering with each other. It provides that:
- "Concurrent criminal and civil proceedings:
- Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings."
40. In analyzing Section 193A above, the Court of Appeal in the case of Commissioner of Police and Director of Criminal Investigations Department v Kenya Commercial Bank and Others, Nairobi Civil Appeal No. 56 of 2012 [2013] eKLR, stated that:
- "While the law [section 193A of the *Criminal Procedure Code*] allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present



civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court. This is a case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations.”

41. Further, in regard to Section 193A above, in the case of *Kuria & 3 Others v AG* [2002] 2 KLR, the following was stated:

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

42. Similarly, in the case of *Amir Lodges Ltd & another v Mohammed Omar Shariff & another* [2022] eKLR, Mrima J stated as follows:

“ 43. From the discussions in the superior Courts decisions and the other comparative decisions from foreign jurisdictions, the rule of the thumb in respect of concurrent criminal and civil proceedings based on similar set of facts and circumstances is that the criminal case ought to proceed unless it can be demonstrated that the prosecution of the criminal case will either result to infringement of the rights and fundamental freedoms of the accused persons or will lead to the contravention of *the Constitution*.

44. In agreeing with the above position, I will attempt two practical assumptions based on the facts in this matter. The assumptions are on terminating the investigations or staying the civil case in favour of the investigations.

.....

49. From the two scenarios, there is, therefore, logic in the general position that where there are concurrent criminal and civil cases based on similar facts and circumstances, the criminal case or investigations ought to be first dealt with.



50. Having said so, it remains clear in the mind of this Court that the foregoing general position is subject to exceptions including whether the criminal case infringes the rights and fundamental freedoms of the accused or is in contravention of *the Constitution*.
51. This Court, therefore, finds and hold that a Court cannot terminate a criminal case or criminal investigations solely on the basis of a pending civil case based on similar facts and circumstances.
52. For a Court to so halt a criminal case or investigations, there must be more to the pendency of a civil claim. In this case, the Petitioners attempted to demonstrate how the investigations will prejudice the civil case and infringe their right to fair trial. However, from the foregoing analysis, this Court is unable to agree with the Petitioners. I say so because the Petitioner's claim is largely based on the fact that they filed a civil claim. The allegations of impropriety on the part of the Respondents remain too remote, if any.
53. In the end, this Court is persuaded that the Petitioners have not demonstrated any prima facie case at the moment. The position may, however, change at the main hearing of the Petition."
43. Section 193A above therefore explicitly provides that the existence of a civil case does not create a ground for delaying the concurrent criminal case. The logic behind the provision is to prevent litigants from using civil proceedings to obstruct or delay criminal justice. The provision therefore ensures that criminal cases are dealt with without delay or frustrations brought about by Court orders issued on the pretext of existence of civil disputes on the same facts. It is however also not in doubt, as is apparent from the authorities cited above, that in spite of the provisions of Section 193A, in appropriate cases, the High Court can still stop a criminal prosecution where the issues involved are matters that are civil in nature. However, a Court will not terminate a criminal case solely on the basis of a civil dispute being based on similar facts and circumstances. It must still be clearly demonstrated that the criminal case infringes the rights and fundamental freedoms of the accused or is in contravention of *the Constitution*.
44. Applying the principles laid down in the various authorities cited above, I note that in this matter, the issue before the ELC case filed by the Interested Party against the 2nd Petitioner is said to be determination of ownership of the suit land as between the Petitioners and the Interested Party, while the issue for determination in the criminal case is whether the 1st Petitioner committed the offences of fraud and/or forgery in procuring the purported transfer of the suit land to the 2nd Petitioner. It cannot however be in dispute that the ELC, in determining ownership of the suit land, will inevitably have to first determine whether the 1st Petitioner committed the offence of fraud and/or forgery in procuring the purported transfer of the suit land to the 2nd Petitioner.
45. It is also clear that the documents that the ELC will look at in making the above determinations will inevitably be the same that the criminal case Court will also consider. Indeed, the Petitioners stated that the statements and charge sheet to be used in the criminal case have already been filed as evidence in the ELC case.
46. It is also not disputed that the Interested Party is the complainant in the criminal case instituted against the 1st Petitioner. As it were therefore, besides the facts being the same, and the issues for determination in both the ELC case and in the criminal case also being, for all intents and purposes, also the same, the main parties involved are also the same.



47. It is also not denied that the ELC case was filed by the Interested Party in January 2021 while the criminal case was instituted subsequently, though in the same 2021. By the time that the criminal case was being brought therefore, the ELC was already seized of the civil case.
48. It is true that each case must be determined on its own facts and peculiar circumstances, and thus the fact that there are parallel or concurrent civil and criminal cases based on the same facts proceeding side by side may in one instance, lead to stoppage of one case in favour of the other, while in another instance, the cases may be allowed to proceed side by side, concurrently. As aforesaid, each case on its own facts. In this case, considering the above matters that I have set out, coupled with the Petitioners' claim that the criminal case is intended to pressurize the Petitioners to forego their claims over the suit land, and/to assist the Interested Party to achieve victory or gain an upper hand in the ELC case, I am afraid, I am not satisfied that allowing the criminal case and the ELC case to proceed side by side will be the correct thing to do.
49. I also note that the Petitioners have complained that the police have never, to date, bothered to interrogate the person who "sold" the suit land to the Petitioners to obtain his side of the story. This, the Respondents have not denied, leave alone responding to, and therefore the presumption is that it is the correct position. If so, is it not irregular that a serious case of land fraud as the one in issue herein has been reported to the police yet the key person who might have been the mastermind thereof has not been sought by the police to even record a statement? Would the police not perhaps want to explore the possibility that the Petitioners may as well have simply just been innocent purchasers who may have been "duped" before arraigning him? If a fraud was perpetrated, would the police not want to break the entire criminal ring or cartel once and for all by rounding up everyone involved in such criminal enterprise?
50. From the way the police have explained the alleged fraud, it is clear that if it indeed happened as described, then the major role was played by officials within the Land office. It points to an obvious inside job. Did the police not find anyone within that office culpable at all to be also arraigned? These questions, the Respondents have not addressed. More curious is the 1st Petitioners' claim that upon his own initiative, the police finally sought and obtained warrants of arrest against some officials within the Lands Office, including a Land Registrar, who may have been implicated in the fraud, but that despite these warrants being issued by the Court way back in the year 2022, the police have, to date, never bothered to execute the warrants, and the said persons are still walk around freely. I say this in the context that the Petitioners' further claim that it is they who in fact made the initial complaint to the police, at first, to the effect that some people were trying to defraud them. One may therefore be excused for asking whether this is a case of "frying the small fish" and leaving the "big fish" aside to perpetuate further fraud, or are other perpetrators untouchable?
51. The above are weighty issues which at the end, point to the institution of the criminal case as not having been done in good faith. The prosecution appears selective and not intended to catch the "big fish". Even if the police did not intend it, the consequence and effect of the prosecution and the manner in which it has been handled, may as well turn out to cause real pressure, though unfairly, upon the Petitioners to abandon their claims, and in the process hand an easy victory to other claimants over the suit land. I am not, and cannot say that the Petitioners are not guilty, that will be determined by the criminal Court. What I am saying is that even if the Petitioners were to eventually be found guilty, let them be found to be so after a fair investigations and fair trial, which process does not commence only during arraignment in Court, but must, for all intents and purposes, be expanded to include even the pre-arraignment stage, particularly the manner in which investigations are conducted before the decision to charge is itself reached. As they say, "justice must not only be done, it must also be seen to



be done”. An officious bystander observing the conduct of the Respondents in this matter, I doubt, will give the process a clean bill of health.

52. In the circumstances of this case, and in spite of the provisions of Section 193A of the *Criminal Procedure Code*, my view is that compelling the 1st Petitioner to stand trial in the criminal trial concurrently with the ELC case would violate the fundamental principles which underlie the society's sense of fair play and transparency and such concurrent litigation would be oppressive and/or vexatious, besides amounting to reliance on ulterior motives and an abuse or misuse of the Court process. I am satisfied that in the circumstances of this case, allowing the two processes to proceed concurrently would pose a real danger to the 1st Petitioner’s right to receive a fair trial, and is likely to result to infringement of his rights and fundamental freedoms and/or will lead to contravention of *the Constitution*.
53. As the ELC case was filed in 2021, 4 years ago, and although none of the parties has addressed the Court on the progress of the case and the stage it has reached, I want to believe that the case is now at an advance stage. I have not been told that the ELC is incapable of determining the matters placed before it, which as aforesaid, are technically, the same issues that the criminal case will be called upon to determine. In the circumstances, and although it is obvious that a criminal act was perpetrated by someone or some people, I believe that the best course will be to suspend the criminal case for now and await conclusion of the ELC case. It is evident that once the ELC case is finalized, findings or determinations made therein will assist the police in making an informed decision on whether or not to continue with the criminal prosecution against the 1st Petitioner, or to widen the net and bring in more people implicated.

Final Orders

54. In conclusion, I hereby rule and/or order as follows:
- i. A declaration is hereby issued that, in spite of the provisions of Section 193A of the *Criminal Procedure Code*, and while each case has to be determined on the basis of its own circumstances, considering the unique circumstances of this case, the prosecution or intended prosecution of the Petitioners by the Respondents, in Eldoret Chief Magistrate’s Court Criminal Case No. E3469, in respect to transfer or sale of the property known as Eldoret Municipality Block 8/527, without evidence that all other persons implicated have also been sought, interrogated and/or investigated and their statements recorded, and without disclosure or explanation on why these other people have also not been charged alongside the 1st Petitioner, and while similar issues are and have been pending for determination in Eldoret Environment and Land Court [ELC] Case No. 2 of 2021, violates the Petitioners’ rights to fair administrative action as guaranteed under Article 47 of the Constitution, and also the Petitioners’ rights to a fair trial as guaranteed under Article 50[1] of the Constitution.
 - ii. The prosecution or intended prosecution of the Petitioners by the Respondents, whether in Eldoret Chief Magistrate’s Court Criminal Case No. E3469, or in any other criminal case, in respect to transfer or sale of the property known as Eldoret Municipality Block 8/527 is stayed or suspended pending the hearing and determination of Eldoret Environment and Land Court [ELC] Case No. 2 of 2021.
 - iii. For avoidance of doubt, upon conclusion of Eldoret Environment and Land Court [ELC] Case No. 2 of 2021, the orders herein shall lapse, and the Respondents shall be at liberty to proceed with the prosecution or intended prosecution of the Petitioners, whether in Eldoret



Chief Magistrate's Court Criminal Case No. E3469, or in any other criminal case, in respect to transfer of the property known as Eldoret Municipality Block 8/527.

iv. I make no order on costs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 1ST DAY OF AUGUST 2025

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Ms. Chepkwony h/b for Mr. Nyamweya for the Petitioners

Mr. Muriithi for the Respondents

Ms. Chumba h/b for Mr. Kitiwa for the Interested Party

Court Assistant: Brian Kimathi

