



**Njeru v Office of the Director of Public Prosecutions & 2 others
(Constitutional Petition 206 of 2021) [2024] KEHC 356 (KLR)
(Constitutional and Human Rights) (26 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 356 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION 206 OF 2021**

M THANDE, J

JANUARY 26, 2024

BETWEEN

FRANCIS NYAGA NJERU PETITIONER

AND

**THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST
RESPONDENT**

DIRECTORATE OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

OFFICE OF THE ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. In a Petition against 9.6.21, the Petitioner seeks the following reliefs:
 1. An Order Certiorarito remove into this Honorable Court for purposes of quashing any and all criminal prosecutions preferred against the Petitioner in respect of offences related to ELC No. 766 of 2016 and the property known as Land Reference Number 20273.
 2. An Order restraining the 1st Respondent from prosecuting the Petitioner in respect of offences related to ELC No. 766 of 2016 and the property known as Land Reference Number 20273.
 3. Punitive damages for abuse of court process, abuse of police power, unlawful arrest and detention.
 4. Costs and interest on prayer (3) above.
 5. Such other orders that this Honorable Court may deem expedient to meet the ends of justice.



2. The Petitioner's case as stated in the Petition and in his supporting affidavit sworn on even date, is that he is the registered proprietor as lessee from the Government of Kenya of all that piece of land situate in the City of Nairobi containing by measurement 1.591 Hectares or thereabouts and being Land Reference Number 20273 (IR No. 176998) as delineated on Land Survey Plan Number 346655 (the property) having acquired the same for good consideration. The Property has since been sub-divided into two subplots A and B, that is to say LR Nos 20273(1) and 20273(2). In 2016 the Petitioner filed ELC Case No. 766 of 2016 against China Road & Bridge Construction (K) Limited (CRBC) seeking remedy for trespass on the property. In its defence, CRBC alleged that it was entitled to occupy the property on the basis of a lease granted to it by a corporation named ARJ Capital Limited (ARJ), the supposed owner of the property. ARJ's application for joinder in the ELC case was dismissed by the ELC Court which then directed the 2nd Respondent herein to investigate ARJ's documents of title for being prima facie fraudulent and forgeries.
3. In the course of investigations, the Land Registrar confirmed that the Petitioner was the true owner of the property. The 2nd Respondent therefore recommended that charges be brought against the individual directors of ARJ for inter alia conspiracy to defraud, making a false document, obtaining registration of land by false pretences and forcible detainer. The 1st Respondent has since charged the individual directors of ARJ vide Milimani Chief Magistrates Court, Criminal Case Number 2144 of 2019 *Republic v Ahmed Rashid Jibril and Farah Ali Mohamed* which matter is ongoing.
4. During the pendency of the ELC case, Siesta Investments Limited and Taj Mall Limited have separately claimed ownership of the property vide ELC 1103 of 2016 - *Taj Mall Limited v China Road & Bridge Corporation* and ELC 334 of 2017 - *Siesta Investments Limited vs China Road & Bridge Corporation*. All 3 ELC cases were consolidated and the 3rd Respondent herein has been joined as a respondent. Status quo orders were granted on 12.4.21 to preserve the substratum of the dispute. In the meantime, CRBC has since vacated the Property.
5. The Petitioner's complaint is that on 9.6.21, whilst the ELC case is still pending, the 2nd Respondent arrested and forcibly detained the Petitioner on the strength of an allegation of forgery with respect to ownership of the property. The 2nd Respondent has already questioned the Petitioner on the ownership of the property, demanding that he confirm either in the affirmative or negative whether he agrees to the allegation of forgery and they have taken his fingerprints. Save for an injunction order issued on 6.7.16, restraining the CRBC from interfering with the Petitioner's quiet possession of the property, there have been no other injunctive reliefs of any nature issued against any party in ELC case. There has also never been any legal bar to the Petitioner's use of the property as he desires, including subdividing the same. Ostensibly acting on the same allegation of forgery, the 1st Respondent has expressed an unambiguous intention to prefer criminal charges against the Petitioner on 10.6.21 for various offences amongst them forgery and fraud relating to the title of the property. The 1st and 2nd Respondents have taken the impugned steps whilst being cognizant of the twin facts that a previous investigation has already been conducted respecting the alleged forgery of ownership documents of the property by another party, and the ELC case over ownership of the property pitting 3 different entities including the Petitioner is still ongoing.
6. The foregoing is what provoked the filing of the Petition herein in which the Petitioner claims that the Respondents violated the Constitution and his rights by improperly, unprocedurally and without sufficient evidence, arriving at the decision to prosecute him, contrary to the National Prosecution Policy and thereby abusing the court process; injudicious, malicious, irresponsible and bad faith exercise of the discretion to commence criminal charges during pendency of a civil dispute on the same issues, namely competing claims of ownership of the property. He further alleges that the Respondents



- acted contrary to public interest and the administration of justice by using the criminal justice process as a pawn in civil disputes.
7. The Petitioner also filed an application of even date seeking interim relief which was granted.
 8. The Petition is opposed by the 1st & 2nd Respondents vide a replying affidavit sworn on 16.2.21. by No. 62020 Sgt Lawson Shuma, who is attached to the 2nd Respondent's headquarters in Nairobi. He averred that investigations showed that the property was first allotted to Jayesh Patel on 6.1.12 and fraudulently sold to the Petitioner vide a sale agreement dated 14.5.05; the Title No. IR 63990 presented to the ELC case by Amina Omar does not correspond to LR No. 20273 as claimed by ARJ, but to LR No.209/136/178 held by Wathiamo Kwihotora Company Limited; that the title in possession of ARJ and given to CRBC was false; that the Titles in respect of LR Nos 20273 were registered on 2.2.94 before signature by the Commissioner of Lands; that the deed plan was prepared on 18.10.97 and title prepared on 28.1.96, which is unprocedural; that deed plan no. 230418 is for LR No. 209/14080 and not LR No. 20273; that signatures on the titles are forgeries; that Joshua Kiptoo Toroitich obtained money by false pretences from ARJ knowing that Title No. IR 143067 had deed plan no. 346655 used to register the title for Siesta Investments Limited whereas the correct title is No. IR 141915; that the Ministry of Lands confirmed that Title IR No. 143067 is for LR No. 337/1417 in the name of Push Enterprises Limited; that entries in respect of LR Nos. 20273/1 and 20273/2 were fraudulent as the lease and certificate of title in favour of Eliud Mbilu were fraudulently obtained; that upon conclusion of investigations the file was forwarded to the DPP who vide a letter dated 7.5.21 directed that the Petitioner and Joshua Kiptoo Toroitich be charged with conspiracy to defraud, making a false document, obtaining registration by false pretences, forcible detainer and obtaining money by false pretences; that the Petition was thus charged in Milimani Criminal Case No. E649 of 2021, pleaded not guilty and released on a bond of Kshs. 1,000,000/=.
 9. It was further deposed that the criminal case was not instituted in bad faith, maliciously or to settle scores. Further that the Petitioner's rights will be taken care of during the proceedings in the trial court as enshrined in the Constitution. Additionally, that under Section 193A of the [Criminal Procedure Code](#), the fact that civil proceedings are pending in respect of any matter in issue shall not be a ground for any stay, prohibition or delay of criminal proceedings. The Petition has thus been instituted in bad faith and to defeat justice, and ought to be dismissed with costs to the 1st Respondent.
 10. The 3rd Respondent filed grounds of opposition dated 7.3.22. The grounds raised are that the Petition does not, with a reasonable degree of precision, demonstrate how the Respondents have violated the Petitioner's constitutional rights. (see [Anarita Karimi Njeru v Republic](#) [1979] eKLR). Further that there is a presumption that a trial court is competent, impartial and conscientious, faithful to its constitutional and statutory obligations, and oath of office to determine the veracity of evidence produced in a criminal matter. As such, this Court cannot usurp the powers of the trial court by determining the veracity of evidence to be presented in that court. Further, that the 1st Respondent is an independent body and pursuant to Article 157(10), does not require the consent of any person or authority for commencement of criminal proceedings. Similarly, the 2nd Respondent is an independent office established under Section 28 of the [National Police Service](#) whose mandate is to, among others, undertake investigation and detect and prevent crime. Additionally, pursuant to Section 193A of the [Criminal Procedure Code](#) civil and criminal proceedings can run concurrently. The Petition herein is premature and based on unfounded apprehension.
 11. In his submissions, the Petitioner contends that his arrest was actuated by malice and intended to harass, intimidate and dehumanize him. He contends that the offences with which he was charged are intended to validate the adverse claims by Siesta Investment Limited. He further contends that



the 1st Respondent had no legal basis for commencing the prosecution whilst investigations were ongoing and that it is not demonstrated that it received directions to commence prosecution against the Petitioner. Additionally, that there is no realistic prospect of conviction as a mandatory evidentiary requirement under Article 13 of the [UN Guidelines on the Role of Prosecutors](#) on the criteria that must be met to initiate prosecution. The Petitioner further contends that the manner in which the charges have been brought against him offends Article 245(4)(a) of the [Constitution](#), which prohibits anyone from directing the IG and DCI on how to conduct investigations. Additionally, that the 1st Respondent proceeded in a manner contrary to Article 4.2 of the [International Association of Prosecutors](#) (IAP) Standards which requires that prosecutors perform their roles objectively, impartially and professionally. The Petitioner further contended that the 1st Respondent proceeded with indifference contrary to Article 47 of the Constitution and the [Fair Administrative Action Act](#) by failing to assess the case considering the statement of parties before preferring trumped-up charges. As such there was clear conflict of interest making the Petitioner apprehensive that justice will neither be done or seen to be done.

12. It is the Petitioner's further submission that the 1st Respondent failed to adhere to the National Prosecution Policy, 2015 in arriving at the decision to prosecute him. That there was absence of a formal complaint or consideration of strict proof by documents. As such, there ought not to have been any prosecution and preferring charges was contrary to the objectives of prosecution under Section 3.1, 3.2(a), (d), and (f) of the policy. There was nothing upon which the 1st Respondent could base its decision to prosecute the Petitioner. Further that the 1st Respondent in breach of Section 3(ii)(a) (l) of the policy did not consider the evidential test and public interest in arriving at the decision to prosecute. Consequently, the charges are defective, have no basis in law and are unconstitutional and unsustainable. The 1st Respondent is subverting the course of justice and abusing the criminal justice system and should review its decision as provided under Clause 5 of the policy. The Petitioner relied on the cases of [Musyoki Kimantbi v Inspector General of Police & 2 others](#) [2014] eKLR and [Sarah Joslyn v Director of Public Prosecution & another](#) [2019] eKLR to buttress his submissions.
13. For the 1st and 2nd Respondents, it was submitted that the Petition is misconceived, frivolous, vexatious, incompetent and improperly before court and an abuse of the court process. The Petition has not met the test established in the Anita Karimi Njeru case. Further that article 24(1) of the [Constitution](#) provides that a right or fundamental freedom may be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors. It was further submitted that the Petitioner shall enjoy the right to equal protection in any court of law and a fair administrative process.
14. In a clear departure from its grounds of opposition, the 3rd Respondent submitted that the jurisdiction to determine the question of ownership and title to land is with the Environmental and Land by dint of Article 162(2) of the Constitution. As such, the dispute between the complainant, the Petitioner and the 2 other parties claiming interest over the property rightly belongs to that Court that has conduct of the matter and not in the criminal court.
15. I have considered the Petition, depositions and the rival written submissions filed. I am keenly aware that my role is not to test the legality or otherwise of the charges against the Petitioner, or to determine his guilt or innocence. The single constitutional issue for this Court to consider is whether the 1st and 2nd Respondents' actions of conducting the investigation and charging the Petitioner are within the law and whether they in any way infringe upon the Petitioners' rights and fundamental freedoms or an abuse of process.



16. Article 245(1) of the Constitution, establishes the office of the Inspector General of Police. Clause (4) confers upon the Inspector General of Police, autonomy in the discharge of its mandate with regard to, the investigation of any particular offence or offences, the enforcement of the law against any particular person or persons, and the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service. It is only the DPP who under Article 157(4) of the Constitution, may direct the Inspector General of Police to investigate any information or allegation of criminal conduct and he is required to comply.
17. Section 28 of the National Police Service Act establishes the 2nd Respondent which shall be under the direction, command and control of the Inspector General of Police. Investigations of crime is a statutory function of the 2nd Respondent. Section 35 of the National Police Service Act provides that the 2nd Respondent shall have the following functions:
 1. collect and provide criminal intelligence;
 2. undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cyber crime among others;
 3. maintain law and order;
 4. detect and prevent crime;
 5. apprehend offenders;
 6. ...
18. The functions of the 2nd Respondent as set out under Section 35 of that Act include collecting and providing criminal intelligence; undertaking investigations on serious crimes; maintaining law and order; detecting and preventing crime; apprehending offenders; maintaining criminal records; conducting forensic analysis; executing the directions given to the IG of Police by the DPP.
19. In the case of Republic v Commissioner of Police & another Ex-Parte Michael Monari & Another [2012] eKLR Warsame, J, (as he then was) considered whether to intervene in respect of the discharge by the police of their duty and stated:

It is also clear in my mind that the police have a duty to investigate on any complaint once a complaint is made. In deed 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 not 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.
20. As regards the 1st Respondent, Article 157(1) of the Constitution establishes the Office of the Director of Public Prosecution. Clause (6) and Section 5(1)(a)(b) of the Director of Public Prosecution Act provide for the powers of the 1st Respondent to institute and undertake criminal proceedings, take over and continue any criminal proceedings commenced in any court and discontinue any criminal proceedings at any stage before judgment is delivered. Clause (10) and Section (6) of the said Act protect the independence of the 1st Respondent by providing that he 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. In the discharge of his mandate, Clause (11) places an obligation upon the 1st Respondent to have regard to the public interest, the interest of administration of justice and the need to prevent and avoid abuse of the legal process.

21. In emphasizing the mandate of the 1st Respondent, the court in *Republic v The Director Of Public Prosecution & 7 Others* [2013] eKLR, Odunga, J considered the independence of the Director of Public Prosecution in the discharge of his mandate and stated:

The law is that 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 interfering with those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process.

The Learned Judge went on to state:

It follows that the office of the Director of Public Prosecutions is an independent constitutional office which is not subjected to the control, directions and influence by any other person and only subject to control by the Court based on the aforesaid principles of illegality, irrationality and procedural impropriety.

22. And in *James Ondicho Gesami v Attorney General & 2 Others* [2012] eKLR, Ngugi, J (as he then was) had this to say of the DPP's mandate:

The DPP is at liberty to prefer charges against any party in respect of whom he finds sufficient evidence to prefer charges.

The learned Judge went on to state:

In my view, requiring that the petitioner subjects himself to the normal criminal prosecution process mandated by law where he has all the safeguards guaranteed by the Constitution does not in any way amount to an attack on his human dignity in violation of his constitutional rights.

23. In the case of Michael Monari (*supra*), the learned Judge went on to state:

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.

24. What is evident from the cited provisions of the law and case law, is that, the mandate of the 1st and 2nd Respondents should not be interfered with unless there is justifiable reason to do so. Constitutional and statutory bodies must be allowed to discharge their mandate unhindered. Such



discharge must however be within the four corners of the Constitution and the law. The Court will only intervene where the actions of the Respondents are tainted with illegality, irrationality and procedural impropriety.

25. The decision of whether or not to prefer criminal charges lies solely with the 1st Respondent. The only caveat is that in making a decision to commence criminal proceedings, the 1st Respondent must be mindful and give regard to the public interest, the interest of administration of justice and the need to prevent and avoid abuse of the legal process.
26. From the affidavit of Sgt Lawson Shuma, one can see that following investigations, discrepancies were noted in the title documents relating to the property and the subdivisions thereof, raising reasonable suspicion, which is all that is required. (See Michael Monari case (*supra*)). Having established reasonable suspicion of the commission of an offence, the 1st and 2nd Respondents cannot be faulted for preferring charges against the Petitioner, leaving the rest to the trial court.
27. The law allows parallel criminal and civil proceedings over the same matter. Section 193A of the [Criminal Procedure Code](#) provides as follows, with regard to 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.
28. This provision was no doubt enacted to allow criminal proceedings to proceed notwithstanding the existence of civil proceedings in which the subject matter thereof is directly or substantially in issue in both proceedings. The caveat however is that such proceedings must not be oppressive and institution of the same is not motivated by malice or an intention to defeat justice or abuse of the court process.
29. In the case of [Musyoki Kimanthi v Inspector General of Police & 2 others](#) [2014] eKLR Majanja, J stated:
 19. I am aware that the section 193 A of the *Criminal Procedure Code* (Chapter 75 of the Laws of Kenya) permits parallel proceedings involving the same subject matter in the a civil and criminal court. I am mindful of what the Court of Appeal stated in *Commissioner of Police and Other v Kenya Commercial Bank and Others* (*Supra*) 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 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”
 21. In *Stanley Munga Githunguri v Republic* (*Supra*), the Court emphasised that the High Court has inherent power to stop a prosecution that amounts to an abuse of the court process, is oppressive and vexatious.



30. The learned Judge was satisfied that the petitioner, an advocate had acted in the best interests of his client. The Judge found no evidence of forgery on the part of the petitioner therein to warrant prosecution. In such circumstances, he found the prosecution oppressive and stopped the same.
31. The consolidated cases relating to the suit property are pending before the ELC Court. The very purpose of the ELC proceedings is to establish the owner of the suit property and it would appear that the Respondents were drawn in to assist the complainant make out his case. My view is that the ELC is better placed to determine the ownership of the property and this can be done without resorting to criminal charges. And as Majanja, J stated, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations.
32. Nyakundi, J was of a similar view and 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, stated:
- I am of the view that when a dispute arises touching on the ownership of or title to land said to have been forcibly detained, a criminal charge should not be preferred rather; the complainant should be directed to lodge his complaint with ELC court for the determination of the issue. It is after the issue is laid to rest by this court that a criminal charge can be considered. I'm also of the view that if the said pending criminal proceedings are allowed to proceed, there would be a possibility that the courts determining the concurrent civil and criminal touching on the same sets of fact may come up with conflicting outcomes and for avoidance of the same and for purposes of maintaining the integrity and dignity of the court proceedings, the same ought to be stayed pending determination of the dispute as regards ownership of the land.
33. And in the case of *Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others* [2018] eKLR the Court of Appeal considering the import of Section 193A of the *Criminal Procedure Code* stated:
47. In terms of Section 193A of the Criminal Procedure Code, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings does not bar the commencement of criminal proceedings. However, where the criminal proceedings are oppressive, vexatious and an abuse of the court process or amounts to a breach of fundamental rights and freedoms, the High Court has the powers to intervene.
34. I have considered the allegations of malice on the part of the 1st and 2nd Respondents, After carefully considering the material placed before me however, I do not see any evidence of harassment or malice by the Respondents as alleged by the Petitioner. Nothing has been placed before the Court to show that the Respondents acted in an oppressive, unreasonable and unjustifiable or illegal manner or in any manner violated the Petitioner's rights in arriving at the decision to institute criminal proceedings against him. It has also not been demonstrated that the actions of the Respondents are motivated by anything other than the purpose of conducting a fair investigation and prosecution in accordance with their constitutional and statutory mandate. This notwithstanding, I find that in light of the pending ELC cases, the criminal proceedings against the Petitioner relating to the ownership of the property are oppressive, vexatious and amount to a breach of his fundamental rights and freedoms. Accordingly, this Court will be justified in exercising its powers to intervene to forestall a travesty of justice.
35. In the end, I make the following orders:



1. An order certiorari do issue quashing any and all criminal prosecutions preferred against the Petitioner in respect of offences related to ELC No. 766 of 2016 and the property known as Land Reference Number 20273.
2. An order do hereby issue prohibiting the 1st Respondent from prosecuting the Petitioner in respect of offences related to ELC No. 766 of 2016 and the property known as Land Reference Number 20273.
3. No order as to costs.

DATED AND DELIVERED VIA MS TEAMS THIS 26TH DAY OF JANUARY 2024

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M. THANDE

JUDGE

