

THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E383 OF 2025

BETWEEN

GATHII IRUNGU.....

.....PETITIONER

VERSUS

**DIRECTOR OF PUBLIC
PROSECUTIONS.....1ST RESPONDENT**

**INSPECTOR GENERAL OF
POLICE.....2ND RESPONDENT**

**DIRECTOR OF CRIMINAL
INVESTIGATIONS.....3RD RESPONDENT**

**ATTORNEY GENERAL.....4TH
RESPONDENT**

**CHIEF MAGISTRATE COURT AT MILIMANI LAW
COURTS.....5TH
RESPONDENT**

AND

**JULIUS GITONGA GITHINJI1ST
INTERESTED PARTY**

**GEORGE KOIMBURI NDUNG'U2ND
INTERESTED PARTY**

**SHELMITH KARUNGURI MAINA.....3RD
INTERESTED PARTY**

JUDGMENT

Introduction

1. The Petition dated 23rd June 2025, is supported by the Petitioner's affidavit in support of even date and a further affidavit dated 18th July 2025.
2. The Petition challenges the 1st, 2nd and 3rd Respondents actions claiming that both the investigation and decision to charge him is devoid of impartiality, objectivity, lacking in procedural fairness and meant to create a coercive and prejudicial environment that hinders the right to full protection of the law as he is being made to face charges in respect of an agreement for sale that he never gave instructions on, drafted or executed save for the fact that it was drawn at his office based in Ruiru by one of his employees.
3. The bedrock of the criminal case is the land sale agreement for the parcel *L.R. RUIRU/JUJA EASTBLOCK 2/36* which was executed between the Interested Parties, **on 17th November 2018** at the Petitioner's law firm office based at Ruiru. The Petitioner contends that the ensuing investigation and prosecution is malicious and without any legal basis as it is founded on unsubstantiated complaint that seeks to make him criminally liable for another person's actions.
4. He therefore contends that the Respondents actions have violated his constitutional rights under Articles 27, 28, 47, 48 and 50 (1) of the Constitution and thus seeks the following reliefs:

- a) **A declaration be issued to declare that the continued prosecution of the Petitioner for fraudulent dealings over land parcel L.R. RUIRU/JUJA EASTBLOCK 2/36 constitutes a violation of the Petitioner's rights under Articles 47, 48, and 50(1) of the Constitution, and is unlawful, unconstitutional, and an affront to the rule of law and due process.**
- b) **An order of certiorari be issued to remove into this Court for purposes of quashing in its entirety the proceedings in Milimani Chief Magistrate's Court Criminal Case No. E328 of 2025 Republic vs. George Koimburi Ndungu and 2 Others, for being unconstitutional, malicious, and instituted in abuse of the criminal justice process.**
- c) **An order of mandamus, in the alternative to prayer (b) above, for purposes of striking out the Petitioner as an accused person from the proceedings in Criminal Case No. E328 of 2025 Republic vs. George Koimburi Ndungu and 2 Others.**
- d) **An order of prohibition restraining the Respondents, whether by themselves, their officers, agents, or assigns, from instituting, maintaining, or continuing any criminal proceedings against the Petitioner in respect of fraudulent dealings over land parcel L.R RUIRU/JUJA EASTBLOCK 2/36 or any transaction relating thereto.**
- e) **A declaration that the conduct of the 1st, 2nd and 3rd Respondents in prosecuting the Petitioner in the manner described herein was arbitrary, irrational and made in disregard of due process, thereby infringing upon the Petitioner's dignity, presumption of innocence, and right to be treated fairly by organs of State.**
- f) **An order of costs be awarded to the Petitioner as against the Respondents, jointly and severally, for the violation of**

constitutional rights and the oppressive conduct occasioned against them.

- g) Such other or further orders or reliefs as this Court shall deem just, expedient, and appropriate in the unique and overriding interests of justice, constitutionalism, and the rule of law.***

Petitioner's Case

5. The Petitioner avers that he was charged in **Criminal Case No. E328 of 2025** on allegations of conspiracy to defraud in relation to *L.R. RUIRU/JUJA EASTBLOCK 2/36*.
6. The Petitioner depones that the alleged transaction flowed from the disputed Agreement of Sale which was executed by the Interested Parties at the Petitioner's Ruiru office on 17th November 2018. He notes that there are further acknowledgements from the parties dated 6th June 2018 and 3rd April 2020.
7. He asserts that he did not take or issue instructions, draft, attest or execute the said Agreement of Sale. In addition, he states that he was never present at any of these transactions.
8. He however states that the impugned Agreement had been executed by one of his employees without his authority and permission. In fact, he depones that he does not have the file and record of the legal fees payments receipts of the transaction in question.

9. The Petitioner avers that sometime in June 2020, he was contacted by the 3rd Respondent's officers in relation to the impugned Agreement of Sale. He informed them that he had no knowledge of it and wrote a statement to that effect and had his specimen signatures taken.
10. He asserts that the result of the forensic examination was not availed to the 1st Respondent by the 3rd Respondent prior to making the decision to charge.
11. Soon after, the Petitioner was summoned by the 3rd Respondent officers and instructed to record another statement as the 1st Interested Party had complained that the matter had been compromised by the 2nd Interested Party.
12. Likewise, the 1st Interested Party had threatened to involve the media in the matter if no action was taken against him.
13. The Petitioner states that the summon to him was flawed because pursuant to the letter dated 26th June 2023, the 1st Respondent had instructed the 3rd Respondent to record the statement of the advocate who had actually drafted the impugned Agreement of Sale.
14. The Petitioner alleges that the officers informed him that the 1st Interested Party was keen on having him personally held liable as it was easier than holding the 2nd Interested Party liable who has a strong political force. Additionally,

that the Petitioner would be in a position to pay what had been agreed as he has professional indemnity.

15. The Petitioner postulates that the logic behind the 1st Interested Party's push was that, he would be pressured to protect his reputation being a respected public figure thus in turn would compel the 2nd Interested Party to solve the issues relating to the impugned transaction.
16. In September 2024, the 3rd Respondent's officers visited his office and instructed him to go to their offices. At their offices, the 2nd Interested Party who was also present indicated that he had settled the issue with the complainant. Moreover, the Petitioner was informed that he would be a prosecution witness in the matter.
17. The Petitioner states that in a strange turn of events, he was informed on 12th June 2025 that he was required to appear before the Chief Magistrates Court on 24th June 2025 in **Criminal Case No. E328 of 2025**. It is at that point that he learnt he was the 3rd accused person in the matter and not a prosecution witness as informed.
18. The Petitioner protests that he has unreasonably been implicated in the matter despite his non-involvement in the alleged offences.
19. He notes that the summons issued by the 3rd Respondent dated 23rd June 2025 did not indicate that there was an allegation by the 2nd and 3rd Interested Party of their

knowledge of him or his involvement. Equally during the investigations, the officers did not inform him that he was involved in the making of the impugned Agreement.

20. He stresses that the only relationship that exists between him and the matter is the alleged fraudulent Agreement of Sale that was drafted through his Ruiru office without his instructions. Considering this, he argues that even if there was any liability to be visited upon his firm relating to the impugned Agreement of Sale, he cannot be held criminally liable for the actions of another person even where there is an employer-employee relationship.
21. He stated that he appealed this matter to the 1st Respondent in his letter dated 25th June 2025 wherein he attached amongst other documents a letter dated 24th September 2024 to the 3rd Respondent disclosing the name of the staff who had prepared the impugned Agreement as Harrison Ndungu. That the said employee had absconded duty since 2020 and they were trying to trace him. Accordingly, he asserts that his joinder in the criminal suit lacks any lawful basis.
22. He further points out that no evidence was adduced to implicate him in any way with reference to the alleged offences. He contends that the Statement that was relied upon by the Respondents in their affidavit as his statement was doctored.

23. Equally, the allegation that he drew the Agreement of Sale is not supported by any evidence nor was the 1st Respondent supplied with his specimen signatures which would have put the matter to rest.
24. He believes therefore that the decision to charge him was made in bad faith, with no proper investigation and thus amounts to harassment, intimidation and an attempt to circumvent the judicial process.
25. In addition, he depones that the Respondents have through this criminal case assumed the role of debt collectors for the Interested Parties as the Trial Court proceedings indicate that the parties continue to engage and pay monies leaving him the casualty in their dispute. The Respondents actions are argued to have also violated his constitutional rights thus the need for this Court's intervention.

1st, 2nd and 3rd Respondents' Case

26. These Respondents through Police Constable **Victor Wangila Mutali** filed their Replying affidavit sworn on **16th July 2025**.
27. He swore that on 19th June 2020, the Deputy in Charge of the Land Fraud Unit, directed him and Sgt. Kanyithia to conduct investigations into the alleged fraudulent transfer of the land, the subject matter of the criminal case.

28. This complaint had been made by the 1st Interested Party's mother, Lucia Wanjiku Githinji, who was the administrator of her late husband's estate. She claimed that the suit property had been transferred to the 2nd and 3rd Interested Party instead of the 1st Interested Party. The complainant's statement was recorded and they as well obtained copies of the documents she had brought as proof of ownership of the subject property.
29. Following this, they wrote a letter to the District Land Registrar Ruiru dated 22nd June 2020, requesting for copies of the suit property's green card, history of ownership, documents launching the transfer and daily presentation book. They received these copies on 24th June 2020. From this, they established that the suit property had been transferred from the late Gibson Githinji Gitonga to the 1st Interested Party then subsequently to the 2nd and 3rd Interested Party.
30. He avers that the 2nd and 3rd Interested Parties claimed that they had bought the suit property from the owner who was the 1st Interested Party.
31. They said this sale was made in line with the impugned Agreement of Sale, which was made and attested by the Petitioner. The two parties further informed that at all times during the transaction they had dealt with the Petitioner.
32. He avers that the two parties supplied the impugned Agreement and acknowledgements of payment of

Ksh.500,000/= and Ksh.2,000,000/= dated 17th November 2018 attested by the Petitioner. In sum, the two alleged that they had purchased the suit property for Ksh.5,500,000/= although they failed to prove this.

33. On the other hand, he depones that the 1st Interested Party claimed that he never sold the suit property to the 2nd and 3rd Interested Parties.
34. He disclosed that he forwarded the *sale agreement* and the *two acknowledgement letters* to the document examiner for forensic examination of the signatures. He states that according to the examiner's report dated 6th July 2020, none of the two documents was found to have been signed by the 1st Interested Party or his mother.
35. Thereafter, they contacted the Petitioner to ascertain his involvement in drafting the said Agreement and acknowledgements. He avers that the Petitioner informed them that these had been done by one of his advocates in his law firm at Ruiru but the Petitioner did not however disclose the particulars of the said advocate.
36. He asserts that at the end of the investigation, he was convinced that there was reasonable cause to believe that there was a conspiracy between the Petitioner and the 2nd and 3rd Interested Parties concerning the alleged fraudulent sale of the suit property. On this premise, he forwarded the investigation file to the 1st Respondent who then made the decision to charge them.

37. He avers that due process was followed in carrying out the investigations, making the decision to charge and instigation of the criminal case.

38. In light of this, he states that the Petitioner's fundamental rights and freedoms were not violated as alleged.

2nd, 3rd, 4th and 5th Respondents' Case

39. The 2nd, 3rd, 4th and 5th Respondents filed their grounds of opposition dated 21st July 2025 stating that:

- i. *The office of the Inspector General of Police that heads the National Police Service (NPS) is an independent office established under Article 245 of the Constitution and that the functions of the National Police Service which includes investigations, and the arrest of suspects are clearly outlined under Section 24 of the National Police Service Act, CAP 84, Laws of Kenya.*
- ii. *The 3rd Respondent is a state agency established under Section 28 of the National Police Service Act and is under the direction, command and control of the 2nd Respondent. The 3rd Respondent has the mandate to undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cyber-crime among others.*
- iii. *The investigative actions leading to the arrest and charging of the Petitioner were conducted in accordance with the constitutional and statutory mandate of the 2nd and 3rd Respondents, based on a complaint and subsequent investigations relating to an alleged fraudulent land transaction.*

- iv. *No material has been placed before this Court to demonstrate that the 2nd and 3rd Respondents acted ultra vires their constitutional mandate or that the investigation process was tainted by illegality, malice, bias, or procedural impropriety.*
- v. *The grant of the orders sought would unnecessarily prevent the respondents from discharging their constitutional and statutory mandate which would go against public interest and constitutional values.*
- vi. *The power to arrest and investigate is not subject to judicial approval unless it can be shown that such power has been exercised unlawfully or oppressively. The Petitioner has not demonstrated any actual or threatened violation of his rights under Articles 27, 29, 47, 48 or 50 of the Constitution.*
- vii. *The 4th Respondent, the Hon. Attorney General, is not a proper party to these proceedings as the impugned actions relate to matters falling exclusively within the constitutional mandate of the investigative and prosecutorial agencies independently established under Articles 245 and 157 of the Constitution.*
- viii. *The mere allegation that the Petitioner's fundamental right has been contravened is not in itself sufficient to entitle the petitioner the conservatory remedies sought. The Petitioner must demonstrate real danger so imminent and evident, true and actual and not fictitious; so as to deserve immediate redress by this Court.*
- ix. *The Petitioner has not demonstrated any prejudice or irreparable harm, damage or injury likely to be suffered if the conservatory orders sought are not granted. There is also no*

evidentiary proof that the grant of conservatory orders sought would enhance constitutional values and objects specific to the rights and freedom in the Bill of rights.

- x. The Petitioner's contention that he had no knowledge or involvement in the impugned transaction is an evidentiary issue that can only be properly ventilated during trial and such the criminal process should not be halted prematurely on the basis of disputed facts, especially where due process is being followed.*
- xi. The fact that the Petitioner is a Senior Advocate of the High Court does not exempt him from being subject to investigation or prosecution if reasonable cause exists to believe that he may have committed an offence.*
- xii. The orders sought in the application are final in nature and this will require the Court to go into a conclusive or definite finding which is tantamount to pre-emptying the petition. Moreover, this will go against the principles, purpose and intention of an application for conservatory orders.*
- xiii. The Petitioner has been unable to sufficiently prove the nature and manner in which the Respondents have allegedly violated its rights or any of the provisions of the Constitution or any other written laws in connection with his arrest and subsequent charging in the criminal case. The Petitioner has both legal and evidential burden, but which they have not discharged. Reliance is placed on the case of Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission and 3 others [2013] eKLR, Kiambu County Tenants Welfare Association v Attorney General & another [2017] eKLR and Kuria & 3 Others v Attorney General [2002] KLR 69.*

- xiv. *The application is an attempt to shield the Petitioner from lawful prosecution and frustrate the administration of justice contrary to the public interest.*
- xv. *The Petitioner has not demonstrated that the Respondents acted dishonestly, in bad faith, or with an ulterior motive in a manner that would justify interference with the exercise of constitutional and statutory powers of the 2nd and 3rd Respondents.*
- xvi. *The investigations by the 3rd Respondents were instituted with the intention to serve justice for the complainant and is without extraneous or ulterior purposes.*
- xvii. *The Petition is an abuse of court process and is improperly inviting the court to usurp the constitutional mandate of investigative and prosecutorial authorities contrary to the doctrine of separation of powers.*
- xviii. *This Court lacks supervisory jurisdiction to intervene, supervise and direct other Constitutional bodies, the Respondents included, in discharging their constitutional mandates. Additionally, it is not the duty of the court except in very clear circumstances to impair the performance of constitutional functions.*
- xix. *The Petitioner has failed to prove that his arrest and subsequent charging are in breach of any law to warrant an order of prohibition against their arrest to be issued by this Court.*
- xx. *The grounds set out in support of the application do not raise any constitutional issues either for enforcement of fundamental rights or interpretation of the Constitution.*
- xxi. *The allegations by the Petitioner are without merit, legal reason or backing and the prayers*

sought are not tenable before this Court as the Petitioner has failed to demonstrate any violation of rights by the 2nd, 3rd and 4th Respondents.

xxii. *The application is hapless, presumptive and an abuse of the court process and should be dismissed.*

Interested Parties' Case

40. The Interested parties' response and submissions to the Petition are not in the Court file or Court Online Platform (CTS).

Petitioner's Submissions

41. Kinoti and Kibe Company advocates for the Petitioner filed submissions dated 29th July 2025 and rebuttal submissions dated 4th August 2025. Counsel identified the issues for argument as: *whether the 1st Respondent has filed a valid replying affidavit; whether the 3rd Respondent has proper grounds and evidential basis to recommend the Petitioner's prosecution, whether the 2nd and 3rd Respondent's violated the Petitioner's rights under Article 47 and 50 of the Constitution, whether the 1st Respondent exercised the prosecutorial powers contrary to Article 157(11) of the Constitution, whether institution of Criminal case No.E328 of 2025 violated the Petitioner's rights under Article 47,48 and 50 of the Constitution and whether the prosecution and public portrayal of the Petitioner as a criminal amounts to violation of his right under Article 28 of the Constitution.*

42. On the first issue, Counsel submitted that while Police Constable Victor Wangila Mutali can competently swear an affidavit for the 2nd and 3rd Respondents, the same is not true for the 1st Respondent. Counsel stressed that these Respondents mandate is distinct and so he did not have capacity to swear an affidavit for the 1st Respondent. As such, Counsel submitted that the filed Replying Affidavit was incompetent in relation to the 1st Respondent.
43. To buttress this claim, Counsel relied in Article 157(4) and (9) of the Constitution as read with Sections 20 and 22 of the Office of Director of Public Prosecutions. Equally the case of **Omar Kahindi Gona & 4 others v Director of Public Prosecution & another [2021] eKLR** where it was held that:

“The criminal justice system in Kenya entrusts the function of investigations to the police or other investigative agencies and the prosecution directorate is never an active actor in that process of evidence gathering geared towards a recommendation to charge a suspect of crime. Whereas the Director of Public Prosecution’s role is to decide whether a prima facie case exists to initiate or continue a prosecution before the trial Courts. To this effect, the requirement of existence of a crime having been committed by the respondents founded on the provisions of any penal Law remained considerably unknown. In line with Article 157 (6) of the Constitution the Law expects the Director of Public Prosecution to act where the breath of the Law which carries a criminal sanction has been violated.”

44. On the next issue, Counsel recapping the averments in the 1st, 2nd and 3rd Respondents’ Replying affidavit submitted

that it was not established whether the Petitioner drafted the impugned Agreement and that the sale of the land was as a result of a conspiracy between the Petitioner and the 2nd and 3rd Interested parties to defraud the 1st Interested Party.

45. Counsel further pointed out that while these Respondents relied on forensic evidence, the Respondents had only issued one forensic report. This is despite the Petitioner willingly submitting his specimen signatures to the officers for forensic analysis. Counsel also noted that while the officers stated that the Petitioner had not supplied the name of the key person, the Petitioner in his further affidavit informed that he had issued the key name and phone number of the staff to his boss, James Githinji yet he was not investigated. Counsel also pointed out that the Respondents affidavit had numerous discrepancies such as no advocate fees receipts were issued to collaborate the averments of payments for the suit property, the doctored Petitioner's recorded statement and inconsistency of the 3rd Respondent's summons dated 2nd September 2024.
46. In view of this, Counsel submitted that the 2nd and 3rd Respondents had not demonstrated that they had any probative evidence or reasonable ground to recommend the prosecution of the Petitioner.
47. On the third issue, Counsel answered in the affirmative. Counsel submitted that according to the 1st, 2nd and 3rd

Respondent's Replying Affidavit the decision to charge the Petitioner was based on the statements of the 2nd and 3rd Interested Parties in the absence of the Petitioner and which were not produced. Counsel asserted that the Petitioner was not granted an opportunity to make a response to these allegations and share his side of the story, which is contrary to the constitutional dictates.

48. Reliance was placed in **Esther Gathoni Mwangi v Director of Public Prosecutions & 2 others; William Charles Fryda & 3 others [2022] eKLR** where it was held that:

"169. Emerging from the above, there is no doubt the investigator's decision in not formally summon the Petitioner was an administrative action. In sum, it was an administrative action because the investigator was discharging a duty bestowed in law and further the decision affected the legal rights and interests of the Petitioner. As such the decision had to pass the constitutional and statutory tests of lawfulness, reasonableness and procedural fairness.

170. As admitted by the Investigator, the impugned decision did not conform to the requirements of Article 47 of the Constitution and Fair Administrative Actions Act. At a minimum, to meet the constitutional and statutory threshold, the investigator had to: -

- (i) Issue formal Summons requiring the attendance of the Petitioner at the DCI Headquarters.*
- (ii) Inform the Petitioner of the purpose of the attendance.*

(iii) *Inform the Petitioner of her right to attend with a Counsel if she so wished.*

(iv) *Inform the Petitioner of the consequences of non-attendance.*

171. *The Respondents' impugned decision in not formally summoning the Petitioner and instead proceeding to obtain a warrant of arrest, therefore, infringed Articles 47 and 50(1) of the Constitution as well as the Fair Administrative Actions Act. The impugned decision is hence constitutionally infirm.*

172. *This Court believes that it has said enough to demonstrate that the Petitioner was only and unfairly targeted for offering professional services to Dr. Fryda and in a manner to curtail her from further discharging her duties as a professional.*

173. *The totality of the prosecution is that it is contrary to public interest, such does not serve the interests of administration of justice or at all, but is aimed at aiding parties to settle personal scores which are civil in nature and that the prosecution amounts to an abuse of the Court process.*

174. *The upshot is that the actions of the Respondents jointly and severally infringes the Petitioner's rights and fundamental freedoms as guaranteed in Article 27(1) for not according the Petitioner equal protection and equal benefit of the law, Article 28 for infringing on the Petitioner's dignity, Article 31 for unnecessarily requiring the Petitioner to disclose her private affairs, Article 39 for curtailing the Petitioner's freedom of movement, Article 40 for interfering with the Petitioner's property, Articles 47(1) and 50(1) for failing to accord the Petitioner a fair administrative action and a hearing.*

175. *The impugned conduct as well contravenes Article 157(11) of the Constitution for not serving public interest or the interests of the*

administration of justice and amounts to an abuse of the Court process.

176. *In such a scenario, this Court is justified to intervene and uphold the Constitution in enforcing the rights and fundamental freedoms of the Petitioner as well as ensuring that the Constitution is not contravened.”*

49. Like dependence was placed in **Geoffrey Kaaria Kinoti & 7 others vs the Chief Magistrate’s Court at Milimani & Others Constitutional Petition No. E495 of 2021.**

50. Moving on to the next issue, Counsel submitted that the 1st Respondent’s exercise of his prosecutorial power was contrary to Article 157(11) of the Constitution as read with Section 4 of the ODPP Act. Moreover, Guideline 3.1.2.2, 3.2 – 3.2.1 and 3.2.2 of the ODPP Guidelines on the Decision to Charge, 2019. In essence, that the 1st Respondent is enjoined to ensure that no accused person is charged unless all the prescribed legal standards and tests are satisfied and there is sufficient evidence upon which the accused can be convicted. Equally relying in the case of **Esther Gathoni Mwangi**(supra) Counsel submitted that the prosecution of the Petitioner ought to be quashed as lacks factual and evidential foundations upon which he can be convicted.

51. Reliance was placed in **Jirongo v Soy Developers Ltd & 9 others [2021] eKLR** where it was held that:

“82. Although the DPP is thus not bound by any directions, control or recommendations made by any institution or body, being an independent public office, where it is shown that the

expectations of Article 157(11) have not been met, then the High Court under Article 165(3)(d) (ii) can properly interrogate any question arising therefrom and make appropriate orders.

83. *In that regard, the Court of Appeal in the case of Commissioner of Police & Another v Kenya Commercial Bank Ltd & 4 others [2013] eKLR persuasively found that the High Court can stop a process that may lead to abuse of power and held that:*

“Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, it is too fairly well settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why courts in this country have consistently held that it would be an unfortunate result for courts to interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The courts must wait for the investigations to be complete and the suspect charged.

By the same token and in terms of Article 157(11) of the Constitution, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may

lead to harassment or persecution. See *Githunguri v Republic* [1985] LLR 3090.

It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See *Ndarua v R* [2002] 1EA 205. See also *Kuria & 3 others v Attorney General* [2002] 2KLR.” (Emphasis supplied)

Furthermore, the Supreme Court of India in *RP Kapur v State of Punjab* AIR 1960 SC 866 laid down guidelines to be considered by the court on when the High Court may review prosecutorial powers. They are as follows:

- (I) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice; or
- (II) Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction; or
- (III) Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; or
- (IV) Where the allegations constitute an offence alleged but there is either no legal

evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.

85. We are persuaded that this is a good guide in the interrogation of alleged abuse of prosecutorial powers and read alongside article 157(11) of the Constitution, we have sufficiently expressed ourselves elsewhere in this Judgment to show that the unconstitutional continuance of the criminal proceedings against the appellant amounts to abuse of court process and that, balancing the scales of justice, the weight would favour the appellant and not the respondents."

52. On the fifth issue, Counsel submitted that considering the circumstances of this case, it was evident that the Petitioner's rights under Articles 47, 48 and 50(1) had been violated. This is because the Petitioner's right to be presumed innocent had been compromised. Further the Petitioner was being subjected to a trial that lacks a factual and evidential foundation. Equally, that despite his appeal to the 1st Respondent to review its decision, he failed to do so as required by law and proceeded to mount the prosecution against the Petitioner.

53. To buttress this point reliance was placed in **Stanley Munga Githunguri v Republic [1986] eKLR** where it was observed that:

"In some countries the power to prevent an abuse of the process of the Court or to stop a prosecution because it is oppressive and vexatious is to be found in the common law and it also exists in the inherent powers of the Court. The great importance of this power is illustrated by it being statutorily enacted in section 84 of our Constitution. It is a pre-requisite of the exercise of this power that at least one of the

three conditions, specified in Section 77(1) should exist. The applicant contends that two of those pre-requisites exist in his case, i.e no hearing within a reasonable time, secondly not a fair hearing in the sense stated above.

Even if none of the pre-requisites exists as required by Section 77(1) it would still be open to this Court to say under its inherent powers, and also by virtue of the provisions of the Judicature Act (Cap 8), that it would not be in the public interest, sometimes also referred to as public policy, to allow the prosecution launched against the applicant to continue, and issue Order of Prohibition to stop it. It is as much in the public interest that breaches of the law should be punished, as it is to ensure that in the process of doing so the people are not bashed about so that they lose respect for the law. If the law falls into disrepute it will have a shattering effect upon the society's sense of security of their personal freedom and property. The Court is the final arbiter of how the public interest is to be preserved."

54. Counsel on the 6th issue submitted that the prosecution of the Petitioner and his depiction as a criminal amount to violation of his right to dignity as protected under Article 28 of the Constitution. This is despite the Petitioner having lived his life and conducted his work in strict compliance with the law. Counsel stressed that the instant charge was a serious matter especially in light of the fact that there is no incriminating evidence against him. Counsel stressed that the continuation of the alleged prosecution would amount to abuse of the Court process and a waste of judicial time.

55. Reliance was placed in **ANN vs. Attorney General [2013] KEHC 6004 (KLR)** where it was held that:

"It is thus apparent that human dignity is the foundation for recognition and protection of human rights, which, as provided at article 19(3)(a), 'belong to each individual and are not granted by the state.' Regardless of one's status or position, or mental or physical condition, one is, by virtue of being human, worthy of having his or her dignity or worth respected. Consequently, doing certain things or acts in relation to a human being, which have the effect of humiliating him or her, or subjecting him or her to ridicule is, in my view, a violation of the right to dignity protected under Article 28."

56. Similar reliance was placed in **Muchanga Investments Ltd Vs. Safari Unlimited (Africa & 2 others (2009) eKLR 229.**

1st, 2nd and 3rd Respondents' Submissions

57. On 28th July 2025, Senior Principal Prosecution Counsel, Kerongo Maatwa filed these parties' submissions and underscored the single issue for discussion as: *whether there is a competent Petition against the 1st, 2nd and 3rd Respondents.*
58. Counsel submitted that the 3rd Respondent under Section 35 of the National Police Service Act is mandated to detect and investigate crimes while the 1st Respondent under Article 157 of the Constitution has the prosecution mandate. As such, Counsel argued that these Respondents cannot be said to be in violation of the Petitioner's fundamental rights and freedoms when performing their respective statutory and constitutional duties.

59. Counsel stressed that the Petitioner herein had not disputed the impugned Agreement of Sale which perpetrated the fraudulent transfer of the subject suit property to the 2nd and 3rd Interested Party and admitted that the same had been prepared and attested to by his Law firm. Counsel argued that the Petitioner although denied attesting to this Agreement had failed to issue the details of the person who had.
60. Counsel noted on this premise probable cause was established. Counsel stressed that the evidence acquired against the Petitioner and his co-accused was sufficient to mount a prosecution. Counsel argued that the Petitioner's claims in this matter were misplaced as the same ought to be raised before the Trial Court in his defence.
61. Moreover, Counsel stressed that the sufficiency or insufficiency of evidence does not amount to violation of the fundamental rights and freedoms. Accordingly, Counsel argued that the Petitioner's rights had not been violated as alleged. In fact, Counsel pointed out that the Petitioner had been granted an opportunity to be heard and record his statement and further charged before a Court of law where he will defend himself.
62. To this end, Counsel submitted that the instant Petition does not meet the threshold for the grant of the orders sought herein as was articulated in **Anarita Karimi - Versus-Republic (No.1) (1979 1 KLR 154** and **Mumo**

Matemu -Versus-Trusted Society of Human Rights Alliance, Civil Appeal No. 290 of 2012.

4th and 5th Respondents' Submissions

63. These Respondents' through Senior Litigation Counsel, Immaculate Opio filed submissions dated 28th July 2025 and highlighted the issues as: *whether the Hon. Attorney General has authority or control over the DPP, DCI, and IG regarding investigation and prosecution of the Petitioner, whether the Chief Magistrates Court at Milimani, as a judicial body, can be held liable for the alleged constitutional violations in ongoing criminal proceedings and whether the Petitioner has demonstrated any constitutional violation attributable to the 4th and 5th Respondents warranting the reliefs sought.*
64. On the first issue, Counsel submitted that the 4th Respondent's core mandate as per Article 156 of the Constitution is to be the principal legal adviser to the government. On the other hand, Counsel pointed out that the Constitution clearly delineates the mandates of the various offices which are independent such as the 1st, 2nd and 3rd Respondents. Therefore, Counsel noted that the 4th Respondent does not exercise control or supervision over these offices.
65. Counsel stressed that the 4th Respondent neither directed nor participated in the impugned decisions and further that no factual or legal basis had been advanced to justify

his inclusion. Accordingly, Counsel emphasized that the case against the 4th Respondent was misconceived and legally untenable.

66. Reliance was placed in **Republic v DPP & 2 Others ex parte Edwin Harold Dayan Dande & 3 Others [2017] eKLR** where the Court held that:

“A reading of Article 157 of the Constitution leaves no doubt that the DPP is required not only to act independently, but to remain fiercely so. Just like the constitutionally guaranteed independence of the DPP, Article 245(4) of the Constitution ensures that investigations are undertaken independently.”

67. Moreover, reliance was placed in **KCB Ltd & 2 Others v Commissioner of Police & Another, Nairobi Petition No. 218 of 2012 [2013] eKLR**.

68. Turning to the second issue, Counsel submitted that the 5th Respondent, a Court of law established under Article 169 of the Constitution is vested with judicial authority and in hearing the criminal proceedings referenced in this Petition, acts within its adjudicative mandate under the Constitution.

69. Counsel noted further that Article 160(1) of the Constitution directs that *‘in the exercise of judicial authority, the judiciary shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority’* and thus judicial officers granted immunity for acts done in good

faith in the lawful performance of their judicial functions under Article 160(5) and affirmed in **Bellevue Development Company Ltd v Gikonyo & 3 Others [2020] KESC 43 (KLR)**.

70. In this matter, Counsel submitted that the 5th Respondent was properly exercising its judicial mandate under the Constitution, the Magistrates' Courts Act, and the Criminal Procedure Code, which empowers it to try criminal offences including those charged against the Petitioner. Counsel pointed out that there was no allegation or evidence that the 5th Respondent acted outside its jurisdiction, in bad faith, or with any impropriety and so, was joined in this suit improperly.
71. On the final issue, Counsel submitted that no proper case had been made out against the 4th and 5th Respondents to justify issuance of any of the sought orders against them. Equally, Counsel stated that the Petitioner had not demonstrated with a reasonable degree of precision the specific provisions alleged to have been infringed, nor the manner in which such infringements are said to have been occasioned by the 4th and 5th Respondents.

Analysis and Determination

72. It is my considered opinion that the issues that arise for determination are as follows:

i. Whether in the light of the facts of this case the 1st, 2nd and 3rd Respondents

abused their statutory and Constitutional mandates considering the manner of investigating and eventual prosecution of the Petitioner in the impugned criminal case thereby violating the Petitioner's constitutional rights under Articles 28, 47, 48 and 50(1) of the constitution.

ii. Whether the Petitioner is entitled to the relief sought.

Whether in the light of the facts of this case the 1st, 2nd and 3rd Respondents abused their statutory and Constitutional mandates considering the manner of investigation and eventual prosecution of the Petitioner in the impugned criminal case thereby violating the Petitioner's constitutional rights under Articles 28, 47, 48 and 50(1).

73. Article 21 (1) of the Constitution obligates the State and its organs to respect and uphold fundamental rights. It provides as follows:

“It is the fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of rights.”

74. Where the State or its organs acts arbitrarily in excess of its mandate which leads to violation of fundamental freedoms and rights of any person it is the responsibility of this Court both under Article 23 (1) and Article 165 (3) (b) & (d) (ii) to intervene and grant redress.

75. This Court therefore has a duty to thoroughly examine the grievances raised by the Petitioner and weigh them

against the mandate of the Respondents to determine if there has been abuse of the legal and constitutional mandates resulting in violation of the rights of the Petitioner as alleged. This is because unless it can be demonstrated that the Respondents have acted contrary to their mandates, the Court would have no business constraining the constitutional and/or statutory mandate of another organ or public entity. This would be so even in respect of investigatory or prosecutorial mandates as was succinctly laid down in **Daniel Ogwoka Manduku vs Director of Public Prosecutions & 2 others [2019]eKLR** where the Court after reviewing several judicial decisions held as follows:

“... It is therefore not possible to stop any criminal investigations unless the foundation of such investigations is malicious or is an abuse of power.

51. 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:

“... 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...”

In Pauline Adhiambo Raget v. DPP & 5 Ors., (2016) eKLR, a case where breach of right to equality was alleged to have been violated by investigations of an offence, Onguto J. held, and I agree, that-

“I have also been unable to see how in investigating an alleged criminal conduct or activity there could be discrimination or a practice of inequality before the law. The respondents are enjoined to investigate any allegations of criminal activity or conduct both by statute as well as by the Constitution. The investigations may take them to anyone including the petitioner. They could investigate on their own prompting or upon being prompted by any member of the public as did the interested party in this case. In so doing, it is a legal mandate they would be undertaking.”

76. It is therefore important to lay down the scope of the mandate of the 1st, 2nd and 3rd Respondents whom the Petitioner heavily faults for inappropriately discharging their mandates to perpetuate infringement of his Constitutional rights.
77. **Article 239 (1) (c)** of the Constitution recognizes the National Police Service as one National Security Organs and specifically establishes it under Article 243 of the Constitution.
78. The **National Police Service Act, 2011** enacted pursuant to Article 245 (8) of the Constitution explicates the functional mandate of National Police Service.

79. Under Section 24 (e) of the National Police Service Act, ***'investigation of crimes'*** is among others one the key functions of the National Police Service.
80. Further Section 35 of the Act provides for the functions of the Directorate of Criminal Investigations (3rd Respondent) which is a core department within the National Police Service charged with investigation of complex crimes. Its functions include:
- (i) *collect and provide criminal intelligence;*
 - (ii) *undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime among others;*
 - (iii) *maintain law and order;*
 - (iv) *detect and prevent crime;*
 - (v) *apprehend offenders;*
 - (vi) *maintain criminal records;*
 - (vii) *conduct forensic analysis;*
 - (viii) *execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of the Constitution;*
 - (ix) *co-ordinate country Interpol Affairs;*
 - (x) *investigate any matter that may be referred to it by the Independent Police Oversight Authority; and*

(xi) *perform any other function conferred on it by any other written law.*

81. Turning to the 1st Respondent's mandate, it derives its authority from **Article 157** of the Constitution. Article 157(6) (a) of the Constitution provides as follows:

(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;*

82. In discharging this Constitutional mandate, Article 157 (10) of the Constitution states that the 1st Respondent ***'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.'***

83. **Article 157(11)** however enjoins the 1st Respondent while exercising that mandate to pay regard to ***'public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.'***

84. The question that this Court must now answer is whether the Petitioner has demonstrated that indeed the 1st, 2nd and 3rd Respondents have acted contrary to their above mandates considering the manner they have investigated

and eventually prosecuted the Petitioner in *Milimani Chief Magistrate Criminal Case Number E328 of 2025- R vs George Koimburi Ndungu & 2 Others*.

85. For this Court should stop the prosecution of the Petitioner, it should be obvious to it that the 1st, 2nd and 3rd Respondent had no reasonable and probable foundation firstly, to undertake the investigation and secondly, the eventual prosecution of the Petitioner and that their actions were merely driven by personal vendetta or other ulterior motives.
86. The Court of Appeal in **Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others [2018] eKLR** quoting with approval a passage from the Supreme Court of India in **State of Maharashtra & Others v. Arun Gulab & Others, Criminal Appeal No. 590 of 2007** warned that the power to stop criminal proceedings must only be applied only in the clearest of cases where there is manifest abuse of power; it stated:

“... The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction to the Court to act according to its whims or caprice. However, the Court, under its inherent powers,

can neither intervene at an uncalled for stage nor can it soft-pedal the course of justice at a crucial stage of investigation/proceedings.

87. ***The provisions of Articles 226, 227 of the Constitution of India and Section 482 of the Code of Criminal Procedure, 1973 (hereinafter called as “Cr.P.C.”) are a device to advance justice and not to frustrate it. The power of judicial review is discretionary; however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of power of the Court, but the more the power, the more due care and caution is to be exercised in invoking these powers...***

88. Now looking at the grievances by the Petitioner in this Petition, he alleges that he was charged in **Criminal Case No. E328 of 2025** on allegations of conspiracy to defraud in relation to L.R. RUIRU/JUJA EASTBLOCK 2/36. He contends that the said land transaction flowed from a disputed Agreement of Sale agreement executed by the Interested Parties at his Ruiru office on 17th November 2018 and included two further acknowledgements by the parties dated 6th June 2018 and 3rd April 2020. He claims that he did not draft, attest or execute the said Agreement of Sale nor was he present during any of the alleged transactions. He nevertheless acknowledges that that

indeed the said Agreement was executed by one of his employees who neither had his authority nor permission and there is thus no file or a record of the legal fees' receipts evidencing payment for the services rendered in respect of the said transaction. He stated that he recorded a statement with the 3rd Respondent and even had his specimen signatures taken sometime in June 2020 denying anything to do with that agreement but the push to charge him has been so hard despite clear indication of his non-involvement in the transaction and even the Respondent have not forensically implicated him. He claimed the 3rd Respondent officers informed him that the 1st Interested Party was only keen on having him personally held liable as it was easier to hold accountable than holding the 2nd Interested Party liable due to his perceived political force and it would be a lot easier to make the Petitioner pay what had been agreed as he has professional indemnity. He claimed that sometime in September 2024, the 3rd Respondent's officers summoned him where the 2nd Interested Party was present and the said interested Party indicated that he had settled the issue with the 1st Interested Party and he thus was informed that he would be a prosecution witness in the matter only for 12th June 2025 to be told he was required to appear before the Chief Magistrates Court on 24th June 2025 in **Criminal Case No. E328 of 2025** as the 3rd accused. The Petitioner protested that he has unreasonably been implicated in the matter despite his non-involvement in the alleged offences. He emphasized

that that the only relationship that exists between him and the alleged fraudulent Agreement of Sale is the fact that it was drafted through his Ruiru office, he had not given instructions, did not draft it or attest it and although liability may be visited upon his firm relating to the impugned Agreement of Sale, he cannot be held criminally liable for the actions of another person despite their being an employer-employee relationship yet in a letter a letter dated 24th September 2024 to the 3rd Respondent he disclosed the name of the staff who had prepared the impugned Agreement as Harrison Ndungu who however had absconded duty since 2020 and was trying to trace him. He further contended that the Statement which the Respondents had annexed in their affidavit was doctored.

89. The Respondents in the replying affidavit of Police Constable **Victor Wangila Mutali** sworn on **16th July 2025** vehemently refuted the Petitioner's claims. He narrated that a complaint was lodged by the 1st Interested Party's mother, Lucia Wanjiku Githinji, who was the administrator of her late husband's estate claiming that the property subject to the investigation and prosecution of the Petitioner had been transferred to the 2nd and 3rd Interested Party instead of the 1st Interested Party. Investigations were commenced and the District Land Registrar Ruiru provided the green card, history of ownership, documents relating to the transfer and daily presentation book on 24th June 2020. Investigation confirmed that the land in question had been transferred from the late Gibson Githinji Gitonga to the 1st Interested

Party and subsequently to the 2nd and 3rd Interested Party. The 2nd and 3rd Interested Parties claimed that they had bought the said land from the owner, being the 1st Interested Party as per the impugned Agreement of Sale that was attested to by the Petitioner. The 2nd and 3rd Interested parties insisted that at all material times of the transaction they had dealt with the Petitioner and that it is they that provided the impugned Agreement and acknowledgements of payment for Ksh.500,000 and Ksh.2,000,000 dated 17th November 2018 attested by the Petitioner. In sum, the two alleged that they had purchased the suit property for Ksh.5,500,000 although they failed to prove this.

90. On the other hand, the 1st Interested Party had maintained that neither he nor his mother sold the land in question to the 2nd and 3rd Interested Parties, a fact confirmed by the document examiner's report dated 6th July 2020 whose finding was that none of the documents neither either land sale agreement or the alleged acknowledgment receipts had been signed by the 1st Interested Party or his mother.
91. When investigating officer contacted the Petitioner to find out if he was involved in drafting the said Agreement for sale and the acknowledgements of payments in question, the Petitioner confirmed that it had been done by one of his staff in his law firm at Ruiru whose details he did not disclose and considering that already the 2nd and 3rd Interested Parties had indicated that they had dealt

directly with the Petitioner, the investigator formed the view that there was reasonable cause to believe that there was a conspiracy between the Petitioner and the 2nd and 3rd Interested Parties to swindle the 1st interested Party of the land in question and hence forwarded the investigation file to the 1st Respondent who thereafter made the decision to charge.

92. As was held by the Court of Appeal in **Kuria & 3 Others Vs. AG (2002) 2 KLR 69** cited with approval in **Raymond Kipchirchir Cheruiyot & another v Republic [2021] eKLR**;

“30... 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... 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.”

93. In this case, the Petitioner accuses the Respondents of not objectively and/or impartially carrying out the investigation by unfairly incriminating him on the basis of an agreement that was drawn by someone else who was his employee and who should thus bear the criminal responsibility, if any.
94. Nevertheless, when the petitioner was accorded the opportunity to record a statement by the 3rd Respondent, he appears elusive in providing the identification details of the staff member in question. For instance, in his sworn affidavit of 26/6/2025; he discloses that what he provided when he was asked to record a statement as follows:

“Para 6. THAT thereafter I was called to the DCIO offices in Muthaiga Road Headquarters and informed that the 1st Interested Party had complained too many offices stating that the matter had been compromised by the 2nd Interested Party. He was also saying that since I had a professional indemnity, I would be able to pay what parties had agreed.”

“Para 7. THAT I was asked to write another statement which I did amidst my explanations. The statement inter alia stated that:

- That I am an Advocate of the High Court of Kenya and practicing as such in the name and style of Gathii Irungu & Co. Advocates based in Ruiru.*

- That on 17th day of December 2018 my offices attested an agreement between one Julius Gikonyo Githinji and George Koimburi Ndungu and Shelmith Karunguri Maina relating to LR No. RuiruEast/Juja Eastblock 2/36.
 - The same was attested by one of my staff and that the staff indicated that all parties were present at the execution of the agreement. That George Koimburi Ndungu is a long-standing client and is known to me and to all staff. That is all I wish to state. (Annexed hereto and marked "GI-3" is a copy of the statement)"
- "8. THAT severally, the officers from Juja called me stating that the 1st interested party was still aghast that no actions were being taken against me and wanted me to be personally liable for the Agreement."
- "9. THAT around September 2024 some officers came to my offices and indicated that I should visit their offices on the abovementioned issues. They left a letter to the effect that a further statement from me was required by the director of public prosecution. (Annexed hereto and marked "GI-4" is a copy of the letter dated 2nd September 2024)"
- "10. THAT I thereafter willingly took myself to their offices and was joined by the 2nd interested party. The 2nd Interested party indicated that he had finalized the issue with the 1st Interested Party. Upon perusal of my earlier statement, it was discovered there was nothing for me to add considering I was never present during all the transactions."

“11. THAT I was informed by the officers that I would be a prosecution witness if the matter was to proceed to trial and went further to add that that the 1st Interested Party was still complaining stating he would involve the media in the matter if no action was taken against me.”

95. In the further affidavit, the Petitioner says he provided details of the said staff in the letter he wrote to the 3rd Respondent. He stated:

“10. THAT in my Appeal letter to the 1st Respondent dated 25th June 2025 I attached amongst others the letter dated 24th September 2024 to the 3rd Respondent which had enough information for him to act as per his duties and mandate and track the staff whose identity is disclosed which mandate\ duty he has been unwilling or neglected to perform up to today (Annexed and Marked 'GI 1' is a copy of the Appeal and Attachments)”

96. The letter referred to by the Petitioner reads:

*“DIRECTOR OF CRIMINAL INVESTIGATIONS
MAZINGIRA HOUSE KIAMBU ROAD*

Dear Sir.

*RE: SUMMONS IN RESPECT TO SALE AGREEMENT OF
PROPERTY RUIRU/RUIRU EAST BLOCK 2/36*

*Refer to your summons dated 2nd September 2024 and our various discussions with your officers. As indicated in my statement of August 2020 **one of my staff without permission nor knowledge executed the agreement. He absconded duty in the year 2020 and we are trying to trace him after we were informed, he relocated to***

Gatundu. His name is **HARRISSON NDUNGU** and **his phone number is 0723900928.** We confirm we shall continue cooperating with your officers' directions.

Yours Faithfully, GATHII IRUNGU ADVOCATE
105/2185/91

For: GATHILIRUNGU & CO. ADVOCATES

97. The petitioner only provides a name and a phone number yet he claims the suspect was his employee. He does not provide evidence of his employment such as the letter of offer of employment, the professional details such as his admission details, that assuming the person was an advocate or even details showing payment of salary or the contract of employment of the said employee. All he gives is a name and a phone number and then claims that the said person even absconded duty from the year 2020.
98. It is apparent that the investigator was unconvinced on the sincerity of the Petitioner whom he considered evasive due to his unwillingness to provide full details of the staff he alleged had drafted the agreement and also because already, the 2nd and 3rd interested parties had implicated the Petitioner as the person whom they had dealt with. At **paragraphs 18** and **19** of the replying affidavit, the investigator states:

"18. THAT in the course of my investigation I contacted the Petitioner herein in my office and informed him what the 2nd and 3rd Interested Parties herein had said about his involvement in the drawing of the said sale agreement,

acknowledgment of payment to JULIUS GITONGA GITHINJI and the carrying out of the entire transaction."

"19. THAT the Petitioner acknowledge the sale agreement and the others said documents having been drawn in his office based in Ruiru town but indicated to me that the same had been one by an advocate in his law firm, which advocate he never disclosed his name or give any details at all. (Attached herewith and marked as "VVM-8" is a copy of the petitioner herein self-recorded statement)."

99. In my view, I sense issues of credibility and reliability around the conduct of the Petitioner vis-à-vis the totality of the evidence by the prosecution that may be marshalled against him and this cannot be a function of this Court. That's a trial Court's function. It is the one that will have the responsibility of evaluating the many turns and twists relating to the said charges to determine whether or not knowledge or participation can be imputed on the Petitioner considering his conduct against overall evidence presented before the Court. That matter squarely lies on the trial court.

100. The supervisory jurisdiction of this Court can only be validly invoked to prohibit an investigation or prosecution where it is manifest that:

- a) ***The investigation or prosecution is vexatious such as in it is possible to demonstrate that it is unwarranted and without basis, and would tend to or is being instigated with an intention to cause***

worry, upset, annoyance or embarrassment.

- b. is oppressive i.e. where it can be demonstrated that it is being made because the complainant or the police have a personal issue or prejudice with the individual they are complaining about, and that they are using the criminal process to settle scores with the individual.**
- c. it is made with ulterior motives and in bad faith i.e. where it can be demonstrated that the police are being misused or manipulated to influence another process or outcome.**
- d. Lastly, it is unreasonable, if a complaint is so outrageous that no reasonable person would have given credence to it or acted on it.**

101. The likelihood of a prosecution being unsuccessful is not a reason to consider it unreasonable.

102. I think it would be premature to terminate the criminal case at this stage given my observations in the foregoing. The Petitioner has failed to demonstrate that the 1st, 2nd and 3rd Respondent lacked reasonable cause in commencing and mounting the prosecution against him as there are sufficient facts supporting their decision to investigate and prosecute the Petitioner hence their actions were not driven by malice. It will be an act of judicial overreach if I were to interfere with the Constitutional and statutory mandate of the 1st, 2nd

and 3rd Respondents by stopping the prosecution of the Petitioner in the circumstances of this case.

103. The instant Petition is hereby dismissed with costs to the Respondents.

Dated, signed and delivered virtually at Nairobi this 13th day of August, 2025.

.....

**L N MUGAMBI
JUDGE**

ORIGINAL