Maina & 4 others v Director of Public Prosecutions & 4 others (Constitutional Petition E106 & 160 of 2021 (Consolidated)) [2022] KEHC 15 (KLR) (Constitutional and Human Rights) (27 January 2022) (Judgment)

Robert Waweru Maina & 4 others v Director of Public Prosecutions & 3 others [2022] eKLR

Neutral citation: [2022] KEHC 15 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION E106 & 160 OF 2021 (CONSOLIDATED)

AC MRIMA, J

JANUARY 27, 2022

BETWEEN

ROBERT WAWERU MAINA .... 1ST PETITIONER

PAUL MWANGI NJUKI .... 2ND PETITIONER

ANTIQUE AUCTIONS AGENCIES .... 3RD PETITIONER

OKSANA INVESTMENTS SUPPLIES LIMITED .... 4TH PETITIONER

AND

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

THE CHIEF MAGISTRATES COURT MILIMANI LAW COURTS .... 2ND RESPONDENT

ALICE WANJIRU WAMWEA .... 3RD RESPONDENT

AS CONSOLIDATED WITH

CONSTITUTIONAL PETITION 160 OF 2021

BETWEEN

TOM JASEME .... PETITIONER

AND

THE DIRECTOR OF CRIMINAL INVESTIGATIONS .... 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS .... 2ND RESPONDENT

Circumstances in which a court could block concurrent civil and criminal proceedings

A court could stop the prosecution of an accused when the institution/continuance of criminal proceedings against an accused could amount to the abuse of the process of the court; when the quashing of the impugned proceedings would secure the ends of justice; where it manifestly appeared that there was a legal bar against the institution or continuance of the proceedings, e.g., want of sanction; where the allegations in the First Information Report or the complaints taken at their face value and accepted in their entirety, did not constitute the offence alleged; where the allegations constituted an offence alleged but there was either no legal evidence adduced or evidence adduced clearly or manifestly failed to prove the charge; where the prosecution was not in public interest; where the prosecution was not in the interests of the administration of justice; where the prosecution was oppressive, vexatious and an abuse of the court process; where the prosecution amounted to a breach of rights and fundamental freedoms; where the investigation and prosecution amounted to abuse of power and discretion and was aimed at achieving an ulterior or improper motive; where the investigation and the prosecution were tainted with illegality, irrationality and procedural impropriety; and where the investigation and prosecution were in gross contravention of the Constitution and the law.

Reported by John Wainaina

***Constitutional Law** – office of the Director of Public Prosecutions – independence of the Office of the Director of Public Prosecutions – whether a court could interfere with the Director of Prosecution's discretion to prosecute or not to prosecute – Constitution of Kenya, 2010, articles 157 & 158; Office of the Director of Public Prosecutions Act, section 4.*

***Constitutional Law** – fundamental rights and freedoms – right to dignity - whether the Director of Public Prosecution's power to prosecute the petitioners on facts where civil remedies existed amounted to unfair discrimination and violated the petitioners' right to dignity – Constitution of Kenya, 2010, articles 27 & 28; Convention Concerning Discrimination in Respect of Employment and Occupation (1958), article 1(a).*

***Constitutional Law** – constitutional petitions – adducing evidence in constitutional petition proceedings – whether the provisions of the Evidence Act were applicable in constitutional petitions – Evidence Act, Cap. 80, Laws of Kenya, sections 107(1), (2) and 109.*

***Civil Practice and Procedure** – concurrent civil and criminal proceedings -meaning and effect of concurrent civil and criminal proceedings – what were the circumstances in which a court could block concurrent civil and criminal proceedings? – Criminal Procedure Code, Cap. 75, Laws of Kenya, section 193A.*

***Words and Phrases** – discrimination – definition of discrimination - effect of a law or established practice that conferred privileges on a certain class because of race, age sex, nationality, religion or hardship - differential treatment especially a failure to treat all persons equally when no reasonable distinction could be found between those favoured and those not favoured - Black's Law Dictionary, 10th Edition.*

Brief facts

The petitioners in the instant two consolidated petitions challenged the manner in which the police and the Director of Public Prosecutions (the DPP) discharged their respective duties in relation to a criminal complaint against the petitioner.

The petitioners and other accused persons were charged with conspiracy to defraud contrary to section 317 of the Penal Code in *Nairobi (Milimani) Chief Magistrates Court Criminal Case No. 1259 of 2019 Republic v. Amos Mugweru Mwangi, Peter Kefa Onsongo, Robert Waweru Mana, Paul Mwangi Njuki, Esther Muthoni Njoroge, Tom Jaseme, Oksana Investments Supplies Limited and Antique Auctions Agencies* (the criminal case).

The petitioners stated that the criminal case related to the manner in which the public auction was conducted, which auction resulted into the sale and transfer of a parcel of land. According to the petitioners, all matters relating to the manner in which the public auction was conducted were subject of two civil suits before the High Court to wit, *Nairobi High Court Commercial and Admiralty Civil Suit No. 86 of 2017 Alice Wanjiru*

Wamwea vs. Faulu Microfinance Bank Limited, Antique Auctions, Oksana Investments Supplies Limited and NIC Bank and High Court being Nairobi High Court Commercial and Admiralty Civil Suit No. E121 of 2018 Oksana Investments Supplies Limited vs. Alice Wanjiru Wamwea(the civil cases). The petitioners thus submitted that the criminal case ought to be terminated.

The consolidated petitions sought various reliefs including; an order prohibiting the 1st and the 2nd respondents from continuing with the prosecution of the petitioners in the criminal case; a declaration that the proceedings in the criminal case were unfounded, malicious, oppressive and as against the petitioner and otherwise unconstitutional; and, an order quashing the decision on cash bail and bond terms against the petitioners pending the hearing and determination of the civil cases.

The respondents opposed the petitions asserting that the petitions were not merited and that the criminal case ought to proceed.

Issues

i. Whether a court could interfere with the Director of Public Prosecution's discretion to prosecute.
ii. Whether there were any instances where a court could exercise its discretion and stop a prosecution.
iii. What were the circumstances in which a court could block concurrent civil and criminal proceedings?
iv. Whether the Director of Public Prosecution's action to prosecute the petitioners based on facts where civil remedies also existed amounted to unfair discrimination and violated the petitioners' right to dignity.
v. Whether the provisions of the Evidence Act were applicable in constitutional petitions.

Held

1. The legal basis for the exercise of prosecutorial powers in Kenya was the Constitution of Kenya, 2010, (the Constitution) and the law. Article 157 of the Constitution established the Office of the Director of Public Prosecutions (ODPP). The Office of the Director of Public Prosecutions Act No. 2 of 2013 (the ODPP Act) was an Act of Parliament enacted to give effect to articles 157 and 158 of the Constitutions, other relevant provisions of the law and for connected purposes.
2. Section 4 of the ODPP Act provided the fundamental principles which guided the DPP in prosecution of cases. The principles included; impartiality and gender equity; diversity of the people of Kenya; rules of natural justice, promotion of public confidence in the integrity of the office, the need to serve the cause of justice; prevention of abuse of the legal process and public interest; and, promotion of constitutionalism. The ODPP Act, among other statutes, variously provided for the manner in which the DPP ought to have discharged his mandate. Suffice to say, the exercise of prosecutorial powers by the DPP had been subjected to legal scrutiny and appropriate principles and guidelines developed.
3. The prosecutorial regime did not grant the DPP a *carte blanche* to run amok in the exercise of his prosecutorial powers. Where it was alleged that the standards set out in the Constitution and in the ODPP Act had not been adhered to, they could not shirk its constitutional mandate to investigate the allegations and make a determination. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by the court would be an abhorrent affront to judicial conscience and above all, the Constitution itself.
4. The High Court had a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one-party system regime. In interpreting the Constitution, the court ought to have upheld and given effect to the letter and spirit of the Constitution, always ensuring that the interpretation was in tandem with aspirations of the citizenry and modern trend.
5. Under article 157 (1) of the Constitution, the ODPP was enjoined in exercising the powers conferred by the provision to have regard to public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process. Interest of the administration of justice dictated that only those whom the DPP believed to have a prosecutable case against them be arraigned in court

and those who DPP believed to have no prosecutable case against them be let free. That was why article 159 (2) of the Constitution provided that justice should be done to all, irrespective of status. Justice demanded that it should not be one way for some people and another for others, but one way for all.

6. With regard to concurrent civil and criminal proceedings, section 193A of the Criminal Procedure Code, Cap. 75, Laws of Kenya (the CPC Act) provided that any matter in issue in any criminal proceedings which was also directly or substantially in issue in any pending civil proceedings could not be a ground for any stay, prohibition or delay of the criminal proceedings. Concurrent proceedings meant independent, simultaneous investigations and prosecutions involving substantially the same matter and parties.
7. A court could only block parallel proceedings in special circumstances. A defendant could move for a stay to block parallel proceedings, which would be granted only if the defendant could prove either that the government was acting in bad faith and using malicious tactics to circumvent the strict criminal discovery rules, or that there was a due process violation. Even if a defendant met one of those requirements, a stay might not be guaranteed. The court took as many other factors into account in deciding whether a stay was appropriate in a specific situation. Those factors included; the commonality of the transaction or issues, the timing of the motion, judicial efficiency, the public interest, and whether or not a petitioner was intentionally creating an impediment.
8. The quest to stay concurrent proceedings ought to first be premised on the fact that there were in existence two or more active cases of civil and criminal nature in respect of the same entity or person.
9. The Office of the Director of Public Prosecutions was an independent constitutional office. However, that office was subject to the control of the court in appropriate instances where illegality, irrationality and procedural impropriety was demonstrated.
10. There were instances where a court ought to exercise its discretion and stop a prosecution. Such instances included where it was demonstrated that:
    1. The institution/continuance of criminal proceedings against an accused could amount to the abuse of the process of the court;
    2. Where the quashing of the impugned proceedings would secure the ends of justice;
    3. Where it manifestly appeared that there was a legal bar against the institution or continuance of the proceedings, e.g., want of sanction;
    4. Where the allegations in the First Information Report or the complaints taken at their face value and accepted in their entirety, did not constitute the offence alleged;
    5. Where the allegations constituted an offence alleged but there was either no legal evidence adduced or the evidence adduced clearly or manifestly failed to prove the charge;
    6. The prosecution was not in public interest;
    7. The prosecution was not in the interests of the administration of justice;
    8. The prosecution was oppressive, vexatious and an abuse of the court process;
    9. The prosecution amounted to a breach of rights and fundamental freedoms;
    10. The investigation and prosecution amounted to abuse of power and discretion and was aimed at achieving an ulterior or improper motive;
    11. The investigation and the prosecution were tainted with illegality, irrationality and procedural impropriety; and,
    12. The investigation and prosecution were in gross contravention of the Constitution and the law.
11. The rule of the thumb with respect to concurrent criminal and civil proceedings based on a similar set of facts and circumstances was that the criminal case ought to proceed unless it could be demonstrated that the prosecution of the criminal case would either result to infringement of the rights and fundamental freedoms of the accused persons or would lead to the contravention of the Constitution.
12. The criminal case and the two civil cases were based on similar facts and background. On one hand, one of the hotly contested issues in the civil cases related to the fraudulent manner in which the impugned

public auction of the suit property was conducted. On the other hand, the petitioners were all charged with conspiracy to defraud contrary to section 317 of the Penal Code.

13. Fraud cut across both the criminal and civil cases. In the event the instant court allowed the instant petitions, effectively the criminal case would be terminated. The civil cases would proceed. One of the possibilities was that if for instance the High Court was satisfied that fraud was committed either before, during or after the public auction, the matter was likely to be taken up by the police for further dealing. Those culpable, who were the petitioners, were likely to be charged. In that case, a criminal case similar to the impugned one would again be instituted against the petitioners. In other words, after all was said and done, the parties would find themselves in the same situation.

14. If the civil cases were stayed in favour of the criminal case, the criminal trial court would be accorded an opportunity to conclusively deal with the issue of fraud in the criminal case. If the trial court dismissed the criminal case, it would then mean that all the civil claims based on the allegation of fraud would stand determined in favour of the petitioners. The other possibility was the success of the criminal case. If that happened, then it meant that the claims based on fraud against all the petitioners would succeed and that would have a significant impact on the public auction and all the resultant actions.

15. There was logic in the general position that where there were concurrent criminal and civil cases based on similar facts and circumstances, the criminal case ought to be allowed to first be heard and determined. The foregoing general position was, however, subject to exceptions including whether the criminal case infringed the rights and fundamental freedoms of the accused or it was in contravention of the Constitution. Accordingly, a court could not terminate a criminal case solely on the basis of a pending civil case based on similar facts and circumstances.

16. The petitioners were required to show the rights alleged to be infringed, as well as the basis of each of each of their grievances. The Evidence Act, cap. 80, Laws of Kenya, applied to matters generally relating to evidence. Section 2 thereof provided that the Evidence Act applied to all judicial proceedings in or before any court other than a Kadhi's Court, but not to proceedings before an arbitrator. Sections 107(1), (2) and 109 of the Evidence Act were on the burden of proof. The provisions required whoever desired any court to give judgment as to any legal right or liability and depended on the existence of facts, he or she had to prove that those facts existed.

17. When a person was bound to prove the existence of any fact the burden of proof lay on that person. The burden of proof as to any particular fact laid on the person who alleged and wanted the court to believe in its existence, unless it was provided by any law that the proof of that fact should lie on any particular person.

18. The petitioners in Petition No. 106 of 2021 pleaded the violation of article 10 of the Constitution. Article 10 of the Constitution provided for national values and principles of governance. The petitioners, however, did not state with precision which of those values and principles of governance were infringed and the manner in which they were so allegedly infringed. Hence, that claim could not succeed.

19. Article 1(a) of the Convention Concerning Discrimination in Respect of Employment and Occupation (1958) defined discrimination as any distinction, exclusion or reference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin which had the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. In essence, the equal should be equally treated and the unequal unequally treated as called for by the inequality.

20. Whereas the Land Registration Act No. 6 of 2012 provided remedies in mortgage transactions, that did not preclude the police from investigating the possible commission of crime in the process of the parties' dealings. The petitioners ought to have demonstrated how the law was unequally applied to them or how they were discriminated against, which they failed to do. The parties' contention under article 27 of the Constitution was therefore, unsuccessful.

21. Unless otherwise proved, the arrest and charging of the petitioner in the criminal case *per se* could not be in contravention of article 28 of the Constitution. The same position applied to the claim that the petitioner's liberty under article 29(a) of the Constitution was arbitrarily curtailed by the preference of the criminal case.
22. Article 40 of the Constitution provided for protection of the right to property. However, article 40(6) provided that the rights under that article did not extend to any property that was found to have been unlawfully acquired. Therefore, in the event the criminal case succeeded and it was found that the suit property was unlawfully acquired, then the constitutional protection under article 40 would not be available to the unlawfully registered owners. The claim under article 40 of the Constitution was, hence, yet to crystallize in the face of the criminal case.
23. Article 43 of the Constitution was on economic and social rights. The rights enumerated therein related to health, housing, sanitation, food, water, social security and education. The petitioner did not plead how the alleged contravention of the right to employment ensued in the circumstances of the case. As such, the claim was unproved.
24. The decision to charge the petitioners was made by the DPP and subsequently, the petitioners were all charged. The decision to charge the petitioners was inevitably based on the evidence. The request to review the evidence and the decision to proceed on with the criminal case did not change the decision which had already been made by the DPP to charge the petitioners. In other words, there was no change in relation to the decision to prosecute the petitioners which decision had already been made. The request to review the evidence and the decision to proceed on with the criminal case did not amount to the administrative decisions contemplated under article 47 of the Constitution.
25. A careful look at article 157(11) of the Constitution against the allegations put forth by the petitioners revealed that the petitioners were anxious that if the criminal case was allowed to proceed, then that would impact negatively to the civil cases. However, as demonstrated in the foregoing paragraphs, there was logic in the criminal case proceeding first.
26. The petitioners failed to demonstrate to the court how the DPP acted contrary to public interest, the interests of the administration of justice or failed to prevent and avoid abuse of the legal process. In fact, it was in the interests of the administration of justice that the criminal case be heard first for that would settle some of the contentious issues in the civil cases including whether the suit property was lawfully acquired and whether the various rights under the Constitution accrued.
27. Whereas the petitioners had the right not to be subjected to an illegal and/or unwarranted criminal process, the DPP was also under a public duty to ensure that offences were prosecuted and those culpable attended to as the law required. That was the balance created by the law and which the court was called upon to take. In fact, that was the essence of the rule of law.
28. The termination of the intended prosecution of the petitioners in the circumstances of the instant case would frustrate, instead of advance, the rule of law. The petitioners had constitutional safeguards in respect of their rights even when undergoing the trial. The petitioners would, at the trial, also be accorded an opportunity to challenge the veracity of the evidence including whether the evidence was properly obtained. In the upshot, the petitioners failed to show how the criminal case was an abuse of the criminal justice system. They failed to prove that the prosecution of the criminal case infringed articles 10, 27(1), 28, 29(a), 40, 43, 47, 50 and 157(11) of the Constitution.

Petition disallowed.

Orders

i. *Petition No. 106 of 2021 and Petition No. 160 of 2021 together with their respective notices of motion were dismissed.*
ii. *The trial court directed to accord priority to the hearing and determination of Nairobi (Milimani) Chief Magistrates Court Criminal Case No. 1259 of 2019 Republic v. Amos Mugweru Mwangi, Peter Kefa*

Onsongo, Robert Waweru Mana, Paul Mwangi Njuki, Esther Muthoni Njoroge, Tom Jaseme, Oksana Investments Supplies Limited and Antique Auctions Agencies.

iii. *The petitioners were to bear the costs of the petitions.*

Citations

Cases

1. *Jirongo, Cyrus Shakhalanga Khwa v Soy Developers Ltd & 9 others* Petition 38 of 2019; [2021] eKLR — (Mentioned)
2. *Maura, Muigana v Stellan Consult Limited & 2 others* Constitutional Petition E033 of 2021; [2021] eKLR — (Followed)
3. *Mwangi, Reuben v Director of Public Prosecutions & 2 others; UAP Insurance & another (Interested Parties)* Constitutional Petition E216 of 2020; [2021] eKLR — (Mentioned)
4. *Republic v Registrar General & 13 others* Miscellaneous Application No 67 of 2005; [2005] eKLR - (Mentioned)
5. *M'ikunyua,* F*rancis Kirima & others v Director of Public Prosecutions,* Petition No 461 of 2012,- (Explained)
6. *Anarita Karimi Njeru* (1976-80) 1 KLR 1272 - (Applied)
7. *Commissioner of Police & another v Kenya Commercial Bank Ltd & 4 others* [2013] eKLR
8. *Ndarua v R* [2002] 1EA 205- (Mentioned)
9. K*uria & 3 others v Attorney General* [2002] 2KLR- (Mentioned)
10. *Republic v Attorney General & another Ex Parte Ngeny* (2001) KLR 612,- (Explained)
11. *Hon Christopher Odhiambo Karan v David Ouma Ocheing & 2 others* [2018] SC Petition No 36 of 2019 - (Explained)
12. *Stanley Munga Githunguri v Republi*c Criminal Application No 271 of 1985 - (Mentioned)
13. *Republic v Director of Public Prosecutions & 2 others ex parte Praxidis Namoni Saisi* (2016) eKLR - (Explained)
14. *Commissioner of Police and Director of Criminal Investigations Department vs Kenya Commercial Bank and others* Nairobi Civil Appeal No. 56 of 2012 {2013}1 eKLR - (Mentioned)
15. *ared Benson Kangwana v Attorney General* Misc, Application No 446 of 1996 - (Explained)
16. V*incent Kibiego Maina v The Attorney General* Misc Application Nos 839 and 1085 of 1999 (UR) - (Explained)
17. *Samuel Kamau Macharia & another v Attorney General & anothe*r, Misc. Application No 356 of 2006 (UR)
18. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR - (Followed)
19. *Peter K Waweru v Republic* [2006] eKLR - (Explained)
20. Petition No E002 of 2021 *Christopher White & Others v Inspector General of Police & others* (2021) eKLR,
21. Civil Appeal 52 of 2014 J*udicial Service Commission v Mbalu Mutava & another* (2015) eKLR - (Explained)
22. *Republic v Fazul Mahamed & 3 Others ex-parte Okiya Omtatah Okoiti* [2018] eKLR. - (Explained)

South Africa

1. National Coalition for Gay and Lesbian Equality v Minister for Justice [1998] ZACC 15 - (Explained)

2. *City Council of Pretoria v Walker* [1989] ZACC 1 - (Explained)

3. *Mbona v Shepstone and Wylie* (2015) ZACC 11, - (Explained)

4. *resident of the Republic of South Africa and Others v South African Rugby Football Union and others* CCT16/98) 2000 (1) SA 1 - (Explained)

India

RP Kapur v State of Punjab AIR 1960 SC 866 - (Applied)

United Kingdom

The Queen on the application of Sarika Angel Watkins Singh (A child acting by Sanita Kimari Singh her mother and litigation friend) v The Governing Body of Aberdare Girls' High School & anor [2008] EWHC 1865 (Admin) - (Explained)

Statutes

1. Constitution of Kenya, 2010 articles 157, 158 — (Interpreted)
2. Criminal Procedure Code (cap 75) section 193A — (Interpreted)
3. Office of the Director of Public Prosecutions Act, 2013 (Act No 2 of 2013) section 4 — (Interpreted)

Texts & Journals

Garner, BA., (Ed) (2014) *Black's Law Dictionary,* London: Thompson West 10th Edn

International Instruments & Conventions

Convention Concerning Discrimination in Respect of Employment and Occupation, 1958 article 1(a)

Advocates

1. Mr. Murango, Learned Counsel for petitioner
2. Miss. Arunga, Learned Prosecution Counsel for respondents

JUDGMENT

Introduction

1. There can be no dispute that the National Police Service is charged with *inter alia* the duty to carry out investigations into suspected criminal activities and to apprehend those culpable. It is also not in doubt that the Director of Public Prosecutions (hereinafter referred to as 'the DPP') exercises the state's power of prosecution of criminal cases. However, in carrying out their respective mandates, both are subject to the *Constitution* and the law.

2. The petition subject of this judgment challenges the manner in which the police and the DPP discharged their respective duties in relation to a criminal complaint lodged by Alice Wanjiru Wamwea (hereinafter referred to as 'the complainant') against the petitioners in petition No E106 of 2021 and petition No E160 of 2021 which petitioners are some of the accused persons. The petitioners were eventually charged in Nairobi (Milimani) Chief Magistrates Court criminal case No 1259 of 2019 Republic v Amos Mugweru Mwangi, Peter Kefa Onsongo, Robert Waweru Mana, Paul Mwangi Njuki, Esther Muthoni Njoroge, Tom Jaseme, Oksana Investments Supplies Limited and Antique Auctions Agencies (hereinafter referred to as 'the criminal case').

3. It is the petitioners' case that the criminal case related to the manner in which the public auction was conducted which auction resulted into the sale and transfer of the property known as LR No. 209/11315 (hereinafter referred to as 'the suit property').

4. The petitioners contended *inter alia* that all matters relating to the manner in which the public auction was conducted were currently subject of two civil suits before the High Court being Nairobi High Court Commercial and Admiralty civil suit No 86 of 2017 *Alice Wanjiru Wamwea v Faulu Microfinance Bank Limited, Antique Auctions, Oksana Investments Supplies Limited and NIC Bank* and High Court being Nairobi High Court Commercial and Admiralty civil suit No E121 of 2018

Oksana Investments Supplies Limited v Alice Wanjiru Wamwea and as such, the criminal case ought to be terminated.

5. The respondents hold the contrary position.

6. Since the two petitions herein, that is petition No E106 of 2021 and petition No E160 of 2021 were instituted by some of the accused persons in the criminal case and both petitions raised similar issues, I have decided to write this consolidated judgment in the interest of the limited judicial time.

7. For clarity, this consolidated judgment relates to both petition No E106 of 2021 and petition No E160 of 2021.

The Petitions:

8. The petitioners in petition No E106 of 2021 filed a petition dated March 23, 2021 together with an application by way of a notice of motion dated March 23, 2021. Both the petition and the application are supported by two affidavits respectively sworn by the Paul Mwangi Njuki and Robert Waweru Maina on the even date.

9. In further support to the petition and the application, the petitioners filed written submissions dated June 14, 2021.

10. The application sought orders staying the further hearing of the criminal case pending the determination of the petition.

11. In the main, the petition No E106 of 2021 prayed for the following orders: -

    a. A stay order of prohibition is hereby issued prohibiting the 1st and 2nd respondents from continuing with the prosecution of the petitioners in Nairobi Law Court criminal case 1259 of 2019; Republic v Amos Mugweru & 7 others as regards to sale of LR No 209/11395 by Faulu Microfinance bank Limited in exercise of its statutory powers of sale and the 4th petitioner being an innocent purchaser for value at a public auction pending the hearing and determination of the HCCS No 86 of 2017 and HCCS No E121 of 2018.

    b. An order of *certiorari* do issue to remove into the Chief Magistrates Court at Nairobi law court and to quash the decision on cash bail and bond terms against the petitioners pending the hearing and determination of HCCS No 86 of 2017 and HCCS No E121 of 2018.

    c. A declaration that the charges of conspiracy to defraud the 3rd respondent by the petitioners be found null and void as they are a breach, infringement, violation and denial of the petitioners' fundamental rights, to equality before the law, equal protection, equal benefit of law as enshrined in article 27(1) of the *Constitution of Kenya 2010*.

    d. A declaration that the criminal case No 1259 of 2019 be dismissed forth as it will amount to infringement of the petitioners right to a fair trial in HCCS No 86 of 2017 and HCCCS No E121 of 2018 as outlined under article 27(1); 40 and 50 of the *Constitution of Kenya,2010*.

    e. Cost of this be awarded to the petitioners.

12. The petition in petition No E160 of 2021 is dated April 30, 2021. It is supported by the petitioner's affidavit sworn on the even date. Contemporaneously with the filing of the petition was an application by way of a notice of motion dated April 30, 2021 which application also sought to stay the criminal case pending the determination of the petition.

13. In further support to the petition, the petitioner filed written submissions dated June 29, 2021.

14. In the main, the petition No E160 of 2021 prayed for the following orders: -

    i. That this honourable court be pleased to declare that the proceedings in Nairobi Chief Magistrate's Court criminal case No1259 of 2019, Republic v Amos Mugweru and others are unfounded, malicious, oppressive and as against the petitioner and otherwise unconstitutional and consequently nullify the same.

    ii. that this honourable court be pleased to declarw that the proceedings in Nairobi Chief Magistrate's Court criminal case No1259 of 2019, Republic v Amos Mugweru and others violate and contravene the constitutional rights and freedoms of the petitioner herein as more particularly pleaded in the petition under articles 27, 28, 43 and 50 of the *Constitution of Kenya*, by the respondents, and consequently nullify the same this honourable court be pleased to.

    iii. That this honourable court be pleased to award to the petitioner damages for violations of his constitutional rights under articles 27, 28, 43, and 50 of the *Constitution of Kenya*, by the respondents.

    iv. That costs be provided.

The Responses:

15. Save for the complainant who was represented by the firm of Messrs J Harrison Kinyanjui & Co Advocates, the rest of the respondents in both petitions were represented by the office of the director of public prosecutions (hereinafter referred to as 'the ODPP').

16. In respect to petition No E106 of 2021, the ODPP filed grounds of opposition dated April 23, 2021.

17. The ODPP also filed written submissions dated June 29, 2021.

18. In opposition to petition No E160 of 2021, the ODPP filed grounds of opposition dated June 18, 2021, a replying affidavit sworn by one PC Isaac Ogutu on June 29, 2021 and written submissions dated July 2, 2021.

19. The complainant filed a replying affidavit she swore on April 26, 2021 and a supplementary affidavit sworn on June 25, 2021 in opposition to the petition and the application in petition No 106 of 2021. She also filed written submissions dated April 27, 2021.

20. The complainant was not a party in petition No E160 of 2021.

21. The respondents prayed that the petitions and the applications be dismissed with costs.

Issues for Determination:

22. On the directions of this court, the two petitions and the respective notices of motion were all heard together by way of reliance on the pleadings, the affidavits and the written submissions.

23. I have carefully considered the petitions and the notices of motion, the responses thereto, the parties' submissions and the decisions referred to. I find that the following main issues arise for determination: -

    a. A discussion on general prosecutorial powers, section 193A of the *Criminal Procedure Code* and abuse of court process.

    b. Whether the criminal case ought to be terminated for infringing the petitioners' rights and fundamental freedoms and for also being contrary to the *Constitution*.

24. I will deal with the issues *in seriatim*.

Analysis and Determination:

a. A discussion on general prosecutorial powers, section 193A of the Criminal Procedure Code and abuse of court process:

25. This court recently discussed this issue in Nairobi High Court constitutional petition No E033 of 2021 *Maura Muigana v Stellan Consult Limited & 2 others* (unreported) and also in Nairobi High Court constitutional petition No E216 of 2020 *Reuben Mwangi v Director of Public Prosecutions & 2 others; UAP Insurance & another (Interested Parties) [2021] eKLR*.

26. As part of the introduction of the subject in *Maura Muigana v Stellan Consult Limited & 2 others* case (*supra*), I acknowledged the many writings by legal scholars and decisions by courts and appreciated that whereas it would have been desirable to come up with all the marvellous work on the issue in a 'one-stop shop', that was a tall order given the time constraints and the need for expeditious disposal of cases. I, however, rendered a concise discussion on the subject.

27. I traced the legal basis of the exercise of prosecutorial powers in Kenya to the *Constitution* and the law. Article 157 of the *Constitution* establishes the office of the director of public prosecutions as under: -

    1. There is established the office of director of public prosecutions.

    2. The director of public prosecutions shall be nominated and, with the approval of the national assembly, appointed by the president.

    3. The qualifications for appointment as director of public prosecutions are the same as for the appointment as a judge of the High Court.

    4. The director of public prosecutions shall have power to direct the inspector-general of the national police service to investigate any information or allegation of criminal conduct and the inspector-general shall comply with any such direction.

    5. The director of public prosecutions shall hold office for a term of eight years and shall not be eligible for re-appointment.

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;

b. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

c. subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the director of public prosecutions or taken over by the director of public prosecutions under paragraph (b).

7) If the discontinuance of any proceedings under clause (6)(c) takes place after the close of the prosecution's case, the defendant shall be acquitted.

8) The director of public prosecutions may not discontinue a prosecution without the permission of the court.

9) The powers of the director of public prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

10) The director of public prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

11) In exercising the powers conferred by this article, the director of public prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

12) Parliament may enact legislation conferring powers of prosecution on authorities other than the director of public prosecutions.

28. There is, as well, the *Office of Director of Public Prosecutions Act* No 2 of 2013 (hereinafter referred to as 'the ODPP Act'). It is an Act of parliament aimed at giving effect to articles 157 and 158 of the *Constitution* and other relevant articles of the *Constitution* and for connected purposes. The ODPP Act provides in section 4 the guiding principles in prosecution of cases as follows:

(4) In fulfilling its mandate, the office shall be guided by the *Constitution* and the following fundamental principles—

(a) the diversity of the people of Kenya;

(b) impartiality and gender equity;

(c) the rules of natural justice;

(d) promotion of public confidence in the integrity of the office;

(e) the need to discharge the functions of the office on behalf of the people of Kenya;

(f) the need to serve the cause of justice, prevent abuse of the legal process and public interest;

(g) protection of the sovereignty of the people;

(h) secure the observance of democratic values and principles; and

(i) promotion of constitutionalism.

29. The ODPP Act, among other statutes, variously provide for the manner in which the DPP ought to discharge its mandate. Suffice to say, the exercise of prosecutorial powers by the DPP has been subjected to legal scrutiny and appropriate principles and guidelines developed.

30. Recently, the Supreme Court sufficiently rendered itself regarding termination of criminal proceedings on the basis of the dispute being civil in nature and also on account of inordinate delay in instituting an intended prosecution. That was in petition No 38 of 2019 *Cyrus Shakhalanga Khwa Jirongo v Soy Developers Ltd & 9 others* [2021] eKLR.

31. On whether the proceedings were more of a criminal or civil nature and on section 193A of the *Criminal Procedure Code*, the apex court rendered the following discussion: -

> [73] The above question is pertinent and must be addressed as a corollary to the issues we have determined above. In that context, the appellant claims that he purchased lawfully all shares in the 1st respondent's company and eventually became a director and shareholder. The 2nd and 3rd respondents on the other hand maintain that there has never been any change of the directorship or shareholding of the 1st respondent, claiming instead that they have always been its sole directors and shareholders. It is evident therefore that the main issue in contention involves the company registration forms of the 1st respondent company as well as the alleged change of its ownership.
>
> [74] The question whether a complainant can pursue both civil and criminal proceedings at the same time is not a new one in our realm. In the present case, it is admitted that the 2nd and 3rd respondents have instituted civil suit No 132 of 2015 at the ELC and one of the claims made therein is that title documents for the suit property have been lost.
>
> [75] The appellant has however argued that the 2nd and 3rd respondents then instituted his prosecution on alleged fraud charges and unlawful use of the title documents to obtain credit whilst also claiming that the same documents had been lost thus pointing to malice in his prosecution. What is the law in such a situation?
>
> [76] The Court of Appeal persuasively stated in the case of *Commissioner of Police & the Director of Criminal Investigation Department & another v Kenya Commercial Bank & 4 others* [2013] eKLR that:
>
>> Clearly, the company and the guarantor through their directors were employing criminal process to assist them in resolving their civil dispute. 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 that 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 the administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court. This is a case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations. We have no doubt in our minds that the belated involvement of the police in this purely civil dispute is an abuse of their power. The police should direct their energies and resources to prevention of crime which we all know is rampant in this country and is about to get out of control.

[77] We respectfully agree and adopt this position in this case but must add that where it is obvious to a court, as it is to us and was to the learned judge of the High Court, that a prosecution is being mounted to aid proof of matters before a civil court or where the hand of a suspect is being forced by the sword of criminal proceedings to compromise pending civil proceedings, then section 193A of the *Criminal Procedure Code* cannot be invoked to aid that unlawful course of action. Criminal proceedings, whether accompanied by civil proceedings or not, cannot and should never be used in the manner that the 2nd and 3rd respondents have done. It is indeed advisable for parties to pursue civil proceedings initially and with firm findings by the civil court on any alleged fraud, proceed to institute criminal proceedings to bring any culprit to book. In addition, we shall, later in this judgment, express ourselves on the criteria to be used by the High Court before terminating any criminal prosecution.

[78] Having so said, we have already expressed ourselves on the right to fair trial and we must now make a finding that, in the unique circumstances of the present case, the institution of civil proceedings, simultaneously with criminal proceedings, claiming on one hand that title documents had been lost, while in another, claiming that they were in the possession of the appellant and his banks or a third party, ASL Ltd, the 10th respondent, is court should

never countenance such conduct for it brings the entire criminal justice into disrepute.

32. On whether the High Court exceeded its jurisdiction in interfering with the prosecutorial mandate of the DPP contrary to the *Constitution*, the Supreme Court stated as follows: -

[79] The High Court in its finding, prohibited the respondents from proceeding with any criminal proceedings against the appellant in relation to the suit property or any subject matter and transaction connected to the suit property. The Court of Appeal reversed this judgment by holding that the High Court had interfered with the discretion given to the Director of public prosecutions (DPP) to initiate and conduct prosecution. Essentially, the Court of Appeal found that the High Court went against public interest in preventing investigation and prosecution of allegations relating to fraudulent transfer and acquisition of the suit property and that the learned judge interfered with the prosecutorial mandate of the DPP to decide on whether to charge or not to charge an individual.

[80] The 5th, 6th and 7th respondents on their part, maintain the position that the decision to commence investigations against the appellant was consistent with the provisions of article 157 of the Constitution and section 6 of the Office of Director of Public Prosecutions Act. They also submitted that the decision to institute criminal proceedings by the DPP is discretionary and that such exercise of power is not subject to the direction or control by any authority as provided for under article 157(10) of the Constitution.

[81] Under article 157(6) of the Constitution, the DPP is mandated to institute and undertake criminal proceedings against any person before any court. Article 157(6) 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."

Article 157(4) provides that:

(4) The Director of Public Prosecutions shall have power to direct the inspector-general of the national police service to investigate any information or allegation of criminal conduct and the inspector-general shall comply with any such direction.

However, article 157(11) stipulates that:

(11) In exercising the powers conferred by this article, the director of public prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

[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] KLR 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] 1 EA 205. See also *Kuria & 3 others v Attorney General* [2002] 2 KLR. (emphasis supplied)

[84] 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 favor the appellant and not the respondents.

33. On public interest, the court expressed itself as follows: -

> [86] On public interest, what is in issue is a dispute arising from a commercial transaction 24 years ago where the complainants have not denied receiving part payment of the purchase price. There is hardly any public interest element in such a transaction save the wide interest of the law to apprehend criminals.
>
> [87] The learned Judge of the High Court, in our view, was well within his mandate under article 165(3)(d)(ii) as read with article 157(11) of the Constitution to curtail the appellant's prosecution and the DPP'S powers have not in any way been interfered with, outside the constitutional mandate conferred on the High Court.

34. And, on whether inordinate delay in instituting an intended prosecution would infringe the rights and freedoms of the party sought to be prosecuted under articles 19, 20, 27 and 50 of the *Constitution*, the apex court had the following to say: -

> [56] The question of delay with respect to the lodging of criminal prosecutions has been addressed by our courts in several matters. The leading persuasive decisions on the subject are the High Court cases of *Githunguri v Republic* (1986) KLR 1 and *Republic v Attorney General & another ex Parte Ng'eny* (2001) KLR 612 which both superior courts relied on.
>
> [57] In *Githunguri v Republic* (*supra*), the court stated as follows:
>
> In this instance the delay is said to have been nine years, six years and four years. The court has not been told why these offences have been unearthed after they remained buried for so long. What caused turning up the soil! It is too long, too much of delay. The Attorney-General is not bound to tell the court the reason but it would have made us knowledgeable if told.
>
> We are of the opinion that to charge the applicant four years after it was decided by the Attorney-General of the day not to prosecute, and thereafter also by neither of the two successors in office, it not being claimed that any fresh evidence has become available thereafter, it can in no way be said that the hearing of the case by the court will be within a reasonable time as required by section 77(1). The delay is so inordinate as to make the non-action for four years inexcusable in particular because this was not a case of no significance, and the file of the case must always have been available in the chambers of the

attorney-general. it was a case which had received notable publicity, and the matter was considered important enough to be raised in the national assembly.

We are of the opinion that two indefeasible reasons make it imperative that this application must succeed. First as a consequence of what has transpired and also being led to believe that there would be no prosecution the applicant may well have destroyed or lost the evidence in his favour. Secondly, in the absence of any fresh evidence, the right to change the decision to prosecute has been lost in this case, the applicant having been publicly informed that he will not be prosecuted and property restored to him. It is for these reasons that the applicant will not receive a square deal as explained and envisaged in section 77(1) of the Constitution. This prosecution will therefore be an abuse of the process of the court, oppressive and vexatious.

[58] Similarly in the case of *Republic v Attorney General & another Ex Parte Ngeny* (2001) KLR 612, the court addressed this question and stated that:

In the case before us, the delay was nine years. No attempt has been made to explain it. The subject matter of the charges against the applicant is a colossal sum involving an institution that was strategic to the government when the losses were occasioned; so why did the state not mount a prosecution immediately? Nine years is too long a delay. We cannot think anything else but that the criminal prosecution against the applicant was motivated by some ulterior motive. It is not a fair prosecution. It was mounted quite late: Nine years after the applicant had vacated the relevant public office alleged to have been abused. We were told, and this was not challenged, that having been out of office for that long, he does not have in his possession material to prepare his defence. This we believe. We are of the view that to allow delayed prosecutions is akin to putting a noose around the necks of individuals and then saying to them: 'Go, you may go. We shall decide your fate as and when we wish.' This is to keep the individual in fear. This does not accord with constitutional guarantees of individual rights and freedoms and is nothing more than an abuse of the process of the court.

[59] The argument put forth by the appellant is that his right to be tried within a reasonable period of time has been infringed in view of the fact that it has taken 24 years for him to be prosecuted. The appellant cites the various hurdles to the impending trial that will result in him not having a fair trial; the missing Land Registry file as well as the loss of vital documentary evidence.

[62] In addressing this issue, we note that in the case of *George Joshua Okungu & another v The Chief Magistrate's Court Anti-Corruption Court at Nairobi & another* (*supra*), the High Court persuasively held that: -

.....it is not mere delay in preferring the charges that would warrant the halting of the criminal proceedings. Rather, it is the effect of the delay that determines whether or not the proceedings are to be halted. In this case, there is no allegation made by the petitioners to the effect that the delay has adversely affected their ability to defend themselves. In other words, the petitioners have to show that the delay has contravened their legitimate expectations to fair trial.

[65] This court in the case of *Hon Christopher Odhiambo Karan v David Ouma Ocheing & 2 others* [2018] SC petition No 36 of 2019 had an opportunity to discuss the significance, distinctive meaning, scope and implication of the right to a fair trial and stated that "It is therefore settled

law that all persons who come to any court are entitled to a fair hearing whether the matter instituted is criminal or civil in nature. In this context, the drafters of the Constitution 2010 in article 25(c) placed a bar on limitation of the right to a fair trial, in civil and criminal matters."

[66] It is in the above regard trite that there is no limitation of time to institute and prosecute criminal offences but as stated in Githunguri, where the delay has the effect of denying a suspect the legal tools to mount a credible defence, then the High Court is properly mandated by the Constitution to step in and stop the intended prosecution.

[67] Similarly, where the delay was occasioned by deliberate inaction on the part of a complainant with the intent of getting at a suspect to force the suspect's hand in say, a different transaction between them at a later date or even use the complaint to force settlement in ongoing civil proceedings, then, again the High Court, as a court of first instance, must step in because the intended prosecution is tainted with malice and not the otherwise unassailable intent to furnish criminal wrong doing, promptly.

[68] Furthermore, both aticles 49(1)(a)(ii) and 50(1) and (2)(e) of the Constitution expect that in resolution of disputes, fairness must necessarily include the promptness of action and the inhibition against unreasonable delay. What is reasonable, it is now settled, includes both the reason for delay and the period of delay.

[69] In the present case, all the evidence before us points to the fact that the documentation necessary to prove the alleged fraud may no longer be available and we agree with the learned Judge of the High Court that, where both parties have admitted that the same issues are also pending resolution in another court, and that the issue of lost documentation remains unresolved, it would be most unfair to subject the appellant to a criminal trial, 24 years after the impugned transaction.

[70] respondents indeed received part purchase price for purchase of the suit property? Why would it take them 24 years to decide that they were now entitled to the balance thereof as well as return of the title documents? Our position is that such a delay and use of the criminal process to force the hand of the appellant fatally taints the fairness of the resultant prosecution.

[71] Lastly, in instituting the prosecution, the ODPP, without in any way taking away the constitutional mandate to prosecute crimes, ought always to act judiciously and not act in perpetuation of an unfair and malicious criminal complaint. In doing so, that office must always be guided by the principle that the right to a fair trial cannot be limited thus raising the bar in the determination of the question whether to prosecute or not.

[72] It is therefore our finding, and in agreement with the learned Judge of the High Court that, the prosecution of the appellant is in breach of his right to a fair trial as protected by article 25(c) as read with article 50 of the Constitution and we have stated why.

35. This court also discussed the various principles and guidelines in *Reuben Mwangi v Director of Public Prosecutions & 2 others; UAP Insurance & another (Interested Parties)* case (*supra*) as follows: -

91. Regarding the exercise of prosecutorial discretion by the Director of Public Prosecutions, the Court of Appeal in *Diamond Hasham Lalji & another v Attorney General & 4 others* [2018] eKLR stated as follows: -

[41] Thus, the exercise of prosecutorial discretion enjoys some measure of judicial deference and as numerous authorities establish, the courts will interfere with the exercise of discretion sparingly and in the exceptional and clearest of cases.

However, as the Privy Council said in *Mohit v Director of Public Prosecutions of Mauritius* [2006] 5LRC 234:

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

In *Regina v Director of Public Prosecutions ex-parte Manning &another* [2001] QB 330, the English High Court said partly at para 23 page 344:

At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the tests were too exacting, an effective remedy could be denied.

Although the standard of review is exceptionally high, the court's discretion should not be used to stultify the constitutional right of citizens to question the lawfulness of the decisions of DPP.

[42] The burden of proof rests with the person alleging unconstitutional exercise of prosecutorial power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision.

In *Ramahngam Ravinthram v Attorney General* (*supra*) the Court of Appeal of Singapore said at p 10 Para 28:

however, once the offender shows on the evidence before the court, that there is a *prima facie* breach of fundamental liberty (that the prosecution has a case to answer), the prosecution will indeed be required to justify its prosecutorial decision to the court. If it fails to do so, it will be found to be in breach of the fundamental liberty concerned. At this stage the prosecution will not be able to rely on its discretion under article 35(8) of the Constitution without more, as a justification for its prosecutorial decision.

92. The High Court in *Bernard Mwikya Mulinge v Director of Public Prosecutions & 3 others* [2019] eKLR had the following to say about the role of the Director of Public Prosecutions in prosecuting criminal offences: -

25. It is therefore clear that the current prosecutorial regime does not grant to the DPP a carte blanche to run amok in the exercise of his prosecutorial powers. Where it is alleged that the standards set out in the Constitution and in the aforesaid Act have not been adhered to, this court cannot shirk its constitutional mandate to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this court would be an abhorrent affront to judicial conscience and above all, the Constitution itself. I associate myself with the sentiments expressed in *Nakusa vs Tororei & 2 others (No 2)* Nairobi HCEP No 4 of 2003 [2008] 2 KLR (EP) 565 to the effect that:

the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement,

enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system...In interpreting the Constitution, the court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of *Domnic Arony Amolo v Attorney General* miscellaneous application No 494 of 2003 is that interpretation of the Constitution has to be progressive and in the words of Prof M V Plyee in his book, Constitution of the World: "The courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time........ In our role as "sentinels" of fundamental rights and freedoms of the citizen which are founded on laisez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent "sentinels" of personal liberty, the court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right.

93. Long before the advent of the Constitution of Kenya, 2010 the High Court in *R v Attorney General exp Kipngeno arap Ngeny* civil application No 406 of 2001 expressed itself as follows: -

.... Although the state's interest and indeed the constitutional and statutory powers to prosecute is recognized, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognized lawful parameters...The High Court will interfere with a criminal trial in the subordinate court if it is determined that the prosecution is an abuse of the process of the court and/or because it is oppressive and vexatious...A prosecution that is oppressive and vexatious is an abuse of the process of the court: there must be some *prima facie* case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a *prima facie* case...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily

by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds....

94. It has also been well and rightly argued that, on the basis of public interest and upholding the rule of law, courts ought to exercise restraint and accord state organs, state officers and public officers some latitude to discharge their constitutional mandates. The Court of Appeal in *Diamond Hasham Lalji & another v Attorney General & 4 others* (*supra*) stated as follows: -

The elements of public interest and the weight to be given to each element or aspect depends on the facts of each case and in some cases, State interest may outweigh societal interests. In the context of the interest of the administration of justice, it is in the public interest, inter alia, that persons reasonably 'suspected of committing a crime are prosecuted and convicted, punished in accordance with the law, that such a person is accorded a fair hearing and that court processes are used fairly by state and citizens.

95. The Court of Appeal in *Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others* [2018] eKLR referred to the Supreme Court of India in *State of Maharashtra & others v Arun Gulab & others,* Criminal Appeal No 590 of 2007, where the court 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 FIR/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.

The provisions of articles 226, 227 of the Constitution of India and section 482 of the Code of Criminal Procedure, 1973 (hereinafter called as "CrPC") 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.

96. The High Court in *Bernard Mwikya Mulinge* case (*supra*) expressed itself as follows: -

14. As has been held time and time again the court ought not to usurp the constitutional mandate of the Director of Public Prosecutions (DPP) to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under article 157 of the Constitution. The mere fact therefore that the intended or ongoing criminal proceedings are in all likelihood bound to fail, is not ipso facto a ground for halting those

proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. An applicant who alleges that he or she has a good defence in the criminal process ought to ventilate that defence before the trial court and ought not to invoke the same to seek the halting of criminal proceedings undertaken bona fides since judicial review court is not the correct forum where the defences available in a criminal case ought to be minutely examined and a determination made thereon.....

97. In *Meixner & another v Attorney General* [2005] 2 KLR 189 the court stated as follows: -

The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion is acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution....

98. Mumbi Ngugi, J (as she then was), in *Kipoki Oreu Tasur v Inspector General of Police & 5 others* (2014) eKLR stated that:

The criminal justice system is a critical pillar of our society. It is underpinned by the Constitution, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated...

99. In *Republic v Commissioner of Police and another ex parte Michael Monari & another* [2012] eKLR the court held that:

... the police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court...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....

100. Recently, the High Court in *Henry Aming'a Nyabere v Director of Public Prosecutions & 2 others; Sarah Joslyn & another (Interested Parties)* [2021] eKLR dealt with several instances where a court may intervene and stop a prosecution. They include where: -

i. There is no ostensible complainant in respect to the complaint;

ii. The prosecution fails to avail witness statements and exhibits without any justification;

iii. There is selective charging of suspects; or

iv. An Advocate is unfairly targeted for rendering professional services in a matter.

36. And, in *Maura Muigana v Stellan Consult Limited & 2 others* case (*supra*), I further discussed the subject as follows: -

> 58. I have also come across several other decisions on the subject. I will refer to only some few. In *Anthony Murimi Waigwe v Attorney General & 4 others* [2020] eKLR, the court held that the Prosecutor has a duty to analyze the case before prosecuting it and it should let free those whom there is no prosecutable case against them. It expressed itself thus: -
>
> 48. It is no doubt dear that under article 157(1) of the Constitution the ODPP is enjoined in exercising the powers conferred by the aforesaid article to have regard to public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process. Interest of the administration of justice dictates that only those whom the DPP believes have a prosecutable case against them be arraigned in court and those who DPP believes have no prosecutable case against them be let free. This is why article 159(2) of the Constitution is crying loudly every day, every hour that "justice shall be done to all, irrespective of status". Justice demands that it should not be one way and for some of us but for all of us irrespective of who one is or one has.
>
> 49. The petitioner in support of interest of administration of justice dictates referred to the national prosecution policy, revised in 2015 at page 5 where it provides that: "public prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction, In other words Public Prosecutors should ask themselves would an impartial tribunal convict on the basis of the evidence available?
>
> 50. In the case of *Republic v Director of Public Prosecution & Another ex parte Kamani,* Nairobi Judicial Review application No 78 of 2015 while quoting the case of *R v Attorney General ex Kipngeno Arap Ngeny* High Court Civil application No 406 of 2001; the court held;

A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper ... there must be in existence material evidence on which the prosecution can say with certainty that it has a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and inactionable.

> 49. In a democratic society like ours, no one should be charged without the authorities conducting proper investigation. The prosecutor on the other hand is under duty to consider both incriminating and exculpating evidence, In the case of *Republic v Director of Public Prosecutions & another ex parte*

Kaman/ Nairobi Judicial Review application No 78 of 2015 (*supra*), the court expressed itself as follows:

this court appreciates that the court should not simply fold its arms and stare at the squabbling litigants/disputants parade themselves before the criminal court in order to show-case dead cases. The seat of justice is a hallowed lace and ought to be reserved for those mattes in which the protagonists have a conviction stand a chance of seeing the light of the day. In my view the prosecution ought not to institute criminal cases with a view of obtaining an acquittal. It is against the public interest as encapsulated in section 4 of the Office of the Director of Public Prosecutions Act to stage-manage criminal proceedings in a manner intended to obtain an acquittal. A criminal trial is neither a show-biz nor a catwalk.

59. In *Meme v Republic & another* (2004) eKLR the Court of Appeal discussed abuse of the court process thus: -

> An abuse of the court's process would, in general, arise where the court is being used for improper purpose, as a means of vexation and oppression, or for ulterior purposes, that is to say, court process is being misused.

60. In quashing a criminal prosecution on the basis of abuse of Court process, the court in *Peter George Anthony Costa v Attorney General & another* Nairobi petition No 83/2010 expressed itself thus:-

> The process of the court must be used properly, honestly and in good faith, and must not be abused This means that the court will not allow its function as a court of law to be misused and will summarily prevent its machinery from being used as a means of vexation or of oppression in the process of litigation. It follows that where there is an abuse of the court process there is a breach of the petitioner's fundamental rights as the petitioner will not receive a fair trial. It is the duty of the court to stop such abuse of the justice system.

60. Still on abuse of court process in using court to settle personal scores, the court in R*osemary Wanja Mwagiru & 2 others v Attorney General & 2 others*, Mumbi J (as she then was) stated that: -

The process of the court must not be misused or otherwise used as an avenue to settle personal scores. The criminal process should not be used to harass or oppress any person through the institution of criminal proceedings against him or her. Should the court be satisfied that the criminal proceedings being challenged before it have been instituted for a purpose other than the genuine enforcement of law and order, then the court ought to step in and stop such maneuvers in their tracks and prevent the process of the court being used to unfairly wield state power over one party to a dispute.

60. On the need for a Prosecutor to act within the law, the court in T*huita Mwangi & 2 others v Ethics and Anti-Corruption Commission & 3 others* stated that: -

> The discretionary power vested in the Director of Public Prosecution is not an open cheque and such discretion must be exercised within the four corners of the Constitution. It must be exercised reasonably within the law and to promote the policies and objects of the law which are set out in section 4 of the Office of Director of Public Prosecution Act. These objects are as follows: the diversity of the people of Kenya; impartiality and gender equity; the rules of natural justice, promotion of public confidence in the integrity

of the office; the need to discharge the functions of the office on behalf of the people of Kenya, the need to serve the cause of justice; prevent abuse of legal process and public interest, protection of the sovereignty of the people; secure the observance of democratic values and principles and promotion of constitutionalism. The court may intervene where it is shown that the impugned criminal proceedings are instituted for other means other than the honest enforcement of criminal law, or are otherwise an abuse of the court process.

60. In *Republic v Commissioner of Co-operatives ex parte Kirinyaga Tea Growers Cooperative Savings & Credit Society Ltd* CA 39/97 119991 EALR 245 the Court of Appeal warned against the improper use of power in the following words: -

> ...it is axiomatic that statutory powers can only be exercised validly if they are exercised reasonably. No statute ever allowed anyone on whom it confers power to exercise such power arbitrarily, capriciously or in bad faith....

60. The above position was amplified in Nairobi High Court Miscellaneous Application No 1769 of 2003 *Republic v Ministry of Planning & another ex-parte Professor Mwangi Kaimenyi,* where it was held:

> So, where a body uses its power in a manifestly unreasonable manner, acted in bad faith, refuse to take relevant factors into account in reaching its decision or based its decision on irrelevant factors the court would intervene that on the ground that the body has in each case abused its power, The reason why the court has to intervene is because there is a presumption that where parliament gave a body statutory power to act, it could be implied that Parliament intended it to act in a particular manner.

60. The need for courts to act with deference and accord constitutional and legal entities to discharge their mandates was revisited in *Paul Ng'ang'a Nyaga vs Attorney General & 3 others* (2013) eKLR, where it was held that: -

> .... this court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they have acted in contravention of the Constitution.

60. I believe I have said enough on the general exercise of prosecutorial powers and for the purposes of this case. I will now look at what Legal Scholars and courts have rendered on concurrent civil and criminal proceedings.

37. There was also a discussion on section 193A of the *Criminal Procedure Code*, cap 75 of the Laws of Kenya. That was in *Maura Muigana v Stellan Consult Limited & 2 others* case (*supra*) where I expressed myself thus: -

    60. In Kenya, the aspect of concurrent civil and criminal proceedings is provided for in section 193A of the CPC.

    61. First, is a look at the said provision, which states as follows: -

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.

60. In an article titled '*Unjust Justice in Parallel Proceedings: Preventing Circumvention of Criminal Discovery Rules,* the author, Randy S Eckers, defines concurrent proceedings as independent, simultaneous investigations and prosecutions involving substantially the same matter and parties.

60. More often than not, the currency of the twin proceedings is challenged before courts. In the above article, the author reiterates that a determination to either stay or allow the continuation of parallel proceedings depend on existence of certain requirements. He observes: -

> The courts only block parallel proceedings in special circumstances. A defendant may move for a stay to block parallel proceedings, which will be granted only if the defendant can prove either that the government is acting in bad faith and using malicious tactics to circumvent the strict criminal discovery rules, or that there is a due process violation....
>
> Even if a defendant meets one of these requirements, a stay is not guaranteed. The court takes many other factors into account in deciding whether a stay is appropriate in a specific situation. These factors include the commonality of the transaction or issues, the timing of the motion, judicial efficiency, the public interest, and whether or not the movant is intentionally creating an impediment." Absent special circumstances, both cases will probably proceed.

60. It is, hence, deducible that the quest to stay concurrent proceedings must first be premised on the fact that there is in existence two or more active cases of civil and criminal nature in respect of the same entity or person. While discussing the general principles applicable in such scenarios, the Supreme Court of Appeal of South Africa in *Law Society of the Cape of Good Hope v M W Randell* (341/2012) [2013] ZASCA 36 (28 March 2013) stated as follows: -

...it applies where there are both criminal and civil proceedings pending which are based on the same facts. The usual practice is to stay the civil proceedings until the criminal proceedings have been adjudicated upon, if the accused person can show that he or she might be prejudiced in the criminal proceedings should the civil proceedings be heard first....

60. The Learned Judges of the Supreme Court of Appeal further stated that it was not automatic for an Applicant to be awarded stay of the civil proceedings. It found support in numerous English decisions among them, *Jefferson Ltd v Bhetcha* [1979] 2 All ER 1108 (CA) and *R v BBC, x p Lavelle* [1983] 1 All ER 241 (QBD) and observed as follows;

> [24]. In dismissing the application, the court emphasized that there was no established principle of law that if criminal proceedings were pending against a defendant in respect of the same subject matter, he or she should be excused from taking any further steps in the

civil proceedings which might have the result of disclosing what his defence or is likely to be, in the criminal proceedings.

[25]. Jefferson was followed in *R v BBC,* x p Lavelle [1983] 1 All ER 241 (QBD) at 255 where Woolf J stressed that there should be no automatic intervention by the court. The learned judge pointed out that while the court must have jurisdiction to intervene to prevent serious injustice occurring, it will only do so in very clear cases in which the applicant can show that there is a real danger and not merely notional danger that there would be a miscarriage of justice in criminal proceedings if the court did not intervene.

60. Closer home, our courts have also had the occasion to address the issue of parallel proceedings. Before the Court of Appeal in Nairobi civil appeal No 181 of 2013, *Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others* [2018] eKLR was the contention whether the High Court was right in granting orders restraining the inspector general of police, as well as the director of criminal investigations from commencing, sustaining or proceeding with any investigations against Investments & Mortgages Bank Limited in connection with an alleged criminal conduct of its officers on account of a charge instrument whose execution was the subject of contention in a pending civil suit.

61. In determining the issue, the learned judges of appeal acknowledged that the office of the director of public prosecutions is an independent constitutional office. However, that office is subject to the control of the court in appropriate instances where illegality, irrationality and procedural impropriety is demonstrated. The court made reference to the decision of the Supreme Court of India in criminal appeal No 590 of 2007, *State of Maharashtra & Others v Arun Gulab & others* where the power of the court in checking excesses of the prosecutorial agency was discussed as follows: -

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 FIR/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.

The provisions of articles 226, 227 of the Constitution of India and section 482 of the Code of Criminal Procedure, 1973 (hereinafter called as "CrPC") 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.

60. The appellate court further discussed limitations courts ought to impose on section 193A of the CPC, the provision that allows parallel prosecution of civil and criminal cases and remarked as follows: -

[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. But this power has to be exercised very sparingly as it is in the public interest that crime is detected and suspects brought to justice.

60. The learned judges cited with approval its earlier decision in *Commissioner of Police & the Director of Criminal Investigation Department & another v Kenya Commercial Bank Ltd & 4 others* [2013] eKLR, where the role of the court in ensuring prosecutorial powers are exercised while having regard to public interest, the interests of administration of justice and to avoid abuse of legal process was discussed as under:

...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.

60. Further, the Court of Appeal in C*ommissioner of Police and Director of Criminal Investigations Department v Kenya Commercial Bank and others* Nairobi civil appeal No 56 of 2012 [2013] eKLR held that:

While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court. This is a case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations.

60. The High Court in *Kuria & 3 others v AG* (2002) 2 KLR appreciated the validity of existence of concurrent civil and criminal proceedings when it made the following findings: -

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

60. In the current petition, the petitioner has been charged in the criminal case, but there are no civil proceedings in place. On that basis, the petitioner contends that the criminal case was instituted to settle a civil dispute hence it is an abuse of the court process. That now takes me to the next sub-issue.

38. In the same case, M*aura Muigana v Stellan Consult Limited & 2 others* case (*supra*), I also dealt with the issue of abuse of court process. This is what I stated: -

60. The subject of abuse of court process was discussed by the Court of Appeal in *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others* civil appeal No 25 of 2002 [2009] KLR 229, as follows: -

The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it...The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice. Examples of the abuse of the judicial process are: -

i. Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.

ii. Instituting different actions between the same parties simultaneously in different courts even though on different grounds.

iii. Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.

iv. Where there is no iota of law supporting a court process or where it is premised on frivolity or recklessness.

60. The Court of Appeal went on and stated as follows: -

In our view, the often quoted principle that a party should have his day in court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine. Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice…We approve and adopt the principles so ably expressed by both Lord Roskil and Lord Templeman in the case of *Ashmore v Corp of Lloyds*[1992] 2 All ER 486 at page 488 where Lord Roskil states:

It is the trial judge who has control of the proceedings. It is part of his duty to identify crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judges' time as is necessary for the proper determination of the relevant issues.

Unless a trial is on discernable issues it would be farcical to waste judicial time on it.

60. In Nairobi civil appeal No 70 of 2017 *Prafulchandra Bharmal v Chief Magistrate Kibera & 3 others* [2020] eKLR, the Court of Appeal further rendered itself as follows: -

20. In answering whether there was abuse of power, the Judge too discussed at length the safeguards that exist under criminal law in regard to an accused person to ensure a fair trial which is also a guaranteed right enshrined in the Constitution. He also appreciated that section 193 A of the Criminal Procedure Code, allows concurrent litigation of civil and criminal proceedings arising from the same issues but cautioned that the prerogative of the police to investigate crime must be exercised according to the laws of the land and in good faith. What we understand the Judge to be saying in this regard is that the mere fact that leave was granted to the appellant to institute private criminal prosecution, this ipso facto did not mean that the 2nd respondent would not get a fair trial because the principles of a fair trial are well ingrained in law and practice. Having said that, the Judge went further to infer the unique circumstances prevailing in this matter, and posited that, if the private prosecution were to proceed, it would amount to an abuse of process. He pointed out and rightly so in our view, that if both the civil and the private criminal prosecution cases which were all centred on the Bakarania agreement were to proceed for hearing in both courts, there was a likelihood of the two processes giving rise to two different outcomes as there were also two sets of evidence in form of document examiners' reports. To us this was not a merit determination but a commentary on the process. We do not also see any

contradictions as the Judge was restating the well-established principles of a fair trial.

21. Was there abuse of process to warrant an order prohibiting the criminal charge? In *Jago v District Court* (NSW) 168 LLR 23, 87 ALR 57) Brennan, J. said in part at p. 47-48: -

An abuse of process occurs when the process of court is put in motion for purposes which in the eye of the law, it is not intended to serve. The purpose of criminal proceedings, generally speaking, is to hear and determine finally whether the accused has engaged in a conduct which amounts to an offence and on that account is deserving of punishment. When criminal process is used only for that purpose and is capable of serving that purpose, there is no abuse of process.

We are aware that the categories of abuse of process are not limited. Whether or not an abuse of power of criminal process has occurred ultimately depends on the circumstances of each case. One of the important factors at common law which underlie a prosecutorial decision is whether the available evidence discloses a realistic prospect of a conviction. In *Walton v Gardener* [1993] 177 CLR 378, the High Court of Australia said at para 23 –

The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all categories of cases in which the process and procedures of the court which exist to administer justice with fairness and impartibility may be converted into instruments of injustice and unfairness. Thus, it has long been established that regardless of the person responsible for their institution and maintenance, proceedings will constitute an abuse of process if they can be seen clearly to be foredoomed to fail..., if that court is in all circumstances of the particular case a clearly inappropriate forum to entertain them..., if, notwithstanding that circumstances do not give rise to an estoppel their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate a case which has already been disposed of by earlier proceedings.

21. It is not lost to us that both the appellant and 2nd respondents are siblings; they have been involved in a dispute over the suit property for a long time; the appellant is the one who filed a civil suit, a defence was filed and when the civil suit was still pending, he instituted a private criminal prosecution. At the backdrop of all this, even the appellant's complaint against the 2nd respondent was subjected to police investigations and the DPP directed the police file be closed. We are on our part persuaded that in the circumstances of this matter, an order of prohibition was justified to protect the court process from being used to settle a civil dispute which was pending and that allowing the criminal process was likely to embarrass the courts. To us, this order was appropriate as the Judge had to navigate carefully so as not to make far reaching pronouncements that would embarrass the pending civil trial.

83. The High Court in *Stephen Somek Takwenyi & another v David Mbuthia Githare & 2 others* Nairobi (Milimani) HCCC No 363 of 2009 stated as follows with respect to the court's power to prevent abuse of its process: -

This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the

court. In the civilized legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it. (emphasis added).

84. From the foregoing, it is the case that the subject of abuse of court process is wide and whether there is an abuse of the due process depends on the circumstances of a case.

85. As I come to the end of the second issue, I must state that I have deliberately endeavored the above somehow elaborate discussion covering the general exercise of prosecutorial powers, the concurrent civil and criminal proceedings under section 193A of the CPC and the subject of abuse of court process so as to lay a sound basis for consideration of the main issue in this matter which is whether the prosecution facing the petitioner herein should be stopped since the dispute is civil in nature and the criminal case amounts to an abuse of court process.

86. That consideration is the gist of the next issue.

39. From the foregoing, it comes to the fore that there are instances where a court ought to exercise its discretion and stop a prosecution. Such instances, include, and where it is demonstrated that: -

i. Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court;

ii. Where the quashing of the impugned proceedings would secure the ends of justice;

iii. Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction;

iv. 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;

v. 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.

vi. The prosecution is not in public interest;

vii. The prosecution is not in the interests of the administration of justice;

viii. The prosecution is oppressive, vexatious and an abuse of the court process;

ix. The prosecution amounts to a breach of rights and fundamental freedoms;

x. The investigation and prosecution amounts to abuse of power and discretion and is aimed at achieving an ulterior or improper motive;

xi. The investigation and the prosecution are tainted with illegality, irrationality and procedural impropriety;

xii. The investigation and prosecution is in gross contravention of the Constitution and the law.

40. Having said so, I will now consider the next issue.

(b) Whether the criminal case ought to be terminated for infringing the Petitioners' rights and fundamental freedoms and for also being contrary to the Constitution:

41. I will begin this discussion with a brief look at the parties' cases.**The Petitioners' cases: Petition No E106 of 2021**

42. The petitioners brought forth their case that they were unfairly charged in the criminal case. They reiterated the contents of the pleadings and the affidavits in support.

43. They claimed that the charges arose out of a set of facts which are in issue and are pending for the hearing and determination before the High Court in civil case No 86 of 2017 and HCCS No E121 of 2018; that the facts that gave rise to the High Court specifically HCC No 86 of 2017 filed by the 3rd respondent are the same ones that the respondents herein have relied upon to institute the criminal case against the petitioners; and that no criminal element exists to justify the institution of a criminal case against them which action amount to abuse of power.

44. It was contended that the criminal charges against the petitioners arose from Faulu Micro Finance Bank in exercise of its statutory power sale for the failure of the 3rd respondent herein to redeem the security and that the property was sold at a public auction on March 28, 2018. That the suit property was transferred and registered in the name of the Oksana Investments Supplies Limited, the 4th petitioner herein and charged to NIC Bank Kenya as security for a loan of Kshs 60,000,000.00.

45. The petitioners pleaded that several other potential suspects including the directors of Faulu Micro Finance Bank were not charged and that they were only cherry-picked to cover up for others. They argued that they were discriminated and their right under article 27(1) of the *Constitution* infringed.

46. They relied on a ruling of the honourable Lady Justice Muigai in HCCS No 86 of 2017 at page 24 where the learned judge held thus: -

> .... the particulars of malice outlined relate and refer to the 1st defendant-Faulu Micro Finance Bank Limited. If the statutory power of sale was not valid, legal or regular, the 3rd and 4th proposed defendant were not aware of or privy to these issues as they were/were not parties in this suit......Nothing on record to suggest/shows that the proposed defendant did or omitted to do any legal act with regard to the purchase of the suit property. No allegation of fraud, misrepresentation, non-disclosure or illegality against the 3rd and 4thproposed defendant...

47. The petitioners averred that the foregoing decision vindicated the 2nd and 4th petitioners from any possible criminal charges thus the 1st respondent further violated their right to fair trial enshrined under articles 10 and 50 of the *Constitution*.

48. The petitioners also sought refuge in the ruling delivered in HCCS No E121 of 2018 by Justice Majanja on February 25, 2020 where it was held that, the 3rd respondent herein, who is the complaint in the criminal case has her only remedy in damages against the Faulu Micro Finance Bank Limited.

49. The petitioners averred that they had demonstrated in their petition at paragraphs 19 and 20 of how their rights have been violated or infringed or is threatened as outlined under article 22(1) of the

Constitution, 2010 and the principles established in the case of *Anarita Karimi Njeru (1976-80) 1 KLR 1272*.

50. The petitioners submitted that the suit property was transferred to the 4th petitioner and thus invoking the criminal proceeding goes against the right to property as provided for under article 40 of the *Constitution* and section 26 of the *Land Registration Act, 2012*.

51. They also submitted that in absence of resolution of the board of directors on the 4th respondent, which is a company, is not fatal to the instant petition. Reference was made to *Republic v Registrar General & 13 others* Misc App No 67 of (2005) eKLR.

52. The petitioners further submitted that the ruling by Lady Justice Muigai ruled out grounds of malice and fraud which are issues in the criminal case. To the petitioners, the 1st and 3rd respondents are more actuated by a desire to punish the 2nd petitioners and the 4th petitioners, or to oppress them into acceding to her demands of abandoning HCCS No E121 of 2018 by brandishing the sword of punishment under the criminal law; than in any genuine desire to punish on behalf of the public a crime committed. That the predominant purpose is to further that ulterior motive and that this court should steps in and grant orders sought in the petition.

53. According to the petitioners, the respondents are improperly using the criminal system to cause improper vexation and oppression to them and have no rational correlation with the pursuit of criminal justice in the public interest but for achievement of some collateral purposes which are not geared towards the vindication of a criminal offence which dispute is purely civil by dint of section 99 of the *Land Act, No 6 of 2012*.

54. Further, the petitioners averred that the actions of the 1st respondent are an abuse of power and arbitrary exercise of authority to achieve a purpose unconnected with the rule of law or objectives of the system of the administration of justice and that the petitioners will not receive a square deal contrary to their right under article 27(1), of the *Constitution* right to fair hearing under article 50(1) and (2), and the right to fair administrative action under article 47(1) *Constitution* if the criminal proceedings goes against the decision of the High Court judges in HCC 86 of 2017 and HCCE 121 of 2018.

55. The petitioners further alleged that the 1st respondent is in contravention of article 157(11) of the *Constitution* in regard to exercise of power in the interest of the administration of justice to prevent and avoid abuse of legal process. That, however, the powers conferred upon the Office of the Public Prosecutor (OPP) has been a machinery to cause injustice and interfering with a fair trial at the High court being HCC No 86 of 2017 and HCCNo E121 of 2018; and as a result of the decision that would be rendered in both civil and criminal, there would be a possibility of conflicting outcomes and the High Court's judgement would take precedence over the criminal process/outcome. To them, the criminal process would be an exercise in futility.

56. The petitioners noted that the existence of civil proceedings do not act as a bar to the criminal process as provided for under section 193A of the *Criminal Procedure Code*. However, they contended that where the criminal process has been instituted as a means of hastening the civil process by either forcing the applicants to concede the civil claim or abandon their claim altogether, the commencement of the criminal proceedings is an abuse of the process of the court, and relying on the authority of *Stanley Munga Githunguri v Republic* criminal application No 271 of 1985 and *Commissioner of Police and Director of Criminal Investigations Department v Kenya Commercial Bank and others* Nairobi civil appeal No 56 of 2012 {2013}1 eKLR, that this court is obliged to stop such proceedings.

57. On the powers under article 157(10) of the *Constitution*, the petitioners contended that such powers are limited in the manner in which the discretion is exercised.

58. The petitioners cited *Jared Benson Kangwana v Attorney General* Misc, application No 446 of 1996, *Vincent Kibiego Maina v The Attorney General* Misc application Nos 839 and 1085 of 1999 (UR) and *Samuel Kamau Macharia & another v Attorney General & another*, Misc application No 356 of 2006 (UR); for the proposition that, a civil matter cannot be the foundation of a criminal charge.

59. The petitioners relied on *Republic v Director of Public Prosecutions & 2 others ex parte Praxidis Namoni Saisi* (2016) eKLR and *Bitange Ndemo v Director of Public Prosecution & 4 others* (*supra*) to support the argument that neglect to make reasonable use of sources of information available before instituting proceedings and to take into account exculpatory evidence is indicative of malice and abuse of process.

60. In the end, the petitioners prayed that the petition be allowed as prayed.

Petition No E160 of 2020:

61. The petitioner therein, as well, reiterated the contents of the petition and the affidavit as a basis of his submissions.

62. He submitted that his case was deserving of the prayers sought for the reasons that the charges are unfounded and based on a purely commercial matter, hence lacking any legal basis.

63. The petitioner averred that he was at all material times a credit officer of Faulu Microfinance Bank Limited, and which is a microfinance institution duly licensed by the Central Bank to undertake the business of offering for value, credit and financial services to its customers.

64. That on or about the May 29, 2015, the complainant applied for and was granted a credit facility in the aggregate sum of Kshs Sixty-five million only (65,000,000/=) for purposes of financing working capital, construction and development of a commercial rental building on the suit property. The said loan was secured by a legal charge, executed and registered over the subject property.

65. That the complainant subsequently defaulted in her repayment of the loan by failing to make expected repayments, underpaying a number of instalments, and stopping payments altogether, when the loan was still outstanding and as a result thereof; Faulu Microfinance instructed its auctioneers to dispose the property by way of sale by public auction in realization of its statutory power of sale and further in recovery of the loan outstanding and owing.

66. The petitioner submitted that the complainant attempted to stop the auction over the suit property by filing HCC civil suit No 86 of 2016, *Alice Wanjiru Wamwea v Faulu Micro Finance Bank Limited*. A conditional stay was issued that the complainant deposits Kshs 1,000,000 (Kenya shillings one million only), which condition was never complied with. Faulu Microfinance was then at liberty to, and realized the security.

67. The petitioner contended that after the auction of the suit property, the Purchaser of the suit property filed Nairobi HCCC No E121 of 2018, O*ksana Investments Supplies Limited v Alice Wanjiru Wamwea,* seeking *inter alia* the complainant to grant vacant possession of the suit property which matter is still pending determination in the commercial division of the High Court.

68. The petitioner stated that the above notwithstanding, the complainant made a complaint against the petitioner alleging that he conspired to sell the property. Subsequently, the 1st and 2nd respondents arrested the petitioner and charged him together with others in the criminal case.

69. The petitioner submitted that his arrest and subsequent charging was unlawful, as it was done on the basis of a commercial transaction provided for by law and on which the court in the aforementioned case had already pronounced itself on. That the charging of the Petitioner was a gross abuse of

the criminal justice system, police powers and functions. Also that the criminal charges against the Petitioner are an abuse of prosecution powers, hence the merits in seeking the reliefs before this court.

70. It was submitted that there was no reasonable and probable cause to mount a criminal prosecution, since it is evidently clear that the purpose of the criminal prosecution is to help the complainant in the advancement of frustration of her civil case.

71. The petitioner further submitted that the commencement of the criminal proceedings is meant to force Faulu Microfinance Bank or its employees such as the petitioner to submit to the civil claim as in this case, hence the institution of the criminal process is for the achievement of a collateral purpose other than its legally recognized aim. He cited *Francis Kirima M'ikunyua & others v Director of Public Prosecutions,* petition No 461 of 2012, in support of the proposition.

72. The petitioner submitted that there was a clear case where the criminal proceedings are meant to give advantage to the complainant in the criminal proceedings on an issue pending determination in civil proceedings between the parties; and that it is a classic example of the complainant trying to steal a march on the petitioner who in fact is not the seller of the property.

73. It was submitted that the respondents failed to undertake proper investigations and to apply the required standards and legal thresholds in the matter, hence the decision to charge the petitioner remained unreasonable, unconstitutional, unlawful and illegal.

74. Having laid a basis for the petition, the petitioner submitted that he was, hence, entitled to damages. He relied on various decisions in support of the position.

The Respondents' Cases:

75. The respondents in both petitions opposed the petitions.

76. They were categorical that the petitions were not merited and that the criminal case ought to proceed. The respondents variously negated the petitioners' allegations.

77. Each of the respondents denied the allegations of infringement of the petitioners' rights and fundamental freedoms as well as any violation of the *Constitution*. They contended that the prevailing circumstances of the case were in favour of the dismissal of the petitions so as to pave way to the finalization of the criminal case.

78. The respondents referred to several decisions in support of their positions. Most of the decisions are already captured in the first issue of this judgment.

79. With a view to avoid repetition and in the interest of the limited judicial time, this court will not reiterate each of the respondents' cases and decisions referred to, as it did for the petitioners' cases. However, this court will surely take into account the submissions and the decisions thereto.

80. Having so said, I will now deal with the issue at hand.

The Analysis:

81. From the parties' cases, there are several sub-issues which come to the fore. They are: -

    i. Whether the criminal case ought to be terminated on account of the civil cases;

    ii. Whether the criminal case infringes on the petitioners' rights and fundamental freedoms and/ or the *Constitution*.

82. I will deal with each of the sub-issues.

i. Whether the criminal case ought to be terminated on account of the civil cases:

83. The first issue in this judgment has discussed in some detail the instances in which a criminal case may be stayed on the basis of a pending civil case(s). The issue has also canvassed the general instances where a criminal case may be terminated either on account of infringing the rights and fundamental freedoms of a person or by contravening the *Constitution*.

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

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

86. On the first assumption, that is terminating the criminal case, there is no doubt that the criminal case and the two civil cases are based on similar facts and background. On one hand, one of the hotly contested issues in the civil cases relate to the fraudulent manner in which the impugned public auction of the suit property was conducted. On the other hand, the petitioners are all charged with conspiracy to defraud contrary to section 317 of the *Penal Code*.

87. It is, therefore, a fact that the issue of fraud cuts across both the criminal and civil cases. In the event this court allows the petitions then effectively the criminal case will stand terminated. The civil cases will proceed. One of the possibilities is that if for instance the High Court is satisfied that fraud was committed either before, during or after the public auction, the matter is likely to be taken up by the police for further dealing. Those culpable, who are the petitioners herein, are likely to be charged. In that case, a criminal case similar to the current one will again be instituted against the petitioners. In other words, after all said and done, the parties herein will find themselves back to where they are currently.

88. But what if the civil cases are stayed in favour of the criminal case? It will mean that the trial court will be accorded an opportunity to conclusively dealt with the issue of fraud in the criminal case. If the trial court dismisses the criminal case, it will then mean that all the civil claims based on the allegation of fraud will stand determined in favour of the petitioners.

89. The other possibility is the success of the criminal case. If that happens, then it means that the claims based on fraud against all the petitioners will succeed and that will have a significant impact on the public auction and all the resultant actions.

90. From the two scenarios, there is, therefore, logic in the general position that where there are concurrent criminal and civil cases based on similar facts and circumstances, the criminal case ought to be allowed to first be heard and determined.

91. Having said so, it remains clear in the mind of this court that the foregoing general position is subject to exceptions including whether the criminal case infringes the rights and fundamental freedoms of the accused or is in contravention of the *Constitution*.

92. In answering this sub-issue, it is the finding and holding of this court that a court cannot terminate a criminal case solely on the basis of a pending civil case based on similar facts and circumstances.

93. I will now deal with the second sub-issue. It is whether the criminal case infringes on the petitioners' rights and fundamental freedoms and/or contravenes the *Constitution*.

94. The starting point is whether the criminal case infringes on the petitioners' rights and fundamental freedoms. The petitioners in petition No 106 of 2021 variously submitted that their rights under articles 10, 27(1), 40, 47 and 50 of the *Constitution* stand infringed by the sustenance of the criminal case. In petition No 160 of 2021 the Petitioner contended that his rights under articles 27, 28, 29(a), 43 and 50 of the *Constitution* are violated.

95. In order for the petitioners to succeed in their respective petitions, the rules of proof enunciated by the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR must be adhered to. The court stated as follows: -

> Although article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic,* (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

96. Further, the conduct of constitutional petitions is also guided by various laws. For instance, the *Evidence Act* applies to matters generally relating to evidence. The *Evidence Act* is clear on its application to constitutional petitions and affidavits in section 2 thereof. The provision provides as follows: -

> 1. This Act shall apply to all judicial proceedings in or before any court other than a Kadhi's Court, but not to proceedings before an arbitrator.
>
> 2. Subject to the provisions of any other Act or of any rules of court, this Act shall apply to affidavits presented to any court.

97. Sections 107(1), (2) and 109 of the *Evidence Act* are on the burden of proof. They state as follows:

> 107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

and

> 109. Proof of particular fact
> The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

98. Drawing from the foregoing guidance, the petitioners in petition No 106 of 2021 pleaded the violation of article 10 of the *Constitution* in paragraph 20 of the petition. Article 10 of the *Constitution* provides for national values and principles of governance. The petitioners, however, did not state with precision

which of those values and principles of governance were infringed and the manner in which they were so allegedly infringed. That claim cannot, hence, succeed.

99. On whether article 27 of the *Constitution* was infringed, all the Petitioners so averred. The provision of the *Constitution* is on equality and freedom from discrimination. I will hereunder endeavour a discussion on the issue.

100. The *Black's Law Dictionary*, 10th Edition, defines discrimination as;

> (1) The effect of a law or established practice that confers privileges on a certain class because of race, age sex, nationality, religion or hardship"
>
> (2) Differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured"

101. Article 1(a) of the *Convention Concerning Discrimination in Respect of Employment and Occupation (1958)* defines discrimination as follows: -

> Any distinction, exclusion or reference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

102. In *Peter K Waweru v Republic* [2006] eKLR, the court defined of discrimination as follows: -

> Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or have accorded privileges or advantages which are not accorded to persons of another such description... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age sex...a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.

103. Discussing what discrimination entails, a three-judge bench of the High Court (Mwera, Warsame and Mwilu JJ, as they then were, before they were all elevated to the Court of Appeal shortly afterwards) in *Federation of Women Lawyers Fida Kenya & 5 others v Attorney General & Anor* 2011 eKLR and in recognition that justice, fairness or reasonableness may not only permit but actually require different treatment rendered themselves as follows: -

> In our view, mere differentiation or unequality of treatment does not per se amount to discrimination within the prohibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary, that it does not rest on any basis having regard to the objective the legislature had in view or which the Constitution had in view. An equal protection is not violated if the exception which is made is required to be made by some other provisions of the Constitution. We think and state here that it is not possible to exhaust the circumstances or criteria which may afford a reasonable basis for classification in all cases.

104. The South African Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister for Justice* [1998] ZACC 15 further added its voice to the discussion as under: -

> The present case shows well that equality should not be confused with uniformity, in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across

differences. It does not presuppose the elimination or suppression of differences. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a leveling or homogenization of behavior but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalization, stigma and punishment – At best, it celebrates the validity that difference brings to any society.

105. Further, the South African Constitutional Court in *City Council of Pretoria v Walker* [1989] ZACC 1 in considering direct and indirect discrimination made the following comment with which I respectfully agree: -

> The inclusion of both direct and indirect discrimination, within the ambit of the prohibition imposed by section 8(2) [our article 27(4)] of the Constitution, evinces a concern for the consequences rather than the form of conduct. It recognizes that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination and, if it does, that it falls within the purview of section 8(2) [our article 27(4)] of the Constitution.

106. A common thread of reasoning flowing from the foregoing is that equal should be equally treated and unequal unequally treated as called for by the inequality.

107. In attaining that legal bar, courts have developed guiding principles. In *Mbona v Shepstone and Wylie* (2015) ZACC 11, the South African Constitutional Court rendered itself on proof of direct discrimination. The court stated that: -

> 26. The first step is to establish whether the respondent's policy differentiates between people. The second step entails establishing whether that differentiation amounts to discrimination. The third step involves determining whether the discrimination is unfair. If the discrimination is based on any of the listed grounds in section 9 of the Constitution, it is presumed to be unfair.... Where discrimination is alleged on an arbitrary ground, the burden is on the complainant to prove that the conduct complained of is not rational, that it amounts to discrimination and that the discrimination is unfair.

108. The English case of *The Queen on the application of Sarika Angel Watkins Singh (A child acting by Sanita Kimari Singh her mother and litigation friend) v The Governing Body of Aberdare Girls' High School & anor* [2008] EWHC 1865 (Admin) dealt with an analysis of proof of indirect discrimination. The court developed the following four steps: -

> (a) to identify the relevant 'provision, criterion or practice' which is applicable;
>
> (b) to determine the issue of disparate impact which entails identifying a pool for the purpose of making a comparison of the relevant disadvantages;
>
> (c) to ascertain if the provision, criterion or practice also disadvantages the claimant personally;
>
> (d) Whether this policy is objectively justified by a legitimate aim; and to consider, if the above requirements are satisfied, whether this is a proportionate means of achieving a legitimate aim.

109. I will now apply the above tests to the petitions herein.

110. In petition No 106 of 2021, the petitioners pleaded the infringement of article 27(1) of the *Constitution*. The provision relates to the right to equality before the law and the right to equal protection and equal benefit of the law. The petitioners pleaded that the criminal case is unfair as they acted on instructions issued by Faulu Microfinance Bank Limited, as the Mortgagee, and that section 99 of the *Land Registration Act*, 2021 provides for the remedies which none of them is a criminal prosecution.

111. In petition No 160 of 2021, the petitioner contended that the criminal case was used to enforce a private commercial transaction to his detriment.

112. In petition No E002 of 2021 *Christopher White & Others v Inspector General of Police & others* (2021) eKLR, this court discussed whether criminal offences may be committed when parties are engaged in pure commercial activities. In the end, this court held that whereas parties are at liberty to engage in private and commercial transactions, that does not preclude the commission of crimes and as such, the police are at liberty to investigate such transactions either when a complaint is lodged or when the police acts on its own motion in a bid to fight crime.

113. That is the position I still hold in this matter. In a nutshell, whereas the *Land Registration Act*, 2021 or any other law may provide remedies in mortgage transactions, that does not preclude the police from investigating the possible commission of crime in the process of the parties' dealings. The petitioners ought to have demonstrated how the law was unequally applied to them or how they were discriminated against. That, they failed to do. The parties' contention under article 27 of the *Constitution* is, therefore, unsuccessful.

114. There was also a claim of violation of article 28 of the *Constitution* in petition No 160 of 2021. The petitioner contended that his dignity was infringed by the arrest and prosecution in the criminal case on the basis of a court guided commercial transaction. He further contended that he was exposed to public odium and ridicule.

115. Flowing from the discussion on article 27 of the *Constitution*, unless otherwise proved, the arrest and charging of the petitioner in the criminal case per se cannot be in contravention of article 28 of the *Constitution*. The same position applies to the claim that the petitioner's liberty under article 29(a) of the *Constitution* was arbitrarily curtailed by the preference of the criminal case.

116. The 1st and 4th petitioners in petition No 106 of 2021 further pleaded that their right to property under article 40 of the *Constitution* was infringed by the 1st and 3rd respondents since as the registered owners of the suit property, their title was indefeasible, a fact which the respondents failed to take cognizance of. To them, the criminal case is aimed at depriving them their property contrary to article 40 of the *Constitution* and section 26 of the *Land Registration Act, 2012*. As the suit property was purchased through a public auction, it was contended that the petitioners' right to enjoy the suit property was arbitrarily curtailed.

117. Article 40 of the *Constitution* provides for protection of the right to property. However, article 40(6) provides that the rights under that article do not extend to any property that was found to have been unlawfully acquired. In this case, therefore, in the event the criminal case succeeds and it is found that the suit property was unlawfully acquired, then the constitutional protection under article 40 will not be available to the now registered owners. The claim under article 40 of the *Constitution* is, hence, yet to crystallize in the face of the criminal case.

118. The petitioner in petition No 160 of 2021 also contended that his rights under article 43 of the *Constitution* were further infringed by the criminal case. He claimed that his right to benefit from lawful employment without undue interference and harassment was infringed.

119. Article 43 of the *Constitution* is on economic and social rights. The rights enumerated therein relate to health, housing, sanitation, food, water, social security and education. The petitioner did not plead how the alleged contravention of the right to employment ensued in the circumstances of this case. As such, the claim is unproved.

120. All the petitioners raised the alleged contravention of article 47 of the *Constitution*. It was contended that upon the institution of the criminal case, the respondents sought for time to review the matter. That, after almost two years the director of public prosecutions and the director of the criminal investigations decided to proceed on with the criminal case without according the petitioners any reasons for doing so. The petitioners were aggrieved.

121. A look at article 47 of the *Constitution* is paramount. Sub-articles (1), (2) and (3) states as follows: -

> 1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
>
> 2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
>
> 3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
>
> a. provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
>
> b. promote efficient administration

122. The legislation that was contemplated under article 47(3) is the *Fair Administrative Actions Act* No 4 of 2015. Section 4 thereof provides that: -

> 1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
>
> 2. Every person has the right to be given written reasons for any administrative action that is taken against him.
>
> 3. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-
>
> a. prior and adequate notice of the nature and reasons for the proposed administrative action;
>
> b. an opportunity to be heard and to make representations in that regard;
>
> c. notice of a right to a review or internal appeal against an administrative decision, where applicable;
>
> d. a statement of reasons pursuant to section 6;

e. notice of the right to legal representation, where applicable;

f. notice of the right to cross-examine or where applicable; or

g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.

4. The administrator shall accord the person against whom administrative action is taken an opportunity to-

a. attend proceedings, in person or in the company of an expert of his choice;

b. be heard;

c. cross-examine persons who give adverse evidence against him; and

d. request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

5. Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

6. Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in article 47 of the *Constitution*, the administrator may act in accordance with that different procedure.

123. Section 2 of the *Fair Administrative Actions Act* defines an 'administrative action', an 'administrator' and a 'decision' as follows: -

'administrative action' includes -

i. The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

ii. Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

'administrator' means 'a person who takes an administrative action or who makes an administrative decision'.

"decision" means any administrative or quasi-judicial decision made, proposed to be made, or required to be made, as the case may be.

124. In Civil Appeal 52 of 2014 *Judicial Service Commission v Mbalu Mutava & another* (2015) eKLR Court of Appeal addressed itself on the above. The court held that: -

> article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the bill of rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of

constitutionality rather than to the doctrine of *ultra vires* from which administrative law under the common law was developed.

125. The South African Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and others* CCT16/98) 2000 (1) SA 1 ring-fenced the importance of fair administrative action as a constitutional right. The court while referring to section 33 of the *South African Constitution* which is similar to article 47 of the Kenyan *Constitution* stated as follows: -

> Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...

126. The right was further discussed in *Republic v Fazul Mahamed & 3 Others ex-parte Okiya Omtatah Okoiti* [2018] eKLR. The court had the following to say:

25. In *John Wachiuri t/a Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & ano* [39] the court emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature.

These are: -

a. illegality - decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be "illegal". Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond it powers.

b. fairness - fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.

c. Irrationality and proportionality - The courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute 'irrationality" or 'perversity' on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of Lord Green in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation: -*

   If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere...but to prove a case of that kind would require something overwhelming...

127. In this case, it has to be first determined whether the decision to review the criminal case was an administrative action. In the event this court finds in the affirmative, then such a decision had to pass the constitutional and statutory tests of lawfulness, reasonableness and procedural fairness.

128. The decision to charge the petitioners was made by the director of public prosecutions and indeed the petitioners were all charged. The decision to charge the petitioners was inevitably based on the evidence. The request to review the evidence and the decision to proceed on with the criminal case did not change the decision which had already been made by the director of public prosecutions to charge the petitioners. In other words, there was no change in relation to the decision to prosecute the petitioners which decision had already been long made.

129. This court now finds that the request to review the evidence and the decision to proceed on with the criminal case did not amount to the administrative decisions contemplated under article 47 of the *Constitution*.

130. Again, all the petitioners alluded to the infringement of article 50 of the *Constitution*. It was vehemently contended that the criminal case infringes on the petitioners' right to fair hearing in that it impeded the fair determination of the two civil cases pending before the High Court.

131. At this point in time, before this court determines whether article 50 of the *Constitution* was infringed, I will deal with whether article 157(11) of the *Constitution* was contravened.

132. Article 157(11) of the *Constitution* provides as follows: -

> In exercising the powers conferred by this article, the director of public prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

133. It is the petitioners' case that the commencement of the criminal proceedings is an abuse of power and the court process and that it is aimed at achieving a collateral purpose which is to unfairly interfere with the determination of the civil cases as the complainant has already sensed defeat going by the ruling made on February 25, 2020 by Hon DS Majanja, J in HCCS No 121 of 2018.

134. This court has in the preceding main issue discussed the instances in which the director of public prosecutions may be in conflict with article 157(11) of the *Constitution* at length. The court also referred to several decisions thereto.

135. A careful look at article 157(11) of the *Constitution* against the allegations put forth by the petitioners reveal that the petitioners are anxious that if the criminal case is allowed to proceed, then that will impact negatively to the civil cases. However, I have already demonstrated above that there is logic in the criminal case proceeding first.

136. This court fails to see how the director of public prosecutions acted contrary to public interest, the interests of the administration of justice or failed to prevent and avoid abuse of the legal process. In fact, it is in the interests of the administration of justice that the criminal case be initially heard for that will settle some of the contentious issues in the civil cases including whether the suit property was lawfully acquired and whether the various rights under the *Constitution* accrued.

137. Whereas the petitioners have the right not to be subjected to an illegal and/or unwarranted criminal process, the Director of Public Prosecutions is also under a public duty to ensure that offences are prosecuted and those culpable attended to as law requires. That is the balance created by the law and which this court is called upon to serious undertake. In fact, that is the essence of the rule of law.

138. It is deducible that the termination of the intended prosecution of the Petitioners in the circumstances of this case will frustrate, instead of advancing, the rule of law. The petitioners still have constitutional safeguards in respect of their rights even when undergoing the trial. The Petitioners will, at the trial, also be accorded an opportunity to challenge the veracity of the evidence including whether the evidence was properly obtained.

139. Based on the foregoing, this court is, therefore, not persuaded that the prosecution of the petitioners infringes any of the various provisions of the *Constitution* either as alleged or otherwise. This court further finds and hold that the Petitioners have failed to show how the criminal case is an abuse of the criminal justice system.

140. This court now finds and hold that the petitioners have failed to prove that the prosecution of the criminal case infringes articles 10, 27(1), 28, 29(a), 40, 43, 47, 50 and 157(11) of the *Constitution*.

141. In sum, the issue as to whether the criminal case ought to be terminated for infringing the petitioners' rights and fundamental freedoms and for also being contrary to the *Constitution* is answered in the negative.

Conclusions and Disposition:

142. Deriving from the foregoing, the determination of the notices of motion and the petitions is as follows: -

a. The petition No 106 of 2021 and petition No 160 of 2021 together with their respective notices of motion be and are hereby dismissed.

b. Due to the age of the criminal case, the trial court shall accord priority to the hearing and determination of Nairobi (Milimani) Chief Magistrates Court criminal case No 1259 of 2019 Republic v Amos Mugweru Mwangi, Peter Kefa Onsongo, Robert Waweru Mana, Paul Mwangi Njuki, Esther Muthoni Njoroge, Tom Jaseme, Oksana Investments Supplies Limited and Antique Auctions Agencies.

c. The petitioners shall bear the costs of the petitions.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF JANUARY, 2022.

A. C. MRIMA

JUDGE

Consolidated judgment virtually delivered in the presence of:

Mr. Murango, Learned Counsel for the Petitioners in Petition No. E106 of 2021.

Mr. Njenga, Learned Counsel for the Petitioner in Petition No. E160 of 2021.

Miss. Arunga, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondents

Elizabeth Wanjohi – Court Assistant.