



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**(Coram: A. C. Mrima, J.)**

**PETITION NO. E289 OF 2020**

**-BETWEEN-**

**1. SAMUEL MUIGAI NJOROGE**

**2. ROYAL HOUSING COOPERATIVE SOCIETY LIMITED .....PETITIONERS**

**-VERSUS**

**1. THE DIRECTOR OF PUBLIC PROSECUTIONS**

**2. INSPECTOR GENERAL OF POLICE**

**3. MOHAMMED ALI.....RESPONDENTS**

**-AND-**

**NATIONAL COOPERATIVE HOUSING UNION LIMITED.....INTERESTED PARTY**

**JUDGMENT**

**Introduction:**

1. The Petition subject of this judgment challenges the powers of the Police and the Director of Public Prosecutions in their respective roles in the criminal justice system.

2. To that end, the Petition and the Notice of Motion dated 22<sup>nd</sup> September, 2020 are principally anchored on Articles 10(1)(2), (3), 27, 43, 49 and 159 (2) of Constitution as well as Article 9 of the International Covenant on Civil and Political Rights.

**The Parties:**

3. The 1<sup>st</sup> Petitioner is described as a male adult of sound mind and disposition who is the Chairman of the 2<sup>nd</sup> Petitioner.

4. The 2<sup>nd</sup> Petitioner is described as a Limited Liability Co-operative Society registered under the Cooperatives Act, Cap 490, Laws of Kenya and under Certificate Number CS/ 13941.

5. The 1<sup>st</sup> Respondent is the Office of the Director of Public Prosecutions established under Article 157 of the Constitution.

6. The 2<sup>nd</sup> Respondent is the Inspector General of Police duly established under Article 145 of the Constitution.

7. The 3<sup>rd</sup> Respondent is a male adult and the Officer Commanding KBC Police Station within Machakos County.

8. The Interested Party is described as a Limited Liability Co-operative Society registered under the Co-operatives Act, Cap 490, Laws of Kenya.

9. I will now consider the parties' cases.

**The Petitioners' case:**

**The Petition:**

10. The Petition is dated 22<sup>nd</sup> September, 2020 and it is supported by an Affidavit of the 1<sup>st</sup> Petitioner sworn on even date. The Petition was filed together with an application by way of a Notice of Motion also evenly dated.

11. The application sought for interim conservatory orders restraining the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from the arresting, detaining, restricting, confining, interference with the liberty of the Petitioners and also restraining the 1<sup>st</sup> Respondent from instituting, charging or prosecuting the Petitioners.

12. On 15<sup>th</sup> March 2021, this Court granted some conservatory orders and directed that both the application and the Petition be heard together and by way of reliance on the pleadings, affidavit evidence and written submissions.

13. It was pleaded that Royal Housing Co-operative Society Limited, the 2<sup>nd</sup> Petitioner herein, (hereinafter referred to as '**the 2<sup>nd</sup> Petitioner**' or '**Royal Sacco**') was incorporated in 2011 with the primary objective of bringing its members together and to enable them acquire houses using the principles of economies of scale, and as of September, 2020, Royal Sacco had over 600 members.

14. It was further pleaded that in 2012 the Royal Sacco affiliated itself to the Interested Party herein, the National Co-operative Housing Union Limited (hereinafter referred to as '**the Interested Party**' or '**National Union**').

15. The National Union then helped Royal Sacco in negotiations for the purchase of a piece of land known as Land Reference Number 2358/10 (hereinafter referred to as '**the land**') which negotiations culminated with the execution of an Agreement for Sale dated 23<sup>rd</sup> March, 2012 (hereinafter referred to as '**the Sale Agreement**').

16. According to the Sale Agreement, the land was to be registered in the name of the National Union. The Sale Agreement also provided that Royal Sacco would then gradually make payments towards the purchase and construction of the houses for its members.

17. The Petitioners contended that it was later discovered that the Vendor of the land was not the actual owner and as such, criminal charges were instituted against the fraudsters who had posed as the registered owners of the land in **Milimani Chief Magistrate's Court in MCCR 281 of 2018**.

18. Further, it was claimed that there were also incidences of double allocation of the houses developed on the land by the National Union to other Co-operatives societies that were also affiliated to the National Union. The upshot of such resulted in lots of conflict on the ground.

19. As the conflict between the National Union and Royal Sacco intensified with no sign of reprieve Royal Sacco resolved and subsequently filed a claim before the Cooperative's Tribunal against the National Union. The claim was registered as **Tribunal Cause No 103 of 2018 Royal Housing Co-operative Society Limited -versus-National Co-operative Housing Union Limited**. Royal Sacco claimed a refund of all the monies paid to the National Union towards the purchase of the land.

20. The Petitioners posited that as a result of the ingenuity on the part of the National Union in the allocation of the houses to the members of Royal Sacco, a lot of complaints arose. Some of the complaints were made to the 3<sup>rd</sup> Respondent (hereinafter referred to as '**the 3<sup>rd</sup> Respondent**' or '**the OCS**').

21. It was further posited that the OCS has so far summoned the 1<sup>st</sup> Petitioner who is the Chairman of Royal Sacco over the members' complaints and that the 1<sup>st</sup> Petitioner has all along, and so dutifully, answered to the call by the OCS and explained in great details what caused the prevailing scenario at Royal Sacco and the measures and efforts Royal Sacco has so far put in place to protect the members' and Royal Sacco's interests.

22. To their utter shock and surprise, the Petitioners posited that the OCS then took it upon himself to delve into the disputes involving the National Union and Royal Sacco despite the fact the dispute is already before the Co-operatives Tribunal pursuant to Section 77 of the Cooperative Societies Act, Cap 490, Laws of Kenya.

23. It was asserted that the OCS then caused the 1<sup>st</sup> Petitioner to be arrested and charged in **Kangundo Principal Magistrate's Courts in Criminal Case No. 601 of 2020** with offences stemming from the dispute before the Tribunal.

24. According to the Petitioners, the OCS has continued his concerted efforts to harass the 1<sup>st</sup> Petitioner over the matters before the Tribunal. The OCS has severally, and so continued, to issue Summons to the 1<sup>st</sup> Petitioner to appear before him over the said dispute.

25. The Petitioners are convinced that the actions of the OCS are geared towards attaining an ulterior motive and are smacked with malice since, for instance, the OCS caused summons dated 17<sup>th</sup> September, 2020 to be served upon the 1<sup>st</sup> Petitioner which required the 1<sup>st</sup>

Petitioner to appear before the OCS on 15<sup>th</sup> September, 2020, a date which had passed thereby exposing the 1<sup>st</sup> Petitioner to a possible arrest and confinement.

26. When the 1<sup>st</sup> Petitioner raised the issue on the manner in which the OCS was summoning him, the OCS instead re-issued another summon for the 1<sup>st</sup> Petitioner to appear before him 21<sup>st</sup> September, 2020, on which day the OCS knew, being the Investigating Officer, that the 1<sup>st</sup> Petitioner was set to appear before the Magistrate's Court in Kangundo in the criminal case.

27. The Petitioners contended that the action of the OCS was utterly malicious since the OCS put the 1<sup>st</sup> Petitioner in such a position that he would definitely default in one of the appearances, that is either before the Court or before him, which both instances would result to the detention of the 1<sup>st</sup> Petitioner.

28. The Petitioners are further surprised with the revelation that the complaints the OCS is currently investigating were reported way back in June 2019 and the reason as to why the OCS launched the investigations just recently remain incomprehensible.

29. The Petitioners argued that there are so many claims on the land which arose as a result of the actions of the National Union, but surprisingly the consequences are being visited upon the Petitioners notwithstanding the fact that the Petitioners are not even officials of the National Union.

30. The Petitioners are apprehensive that if indeed all the complaints lodged with the OCS over the land and the houses under the arrangement between the National Union and Royal Sacco are visited upon the 1<sup>st</sup> Petitioner, then the 1<sup>st</sup> Petitioner will continue to be unfairly harassed more so notwithstanding the fact that the dispute is currently before the Tribunal.

31. The Petitioners contended that at every appearance at the KBC Police station, the OCS forces the 1<sup>st</sup> Petitioner to pay cash bail. The Petitioners are apprehensive that with the plethora of complaints being 'entertained by the OCS against the 1<sup>st</sup> Petitioner, the Petitioners are now under a lot of financial distress bearing in mind the economic hardships occasioned by Covid-19 pandemic.

32. The Petitioners contended that they were apprehensive that unless this Honourable Court urgently intervened, the OCS will eventually be successful in utilizing the criminal justice system to settle issues which relating to private and commercial transactions despite the pendency of matter before the Tribunal. To the Petitioners, that will occasion them great prejudice and is a continued violation of their right to liberty and protection from arbitrary arrest.

33. The Petitioners maintains that they are entitled to equal protection and equal benefit before the Law by dint of Article 27 of the Constitution and it therefore behoves this Honourable Court to exercise the noble mandate bestowed upon it of ensuring enjoyment of the said right; and that Article 22 of the Constitution postulates that every person has the right to institute Court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed, or is threatened.

34. In the main, the Petitioners pray for the following remedies: -

*a. A declaration that the threatened arrest and prosecution of the Petitioners based on the issues raised herein is unlawful and unconstitutional.*

*b. THAT a permanent injunction to issue restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents by themselves, their officers, servants, agents or anyone acting on their behalf from arresting, detaining, restricting or otherwise confining or in any other way interfering with the liberty of the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners herein in respect of or in connection with the complaint or allegation(s) made arising from or in relation to this matter.*

*c. THAT a permanent injunction to issue restraining the Director of Public Prosecutions by himself, his officers, servants, agents or anyone acting on his behalf from instituting, charging or prosecuting the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners herein in respect of or in connection with the complaint or allegation(s) made arising from or in relation to this matter.*

*d. THAT this Honourable Court do award any other orders it may deem just, fit and expedient to award in the interests of justice.*

*e. Costs of this Petition.*

**The Petitioners' submissions:**

35. The Petitioners re-emphasized the issues as pleaded.

36. They submitted that both the Notice of Motion and the Petition ought to succeed. They urged that both the application and the Petition attained the threshold for granting the orders sought.

37. The Petitioners relied on *Centre for Rights Education and Awareness (CREAW) & 7 Others v Attorney General*, Nairobi High Court Petition No. 16 of 2011; [2011] eKLR and *Platinum Distillers Limited V Kenya Revenue Authority* (2019) eKLR in buttressing their submission that the application be allowed.

38. On the main Petition, the Petitioners submitted that the Petition was anchored on Articles 10(1), (2) and (3), 27 and 49 of the

Constitution as well as Article 9 of the International Covenant on Civil and Political Rights.

39. The Petitioners further submitted that the primary purpose for which Royal Sacco was formed was to provide a platform through which its members would be able to acquire homes at an affordable rates. In order to achieve the much-desired objective, Royal Sacco, with the guidance of the Ministry of Co-operative Development partnered with the National Union which is an umbrella body for Housing Co-operative Societies in the country.

40. It was further submitted that when Royal Sacco intended to buy land in 2012, it was the National Union that assured it that the National Union had a property that it could sell to the latter. It was on that basis that Royal Sacco purchased the land at a cost of KShs. 54,000,000/=.

41. The Petitioners also submitted that trouble began when Royal Sacco demanded the title document for the land from the National Union. It was then when Royal Sacco discovered that indeed it had been duped by the National Union as the land did not belong to the National Union. Royal Sacco later found out that the National Union had clandestinely allocated and/or sold the same land to other Co-operative Societies and entities and that the said third parties had also lodged claims over the land. Royal Sacco also realised that the National Union had in some instances made double allocation of some portions of the land to its members and members of other entities aforesaid.

42. The Petitioners also submitted that it was a result of double allocation that led the 1<sup>st</sup> Petitioner to be charged in *Kangundo Principal Magistrate's Court under Criminal Case No. 601 of 2020*

43. The Petitioners then instituted *Criminal Case No. 281 of 2018* and *Tribunal Cause No. 103 of 2018*.

44. This Court was called upon to note that despite Royal Sacco having acted with speed to safeguard the members' interests, there has been disquiet from the members who contributed money towards the purchase of the land and that has led to the lodging of complaints at the KBC Police Station. As a result, the Petitioners have been summoned before the OCS.

45. The Petitioners further submitted that the complaints in the various summonses issued by the OCS are in respect to the problem which was initiated by the National Union and which is pending before the Tribunal. Section 76 of the Co-operative Societies Act, Cap 490 (hereinafter referred to as '*the Societies Act*') was referred to in furtherance of the submission.

46. It was also submitted that over and above the provisions of Section 76 of the Societies Act, Royal Sacco developed comprehensive By-Laws pursuant to Section 6(2) of the Societies Act. The by-laws, it was submitted, outlined the procedure on disputes by members.

47. A further submission was made that the By-Laws also laid down the procedure on cessation of membership.

48. The Petitioners contended that all disputes arising from the problem created by the National Union especially on the double allocation of houses have all been handled within the By-Laws.

49. The Petitioners submitted that despite the OCS having been made aware and statements written by the officials of Royal Sacco over the members' disputes in Royal Sacco and the pending Tribunal case, the OCS is hell bent on interfering and usurping the powers of the Tribunal. To the Petitioners, the actions of the OCS are punctuated by malice and amount to abuse of his powers under the National Police Service Act.

50. The decision in *Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others* while citing *Reg vs. Secretary of State for the Environment Ex Parte Nottinghamshire County Council (1986) AC* was referred to in bolstering the Petitioners submission. In that case the Court held as follows: -

*A power which is abused should be treated as a power which has not been lawfully exercised....*

51. In submitting that the actions of the OCS amount to infringement of the Petitioners' constitutional right to fair administrative action under Article 47 (1) of the Constitution, the Court of Appeal decision in *Judicial Service Commission v Mbalu Mutava & another [2014] eKLR* was cited.

52. The Petitioners further submitted that the only reason the 1<sup>st</sup> Petitioner has been charged before the Kangundo Principal Magistrate's Court is because he is the Chairman of the Royal Sacco despite the fact that the Petitioners are also victims.

53. Submissions were also made on Article 9 of the International Covenant on Civil and Political Rights. The provision states that:

*Every person has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with procedure as provided by the law.*

54. It was submitted that the aforesaid Article forms part of Kenyan law by dint of Article 2(6) of the Constitution.

55. In the end, the Petitioners urged the Court to allow the Petition and the application as prayed.

#### **The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' cases:**

#### **The Grounds of Opposition:**

56. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents opposed the application and the Petition.

57. They filed Grounds of Opposition and raised the following six grounds.

58. *First*, the prayers sought by the Petitioners are unconstitutional as they seek to prevent the Director of Public Prosecutions from exercising its mandate as provided under Article 157 of the Constitution. The prayers if granted would result to a greater injustice in the criminal justice system and public interest.

59. *Second*, under Article 157(10) of the Constitution and Section 6 of the Office of the Director of Public Prosecution Act (2013) the Director of Public Prosecutions does not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of the powers or functions, shall not be under the direction or control of any person or authority.

60. *Third*, Section 24 of the National Police Service Act mandates the police to investigate any complaint brought to their attention in order to determine whether a criminal offence has been committed.

61. *Fourth*, the Petitioners have not adduced reasonable evidence to show that the criminal proceedings are mounted for an ulterior purpose.

62. *Fifth*, the Petitioners must demonstrate that substantial injustice would otherwise result if the criminal proceedings proceed, the cases are determined on merit.

63. *Sixth*, it is in the public interest that complaints made to the police are investigated and the perpetrators of crimes are charged and prosecuted.

64. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents urged this Court to dismiss the Petition with costs.

**1<sup>st</sup> and 2<sup>nd</sup> Respondents' submissions:**

65. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted on the several heads. They are as follows: -

**a. The investigative power of the Police**

66. It was submitted that the National Police Service draws its authority to investigate mainly from Article 245 of the Constitution and Section 35 of the National Police Services Act 2013. Section 35 states as follows: -

**35. Functions of the Directorate**

*The Directorate shall;*

*(a) collect and provide criminal intelligence*

*(b) undertake investigations on serious crimes including homicide narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime among others;*

*(c) maintain law and order;*

*(d) detect and prevent crime*

*(e) apprehend offenders;*

*(h) execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of the Constitution;*

...

67. The further submitted that in the exercise of its power of investigation, the Police are functionally independent and can only take directions to investigate from the Director of Public Prosecutions (hereinafter referred to as '**the 1<sup>st</sup> Respondent**' or '**the DPP**') and no other authority.

68. The DPP submitted that in the instant Petition, the Petitioner did not present any written directive to the Police by any other authority to justify his claim that the investigations have been commenced for a collateral purpose. In the absence of that evidence, the Court can only presume that they are purely acting on the discharge of their lawful authority.

69. The law allows the Police and any other investigative agency to investigate the Petitioners where there is probable cause to do so, the status of the Petitioner notwithstanding. That was so held in *Dr. Alfred N. Mutua vs. The Ethics and Anti-Corruption Commission & Others, Misc. Application No. 31 of 2016*.

70. In the instant case, they submitted that, the Police received complaints and were duty bound to investigate. Reliance was sought in *Republic v The Commissioner of Police & the Director of Public Prosecution Ex parte Michael Monari & Another Misc. Application No, 68 of 2011, Nairobi*, in determining whether the Respondents had abused their statutory and constitutional powers. The Learned Judge stated 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. The predominant reason for the institution of the criminal case cannot therefore be said not to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decision to charge act in a reasonable manner, the High Court would be reluctant to intervene. It is not the duty of the court to go into the merits and demerits of any intended charges to be preferred against any party it would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it.*

*There is no evidence to show that the respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment.*

71. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent further submitted that unless the Petitioners established that the Police were acting *ultra vires* to their powers, the Court should not unnecessarily inhibit them from investigations. The decision in *Cascade Company Limited vs Kenya Association of Music Production (KAMP) & Others, Petition No. 7 OF 2014 High Court, Murang'a* was referred to.

**b. Prosecutorial authority of the DPP:**

72. It was submitted that Article 157 of the Constitution vested the State powers of prosecution upon the DPP. The power is reinstated in *pari materia* under Section 5 of the Office of Director of Public Prosecutions Act. In the exercise of this power, the DPP is not under the direction or control of any person, body or authority as provided for under Article 157(10) of the Constitution as so stated in *Hon. James Ondicho Gesami vs. the Attorney General & Others, Petition No.376 of 2011*.

73. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the primary test in the making of prosecutorial decision on the part of the DPP is whether or not the material gathered meets the evidential and public interest threshold as provided under the Nation Prosecution Policy as restated in *Mohamed Ali Swaleh vs The Director of Public Prosecution & Another- High Court Mombasa Petition No. 2 of 2017* and *Republic vs Commissioner of Police & Another (2012) ECLR*.

74. Counsel further submitted that in an avalanche of judicial decisions, Courts have held that it is not the Court's duty to decide who is to be charged and with what offence. If the Courts were to do so, they would clearly be intermeddling in matters that are purely within the province of the DPP thus rendering the DPP, a constitutionally docile entity. The emasculation of independent constitutional offices and organs would be dangerous for a country that believes in the Rule of law and separation of powers.

75. They further submitted that the Court should be shy in accepting invitations by litigants to interfere with the independent exercise of constitutional and statutory authority by state organs except in those cases where such organs and offices are acting *ultra vires*, outside the confines of reasonableness, procedural fairness, *mala fides* and in total disregard of the doctrine of proportionality in decision making. That, in the instant Petition there is absolutely no reason for the Court to bar investigations and prohibit prosecution since none of the foregoing grounds exists to justify such a decision. *Pauline Raget Adhiambo Agot v DPP and 5 Others (2010) eCLR Petition No. 446 of 2015* was referred to.

76. In their further submissions, it was averred that lodging complaints or reporting incidents of criminal activity does not equate giving directions to the Respondents or any of them. If it was so to be held then a grievant would never receive justice. The public would never report crime and the Respondents would also be under no obligation to act. In *AG V AG & 3 Others Ex parte Thomas Ng'ang'a Munene (2014) Petition No. 166 of 2013*, the Court found as follows: -

*...It is not for this Court to stop the DPP in his tracks simply because the Court believes that the DPP ought to have done better. The constitutional discretion given to the DPP ought to be lightly interfered with especially if on evidence in his possession if true may well sustain a prosecution. Trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defense and even after placing the accused on his defense, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of an appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words, I am not satisfied based on the material before me that the applicant will not receive a fair trial before the trial court more so as no allegations are made against the 5<sup>th</sup> Respondent towards that direction. Therefore, the mere insufficiency of evidence does not in my considered view justify the halting of a criminal trial.*

*In these types of proceedings, the court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings. As judicial review proceedings are concerned with the process rather than merits of the challenged decision or proceedings the court is not entitled to make definitive finding on matters which go to the merits of the impugned proceedings.*

*In the premise I am not satisfied that this a proper case which the court ought to bring criminal proceedings to a halt. The applicant will be afforded an opportunity to defend himself, cross-examine witnesses and adduce evidence in support of his case and that in my view is the proper course to take in the circumstances of the case.*

77. The decisions in *Republic v Attorney General & 4 Others Ex parte Kenneth Kariuki Githii (2014) eCLR Miscellaneous Application no.*

151 of 2013, *Hon. James Ondicho Gesami vs The Attorney General & Others, Petition No. 376 of 2011, Nairobi Thuita Mwangi & 2 others vs Ethics and Anti-Corruption Commission & 3 others (2004)* and *Total Kenya Limited & 9 others vs Director of Criminal Investigation Department and 3 others, 2013* were variously referred to in urging the Court to disallow the Petition.

**c. The Doctrine of separation of powers:**

78. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that for orderly functioning of state organs, each arm of government should be allowed to exercise its powers without interference from any of the other arms. Obviously, where such exercise of power is abused or exceeded, then a check on the responsible organ would be necessary.

79. That too much superintendence by one organ could render the other arms of government dysfunctional, which is clearly a threat of the Rule of law and could possibly lead to a constitutional paralysis or crises in government. Any intervention therefore by one arm against the other must be guarded and properly justified as so emphasized in *Dr. Alfred N. Mutua VS. The Ethics and Anti-Corruption Commission & Others, Misc. Application No. 31 of 2016*.

80. In sum, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the instant Petition is an abuse of Court process merely meant to circumvent the criminal justice in Kenya and prevent the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from discharging their constitutional mandate and should therefore be dismissed with costs to the Respondents.

**3<sup>rd</sup> Respondent's case:**

**The Replying Affidavit:**

81. The 3<sup>rd</sup> Respondent, in opposing the Petition and the application filed a Replying Affidavit.

82. He deponed that the application was full of lies and falsehood and that the Petitioners had not been candid and forthright with information that relates to the subject matter.

83. The OCS further deposed that as a police officer his duty and responsibility is to take every form of complain by members of public and investigate such complaint in accordance with the law, guided by the Police Act, the Penal Code, the Criminal Procedure code and the Constitution.

84. In police investigations, he further deposed, all the relevant factors are taken into account, the circumstances of the case and appropriate recommendations made to the DPP whom upon thorough evaluations of the evidence depending on the facts at hand approves or rejects the investigator's recommendations.

85. In the instant case, the OCS received several complains by members of the Royal Sacco and of various nature; ranging from new issues to issues of which investigations were pending.

86. He contended that some of the issues raised by the members of the Royal Sacco are very serious in nature and others are just ordinary complaints. However, all complaints need to be thoroughly investigated. Some complaints border on criminal activities committed by the Petitioners against the members of the Royal Sacco and ought to be thoroughly investigated.

87. The OCS further deposes that in the event the complaints are fictitious or not criminal in nature and not in any way incriminates the Petitioners, then they will be dismissed and if otherwise, the direction of the DPP will be sought.

88. According to the OCS, it will be unfortunate, inequitable and unjust if prohibitory orders are granted in the circumstances of this matter.

89. It is the OCS's position that the Petitioners are just manipulating the law and are abusing of the Court process in the name of infringement of their rights.

90. The OCS deponed that in view of the evidence surrounding the complaints, the Petitioners' that the matter is before the Tribunal should not bar any investigations since the truth as to whether the Petitioners are criminally culpable will be unveiled in the course of time.

91. To the OCS, there are a total of 20 complainants who allege to have been victims of deceit and deception by the Petitioners which allegations are purely criminal in nature and it is only fair that the investigations be allowed to proceed.

92. The OCS prays that the Petition be dismissed with costs.

**The Interested Party's case:**

**The Replying Affidavit:**

93. The National Union filed a Replying Affidavit sworn by its Finance Manager in opposition to the application and the Petition.

94. It was deposed that the Petition and the application is devoid of any merits, is frivolous, vexatious and an outright abuse of the Court

process.

95. The Petitioners are accused of being mean with the truth and facts and outrightly confined their case to falsehoods and lies; have not been candid and forthright before this Court. The result is that they have knowingly distorted facts with the sole motive of unfairly obtaining orders whereas the Petition and the application are misconceived, ill-advised and factually-selective.

96. The Manager deponed that the Petitioners' position that the current investigation by the police are *ultra-vires* the provisions of the Societies Act is not only misleading but also a misrepresentation of the facts and the truth.

97. It was contended that the complaints currently under investigations arose out of the Petitioners' impropriety in dishonestly dealing with the members on the issue of housing. The investigations will reveal the criminal culpability on the part of the Petitioners, hence the need to allowed the investigations to go on.

98. The Manager further deponed that the 1<sup>st</sup> Petitioner has lately been craftly representing to innocent members of public that Royal Sacco has houses for sale while knowing such to be untrue and once the people are recruited into the membership of the Royal Sacco, they are swindled their monies. That is a criminal syndicate which must be investigated and smashed.

99. It is also deposed that those who were swindled of their monies lodged complaints to the police and the police are duty bound to carry out investigations. The National Union has so far recorded statements with the police thereby putting the record straight and exposing the Petitioners as real criminals.

100. To the Manager, the idea of bringing into question the case before the Co-operative Tribunal is insincere since there is no nexus between the case and what the Petitioners are unlawfully doing to the unsuspecting and innocent members of public.

101. It was deponed that the Tribunal heard the Petitioners' application and disallowed it. The Tribunal sided with the National Union, Razak Housing Cooperative Society Ltd and Progressive Housing Co-operative Society Ltd against the Petitioners' eviction of members of the other Co-operative Societies from their houses and giving out those houses to the new members Royal Sacco recruits under false pretence and falsity.

102. The Manager deponed that the housing project on the land was developed by the National Union which is an Apex Co-operative Society for the benefit of the members of three Societies including Royal Sacco and that each of the Societies were allocated its share of the houses according to their respective contributions.

103. Out of its contribution, Royal Sacco was allocated 91 houses, Razak Housing Co-Operative Society Limited got 52 houses and Progressive Step Housing Co-operative Society limited got 14 houses.

104. It is further deponed that the 1<sup>st</sup> Petitioner has personally caused a lot of havoc and harassment to the members of the other two Societies who are primarily women. Those are the ones who lodged the complaint a result of which the 1<sup>st</sup> Petitioner was charged in Criminal Case No. 601 of 2020.

105. The National Union contended that the actions by the 1<sup>st</sup> Petitioner have nothing to do with the case before the Tribunal as they are pure criminal activities visited upon innocent persons.

106. It was further deponed that the allegation that the National Union defrauded Royal Sacco is incorrect as the matter was determined in Machakos ELC HCC 222 of 2018, a fact well known to the Petitioners.

107. To the utter shock and surprise of the National Union, the Petitioners have been going to offices, media houses and even on social media spreading false, malicious, *mala fide* rumours and other scandalous stories about the National Union and the affordable housing projects which has benefited the lower income group of persons who would otherwise not afford housing.

108. According to the National Union, it has found out that the Petitioners have been collecting money from its members in the pretext that they will transmit to the National Union for them to be allocated houses. However, the Petitioners have failed to remit such monies to the National Union hence the criminality.

109. The National Union believed the investigations on the complaints from the individual members who have given their money should not be prohibited at the altar of an individual or group of individuals who have falsely obtained money from them and have failed to give them the houses they paid for.

110. It is contended by the National Union that the complainants also have constitutional rights which this Honourable Court should protect and not to be misled by the fictitious and selectively tailed stories of the Petitioners.

111. The National Union prayed that the Court dismisses the Petition and the application with costs and direct that the investigations to be completed.

**The 3<sup>rd</sup> Respondent's and Interested Party's submissions:**

112. The OCS and the National Union filed joint submissions. They expounded on their respective cases.

113. It was submitted that the Court ought to be extremely cautious in making its determination in the matter so as to avoid prejudicing the intended or pending criminal proceedings. That the Court ought not to usurp the constitutional and statutory mandate of the DPP and neither should it curtail with the investigatory mandate accorded to the Police.

114. It was also submitted that the Court nevertheless may intervene where the discretion is exercised unlawfully and in bad faith, for instance where it is being abused or being used for achievement of some collateral purpose which are not geared towards the vindication of the commission of a criminal offence as so held in *George Joshua Okungu & Another vs. The Chief Magistrates Court, Nairobi & Another (2014) eKLR*.

115. Further submissions were made that the Petitioners failed to prove any violations of their rights or at all. They submitted that it was trite law that a Petitioner who alleged violation of constitutional rights must demonstrate sufficiently the specific provisions/Articles of the Constitution alleged to have been violated. There is, as well, no evidence that the OCS has been abusing his discretion and/or acted in bad faith.

116. It was argued that the duty to investigate criminal complaints is anchored in Section 35 of the National Police Service Act which gives the police investigative powers and that in carrying out their duties the police should not seek the consent of any person or authority.

117. It was submitted that public interest demanded that crimes be investigated and those culpable be prosecuted. That, as a general rule it is not in public interest to stop the Police from investigating any criminal offence on the basis that such investigation is a threat to fundamental rights and freedoms because such investigations may lead to revelation of criminal activities.

118. Submissions were made that for the intended prosecution to be deemed as being unfounded, the evidence must be so manifestly weak so as to not disclose a prosecutable case or have no prospect for conviction, but that was not the case in the instant matter.

119. The parties also submitted that on the face of it, there is tangible evidence, which evidence is uncontroverted, that it was the Petitioners' actions that resulted in the transfer of the land from the National Union to Royal Sacco in circumstances that are unknown to the National Union.

120. On whether the Petitioners are entitled to the reliefs sought, it was submitted that whereas the Petitioners seek a declaration that the investigations and institution of criminal proceedings against them were a violation of their constitutional rights and for orders of *certiorari* quashing the proceedings, charge sheet and summons against the as well as orders prohibiting the Respondents from proceeding with the criminal prosecution, the facts in this case do not support such a position.

121. Reference was made to *Halsbury's Laws of England 4<sup>th</sup> Edn. Vol. 1(1) para 12 page 270* which states that: -

*The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus) ... are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders.*

122. In the end, it was submitted that the Petitioners ought not to jump the gun at an interlocutory stage by urging the Court to interfere, prematurely so, and stop the criminal prosecution.

#### **Issues for Determination:**

123. From the documents filed by the parties, the issues that arise for determination are: -

i. *A general discussion on general prosecutorial powers, Section 193A of the Criminal Procedure Code and abuse of Court process.*

ii. *Whether the Police should carry out investigations over the complaints laid before it, whether the DPP should make decisions on the investigations carried out by the Police and if answered in the affirmative, whether the Petitioners' rights have been variously infringed by the Police and the DPP in discharging the said duties.*

124. I will deal with each of the issues in seriatim.

#### **Analysis and Determinations:**

125. Before I deal with the issues herein, I wish to acknowledge and appreciate the research undertaken by the Counsel for the parties on this matter. There is no doubt that the research has covered all the pertinent areas which are salient to this matter and as such it makes the analysis

lighter.

126. Having said so, I will likewise make reference to some decisions referred to by the parties.

**(i) A general discussion on general prosecutorial powers, Section 193A of the Criminal Procedure Code and abuse of Court process:**

127. I recently discussed this issue in Nairobi High Court Constitutional Petition No. E033 of 2021 *Maura Muigana vs. 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.

128. As part of the introduction of the subject in *Maura Muigana vs. 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.

129. 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.*

130. 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.

131. 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.

132. 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 Shakhlanga Khwa Jirongo v Soy Developers Ltd & 9 others** [2021] eKLR.

133. 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 indeed an expression of mischief and dishonesty. This or another Court should never countenance such conduct for it brings the entire criminal justice into disrepute.*

134. 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] LLR 3090.*

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

[84] Furthermore, the Supreme Court of India in **R.P. 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.

135. 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.

136. 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 infeasible 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 Articles 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] What of the fact that it is admitted that the 2nd and 3rd 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.

137. 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 and 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 vs. 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 laissez-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 vs. 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 F.I.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction to the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor can it soft-pedal the course of justice at a crucial stage of investigation/proceedings.*

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

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 vs. 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 vs. 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 vs. 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.

138. And, in **Maura Muigana vs. 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 whom 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 vs. 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.*

51. 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 exculpatory evidence, In the case of *Republic v. Director of Public Prosecutions & Another ex parte Kaman/ Nairobi Judicial Review Application Nog 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 matters 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 -vs- 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.*

61. Still on abuse of Court process in using Court to settle personal scores, the Court in **Rosemary Wanja Mwangi & 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.

62. On the need for a Prosecutor to act within the law, the Court in **Thuita Mwangi & 2 Others vs. 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.*

63. 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...*

64. The above position was amplified in Nairobi High Court Miscellaneous Application No. 1769 of 2003 **Republic vs. Ministry of Planning and 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.*

65. 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.*

66. 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.

139. 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 vs. Stellan Consult Limited & 2 Others** case (supra) where I expressed myself thus: -

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

68. 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.*

69. 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.

70. 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.**

71. 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 MW 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...*

72. 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.

73. 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.

74. 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 -vs- 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 F.I.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction to the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor can it soft-pedal the course of justice at a crucial stage of investigation/proceedings.*

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

75. 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.*

76. The Learned Judges cited with approval its earlier decision in **Commissioner of Police & the Director of Criminal Investigation Department & another -vs- 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.

77. Further, the Court of Appeal in **Commissioner of Police and Director of Criminal Investigations Department vs. 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.

78. The High Court in **Kuria & 3 Others vs. 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).

79. 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.

140. In the same case, **Maura Muigana vs. Stellan Consult Limited & 2 Others** case (supra), I also dealt with the issue of abuse of Court process. This is what I stated: -

80. The subject of abuse of Court process was discussed by the Court of Appeal in **Muchanga Investments Limited vs. 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.

81. 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 E.R 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 not 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.

82. In *Nairobi Civil Appeal No. 70 of 2017 Pratulchandra 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 2<sup>nd</sup> 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 impartiality 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 2<sup>nd</sup> 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 2<sup>nd</sup> 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 vs. 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.

141. 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;

142. Having laid the legal and jurisprudential positions on the exercise of prosecutorial powers, the concurrent civil and criminal proceedings under Section 193A of the CPC and the subject of abuse of Court process, suffice to say that the analysis lays a sound basis for consideration of the rest of the issues which I will now look at.

**ii. Whether the Police should carry out investigations over the complaints laid before it, whether the DPP should make decisions on the investigations carried out by the Police and if answered in the affirmative, whether the Petitioners' rights have been variously infringed by the Police and the DPP in discharging the said duties.**

143. This issue carries three sub-issues. The first one is whether the Police should carry out investigations over the complaints laid before it. The second sub-issue is whether the DPP should make decisions on the investigations carried out by the Police and the third sub-issue is whether the Petitioners' rights have been variously infringed by the Police and the DPP in discharging the said duties.

144. I will deal with all the sub-issues together.

145. The mandate and powers of the police have been reiterated through the parties' pleadings, submissions and in the preceding issue.

146. There is no doubt that the Police service is a very critical partner in the criminal justice system. In carrying out its mandate under the Constitution and the law, the Police service principally ensures that law and order is maintained. As a result, the affairs of the country are carried out in an orderly manner and that creates an enabling environment for development not only for the citizens, but for all other relevant partners.

147. It is for such reasons that the Police service must always endeavour to discharge its duties. Likewise, all sector players should support the police service in order to achieve its objectives. One way of doing so is to allow the police the leeway to carry out its duties as long as it abides by the Constitution and the law.

148. As demonstrated in the preceding issue, Courts will only intervene and stop the police from carrying out their duties in very specific and clear instances. However, for the Court to do so, the onus of proof that the Constitution and the law is infringed lies on the Petitioner.

149. The conduct of constitutional Petitions is guided by the Constitution and 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.*

150. *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.*

151. The burden of proof on a Petitioner in a constitutional Petition was addressed by the Supreme Court in ***Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR*** 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 vs. 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.*

152. The National Police Service Act provides that one of the many duties carried out by the police is investigation of crimes. The investigations ordinarily begin either with the laying of a complaint or by the police on their own motion. In the event a complaint is laid, it is the duty of the police to carry out investigations. Once the investigations are complete, the police then make recommendations on the way forward in the matter and seeks the decision of the DPP.

153. The DPP reviews the evidence and on the basis of the law, makes a decision on whether to charge any suspect.

154. In this case, around 20 complaints were made to the police over the Petitioners. The police commenced investigations. Statements were and are still being recorded from several witnesses including the 1<sup>st</sup> Petitioner and the National Union.

155. According to the National Union, the Petitioners are engaged in criminal activities including house breaking and committing fraud and should not be allowed to take shelter under the guise of the matter before the Tribunal.

156. The OCS shares a similar position. To him, it is only after the investigations are carried out then it will be possible to decipher what ought to await the determination of the case before the Tribunal and what is criminal *per se*. The OCS is of the view that if a blanket order is issued in the matter that will visit an injustice to the complainants.

157. This Court agrees with the OCS and the National Union. To re-emphasize, the police ought to carry out the investigations with the Tribunal case in mind. They must be able to draw a line between what ought to await the determination of the Tribunal and what can be pursued as criminal activities. Indeed, the DPP is better placed to give the appropriate guidance.

158. A good example is at hand. The 1<sup>st</sup> Petitioner is charged in a criminal case at the Kangundo Law Courts on charges of house-breaking and theft in respect of one of the houses within the land allegedly sold by the National Union to Royal Sacco, although the National Sacco

disputes such sale. This Court does not see the nexus between that criminal case and the matter pending at the Tribunal. Even if it is true that the house in issue will eventually be decreed to belong to Royal Sacco, that does not mandate the Petitioners to commit the alleged activities which are in criminal in nature. Therefore, any order stopping the criminal case will visit an injustice to the complainant.

159. Further, if this Court is to gag the police form in any way dealing with any issue arising from the affairs of the Petitioners and third parties then that will be tantamount to creating a monster. The Petitioners will, hence, be accorded a free hand to even engage in criminal activities knowing for sure that the police will not intervene and nothing will happen to them. That is not a position which any Court ought to countenance in a country governed by the Rule of law.

160. This Court has carefully reviewed the parties' cases. There seems to be no persuasion in favour of the Petitioners' proposition that the police be stopped from carrying out investigations over the complaints laid against the Petitioners. Apart from contending that there is a pending case before the Co-operative Tribunal between Royal Sacco and the National Union, the Petitioners have not demonstrated the manner in which the police are alleged to either infringe their rights and fundamental freedoms or how they are acting contrary to the Constitution and the law.

161. Disputes before Courts are decided on the basis of the law and evidence. In the event no evidence is tendered, unless the law otherwise provides, a dispute is not likely to stand for it definitely lacks a legal leg. Such dispute collapses.

162. The contention by the 1<sup>st</sup> Petitioner is that he is usually summoned by the OCS over complaints laid against him and Royal Sacco. The summoning of the 1<sup>st</sup> Petitioner by the police and nothing more demonstrates no illegality. The police are under such a duty when a complaint is laid before them and unless legally estopped, they must discharge it. In any event, the police will only make recommendations and the matter referred to the DPP for further action.

163. There is, as well, no evidence that the DPP will not act in accordance with the Constitution and the law. The Petitioners are, therefore, being merely speculative. Such cannot be a basis of stopping any constitutional entity from discharging its mandate.

164. As a recap, in this matter the Petitioners have failed to demonstrate the manner in which their rights and fundamental freedoms are infringed and the Constitution contravened by the investigations carried out by the police over complaints lodged against the Petitioners.

165. In sum, the Petitioners have failed to prove that they are entitled to the prayers sought in the application and the Petition.

**Disposition:**

166. Having so found, this Court hereby makes the following final orders: -

- (a) The Petition and the Notice of Motion dated 22<sup>nd</sup> September, 2020 are hereby dismissed.**
- (b) The conservatory orders issued on 15<sup>th</sup> March, 2021 are hereby discharged forthwith.**
- (c) Costs be jointly and severally borne by the Petitioners.**

Orders accordingly.

**DELIVERED, DATED and SIGNED at NAIROBI this 27<sup>th</sup> day of January, 2022.**

**A. C. MRIMA**

**JUDGE**

**Judgment virtually delivered in the presence of:**

**Mr. Ikua**, Learned Counsel for the Petitioner.

**Miss. Kihara**, Learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

**Mr. Muriuki**, Learned Counsel for the Interested Party.

**Elizabeth Wanjohi** – Court Assistant.