



REPUBLIC OF KENYA



KENYA LAW
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Kangwana & 2 others v Director of Public Prosecutions & 3 others; Monarch Insurance Company Ltd & another (Interested Parties) (Constitutional Petition 34 of 2019) [2022] KEHC 170 (KLR) (28 February 2022) (Judgment)

Jared Benson Kangwana & 2 others v Director of Public Prosecutions & 3 others; Monarch Insurance Company Ltd & 2 others (Interested Parties) [2022] eKLR

Neutral citation: [2022] KEHC 170 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CONSTITUTIONAL PETITION 34 OF 2019
GV ODUNGA, J
FEBRUARY 28, 2022
IN THE MATTER OF THE ALLEGED CONTRAVENTION OF
ARTICLES 19, 20, 21, 22, 23, 24, 25, 28, 40, 64, 157 OF THE
CONSTITUTION OF KENYA 2010
AND
IN THE MATTER OF ARTICLE INFRINGEMENT AND
VIOLATION OF THE
AND
IN THE MATTER OF THE CONSTITUTION OF KENYA
(PROTECTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE
RULES 2013
AND
IN THE MATTER OF THE LAND ACT NO 6 OF 2012, LAWS
OF KENYA
AND
IN THE MATTER OF LAND REGISTRATION ACT NO 3 OF
2012 LAWS OF KENYA
AND
IN THE MATTER OF LAND CONTROL BOARD ACT CAP 302



LAWS OF KENYA
AND
IN THE MATTER OF THE LAW OF CONTRACT ACT CAP 23
LAWS OF KENYA
AND
AND IN THE MATTER OF COMPANIES ACT 2015
AND
IN THE MATTER OF INSURANCE ACT CAP 487 LAWS OF
KENYA
AND
IN THE MATTER OF THE PENAL CODE CAP 63 LAWS OF
KENYA

BETWEEN

JARED BENSON KANGWANA 1ST PETITIONER
BETH BONARERI KANGWANA 2ND PETITIONER
TBK 3RD PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT
DIRECTORATE OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT
CHIEF MAGISTRATE COURT, MAVOKO 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT

AND

MONARCH INSURANCE COMPANY LTD INTERESTED PARTY
SIKANANENE ASAI OLE SAUNYI GRACE NASERIAN ENE ASAI
SAUNYI INTERESTED PARTY

A mere lapse of time between an alleged commission of an offense and the charge does not ipso facto justify the halting of a criminal process.

The court held that it was not a mere delay in mounting a prosecution that justified the halting of criminal proceedings. Rather, it was the effect of the delay that would determine whether the proceedings would be stopped. The petitioners were required to show that the delay adversely impacted on their ability to defend themselves or that the lapse in time meant that a fair trial was not possible but in the circumstances of their case, they did not show that. However, the court held that the delay of almost three decades in commencing criminal proceedings against the petitioners meant that the proceedings would be unfair and contrary to the right to a fair hearing



especially when considered in light of the fact that the relevant transactional documents had been lost, misplaced or tampered with. The decision to prefer criminal charges against the petitioners was quashed.

Reported by Kakai Toili

Constitutional Law – fundamental rights and freedoms – right to fair hearing – right to fair trial – interests in which the right to a speedy trial was designed to protect – whether a mere delay in preferring criminal charges would warrant the halting of the criminal proceedings – where there had been a delay of almost 30 years between the alleged commission of a crime and the institution of criminal proceedings – whether the mere lapse of time between the alleged commission of the offence and the charge ipso facto justified the halting of the criminal process – Constitution of Kenya, 2010, articles 25 and 50.

Criminal Procedure – institution of criminal prosecutions – factors to consider in determining whether a prosecution was improper – what were the circumstances in which abuse of process justifying the grant of a stay of prosecution could arise – Constitution of Kenya, 2010, article 157(11).

Jurisdiction – jurisdiction of the High Court – jurisdiction of the High Court as a constitutional court – what was the role of a constitutional court in a case where a petitioner sought to quash criminal proceedings – Constitution of Kenya, 2010, articles 157(11) and 165(3)(d)(ii).

Judicial Review – judicial review proceedings – purpose – what was the purpose of judicial review proceedings – judicial review proceedings as a recourse/remedy in situations where it was alleged that powers to institute criminal proceedings were improperly exercised.

Words and Phrases – judicial review – definition of – judicial review was a central control mechanism of administrative law (public law), by which the Judiciary discharged the constitutional responsibility of protecting against abuses of power by public authorities – Judicial Review Handbook, 6th Edition by Michael Fordham at page 5.

Brief facts

According to the petition, the 1st and 2nd petitioners having ventured into business incorporated Kamu Company Limited (the company). The 3rd petitioner, who was the wife of the 1st petitioner, was appointed as a director of the company. The company purchased the suit property. It was averred that the vendor, the deceased, executed a transfer in favour of the company. In April 1990, the company lodged an application for transfer of the property in its favour, and the same was granted and the company was registered as the proprietor of the suit property.

The petitioners averred that they subsequently took the physical and vacant possession of the suit property and enjoyed continuous, peaceful, singular, and unchallenged occupation of the land from that time, for a period of 22 years, to the time that it transferred the property to the 1st interested party. It was further claimed that the 1st interested party had also held the uninterrupted possession of the land for an uninterrupted period of 7 years. The petitioners stated that to the best of their knowledge, the deceased died intestate in 2012 and that from the year 1990 he sold the property to the company to the year 2012 when he passed away, a period of 22 years, he neither placed any claim to the suit property nor visited, sought to occupy or obtain possession of the land knowing well that he had sold it to the company.

Upon the death of the deceased, his family commenced probate and administration proceedings. The petitioners claimed that in the application for confirmation of the grant of the estate of the deceased, the administrators indicated that the suit property belonged to the deceased at the time of his demise. It was pleaded that the confirmation of grant was invalid because the deceased had transferred ownership and possession of the land to the company. The petitioners, therefore, sought among other orders a declaration that in the prosecution of the petitioners, the 1st respondent, the Director of Public Prosecution (DPP) abdicated his constitutional duty to prevent and avoid the abuse of the legal process and a declaration that the prosecution of the petitioners before any meaningful investigations were undertaken violated the petitioners' right to a fair hearing.



Issues

- i. What was the role of a constitutional court in a case seeking to quash criminal proceedings?
- ii. What was the purpose of judicial review proceedings?
- iii. What were the factors to be considered before the institution of criminal prosecutions?
- iv. What were the interests which the right to a speedy trial was designed to protect?
- v. Whether mere delay in preferring criminal charges would warrant the halting of the criminal proceedings.
- vi. Whether mere lapse of time between the alleged commission of the offence and the charge *ipso facto* justified the halting of the criminal process.
- vii. What were the factors to be considered in determining whether a prosecution was improper?
- viii. What were the circumstances in which abuse of process justifying the stay of prosecution could arise?

Held

1. A constitutional court was not concerned with the innocence or guilt of the applicant but rather with the fairness of the process to which the applicant was being or had been subjected to. Where the court found that the process was unlawful or unfair, the court had the duty to stop the same in its tracks. On other hand as long as the process was being carried out in a lawful and just manner, the mere fact that there was a likelihood of an acquittal would not justify court interference.
2. A criminal prosecution which was commenced in the absence of proper factual foundation or basis was always suspect of ulterior motive or improper purpose. Before instituting criminal proceedings, there had to be in existence material evidence based on which the prosecution could say with certainty that they had a prosecutable case. A prudent and cautious prosecutor had to be able to demonstrate that he had a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution would be malicious and actionable.
3. Crimes had to be proved and punished, and a suspected criminal had to be dealt with expeditiously and decisively. A judicial system that was so porous that it permitted criminals to go scot-free was not worthy of its name. However, the process of arriving at the decision on whether a person had committed a crime had to in the words of article 47 of the Constitution of Kenya, 2010 (Constitution) be expeditious, efficient, lawful, reasonable and procedurally fair; anything less than that would not do. Public outcry ought not to be the determinant factor in determining the criminal process wave so that the tide of criminal prosecution was dictated by the direction the public wind blew.
4. Whereas the court was alive to the fact that the DPP was constitutionally mandated to determine the cases which met the threshold for a criminal prosecution, and that it was a mandate which ought not to be interfered with lightly. The court had the powers and the constitutional duty to supervise the exercise of the respondents' mandate whether constitutional or statutory as long as the challenge properly fell within the parameters of judicial review.
5. In arriving at its decision, the court had to avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial court. Similarly, the court in determining judicial review proceedings ought not to usurp the constitutional and statutory mandate of the DPP and the investigative agencies to investigate and undertake prosecution in the exercise of the discretion conferred upon them by the law and the Constitution.
6. The DPP derived his prosecutorial power both from the Constitution and the Office of the Director of Public Prosecutions Act. Whereas article 157(10) of the Constitution provided that the DPP would not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of their powers or functions, would not be under the direction or control of any person or authority, article 157(11) provided that in exercising the powers conferred by that article, the DPP would have regard for the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.



7. Since the promulgation of the Constitution of Kenya, 2010, the terrain under the prosecutorial regime had changed and the discretion given to the DPP was not absolute but had to be exercised within certain laid down standards provided under the Constitution and the Office of the Director of Public Prosecutions Act. Where it was alleged that those standards had not been adhered to, it behoved the court to investigate the allegations and make a determination. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by the court would be an abhorrent affront to judicial conscience and above all, the Constitution itself.

8. Where it was clear that discretion was being exercised with a view to achieving certain extraneous goals other than those legally recognised under the Constitution and the Office of the Director of Public Prosecutions Act, that would constitute an abuse of the legal process and would entitle the court to intervene and bring to an end such wrongful exercise of discretion.

9. According to the Judicial Review Handbook, 6th Edition by Michael Fordham at page 5, judicial review was a central control mechanism of administrative law (public law), by which the Judiciary discharged the constitutional responsibility of protecting against abuses of power by public authorities. It constituted a safeguard which was essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they acted lawfully; ensuring that they were accountable to the law and not above it, and protecting the rights and interests of those affected by the exercise of public authority power.

10. The complainants in the criminal proceedings did not swear any affidavit. The affidavits in opposition were sworn by the State counsel whose affidavit, apart from propounding legal issues was based wholly on the affidavit sworn by the investigations officer. Accordingly, that affidavit was unhelpful in so far as the factual issues were concerned.

11. From 1990 when the deceased sold the property to the year 2012 when he passed away, for a period of 22 years, he neither placed any claim to the property nor visited, sought to occupy or obtain possession of the land knowing well that he had sold it to the company. For a period of 22 years, the deceased lived without any indicative trace or suggestion of entitlement or declaration that he had any right or claim over that property and that at all material times, the company was in possession of the land and the title to the suit property until it was transferred to the interested party.

12. Evidence of extraneous purposes could also be presumed where prosecution was mounted after a lengthy delay without any explanation being given for that delay. A criminal prosecution would also be halted if the charge sheet did not disclose the commission of a criminal offence. A criminal prosecution that did not accord with an individual's freedoms and rights, such as where it did not afford an individual a fair hearing within a reasonable time by an independent and impartial court, would be the clearest case of an abuse of the process of the court. Such prosecution would be halted for contravening the constitutional protection of individuals' rights.

13. In deciding whether to commence or pursue a criminal prosecution the prosecutor had to consider the interests of the public and had to ask himself *inter alia* whether the prosecution would enhance public confidence in the law, whether the prosecution was necessary at all, whether the case could be resolved easily by a civil process without putting individual's liberty at risk. Liberty of the individual was a valued individual right and freedom, which should not be tested on flimsy grounds.

14. Three interests which the speedy trial right was designed to protect were to prevent oppressive pretrial incarceration; to minimize anxiety and concern of the accused, and to limit the possibility that the defence would be impaired.

15. Where a person against whom wrongdoing had been allegedly committed took an inordinately long period of time before lodging his complaint with the police and as a result crucial evidence was lost and or witnesses become unavailable, to subject the applicant to a process of prosecution would amount to nothing but persecution. That was not to say that the applicant was in such circumstances innocent. It was simply a



recognition that the criminal process had to be conducted in an atmosphere of fairness to both the accused person and the complainant and where the right to a fair hearing had been jeopardised by the long delay in the commencement of the criminal process thus placing the applicant's rights into jeopardy, such a process had to be discontinued.

16. It was not mere delay in preferring the charges that would warrant the halting of the criminal proceedings. Rather, it was the effect of the delay that determined whether or not the proceedings were to be halted. In the instant case, there was no allegation made by the petitioners to the effect that the delay had adversely affected their ability to defend themselves. In other words, the petitioners had to show that the delay had contravened their legitimate expectations of a fair trial.

17. Mere lapse of time between the alleged commission of the offence and the charge, did not *ipso facto* justify the halting of the criminal process. The onus was upon the applicant to satisfy the court that in the circumstances of the case, a fair trial would not be possible in the sense that he would be prejudiced as a result of the lapse of time. That about three decades in bringing a criminal offender to book was a long period of time was not in question. However, where due to such circumstances as the position held by the applicant in the criminal justice system or the Executive, it was not possible or the attempts to bring him to book were thwarted by his actions, the court would not readily accede to his contention that a fair trial was impracticable.

18. From the investigator's own version, some of the records relating to the consent of the land control board were missing due to poor record-keeping at the time. The complainants did not expressly claim that the petitioners had something to do with the missing records. Whether rightly or wrongly, title documents were issued in the names of the company which had since transferred its interests to the 1st interested parties.

20. If the complainants were interested in recovering the suit property, one would have expected them to institute civil proceedings for nullification of the titles to the entities as well. In absence of such proceedings, the petitioners could well be excused for taking the view that the criminal process was being used to achieve what ought to have been achieved through the civil process but for the fact that that avenue could be time-barred.

21. A prosecution was improper if;

1. it was for a purpose other than upholding the criminal law;
2. it was meant to bring pressure to bear upon the applicant/accused to settle a civil dispute;
3. it was an abuse of the criminal process of the court;
4. it amounted to harassment and was contrary to public policy; and
5. it was in contravention of the applicant's constitutional right to freedom.

22. An abuse of process justifying the stay of prosecution could arise in the following circumstances:

1. where it would be impossible to give the accused a fair trial; or
2. where it would amount to a misuse/manipulation of the process because it offended the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.

23. The intention under the Constitution was to enable the DPP to carry out his constitutional mandate without interference from any party. The court could not direct or interfere with the exercise by the DPP of his power under the Constitution or direct him on the way he should conduct his constitutional mandate unless there was clear evidence of a violation of a party's rights under the Constitution, or violation of the Constitution itself.

24. Where the constitutional right to a fair hearing as decreed under article 50 of the Constitution was violated or threatened with a violation, the court without necessarily pronouncing itself on the innocence or otherwise of the applicant was entitled to and had a duty to step in and it did not have to wait until the applicant's rights were actually violated before doing so. Any efficient legal system had to put in place machinery where equality of arms applied to both the complainant and the accused without placing one of the parties at an unwarranted disadvantage.

25. The people placed in charge of investigation and prosecution had to, in deciding whether to prefer criminal charges, ask themselves whether, in the circumstances, a fair trial was possible notwithstanding the material



placed before them. In other words, the police and the DPP ought not to have conducted themselves as if they were an appendage of the complainants. In exercising their discretion to charge a person both the police and the DPP's office had to take into account and had to exercise the discretion on the evidence of sound legal principles.

26. The mere fact that the applicant would be subject to a criminal process where he would get an opportunity to defend himself was no reason for allowing a flawed, unlawful and unfair trial to run its course. In the circumstances of the instant case, it would be unjust and contrary to article 50 of the Constitution to prosecute the petitioners for an offence which was allegedly committed nearly three decades ago particularly when both the complainants and the petitioners contended that some of the relevant transactional documents could have been lost, misplaced or tampered with and the person from whom the petitioners obtained their title to the suit property died some years after the transaction without taking up the issue himself.

Petition allowed; each party to bear its own costs.

Orders

- i. *A declaration was issued that in the prosecution of the petitioners, the DPP abdicated his constitutional duty under article 157(11) of the Constitution to prevent and avoid the abuse of the legal process.*
- ii. *A declaration was issued that the prosecution of alleged offences claimed to have been committed almost 30 years ago was a violation of the petitioners' right to a fair trial contrary to article 50 of the Constitution.*
- iii. *A declaration was issued that investigations of the petitioners by the 1st respondent and the 2nd respondent's institution of criminal proceedings against the petitioners in Criminal Case Number 854 of 2019 in the Chief Magistrate's Court, Mavoko was unlawful and comprised a violation of the petitioners' constitutional rights and was to that extent null and void.*
- iv. *An order of certiorari was issued quashing the decision of the 1st and 2nd respondents to prefer criminal charges against the petitioners under sections 317, 345, 349, 237 and 353 of the Penal Code with respect to the suit property contained in the charge sheet in the case of Republic v Jared Benson Kangwana, Beth Bonareri Kangwana and TBK in Mavoko Chief Magistrates' Court Criminal Case Number 854 of 2019.*
- v. *An order of prohibition was issued directed at the DPP prohibiting the prosecution of the petitioners for the alleged offences of conspiracy to defraud; forgery; making a false document, and uttering a false document, contrary to the Penal Code with respect to the suit property.*
- vi. *An order of prohibition was issued directed at the Chief Magistrates Court Mavoko, barring and forbidding her or any other judicial officer from hearing and /or proceeding in any manner with the conduct of Mavoko Chief Magistrates' Court Criminal Case Number 854 of 2019, (Republic v Jared Benson Kangwana, Beth Bonareri Kangwana and TBK) based on the facts related to the purchase and complaint by the 2nd interested party with respect to the suit property.*

Citations

Cases

Kenya

1. *Cape Holdings Limited v Attorney General & 2 others* Miscellaneous Civil Application No 240 of 2011; [2012] eKLR - (Mentioned)
2. *Commissioner of Police and the Director of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others* Civil Appeal 56 of 2012; [2013] KECA 182 (KLR) - (Explained)
3. *Githunguri v Republic* [1986] KLR 1 - (Explained)
4. *Guantai, Joram Mwenda v The Chief Magistrate Nairobi* Civil Appeal 228 of 2003; [2007] KECA 496 (KLR); [2007] 2 EA 170 - (Explained)
5. *Imison, Paul Stuart & another v Attorney General & 2 others* Petition No 57 of 2009 - (Explained)
6. *Imison, Paul v Attorney General & 3 others* Miscellaneous Civil Application No 1604 of 2003 - (Explained)



7. *Ivita v Kyumbu* [1984] KLR 441 - (Explained)
8. *Jirongo v Soy Developers Ltd & 9 others* Petition 38 of 2019; [2021] KESC 32 (KLR) - (Explained)
9. *Juma, Francis Anyango v Director of Public Prosecutions & another* Petition 160 of 2012; [2012] KEHC 2618 (KLR) - (Explained)
10. *Karan v Ochieng & 2 others* (Petition 36 of 2018) [2018] KESC 4 (KLR) - (Explained)
11. *Karmali, Mohammed Gulam Hussein Fazal & another v Chief Magistrate's Court Nairobi & another* Miscellaneous Civil Application No 367 of 2005; [2006] eKLR - (Explained)
12. *Koinange v Attorney General & others* [2007] 2 EA 256 - (Explained)
13. *Kotut v Judicial Commission of Inquiry into the Goldenberg Affairs* [2008] KLR 390 - (Explained)
14. *Kuria & 3 others v Attorney General* [2002] 2 KLR 69 - (Explained)
15. *Kuria, James v Attorney General & 3 others* Petition No 254 of 2016; [2018] eKLR - (Explained)
16. *Lalji, Diamond Hasham & another v Attorney General & 4 others* Civil Appeal 274 of 2014; [2008] eKLR - (Explained)
17. *M'ikunyua, Francis Kirima & 2 others (suing as the Chairman, Secretary and Treasurer on behalf of Zimman Settlement Scheme Society) v Director of Public Prosecutions & 4 others* Petition 461 of 2011; [2017] KEHC 9646 (KLR) - (Explained)
18. *Meixner & another v Attorney General* [2005] 2 KLR 189 - (Explained)
19. *Murungaru, Christopher Ndarathi v Kenya Anti-Corruption Commission & another* Civil Application 43 of 2006; [2006] KECA 341 (KLR); [2006] 1 KLR 77 - (Explained)
20. *Nakusa v Tororei & 2 others (No 2)* (2008) 2 KLR (EP) 565 - (Explained)
21. *Okungu, George Joshua & another v Chief Magistrate's Court Anti-Corruption Court at Nairobi & another* Petition Nos 227 & 230 of 2009; [2014] eKLR - (Explained)
22. *Oluoch, Thomas Mboya & another v Lucy Muthoni Stephen & another* Civil Case No 1729 of 2001; [2005] eKLR - (Explained)
23. *Onyango, Naftali Opondo v National Bank of Kenya Ltd* Civil Case 1550 of 2001; [2005] KEHC 1746 (KLR) - (Explained)
24. *Otieno, Leonard v Airtel Kenya Limited* Petition 218 of 2017; [2018] KEHC 9063 (KLR) - (Explained)
25. *Republic v Attorney General & 3 others ex parte Kamlesh Mansukhlal Damji Pattni* Judicial Review Miscellaneous Civil Application No 305 of 2012; [2013] eKLR - (Explained)
26. *Republic v Attorney General & another Ex-Parte Kipng'eno Arap Ng'eny* Miscellaneous Application 406 of 2001; [2001] KEHC 746 (KLR); [2001] KLR 612 - (Explained)
27. *Republic v Chief Magistrate's Court at Mombasa Ex Parte Ganijee & another* Miscellaneous Application 64 of 2001; [2002] KEHC 1120 (KLR); [2002] 2 KLR 703 - (Explained)
28. *Republic v Director of Public Prosecution & another ex parte Chamanlal Vrajlal Kamani & 2 others* Judicial Review Application No 78 of 2015; [2015] eKLR - (Explained)
29. *Republic v Judicial Commission of Inquiry into the Goldenberg Affair & 2 others ex parte Saitoti ?* 102 of 2006; [2006] KEHC 3533 (KLR) - (Explained)
30. *Republic v Kenya Revenue Authority & 2 others* Miscellaneous Application Judicial Review No 186 of 2013; [2013] eKLR - (Explained)
31. *Republic v Minister for Home Affairs & others ex parte Sitamze ?* 1652 of 2004; [2008] KEHC 2766 (KLR) - (Explained)
32. *Suchan Investment Limited v Ministry of National Heritage and Culture & 3 others* Civil Appeal No 46 of 2012; [2016] eKLR - (Mentioned)
33. *Tarus, Erick Kibiwott & 2 others v Director of Public Prosecutions & 7 others* Judicial Review Civil Application No 89 of 2014; [2014] eKLR - (Explained)

United Kingdom

1. *Allen v Sir Alfred McAlphine and Sons Ltd* [1968] 2 QB 229; [1968] 2 WLR 366; [1968] 1 All ER 543 - (Explained)



2. *Director of Public Prosecutions v Humphrys* [1977] AC 146; [1977] AC 1; [1976] 2 All ER 497; [1976] 63 Cr App R 95; [1976] 2 WLR 857 - (Explained)
3. *Regina v Horseferry Magistrates' Court ex parte Bennett* [1993] 3 WLR 90; [1994] 1 AC 42; [1993] UKHL 10; [1993] 3 All ER 138; (1994) 98 Cr App R 114 - (Explained)
4. *William and others v Spautz* [1992] HCA 34; (1992) 174 CLR 509 - (Explained)

India

RP Kapur v State of Punjab 1960 AIR 862; 1960 SCR (3) 311 - (Explained)

United States

Barker v Wingo 407 US 514 (1972) - (Applied)

Philippines

City of Devao v Department of Labour et al GR No L-19488 - (Explained)

Texts

Fordham, M., (Ed) (2012), **Judicial Review Handbook** Oxford: Hart Publishing Co 6th Edn p 5

Statutes

Kenya

1. Constitution of Kenya articles 19, 20, 21, 22, 23, 24; 25(c); 26(3)(a)(8); 47; 49(1)(a)(ii); 50(1) (2)(e); 156(1); 157(1)(6)(a)(10)(11); 162(2)(b); 165(3)(d)(ii); 169(1); 317; 349; 353; 357(a)- (Interpreted)
2. Evidence Act (cap 80) section 65- (Interpreted)
3. Fair Administrative Action Act (cap 7L) section 7(2)(1) - (Interpreted)
4. Magistrates' Courts Act (cap 10) section 5- (Interpreted)
5. National Police Service Act (cap 85) In general- (Cited)
6. Office of the Director of Public Prosecutions Act (cap 6B) section 4- (Interpreted)
7. Penal Code (cap 63) sections 237, 317, 345, 349, 353- (Interpreted)

Advocates

Ms Lukoye for the petitioner

Mr Ngetich h/b for *Ms Njeru* for the respondents

Mr Wamalwa for the 2nd and 3rd interested parties

JUDGMENT

The Parties

1. The 1st petitioner and 3rd petitioners herein, according to the petition, are husband and wife while the 2nd petitioner is their daughter.
2. The 1st respondent, the Director of Public Prosecutions (DPP), is established under article 157(1) of the [Constitution of Kenya 2010](#) and is governed by the [Office of the Director of Public Prosecutions Act](#) (Act No 2 of 2013) (ODPP Act) while the 2nd respondent is the Director of Criminal Investigations (DCI) and the head of the Directorate of Criminal Investigations whose mandate is prescribed under the [National Police Service Act](#), chapter 84 Laws of Kenya (NPS Act).
3. The 3rd respondent is a subordinate court established pursuant to article 169(1) of the [Constitution](#) and section 5 of the [Magistrates' Courts Act](#), No 56 of 2015 while the 4th respondent is the Attorney General (AG) of the Republic of Kenya and the principal legal advisor to the national government. His office is established under article 156(1) of the [Constitution](#).



4. The interested party, it was pleaded is a limited liability company established under the Companies Act and is engaged in the business of insurance underwriting in Kenya. The interested party is the registered proprietor of the property Land Reference Number 14754 (Inland Registry Number 48968/1) having acquired it from Kamu Company Limited in the year 2012.

The Petitioners' Case

5. According to the petition, the 1st and 2nd petitioners having ventured into business on December 23, 1980, incorporated Kamu Company Limited (hereinafter referred to as “the Company”), a limited liability company incorporated in Kenya under Certificate of Incorporation Number CPR C 21810. The 3rd Petitioner was however, appointed as a director of the company in 2014.
6. On or about the month of April 1990, the petitioners were approached by one Asai Ole Saunyi Lila (hereinafter referred to as the deceased) who was seeking to sell a piece of land located in and around Athi River, Machakos County. The deceased was introduced to the Company Limited by the late (Former Vice-president of the Republic of Kenya) Prof George Saitoti. Besides Mr Lila, the late Prof Saitoti introduced the 1st petitioner to other persons who sold land to the 1st petitioner hence this was not an isolated incident.
7. Upon introduction by the late Prof Saitoti, the parties negotiated for the sale of this land, described as Land Reference Number 14754, being premises comprised in the Grant registered in the Land Titles Registry at Nairobi as number IR 48968/1 which discussions were undertaken with the deceased who was the registered proprietor and a willing vendor thereof. As a result, the Company decided to purchase the said land at an agreed purchase price of Kshs 2,000,000. Subsequently a Sale of Land Agreement, with respect to this transaction, was drawn by the law firm of Kangwana & Company Advocates which Agreement was executed by all the parties. Later, upon dissolution of the firm of Kangwana & Co Advocates, the documentation with respect to this transaction was left with Lubulella & Associates who inherited all the files from Kangwana & Co Advocates, which was dissolved.
8. The 1st petitioner averred that the 1st instalment of Kenya Shillings Five Hundred Thousand Only (KS 500,000/=) was paid to the deceased sometimes in early March 1990, by the 1st Petitioner, in cash and in progression of the transaction, the deceased applied to the Purika Land Control Board for consent to transfer the said parcel of land to the Company which consent was granted on March 13, 1990. On April 4, 1990, the 1st petitioner paid the second instalment, which was the balance of the purchase price, in the sum of One Million Five Hundred Thousand Only (KS 1,500,000/=) to the vendor through a Debit Note executed by Mr Itotia K Kamau, then a manager at Transnational Bank Kenya Limited, Trans National Plaza branch, Nairobi on the account of Jared Benson Kangwana, the 1st petitioner.
9. It was averred that upon application and receipt of a Consent to transfer the property the Vendor, the deceased executed a transfer in favour of the Company which execution was attested by Mr Antony Lubulella, Advocate, then a partner in the firm of Kangwana & Co Advocates. On April 2, 1990 Kamu Company Limited lodged an application for transfer of the property in its favour and the same was granted and the Company was registered as the proprietor of Land Reference Number 14754 (Inland Registry Number 48968/1) and a title issued in the name of the Company.
10. The petitioners averred that upon entering into the agreement for sale of the Land Reference Number 14754 (Inland Registry Number 48968/1), paying for it and obtaining a Consent to transfer and a title in its name, Kamu Company Limited took the physical and vacant possession of the said land and enjoyed continuous, peaceful, singular and unchallenged occupation of the land since that time, for a period of 22 years, to the time that it transferred the property to Monarch Insurance Company, who are currently the owners and occupants of the land. Monarch Insurance Company have also held the



uninterrupted possession of the land for a uninterrupted period of 7 years, to date. To the best of their Knowledge, the deceased died intestate on July 31, 2012.

11. It was disclosed that from the year 1990, when the deceased, sold the property to the company, to the year 2012 when he passed away, a period of 22 years, he neither placed any claim to the property nor visited, sought to occupy or obtain possession of the land knowing well that he had sold it to the Company. It was noted that for a period of 22 years, the deceased lived without any indicative trace or suggestion of entitlement or declaration that he had any right or claim over this property and that at all material times, the Company was in possession of the land and the title to the property Land Reference Number 14754 (Inland Registry Number 48968/1, until it was transferred to the interested party.
12. It was pleaded that in the year 2010, the Company bought shares in an insurance company known as Monarch Insurance Company Limited in which the 1st Petitioner serves as a Director and on 6th May 2010, the Company entered into a share subscription agreement with the Monarch Insurance Company Limited in which the Company was permitted to subscribe to the un-allotted shares in Monarch Insurance Company Limited in consideration of a monetary payment and the transfer of the Land Reference Number 14754 to Monarch Insurance Company Limited. Pursuant thereto, on May 28, 2010 a transfer was registered in favour of Monarch Insurance Company, who are the current owners and occupants of the land and have held uninterrupted possession of the land for the past seven (7) years.
13. However, upon the death of the deceased, his family commenced Probate and Administration proceedings under Kajiado High Court Succession Cause 49 of 2016 in which Sikanene Asai Ole Saunyi and Grace Naserian Ene Asai Saunyi were appointed as Personal Administrators of the deceased's Estate. The petitioners learnt that in the application for Confirmation of the Grant of the estate of the deceased, the Administrators maliciously, mischievously and without colour of right indicated that the Land Reference Number 14754 (Inland Registry Number 48968/1) belonged to the deceased at the time of his demise.
14. It was pleaded that the confirmation of Grant in favour of the Administrators of the Estate of Mr Asai Ole Saunyi Lila – with respect to the Land Reference Number 14754 (Inland Registry Number 48968/1) – was flawed, incorrect and invalid because at the time of Confirmation of the Grant, and indeed at all material times, the deceased had transferred ownership and possession of this land to the Company and the title to this property was and has always been in possession of the Company.
15. To the petitioners, the allegations of conspiracy and fraud are founded on bare claims that because the family of the deceased could not find the title to the property Land Reference Number 14754 the same had therefore been illegitimately transferred to the Company. Further, it was pleaded that upon reading the statements of the widows of the late Mr Asai Ole Saunyi Lila, that is, Mrs Sikanene Asai Ole Saunyi and Mrs Grace Naserian Ene Asai Saunyi and the children Peter Tobiko Iyie Asai and James Kinayian it is clear that none of them knew the status of the land as at the time of the death the deceased. It is also clear from their statements that they had never visited the land since the family moved away to Kajiado.
16. Contrary to these accounts by the family members of the deceased's family, the investigating officers Jephchirchir Rael and Vincent Langat, in their statements, convey the position that before the deceased passed away he had confided to his widows that he had not sold Land Reference Number 14754. According to the petitioners, this significant variance between the assertions of the family members and the investigating officers demonstrates that the investigating officers set out and are intent on manipulating and misrepresenting facts to launch and institute a prosecution which is a complete travesty and abuse of the criminal justice process.



17. It was pleaded that on September 28, 2018, a group of persons visited the 1st petitioner in his offices at the Monarch Insurance Co Ltd and reported that they were agents, acting on behalf of persons who wanted to purchase the property Land Reference Number 14754 (Inland Registry Number 48968/1) and that they had met with the administrators of the Estate of the late Mr Asai Ole Saunyi Lila and were informed that the petitioners were in possession of the title to the property. The said group, it was pleaded, was said to be led by Mr David Muiru of Gimco Limited and represented by Wambui Njoroge Advocates. Though various discussions were held with Christine Njoroge Advocate, representing this group, on the sale of this land, nothing became of it.
18. According to the petitioners, they have since come to learn that the brains and driving force behind the attempts to sell the subject property is a person by the name Godfrey Saroni Kapoya who is indicated as a beneficiary in the Consent to the Mode of Distribution of the Estate of Mr Asai Ole Saunyi Lila. To the petitioners' best knowledge Godfrey Saroni Kapoya is not in any way related to the deceased and yet he is recorded as an intended beneficiary of 80 Acres of the land which the Administrators now seek to illegally wrestle out of the rightful owners. He is a key actor in the intermeddling of the ownership of this land and is a central player, even in the present attempts to prefer false and malicious charges against the petitioners.
19. To the petitioners, the present criminal charges against them is a further attempt, in the chain of malicious actions, seeking to wrestle the subject property from them. The contended that with respect to the 2nd and 3rd petitioners, no investigations or meaningful investigations have taken place and no statement has been taken from them in accordance with the law. In the premises the charges against them are premature, premeditated and not a result of any consequential search for the truth in advancement of justice. Further, the charges against the petitioners are a flagrant abuse of the law, procedure and usage regarding investigations as the 1st respondent has not conducted a balanced investigation and has allowed himself to be misled and misused by the Administrators of the Estate of the late Mr Asai Ole Saunyi Lila and that the 1st Respondent has placed himself under the control and whims of the said Administrators.
20. It was their case that in additional advancement of their ill will, the administrators falsely and deceptively made a report to the 2nd respondent that the original title document to Land Reference Number 14754 (Inland Registry Number 48968/1) registered in the name of the deceased was lost and/or stolen and/or missing. More allegations were made leading to the arrest of the petitioners. Despite the Petitioners informing the 1st respondent that the transfer with respect to the subject land was done in a lawful manner and based on a legally binding contract, the 1st and 2nd Respondents directed the indictment and prosecution of the Petitioners before the Mavoko Chief Magistrates Court in Criminal Case Number 854 of 2019 with respect to Land Reference Number 14754 (Inland Registry Number 48968/1) for various offences ranging from: -
1. Count I-Conspiracy to defraud contrary to section 317 of the Penal Code
 2. Count II-Forgery contrary to section 345 as read with section 349 of the Penal Code
 3. Count III- Making a false document contrary to section 357 (a) of the Penal Code, to
 4. Count IV- Uttering a false document contrary to section 353 of the Penal Code.
21. The 3rd petitioner states that despite the fact that she was an 8-year-old minor at the time of the alleged commission of the offences claimed, in 1990, and further in spite of the fact that she became a director of the Company in the year 2012, facts well known to the 1st and 2nd respondents, she has been charged with offences wherein she is an absolute stranger and innocent non-participant to the events and



facts complained thereto. To the petitioners, the complaints made before the 1st and 2nd respondents were generated and crafted seven (7) years after the demise of the vendor. It was their case that in instigating the impugned criminal proceedings the 1st and 2nd Respondents failed to take into account relevant matters such as the ownership of the parcel of land; and that a criminal trial cannot determine ownership of land, which is the explicit preserve of the Environment and Land Courts established under article 162(2)(b) of the *Constitution*.

22. According to the petitioners, the process of investigation and institution of the charges against them was biased and in favour of the complainants and did not take cognisance of or the preponderance of evidence exonerating them from any wrongdoing or at all in violation of article 47 of the *Constitution* and contrary to clear, exculpatory explanations and documentary evidence absolving the petitioners. Further, the 2nd and 3rd petitioners contended that the 1st respondent did not undertake any investigation into the complaints raised by the Administrators of the Estate of the late Mr Asai Ole Saunyi Lila as the officers of the 1st respondent did not take any testimony from them and only administered a charge and caution statement for purposes of presenting them before the criminal court. They asserted that in undertaking a prosecution before completion of the investigations the 2nd respondent acted in violation of the 1st and 2nd petitioner's constitutional rights as he preferred charges before reviewing any evidence presented by them. In the premises the 2nd respondent acted in violation of the petitioners' fair trial rights.
23. In the petitioners' view, on the available evidence, the decision to prosecute them is malicious, ill intended and is contrary to the information available to the 1st and 2nd respondents and is a manifestly malicious prosecution as it is against all tenets of justice, fairness and is in violation of article 47 and article 157 (11) of the *Constitution*. The contended that in prosecuting them, the 1st and 2nd respondents have taken into account extraneous considerations and or failed to take into account relevant considerations and in so doing acted in abuse of their powers and in violation of the fundamental rights of the petitioners.
24. The petitioners' case was that the prosecution is intended to pave the way for a claim over this land, a claim that should be made in the civil courts. They maintained that the impugned prosecution is a premeditated technique to embarrass the petitioners and coerce and force them to surrender a legitimately and legally owned property. It was the petitioners' case that the complainants, maliciously, made a report on this alleged wrongful acquisition of the property when they learnt that they cannot sustain a civil suit over this property which the petitioners have held a continuous possession of over 29 years. The instant prosecution, their contended, is an ill-advised attempt by the 1st and 2nd respondents to criminalize a civil matter with the aim of assisting a civil litigant and on this score this court must intervene and prevent an abuse of the criminal justice process.
25. It was reiterated that despite all the facts leading to this matter being availed to the 1st and 2nd Respondents, the same have been conveniently ignored by the investigating officer in forming his opinion or arriving at his decision to institute Criminal Proceedings against the petitioners hence it is clear that the procedure followed was flawed, laced with malice and actuated by extraneous reasons.
26. The petitioners believed that the intervention of this court is the only remedy available to the petitioners to stop a deliberate affront and violation of their constitutional rights to a fair process devoid of intimidation, harassment and malice. To them, separate from the malicious intent of the 1st and 2nd respondents, the inordinate delay – a period of almost 30 years – which has passed from the time of the alleged commission of the criminal acts claimed and the prosecution of the present charges greatly compromises the petitioners' defence to the accusations as memory has certainly lapsed and critical documents lost and or destroyed in the ordinary course of business. The long delay, running into



29 years since the alleged commission of the criminal acts, has certainly contravened the petitioners' legitimate expectations to a fair trial, contrary to article 50 of the *Constitution*. It was therefore the petitioners' belief that the institution of the present criminal charges is motivated by a desire to achieve a collateral purpose - coerce them to submit to an illegitimate civil claim over the subject property hence their prosecution is not only an abuse of the court process but is oppressive and vexatious and is motivated by an ulterior purpose. Their maintenance is a travesty of justice epitomised by the manifest manipulation of the criminal justice process by the complainants who have tried and failed to obtain possession and ownership of the subject land by other means.

27. The petitioners therefore sought:

- (i) A declaration that in the prosecution of the petitioners, the Director of Public Prosecution abdicated his constitutional duty under article 157(11) of the *Constitution of Kenya 2010* to prevent and avoid the abuse of the legal process.
- (ii) A declaration that the prosecution of the petitioners in Mavoko Chief Magistrates Criminal Case Number 854 of 2019 before any meaningful investigations were undertaken violates the petitioners right to a fair trial and constitutes an infringement of article 25 as read together with article 50 of the *Constitution* and is therefore null and void.
- (iii) As against the 1st and 2nd respondent and in favour of the 2nd petitioner, a declaration that the prosecution of the 2nd petitioner for offences allegedly committed when she was a minor and not a director of Kamu Company Limited is factually and legally unsound, erroneous and cannot be maintained.
- (iv) A declaration that the prosecution of alleged offences claimed to have been committed almost 30 years ago is a violation of the petitioners' right to a fair trial contrary to article 50 of the *Constitution*.
- (v) A declaration that investigations on the petitioners by the 1st respondent and the 2nd respondent's institution of criminal proceedings against the petitioners in Criminal Case Number 854 of 2019 in the Chief Magistrate's Court, Mavoko is unlawful and comprise a violation of the Petitioners constitutional rights and is to that extent null and void.
- (vi) A declaration that a dispute over 'the use and occupation of and title to land' is the preserve of the Environment and Land Courts established under article 162(2)(b) of the *Constitution*.
- (vii) An order of *certiorari* to remove and bring to this honourable court and to quash the decision of the 1st and 2nd respondents to prefer criminal charge against the petitioners under sections 317, 345, 349, 237 and 353 of the Penal Code with respect to Land Reference Number 14754 (Inland Registry Number 48968/1) contained in the charge sheet in the case of *Republic v Jared Benson Kangwana, Beth Bonareri Kangwana and TBK* in Mavoko Chief Magistrates' Court Criminal Case Number 854 of 2019.
- (viii) An order of prohibition directed at the Director of Public Prosecutions prohibiting the prosecution of the petitioners for the alleged offences of conspiracy to defraud; forgery; making a false document, and; uttering a false document, contrary to the Penal Code with respect to the property Land Reference Number 14754 (Inland Registry Number 48968/1)
- (ix) An order of prohibition directed at the Chief Magistrates Court Mavoko, barring and forbidding her or any other judicial officer from hearing and /or proceeding in any manner with the conduct of Mavoko Chief Magistrates' Court Criminal Case Number 854 of 2019, (*Republic v Jared Benson Kangwana, Beth Bonareri Kangwana and TBK*) based on the facts



related to the purchase and complaint by Sikinane Asai Ole Saunyi with respect to Land Reference Number 14754.

- (x) The petitioners be awarded damages for violation of their constitutional rights.
 - (xi) Interest on (x) above at courts rates until payment in full.
 - (xii) Costs of this petition and interest thereon until payment in full.
 - (xiii) Such other order(s) as this honourable court shall deem just.
28. In support of the petition, the 1st petitioner swore an affidavit in support thereof in which he reiterated the foregoing and also relied on the affidavit sworn by Itotia Kamau Kihuria, a retired banker, who in the year 1990, was working as a branch manager, Transnational Bank, Nairobi.
29. According to him, Mr Jared Kangwana was the executive chairman of the Transnational Bank by then. On April 4, 1990, Mr Kangwana called him and informed him that he was sending a Mr Asai Ole Saunyi Lila whom he should pay the sum of KS 1,500,000 on the bank's Suspense account and assign it to J B Kangwana Account. Accordingly, a debit voucher was raised and taken to him for signature which he executed. Thereafter Mr Lila was paid and he signed the voucher on the back of it as, this was the practice.
30. Mr Asai Ole Saunyi Lila then collected the money over the counter, in cash. He confirmed an extract of the JB Kangwana schedule of payments which he confirmed to be true. He also confirmed a letter from the Transnational Bank dated October 16, 2019 showing the payment of KS 1,500,000 to be true. He averred that the sum of KS 1,500,000 could not have been paid out of the suspense account without his authority as the branch manager. He stated that a payment on account of Mr. Kangwana was not uncommon as he had made several of such payments on the request and instructions of Mr Kangwana.

1st Interested Party's Case

31. On behalf of the 1st interested party, Monarch Insurance Co Ltd. its Chief Executive Officer, Stephen Okundi Olweya, deposed that on May 6, 2010, Kamu Company Limited entered into a share subscription agreement with the Monarch Insurance Company Limited in which Kamu Company Limited was permitted to subscribe to the uncalled shares in Monarch Insurance Company in consideration of a monetary payment and the transfer of Land Reference Number 14754 (Inland Registry Number 48968/1 Monarch Insurance, the Interested Party herein.
32. On May 28, 2010, a transfer of Land Reference Number 14754 (Inland Registry Number 48968/1) was effectively registered in favour of Monarch Insurance Company, who are the present owners and current occupants of the said parcel of land and have enjoyed quiet possession for seven (7) years.
33. He deposed based on information that on May 3, 2017 the 2nd interested parties, under Kajiado High Court Succession Cause 49 of 2016 (Probate and Administration) applied to be appointed as administrators of the Estate of the late Asai Ole Saunyi Lila on 3rd Mya 2017 and indicated the property, of Land Reference Number 14754 (Inland Registry Number 48968/1), as part of the late Asai Lila's Estate. However, at the time the 2nd Interested Parties were applying for administration of the Estate of the late Asai, the Monarch Insurance Company had been in ownership of the subject property for the period of 7 years, a fact that was appropriately indicated in the records at the lands registry and anyone who cared to check must have seen this position. It was therefore erroneous, dishonest and illegal to list this property as part of the Estate of the late Asai.
34. It was his view that the judge who dealt with the application for administration in the High Court in Kajiado confirmed the distribution of the property of Land Reference Number 14754 (Inland Registry



- Number 48968/1) without evidence ownership of the land. As a result of this, he averred that the Petitioners herein were maliciously prosecuted by the 1st and Second Respondents for a charge of fraud and conspiracy to defraud.
35. He maintained that the said purchase of Land was valid as evidenced in the share subscription agreement together with the transfer instrument. (Provide documentation) and that before the 1st interested party entered into any dealings on this property, they undertook extensive due diligence on the ownership and possession of the property, and were satisfied that no dispute or claim was pending on the land. He disclosed that the 1st interested party, a bona fide purchaser, undertook a search of the property records, inspected it to ascertain its physical location, person, if any, in occupation, developments, buildings and fixtures thereon, among others and were content that Kamu Company Limited are the true owners of the property. To him, there was no doubt that the property, at the time of transfer, belonged to Kamu Company Limited because conclusive proprietorship of land lies with the Certificate of Title or Certificate of Lease.
 36. Upon being satisfied, a share subscription agreement was determined with Kamu Company Limited wherein soon afterwards, a transfer instrument was executed.
 37. It was his position that based on the facts herein it will be in the interests of justice to allow the interested party to enjoy a quiet Possession of Land owing to the fact that the interested party is an Innocent Purchaser for Value without Notice of any wrong dealings, if at all.
 38. He therefore sought that the Petition herein be allowed and that the orders sought by the petitioners herein be granted to protect the interest of the 1st interested party herein.
 39. Ruth Wamuhu Ngugi the General Manager /Operations of the 1st interested party also deposed that in 2010 Kamu Company Limited entered into a share subscription agreement with the 1st interested party in which Kamu Limited was permitted to subscribe to the uncalled shares in Monarch Insurance company in consideration of a monetary payment and the transfer of Land Reference Number 14754 (IR No 48968/1 Monarch Insurance. According to her sometime a man and women visited their offices and informed her that they're Investing Officers investigating issues in relation to the land under LR No 14754 (IR No 48968/1.)
 40. The lady officer whom she later learnt to be called Jephchirchir Rael menacingly and with sublime contempt amidst all present demanded of the chairman (the 1st petitioner) to record a statement with her, accusing him of being a fraudster who steals from windows and threatened him with arrest if he didn't record the statement. According to the deponent, the chairman sat down with her and while recording the statement, he informed her that the land had been transferred to the 1st interested party and told her to see the deponent for the statement since she was the most senior officer at the time.
 41. She deposed that soon thereafter, the two officers sat down with her and recorded a statement from her but insisted that she had to take a statement from the chairman the 1st Petitioner. Thereafter she proceeded for maternity leave and that sometimes during her leave received a phone call from 0721388712 by Vincent Langata who was among the two-officers requesting her to inform the chairperson to go to Athi River Station and record the statement. She informed him that she was still on leave while the Chairman was out of the town but, that as soon as he returned, she would inform him. She disclosed that upon return from maternity leave she received a phone call from Tafash Mohammed, Deputy DCIO Athi River and she alerted the Chairman of the Interested party who proceeded and attended the meeting recording a statement as requested. The chairman honored the phone call and appeared before them. She therefore denied the allegations that they did not appear before the Investigating officers.



42. According to her, the interested party has been in quite possession of the said land for a very long time. Therefore, the respondents are trying to litigate a land matter using the criminal court which amounts to abuse of court process and infringes on the rights of the Petitioners together with the Interested Parties.

43. She similarly sought for the Petition to be allowed as prayed

1st Respondent's Case

44. In opposing the application, the 1st respondent relied on an affidavit sworn by Felister Njeru a Prosecution Counsel at the Office of Director of Public Prosecutions. According to her, a report was made to the 1st respondent of a lost land title deed by one Leonard Kiranto Asai in relation to LR No 14754 (IR No 48968) the subject of this petition. PC Jepchichir Rael was then directed to commence investigations. The deponent then proceeded to regurgitate the contents of the affidavit sworn by the said PC Jepchichir Rael.

45. Upon being convinced by the evidence on record, that the same indeed proves that the petitioners committed the offences recommended, the 2nd respondent proceeded to charge the petitioners before the 3rd respondent. It was averred that the 2nd respondent did not err in preferring the charges against the petitioners before the 3rd respondent and that he acted on the sufficient, cogent and corroborative evidence gathered by the 1st respondent to arrive at this decision.

46. According to the deponent, under article 157 (6)(a) of the Constitution the 2nd respondent is empowered to institute and undertake Criminal Proceedings against any person before any court-other than a court martial that have been instituted or undertaken by another person or entity.

47. The deponent also associated herself with the contents of the affidavit sworn by Grace Nasenani Ene Asai Saunyi dated 2nd March 202 confirming that the deceased acquired the suit land on 11th December 1989 and from that time onwards he lived there with his family and that most of his elder children were born and brought up from the said location. According to her, the proceedings are a ploy aimed at acquiring the suit land from the petitioners.

48. It was averred that based on the investigations conducted, it was found that all the documents purported to have been executed by the deceased were not authored by him all the transactions alleged to have been conducted by the deceased are not genuine making them illegal and criminal in nature, hence the charges levelled against the petitioners.

49. The deponent denied that the 3rd respondent was a minor and that she was charged without a statement being recorded from her and that by virtue of her being a director of KAMU that was implicated with irregularities during investigations, she was rightfully charged.

50. The deponent maintained that the 2nd respondent has sufficient evidence to prove this case and sought that this petition be dismissed to enable him avail the same before court.

51. In response to the affidavit sworn on behalf of the interested party by Ruth Wamuhu Ngugi, the deponent's averments were merely argumentative and assertions of legal position.

2nd Respondent's Case

52. On behalf of the 2nd respondent, PC Jepchichir Rael, averred that she was instructed by her DCIO, Mr Kipkorir to act on a referred complaint from DCI Headquarters by one Leonard Kiranto Asai who is one of the sons and heir to the estate of his father, the late Asai Ole Sainyi. She was tasked with



- the investigations work jointly with her colleague No. 69585 CPL Vincent K. Langat who also does investigation work.
53. According to her, the complaint related to LR No 14754 (IR No 48968) situated within South of Athi River whereby he stated that the land had been transferred to Kamu Limited and then to Monarch Insurance without the family's knowledge. Investigations were then commenced immediately and through Leonard the deponent was able to summon the other family members who included the two surviving widows of the late Asai. From the statements, it was averred that it was clear the late Asai had three wives, the first one being deceased.
54. The deceased also had a large parcel of land in Kajiado and Machakos County in Athi River and that before his demise in 2012, the late Asai had confided in his three wives that he had not sold any of his land parcels and that each wife was keeping the title of the land allocated to her. And in respect to the land in question the title was kept by the first wife. According to them, the late Asai and his family lived in Embakasi Athi River until the year 1986 when they relocated to Kajiado after the government directed them to leave as they were living next to the game park and that the family lived in Kajiado knowing their land in Athiriver was intact until the demise of their father in 2012. Following his death, the family filed for succession vide succession cause No 49/2016 at the Kajiado High Court and the land in question was also listed in the list of properties of the deceased for distribution. However, when the succession matter was proceeding the family noted that the title to the land in question was missing and the family tasked Godfrey Saroni Kapoya to assist in tracing the whereabouts of the title as only a copy of the same could be traced.
55. According to the deponent, on October 15, 2018she wrote to the Ministry of Lands in Nairobi requesting to be issued with a certified copy and subsequently received the results that the land in question had been transferred to Kamu Limited at Kshs 2,000,000/= on 02/04/1990 and later to Monarch Insurance Company Ltd for Kshs 100,000,000/= on 28/05/2010. She then sought to know who were the directors of Kamu Ltd which she did establish. On December 17, 2018, she sought to know from the government printers seeking whether the family had placed a notice on the Kenya Gazette and received Gazette Notice dated 10/01/2019 indicating a succession cause No 49/2016. She also did a letter to the Registrar High Court Kajiado where the succession matter was proceeding and requested for a copy of the typed proceedings which she received and which touched the title in question. On May 14, 2019, she proceeded to Monarch offices in Lavington where we met the director of Kamu, Mr. Hon Jared Benson Kangwana, seeking to clarify how he acquired the land in question and during the conversation Mr. Kangwana became irritated and arrogant and claimed he would incriminate himself and directed the general manager Ms Ruth Wamuhu to record the statement on his behalf and instructed Ruth to give them the transfer document B-7(i) to B-7(iv). She then proceeded to the lands office to obtain the land transfer documents.
56. On May 16, 2019she wrote a letter to Purka land control board to establish the minutes of the meeting held on March 13, 1990but was informed that the records were not available due to poor record keeping at that time. On June 11, 2019she wrote a letter to Registrar of Persons Nairobi to obtain a printout (marked B-2) and subjected it to a document examiner through a memo to establish whether the signatures were the same and upon examination, it was established that the signatures on the transfer were done by different authors when compared with the one on the printout. Coupled with the above evidence she did letters dated 18/06/2019 and 26/06/2019 seeking to place a caveat on the land in question and also a surveyor to show the location of the land in Machakos/Athiriver.
57. At the end she found from her investigations that the purchase and transfer of LR No 14754 (IR No 48968(1) did not follow the due process and she recommended to the 1st respondent to have the Petitioners charged with the offences in question and upon perusal of the file and examination of the



evidence recorded, the 1st respondent directed the petitioners to be charged with the offences that they are facing before court. It was therefore her case that the charges facing the petitioners were properly before the 3rd respondent and they do not infringe on any rights of the accused persons/petitioners and that the 1st and 2nd respondents have overwhelming evidence to prove the said charges beyond any reasonable doubt.

Petitioners' Rejoinder

58. In a rejoinder to the affidavit sworn by affidavit of Jepchirchir Rael, the petitioner deposed that the same are mere presuppositions, assumptions and innuendo bereft of factual substance. According to him, neither of the 2nd Interested parties have stated, in their statements that before his death the late Asai had confided in his wives that he had not sold the property subject of this petition hence it is clear that PC Jepchirchir is making up a story to support her bare assertions.
59. Further, it is clear, from the recorded statements, that none of the family members of the late Asai Ole Saunyi allege that the title deed to the property has been forged and their position is that the title deed is lost/misplaced.
60. He reiterated that the sale and transfer of the property LR No 14754 (Inland Registry No 48968/1 to Kamu Limited was undertaken by the owner, the late Asai Ole Saunyi at a time when there was no legal requirement for either spousal or family consent. He denied that the family of Asai Ole Saunyi lived on the subject property at any time in the past. And asserted that Kamu Limited purchased the property LR No 14754 (Inland Registry No 48968/1 in 1992 and assumed quiet possession of it until the same was transferred to The Monarch Insurance Co Ltd. There has never been any claim to the property whatsoever and nobody, including the 2nd Interested Parties ever visited the farm at any time, even during the pendency of these proceedings.
61. He noted that from the letter of consent to transfer the property, LR No 14754 (Inland Registry No 48968/1, annexed as exhibit B-11 and produced by PC Jepchirchir, that the application to transfer the property was made by the late Asai Ole Saunyi. The consent to transfer the property was issued on March 13, 1990 and indicates the purchase price for the property as Kshs 2,000,000, which accords with his evidence on the matter.
62. He insisted that the 2nd interested parties, prompted, instigated and buoyed by support from certain shadowy persons led by one Godfrey Saroni Kapoya, are pursuing a gamble to employ the criminal justice system to wrestle from the petitioners a property legitimately purchased from the late Asai Ole Saunyi. He noted that it is curious that whilst the DCIO made recommendations that the said Godfrey Saroni Kapoya be charged, this has not been fulfilled for the simple reason that he is a co-conspirator in the trumped up criminal charges against the petitioners. He reiterated that if there was any iota of truth in the allegations by the 2nd interested parties, they should have utilised the Environment & Land Courts, the legal forum for litigation of land matters, to prove their hollow allegations and insisted that the criminal proceedings against the petitioners are a ploy, ruse and subterfuge to obtain the land LR No 14754 (Inland Registry No 48968/1, by other means. He reasserted that the charges against the 3rd petitioner cannot be sustained because, firstly, she was a minor and secondly not a director of Kamu Limited, at the time of the alleged offences. In addition, the 3rd petitioner was charged without the 1st respondent taking any statement from her.

Petitioners' Submissions

63. It was submitted on behalf of the petitioners that it is now settled law that for the court to interfere with the decision of the Director of Public Prosecution there must be sufficient proof that the DPP's action or decision is actuated with malice made in bad faith therefor *ultra vires* and amounts to abuse



of office. However, the Director of Public Prosecution does not have blank cheques to do what he wishes regardless of the law. He is bound by the Constitution and where there is clear and sufficient proof of such contravention of the law, the court does not hesitate to set such orders aside. In support of this position they relied on the case of Diamond Hasbam Lalji & another v Attorney General & 4 others [2018]eKLR where the Court of Appeal held in Paras 42 and 45 as follows;

“The burden of proof rests with the person alleging unconstitutional power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision...in considering the evidential test, the court should only be satisfied that the evidence collected by the investigative agency upon which the DPP’s decision is made establishes a *prima facie* case necessitating prosecution. At this stage the courts should not hold a fully-fledged inquiry to find if evidence would end in a conviction or acquittal. That is the function of the trial court. However, a proper scrutiny of the facts and circumstances of the case are absolutely imperative”

64. According to the petitioners, their arraignment in Mavoko Chief Magistrate Cri Case No 854 of 2019 before any meaningful investigation were taken is suspect of ulterior motive and is a violation of the petitioners’ rights to a fair trial and constitutes an infringement of art 25 and 50 of the Constitution and is null and void. The fact that the “sponsor” of the criminal case one Godfrey Saroni Kapoya, who is not related to the deceased in anyway is listed as a beneficiary of 80 Acres of the land, which property the administrators now seek to wrestle out of the rightful owners tells a sad story on the DPP’s decision to prosecute. Godfrey Saroni Kapoya is at the centre of the false and malicious charges which the petitioners submit are an attempt, in seeking to wrestle them out from the property without proving the allegations, if any, against the petitioners in the Environment & Land Court.
65. Further, no investigations or meaningful investigations took place and no statement was taken from the 2nd and 3rd petitioners in accordance with the law which renders the charges preferred against them premature, premeditated and not resultant of a reasonable and unbiased search for the truth in advancement of justice. Consequently, it was submitted that the recommended prosecution is based on insufficient evidence which cannot sustain a conviction and reliance was placed on the case of R v Attorney General Exparte Kipngeno Arap Ngeny HCCC Application 406/2001 where the court held that criminal prosecution not based on factual foundation is suspect of ulterior motive or improper purpose.
66. It was submitted that the 1st & 2nd respondents abused their discretion in recommending and commencing prosecution against the petitioners since one Godfrey Saroni Kapoya is the mastermind of this illegitimate process of repossession of land through criminal prosecution. To the Petitioners, the fragrant abuse of process and procedure and a casual approach towards investigations all point to an illegality. What is clearly visible is that, the 1st respondent placed themselves under the control/direction of the said alleged Godfrey Saroni Kapoya and the alleged administrators. It goes without saying that charging a minor as stated above means, that the respondents acted irrationally and unreasonably by failing to take into account all relevant factors of this case. Their conduct defeats all logic and this court has jurisdiction which it must deploy to stop this.
67. According to the petitioners, abuse of court takes several forms, one of which is where power is exercised for a collateral purpose without adequate justification and that a power that is being exercised arbitrarily is a power that is being abused. It was submitted that failure to call all the respondents for questioning before the respondents proceeded to charge them is irrational and amounts to harassment. At best it would have been discovered that the 3rd petitioner was still a minor at the time. A careful investigation would even have revealed the age of the respondent and a rational conclusion not to



- charge the 3rd petitioner would have been reached. However, because the respondents were not freely exercising their discretion, they proceeded to drag the petitioners without a careful investigation.
68. The court was urged to find the 1st & 2nd respondents were in abuse of their office and that they acted in a discriminatory manner hence their decision should be quashed and reference was made to the cases of *George Joshua Okungu and another vs CM'S Court at Nairobi & another* [2014] eKLR and *James Kuria & 3 others v AG & 3 others* [2018] eKLR.
 69. It was submitted that for the office of the DPP to exercise its powers under the constitution, the power has to be exercised fairly and reasonably and not exercised arbitrarily or oppressively. Therefore, to institute criminal proceedings against a person charging him with offences allegedly committed over 30 years ago is vexatious and harassing; and/or an abuse of the process of court; and/or contrary to public policy, unless good and valid reasons exist for doing so, such as for example the discovery of important and credible fresh evidence or the return from abroad of the person concerned. In this case it was contended that the parties whose time to file a land case has lapsed are seeking to use the back door to unduly prejudice the petitioner through the use of the DPP.
 70. It was further submitted that an unreasonably long time has passed since the transaction was made and under civil laws, the matter is time barred. The running of time affects the petitioner's right to a fair trial since a fair trial is also one, where the parties can respond to issues raised while the advantage to a defense through the availability of their witnesses still subsists and not when the possibility of that defense has been compromised by death of key witnesses. In this case it was submitted that the death of some important parties privy to the transaction left the petitioners herein compromised. With the death of the petitioner's witnesses during the 30 years taken by the prosecution to bring charges against, one can rightly say that there's no possibility that the accused/petitioner will receive justice after the prosecution waited for vendor to die and other would be witnesses too. In this regard the petitioners relied on the case of *Stanley Munga Githunguri v Republic* [1986] eKLR, *George Joshua Okungu & another v Chief Magistrate's Court Anti-Corruption Court at Nairobi & another* [2014] eKLR, *Republic v Minister for Home Affairs and Others ex parte Sitamze* Nairobi HCCC No 1652 of 2004 [2008] 2 EA 323.
 71. According to the petitioners, what amounts to unreasonable delay was explained in *Naftali Opondo Onyango v National Bank of Kenya* [2005] eKLR while quoting Salmon LJ in *Allan v Sir Alfred Mc Alpine and Sons Ltd* [1968] 1 All ER 543F and *Ivita v Kyumbu* [1984] KLR 441 and submitted that the decision to prosecute the petitioners' has met the threshold of what amounts to delay. Firstly, the delay is of almost thirty (30) years, which is so inordinate and inexcusable and will result to unfair trial of the petitioners. It was submitted that during the pendency of the delay herein the witnesses who the petitioners would have summoned have died. For instance, the vendor, Mr Asai Ole Saunyi Lila being a material witness died on July 31, 2012. Further, the petitioners have lost a copy of the land sale agreement between Kamu Limited Company and vendor Mr Asai Ole Saunyi Lila (deceased). In addition, the petitioners are unable to produce the debit notes in support of the payment to Mr Asai Ole Saunyi Lila as the debit notes are destroyed after ten (10) years by the bank. It was submitted that the dissolution of the firm of Kangwana & Company Advocates who prepared the land sale agreement and the disappearance and/or misplacement of the aid land sale agreement between Kamu Limited and Mr. Asai Ole Saunyi Lila.
 72. The petitioners therefore maintained that this unreasonable delay has created impediments due to the above existence of the militating factors and they stand to suffer from the long period of time that has elapsed since the alleged events occurred in 1990. According to the petitioners, the courts have restated the importance of speedy trial as was held in the case of *Barker v Wingo* 407 US 514 at page 532, where Powell J, on behalf of the United States Supreme Court, identified three interests which



the speedy trial right was designed to protect and these are to prevent oppressive pre-trial incarceration; to minimize anxiety and concern of the accused; and to limit the possibility that the defence would be impaired. In the Petitioners' view, the most serious is the last one because the inability of an accused to adequately prepare his case skews the fairness of the entire system. The accused may also be prejudiced by delay which leads to the loss of defence evidence arising from death or disappearance of key defence witnesses or other forms of impairment of the defence. As for the effects of delay in commencing criminal trials, the same was discussed in the case of *Republic v Attorney General & 3 others ex parte Kamlesh Mansukhlal Damji Pattni* [2013] eKLR where the court expressed itself as hereunder:

“I may at this juncture comment on the submissions by the respondents in reply to the applicant's case under this head. Firstly, the submission by the 2nd respondent that delay does not per se constitute a ground for finding a violation of the right to fair trial withers in the face of the Constitution as it is explicit that an accused person must be accorded a fair trial without delay. No exception is made by the Constitution on this requirement. The reality is that unless trial begins and concludes without unreasonable delay, an accused person's constitutional rights are violated not only because of the delay but also because of other incidental consequences of delay such as loss of memory of witnesses, witnesses falling by the wayside in one way or another, and loss of documents among other pertinent considerations.”

73. According to the petitioners, the court upheld a period of 14 years from the date of occurrence of the crime is equally too an inordinate delay to commence a trial and inordinate delay in concluding the trial. Further in *Eric Cheruiyot Kotut v SEO. Bosire & 2 others* [2008] eKLR the court found a delay of thirteen years from when the events occurred was held to merit prohibition of the 1st respondent from filing and prosecuting any criminal charges against the applicant in respect of the Goldenberg affair. In that case, it was held that delay of nine years from when the events occurred in commencing prosecution was inordinate.
74. It was submitted that this court is empowered to give remedies sought under judicial review pursuant to articles 23 and 165 of the *Constitution*. According to the petitioners, their constitutional rights have been violated and /or threatened to be violated pursuant to the respondent's recommendation thus contravening articles 19, 20, 21, 22, 23, 24, 25, 28, 40, 64, 157 of the *Constitution*.
75. It was submitted that the DPP in instituting court proceedings is to advance or protect public interest as opposed to private interest. The decision to prosecute or not to prosecute is of great importance. It can have the most far-reaching consequences for an individual. Even where an accused person is acquitted, the consequences resulting from a prosecution can include loss of reputation, disruption of personal relations, loss of employment and financial expense, in addition to the anxiety and trauma caused by being charged with a criminal offence. A wrong decision to prosecute or, conversely, tend to undermine the confidence of the community in the criminal justice system. For victims and their families. It is therefore essential that the prosecution decision receives careful consideration.
76. It was submitted that courts have an overriding duty to promote justice and prevent injustice. From this duty there arises an inherent power to stop a prosecution if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court or infringement of a citizen's fundamental rights. Whether a prosecution is an abuse of court process, unfair, wrong or a breach of fundamental rights, it is for the Court to determine on the individual facts of each case. In this case it was contended that the 1st respondent abused their discretion in recommending prosecution. While citing the National Prosecution Policy it was submitted that the circumstance as elucidated in the petition offend the Court's sense of justice and propriety to be asked to try the petitioners in the



circumstances. Therefore, affiliated to its spirit, the high court should prohibit or quash prosecutions in cases where it would be impossible to give the accused a fair trial; or where it would amount to a misuse/manipulation of process because it offends the Court's sense of justice and propriety to be asked to try the accused in the circumstances of the impugned case. It is in public interest requires that prosecutions be mounted to uphold law and order and justice for the victims of crime.

77. According to the petitioners, public interest demands that one cannot exercise their powers to charge/prosecute a person for committing an offense yet at the time of that alleged offense, such a person was unable to make binding legal decision on the ground that she/he was a minor.
78. It was therefore urged that the court ought to find for the petitioners, grant the prayers sought in the petition and reaffirm the court's strong duty to guard against abuse of court process.

1st and 2nd Respondents Submissions.

79. On behalf of the 1st and 2nd respondents, it was submitted that the 2nd respondent-Director of Public Prosecutions is empowered with prosecutorial powers by the Constitution of Kenya 2010 According to Judicial Review is the law concerning control by courts of the powers, functions and procedures of administrative authorities and bodies discharging public functions. The courts do not come in to review the powers of the public bodies or the decisions which have been made, they only come in to review the manner in which the decisions were arrived at. This submission was based on *Cape Holdings Limited v AG & 2 others* Misc Civil Application No 240 of 2011 and *Suchan Investments Ltd v The Ministry of National Heritage and Culture* Civil Appeal No 46 of 2012. According to them, the provisions of section 7(2)(1) of the *Fair Administrative Action Act* have given a Judicial Review Court the mandate of reviewing the decision of an inferior body by looking at not only the traditional parameters, but also at the proportionality of the impugned decision, which entails consideration of the merits of the challenge decision.
80. It was submitted that the respondents are independent and constitutionally constituted public authorities discharging public functions and that they have carried out their duties within the powers conferred to them and hence the decisions arrived at are not ultra vires and are impartial. Since the life period of a criminal act is unlimited, it was submitted that the investigations were carried out at the right time and hence the outcome of the same is not time barred as alleged.
81. In this case, it was contended that upon perusal and thorough examination of all the evidence gathered, the 2nd respondent was convinced that the evidence on record met the two tests. The evidence on record was sufficient and proved the recommended charges. It was clear that illegalities had been committed and there was need to charge the petitioners in order to protect property and public interest.
82. Based on the replying affidavits, it was submitted that no constitutional right as regards to investigations was violated by the 1st respondent since the petitioners declined to give the 1st respondent the audience she was according them. In the respondents' view, the petitioners are cross-examining the evidence to be adduced in court before the trial even begins. It was however submitted that the 2nd respondent arrived at the decision after examination of the evidence placed before him and that the evidence gathered is sufficient, cogent, consistent and corroborative and meets the evidentially test, the public interest test.
83. According to the said respondents, the 3rd petitioner was properly charged by virtue of her being the director of KAMU that was implicated with irregularities during investigations. In this case it was submitted that the 1st respondent has clearly demonstrated how she carried out her investigations in accordance with the law and that she gave the petitioners an audience but they declined to take the opportunity which is their constitutional right. It was therefore submitted that this Petition is misconceived, incompetent and improperly before court and an open abuse of the court process. The



petitioners have not demonstrated in any way before this court, the ulterior motives that the 1st and 2nd respondents have, that guided them largely in arriving at a decision to charge. The claims must be propounded on an evidentiary foundation and this submission was based on the decision of Mativo, J in Leonard Otieno v Airtel Limited [2018] eKLR where he held that;

“It is fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the proposition he asserts to prove his claim. Decisions on violation of Constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the constitution an inevitable result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.”

84. According to the respondents, the petitioners have not demonstrated before this court who Godfrey Saroni Kapoya is if not a beneficiary as confirmed in the Grant of Letters of Administration and in what way he has allegedly masterminded the illegal repossession of the land in question.

85. Regarding the alleged delay it was submitted that there was none since the complaint was not lodged in 1990 and the investigations commenced 30 years later. Rather it was lodged in 2019 and investigations unearthed illegalities committed 30 years back.

86. In the respondents’ view, the best guide the court when considering a petition such as above were best captured in the words of Mason CJ in William and others vs Spautz [1992] 2 LRC 659 stated as follows

“It is of fundamental importance that unless the interests of justice demand it, that courts should exercise rather than refrain to exercise their jurisdiction especially their jurisdiction to try persons charged with criminal offences and that persons charged with such offences should not obtain immunity from prosecution. It is equally important that freedom of access to the courts should be preserved and that litigation of principle proceedings whether it be criminal or civil should not become a vehicle for abuse of process issues on an application for stay unless once again the interests of justice demand it.”

87. It was submitted that an order of certiorari in this petition is also not applicable since the decision to charge was made *intra vires* with the constitution and there was no breach of rules of natural justice or any error of law apparent to face of the record.

88. It was submitted that whereas this court has the power and is enjoined to interrogate the Constitutionality of a actions by state organs, in the circumstances of this case, the petitioners rights were not violated since they were called up to shed more light on how they acquired he disputed piece of land but failed to do so. Accordingly, the court was called upon to find that this Petition has no merit and proceed to dismiss the same with costs to the respondents.

2nd and 3rd Interested Parties’ Submissions

89. On behalf of the 2nd and 3rd interested parties, it was submitted that the petitioners failed altogether to plead or prove by any evidence illegality or irregularity in the record of proceedings before or order by the 3rd respondent in the criminal case. According to them, it is evident from documents produced in evidence by the petitioners in support of their Petition and by the 2nd respondent and by the 2nd and 3rd interested parties in opposition to the Petition that upon the complaint of the 2nd and 3rd interested parties the 1st respondent’s Athi River offices, Mavoko Sub-County of Machakos County conducted



investigations into the lawfulness of acquisition of title to property Land Reference Number 14754 IR 48968/1 by Kamu Limited. It is further evident from numerous documents on the record of the honourable court that the 2nd respondent made his decision to prosecute the petitioners together with officers at the Ardhi Land Office with offences of conspiracy to defraud, forgery, making a false document, and uttering a false document contrary to the Penal Code with respect to acquisition of title to property Land Reference Number 14754 IR 48968/1 by Kamu Limited on the basis of facts in those documents lawfully and procedurally gathered in the course of investigations by the 1st respondent and not on the basis of unproven ill will, prejudice or collateral motive as argued by the petitioners. That conclusion, it was submitted, appears irrefutable in light of provisions of section 65 of Evidence Act which bars admission of oral evidence to contradict documentary evidence.

90. It was submitted that the 1st respondent acting under the authority and mandate of the Inspector General of Police Service has, in the public interest and in the interests of fair administration of criminal justice, the power to investigate a wide spectrum of criminal offences and that the 2nd respondent likewise if he considers evidence gathered by the investigation sufficient has amplitude of discretion to institute criminal prosecution proceedings justified by evidence apparent from the 1st respondent's investigation report. The petitioners' contention that the 1st respondent failed to undertake any meaningful investigation of the complaints by 2nd and 3rd interested parties alleging against them fraudulent acquisition by Kamu Ltd of right to own or use property Land Reference Number 14754 IR 48968/1 amounts to probing the question whether or not evidence gathered is sufficient to convict the petitioners and that question is exclusively the business of the trial court to say.
91. In support of their submissions, the said interested parties relied on the holding in Republic v Kenya Revenue Authority, Director of Criminal Investigations and The AG & 2 others [2013] eKLR where Majanja J delivered himself as follows:

“21.The applicant has pleaded the doctrine of corporate liability to assert that criminal charges cannot be taken out against him personally regarding the alleged offence as the cheques were drawn on behalf of the company by its tax assessors. This is an attractive and well-founded argument urged by the counsel for the *ex-parte* applicant but I think it is made in the wrong forum. Whether and to what extent sections 23c and 316 of the Penal Code encompass liability of directors of a company is not for this court to pronounce in this case at this stage. Likewise whether or not the acts complained of fall within the provisions of the law cited is not the concern of the court at this stage.

22. In my view the court should not pronounce on criminal liability a priori or speculate and make a decision on the charges that have been preferred against the *ex-parte* applicant. To do so would encroach on the responsibility of the Inspector General of the Police Service and the Director of Public Prosecutions. If and in the event a decision is made to charge the applicant with an offence and whether the charge can be sustained as a matter of law and fact is for the trial court to decide.”

92. In the foregoing premises the court was urged to find that the Petition herein as drawn and presented is incompetent and ought to be dismissed with costs to the 1st, 2nd, 3rd Respondents and 2nd and 3rd Interested Parties.

Determinations

93. I have considered the petition, the affidavits sworn both in support of and in opposition to the application, the submissions made on behalf of the parties herein as well as the authorities cited.



94. From the submissions made, it is clear that the parties herein fully appreciate the principles that guide the grant of order prohibiting or quashing criminal proceedings in this jurisdiction. It is however important to restate a Constitutional Court as opposed to a trial or appellate court. The former is not concerned with the innocence or guilt of the applicant but rather with the fairness of the process which the applicant is being or has been subjected to. Where the court finds that the process is unlawful or unfair, this court has the duty to stop the same in its tracks. On other hand as long as the process is being carried out in a lawful and just manner, the mere fact that there is likelihood of an acquittal will not justify the court in interfering. The demarcation between the two circumstances was clarified in *Meixner & another v Attorney General* [2005] 2 KLR 189, where the Court of Appeal expressed itself as hereunder:

“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... Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it; it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power. Having regard to the law, the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision is correct. The other grounds, which the appellants claim were ignored ultimately, raise the question whether the evidence gathered by the prosecution is sufficient to support the charge. The criminal trial process is regulated by statutes, particularly the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court, which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence and that is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.”

95. This Court therefore held in *Republic v Director of Public Prosecution & another ex parte Chamanlal Vrajlal Kamani & 2 others* [2015] eKLR in which the court expressed itself as hereunder:

“In my view, criminal proceedings ought not to be instituted simply to appease the spirits of the public yearning for the blood of its perceived victims. This is a country governed by the rule of law and any action must be rooted in the rule of law rather than on some perceived public policy or dogmas. The former has been branded an unruly horse, and when you get astride it, you never know where it will carry you. See *Richardson v Mellish* (1824) 2 Bing 229.”



96. As was held in *R v Attorney General exp Kipngeno Arap Ngeny* High Court Civil Application No 406 of 2001:

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have 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 actionable”.

97. In the said case, the court went on:

“The function of any judicial system in civilized nations is to uphold the rule of law. To be able to do that, the system must have power to try and decide cases brought before the Courts according to the established law. The process of trial is central to the adjudication of any dispute and it is now a universally accepted principle of law that every person must have his day in court. This means that the judicial system must be available to all...Although the Attorney General enjoys both constitutional and statutory discretion in the prosecution of criminal cases and in doing so he is not controlled by any other person or authority, this does not mean that he may exercise that discretion arbitrarily. He must exercise the discretion within lawful boundaries...Although the state’s interest and indeed the constitutional and statutory powers to prosecute is recognised, 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 recognised 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...In doing so the court may be guided by the following principles: (i). Where the criminal prosecution amounts to nothing more than an abuse of the process of the court, the court will employ its inherent power and common law to stop it. (ii). A prosecution that does not accord with an individual’s freedoms and rights under the constitution will be halted: and (iii). A prosecution that is contrary to public policy (or interest) will not be allowed...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.”

98. That crimes must be punished and proved criminal must be dealt with expeditiously and decisively is not an option. A judicial system that is so porous that permits criminal to go scot-free is not worthy of its name. However, the process of arriving at the decision whether a person has committed a crime must in the words of article 47 of the *Constitution* be expeditious, efficient, lawful, reasonable and procedurally fair. Anything less than that will not do.

99. Public outcry in my view ought not to be the determinant factor in determining the criminal process wave so that the tide of criminal prosecution is dictated by the direction the public wind blows. This was appreciated in *Dr. Christopher Ndarathi H Murungaru v Kenya Anti-Corruption Commission & another* Civil Application No Nai 43 of 2006 [2006] 1 KLR 77 in which the Court expressed itself in this fashion:

“Lastly, before we leave the matter, Professor Muigai told us that their strongest point on the motion before us is the public interest. We understood him to be saying that the Kenyan public is very impatient with the fact that cases involving corruption or economic crimes



hardly go on in the courts because of the applications like the one we are dealing with. Our short answer to Professor Muigai is this. We recognize and we are well aware of the fact that the public has a legitimate interest in seeing that crime, of whatever nature, is detected, prosecuted and adequately punished, the Constitution of the Republic is a reflection of the supreme public interest and its provisions must be upheld by the courts, sometimes even to the annoyance of the public and the only institution charged with the duty to interpret the provisions is the High Court and where permissible, with an appeal to the Court of Appeal. Since the Kenyan nation has chosen the path of democracy rather than dictatorship, the courts must stick to the rule of law even if the public may in any particular case want a contrary thing and even if those who are mighty and powerful might ignore the court's decisions since occasionally those who have been mighty and powerful are the ones who would run and seek the protection of the courts when circumstances have changed...The courts must continue to give justice to all and sundry irrespective of their status or former status."

100. Whereas the court is alive to the fact that the DPP is constitutionally mandated to determine the cases which meet the threshold for criminal prosecution, and that it is a mandate which ought not to be interfered with lightly, as was held in *Paul Imison v Attorney General & 3 others* Nbi HCMCA No 1604 of 2003:

"I do not think that our Constitution which is one of a democratic state would condone or contemplate abuse of power...The Attorney General in some of his constitutional functions does perform public duties and if he were to be found wanting in carrying them out or failing to perform them as empowered by the Constitution or any other law, I see no good reason for singling him out and failing to subject him to judicial review just like any other public official. I find nothing unconstitutional in requiring him to perform his constitutional duties. A monitoring power by the court by way of judicial review would have the effect of strengthening the principles and values encapsulated by the Constitution. To illustrate my point, Judicial Review tackles error of law and unlawfulness, procedural impropriety, irrationality, abuse of power and in not too distant future, human rights by virtue of the International Conventions which Kenya has ratified. In exercising the Judicial Review jurisdiction the court would not be sitting on appeal on the decisions of the Attorney general, he will still make the decisions himself but the lawfulness, etc. of his decisions should be within the purview of the courts..."

101. This court therefore has the powers and the constitutional duty to supervise the exercise of the Respondents' mandate whether constitutional or statutory as long as the challenge properly falls within the parameters of judicial review. See *R v Attorney General exp Kipngeno Arap Ngeny (supra)*.
102. In *George Joshua Okungu & another v Chief Magistrate's Court Anti-Corruption Court at Nairobi (supra)* this court cited with approval the holding in *Republic v Minister for Home Affairs & others ex parte Sitamze* Nairobi HCCC No 1652 of 2004 [2008]2 EA 323 and held:

"Whereas we appreciate the fact that the decision whether or not to prosecute the petitioners is an exercise of discretion this Court is empowered to interfere with the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given;



(7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable...”

103. It is therefore important in my view for the court to appreciate the principles guiding the constitutional remedy of judicial review relief in the field of criminal process and apply the same to the circumstances before it. Several decisions have been handed down which in my view correctly set out the law relating to circumstances in which the court would be entitled to prohibit, bring to a halt or quash criminal proceedings. In arriving at its decision however, the court must avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial court. Similarly, the court in determining judicial review proceedings ought not to usurp the Constitutional and statutory mandate of the DPP and the investigative agencies to investigate and undertake prosecution in the exercise of the discretion conferred upon them by the law and the Constitution. Therefore, where there is no justification for interference the House of Lords in *Director of Public Prosecutions v Humphreys* [1976] 2 All ER 497 at 511 cautioned that:

“A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval...If there is a power...to stop a prosecution on indictment in limine, it is in my view a power that should only be exercised in the most exceptional circumstances.”

104. The DPP derives his prosecutorial power both from the Constitution and the Office of the Director of Public Prosecutions Act. Whereas article 157(10) of the *Constitution* provides that 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, article 157(11) provides:

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.

105. Apart from that, section 4 of the *Office of Public Prosecutions Act*, No 2 of 2013 provides:

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.



106. This court has therefore held that since the promulgation of the Constitution of Kenya, 2010, the terrain under the current prosecutorial regime has changed and that the discretion given to the DPP is not absolute but must be exercised within certain laid down standards provided under the Constitution and the Office of the Director of Public Prosecutions Act. Where it is alleged that these standards have not been adhered to, it behoves this court 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. It is on this basis that I understand the holding in *Nakusa v Tororei & 2 Others (No 2)* Nairobi HCEP No 4 of 2003 [2008] 2 KLR (EP) 565 to the effect that :

“the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system...In interpreting the Constitution, the court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of *Domnic Arony Amolo v Attorney General* Miscellaneous Application No 494 of 2003 is that interpretation of the Constitution has to be progressive and in the words of Prof M V Plyee in his book, *Constitution of the World*: “The courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time..... In our role as “sentinels” of fundamental rights and freedoms of the citizen which are founded on 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.”

107. Where therefore it is clear that the discretion is being exercised with a view to achieving certain extraneous goals other than those legally recognised under the Constitution and the Office of the Director of Public Prosecutions Act, that would, in my view, constitute an abuse of the legal process and would entitle the court to intervene and bring to an end such wrongful exercise of discretion. As was held by Wendoh, J in *Koinange vs Attorney General & Others* :

“Under section 26 of the Constitution the Attorney General has unfettered discretion to undertake investigations and prosecute. The Attorney General's inherent powers to investigate and prosecute may be exercised through other offices in accordance with the Constitution or any other law. But, if the Attorney General exercises that power in breach of the constitutional provisions or any other law by acting maliciously, capriciously, abusing the court process or contrary to public policy the Court would intervene under section 123(8) of the Constitution and in considering what constitutes an abuse of the court process the following principles are relevant: (i) Whether the criminal prosecution is instituted for a purpose other than the purpose for which it is properly designed; (ii) Whether the person against whom the criminal proceedings are commenced has been deprived of his fundamental right of a fair trial envisaged in the provisions of the constitution; (iii) Whether the prosecution is against public policy.”



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

“It is trite that an order of prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.”

109. In *Republic v Chief Magistrate's Court at Mombasa Ex Parte Ganijee & another* [2002] 2 KLR 703, it was held:

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement or frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth... When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to overawe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court... In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in...”

110. In that regard, the Court of Appeal in the case of *Commissioner of Police & Another v Kenya Commercial Bank Ltd & 4 others* [2013] eKLR 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.”

111. The Supreme Court of India in *RP Kapur v State of Punjab* AIR 1960 SC 866 laid down guidelines to be considered by the court on when the High Court may review prosecutorial powers 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.
112. The Supreme Court in *Cyrus Shakhhalanga Khwa Jirongo v Soy Developers Ltd & 9 others* [2021] eKLR has weighed in on the matter by asserting that:
- “(82) Although the DPP is thus not bound by any directions, control or recommendations made by any institution or body, being an independent public office, where it is shown that the expectations of article 157(11) have not been met, then the High Court under article 165(3)(d)(ii) can properly interrogate any question arising therefrom and make appropriate orders.”
113. According to *Judicial Review Handbook*, 6th Edition by Michael Fordham at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes



a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority power.

114. In this case, the complainants in the criminal proceedings did not swear any affidavit. The affidavits in opposition were sworn by the Learned State Counsel whose affidavit, apart from propounding legal issues was based wholly on the affidavit sworn by the investigations officer, Jepchirchir Rael. Accordingly, that affidavit was unhelpful in so far as the factual issues were concerned. As for the said affidavit of Jepchirchir Rael, the circumstances that provoked the commencement of the criminal proceedings was that the complainants, the beneficiaries of the estate of the deceased, Asai Ole Sainyi, complained that that L.R No. 14754 (IR No.48968) situated within South of Athi River whereby he stated that the land had been transferred to Kamu Limited and then to Monarch Insurance without the family's knowledge. However, the deceased had confided in his three wives that he had not sold any of his land parcels and that each wife was keeping the title of the land allocated to her with the subject parcel being in custody of the first wife who was also deceased. According to the statement the deceased's family lived in Embakasi Athi River until 1986 when they relocated to Kajiado after the government directed them to leave as they were living next to the game park. All the time the family lived in Kajiado, they knew that their land in Athi River was intact until the demise of the deceased in 2012. When the family commenced succession proceedings, they listed in the list of properties of the deceased for distribution the said property and it was during that time that the family noted that the title to the land in question was missing and tasked Godfrey Saroni Kapoya to assist in tracing the whereabouts of the title as only a copy of the same could be traced.
115. The petitioners on the other hand aver that the transaction was above board and that upon entering into the agreement for sale of the Land Reference Number 14754 (Inland Registry Number 48968/1), paying for it and obtaining a Consent to transfer and a title in its name, Kamu Company Limited took the physical and vacant possession of the said land and enjoyed continuous, peaceful, singular and unchallenged occupation of the land since that time, for a period of 22 years, to the time that it transferred the property to Monarch Insurance Company, who are currently the owners and occupants of the land. Monarch Insurance Company have also held the uninterrupted possession of the land for an uninterrupted period of 7 years, to date.
116. From the year 1990, when the deceased, sold the property to the company, to the year 2012 when he passed away, a period of 22 years, he neither placed any claim to the property nor visited, sought to occupy or obtain possession of the land knowing well that he had sold it to the Company. It was noted that for a period of 22 years, the deceased lived without any indicative trace or suggestion of entitlement or declaration that he had any right or claim over this property and that at all material times, the Company was in possession of the land and the title to the property Land Reference Number 14754 (Inland Registry Number 48968/1, until it was transferred to the Interested Party.
117. To the petitioners, the delay of almost thirty (30) years is so inordinate and inexcusable and will result to unfair trial of the petitioners due to the fact that during the pendency of the delay herein the witnesses who the petitioners would have summoned have died. For instance, the vendor, Mr Asai Ole Saunyi Lila being a material witness died on July 31, 2012. Further, the petitioners have lost a copy of the land sale agreement between Kamu Limited Company and vendor Mr. Asai Ole Saunyi Lila (deceased). In addition, the Petitioners are unable to produce the debit notes in support of the payment to Mr Asai Ole Saunyi Lila as the debit notes are destroyed after ten (10) years by the bank. Since ten the situation has been exacerbated by the dissolution of the firm of Kangwana & Company Advocates who prepared



the land sale agreement and the disappearance and/or misplacement of the said land sale agreement between Kamu Limited and Mr Asai Ole Saunyi Lila.

118. The petitioners therefore maintained that this unreasonable delay has created impediments due to the above existence of the militating factors and they stand to suffer from the long period of time that has elapsed since the alleged events occurred in 1990.
119. The inordinate delay in circumstances that render a fair criminal process impossible hence justifying being halted was appreciated in *R v Attorney General exp Kipngeno Arap Ngeny* High Court Civil Application No 406 of 2001 where the court held that:

“Evidence of extraneous purposes may also be presumed where a prosecution is mounted after a lengthy delay without any explanation being given for that delay...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...A criminal prosecution that does not accord with an individual’s freedoms and rights, such as where it does not afford an individual a fair hearing within a reasonable time by an independent and impartial court, will be the clearest case of an abuse of the process of the court. Such a prosecution will be halted for contravening the constitutional protection of individual’s rights...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.”

120. The reasons that justify the halting of criminal prosecution after a long delay were explained in the case of *Barker v Wingo* 407 US 514 at page 532, where Powell J, on behalf of the United States Supreme Court, identified three interests which the speedy trial right was designed to protect and these are to prevent oppressive pre-trial incarceration; to minimize anxiety and concern of the accused; and to limit the possibility that the defence would be impaired.
121. The issue of the delay was also dealt with in *Okungu* case (*supra*) where the court expressed itself as hereunder:

“The petitioners further contend that the said charges are being brought after a long period of time after the investigations thereon had been closed. Under article 47(1) of the *Constitution*, “every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.” It is therefore imperative that criminal investigations be conducted expeditiously and a decision made either way as soon as possible. Where prosecution is undertaken long after investigations are concluded, the fairness of the process may be brought into question where the petitioner proves as was the case in *Githuburi v Republic* case, that as a result of the long delay of commencing the prosecution, the petitioner may not be able to adequately defend himself. Whereas the decision whether or not the action was expeditiously taken must necessarily depend on the circumstances of a particular case, on our part we are not satisfied that the issues forming the subject of the criminal proceedings were so complex that preference of charges arising from the investigations therefrom should take a year after the completion of the investigations. From the charges leveled against the Petitioners, the issues seemed to stem from the failure to follow the laid down regulations and procedures in arriving at the decision to sell the



company's idle/surplus non core assets. In our view ordinarily it does not require a year after completion of investigations in such a matter for a decision to prosecute to be made.”

122. Where a person against whom wrongdoing has been allegedly committed takes an inordinately long period of time before lodging his complaint with the police and as a result of which crucial evidence is lost and or witnesses become unavailable, to subject the applicant to a process of prosecution will amount to nothing but persecution. This is not to say that the applicant is in such circumstances innocent. It is simply a recognition that the criminal process must be conducted in an atmosphere of fairness to both the accused person and the complainant and where the right to a fair hearing has been jeopardised by the long delay in the commencement of the criminal process thus placing the applicant's rights into jeopardy, such a process must not be permitted to continue.

123. However as was appreciated in the *Okungu* case (*supra*):

“That notwithstanding, 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.”

124. The effect of the long delay in prosecuting the applicant was considered in *Githunguri v Republic* KLR [1986] 1, where the court expressed itself 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.... If we thought, which we do not, that the applicant by being prosecuted is not being deprived of the protection of any of the fundamental rights given by section 77(1) of the *Constitution*, we are firmly of the opinion that in that event we ought to invoke our inherent powers to prevent this prosecution in the public interest because otherwise it would similarly be an



abuse of the process of the court, oppressive and vexatious. It follows that we are of the opinion that the application must succeed in either event...A prosecution is not to be made good by what it turns up. It is good or bad when it starts. The long and short of it is that in our opinion it is not right to prosecute the applicant as proposed.”

125. 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.”

126. In *Erick Kibiwott Tarus & 2 others v Director of Public Prosecutions & 7 others* [2014] eKLR this court expressed itself as hereunder:

“In this case it is the applicants’ case that the criminal proceedings have been instituted after a very long period of time after the alleged offences were committed. Article 50 of the *Constitution* provides for the right to fair trial and under article 50(1)(e) fair trial includes the right to have the trial begin and conclude without unreasonable delay. Therefore both the commencement and the conclusion of the trial must be conducted without an unreasonable delay. This delay in my view not only encompasses the period between the arraignment and the commencement of the hearing but also includes the period between the discovery of the commission of an offence and the arraignment in court. However what is reasonable depends upon the circumstances of the case such as the nature of the offence, the collation and collection of the evidence as well as the complexity of the offence. Again of paramount importance is the effect of the delay on the viability of a fair trial... In this case, whereas the applicants contend that there has been a long time lapse between the time of the alleged commission of the offences in question and the preference of the charges, they do not contend that as a result of the said delay there has been a change in the circumstances which militate against a fair trial. Such change in circumstances may be shown for example by the fact of unavailability of the applicant’s potential witnesses or evidence resulting from the said delay. I am therefore not satisfied that in the circumstances of this case the delay in bringing the charges against the applicants without more merits the termination or prohibition of the criminal trial. In this case the applicants have not contended that as a result of the long delay in bringing the criminal charges their defences have been compromised for example by making it impossible for them to efficiently present formidable defences which they could have done had the charges been preferred earlier on.”



127. From the foregoing, it is clear that mere lapse of time between the alleged commission of the offence and the charge, does not *ipso facto* justify the halting of criminal process. The onus is upon the applicant to satisfy the Court that in the circumstances of the case, a fair trial would not be possible in the sense that he would be prejudiced as a result of the lapse of time. That about three decades in bringing a criminal offender to book is a long period of time is not in question. However, where due to such circumstances as the position held by the applicant in the criminal justice system or the executive, it was not possible or that attempts to bringing him to book were thwarted by his actions, the court will not readily accede to his contention that a fair trial is impracticable.
128. In this case, it is clear that the person who the petitioners alleged sold them the suit land is long deceased, having died in 2012. The transaction in question, it was contended, was completed in 1990 and the Company took possession of the said land. It is contended which contention the 2nd and 3rd interested parties have not expressly denied that the deceased did not take any issue with the Company's possession and utilisation of the said land. Again, the person who was meant to benefit, according to the investigations, the first wife of the deceased who ought to have been in possession of the suit title, also died. According to the Petitioners as a result of the lapse of time, they can no longer trace the documents which they would have relied on to defend themselves in the criminal case.
129. From the investigator's own version, it is clear that some of the records relating to the consent of the land control board are missing due to poor record keeping at the time. I did not hear the complainants expressly claim that the petitioners had something to do with the missing records.
130. In this case, it is clear that whether rightly or wrongly, title documents were issued in the names of Kamu Company Limited which has since transferred its interests to Monarch Insurance Company Limited. If the Complainants are interested in recovering the suit property, one would have expected them to institute civil proceedings for nullification of the titles to the said entities as well. In absence of such proceedings, the Petitioners may well be excused for taking the view that the criminal process is being used to achieve what ought to have been achieved through the civil process but for the fact that that avenue may be time barred. Majanja, J in Petition No 461 of 2012 *Francis Kirima M'ikunyua & others v Director of Public Prosecutions*, when dealing with situations where there exist criminal and civil proceedings arising from the same facts pronounced himself as follows:

“It is very clear that the criminal process and the resultant court proceedings are being used to settle what is otherwise civil dispute which has been the subject of several court cases and indeed decisions. It is clear to me that the contending parties wish to use the criminal process to score points against each side in order to assert the rights of ownership. The use of the criminal process in this manner is not uncommon within this jurisdiction to find that intractable land disputes mutate into criminal matters. It is not difficult to see why. In criminal cases the State's coercive power is brought to bear upon the individual and where we have an inefficient system to settle civil claims, a person who can tie his opponent in the criminal justice system and ultimately secure a conviction will no doubt have an advantage over his opponent.”

131. In *Kuria & 3 others v Attorney General* [2002] 2 KLR 69, the High Court held:

“The court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling



an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, by whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far from that which the courts indeed the entire system is constitutionally mandated to administer... In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute”.

132. In Mohammed Gulam Hussein Fazal Karmali & another v Chief Magistrate's Court Nairobi & another [2006] eKLR Nyamu, J examined the policy considerations for halting criminal proceedings, noting that the court has two fundamental policy considerations to take into account which were enunciated in the case of M Devao v Department of Labour (190) in SUR 464 at 481 as:

“The first is that the public interests in the administration of justice require that the court protects its ability to function as a court of law, by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court processes may lend themselves to oppression and injustice...the court grants a permanent stay in order to prevent the criminal process from being used for purposes alien to the administration of criminal justice under the law. It may intervene in this way if it concludes that the court processes are being employed for ulterior purposes or in such a way as to cause improper vexation and oppression.”

133. The circumstances which the court takes into consideration in deciding whether or not to halt a criminal process were set out by Musinga, J (as he then was) in Paul Stuart Imison & another v Attorney General & 2 others Petition No 57 of 2009, in the following manner:

“The instances in which a court can declare a prosecution to be improper were well considered in Macharia & another v Attorney General & another [2001] KLR 448. A prosecution is improper if:

- (a) It is for a purpose other than upholding the criminal law;
- (b) It is meant to bring pressure to bear upon the applicant/accused to settle a civil dispute;
- (c) It is an abuse of the criminal process of the court;
- (d) It amounts to harassment and is contrary to public policy;
- (e) It is in contravention of the applicant's constitutional right to freedom.

134. According to Bennett v Horseferry Magistrates' Court [1993] 3 All ER 138, 151, HL, an abuse of process justifying the stay of a prosecution could arise in the following circumstances:

- a) where it would be impossible to give the accused a fair trial; or



- b) Where it would amount to a misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.
135. I therefore agree with Mumbi Ngugi, J's opinion in *Francis Anyango Juma v Director of Public Prosecutions & another* [2012] eKLR that:
- “Clearly, the intention under the Constitution was to enable the Director of Public Prosecutions to carry out his constitutional mandate without interference from any party. This court cannot direct or interfere with the exercise by the DPP of his power under the Constitution or direct him on the way he should conduct his constitutional mandate, unless there was clear evidence of violation of a party's rights under the Constitution, or violation of the Constitution itself.”
136. In other words, where the constitutional right to a fair hearing as decreed under article 50 of the *Constitution* is violated or threatened with violation, this court without necessarily pronouncing itself on the innocence or otherwise of the applicant is entitled to and has a duty to step in and it does not have to wait until the applicant's rights are actually violated before doing so. Any efficient legal system must put in place a machinery where equality of arms applies to both the complainant and the accused without placing one of the parties to an unwarranted disadvantage.
137. Therefore, the people placed in charge of investigation and prosecution must in deciding whether to prefer criminal charges ask themselves whether in the circumstances, a fair trial is possible notwithstanding the material placed before them. In other words the police and the DPP ought not to conduct themselves as if they are an appendage of the complainants. In exercising their discretion to charge a person both the police and the DPP's office must take into account and must exercise the discretion on the evidence of sound legal principles. As was held by Ojwang, J (as he then was) in Nairobi HCCC No 1729 of 2001 – *Thomas Mboya Oluoch & another v Lucy Muthoni Stephen & another*:
- “...policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense...I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State's prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes”.
138. It is now clear that the mere fact that the applicant will be subject to a criminal process where he will get an opportunity to defend himself is not reason for allowing a clearly flawed, unlawful and unfair trial to run its course. As was appreciated in *R vs. Attorney General exp Kipngeno Arap Ngeny* High Court Civil Application No. 406 of 2001:
- “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.”

139. As was held in *R v The Judicial Commission into the Goldenberg Affair and 2 others exp Saitoti* HC Misc Appl 102 of 2006:

“It is not good for the DPP to argue that the applicant should be arrested and charged so that he can raise whatever defences he has in a trial court. The court has a constitutional duty to ensure that a flawed threatened trial is stopped in its tracks if it is likely to violate any of the applicants’ fundamental rights.”

140. As appreciated in *Githunguri* case:

“What kind of a mad man who has an opportunity to apply for prohibition would opt for a trial, the risk of conviction and imprisonment.”

141. The Supreme having regard to article 50 of the *Constitution* in the case of Hon Christopher Odhiambo Karan v David Ouma Ochieng & 2 others [2018] SC Petition No 36 of 2019 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.”

142. The same Court in *Cyrus Shakhbalanga Khwa Jirongo v Soy Developers Ltd & 9 others* [2021] eKLR expressed itself as hereunder:

“[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 appellantis 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."

143. Having considered the material placed before me in this Petition, without making a finding as to the innocence of the petitioners, it is my view and I so hold that in the circumstances of this case, it would be unjust and contrary to article 50 of the Constitution to prosecute the petitioners for an offence which was allegedly committed nearly three decades ago particularly when both the complainants and the Petitioners contend that some of the relevant transactional documents may have been lost, misplaced or tampered with and the person from whom the Petitioners obtained their title to the suit property died some years after the said transaction without taking up the issue himself.

Order

144. In the premises, I find merit in this Petition and I issue the following orders:

- 1) A declaration that in the prosecution of the petitioners, the Director of Public Prosecution abdicated his constitutional duty under article 157(11) of the Constitution of Kenya 2010 to prevent and avoid the abuse of the legal process.
- 2) A declaration that the prosecution of alleged offences claimed to have been committed almost 30 years ago is a violation of the petitioners' right to a fair trial contrary to article 50 of the Constitution.
- 3) A declaration that investigations on the Petitioners by the 1st respondent and the 2nd respondent's institution of criminal proceedings against the petitioners in Criminal Case Number 854 of 2019 in the Chief Magistrate's Court, Mavoko is unlawful and comprise a violation of the petitioners constitutional rights and is to that extent null and void.
- 4) An order of *certiorari* to remove and bring to this Honourable court and to quash the decision of the 1st and 2nd respondents to prefer criminal charge against the petitioners under sections 317, 345, 349, 237 and 353 of the Penal Code with respect to Land Reference Number 14754 (Inland Registry Number 48968/1) contained in the charge sheet in the case of *Republic v Jared Benson Kangwana, Beth Bonareri Kangwana and TBK* in Mavoko Chief Magistrates' Court Criminal Case Number 854 of 2019.
- 5) An order of prohibition directed at the Director of Public Prosecutions prohibiting the prosecution of the petitioners for the alleged offences of conspiracy to defraud; forgery; making a false document, and; uttering a false document, contrary to the penal code with respect to the property Land Reference Number 14754 (Inland Registry Number 48968/1)



- 6) An order of prohibition directed at the Chief Magistrates Court Mavoko, barring and forbidding her or any other judicial officer from hearing and /or proceeding in any manner with the conduct of Mavoko Chief Magistrates' Court Criminal Case Number 854 of 2019, (Republic v Jared Benson Kangwana, Beth Bonareri Kangwana and TBK) based on the facts related to the purchase and complaint by Sikinine Asai Ole Saunyi with respect to Land Reference Number 14754.
- 7) As I have not made a determination as to the merits of the criminal offence in question, each party will bear own costs.

145. Judgement accordingly.

**JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS
28TH DAY OF FEBRUARY, 2022**

G V ODUNGA

JUDGE

Delivered the presence of:

Ms Lukoye for the Petitioner

Mr Ngetich for Ms Njeru for the Respondents

Mr Wamalwa for the 2nd and 3rd interested parties

CA Susan

