



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW MISC. APPLICATION NO. 357 OF 2019**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTION.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATION.....2<sup>ND</sup> RESPONDENT**

**DCIO, DCI EMBAKASI POLICE STATION.....3<sup>RD</sup> RESPONDENT**

**CHIEF MAGISTRATES COURT, MAKADARA.....4<sup>TH</sup> RESPONDENT**

**AND**

**TUFFPLAS MANUFACTURERS LIMITED.....INTERESTED PARTY**

**EX PARTE APPLICANTS:**

**MANSUKHLAL SHANTITAL PATEL**

**PERRY MANSUKH KANSAGRA**

**LAWI KIGEN KIPLAGAT**

**JUDGMENT**

**The Application**

1. The 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants herein, Mansukhlal Shantilal Patel and Perry Mansukh Kansagra are Directors of Kensalt Limited, while the 3<sup>rd</sup> *ex parte* Applicant, and Lawi Kigen Kiplagat, is a General Manager of the said company, which is registered under the Companies Act Cap 486 of the Laws of Kenya.

2. The *ex parte* Applicants have filed an application by way of a Notice of Motion dated 6<sup>th</sup> January 2020, seeking the following orders:

a) **THAT an order of Certiorari do issue to remove this court for purposes of being quashed the decision of the Director of Public Prosecutions either directly or by subordinate persons acting in accordance with the general or specific instructions to charge the 1st, 2nd and 3rd ex parte Applicants with criminal offences regarding the land Parcel Number 209/11410 situated within Kia Ngombe in Embakasi Sub-County District within Nairobi County vide the Makadara Chief Magistrate Cr. Case No. 4833 of 2019 R -vs- Mansukhlal Shantilal Patel, Perry Mansukh Kansagra and Lawi Kigen Kiplagat.**

b) **THAT an order of Certiorari do issue to remove this court to quash all the proceedings in the Makadara Chief Magistrate Cr. Case No. 4833 of 2019 R -vs- Mansukhlal Shantilal Patel, Perry Mansukh Kansagra and Lawi Kigen Kiplagat.**

c) **THAT an order of Prohibition do issue prohibiting the Respondents from proceeding with the hearing of the Makadara Chief Magistrate Cr. Case No. 4833 of 2019 R -vs- Mansukhlal Shantilal Patel, Perry Mansukh Kansagra and Lawi Kigen Kiplagat and/or from prosecuting the 1st, 2nd and 3rd ex-parte Applicants herein.**

d) **THAT an order of Mandamus do issue directed to the 1st, 2nd, 3rd and 4th Respondents to act in accordance with the law and the Constitution of Kenya and to desist and/or vacate from the issue of determination of the ownership of the land Parcel Number 209/11410 situated within Kia Ngombe in Embakasi Sub-County District within Nairobi County vide a criminal trial in Makadara Chief Magistrate Cr. Case No. 4833 of 2019.**

e) **THAT an order of Prohibition do issue prohibiting the Chief Magistrate Court Makadara from proceeding with the hearing of the Makadara Chief Magistrate Cr. Case No. 4833 of 2019 R -vs- Mansukhlal Shantilal Patel, Perry Mansukh Kansagra and Lawi Kigen Kiplagat and from further hearing of the criminal case herein.**

f) **THAT the costs of this Application be provided for.**

3. The Director of Public Prosecutions, the Director of Criminal Investigations, the DCIO, DCI Embakasi Police Station and the Chief Magistrate Court Makadara are sued as the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents herein respectively. The application is supported by a statutory statement dated 27<sup>th</sup> December 2019, a verifying affidavit sworn on the same date, and a supplementary affidavit sworn on 20<sup>th</sup> April, 2020 by Mansukhlal Shantilal Patel, the 1<sup>st</sup> *ex parte* Applicant. In response, C.I Dorcas Simalo, a police officer at the time serving at the Embakasi DCI Office and the investigation officer, swore a replying affidavit on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The Interested Party also filed a replying affidavit on 3<sup>rd</sup> February, 2020, sworn by Sunit Jayantilal Shah, its Director. This Court directed that the instant application be canvassed by way of written submissions. A summary of the parties' respective cases as stated in their pleadings now follows.

#### **The ex parte Applicants' case**

4. The *ex parte* Applicants' case is that there exists pending litigation before the Environment and Land Court of Kenya at Nairobi, being **ELC Case No. 493 of 2012 - Gorvas Holdings Limited vs Kensalt Limited, Supplies and Services Limited, Chief Land Registrar, Director of Surveys, Tufflas Manufacturers Limited & Taylor Winch (Coffee) Limited** and **ELC Case No. 195 of 2019 - Tufflas Manufacturers Limited vs Kensalt Limited & 3 Others**, in which the dispute concerns among other properties land parcel number 209/11410, which is also the subject matter of criminal charges in the charge sheet before the Makadara Criminal Case No. 4833 of 2019. The *ex parte* Applicants annexed a copy of the charge sheet and of the pleadings filed in ELC No. 493 of 2012 and in ELC No. 195 of 2019 .

5. It was averred that in ELC No. 493 of 2012, Kensalt Limited, of which the *ex parte* Applicants are directors, has contended that they have an indefeasible title over all that parcel of land Number L.R No. 209/11410 as a bona fide purchaser for value without notice, having purchased the said property from Taylor Winch (Coffee) Limited for valuable consideration. Further, that the complainant in Makadara Criminal Case No. 4833 of 2019, also claims ownership of land Parcel Number 209/11410, and filed the suit in ELC Case No. 195 of 2019 seeking orders in relation to the said parcel of land. It was also averred that the *ex parte* Applicants through their company Kensalt Limited, had already raised and filed a preliminary objection on points of law for the striking out of the suit in ELC Case No. 195 of 2019, on the grounds that that there was a similar matter touching the same subject matter in ELC No. 493 of 2012, which was awaiting hearing and determination. The *ex parte* Applicants annexed a copy of the said Preliminary Objection.

6. It is thus the *ex parte* Applicants' case that the issue herein is a land dispute before the Environment and Land Court, wherein the determination of the ownership of the suit land is moot. Therefore, that waiting from the year 1985 and 1994 when the alleged criminal offence took place, and seven years after the institution of civil case to raise a criminal complaint, pointed that to the conclusion that the institution of the criminal process was meant to force the *ex parte* Applicants to submit to the civil claim, and for the achievement of a collateral purpose other than its legally recognised aim and legitimate use. In addition, that the institution of criminal charges against the *ex parte* Applicants was tainted with illegality, irrationality, procedural impropriety, *ultra vires* and unreasonable, as the charge sheet read that the criminal offences were committed between 1<sup>st</sup> July, 1985 and 13<sup>th</sup> July, 1994, yet the *ex parte* Applicants purchased the subject land in the year 2010. The *ex parte* Applicants averred that the use of the criminal process was in the circumstances oppressive and vexatious, and that all the persons had to be treated fairly and equally before the law and there was thus need to prevent an abuse of the process of the court.

7. The *ex parte* Applicants also contended that the subject land Parcel Number 209/11410 was a matter under investigation at DCI Headquarters upon a complaint made by Gorvas Holdings Limited, and that while still under inquiry, the DCIO Embakasi Police Station, unlawfully and without jurisdiction purported to open parallel investigations over the same land Parcel allegedly at the complaint of Tufflas Manufacturers Limited, and rushed to the criminal court to charge the *ex parte* Applicants. In addition that the charge sheet read that the suit property then belonged to Tufflas Manufacturers Limited, therefore vesting the ownership of a disputed land to one of the parties in the two pending suits in the Environment and Land Court on the same subject property. The *ex parte* Applicants averred that the process of investigations, framing of charges and the prosecution before the criminal court is meant to "steal a match" upon them and to vest the disputed land to the complainant in Makadara Criminal Case No. 4833 of 2019. The *ex-parte* Applicants annexed various court documents and reports on the prosecution. .

8. It is the *ex parte* Applicants' averment that the criminal complaint and prosecution on the face of it was one made without jurisdiction or in consequence of an error of law, and in abuse or use of excess of power by the Respondents. Further, that the criminal case was meant to frustrate the *ex parte* Applicants' claim to the land before the Environment and Land Court, and no one is allowed to use criminal proceedings to interfere with a fair trial. The *ex parte* Applicants acknowledged that while the Director of Public Prosecutions is given an inherent discretion to institute and undertake criminal proceedings against any person, that discretion should not be exercised arbitrarily, oppressively or contrary to public policy. It was averred that it is contrary to public policy when prosecution is undertaken selectively, oppressively and for collateral purposes namely an advancement of a civil case of one party when litigations before the Environment and Land Court is still pending.

9. Further, that while section 193A of the Criminal Procedure Code allows the concurrent litigation of civil and criminal proceedings arising from the same issues and while it is the prerogative of the police to investigate crime, it is fundamental that the power must be exercised responsibly, in accordance with the law of the land and in good faith. In addition, that it is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes, and that it is unconscionable and a travesty of justice for the police to be involved in settlement of what is purely a dispute litigated in civil court.

10. Lastly, the *ex parte* Applicants contended that the matters of land ownership are clearly matters for Environment and Land Court which would determine its ownership with finality with all the safeguards of cross-examination and attendant re-examination. It was also deponed that there was in place a maintenance of status quo order in ELC No. 493 of 2012, by which all the parties Tufflas Manufacturers Ltd included, were ordered to maintain status quo on 28<sup>th</sup> November, 2014 and not to assert ownership of land while the suit was still pending.

### **The Respondents' Cases**

11. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents contended that the 7<sup>th</sup> April, 2019, the SCCIO received a letter from DCI HQS to investigate a case of forcible detainer pertaining to LR. No. 209/11278, and that upon carrying out investigations, they found out that the *ex parte* Applicants were the owners of LR 209/11410, a parcel which had been fraudulently sold to them by Taylor Winch Coffee Limited. Further, that the *ex parte* Applicants had amalgamated LR No. 209/11278 and LR No. 209/11410 to all read as LR No. 209/11410. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents annexed documents to support their contention that grant titles LR. No. 209/11410 and LR. No. 67926 were non-existent, and that the property existing in the land and survey offices was LR No. 209/11410 of LR. No. 140103, which was the property of Tufflas Manufacturing Limited.

12. Consequently, that the *ex parte* Applicants were charged with the offence of conspiracy to commit a felony namely forgery of a document being the title deed of land parcel number 209/11410 situated within Kia Ng'ombe in Embakasi Sub-County District within Nairobi County, the property of Tufflas Manufacturers Limited. Further, that the 3<sup>rd</sup> *ex parte* Applicant was charged at Makadara Law Courts for the offence of forcible detainer. She stated that he was the Property Manager for Kensalt Company Limited and had been paying for the services of the watchmen who had been manning the parcel in question.

13. It was further averred that the Directors of Taylor Winch Coffee Limited should be charged with conspiracy to commit a felony contrary to Section 393 of the Penal Code, since they fraudulently sold that parcel of land to Kensalt Coffee Limited after being notified by the Registrar Ministry of Lands that the file of that LR. No. 209/11410 they owned belonged to LR. No. 209/11278 which belonged to Gorvas Holdings Limited. According to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the *ex parte* Applicants have not demonstrated that in undertaking the said investigations, the office of the Director of Public Prosecution or the Director of Criminal Investigations officers acted without or in excess of the power conferred upon them by the law, or have infringed, violated, contravened or in any other manner failed to comply with the provisions of the Constitution or any other law.

14. Lastly, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents contended that the accuracy and correctness of the evidence or facts gathered in an investigation could only be assessed and tested by the trial court.

### **The Interested Party's Case**

15. The Interested Party contended that it is the registered owner and proprietor of all the piece of land known as L.R. No. 209/11410 situated in Embakasi, Nairobi, and annexed a copy of their title document, and explained the processes of allocation of the said title, with reference to the supporting documents. According to the Interested Party, the said property was re-parceled and another title deed issued to Kensalt Limited, and that the *ex parte* Applicants were illegally and unprocedurally issued with a deed plan number 193873 by the Director of Survey on 10<sup>th</sup> March 1995. Further, that there were no parallel investigations being carried as alleged by the *ex parte* Applicants, and that the position was that the investigations being carried out did not relate to the same complaint since the DCI headquarters was dealing with the forgery allegations, while the DCIO Embakasi was investigating allegations of forcible detainer, and that the complainants in the complaints were different.

16. The Interested Party averred that the Office of the Director of Public Prosecution exercises state powers of prosecution that are constitutionally reposed in his office by Article 157 of the Constitution, and that the said office is guided by a National Prosecution Policy that provides guidelines on the test to be applied before a decision to prosecute is taken. Further, that where acts of a criminal nature are brought to the attention of the Office of the Director of Public Prosecution, the allegations are thoroughly investigated and appropriate action taken and in doing so, the office is not subject to the direction and control of any person, body or authority.

17. Therefore, that the Office of the Director of Public Prosecution being an independent institution established under the Constitution, the court can only interfere with or interrogate its actions where there is contravention of the Constitution, the law, rules of natural justice or breach of fundamental rights. In addition, that the court should not usurp the Director of Public Prosecution's constitutional mandate, and should remain then neutral arbiter and restrain itself from making orders that would unnecessarily fetter this mandate.

18. It is the Interested Party's case that the position taken by the Director of Public Prosecutions to prosecute the *ex parte* Applicants was a lawful process sanctioned by the Constitution and to fetter his powers would be to undermine the rule of law. Further that the Director of Public Prosecutions had provided reasonable and sufficient evidence before the trial court for the prosecution of the *ex parte* Applicants. It was also contended that the police have a duty to investigate on any complaint once a complaint is made, and would be failing in their constitutional mandate to detect and present crime. It was averred that the section 193A of the Criminal Procedure Code, provides that the fact that any matter in issue in any criminal proceedings is also directly and substantially in issue in any civil proceedings shall not be a ground for stay, prohibition or delay in criminal proceedings.

19. In conclusion, the Interested Party stated that the *ex parte* Applicant had not demonstrated how the Director of Public Prosecutions acted illegally, unreasonable, ultra vires and/or contrary to natural justice.

## The Determination

20. The *ex-parte* Applicant's Advocates on record, Arusei & Company Advocates filed three sets of written submissions dated 24th January, 2020, 10<sup>th</sup> August, 2020, and 24<sup>th</sup> September 2020, while the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' written submissions dated 9<sup>th</sup> September 2020 were submitted by Njoki Kihara, a prosecution counsel in the office of the 1<sup>st</sup> Respondent. Muturi Mwangi & Associates Advocates for the Interested Party filed submissions dated 3<sup>rd</sup> July 2020. The main issues for determination in the instant application are firstly, whether the criminal charges against the *ex parte* Applicants are in abuse of prosecution powers, and secondly whether the *ex parte* Applicant merits the relief sought.

21. The *ex parte* Applicant submitted on the scope of and remedies in judicial review, and that an Applicant has to show that act the complained of is tainted with illegality, irrationality and procedural impropriety. Reliance was placed on the decisions in **Kabale District Local Government Council and Others, (2008) 2 EA 300, Council of Civil Unions vs Minister for the Civil Service, (1985) A.C 2, Re Bukoba Gymkhana Club (1963) EA 478 and Re Bivac International SA (Bureau Beritas) [2005] 2 EA 43**, The *ex parte* Applicant reiterated the details of the pending suits in the Environment and Land Court on the subject matter of the prosecution, and of the parallel police investigations on the same matter. It was submitted that the subject criminal charges were being mounted before the issue of ownership of suit land was determined by the Environment and Land Court.

22. Further, that in these circumstances, there could be no reasonable and probable cause to mount a criminal prosecution, and that it was clear that the purpose of a criminal prosecution was to help individuals in the advancement of frustration of their civil cases. Reliance was placed on the decisions in **Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703 and Republic vs Director of Public Prosecution & 3 others Ex-parte George Kuria Mwaura (2015) eKLR** for this submission.

23. According to the *ex parte* Applicants, where the commencement of the criminal proceedings is meant to force the Applicant to submit to the civil claim as in this case, the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim, as held in **Francis Kirima M'ikunyua & Others vs. Director of Public Prosecutions, Petition No. 461 of 2012 and Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69**. Further, that this Court has the power and indeed the duty to bring to a halt criminal proceedings where the same were being brought for ulterior motives or for achievement of some collateral purposes notwithstanding the constitutional and legal powers conferred upon the Director of Public Prosecutions and the police, and reliance was placed on the holdings to this effect in **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170, Meixner & Another vs. Attorney General [2005] 2 KLR 189**

24. It was further submitted that while the role of police in criminal process was recognised in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR** it was similarly appreciated in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** that a criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. On section 193A of the Criminal Procedure Act, the *ex parte* Applicants contended that whereas the mere fact that the facts of the case constitute both criminal and civil liability does not warrant the halting of the criminal case, it was held in **Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703** and in **Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others Nairobi Civil Appeal No. 56 of 2012 [2013] eKLR** that it is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of their civil cases .

25. It was reiterated that the dispute between the *ex parte* Applicants herein and the Interested Party is a land dispute which is purely a civil matter, and that the institution of the criminal proceedings was meant to compel the *ex parte* Applicants to own up to the demands of the Interested Party. Further, that there was no reasonable and probable cause for mounting a criminal prosecution because between 1<sup>st</sup> July 1985 and 13<sup>th</sup> July 1994, the *ex parte* Applicants had not come in to the picture, and the vendor who sold them the disputed parcel of land had not been charged, which was a demonstration of malice, mischief, collateral purpose and oppressiveness and acting unreasonably in the criminal charge.

26. Therefore, that whereas the discretion given to the police to investigate offences and that given to the Director of Public Prosecutions ought not to be lightly interfered with, the *ex parte* Applicants had placed material before court sufficient to warrant the High Court to interfere with the powers of the police and the DPP. Reliance was placed on the decisions in **R v DPP & Others Ex-parte Qian Guo Jun & Another, (2013) eKLR , Meixner & Another vs. Attorney General [2005] 2 KLR 189, Geoffrey K. Sang v Director of Public Prosecution & 4 others (2020) eKLR , Kenya Commercial Bank Limited & 2 Others vs. Commissioner of Police and Another, Nairobi Petition No. 218 of 20122 (2013) eKLR, and Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323** for the submission that where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes the Court should bring the proceedings to a halt.

27. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submissions were that it is an established principle that where a party alleges a breach of fundamental rights and freedoms, he or she must state and identify the rights with precision and how the same have been or will be infringed in respect to him. The decisions in **Anarita Karimi Njeru vs The Republic, (1976-1980) KLR 1272 Matiba vs AG (1990) KLR 666 and Leonard Otieno vs Airtel Kenya Limited (2018) eKLR**. It was submitted that the National Police Service draws its authority to investigate from Article 245 of the Constitution and the section 35 of the National Police Services Act, and in the exercise of its power of investigation, the police are functionally independent and can only take directions to investigate from the Director of Public Prosecutions.

28. It was contended that the *ex parte* Applicants had not presented any written directive to the police by any other authority to justify the claim that the investigations have been commenced for a collateral purpose, and in the absence of that evidence, the court can only presume that the Respondents are purely acting on the discharge of their lawful authority. Reliance was placed on the decisions in **Dr. Alfred N. Mutua vs The Ethics and Anti-Corruption Commission & Others, Misc. Application No. 31 of 2016 and Republic vs The Commissioner of Police & the Director of Public Prosecution ex parte Michael Monari & Another, Misc. Application No. 68 of 2011, Nairobi**, that the Constitution recognizes that if a criminal offence is committed, investigation, arrest and prosecution might ensue.

29. Reliance was also placed on Article 157 of the Constitution which it was submitted vests state powers of prosecution upon the Office of the Director of Public Prosecutions, which power is restated in section 5 of the Office of Director of Public Prosecutions Act. Further, that in the exercise of this power, the Director of Public Prosecutions is not under the direction or control of any person, body or authority as provided for under Article 157(10) of the Constitution, and as held in Hon. James Ondicho Gesami vs The Attorney General & Others, Nairobi Petition No. 376 of 2011, Nairobi and in Thuita Mwangi & 2 others vs Ethics and Anti-Corruption Commission & 3 others (2004). It was also submitted that primary test in the making of prosecutorial decisions on the part of the Director of Public Prosecutions is whether or not the material gathered meets the evidential and public interest threshold.

30. The holdings in various cases, including in Mohamed Ali Swaleh vs The Director of Public Prosecutions & Another, Mombasa H. C. Petition No. 2 of 2017; Republic vs Commissioner of Police & Another, [2012] eKLR; Pauline Raget Adhiambo Agot vs DPP & 5 Others, Petition No. 446 of 2015; AG vs AG & 3 Others ex parte Thomas Ng'ang'a Munene, Petition No. 166 of 2013; and Total Kenya Limited & 9 others vs Director of Criminal Investigations Department & 3 others, [2013] eKLR were relied upon for the submissions that the Police only need to establish reasonable suspicion before preferring charges, and the rest is left to the trial court, and that a judicial review Court should not determine the merits of a dispute between parties, and ought not to usurp the Constitutional mandate of the DPP to investigate and undertake prosecution.

31. In conclusion, it was submitted by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that too much superintendence by one organ could render the other arms of government dysfunctional, which is a threat of the rule of law and could possibly lead to a constitutional paralysis or crises in government. Therefore, that any intervention therefore by one arm against the other must be guarded and properly justified.

32. The Interested Party on its part submitted the decision to charge the *ex parte* Applicants was *intra vires* and consistent with the powers conferred upon the Director of Public Prosecutions by Article 157 of the Constitution, the Office of the Director of Public Prosecutions Act and the National Police Service Act. Further, that the decision to prosecute could not be said to have been *ultra vires*, where the Director of Public Prosecutions had reviewed an investigation file and found the evidence to be sufficient. It was submitted that it is not for the court to direct the Director of Public Prosecutions on how to exercise his constitutional powers, though the court could intervene where the exercise of the powers is contrary to the Constitution, in bad faith or amounts to an abuse of process as held in in Douglas Maina Mwangi vs Kenya Revenue Authority & Another, Constitutional Petition No. 528 of 2013.

33. Reliance was also placed on the decisions in Thuita Mwangi & 2 Others v Ethics & Anti-Corruption Commission and 3 Others (supra); Republic v Commissioner of Police and Another ex parte Michael Monari & Another, (supra); Peter Ngungiri Maina vs The Director Of Public Prosecutions & 2 Others, Judicial Review No. 11 of 2016; Republic vs The Hon. Chief Magistrate, Milimani Criminal Division & Others, Misc. Application No. 620 OF 2017; Isaiah Waweru Ngumi vs Attorney General & 7 Others [2013] eKLR; and Republic vs The Chief Magistrate's Court At Nanyuki & Others, Judicial Review Cause No. 2 of 2017 for the position that the DPP acted in accordance with the Constitution and his role should be upheld.

34. According to the Interested Party, the subject criminal case was solely based on the evidence gathered during the investigations and were not intended to harass the *ex parte* Applicants and had not been influenced by anyone. With respect to the pending civil cases, it was submitted that their existence was no bar to the criminal case, and the decisions to this effect in the cases of Diamond Hasham Lalji & Another vs The Attorney General, The Director of Public Prosecutions & 3 Others, Civil Appeal No. 274 of 2014 and Communications Commission of Kenya vs Director of Public Prosecutions & 2 Others, Civil Appeal No. 370 of 2014 were cited in this regard.

35. The Interested Party contended that that criminal proceedings against the *ex parte* Applicants had not been instituted for any other purpose other than for the trial court to consider their conduct to determine whether or not an offense had been committed. Therefore, that this Court ought not to usurp the Constitutional mandate of the 1<sup>st</sup> Respondent conferred to it by dint of Article 157(6)(a) of the Constitution.

36. Lastly, the Interested Party submitted that no **evidence was presented by the *ex parte* Applicants of excess or want of authority, of harassment or intimidation, or of manipulation of court process, and as such they had not demonstrated how the Director of Public Prosecutions acted illegally, unreasonably, ultra vires and/or contrary to natural justice to settle a civil dispute.**

37. Before determination of the issues before the Court, it is necessary to restate the parameters of judicial review jurisdiction, as stated in the Ugandan case of Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300 thus:

**“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).**

**Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....**

**Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.**

**Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid**

down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

38. Judicial review is now entrenched as a constitutional principle pursuant to the provisions of Article 47 of the Constitution, which provides for the right to fair administrative action, and section 7 of the Fair Administrative Action Act in this regard provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision. In addition, it was emphasized by the Court of Appeal in ***Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others*, (2016) KLR that Article 47 of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, even though the reviewing court has no mandate to substitute its own decision for that of the administrator.**

39. **Lastly**, Article 165(6) of the Constitution also provides that this Court has supervisory jurisdiction over any person, body or authority that exercises a quasi-judicial function or a function that is likely to affect a person’s rights. The consideration and determination of the substantive issues raised in the instant application now follows.

#### ***On whether there was Abuse of Prosecutorial Powers***

40. On the issue of abuse of prosecutorial powers, it is important to first deal with the applicable principles and circumstances under which the Court will grant order prohibiting the commencement or continuation of a criminal trial process. In this respect, the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The merits of the case, and particularly whether the criminal proceedings have a likelihood of success, or that the Applicant has a good defence is also not a ground for halting criminal proceedings by way of judicial review, in light of the purpose and limits of judicial review explained in the foregoing.

41. However, if an applicant demonstrates that the criminal proceedings constitute an illegality or abuse of process, this Court will not hesitate in putting a halt to such proceedings, as that fall squarely within its mandate as a judicial review Court. The cases of ***Peter Ngunjiri Maina v DPP & 2 Others* (2017) eKLR**, and ***R v DPP & 2 Others Ex parte Nomoni Saisi* (2016) eKLR** identified various scenarios that would require interrogation to warrant a review of the unfettered discretion of the Director of Public Prosecutions as follows:

- (a) Where there is an abuse of discretion;
- (b) Where the decision-maker exercises discretion for an improper purpose;
- (c) Whether decision-maker is in breach of the duty to act fairly;
- (d) Whether decision-maker has failed to exercise statutory discretion reasonably;
- (e) Where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power;
- (f) Where the decision-maker fetters the discretion given;
- (g) Where the decision-maker fails to exercise discretion;
- (h) Where the decision-maker is irrational and unreasonable.”

42. In this regard, the concurrent existence of the criminal proceedings and civil proceedings would not, *ipso facto*, constitute an abuse of the process of the court as recognised by section 193A of the Criminal Procedure Code, unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim.

43. These principles have been restated in various judicial decisions. The role of the different players in the criminal process was recognised in ***Republic vs Commissioner of Police and Another ex parte Michael Monari & Another*, [2012] eKLR** where it was held that:

**“the police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene”.**

44. In ***Joram Mwenda Guantai vs The Chief Magistrate*, [2007] 2 EA 170**, the Court of Appeal explained the applicable principles as follows:

**“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 the 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.”

45. In Johnson Kamau Njuguna & Another vs Director of Public Prosecutions (2018) eKLR, the court also restated the said principles thus:

**“It is settled law that the role of the court in a judicial review application of this nature is to ensure that an applicant is not dragged willy-nilly into court on criminal charges when there is no substantial evidence to sustain an indictment. The DPP has the authority and discretion to decide who, when and how to prosecute within the bounds of legal reasonableness. That role cannot be usurped by the court. If the DPP acts outside the bounds of legal reasonableness, however, he acts ultra vires and the court can intervene, because it is the court’s high responsibility and inherent power to secure fair treatment for all persons brought before the court, and to prevent an abuse of the court’s process.”**

46. The Court of Appeal in Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others, [2013] eKLR also held as follows on concurrent criminal a civil proceedings on the same issues:

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

47. The circumstances when a Court can intervene in a criminal prosecution was also the subject of the decision in R vs. Attorney General exp Kipngeno Arap Ngeny, High Court Civil Application No. 406 of 2001 wherein it was held that:

**“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”.**

48. The question that therefore need to be answered by this Court is whether the criminal proceedings against the *ex parte* Applicants were brought in abuse of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent’s powers, were unreasonable or were motivated by improper motives. In this respect, it is not disputed that there are pending civil cases on the ownership of land parcel No. L.R. No. 209/11410 in the Environment and Land Court, filed by both the *ex parte* Applicants and the Interested Party, and the issue of ownership of the said land is pending determination by the Environment and Land Court. Furthermore, the disputed parcel of land is also the basis of the criminal proceedings brought against the *ex parte* Applicants. Lastly, the Respondents and Interested Party do not dispute the *ex parte* Applicant’s averments that there are *status quo* orders in relation to the disputed land in the pending civil cases. Therefore, the criminal proceedings are not only *sub judice*, having been brought in relation to a matter that is pending determination in another Court, but also meant to preempt the decision on the ownership on the disputed parcel of land.

49. This is therefore clearly a case where the criminal proceedings against the *ex parte* Applicant are meant to give advantage to the Interested Party on an issue pending determination in civil proceedings between the parties, and is a classical example of the Interested Party trying to steal a march on the *ex parte* Applicants through criminal proceedings. Equally, had the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents undertaken proper investigations and applied the required standards and thresholds they have submitted on, it would have been evident that the Interested Party’s was a case that was inappropriate for criminal prosecution.

50. It is also notable that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and Interested Party do not dispute that the charges are brought in relation to events that occurred between 1<sup>st</sup> July, 1985 and 13<sup>th</sup> July, 1994, when the *ex parte* Applicants allege they had not yet purchased the said land, and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents admit that they have not brought any criminal proceedings against the vendor of the said parcel of land to the *ex parte* Applicants. In addition, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents It is thus proper and justified in the circumstances to conclude that the prosecution of the *ex parte* Applicant was unreasonable, made without any basis, and was thus in abuse of prosecutorial powers.

51. The prosecution by the Respondents was thus not only in abuse of their powers, but also in abuse of the process of Court, as it was a collateral attack on pending court orders and proceedings on the same subject matter in the Environment and Land Court. It is also notable in this regard that the jurisdiction to hear any dispute in relation to title, use and occupation of land now falls within the exclusive jurisdiction of the Environment and Land Court, pursuant to Articles 162(2) (b) and 165(5) of the Constitution, and section 13 of the Environment and Land Court Act.

52. It is thus the finding of this Court that the prosecution of the *ex parte* Applicants and criminal proceedings brought against them in Makadara Chief Magistrate Cr. Case No. 4833 of 2019 - R vs Mansukhlal Shantilal Patel, Perry Mansukh Kansagra and Lawi Kigen Kiplagat was an abuse of the discretion granted to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, as it was for the improper purpose of circumventing and preempting the proceedings in the Environment and Land Court on the ownership of the disputed parcel of land, and which is the proper forum with jurisdiction to examine and determine if there was any fraudulent dealing with the said land. The said criminal proceedings

would also give unfair advantage to the Interested Party in relation to existing civil cases in Nairobi ELC No. 493 of 2012 and Nairobi ELC No. 195 of 2019 in the Environment and Land Court, Nairobi over the same subject matter. The intervention by this Court in the circumstances is therefore justified and necessary in the interests of justice, and to prevent abuse of the process of court.

### ***Whether the orders sought are merited***

53. On the last issue as regards the relief sought, the *ex parte* Applicants have sought orders of certiorari, prohibition and mandamus. An order of prohibition restrains a public body from acting in the manner specified in the order to restrain a threatened or impending unlawful conduct. An order of certiorari on the other hand nullifies an unlawful decision or enactment. The Court of Appeal in the case of **Republic v Kenya National Examinations Council ex parte Gathenji & Others, (1997) e KLR** explained the circumstances under which the orders of prohibition and certiorari can issue as follows: -

**“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...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 for 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...Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”**

54. An order of mandamus on the other hand requires a public body to do some particular act as specified in the order, to enforce public law duties. The Court of Appeal in the above cited decision held as follows on the applicable principles for an order of mandamus to issue:-

**“The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY’S LAW OF ENGLAND, 4<sup>th</sup> Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-**

**“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”**

At paragraph 90 headed “the mandate” it is stated:

**“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”**

**What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed....”**

55. The prosecution of the *ex parte* Applicants by the Respondents in **Makadara Chief Magistrate Cr. Case No. 4833 of 2019 - R vs Mansukhlal Shantilal Patel, Perry Mansukh Kansagra and Lawi Kigen Kiplagat**, has been found by this Court to be in abuse of prosecutorial powers and the process of Court, unreasonable and for improper purposes. The orders sought of certiorari to quash the said prosecution is thus merited. Consequently, an order of prohibition stopping any further prosecution of the *ex parte* Applicant in the said criminal case is also merited, to ensure that this Court does not act in vain.

56. On the orders of mandamus sought, it was held in **Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants [2007] 2 EA 441**, that an order of mandamus compels a public officer to act in accordance with the law. The main principles that apply therefore for an order of mandamus to issue are firstly, that the Court will only issue a mandatory order if it concludes that it is the only decision lawfully open to the public body, and there is no other legal remedy that is available to remedy the infringement of a legal right.

57. Secondly, the Court will only compel the satisfaction of a public duty if it has become due, and if or where there is a condition precedent necessary for the duty to accrue, an order of mandamus will not be granted until that condition precedent comes to pass. Therefore, where there is a dispute as to whether a public duty has crystallised, the Court will not by an order of mandamus compel a Respondent to exercise that duty until the dispute is sorted out. Lastly, whereas the Court may compel the performance of the public duty where such duty is shown to exist, it will however not compel its performance or the exercise of its discretion in a particular manner.

58. In the present case, there are available remedies of certiorari and prohibitions that are adequate to address the *ex parte* Applicants’ grievances. In addition, the issue of the legal duty of the Respondents in relation to the ownership of the disputed property, and breach of this

duty was not canvassed by the parties, more so as this issue is still pending determination before the Environment and Land Court, and any legal duties arising can only be ascertained after the determination. Lastly, in the circumstances, this Court cannot grant orders that will curtail performance of the Respondents' constitutional and statutory duties. The order of mandamus is therefore not merited for these reasons.

59. In the premises, I find that the *ex parte* Applicants' Notice of Motion dated 6<sup>th</sup> January 2020 is merited to the extent of the following orders:

**I. An order of Certiorari be and is hereby issued to bring into the High Court for purposes of being quashed the decision of the Director of Public Prosecutions either directly or by subordinate persons acting in accordance with general or specific instructions to charge the 1st, 2nd and 3rd *ex parte* Applicants with criminal offences regarding land Parcel Number 209/11410 situated within Kia Ngombe in Embakasi Sub-County District within Nairobi County vide the Makadara Chief Magistrate Cr. Case No. 4833 of 2019 - R vs Mansukhlal Shantilal Patel, Perry Mansukh Kansagra and Lawi Kigen Kiplagat, as the ownership of the said land parcel is the subject of pending cases in the Environment and Land Court at Nairobi in Nairobi ELC No. 493 of 2012 and in Nairobi ELC No. 195 .**

**II. An order of Certiorari be and is hereby issued to bring into the High Court for purposes of being quashed the proceedings in the Makadara Chief Magistrate Cr. Case No. 4833 of 2019 - R vs Mansukhlal Shantilal Patel, Perry Mansukh Kansagra and Lawi Kigen Kiplagat.**

**III. An order of Prohibition be and is hereby issued prohibiting the Respondents from proceeding with the hearing of the Makadara Chief Magistrate Cr. Case No. 4833 of 2019 - R vs Mansukhlal Shantilal Patel, Perry Mansukh Kansagra and Lawi Kigen Kiplagat and/or from prosecuting the 1st, 2nd and 3rd *ex-parte* Applicants herein in the said criminal case.**

**IV. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and Interested Party shall meet the *ex parte* Applicants' costs of the Notice of Motion dated 6<sup>th</sup> January 2020.**

60. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 31<sup>ST</sup> DAY OF MARCH 2021**

**P. NYAMWEYA**

**JUDGE**

**FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS JUDGMENT**

**In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this judgment will be delivered electronically by transmission to the email addresses of the *ex parte* Applicants', Respondents' and Interested Party's Advocates on record.**

**P. NYAMWEYA**

**JUDGE**