REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

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

CONSTITUTIONAL PETITION NO. E033 OF 2021

BETWEEN

MAURA MUIGANA.....PETITIONER

VERSUS

1. STELLAN CONSULT LIMITED

2. THE DIRECTOR OF PUBLIC PROSECUTIONS

3. THE CHIEF MAGISTRATE COURT, KIBERA.....RESPONDENTS

JUDGMENT

Introduction:

1. The Petitioner herein, *Maura Muigana,* is the accused person in *Kibera Chief Magistrates' Criminal Case No. 427 of 2019* (hereinafter referred to as '***the criminal case***').

2. He approached this Court through the Petition dated 11th January, 2021 and supported by his Affidavit sworn on 12th January, 2021, with the plight that his former employer, *Stellan Consult Limited,* the 1st Respondent herein, instituted the criminal case with a view of using the criminal justice system to settle a civil dispute.

3. The Petition is opposed.

4. The parties herein proposed and the Court approved that the hearing of a Notice of Motion application dated 3rd February, 2021 which had been filed by the Petitioner be dispensed with in favour the main Petition. Parties thereafter filed respective pleadings and written submissions to the Petition hence this judgment.

The Petitioner's case:

5. The Petitioner contends that he was the General Manager of the 1st Respondent. On 14th December 2015, his employment was terminated on the basis that Kshs. 703,887/30 was lost under his watch.

6. It is his case that upon being called upon by the 1st Respondent to answer to the loss, he undertook, *albeit* under duress, to pay the said amount and to provide land title as a collateral.

7. The Petitioner claimed that he made an initial payment of Kshs. 20,000/- and that it is his failure to make good payment of two subsequent instalments that led to the institution of the criminal case.

8. The Petitioner posited that the criminal charge, *stealing by servant contrary to section 281 of the Penal Code,* was informed by a cause of action arising from a civil debt since he had negotiated, tendered security, partly paid and had a written payment plan. As such, the 1st

Respondent was abusing the criminal justice system by instituting the criminal case for purpose of submitting him into the civil claim.

9. The particulars of the charge were as follows: -

> *On the diverse dates between 5th and 12th November, 2015 at Stellan consult limited offices Westlands within Nairobi county, being a servant of Stellan consult limited as the general manager stole Kshs. 703,887.80/= (seven hundred and three thousand eight hundred and eight seven and eighty cents) the property of Stellan consult limited.*

10. The Petitioner stated that he had the right to claim constitutional infringement under *Article 22* of the Constitution since the criminal case violated his right to *equality before the law, freedom and security person, fair administrative action and fair hearing* under *Article 27, 29, 47* and *50* of the Constitution respectively.

11. In the Petition, he prayed for the following orders: -

a. *An order of stay of the criminal case No. 427/2019, R -vs- The Petitioner pending the hearing and determination of this petition.*

b. *An order of prohibition refraining the 2nd Respondent from instituting or further prosecuting criminal case no. 427/19, R -vs- the Petitioner on same facts.*

c. *An order of certiorari do issue to remove to this court and/or quash the charge sheet dated 28th of March 2019 and all proceedings against the Petitioner in Criminal Case No. 427/19 in the 3rd Respondent.*

d. *An Order for compensation for the violation of the Petitioner's.*

e. *Legal Costs incurred the amount of Kshs. 200,000/-*

f. *Costs of the suit.*

12. In his written submissions dated 14th June, 2021 the Petitioner submitted that his right to expeditious, efficient, lawful, reasonable and procedurally fair process before the 1st Respondent as guaranteed under section 4 of the Fair Administrative Act was violated. He further submitted his right to fair administrative action was violated at the meeting before the 1st Respondent where the decision to make him pay for the lost money was arrive at.

13. The Petitioner urged this Court to stay the criminal proceedings and found support in the decision in *Republic -vs- Attorney General (2002) 2KLR 703* where Court stated that it had the power and duty to prohibit the continuation of the criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. He contended that no matter how serious the criminal charge may be; the charge should not be allowed to stand if their predominant purposes is to further some other ulterior purpose.

The 1st Respondent's case:

14. The 1st Respondent opposed the Petition through the Replying Affidavit sworn by *Eunice Mathu*, its Managing Director.

15. It was deponed that the Petitioner is undeserving of the orders as pleaded in the Petition as he failed to disclose material facts including; the fact that the criminal case had been in court on 28rd March, 2019 for plea, on 11th April, 2019 for pre-trial, on 17th May, 2019 for further pre-trial, on 24th June, 2019 for hearing, on 07th October, 2019 for hearing of PW1, on 29th October, 2019 for Mention to amend the charge sheet, on 21st January, 2020 for further hearing, on 11th March, 2020 for mention, on 08th April, 2020 for mention but accused absent, on 27th October, 2020 for Mention, on 18th February, 2021 for hearing and on 03rd March, 2021 for further hearing.

16. She further deponed that the Petitioner had failed to disclose the contents of his letter dated 9th December, 2015 which acknowledged that there was loss of Kshs 703, 887.80 by the 1st Respondent which amount got lost in the course of his duties as a General Manager which he undertook to pay in three (3) months with effect from 31st January, 2016 to end of 31st March, 2016 for which he offered his land as a collateral.

17. In a bid to prove propriety of the criminal case, Eunice Mathu deposed that an audit was conducted and a report prepared. The Auditor's Report pointed out a summary of irregularities attributed to the Petitioner which included salary overpayment of Kshs. 98,000/=, Old engine (lost item) of Kshs. 9,150/=, overcharge of an old scanner of Kshs. 35,000/=, Jiinue na Parents Magazine (lost items) worth Kshs. 88,000/=, Lost Magazines (half of total cost) worth Kshs. 270,746.80/-, Promotional items unaccounted for Kshs. 35,186/=, Replaced tyres for KBQ 998B at Kshs 8,500/=, and Kshs. 43,000/=, Disposal of old items at Kshs. 128,055/=, Old generator battery for Kshs. 5,750/=, leave payment without the Managing Director's authority and offset against his loan.

18. The 1st Respondent deposed that the foregoing information formed the basis of the charge and as such, the criminal case did not have its roots in the civil suit. She further stated that even if the the actions of the Petitioner amounted to a civil debt, nothing barred the 1st Respondent from pursuing criminal charges against him as long as the charges were well founded in law. To that end, reference was made to the *Section 193A* of the *Criminal Procedure Code* that allows concurrent litigation of criminal and civil proceedings.

19. She further impugned violation of any constitutional right of the Petitioner in respect to the right to fair hearing and deposed that justice

must be done to both the complainant and the accused and where there is evidence upon which prosecution can reasonably mount a criminal case, it is not for this Honourable Court to inquire into the sufficiency or otherwise of such evidence since the High Court ought not to usurp the role of the trial court in determining the merits of the criminal case.

20. In disputing the existence of civil agreement, it was deposed that the Petitioner was the initiator of a payment proposal and indeed made several undertakings to pay and offered security as collateral to pay after the offence of stealing by servant had been detected. This cannot be used to convert the actions that are criminal in nature to an alleged civil debt.

21. She deposed that the investigations and subsequent agreement by the Petitioner to pay what he stole were lawful and there was no iota of intimidation, hostile environment or duress during such exercises.

22. In its written submissions, the 1st Respondent largely reiterated the depositions in the Replying Affidavit. It sought to impugn this Court's jurisdiction by making reference to the decision in in *Simon Wachira Kagiri vs County Assembly of Nyeri& 2 Others (2013) eKLR* where it was observed;

> **……** *the Court is therefore clothed with jurisdiction to question the substance of the decisions made by other organs of government such as the 1st and 2nd Respondents but only to the extent of their constitutionality or otherwise. The court must guard against the temptation to substitute its own opinion and judgment with that of other state organs properly mandated to make such decisions.*
>
> *If a person seeking redress from the High Court on a matter which involves a reference to constitution, it is important that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.*

23. It was also submitted that the Petitioner did not plead with precision as to disclose constitutional violations. Reliance was placed on the High Court in *Daniel Muthama Muoki vs Ministry of Health & Anor (2020) eKLR* where it was observed;

> **…..** *I am alive to the fact that the styling of a suit as Constitutional Petition with a view to circumventing the mandatory constitutional and statutory process amounts to abuse of the process of the court, and in such circumstances, the court is called upon to exercise its inherent powers by considering striking out such a Petition and subsequently referring the respective issues to the appropriate dispute resolution forum….*

24. To buttress the argument that the Petitioner was underserving of the orders sought, the 1st Respondent submitted that according to Section 193A of the Criminal Procedure Code, parallel civil and criminal proceeding were allowed in law. Reliance was placed in *Alfred Lumiti Lusiba vs Pethad Ranik Shantilal & 2 Others (2016) eKLR* where it was found: -

> **….** *The conclusion that one can draw from Section 193A of the Criminal Procedure Code together with the decisions of the learned judges in aforementioned cases is that both civil and criminal jurisdictions can run parallel to each other and that neither can stand in the way of the other unless either of them is being employed to perpetuate ulterior motives or generally to abuse the process of the court in whatever manner. (underline added)*

25. It was further submitted that the Petitioner had not established a case by way of evidence to warrant staying of the criminal proceedings. Counsel referred to *Republic vs Chief Magistrate, Kilgoris; Ex Parte Johana Kipngeno Langat (2021) eKLR* where the following remarks were made;

> **….** *For the Court to stay a criminal proceeding, the applicant must show that the criminal proceeding is being used oppressively or it was instituted for reasons other than to bring the accused to justice. Abuse of process should be established.*
>
> *I must repeat that DPP has a constitutional mandate under article 157 to prosecute criminal cases. The mandate should not be disrupted unless for good reason; that it is being exercised in violation of the Constitution or rights and fundamental freedoms of the applicant. I should also quickly state that a criminal trial is constitutionally mandated and is clothed with staple protection for the accused. Therefore, being subjected to a criminal trial is not per se oppressive or a violation of a person's rights. Such succinct factors that the process is being used oppressively or on a charge of an offence not know to law, or for purposes of obtaining collateral or other advantages other than bringing the applicant to justice, etc must be established. I find none of these things here. Accordingly, I reject the request for stay of criminal proceedings at Kilgoris CMCCR No. 873 of 2018….*

26. The 1st Respondent also submitted that this Court ought to consider the fact that it had taken the Petitioner very long to institute the instant Petition given that the plea was taken on 28th March, 2019. As such, the discretionary power of the Court ought not to be in favour of the Petition. Support was found in *Bernard Mwikya Mulinge vs Director of Public Prosecutions & 3 Others (2019) eKLR* and in *Republic vs Director of Public Prosecutions & 2 Others Exparte Francis Njakwe Maina & Another (2015) eKLR* where the Court observed as follows respectively: -

> **…***Whereas there is nothing that can bar the Court from terminating pending criminal proceedings at any stage of those proceedings, it must always be remembered that the decision to do so is an exercise of discretionary power and the Court in determining whether or not to grant the relief sought will take into account the delay in making the application and the import and impact of such delay in the administration of justice.*
>
> *It(sic) this case it is clear that the criminal proceedings against the 1st applicant which were instituted in the year 2011 are already*

in the course of hearing. The applicant contends that it has been admitted in the said proceedings that the same proceedings were solely instituted for recovery purposes. It is further contended that the applicants are not liable to the interested party. In deciding whether or not to grant orders of judicial review, the Court must consider whether or not the orders sought by the applicant are the most efficacious remedies in the circumstances. As stated in Halsbury's Laws of England 4th Edition Vol.1(1) paragraph 122, the Court has to weigh one thing as against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles. Sound legal principles, in my view would dictate that where what is sought to be prohibited has reached a very advanced stage due to failure by the applicant to act promptly, it may well be prudent to allow the process to run its course.

27. With the foregoing persuasion, the 1st Respondent prayed that the Petition be dismissed with costs for want of merit.

The 2nd Respondent's case:

28. The 2nd Respondent opposed the Petition through Grounds of Opposition dated 6th April 2021 and written submissions dated 7th April 2021.

29. In its grounds of opposition, it stated that the Petition was unconstitutional as it sought to prevent the 2nd and 3rd Respondents from exercising their constitutional mandate. It further stated that the Petitioner had not adduced evidence to show that the criminal proceedings had been mounted for an ulterior purpose or had acted without or in excess of its powers.

30. It was its case that the Petitioner's grievance could be addressed by the trial court in the course of hearing the criminal case and as such the Petition was misconceived, frivolous and vexatious and ought to be dismissed.

31. In its written submissions, the 2nd Respondent while relying on *Anarita Karimi Njeru vs. the Republic (1976-1980) KLR 1272* and the in *Paul Ng'ang'a vs DPP & Anor Constitutional Reference No.483 of 2012*, it was submitted that the Petitioner failed to state with precision how his fundamental freedoms and rights had been violated or threatened with violation.

32. It was submitted that the Petitioner merely stated his rights and did not demonstrate specifically how each of the rights under the espoused Articles were violated by the Respondents.

33. It was also its case that the due process of investigations, arrest and prosecution could not be claimed as amounting to a violation of rights.

34. In submitting that the decision to prosecute was fair, legal and undertaken within the prescribed legal provisions, the 2nd Respondent made reference to *Article 157(6)* and *Article 157(11)* of the Constitution and stated that it was exercising constitutional mandate and it did so having regard to public interests, the administration of justice without abusing the legal process.

35. The 2nd Respondent also submitted that the Petitioner had failed to meet the threshold of demonstrating abuse of process. It found support in the case of *Matalulu -vs- DPP (2003) 4 LRC 712* where it was held that the grounds upon which the powers of the DPP to prosecute could be reviewed include; when it has acted contrary to the provisions of Constitution, shown to have acted under the direction or control of another, person or authority and failed to exercise his or her own independent discretion, acted in bad faith, abused the process of the court in which it was instituted and where it has fettered its discretion by a rigid policy.

36. As to what constitutes '*abuse of process*', support was found in the High Court in *Petition No. 537 of 2017 Stephen Oyugi Okero –vs– Milimani Chief Magistrate's Court & DCI, cited Bennet -vs- Horseferry Magistrate's Court & Anor* where it was held to be: -

something so unfair and wrong with the prosecution that the court should not allow a prosecutor to proceed with what is, in all other respects, a perfectly supportable case.

37. The 2nd Respondent further submitted that there was no evidence of misuse of power or contravention of Article 157 of the Constitution or rules of natural justice as alleged by the Petitioner, to justify stay of the criminal proceedings. Reliance was placed on the High Court in *J.R. Application No. 621 of 2017 R -vs- Inspector General Director of Public Prosecutions & 3 Others* where it was stated that;

...The power to stay or prohibit criminal proceedings is meant to advance the Rule of Law and not to frustrate it. The Constitutional provision in Article 157(10) of the Constitution ensures that the DPP has complete independence in his decision making process, which is vital to protect the integrity of the criminal justice system because it guarantees that any decision to prosecute a person is made free of any external influences.

38. It was stated that the Petitioner was purely being prosecuted based on criminal liability under Section 281 of the Penal Code and not for the recovery of any monies owed. Recovery of civil debts is not the preserve of the 2nd Respondent. Further, that the commitment by the Petitioner out of his own will to pay the amount stolen does not vitiate criminal prosecution. To that end, reliance was placed in *Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR,* where it was held;

…. The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court...As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene…

39. In conclusion, it was submitted that that orders of prohibition and *Certiorari* sought against the 2nd Respondent to restrain it from further prosecuting the Petitioner was without merit. The 2nd Respondent prayed that the Petition be dismissed with costs.

The 3rd Respondent's case:

40. The 3rd Respondent is the Chief Magistrate Court at Kibera. That is the trial Court in the criminal case.

41. The 3rd Respondent did not participate in these proceedings.

Issues for Determination:

42. From the foregoing recount of parties' cases and submissions, the issues that arise for determination are: -

i. Whether this Court has jurisdiction.

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

iii. Whether the proceedings in Criminal Case No. 427 of 2019, Republic -vs- Mwaura Muigana amounts to abuse of the criminal justice system.

iv. Reliefs, if any.

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

Analysis and Determinations:

(a) The Court's jurisdiction:

44. The subject of Court's jurisdiction has been litigated over time and is well settled. The challenge on this Court's jurisdiction arose for the first time in the 1st Respondent's written submissions. However, since challenge on jurisdiction is a preliminary issue that goes to the root of a Court's adjudicatory powers, it is necessary to make a finding irrespective of time it was raised.

45. This Court has on several occasions dealt with the issue. In Nairobi High Court Petition E282 of 2020 ***David Ndii & 4 others v Attorney General & 3 others; Kenya Human Rights Commission & 2 others (Intended Amicus Curiae)*** [2020] eKLR where yours truly discussed jurisdiction as follows: -

> *24. Jurisdiction is defined in Halsbury's Laws of England (4th Ed.) Vol. 9 as "…the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.". Black's Law Dictionary, 9th Edition, defines* jurisdiction *as the Court's power to entertain, hear and determine a dispute before it.*
>
> *25. In Words and Phrases Legally Defined Vol. 3, John Beecroft Saunders defines* jurisdiction *as follows*:
>
> > *By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics…. Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.*
>
> *26. That, jurisdiction is so central in judicial proceedings, is a well settled principle in law. A Court acting without jurisdiction is acting in vain. All it engages in is nullity.* Nyarangi, JA, *in* ***Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited*** **[1989] KLR 1** *expressed himself as follows on the issue of jurisdiction: -*
>
> > *Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings…*
>
> *27. Indeed, so determinative is the issue of jurisdiction such that it can be raised at any stage of the proceedings. The Court of Appeal in Jamal Salim v Yusuf Abdulahi Abdi & another Civil Appeal No. 103 of 2016 [2018] eKLR stated as follows: -*
>
> > *Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in Adero & Another vs. Ulinzi Sacco Society Limited [2002] 1 KLR 577, as follows;*
> >
> > *1) ……..*
> >
> > *2) The jurisdiction either exists or does not ab initio …*

3) Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.

4) Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.

28. On the centrality of jurisdiction, the Court of Appeal in Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR *stated that: -*

> *So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.*

29. On the source of a Court's jurisdiction, the Supreme Court of Kenya in Constitutional Application No. 2 of 2011 In the Matter of Interim Independent Electoral Commission (2011) eKLR *held that: -*

29. Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid down in judicial precedent ….

30. *Later, in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & Others (2012) eKLR Supreme Court stated as follows: -*

> *A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings … where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.*

31. And, in Orange Democratic Movement v Yusuf Ali Mohamed & 5 others [2018] eKLR, *the Court of Appeal further stated: -*

> [44] *…. a party cannot through its pleadings confer jurisdiction to a court when none exists. In this context, a party cannot through draftsmanship and legal craftsmanship couch and convert an election petition into a constitutional petition and confer jurisdiction upon the High Court. Jurisdiction is conferred by law not through pleading and legal draftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court...*

46. The challenge on this Court's jurisdiction is pegged on the contention that the Court ought not usurp the role of a trial Court or substitute its own opinion and judgment with that of other state organs properly mandated to make such decisions, such as the one bestowed upon the 2nd Respondent to prosecute criminal cases.

47. The constitutional foundation of the Petition arises from alleged violation of the right to *equality before the law, freedom and security of person, fair administrative action* and *fair hearing* under *Articles 27, 29, 47* and *50* respectively. The Petitioner in paragraphs 23, 24 25 and 26 of the Petition enumerates the manner in which the various constitutional provisions were violated.

48. The Petitioner invokes this Court's jurisdiction on the basis of Article 22(1) which entitles every person to institute Court proceedings for the purpose of enforcing the Bill of Rights. Article 258 of the Constitution also comes to the fore on the basis of the allegations that the actions of the 2nd Respondent in prosecuting the Petitioner are contrary to the Constitution. The Petitioner further asserts this Court's jurisdiction pursuant to Article 23 as read with Article 165 of the Constitution which bestow the High Court with the responsibility to uphold and enforce the Bill of Rights.

49. At the core of the Petitioner's case is whether there is abuse of the criminal justice system by the Respondents. Placing side by side the constitutional obligation of this Court and the violations alluded to by the Petitioner, there is no difficulty in returning the verdict that this Court indeed has jurisdiction in this matter. As rightly put by the Petitioner, it is only this Court that can vindicate his constitutional violations and no other forum.

50. This Court, therefore, affirms its jurisdiction over the Petition herein.

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

51. This subject has by now attracted many writings by legal scholars further to decisions having been rendered by Courts on it. In this decision, whereas it is desirable, I cannot purport to come up with all the marvellous work that has been done on the subject.

52. In this discussion, I will begin with a general look at the prosecutorial powers of the Director of Public Prosecutions (hereinafter referred to as '***the DPP***') and then deal with Section 193A of the *Criminal Procedure Code*, Cap. 63 of the Laws of Kenya (hereinafter

referred to as '***the CPC'***). Lastly, I will endeavour a look at the concept of abuse of Court process.

A general look at exercise of prosecutorial powers:

53. The basis of the exercise of prosecutorial powers in Kenya is the Constitution and the law. **Article 157** of the Constitution establishes the Office of the Director of Public Prosecutions as under: -

1) There is established the office of Director of Public Prosecutions.

2) The Director of Public Prosecutions shall be nominated and, with the approval of the National Assembly, appointed by the President.

3) The qualifications for appointment as Director of Public Prosecutions are the same as for the appointment as a judge of the High Court.

4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

5) The Director of Public Prosecutions shall hold office for a term of eight years and shall not be eligible for re-appointment.

6) The Director of Public Prosecutions shall exercise State powers of prosecution and may--

a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

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

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

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

8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.

9) The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

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

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

12) Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions.

54. Further to the foregoing, the *Office of Director of Public Prosecutions Act No. 2 of 2013* (hereinafter referred to as '***the ODPP Act'***) is an Act of Parliament aimed at giving effect to Articles 157 and 158 of the Constitution and other relevant Articles of the Constitution and for connected purposes. The ODPP Act provides in Section 4 the guiding principles which must guide the DPP in prosecution of cases as follows:

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

(a) the diversity of the people of Kenya;

(b) impartiality and gender equity;

(c) the rules of natural justice;

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

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

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

(g) protection of the sovereignty of the people;

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

(i) promotion of constitutionalism.

55. Suffice to say the ODPP Act and other statutes variously provide for the manner in which the DPP ought to discharge its mandate.

56. The exercise of prosecutorial powers by the DPP has been subjected to legal scrutiny and appropriate principles and guidelines developed. I have, hereinabove, endeavoured to capture several decisions which were referred to by the parties in their respective submissions. To that end, this Court is grateful to the parties for such diligence.

57. Having said so, this Court recalls that it recently discussed the exercise of prosecutorial powers by the DPP in Nairobi High Court Constitutional Petition No. E216 of 2020 ***Reuben Mwangi v Director of Public Prosecutions & 2 others; UAP Insurance & another (Interested Parties)*** [2021] eKLR. Since I am still of that persuasion, I will reproduce what was stated in that case and as follows: -

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

[41] Thus, the exercise of prosecutorial discretion enjoys some measure of judicial deference and as numerous authorities establish, the courts will interfere with the exercise of discretion sparingly and in the exceptional and clearest of cases. However, as the Privy Council said in Mohit v Director of Public Prosecutions of Mauritius [2006] 5LRC 234*:*

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

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

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

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

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

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

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

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

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

> *the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system…In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of* ***Domnic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003*** *is that interpretation of the Constitution has to*

be progressive and in the words of Prof M V Plyee in his book, ***Constitution of the World****: "The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time……. In our role as "sentinels" of fundamental rights and freedoms of the citizen which are founded on laisez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent "sentinels" of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right.*

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

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

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

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

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

> ***The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction to the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor can it soft-pedal the course of justice at a crucial stage of investigation/proceedings.***
>
> ***The provisions of Articles 226, 227 of the Constitution of India and Section 482 of the Code of Criminal Procedure, 1973 (hereinafter called as "Cr.P.C.") are a device to advance justice and not to frustrate it. The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of power of the Court, but the more the power, the more due care and caution is to be exercised in invoking these powers.***

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

> ***14. As has been held time and time again the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions (DPP) to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution. The mere fact therefore that the intended or ongoing criminal proceedings are in all likelihood bound to fail, is not ipso facto a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. An applicant who alleges that he or she has a good defence in the criminal process ought to ventilate that defence before the trial court and ought not to invoke the same to seek the halting of criminal proceedings undertaken bona fides since judicial review court is not the correct forum where the defences available in a criminal case ought to be minutely examined and a determination made thereon…..***

*97. In **Meixner & Another vs. Attorney General [2005] 2 KLR 189** the Court stated as follows: -*

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

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

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

*99. In **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR** the Court held that:*

> ***…** the police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court...As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene....*

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

> *(i) There is no ostensible complainant in respect to the complaint;*
>
> *(ii) The prosecution fails to avail witness statements and exhibits without any justification;*
>
> *(iii) There is selective charging of suspects; or*
>
> *(iv) An Advocate is unfairly targeted for rendering professional services in a matter.*

101. It is, hence, a settled legal principle and position that whenever a Petitioner sufficiently demonstrates the stifling of or threats of infringement of rights, fundamental freedoms, the Constitution and/or the law by the investigative and prosecutorial agencies, a Court should not hesitate to intervene and stop such a prosecution. Such intervention by the Courts should, however, be in clearest of the cases.

58. I have also come across several other decisions on the subject. I will refer to only some few. In ***Anthony Murimi Waigwe v Attorney General & 4 others*** [2020] eKLR, the Court held that the Prosecutor has a duty to analyze the case before prosecuting it and it should let free those whom there is no prosecutable case against them. It expressed itself thus: -

> *48. It is no doubt dear that under Article 157 (1) of the Constitution the ODPP is enjoined in exercising the powers conferred by the aforesaid Article to have regard to public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process. Interest of the administration of justice dictates that only those whom the DPP believes have a prosecutable case against them be arraigned in Court and those who DPP believes have no prosecutable case against them be let free. This is why Article 159 (2) of the Constitution is crying loudly every day, every hour that "justice shall be done to all, irrespective of status". Justice demands that it should not be one way and for some of us but for all of us irrespective of who one is or one has.*
>
> *49. The Petitioner in support of interest of administration of justice dictates referred to the National Prosecution policy, revised in 2015 at page 5 where it provides that: "Public Prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction, In other words Public Prosecutors should ask themselves• would an impartial tribunal convict on the basis of the evidence available?*
>
> *50. In the case of Republic v. Director of Public Prosecution & Another ex parte Kamani, Nairobi Judicial Review Application No. 78 of 2015 while quoting the case of R vs. Attorney General ex Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001; the Court held;*
>
> > *A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper … there must be in existence material evidence on which the prosecution can say with certainty that the 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.*

51. In a democratic society like ours, no one should be charged without the authorities conducting proper investigation. The prosecutor on the other hand is under duty to consider both incriminating and exculpating evidence, In the case of Republic v. Director of Public Prosecutions & Another ex parte Kaman/ Nairobi Judicial Review Application Nog 78 of2015 (supra), the court expressed itself as follows:

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

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

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

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

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

61. Still on abuse of Court process in using Court to settle personal scores, the Court in ***Rosemary Wanja Mwagiru & 2 Others V Attorney General & 2 Others***, **Mumbi J** (as she then was) stated that: -

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

62. On the need for a Prosecutor to act within the law, the Court in ***Thuita Mwangi & 2 Others vs. Ethics and Anti-Corruption Commission & 3 Others*** stated that: -

> *The discretionary power vested in the Director of Public Prosecution is not an open cheque and such discretion must be exercised within the four corners of the Constitution. It must be exercised reasonably within the law and to promote the policies and objects of the law which are set out in Section 4 of the Office of Director of Public Prosecution Act. These objects are as follows: the diversity of the people of Kenya; impartiality and gender equity; the rules of natural justice, promotion of public confidence in the integrity of the office; the need to discharge the functions of the office on behalf of the people of Kenya, the need to serve the cause of justice; prevent abuse of legal process and public interest, protection of the sovereignty of the people; secure the observance of democratic values and principles and promotion of constitutionalism. The court may intervene where it is shown that the impugned criminal proceedings are instituted for other means other than the honest enforcement of criminal law, or are otherwise an abuse of the court process.*

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

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

64. The above position was amplified in Nairobi High Court Miscellaneous Application No. 1769 of 2003 ***Republic vs. Ministry of Planning and Another ex-parte Professor Mwangi Kaimenyi***, where It was held:

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

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

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

66. I believe I have said enough on the general exercise of prosecutorial powers and for the purposes of this case. I will now look at what

Legal Scholars and Courts have rendered on concurrent civil and criminal proceedings.

Section 193A of the CPC:

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

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

> ***Concurrent criminal and civil proceedings:***
>
> *Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.*

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

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

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

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

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

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

> *[24]. In dismissing the application the Court emphasised that there was no established principle of law that if criminal proceedings were pending against a defendant in respect of the same subject matter, he or she should be excused from taking any further steps in the civil proceedings which might have the result of disclosing what his defence or is likely to be, in the criminal proceedings.*
>
> *[25]. Jefferson was followed in R v BBC, x p Lavelle [1983] 1 All ER 241 (QBD) at 255 where Woolf J stressed that there should be no automatic intervention by the court. The learned judge pointed out that while the court must have jurisdiction to intervene to prevent serious injustice occurring, it will only do so in very clear cases in which the applicant can show that there is a real danger and not merely notional danger that there would be a miscarriage of justice in criminal proceedings if the court did not intervene.*

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

74. In determining the issue, the Learned Judges of Appeal acknowledged that the Office of the Director of Public Prosecutions is an independent constitutional office. However, that office is subject to the control of the Court in appropriate instances where illegality, irrationality and procedural impropriety is demonstrated. The Court made reference to the decision of the Supreme Court of India in Criminal Appeal No. 590 Of 2007, ***State of Maharashtra & Others -vs- Arun Gulab & Others*** where the power of the Court in checking excesses of the prosecutorial agency was discussed as follows: -

> *The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent*

person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction to the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor can it soft-pedal the course of justice at a crucial stage of investigation/proceedings.

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

75. The Appellate Court further discussed limitations Courts ought to impose on **Section 193A** of the **CPC,** the provision that allows parallel prosecution of civil and criminal cases and remarked as follows: -

[47]. In terms of Section 193A of the Criminal Procedure Code, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings does not bar the commencement of criminal proceedings. However, where the criminal proceedings are oppressive, vexatious and an abuse of the court process or amounts to a breach of fundamental rights and freedoms, the High Court has the powers to intervene. But this power has to be exercised very sparingly as it is in the public interest that crime is detected and suspects brought to justice.

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

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

77. Further, the Court of Appeal in ***Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and*** *Others* Nairobi Civil Appeal No. 56 of 2012 [2013] eKLR held that**:**

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

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

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

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

Abuse of Court process:

80. The subject of abuse of Court process was discussed by the Court of Appeal in ***Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others*** Civil Appeal No. 25 of 2002 [2009] KLR 229, as follows: -

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all categories of cases in which the process and procedures of the court which exist to administer justice with fairness and impartibility may be converted into instruments of injustice and unfairness. Thus, it has long been established that regardless of the person responsible for their institution and maintenance, proceedings will constitute an abuse of process if they can be seen clearly to be

foredoomed to fail…, if that court is in all circumstances of the particular case a clearly inappropriate forum to entertain them…, if, notwithstanding that circumstances do not give rise to an estoppel their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate a case which has already been disposed of by earlier proceedings.

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

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

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

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

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

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

(c) Whether the proceedings in Criminal Case No. 427 of 2019, Republic -vs- Mwaura Muigana amounts to <u>abuse of the criminal justice system:</u>

86. I have carefully addressed myself to the facts and the law in this matter. As a brief rehash, a criminal complaint was made by the 1st Respondent on loss of its money. The complaint was investigated. In the course of investigations, the manner in which the alleged loss occurred was traced to the Petitioner, then the General Manager of the 1st Respondent. There are some correspondences by the Petitioner on the issue including undertakings to make good the loss and granting of a collateral. The undertakings are, however, factually challenged including whether the undertakings and part-payment of the money lost were made under duress.

87. There is also an Auditor's Report on a detailed analysis of how the loss occurred.

88. The 1st and 2nd Respondents contend that the loss of the money occurred under the watch of the Petitioner. That loss was discovered when the 1st Respondent undertook an audit. The audit was not prompted by the Petitioner who was then serving as the General Manager. The 1st and 2nd Respondents further contend that an offence was committed long before the issue of undertaking to make good the loss occurred and as such the perpetrator ought to face the law.

89. In the ***Reuben Mwangi v Director of Public Prosecutions & 2 others; UAP Insurance & another (Interested Parties)*** case (supra), this Court summed up the burden on the Petitioner to succeed in stopping a criminal trial as follows: -

102. Drawing from the foregoing, for the Petitioner to succeed in his claim in this case, he must demonstrate the stifling of or threats of infringement of his rights, fundamental freedoms, the Constitution and/or the law by the investigative and prosecutorial agencies. The Petitioner may also demonstrate that the prosecution of the criminal case is not in public interest or is not in the interests of the administration of justice or that the prosecution is in abuse of the legal process. Likewise, the Petition may succeed if the Petitioner proves that the investigations were undertaken contrary to Article 244 of the Constitution, the National Police Service Act and the law in general.

90. The Petitioner in this matter mainly holds to the belief that the criminal case is being used to settle a civil dispute. He, however, falls short of addressing the manner in which the alleged civil dispute arose.

91. Several of the decisions referred to in the preceding issue, were on instances where parties had initially litigated in civil proceedings and later turned to the criminal process with the hope of using the coercive nature of the criminal system to secure what was seemingly not forthcoming from the civil litigation. That is not the case here. Infact, no civil proceedings were neither instituted nor are pending. It, hence, remained the cardinal duty of the Petitioner to demonstrate, and as held in ***Republic vs Chief Magistrate, Kilgoris; Ex Parte Johana Kipngeno Langat*** (2021) eKLR '…. *that the criminal process is being used oppressively or on a charge of an offence not know to law, or for purposes of obtaining collateral or other advantages other than bringing the applicant to justice*….'. I am afraid the Petitioner has not so established.

92. The Petitioner has also not shown how the prosecution of the criminal case is not in public interest or is not in the interests of the administration of justice or that the prosecution is in abuse of the legal process.

93. At this point in time, I must agree with the Respondents on the position that the alleged events constituting the charge, whether valid in law or otherwise, occurred long before the negotiations on the manner in which the loss was to be made good were entered into. Therefore, if for instance the events complained of by the 1st and 2nd Respondents constituted an offence known in law, then unless properly so otherwise demonstrated, any subsequent arrangements to settle the loss may not vitiate any criminal proceedings instituted on the basis of the facts in issue. That is, indeed, the basis of Section 193A of the CPC.

94. The offence facing the Petitioner is stealing by servant. It is codified in Section 281 of the Penal Code. The decision to charge and prosecute the Petitioner rests with the 2nd Respondent as long as it is exercised within the law. The 2nd Respondent has shown the basis of making the decision to charge and prosecute the Petitioner. As said, the Petitioner has not demonstrated how that decision was arrived at contrary to the law. All what the Petitioner has done is to claim that he had initiated a repayment process thereby removing the issue from the arena of criminal justice system into a civil dispute. There is no doubt that there is fault in that line of argument. I say so because criminal responsibility is not solely absolved by civil agreements. There has to be more to that.

95. Whereas the Petitioner has a right not to be subjected to an illegal and/or unwarranted criminal process, the 2nd Respondent is also under a public duty to ensure that offences are prosecuted and those culpable attended to as law requires. That is the balance created by the law and which this Court is called upon to serious undertake. Infact, that is the essence of the rule of law.

96. It is clear that the termination of the criminal case in the circumstances of this case will frustrate, instead of advancing, the rule of law. The Petitioner still has constitutional safeguards in respect of his rights even when undergoing the trial. The Petitioner will, at the trial, also be accorded an opportunity to challenge the veracity of the evidence including whether the evidence was properly obtained.

97. Based on the foregoing, this Court finds and hold that the Petitioner has failed to show how the criminal case is an abuse of the criminal justice system, and, the Petition fails.

(d) <u>Reliefs:</u>

98. In the end, the Petition is found to be wholly without merit and the following final orders hereby issue: -

(a) The Petition is hereby dismissed.

(b) The orders of this Court issued on 19th February, 2021 staying proceedings in Kibera Chief Magistrates Court Criminal Case No. 427/2019 Republic -vs- Mwaura Muigana are hereby set-aside and vacated.

(c) Due to the age of the criminal case, the trial court shall accord priority to the hearing and determination of Kibera Chief Magistrates Court Criminal Case No. 427/2019 Republic -vs- Mwaura Muigana.

(d) Given that the criminal case is still on and a payment was made, each party shall bear its own costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021

A. C. MRIMA

JUDGE

<u>Judgment virtually delivered in the presence of:</u>

Mr. Chigiti, Senior Learned Counsel for the Petitioner.

Miss. Kamende, Counsel for the 1st Respondent.

Miss. Marinda, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the 2nd Respondent.

Elizabeth Wanjohi – Court Assistant