



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 283 OF 2018

DEVELOPMENT BANK OF KENYA LTD.....PETITIONER

VERSUS

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

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

AND

GIRIAMA RANCHING COMPANY LIMITED.....INTERESTED PARTY

JUDGMENT

1. The Petitioner, the Development Bank of Kenya Ltd, is a limited liability company incorporated in Kenya and carrying on the business of a bank. The 1st Respondent, the Director of Public Prosecutions, is responsible for the exercise of State powers of prosecution. The 2nd Respondent, the Inspector General of Police, exercises independent command over the National Police Service which is responsible for investigation of offences and the enforcement of the laws of the land among other functions.

2. On 19th September, 2018 this Court (Mwita, J) directed the Petitioner to serve the pleadings upon various persons as interested parties. Giriama Ranching Company Limited is the only one who responded to the Petitioner's case. It is therefore the Interested Party in this case.

3. Through the petition dated 16th August, 2018 the Petitioner prays for orders as follows:-

“ i. A declaration that the continued investigations in any manner whatsoever or any intended prosecutions in respect of a legal charge over L. R. No. 12785 or any related issues pending in dispute in Mombasa Commercial Case No 57 of 2018, Milimani Commercial Case No. 304 of 2018 and Malindi ELC No. 155 of 2018 is unconstitutional, unlawful and invalid.

ii. An order of prohibition do issue restraining the 1st and 2nd Respondents by themselves, agents, servants or employees from carrying out any further or continued investigations in any manner whatsoever or any intended prosecution in respect of the legal charges created over L. R. No. 12785 or any related issues pending in dispute in Mombasa Commercial Case No. 57 of 2018, Milimani Commercial Case No. 304 of 2018 and Malindi ELC No. 155 of 2018.

iii. An order of Certiorari do issue quashing the continued investigations in any manner whatsoever or any intended prosecution by the 1st and 2nd Respondents, their agents, servants or employees in respect of the legal charge over L. R. No. 12785 or any related issues in dispute in Mombasa Commercial Case No. 57 of 2018, Milimani Commercial Case No. 304 of 2018 and Malindi ELC No. 155 of 2018.

iv. That the Respondents bears the Petitioner's costs.”

4. The respondents opposed the petition through a replying affidavit sworn on 14th September, 2018 by Bernard Kwarat, a Chief Inspector of Police attached to the Directorate of Criminal Investigations and the Deputy Officer in Charge of Land Fraud Investigations Unit in Nairobi.

5. On its part, the Interested Party opposed the petition through a replying affidavit sworn on 6th November, 2018 by one of its directors, Rajab Menza Shikari.

6. This petition questions the deployment of the prosecutorial powers of the 1st Respondent and the investigative powers of the 2nd Respondent. The Petitioner holds the view that the respondents have engaged their powers in contravention of the Constitution and the law.

7. Although the parties have filed lengthy affidavits, the facts of the case can be summarized as hereunder. Sometimes in 2007 a company known as Riva Oils Company Limited (hereinafter simply referred to as Riva) took a loan of Kshs.250 million from the Petitioner in two tranches of Kshs 60 million taken on 29th March, 2007 and Kshs190 million taken on 1st August, 2007. The Interested Party's parcel of land known as L. R. No. 12785 was used as security for the loan.

8. It appears that Riva did not service the loan and on 23rd July, 2018, the Interested Party's land was advertised for sale through public auction in the Daily Nation newspaper. The advertisement attracted instant reaction from the Interested Party, Hon. Owen Yaa Baya who is the Member of Parliament for Kilifi North Constituency and a group of squatters allegedly living on the land.

9. Hon. Baya wrote to the Director of Criminal Investigations and the 1st Respondent alleging that the intended sale was fraudulent as a provisional title deed was used to secure the loan while the title deed of the parcel of land in question was actually with the genuine directors of the Interested Party. He urged that swift investigations be conducted and those concerned be brought to book.

10. The current directors of the Interested Party took a position similar to that of Hon. Baya and went ahead to institute **Mombasa HCCC No. 57 of 2018 Giriama Ranching Company Limited v Development Bank of Kenya Limited and Garam Investments Auctioneers and Nairobi HCCC No. 304 of 2018 Giriama Ranching Company Limited v Development Bank of Kenya Limited** seeking to stop the sale of the land.

11. A group of squatters moved to the Environment and Land Court vide **Malindi ELC No. 155 of 2018 Chengo Voi Wanje & 434 others v Development Bank of Kenya Ltd & 6 others**, claiming ownership of the land in question. The Petitioner being aggrieved by the decision of the 2nd Respondent to commence investigations of the matter filed this petition seeking to halt further investigations by the 2nd Respondent.

12. It is the Petitioner's case that the criminal investigations and the intended prosecution ought to be stopped on the grounds that the outcome of the purported criminal investigations is pre-determined as was reported in the Standard newspaper of 8th August, 2018; that the Interested Party has filed three cases and obtained injunctions suspending the auction of the Interested Party's land; that the purported investigations relates to various charge documents and corporate guarantees given by the Interested Party to secure borrowings by Riva and that the three civil cases filed by the Interested Party all challenge the validity of the charges created over the Interested Party's land; that the purported criminal investigations are not genuine or intended to advance the cause of justice but calculated to undertake a discovery and help the Interested Party and the plaintiffs in the civil cases advance their cases and openly disable the Petitioner's right to a fair trial under Article 50 of the Constitution; that the criminal investigations by the respondents have unlawfully been influenced by Hon. Baya and are unfair and an abuse of the legal process; that the criminal investigations are meant to threaten, embarrass, scare and stop the Petitioner from exercising its statutory power of sale and are thus an attempt to criminalize banking practice and transactions in the country; that the criminal investigations and the three suits filed against the Petitioner in three different court stations are part of a wider plan calculated to harass, bog down, wear down, and intimidate the Petitioner.

13. Through its submissions dated 1st February, 2019 the Petitioner's counsel identified five grounds in support of the quest for orders. The first ground is that the petition is an abuse of the legal process. Pointing to Article 157(10) of the Constitution, counsel for the Petitioner submitted that the 1st Respondent is required to carry out his functions independently and without directions from any person. Further, that Article 157(11) provides that in exercising his powers, the 1st Respondent shall have regard to the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

14. Counsel proceeded to submit that Section 4 of the Office of the Director of Public Prosecutions Act provides that in fulfilling his mandate the 1st Respondent shall be guided by the Constitution, the principles of the rules of natural justice, the need to serve the cause of justice, the need to prevent abuse of legal process, public interest, the need to secure the observance of democratic values and principles; and the promotion of constitutionalism.

15. In counsel's view the criminal process seeks to investigate a possible fraud in connection with the title and charge over L. R. No. 12785 which is the subject of the three civil matters and the criminal process is therefore a roundabout way of determining the civil suits through another forum. In short, counsel for the Petitioner holds the view that the criminal investigation is an abuse of the legal process by the respondents.

16. The second ground upon which the Petitioner supports its case is that the criminal investigation violates and threaten to violate its right to a fair trial in the three civil cases. It is the Petitioner's case that the matters the respondents seek to investigate, namely the manner in which the provisional title was sought and issued by the Land Registrar, the validity of the provisional title, the validity of the charge to the Petitioner, the debt owed and the question of the enforceability of the Petitioner's statutory power of sale are all in issue in the three civil cases. Further, that all the necessary parties have been enjoined in those cases.

17. According to the Petitioner, the purported investigations by the respondents are calculated to undertake a discovery and give undue advantage to the Interested Party as the issues to be investigated have all been raised in the civil cases which are being handled by courts of competent jurisdiction.

18. It is the Petitioner's proposition that the criminal investigations are neither genuine nor intended to advance the cause of justice but calculated to help the Interested Party and the other plaintiffs in the civil matters to advance their cases. It is thus the Petitioner's take that unless the investigations are stopped, the respondents will abuse the criminal process and openly disable the Petitioner from enjoying its rights to be heard and the right to fair trial under Article 50 of the Constitution.

19. The third ground advanced by the Petitioner is that the investigations are contrary to the principles of justice and public policy. According to the Petitioner, allowing investigations into issues before the civil courts will amount to subjecting the Petitioner to double jeopardy. Such a scenario would require the Petitioner to defend itself in multiple fora over the same issues which would indeed be unnecessary.
20. The Petitioner identifies Article 159 of the Constitution as enjoining the courts to be guided by the principle of justice in all cases. Section 4 of the Office of the Director of Public Prosecutions Act is pointed out as requiring the Director of Public Prosecutions to be guided by the Constitution and the following principles: the rules of natural justice, the need to serve the cause of justice, the need to prevent abuse of the legal process, public interest, democratic values and principles, and promotion of constitutionalism.
21. Turning to the fourth ground, the Petitioner submitted that the investigations threaten to violate its right to property under Article 40 of the Constitution. It is the Petitioner's case that it has legal interest in L. R. No 12785 by virtue of the legal charges created to secure the loan advanced to Riva. According to the Petitioner, the 1st Respondent has already made it known that his intention is to discharge the property through a criminal process and such a discharge will unlawfully deprive it of its legal and lawful interest in the property created by the legal charges.
22. It is the Petitioner's assertion that the criminal investigations by the respondents have been unlawfully influenced by Hon. Baya and the Interested Party hence rendering the investigations an abuse of process attended by bad faith and intended to achieve ulterior motives. It is thus the Petitioner's case that in making their decision the respondents acted on the directions of persons not authorized by law to give directions hence rendering the decision reviewable by this court pursuant to Section 7(2) of the Fair Administrative Action Act.
23. The fifth and final ground upon which the Petitioner supports the petition is that the investigations violate the rule of law. The respondents submit that the respondents being State organs are bound by the Constitution and the laws of Kenya. According to the Petitioner, Article 157(4) and (11) of the Constitution requires the Director of Public Prosecutions to exercise his powers and carry out his functions in a manner that protects public interest, the interests of the administration of justice and the need to avoid abuse of the legal process.
24. Further, that Article 245(4)(a) of the Constitution on the other hand requires the Inspector General of Police not to take any directions on investigation of any particular offence from any person other than the Director of Public Prosecutions and the Cabinet Secretary responsible for police services.
25. It is the Petitioner's case that the respondents have blatantly breached the cited constitutional provisions by readily accepting instructions and acting at the behest of the Interested Party and Hon. Baya to carry out the investigations.
26. The Petitioner cited the case of **Kenya Commercial Bank Ltd & 2 others v Commissioner of Police & another [2012] eKLR** and submitted that this court can intervene in the respondents' exercise of their powers where the facts disclose a violation of the rights and fundamental freedoms guaranteed under the Constitution.
27. The decision in the case of **Investments & Mortgages Bank Limited (I & M) v Commissioner of Police and Director of Criminal Investigations Department & DPP & 2 others [2013] eKLR** was cited in support of the proposition that an investigation that is likely to intervene with the right to a fair trial under Article 50 of the Constitution ought to be stopped.
28. Finally, the decision of the Court of Appeal in the case of **Commissioner of Police & the Director of Criminal Investigations Department v Kenya Commercial Bank Limited & 4 others [2013] eKLR** is cited as establishing the principle that this court is required to oversee that the Director of Public Prosecutions and the Inspector General of Police undertake their functions in accordance and in compliance with the law. Further, that a vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime or to prosecute must not be made in bad faith.
29. Through their submissions dated 26th March, 2019, the respondents contend that they see no abuse of power on their part. According to them, they are discharging their constitutional and statutory duties in carrying out the investigations.
30. The respondents cited the case of **Republic v Commissioner of Police & another Ex parte Michael Monari & another [2012] eKLR** for the holding that the police have a duty to investigate any complaint once the complaint is made.
31. It is also the respondents' case that the Petitioner has not demonstrated any illegality on the part of the 2nd Respondent. According to the respondents, the court can only intervene if it is demonstrated that the respondents have exercised their powers contrary to the Constitution, in bad faith and in abuse of process. The decision in the case of **Douglas Maina Mwangi v Kenya Revenue Authority & another, Nairobi High Court Constitutional Petition No. 528 of 2013** is cited in support of the submission.
32. The Interested Party through submissions dated 5th February, 2019 take a similar view to that of the respondents. The decisions in the cases of **Republic v Director of Public Prosecutions & another Ex Parte Patrick Ogola Onyango & 8 others [2016] eKLR**; **Mary Lurambi & another v Inspector General of Police & 4 others [2018] eKLR**; and **Republic v Chief Magistrate, Milimani Criminal Division & 4 others Ex parte John Wachira Wambugu & another [2018] eKLR** are cited in support of the Interested Party's position.
33. The only issue for the determination of this court in this petition is whether the Petitioner has established grounds for grant of the orders sought. The petition largely targets the powers of the Inspector General of Police to investigate crimes.
34. Article 157(4) of the Constitution states that:-

“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.”

35. The Director of Public Prosecutions is therefore given leeway by the Constitution to direct the Inspector-General to investigate any alleged criminal conduct. That power, in my view, does not include the power to give directions on how the investigations should be carried out or what the outcome of the investigations should be.

36. The Constitution at Article 243 establishes the National Police Service and at Article 245(1) the office of the Inspector– General of the National Police Service is created. Article 245(4) and (5) are relevant to this petition. They provide as follows:-

“(4) The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector- General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to—

(a) the investigation of any particular offence or offences;

(b) the enforcement of the law against any particular person or persons; or

(c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.

(5) Any direction given to the Inspector-General by the Cabinet secretary responsible for police services under clause (4), or any direction given to the Inspector-General by the Director of Public Prosecutions under Article 157(4), shall be in writing.”

37. The power given to the Cabinet Secretary is only limited to matters of policy and for avoidance of doubt it is clearly provided that no direction can be given in respect to the investigation of any particular offence or offences or the enforcement of the law against any particular person or persons. The office of the Inspector–General is therefore an independent office when it comes to investigation of crimes.

38. Section 51 of the National Police Service Act, Cap. 84 provides the powers of a police officer as follows:-

“51. Obedience to orders and warrants and detection of crimes, etc.

(1) A police officer shall—

(a) obey and execute all lawful orders in respect of the execution of the duties of office which he may from time to time receive from his superiors in the Service;

(b) obey and execute all orders and warrants lawfully issued;

(c) provide assistance to members of the public when they are in need;

(d) maintain law and order;

(e) protect life and property;

(f) preserve and maintain public peace and safety;

(g) collect and communicate intelligence affecting law and order;

(h) take all steps necessary to prevent the commission of offences and public nuisance;

(i) detect offenders and bring them to justice;

(j) investigate crime; and

(k) apprehend all persons whom he is legally authorized to apprehend and for whose apprehension sufficient ground exists.”

39. The powers of the police to investigate crime were outlined by Warsame, J (as he then was) in **Ex-parte Michael Monari (supra)** as follows:-

“Under Article 157(4) of the Constitution, the Director shall have power to direct police to investigate any information or allegation of a criminal conduct and it is mandatory for the police to comply with any directions or instructions given by the Director of Public Prosecution. Under article 157(10) the Director of Public Prosecution shall not require the consent of any person or authority for commencement of criminal proceedings and shall not be under the direction or control of any person. It is also clear in my mind that the police have a duty to investigate on any complaint once a complaint is made. In deed the police would be failing in their constitutional mandate to detect and prevent crime. The Police only need to establish

reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said not to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.

It is not the duty of the court to go into the merits and demerits of any intended charges to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and the merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct, which amounts to an offence and on that account is deserving punishment.”

40. I agree with that position and only need to add that the investigative powers must be exercised within the boundaries of the Constitution and the laws of Kenya.

41. As for the 1st Respondent, the only caveat placed on his exercise of prosecutorial powers is found in Article 157(11) of the Constitution which provides that:-

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

42. The Petitioner claim abuse of power by the respondents on several grounds as already stated in this judgment. The question is whether the Petitioner has supported the allegations with evidence to warrant grant of orders.

43. A perusal of the Petitioner’s pleadings reveals an averment to the effect that the criminal investigations have been influenced by Hon. Baya, the Interested Party and the plaintiffs in the civil cases. This averment is supported by reference to articles in various newspapers which reported that Hon. Baya had directed the 1st Respondent to investigate and prosecute those who obtained title to the land in question and charged it with the Petitioner.

44. It is also averred that acting on Hon. Baya’s instructions the 1st Respondent directed the Director of Criminal Investigations to investigate the matter within 21 days. The Petitioner’s case is that the 1st Respondent violated Article 157(10) and (11) of the Constitution by taking directions and being influenced by Hon. Baya.

45. It is also the Petitioner’s averment that the outcome of the investigation is predetermined as per the newspaper reports. It is indeed true that Article 157(10) of the Constitution provides absolute independence to the 1st Respondent in the following terms:-

“(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.”

46. The Court is however authorized by Article 157(11) to check on the exercise of the power in order to ensure that the 1st Respondent complies with the requirements of that provision. The jurisdiction of the court in that regard has severally been stated to be limited to ensuring that the 1st Respondent does not step out of the legal and constitutional bounds. In other words, the 1st Respondent in exercising his mandate should not abuse his powers, act maliciously or go against public interest.

47. The Court of Appeal spoke to this court’s powers over the mandate of the 1st Respondent in the case of **Diamond Hasham Lalji & another v Attorney General & 4 others [2018] eKLR** as follows:-

“[33] From the foregoing, there cannot be any doubt that the prosecutorial discretion of DPP is not absolute. It is limited by Article 157(11) which specifies the mandatory considerations that underlie the exercise of discretion; by the constitutional principles to which we have referred and by statute.

In Ramalingam Ravinthran v. Attorney General [2012] SGCA 2, the Court of Appeal of Singapore said at para 53:

“The Attorney General is the custodian of prosecutorial power. He uses it to enforce criminal law not for its own sake but for the greater good of the society, i.e. to maintain law and order as well as to uphold rule of law.

Offences are committed by all kinds of people in all kinds of circumstances. It is not the policy of the law under our legal system that all offenders must be prosecuted, regardless of the circumstances in which they have committed offences. Furthermore not all offences are provable in a court of law. It is not necessary in the public interest that every offender must be prosecuted, or that an offender must be prosecuted for the most serious possible offence available in the statute book. Conversely, while the public interest does not require the Attorney General to prosecute any and all persons who may be guilty of the crime, he cannot decide at his own whim and fancy who should or should not be prosecuted and what offence or offences a particular offender should be

prosecuted for. The Attorney General's final decision will be constrained by what public interest requires."

That passage applies with equal force to the considerations that the DPP must employ.

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.

[34] It is also indubitable that the constitutional prosecutorial power of DPP is reviewable by the High Court as Article 165(2)(d)(ii) of the Constitution ordains. However, the doctrine of separation of powers should be respected and the courts should not unjustifiably interfere with the exercise of discretion by DPP unless it is exercised unlawfully by, *inter alia*, failing to exercise his/her own independent discretion; by acting under the control and direction of another person; failing to take into account public interest or interest of the administration of justice in all their manifestations; abusing the legal process; and by acting in breach of fundamental rights and freedoms of an individual.

The DPP is entitled to make errors within his constitutional jurisdiction and the decision will not be reviewed solely on the ground that it was based on misapprehension of facts and the law. (*Matululu and Anor v. DPP* [2003] 4 LRC 712). Further, authority show that courts are generally reluctant to interfere with prosecutorial decisions made within jurisdiction."

48. It is necessary to also proceed to consider the other separate grounds of opposition to the investigation set out by the Petitioner before making a decision in this petition. It is the Petitioner's case that the respondents are using their powers to aid the Interested Party and the other plaintiffs steal a match over the Petitioner in the civil cases already filed in court.

49. It must be stated that the law on this issue has never changed since *Kuria & 3 others v Attorney General* [2002] 2 KLR 69 when Mulwa, J held that:-

"It cannot be gainsaid that the court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its processes does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform..."

Kuloba J in *Floriculture International HC Misc. Civil App No. 114 of 1997* warned, which warning I would concur with, that the machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta."

50. The learned Judge nevertheless clarified that the existence of a civil dispute of itself was not a sufficient ground for stopping a criminal prosecution. He held that:-

"It is not enough to simply 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. There is 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 for supposing that a criminal prosecution is an "abuse of process", is a "manipulation", "amounts to selective prosecution" or such other processes, or of even supposing that the applicants might not get a fair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same set of facts."

51. That position of the law was restated by the Court of Appeal in the post-2010 constitutional epoch in *Commissioner of Police & The Director of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others* [2013] eKLR thus:-

"Clearly, the company and the guarantor through their directors were employing criminal process to assist them in resolving their civil dispute. While the law (Section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that that power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of the administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court. This is a case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations. We have no doubt in our minds that the belated involvement of the police in this purely civil dispute is an abuse of their power. The police should direct their energies and resources to prevention of crime which we all know is rampant in this country and is about to get out of control."

52. The same position was reiterated in *Lalchand Fulchand v Investments & Mortgages Bank Limited & 5 others* [2018] eKLR where the Court of Appeal held that:-

"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.”

53. Applying the stated law to the facts of this case, I find the Petitioner’s claim that the decision of the respondents to investigate the matter was influenced by external forces unsustainable. It has not been demonstrated that Hon. Baya, the Interested Party and the plaintiffs in the civil cases have coercive powers over the respondents.

54. The fact that Hon. Baya went to the press and made various demands upon the respondents is not indicative of the fact that the respondents are acting at the behest of the said Member of Parliament.

55. The respondents have no control over what appears in the media. When they act on a matter highlighted in the media, it cannot be said that they are acting under the command of somebody. Apart from exhibiting the statements made in the newspapers, the Petitioner has not provided any link between the demands of Hon. Baya and the actions of the respondents. I therefore reach the conclusion that the demands made by Hon. Baya and the Interested Party in the media did not influence the respondents to reach their decision. There is therefore no basis of agreeing with the Petitioner that the respondents abused their offices based on this ground.

56. In my view, the crux of the matter is whether the criminal investigations are being used to lend a hand to the plaintiffs in the civil matters. A determination of this issue requires an examination of the facts of the matter.

57. The affidavit of Chief Inspector Bernard Kwarat sworn on behalf of the respondents in response to the petition gives a detailed background to the dispute. He confirmed that the 2nd Respondent commenced investigations as a result of a letter dated 26th July, 2018 received from the 1st Respondent. The 1st Respondent was in turn acting upon a complaint dated 24th July, 2018 from Hon. Baya.

58. Chief Inspector Kwarat averred that preliminary investigations had disclosed that when Rajab Menza Shikari took over the office of the Chairman of the Interested Party on 9th February 2017, he received among other documents the original title deed for the parcel of land known as L.R. No. 12785, the Company Seal and Articles and Memorandum of Association.

59. According to Chief Inspector Kwarat, the company records revealed that the property had been used as security for a loan of over Kshs.3 million borrowed from Agricultural Finance Corporation in 1999 but the title deed was discharged in 2004 after the loan was written off by the Government. The respondents’ averment is that the title deed has since then been in the actual possession of the officials of the company and has never been lost.

60. It is the respondents’ evidence that it was only after the Petitioner advertised the land for sale in the Daily Nation newspaper of 23rd July, 2018 that it was discovered that a provisional certificate of title belonging to the parcel of land had been used to guarantee a loan of Kshs.250 million advanced to Riva. According to the respondents, the process of generating the provisional certificate of title was fraudulent and that is what they seek to investigate and have any culpable persons charged.

61. The replying affidavit of Rajab Menza Shikari confirmed the averments of the respondents. Indeed at paragraph 10 of the replying affidavit sworn on 6th November, 2018 the Chairman poses pertinent questions as follows:-

“10. THAT as regards paragraphs 26 to 43, of the aforementioned affidavit, it is again not true that the Company is behind commencement of the Criminal Investigations as the Complainant in these proceedings is Hon. Owen Baya and not the Company. More over the Company does not rely on the Criminal Investigations for the Mombasa Case, neither does the Company require the services of the Respondents to prove its case of non-advancement of loan sums or not being a Guarantor for the repayment of loan sums but looking at the documents presented or filed by the Petitioner in the Mombasa case, it is obvious that a Criminal offence(s) were committed by the Bank in collusion with others including the Ministry of Lands and therefore if they are Criminal investigations commenced by the respondents, the same are justified and are without malice in that:-

(i) How could a loan be advanced on the strength of a Certificate of Title as a security, yet the same was not presented to the Petitioner at the time of the loan borrowings as the Original Certificate of Title is still in my possession.?

(ii) Even assuming that the Original Certificate of Title was lost (which is not true as the same is in my possession), how could the Petitioner advance a loan of the sum of Kshs.60,000,000/- to Riva Oils Company Limited on 7th March, 2007 and had the charge instrument dated 23rd March, 2007 registered at the Lands Registry, Mombasa on 29th March, 2007 (Refer to page 41 of the Petitioner’s Replying Affidavit in the Mombasa case filed on 1st August, 2018 and specifically entry No. 4 thereof and also page 42 of the same), yet the Provisional Certificate was procured or issued on 11th September, 2007 as confirmed vide entry No. 6 on page 41 of the said Affidavit upon an application for the same made on 29th March, 2007 (refer to the said application appearing on page 33 of the Replying Affidavit) which was not acted upon till on 8th June, 2007 when a Gazette Notice for the alleged loss of the title was issued, being Gazette Notice No. 5099 as confirmed vide entry No. 6 above.

It is obvious that both the original Certificate of Title and the Provisional Certificate of Title were not available for the charge instrument to be registered in the month of March, 2007 and of course upto 11th September, 2007.

One therefore wonders how this loan was advanced by the Petitioner to Riva Oils Company Limited. In any event the application for issuance of a provisional Certificate of Title was made on 29th March, 2007 as evidenced vide a copy of the

same appearing on page 33 of the Petitioner's Replying Affidavit which is the same day the charge instrument was registered, how then was the loan advanced before the issuance of the Provisional Certificate.

(iii) Looking at the Gazette Notice appearing on page 35 of the Petitioner's Replying Affidavit and in particular Gazette Notice No. 3398 on page 36, it is obvious that a Criminal Offence was committed because how could a Gazette Notice be issued on 20th April, 2007 calling for objections against Registration of the Charge instrument dated 7th March, 2007, yet the same had already been registered on 29th March, 2007 which is about 3 weeks after the registration (Refer to pages 41 and 42, thereof)!

(iv) Again looking at the further charge instrument appearing on pages 86 to 99 of the Petitioner's Replying Affidavit, it is puzzling how a loan of Kshs.190,000,000/- could be issued by the Petitioner to Riva Oils Company Limited on 1st August, 2007 and had the further charge instrument dated 1st August, 2007 registered at the Lands Registry, Mombasa on 1st August, 2007 (Refer to page 41 of the Petitioner's Replying Affidavit in the Mombasa case filed on 1st August, 2018 and specifically entry No. 5, thereof and also pages 86 to 99 of the same), yet the Provisional Certificate was procured or issued on 11th September, 2007 as confirmed vide entry No. 6 on page 41 of the said Affidavit upon an application for the same made on 29th March, 2007 (Refer to the said application appearing on page 33 of the Replying Affidavit) which was not acted upon till on 8th June, 2007 when a Gazette Notice for the alleged loss of the title was issued, being Gazette Notice No. 5099 as confirmed vide entry No. 6 above!

It is obvious that both the original Certificate of Title and the Provisional Certificate of Title were not available for the further charge instrument to be registered in the month of August, 2007 and of course upto 11th September, 2007.

(v) One therefore wonders how this loan was advanced by the petitioner to Riva Oils Company Limited. In any event the application for issuance of a Provisional Certificate of Title was made on 29th March, 2007 as evidenced vide a copy of the same appearing on page 33 of the Petitioner's Replying Affidavit but was not acted upon till on 8th June, 2007 when a Gazette Notice for the alleged loss of the title was issued, being Gazette Notice No. 5099 as confirmed vide entry No. 6 above, which in essence the said Provisional Certificate could not be issued till in the month of September, 2007 as the duration required for objections before issuance of provisional certificates was three months.

(vi) From a reading of the Supplementary Affidavit in the Mombasa suit, being annexure RMS – 1, above, it is obvious that the purported resolutions used by the Petitioner in the loan transactions were forgeries and that is the reason why the Respondents in exercising their statutory duties, would want to investigate for any Criminal liability.

For avoidance of doubt, I reproduce and append hereto the entire bundle, being the Petitioner's Replying Affidavit in the Mombasa Case where the documents above mentioned are captured therein as part of the Petitioner's evidence and mark the same jointly as RMS-3."

62. The Petitioner did not offer any response to the averments by the respondents and the Interested Party. From those averments it appears that some criminal offences may have been committed in the process of registering a charge over the Interested Party's property. The only office mandated to make a determination whether any offences were indeed committed is that of the 2nd Respondent. So far it has not been demonstrated that he has abused his powers.

63. The Petitioner, however, has asked this court to find that the circumstances in this case are similar to those in the cases of **Kenya Commercial Bank Ltd & 2 others v Commissioner of Police and the Director of Criminal Investigations Department & another, Interested Party Benjoh Amalgamated Ltd [2012] eKLR** and **Investments & Mortgages Bank Limited (I & M) v Commissioner of Police and the Director of Criminal Investigations Department & DPP & 2 others [2013] eKLR** where this Court (Majanja, J) stopped investigations by the respondents for being unconstitutional. The Petitioner is indeed correct that the investigations were stopped and in fact the Court of Appeal confirmed both decisions on appeal. The respondents' position is that those decisions are distinguishable on the ground that the civil matters were already determined. A perusal of the cited cases shows that the facts in those cases are similar to the facts in this case. The principles of law established in those cases are therefore applicable in this case.

64. In the **Investment & Mortgages Bank Limited case**, the 1st Interested Party, Lalchand Fulchand Shah's title deed had been used by one Sulu Shah to secure a loan for his company known Shah Motors Limited from the petitioner. Shah Motors Limited defaulted on the loan and the petitioner exercised its statutory power of sale. Lalchand attempted through the civil process to stop the sale alleging that the charge on his property was fraudulent. He was not successful. Lalchand later filed a fresh suit in order to join the advocate who attested the charge as a defendant.

65. According to Lalchand, when preparing for the hearing of the fresh suit he instructed his advocate to carry out a search on the suit property and it came to light that the charge document at the land registry was materially different from the one filed in court. He suspected fraud and reported the matter to the police and investigation commenced. That is the investigation that was stopped by the Court.

66. In the **Kenya Commercial Bank Ltd case**, several civil suits had been filed and determined in respect of a loan advanced to an entity known as Benjoh Amalgamated Ltd. About 20 years after the dispute had found its way into the court system, the 2nd and 3rd petitioners who were employees of Kenya Commercial Bank Ltd were summoned to report at the CID Headquarters in relation to an investigation concerning the making of a document without authority and conspiring to defraud in respect of the interested parties' account with the bank. The petitioners' challenge to the criminal investigation was successful.

67. Although the civil disputes in respect of the matter before this court are yet to be determined, it is noted that the dispute herein is more of civil than criminal in nature. The allegation by the Interested Party is that the provisional title that was used to secure the loan advanced to

Riva was obtained fraudulently. The officials of the Interested Party who were in office in 2018 when the property was advertised for sale are accusing those who were in office in 2007 when the loan was advanced to Riva of having acted fraudulently. That is an issue that can be determined by the courts seized of the civil matters in the process of determining whether the Petitioner can exercise its power of sale.

68. The respondents and the Interested Party are trying to criminalize the transaction between the Petitioner and Riva in an attempt to deny the Petitioner its right to property. Any fraudulent activity that may be exposed at the hearing of the civil matters will find appropriate remedies in those cases.

69. If, at the end of the trial of the civil matters, any fraud is confirmed and the Petitioner is implicated in the fraud, the court trying the cases will have powers to decline the proposed sale of the property by the Petitioner. The court can recommend criminal investigation and prosecution of any person deemed to be culpable. I agree with the Petitioner that unsheathing the investigative and prosecutorial swords in the circumstances of this case will result in a deluge of attacks on it to the detriment of its right to a fair trial.

70. I have said enough to demonstrate that the respondents have abused their constitutional and statutory powers by commencing investigations in respect of the charge over L. R. No. 12785. The appropriate order is one in terms of prayer (ii) in the petition but amended to suit the circumstances of this case. As such an order of prohibition is therefore issued restraining the 1st and 2nd respondents from carrying out investigations or prosecution in respect of the legal charges created over L. R. No. 12785 pending the hearing and determination of Mombasa Commercial Court Case No. 57 of 2018, Milimani Commercial Court Case No. 304 of 2018, and Malindi ELC No. 155 of 2018.

71. As already stated, there is no evidence of bad faith on the part of the respondents in the execution of what they genuinely believed to be their duties. For that reason alone, I direct the parties to meet their own costs of the proceedings.

Dated, signed and delivered at Nairobi this 5th day of March, 2020.

W. Korir,

Judge of the High Court