



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 620 OF 2017

**IN THE MATTER OF BREACH AND/OR CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER
ARTICLES 47 AND 50 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA 2010**

AND

IN THE MATTER OF ARTICLE 157 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010

AND

IN THE MATTER OF VICTIM PROTECTION ACT, 2014

AND

**IN THE MATTER OF THE DECISION BY THE DIRECTOR OF PUBLIC PROSECUTIONS TO TERMINATE CRIMINAL
CASE NO. 95 OF 2014, REPUBLIC VS GILBERT NDERITU & ANOTHER AFTER COMMENCEMENT OF HEARING**

AND

IN THE MATTER OF THE LAW REFORM ACT, CAP 26, LAWS OF KENYA

AND

IN THE OF ORDER 53 RULES 1 AND 2 OF THE CIVIL PROCEDURE RULES 2010, CAP 21, LAWS OF KENYA

AND

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF *PROHIBITION*,
MANDAMUS AND *CERTIORARI***

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

BETWEEN

REPUBLIC APPLICANT

VS

THE HON. CHIEF MAGISTRATE, MILIMANI CRIMINAL DIVISION 1STRESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2NDRESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 3RDRESPONDENT

MIGWI MACHARIA 4TH RESPONDENT

GILBERT NDERITU 5THRESPONDENT

AND

EX PARTE APPLICANT JOHN WACHIRA WAMBUGU

AND

HOUSING FINANCE COMPANY OF KENYA LIMITED INTERESTED PARTY

JUDGMENT

The Parties

1. **John Wachira Wambugu**, the *ex parte* applicant, an advocate of the high Court of Kenya is the complainant in *CMC Criminal Case No. 95 of 2014, Republic vs Gilhert Nderitu & Another*, (hereinafter referred to as the criminal case). He is a director of **Kenon Court Limited** and **Kenon Court Management Limited**. The core business for the companies is real estate.

2. The first Respondent is the Chief Magistrates Court, Milimani Criminal Division, Nairobi. The second Respondent is the Director of Public Prosecutions (**the DPP**), established under Article 157 of the Constitution with constitutional mandate to *inter alia* 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.^[1]

3. The fourth Respondent is the Director of Criminal Investigations (**CID**). It's mandate to undertake Criminal Investigations stems from Article 243 of the Constitution and Section 4 of the National Police Service Act.^[2]

4. The fourth and fifth Respondents are the accused persons in the criminal case while the Interested Party is the Housing Finance Company of Kenya Limited, (**HFCK**), a financial Institution duly established under the Banking Act^[3] (herein after referred to as **the Bank**).

Factual matrix

5. By a Notice of Motion dated 27th November 2017, expressed under Articles 47, 48, 50 and 157 of the Constitution, Section 9 of the Victim Protection Act and order 53 Rules 1, 2 & 3 of the Civil procedure Rules, 2010, the *ex parte* applicant seeks the following orders:-

- a. An order of **Certiorari** directed to the second Respondent quashing the decision and subsequent formal application to terminate charges against the accused persons in *CMC Criminal Case No. 95 of 2014, Republic vs Gilhert Nderitu & Another*.
- b. An order of **Prohibition** directed to the Respondents herein jointly and severally to prohibit them from terminating *CMC Criminal Case No. 95 of 2014, Republic vs Gilhert Nderitu & Another*.
- c. An order of **Mandamus** to compel the first and second Respondents to proceed with the hearing of *CMC Criminal Case No. 95 of 2014, Republic vs Gilhert Nderitu & Another*.
- d. An order of **Mandamus** compelling the second Respondent to appoint a special prosecutor to take over prosecution of *CMC Criminal Case No. 95 of 2014, Republic vs Gilhert Nderitu & Another*.

6. The *ex parte* applicant relies on the following grounds:-

- i. **That** on 17th October 2017, counsel for the 5th Respondent presented before the Chief Magistrate's Court a letter addressed to him from the second Respondent's office intimating the second Respondent's intention to withdraw the above criminal case. However, the counsel who appeared on behalf of the second Respondent to prosecute the matter was not aware of the aforementioned letter or any withdrawal of charges, hence, hearing commenced and the applicant herein took the stand for examination in chief.
- ii. **That** on 19th October 2017, the second Respondent made a formal application to terminate the charges against the fourth and fifth Respondents, but never provided any reasons for the termination.
- iii. **That** the applicant as the complainant in the criminal case was never informed or made aware of the intended termination of the charges, and that the decision to terminate the said charges is illegal, arbitrary and unreasonable as there is sufficient evidence to support a *prima facie* case establishing criminal liability and responsibility on the part of the accused persons.
- iv. **That** the formal application for termination of the proceedings is a violation of the applicant's right guaranteed under Article 47 (1) of the Constitution to have written reasons for any administrative action taken against him as in this case. Further, the termination of the said case is a breach of Natural Justice.

v. ***That*** the *ex parte* applicant stands to suffer great prejudice since there is a High Court case, ELC No. 214 of 2011, **Caroline Waithera & 3 Others vs Susan Nyambura Wachira & 3 Others** which is directly linked to the criminal case and also there is a case in the Disciplinary Tribunal of the Law Society of Kenya, being Disciplinary Tribunal No. 207 of 2013, **John Wacira Wambugu vs Migwi Macharia** which is also directly linked to the criminal case No. 95 of 2014.

vi. ***That*** there has been constant laxity and delay in prosecuting the said case by the second Respondent, a violation of the applicant's constitutionally guaranteed rights.

vii. ***That*** the applicant has faithfully attended Court as a prosecution witness but the prosecutor continuously applied for adjournment and that the termination will occasion grave prejudice to the applicant's right to access justice guaranteed under Article 48 of the Constitution.

7. In his supporting Affidavit, the *ex parte* applicant avers that he was out of the country between 17th September 2017 to 6th October 2017 and upon returning, he visited the third Respondent on 10th October 2017 to confirm whether witness statements had been recorded. He also avers that Forensic Document Examination Report which forms part of the prosecution's evidence concluded that his signature and that of his wife **Susan Nyambura Kamau** used to transfer 8 flats were not genuine.

8. He averred that it is beyond the scope of the duty of the DPP to challenge evidence provided by the investigating officer, and, that on 4th October 2016 and on 3rd November 2016 his advocates wrote to the DPP registering their displeasure in the manner in which the DPP was handling the criminal case and the numerous adjournments. He averred that on 10th November 2016, the DPP wrote to his advocates, but, contrary to Article 35 of the Constitution declined to disclose the basis that triggered a review of the case. He further averred that the numerous adjournments were a deliberate effort to frustrate the proceedings; and that there were attempts to tamper with the police duplicate file. Also, he averred that a victim of a crime has right to speedy trial. Lastly, he averred that the DPP has failed to reply to his letters asking to undertake private prosecution.

Second and third Respondent's Replying Affidavit.

9. **Grace Murugi**, a Senior Assistant Director of Public Prosecutions in his Replying Affidavit dated 8th February 2018 averred that on 2nd July 2016 the DPP called for police inquiry file following a complaint by the advocates of the fourth Respondent to the effect that the applicant was a beneficiary of the proceeds of the sale of the 8 houses in issue, the subject of the criminal case. He averred that the DPP reviewed the investigations file and directed the police to conduct thorough investigations which established the following facts from the record:-

a. ***That*** the applicant with his wife **Susan Nyambura Kamau** constructed several houses on their plot No. **L.R No. 187/V/217** financed by a loan from HFCK, but they later fell in arrears and entered into a private treaty with HFCK to sell some of the houses to offset the loan. Further, **Susan Nyambura Kamau** formed a company known as **Kenon Place Ltd.** in which she was one of the Directors. The company sold 8 houses in order to offset the loan.

b. ***That*** the fifth Respondent as a manager in **Kenon Place Ltd** engaged the law firm of **Mamicha & Co. Advocates** to prepare legal documents for the purposes of transferring the houses to the buyers. However, after the completion of the sale, the applicant alleged that the houses were sold fraudulently, and, that he did not sign or give his pin number in the sale agreement. As the manager of **Kenon Place Ltd.** the fifth Respondent was the person liaising with **Mamicha & Co Advocates** and **HFCK**.

c. ***That*** the applicant alleged that in the year 2012 he requested **HFCK** and **Mamicha & Co Advocates** to supply him with documents pertaining to the sale of the houses but they declined to do so and he therefore lodged a complaint of fraud with the police.

d. ***That*** upon review of the evidence, the **DPP** established that the buyers purchased the houses through the **HFCK** and the payment was remitted through the account of **Kenon Place Limited** in **HFCK**, and, that, the applicant's mortgage was fully paid, the applicant knew that the proceeds of the sale were used to clear the loan. The evidence shows that the *ex parte* applicant and his wife were the recipients of the proceeds of the sale, hence, they cannot allege that the 8 houses were sold fraudulently. Also, the houses were sold in 2005, yet the complainant alleged fraud in 2013, eight years after the sale.

e. ***That*** the applicant is relying on a report of a document examiner which evidence should also be weighed against any other independent evidence that points to the fact that the applicant had issued such instructions or was well aware of such instructions to have the houses sold and the proceeds of the sale remitted to **HFCK** in order to offset the loan.

10. **Mr. Murungi** also averred that Article 157 (8) of the Constitution allows the DPP to discontinue a criminal case only with the permission of the Court. He further averred that the applicant has an opportunity to raise his objections before the trial Court, and the Court would hear both parties before the case is withdrawn. He further averred that the DPP is required to respect, observe, defend and uphold the Constitution, public interest, the interests of administration of justice, the need to prevent and avoid abuse of the legal process, national values and principles of governance, respect, observe, protect, implement, promote and uphold the rights and freedoms in the Bill of Rights, be accountable to the public for decisions and actions taken generally, observe Article 73 (2) (d) of the Constitution, and, be accountable for administrative acts and observance of the values and principles of public service under Article 232 (e) of the Constitution.

11. **Mr. Murungi** further averred that the second Respondent is required to thoroughly review the evidence gathered by investigative agencies vis-a-vis that of the defence and be satisfied that there is enough evidence to prove a criminal case against any accused person. Further, he averred that on 3rd November 2016, the applicant through his advocate wrote to the DPP and copied to the third Respondent expressing dissatisfaction on how the matter was being handled and on 10th November 2016, the DPP responded accordingly. He further averred that upon reviewing the applicant's assertions and the evidence on record, the DPP directed that the matter be withdrawn.

12. **Mr. Murungi** averred that the applicant was aware that the DPP was reviewing the evidence; that the applicant has not demonstrated that in making the decision to withdraw the case, the DPP acted without or in excess of its powers or in any manner contravened the Constitution; nor has he demonstrated that the applicant did not act independently; and, having found that the evidence was insufficient, the DPP cannot appoint a special prosecutor.

Second Respondent's grounds of opposition.

13. The DPP also filed grounds of opposition stating that:- **(a)** Under section 157 (10) of the Constitution and section 6 of the Office of the Director of Public Prosecution Act, the DPP does not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise the powers or functions, shall not be under the direction or control of any person or authority; **(b)** Article 157 (8) of the Constitution allows the DPP to discontinue a criminal case with permission of Court. The applicants have an opportunity to raise their objections before the trial Court and the trial Court will consider both the prosecution and the applicant before the case; **(c)** That the application is misconceived, frivolous, vexatious since the applicant has not demonstrated how the DPP will act illegally, unreasonable, ultra vires and or contrary to natural justice; **(d)** That the application has no merit and the orders sought amount to inviting the Court to supervise the DPP.

The fifth Respondent's Replying Affidavit.

14. **Gilbert Nderitu**, the fifth Respondent swore the Replying Affidavit dated 12th December 2017. He averred that he was charged in the criminal case together with the fourth Respondent at the instigation of the *ex parte* applicant, and that the particulars of the charges relate to the sale of 8 houses which were owned by Kenon Court Limited operated by the applicant and his wife. He averred that at the material time relevant to this suit, he was a director of the company together with the *ex parte* applicant's wife, **Susan Nyambura Kamau**, a witness and a complainant in the criminal case. He also averred that the houses were charged to the Bank, and, that the borrower was unable to repay the loan, hence, they were forced to sell the houses by the Bank, a fact which was well brought out in the witness statement of the said **Susan Nyambura Kamau**.

15. He also averred that the only role Gem Court Ltd and Kenon Place Company Ltd in which he was a director with **Susan Nyambura Kamau** played was to look for buyers for the houses as demanded by the Bank. He further averred that the sale of the houses was conducted by the Bank to whom all the funds were paid to clear the debt owed by Kenon Place Ltd. Additionally, he averred that Kenon Place Ltd and Gem Court Ltd did not receive any monies from the sale of the houses because the sale was meant to settle the loan.

16. **Mr. Nderitu**, averred that upon being charged in Court, he requested for a court order to compel the Bank to avail to him account details of Kenon Place Ltd, which were provided and the statements show that all the proceeds were paid into the said account. He averred that he requested the DPP to call for the file for further investigations as he felt that he was being maliciously prosecuted and the DPP wrote confirming his directions that that the criminal case to be withdrawn. Further, he averred that the applicant is maliciously pursuing the prosecution, and that he has a right to have the charges dropped since the DPP has established that no case has been established against him. He also averred that the applicant and his wife are embroiled in a legal battle with the purchasers in which the purchasers have sued them for the reversionary interest in the management company that was incorporated to facilitate the sale of the houses. He also averred that he is entitled to a fair trial, and, that the documents the applicant seeks to rely upon have not been admitted in evidence and cannot be used as a basis to oppose the withdrawal of the criminal case.

Applicant's further Affidavit.

17. The *ex parte* applicant filed a further Affidavit dated 26th February 2018 admitting *inter alia* that it was the role of the directors of both companies to look for buyers for the flats, but averred that the sale was tainted with elements of fraud. He averred that the sale was subject to the consent of the directors and approval by the board of directors. Further, he averred that at the time of the sale, **Susan Nyambura Kamau** was out of the country, hence, she could not participate in the sale and that the fifth Respondent took advantage of his position as a director to forge the other directors signatures. He averred that the flats were sold without a resolution of the directors of the two companies. He also averred that upon sale of the flats, he requested for statement of accounts together with the supporting documents prepared by Mamicha & Co Advocates and at this time they embarked on tracing the duly registered documents at the lands office only to discover that some of the documents prepared by the fourth Respondent bore forged signatures of himself and his wife and forged personal identification numbers.

18. The *ex parte* applicant also averred that upon lodging a complaint with the police, they took specimen signatures and a forensic document examination report concluded that the signatures were forged. He also averred that the independence of the DPP can be interfered with if he acts contrary to the law, unreasonably, or failure to take into consideration the evidence before it.

The Interested Party's Replying Affidavit.

19. **Joseph Lule**, the Bank's Legal Officer swore the Replying Affidavit dated 6th June 2018. He averred that the Bank advanced a loan to Kenon Place Ltd. secured by a charge over LR. No. **187/V/21**. He averred that the borrower defaulted in repayment and subsequent negotiations were held and the borrower offered to settle the debt by selling 8 apartments. Further, he averred that the borrower asked the Bank to accept as final settlement Ksh. 21,000,000/= from the sale by private treaty. He further averred that the Bank instructed Mamicha & Co Advocates to represent it in the sale of the 8 apartments and Ksh. 21,000,000/= Million was remitted to Kenon Place loan Account No. 600-0004056 in settlement of the outstanding loan and that the allegations of forgery are untrue. He also averred that no criminal complaints were filed against the Interested Party, hence, the unwarranted averments against the Interested Party ought to be struck off.

Issues for determination.

20. Upon carefully analyzing the opposing facts and submissions presented by the parties, I find that the following issues distil themselves for determination:-

- a. Whether the DPP's decision to terminate the criminal case was undertaken lawfully.
- b. Whether there is any merit in the *ex parte* applicant's prayer to institute private criminal prosecution.
- c. Whether the *ex parte* applicant is entitled to the reliefs sought.

a. Whether the DPP's decision to terminate the criminal case was undertaken lawfully.

21. My understanding of the *ex parte* applicant's case is that he is not disputing the powers of the DPP to terminate criminal Proceedings. The contestation is whether the decision to terminate the criminal proceedings was undertaken in a manner that violated the law. On the other hand the DPP's case is that he acted within the law.

22. Article 157(6) of the Constitution provides that the DPP 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).*

23. The *ex parte* applicant states above mandate can be challenged if any of the circumstances stated in Article 157 (11) are proved. Article 157 (11) 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."*

24. To buttress his argument, the *ex parte* applicant's counsel cited *Githunguri vs Republic*^[4] *(a case determined twenty five three years prior to the promulgation of the Constitution of Kenya, 2010, a charter that has been hailed as highly progressive, transformative and liberal)*. He argued that statutory power can only be exercised validly and reasonably.^[5] He also cited the Malaysian case of *Sugumar Balakrishman vs Pengarah N. Sabah*^[6] where the Court held that the Constitution protects the right to equality before the law and equal protection of the law and the public decision maker has a duty to act fairly. Additionally, he argued that the power to prosecute is open to Judicial Review.^[7]

25. He also submitted that the DPP acted unreasonably and violated Article 47 of the Constitution. He faulted the DPP for failing to provide reasons for his decision and failing to take into consideration available evidence. He further submitted that the DPP relied upon evidence provided by an accused person, namely, the fifth Respondent herein. The *ex parte* applicant also argued that the report by the hand writing expert should be relied upon by the prosecution and in any event, the veracity of the evidence can only be tested by way of cross-examination.

26. He submitted that the DPP acted unreasonably by relying on evidence submitted by an accused person without the knowledge of the Director of Criminal Investigations and the applicant. In his submission, there was collusion between the DPP & the fifth Respondent, and that the withdrawal of the criminal trial was in bad faith because there was *prima facie* evidence to sustain the case. He also argued that failure to inform the complainant of the withdrawal, numerous adjournments in the criminal proceedings, and failure to inform the *ex parte* applicant the nature of the investigations were acts of bad faith. Further, he argued that the decision to withdraw is arbitrary, is an abuse of process and denies the applicant access to justice, hence illegal.

27. Counsel for the DPP argued that in making the impugned decision, the DPP was guided by Article 157 (11) of the Constitution. He submitted that no abuse of process has been proved, nor has evidence been tendered to warrant this court to interfere with the decision to withdraw the criminal case.

28. He also argued that the decision to withdraw the criminal case was consistent with section 87 (a) of the Criminal Procedure Code^[8], the functions of the Office of the Director of Public Prosecutions as provided under Article 157 (6) of the Constitution, and that the Constitution expressly provides under Article 157 (8) that the DPP may not discontinue a prosecution without the permission of the Court, hence, the applicant will have the opportunity to argue his case in the lower court.

29. On the alleged failure to consider the evidence, counsel cited Article 157 (10) and argued that the DPP is not bound by the evidence of the investigating officers. Also, he argued that the DPP is not subject to the control, direction, or influence by any other person but is only subject to the control of the court based on the principles of illegality, irrationality and procedural impropriety.^[9] Counsel also submitted that the evidence gathered was considered and the DPP directed that other areas be considered, and in any event, the mere fact a complaint is lodged does not warrant a prosecution. He also argued that Prosecution is the absolute discretion of the DPP.

30. Mr. Ouma representing the Bank did not make any submissions but opted to rely on the Bank's Replying Affidavit.

31. Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our Constitution. It follows that for the decision to terminate

the criminal proceedings to be reviewed by this court, it must be demonstrated that it is not grounded on the law. As such, the decision to terminate the criminal proceedings must conform to the doctrine of legality. Put differently, a failure to exercise that power where the exigencies of a particular case require it, would amount to undermining the legality principle which, is inextricably linked to the Rule of Law. Guidance can be obtained from the South African case of *AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council and another* where the court held as follows:-

“(t)he doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . Public power . . . can be validly exercised only if it is clearly sourced in law” [10]

32. Courts are similarly constrained by the doctrine of legality, i.e to exercise only those powers bestowed upon them by the law. [11] The concomitant obligation to uphold the Rule of Law and, with it, the doctrine of legality, is self-evident. The DPP has not only a statutory duty but also a moral duty to uphold the law and to ensure due compliance with the law. The DPP has a moral and legal duty to ensure that only the guilty are prosecuted and the innocent are not dragged to court.

33. When the constitutionality of an act of a public body is challenged as in this case, the court's duty is first to determine whether, through “the application of all legitimate interpretive aids,” [12] the impugned decision, or act or omission is capable of being read in a manner that is constitutionally compliant. Differently put, whether a law, act, omission, decision or conduct is invalid is determined by an objective enquiry into its conformity with the Constitution [13] and the relevant statutory provisions.

34. The Court is obliged not only to avoid an interpretation that clashes with the Constitutional values, purposes and principles but also to seek a meaning of the provisions that promotes constitutional purposes, values, principles, and which advances the Rule of Law, Human Rights and Fundamental Freedoms in the Bill of Rights and also an interpretation that permits development of the law and contributes to good governance.

35. The following excerpt from the Supreme Court of Appeal of South Africa in *National Director of Public Prosecutions vs Freedom Under Law* [14] is instructive:-

[28] *“The legality principle has by now become well-established in our law as an alternative pathway to judicial review where PAJA finds no application. Its underlying constitutional foundation appears, for example, from the following dictum by Ngcobo J in Affordable Medicines Trust & others v Minister of Health & others 2006 (3) SA 247 (CC) para 49:*

‘The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution.’

36. The constitution of Kenya, 2010, ushered in a new set of national values, a new Bill of rights and a new system of government. It reset the relationship between the citizen and the State and reconfigured both the ethos and the architecture of governance. [15] A special feature of the Constitution of Kenya, 2010 is the establishment of an independent office of the DPP whose independence is provided under Article 157 (10) of the Constitution which declares that the DPP shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his powers or functions, shall not be under the direction or control of any person or authority. This provision is replicated in Section 6 of the Office of the Director of Public Prosecutions Act [16] which provides that pursuant to Article 157 (10) of the Constitution, the Director of Public Prosecutions shall- **(a)** not require the consent of any person or authority for the commencement of criminal proceedings; **(b)** not be under the direction or control of any person or authority in the exercise of his powers or functions under constitution, this Act or any other written law; and **(c)** be subject only to the Constitution and the law.

37. The architecture and design of the above provision leaves no doubt that the DPP is not only required to act independently in the exercise of his functions, but also ought not to be perceived to be acting under the direction or instructions or instigation of any other person. More fundamental is the fact that the decision to institute or not institute criminal proceedings is a high calling imposed upon the DPP by the law and must be exercised in a manner that leaves no doubt that the decision was made by the DPP independently. Differently stated, the prosecutor is required to act with diligence and promptness to investigate, litigate, and dispose of criminal charges, consistent with the interests of justice and with due regard for fairness, accuracy, and rights of the accused, victims, and witnesses. The reverse is that where the DPP's does not act independently, the decision cannot be allowed to stand.

38. The DPP must at all times act in the interest of the community and not necessarily in accordance with the wishes of the community. The prosecutor's primary function is to assist the court in arriving at a just verdict and, in the event of a conviction, a fair sentence based upon the evidence presented. At the same time, prosecutors represent the community in criminal trials. In this capacity, the DPP should ensure that the interests of victims and witnesses are promoted, without negating their obligation to act in a balanced and honest manner.

39. The prosecutor has a discretion to make decisions which affect the criminal process. This discretion can be exercised at specific stages of the process, for example— the decision whether or not to institute criminal proceedings against an accused person; the decision whether or not to withdraw charges or stop the prosecution; the decision whether or not to oppose an application for bail or release by an accused person who is in custody following arrest; the decision about which crimes to charge an accused person; the decision whether or not to enter into a plea or sentence agreement; the decision about which evidence to present during the trial; the decision whether or not to appeal to a higher court in connection with a question of law, an inappropriate sentence or the improper granting of bail, or to seek review of proceedings. [17]

40. The DPP must serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law.

41. The *ex parte* applicant's case is that together with his wife they recorded a complaint with the CID. He procured "a forensic expert report" and shared it with the CID. He now wants the DPP to prosecute the accused persons based on what he considers to be "credible evidence." A

clear reading of the architecture of Article 157 of the Constitution leaves no doubt that the DPP is required to not only act independently, but to remain fiercely so. The *ex parte* applicant is a complainant and has an interest in the outcome of the criminal case. He cannot be seen to be the one pushing the DPP to mount a prosecution without offending Article 157 (10) of the Constitution. If that were to happen, the criminal proceedings would risk being quashed on grounds that the DPP did not act independently. All that the Petitioner is required to do is to present his evidence to the investigating officers, (which he did) and leave it to the DPP to independently evaluate the evidence and make a decision whether or not to mount the prosecution.

42. A common thread in the *ex parte* applicant's case is that he has submitted ample evidence and that the DPP has refused to act. It is not for the Petitioner or even this Court to decide the sufficiency or otherwise of the evidence before the prosecution is mounted. It is for the DPP to decide independently and act accordingly. This is a constitutional imperative. It is consistent with the constitutional dictates safeguarding the independence of the DPP and fair trial process. It is also important to mention that under Article 245 (4) (a) of the Constitution, "no person may give a direction to the Inspector General with respect to the investigation of any offence or offences." Just like the constitutionally guaranteed independence of the DPP, this provision is aimed at ensuring that investigations are undertaken independently.

43. The process of establishing whether or not to prosecute usually starts when the police present a docket to the prosecutor. The DPP must consider whether to— request the police to investigate the case further; or, whether to institute a prosecution; or, whether to decline to prosecute; or terminate a criminal trial like in the present case.

44. The decision whether or not to prosecute must be taken with care, because it may have profound consequences for victims, witnesses, accused persons and their families. A wrong decision may also undermine the community's confidence in the prosecution system and the criminal justice system as a whole. The prosecutor should remain fiercely independent, fair and courageous. The responsibilities entrusted to the DPP and police demand nothing less. D.A. Bellemare, M.S.M, Q.C put best the often difficult course for the prosecutor when he said:-

"It is not easy to be a prosecutor. It is often a lonely journey. It tests character. It requires inner strength and self-confidence. It requires personal integrity and solid moral compass. It requires humility and willingness, where to appropriate, to recognize mistakes and take appropriate steps to correct them. Prosecutors must be passionate about issues, but compassionate in their approach, always guided by fairness and common sense." [18]

45. In order to advance the rule of law, and in particular to protect the principle that all are equally subject to the law, the DPP (and the Police) must be independent. The Constitutional provision in Article 157 (10) of the Constitution 2010 ensures that the DPP has complete independence in his decision making processes. This 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. In the words of John Kelly TD, the prosecution system "*should not only be impartial but should be seen to be so and that it should not only be free from outside influence but should be manifestly so.*" [19] The following observations are useful to bear in mind:-

"...the use of prosecutorial discretion should be exercised independently and free from ANY interference. Prosecutors are required to carry out their duties without fear, favour or prejudice—impartially, with objectivity, unaffected by individual or sectional interests and public or media pressures, fairly, having regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect and make all necessary and reasonable enquiries and disclose the results of those enquiries, regardless of whether they point to the guilt or innocence of the suspect ...That is a role which, I fear, is not well understood in the community. It may not be a popular position but it is a very valuable and important one." [20]

46. The role of the prosecutor excludes any notion of winning or losing or pleasing a complainant; it is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings. [21] It is said that the prosecutor acts in the general public interest and so it must be. That is where the prosecutor's ultimate loyalty and responsibility lie. It does not lie in acting at the behest of an overzealous complainant. Mere or reasonable suspicion that the DPP did not act independently, would be sufficient to taint the criminal proceedings.

47. Also, one key consideration to guide the DPP in instituting court proceedings is to advance or protect public interest as opposed to private interest. The decision to prosecute or not to prosecute is of great importance. It can have the most far-reaching consequences for an individual. Even where an accused person is acquitted, the consequences resulting from a prosecution can include loss of reputation, disruption of personal relations, loss of employment and financial expense, in addition to the anxiety and trauma caused by being charged with a criminal offence.

48. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system. For victims and

their families, a decision not to prosecute can be distressing. The victim, having made what is often a very difficult and occasionally traumatic decision to report a crime, may feel rejected and disbelieved. It is therefore essential that the prosecution decision receives careful consideration.

49. The discretion vested upon the DPP by the law must be properly exercised. But the *grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed*. Exercise of the discretion will be clearly unlawful *if the DPP knowingly invokes the power to arrest and prosecute for a purpose not contemplated by the law*. The decision to prosecute must be *based on the intention to bring the arrested person to justice*. The decision to terminate pending proceedings must be undertaken in order to advance the administration of justice.

50. The constitutional approach to the nature of a discretion and how it should be exercised must of necessity take cognizance of the provisions of the fundamental right to the freedom and the dignity of the individual. [22] This includes the rights of the accused and the complainant. It must be borne in mind that the Bill of Rights is a cornerstone of democracy in Kenya. [23] It enshrines the rights of all people

in our country and affirms the democratic values of *human dignity, equality and freedom*. The constitution directs the State and all persons to "... respect, protect, promote and fulfill the rights in the Bill of Rights; "The Bill of Rights applies to all law, and binds all organs of state."^[24]

51. A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motives or improper purpose.^[25] Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable.

52. Prosecutors shall perform their duties fairly, consistently and expeditiously. In the institution of criminal proceedings, the DPP will proceed only when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and will not continue with a prosecution in the absence of such evidence.^[26] Throughout the course of the proceedings, the case will be firmly but fairly prosecuted; and not beyond what is indicated by the evidence.^[27]

53. It has never been the rule in this country that suspected criminal offences must automatically be the subject of prosecution. There must be sufficient evidence to mount a prosecution. The initial consideration in the exercise of this discretion is whether the evidence is sufficient to justify the institution or continuation of a prosecution. It is for the DPP to determine that the evidence presented is sufficient to justify a prosecution. A prosecution should not be instituted or continued unless there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the accused.

54. It is also true that the decision as to whether there is a reasonable prospect of conviction requires an evaluation of how strong the case is likely to be when presented in court. It must take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the arbiter of fact, and the admissibility of any alleged confession or other evidence.

55. The prosecutor should also have regard to any lines of defence which are plainly open to, or have been indicated by, the accused and any other factors which in the view of the prosecutor could affect the likelihood or otherwise of a conviction. This assessment may be a difficult one to make, and of course, there can never be an assurance that a prosecution will succeed. Indeed, it is inevitable that some will fail. However, application of this test dispassionately, after due deliberation by a person experienced in weighing the available evidence, is the best way of seeking to avoid the risk of prosecuting an innocent person and pursuing a futile prosecution resulting in the unnecessary expenditure of public funds.

56. Resources should not be wasted pursuing inappropriate cases, but must be used to act vigorously in those cases worthy of prosecution. In deciding whether or not to institute criminal proceedings against an accused person, prosecutors must assess whether there is sufficient and admissible evidence to provide **a reasonable prospect of a successful prosecution.**^[28] There must indeed be a reasonable prospect of a conviction, otherwise the prosecution should not be commenced or continued. This assessment may be difficult, because it is never certain whether or not a prosecution will succeed. This test of a reasonable prospect must be applied objectively after careful deliberation, to avoid an unjustified prosecution. The review of a case is a continuing process.^[29] Prosecutors must take into account changing circumstances and fresh facts, which may come to light after an initial decision to prosecute or not to prosecute has been made.^[30] This may occur after having heard and considered the version of the accused person and representations made on his or her behalf. Prosecutors may therefore withdraw charges before the accused person has pleaded or in the course of the trial in spite of an initial decision to institute a prosecution.^[31]

57. When evaluating the evidence regard should be had to the following matters:- **(a) Are there grounds for believing the evidence may be excluded bearing in mind the principles of admissibility at common law and under statute?** **(b) If the case depends in part on admissions by the accused, are there any grounds for believing that they are of doubtful reliability having regard to the age, intelligence and apparent understanding of the accused?** **(c) Does it appear that a witness is exaggerating, or that his or her memory is faulty, or that the witness is either hostile or friendly to the accused, or may be otherwise unreliable?** **(d) Does a witness have a motive for telling less than the whole truth?** **(e) Whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute.** **(f) whether the alleged offence is of considerable public concern and (g) the necessity to maintain public confidence. As a matter of practical reality the proper decision in most cases will be to proceed with a prosecution if there is sufficient evidence available to justify a prosecution.**

58. The *ex parte* applicant argues that there is ample evidence which establishes a *prima facie* case. As stated above, it is for the DPP to independently evaluate the evidence and decide independently whether to proceed with the prosecution or not. The *ex parte* applicant's case hangs on one thread, namely, the document examiner's report which he refers to as "expert evidence." To him, the "*expert evidence*" establishes a *prima facie* case. If sufficiency of evidence were to be left to complainants, then, it is human that they would all be inclined to prefer a prosecution and ultimately a conviction. Thanks to the law, the decision to evaluate the sufficiency of the evidence is vested upon the DPP not the complainant.

59. Expert evidence forms an important part of litigation because it is vitally important for the prosecutors to get the necessary help from those skilled in particular fields and in the different technologies in forming an opinion and coming to a conclusion whether to prosecute or not. Under section 48 of the Evidence Act^[32] opinions of science or art are admissible if made by persons specially skilled in such science or art. A person specially skilled in art or science is therefore deemed to be an expert. The term science or art usually means any branch of learning which requires a course of previous habit of study in order to obtain competent knowledge of its nature.^[33] Talking about expert evidence, this Court is reminded of a passage from a judgment by **Sir George Jessell MR** in the case *Abringer vs Ashton*^[34] where he used the phrase "*paid agents*" while describing expert witnesses. Almost 100 years later **Lord Woolf** joined the list of critics of expert witnesses. In his Access to Civil Justice Report, he said this:-

"Expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their field. Today they are in practice hired guns. There is a new breed of litigation hangers-on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients."^[35]

60. The fundamental characteristic of expert evidence is that it is opinion evidence. Generally speaking, lay witnesses may give only one

form of evidence, namely evidence of fact. To be practically of assistance, expert evidence must also provide as much detail as is necessary to allow the prosecutor to assess its probative value. Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. The weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence.

61. While expert evidence is important evidence, it is nevertheless merely part of the evidence which the DPP must take into account. Four consequences flow from this. *First*, expert evidence does not “trump all other evidence.” It is axiomatic that the DPP is required to evaluate it and weigh it against all the other evidence so as to make an informed decision. In this case, the *ex parte* applicant is only mentioning the expert evidence and carefully omits to mention all the other available evidence. Expert evidence should not be elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.⁹

62. *Second*, the DPP must not consider expert evidence in a vacuum as the *ex parte* applicant seems to suggest. Expert evidence should not therefore be “artificially separated” from the rest of the evidence. To do so is a structural failing.¹² *Third*, where there is conflicting evidence, the DPP should test it against the background of all the other evidence in order to decide which evidence is to be preferred. The DPP is required to consider all the evidence in the case, including that of the experts, before making the decision to proceed with the case and if he independently concludes that the evidence is not sufficient to sustain the trial, he is entitled to exercise his discretion and terminate the trial.

63. *Fourth*, a further criteria for assessing an expert’s evidence focuses on the quality of the expert’s reasoning. The DPP should examine the expert’s testimony in terms of its rationality and internal consistency in relation to all the evidence presented. In my view, to base the case on the argument that the expert evidence was not considered is a serious misapprehension of the law and a misunderstanding of the constitutional mandate of the DPP. In any event, as stated earlier, it is not the duty of the complainant to evaluate and determine the sufficiency or probative value of the evidence.

64. The *ex parte* applicant states that he was not consulted prior to the decision to terminate the criminal case being made. There is no requirement under the law that the DPP consults a complainant before deciding to prosecute or withdrawal a trial. More significant is the fact that an official who has discretionary powers must, naturally exercise them within the limits of the Constitution and the authorizing statute, *read in the light of the Bill of Rights*. Rights here will include the rights of the *ex parte* applicant and the accused persons. The DPP is required to balance the two and make the right decision. No material has been presented before me to show that the DPP failed to exercise his functions or abused his discretion in making the decision. The enquiry is whether there has been an irregularity or an illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated, conducted [36] or terminated. No such illegality or irregularity has been established.

65. The *ex parte* applicant argued that he has unsuccessfully sought to be supplied with the reasons forming the basis for terminating the proceedings. The Respondent's counsel on the other hand argued that there is no requirement under the law for the DPP to share an investigation report with the *ex parte* applicant.

66. The right of access to information held by the state is guaranteed by Article 35 of the Constitution. The importance of this right has been explained by the constitutional Court of South Africa [37] where the Court said:- “...access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights...” Section 4 provides that Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost. More important is the wording of subsection (4) which provides that the Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6.

67. Under our law, the disclosure of information is the rule and exemption from disclosure is the exception. Section 6 of the act provides for limitations. This Section will grant us a glimpse of what constitutes reasonable and justifiable limitations on the right of access to information. The purpose of section 6 is to protect from disclosure certain information that, if disclosed, could cause material harm to, amongst other things: the defence, security and international relations of the Republic; the economic interests and financial welfare of the Republic and commercial activities of public bodies; and the formulation of policy and taking of decisions by public bodies in the exercise of powers or performance of duties conferred or imposed by law. The decision to prosecute or not prosecute is not only a constitutional and a statutory mandate but also a policy consideration which falls within the constitutional mandate of the DPP. It is also true that the right of access to information is not absolute. The question is whether the reasons for the refusal satisfy Article 24 analysis test. No argument was advanced before me to prove that the refusal falls outside Article 24.

68. On the alleged breach of Article 47 rights, the DPP has not only a constitutional and statutory duty but also a moral duty to uphold the law. It would in general be wrong to whittle away the obligation of the DPP to uphold the law and enforce the criminal justice system in compliance with the Constitution. A lenient approach could be an open invitation to the Respondents to act against their legal mandate.

69. Article 259 of the Constitution introduced a new approach to the interpretation of the Constitution. The Article obliges courts to promote 'the spirit, purport, values and principles of the Constitution, advance the rule of Law, Human Rights and fundamental freedoms in the Bill of Rights and contribute to good governance. This approach has been described as 'a mandatory constitutional canon of Constitutional interpretation'. The duty to adopt an interpretation that conforms to Article 259 mandatory.

70. Therefore, in construing Articles 47 and 157 of the Constitution, we are obliged not only to avoid an interpretation that clashes with the Constitutional values, purposes and principles but also to seek a meaning of the provisions that promotes constitutional purposes, values, principles, and which advances rule of law, human rights and fundamental freedoms in the Bill of Rights and also an interpretation that permits development of the law and contributes to good governance. We are also obliged to be guided by the provisions of Article 159 (e) which requires us to promote and protect the *purposes and principles of the Constitution*.

71. It is an elementary rule of constitutional construction that no one provision of the constitution is to be segregated from the others and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the instrument. [38] It follows that the *ex parte* applicant cannot invite this Court to look at Article 47 in

isolation and ignore crucial provisions of Article 157 (10) and 245 of the Constitution.

72. No evidence has been tendered to show that the DPP abused his discretion or powers under the Constitution. The duty of the prosecutor is to seek justice, not merely to convict or parade people in court without sufficient evidence. The court is inclined to respect the decision by the DPP to terminate the case for two reasons; namely:- **(a) it is a constitutional imperative that the Constitutional independence of the independence of the DPP must be respected, (b) for the court to intervene, there must be clear evidence of breach of the Constitutional duty to act on the part of the DPP or abuse of discretion.** I have carefully considered the law and the authorities and applied the same to the facts of this case. I find that the applicant has not established any grounds to suggest that the DPP illegally exercised his powers. There is no material before me to suggest even in the slightest manner that the impugned decision was undertaken in a manner that can be said to be inconsistent with the constitution.

b. Whether there is any merit in the ex parte applicant's prayer to institute private criminal prosecution.

73. The *ex parte* applicant argued that a complainant may approach the court under section 88 of the Criminal Procedure Code [39] to permit him to institute private criminal prosecution especially where it serves as a remedy against a culpable inertia or partiality on the part of the public prosecuting authority.[40] In such an eventuality, counsel argued a complainant must meet the requirements set out in *Florence International Limited & Others*[41] which are exhaustion of the public machinery of prosecution, that the prosecutor has declined to prosecute without good cause, likelihood of failure of public or private justice, exceptional and substantial injury on the part of the complainant, and, that the complainant is not motivated by bad faith. Other requirements as laid down in the said case include great injustice caused by social evil, or corrupt or biased failure to prosecute and that the private prosecution is an initiative to counter refusal to prosecute.

74. Counsel argued that a special prosecutor should be appointed as a safeguard against extraordinary impropriety, capricious, corrupt or biased failure or refusal to prosecute by public prosecuting agencies[42] and that the applicant meets the tests to be permitted to instituted private prosecution as stipulated in *Floriculture International Limited & Others*. [43]

75. The Respondent's counsel argued that that there is no basis to warrant allowing private prosecution.

76. Section 88 of the Criminal Procedure Code[44] provides that provides that a Magistrate trying a case may permit the prosecution to be conducted by any person. *First*, there is nothing before me to demonstrate that the *ex parte* applicant has invoked the above section. *Second*, the tests laid down in the case of *Florence International Limited & Others*[45] cited by *ex parte* applicant have not been satisfied in the circumstances of this case. The DPP has not declined to prosecute. He opted to terminate the proceedings after carefully evaluating the evidence. Refusal or failure to prosecute has not been demonstrated.

77. It has not been established that the withdrawal is without good cause. The reason given is valid, that is, the evidence is not sufficient. Whether or not the evidence assembled can sustain a conviction is one of the core considerations the DPP is required to take into account before mounting a prosecution. The duty of the DPP is not to parade citizens in court just because complaints have been made. The DPP has a constitutional obligation to weigh the evidence and to review it continuously during the trial to take into account any developments. It cannot be said that the complainant is not motivated by bad faith. He has already disclosed existence of a civil case touching on the same property mentioned in the charge sheet. There is danger of the criminal trial being turned into mechanism for fishing for evidence to fight the civil case. There is a real likelihood that the complainant is propelled by the personal or pecuniary motive. He has already disclosed in his affidavit that the criminal trial is closely linked to a civil suit.

78. Applying the tests enumerated in the cited by the *ex parte* applicant, I find and hold that the applicant has not established any basis for the court to permit him to undertake private prosecution. In any event, such an application ought to be made in the Magistrates Court as provided under section 88 of the Criminal Procedure Code. [46]

c. Whether the ex parte applicant is entitled to the reliefs sought.

79. *This case presents an opportunity to this Court to restate the function, scope and nature of Judicial Review remedies and the test for granting such remedies.* In Judicial Review, the reviewing court cannot set aside a decision merely because it believes that the decision was wrong on the merits. A court of review is concerned only with the lawfulness of the process by which the decision was arrived at, and can set it aside only if that process was flawed in certain defined and limited respects. The role of the Court in Judicial Review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach'.

80. Broadly, in order to succeed in a Judicial Review proceeding, the applicant will need to show either:-

a. *the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or*

b. *a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it.*

81. An administrative or quasi-judicial decision can only be challenged for **illegality, irrationality and procedural impropriety.** An administrative decision is flawed if it is illegal. A decision is illegal if it: - **(a) contravenes or exceeds the terms of the power which authorizes the making of the decision; (b) pursues an objective other than that for which the power to make the decision was conferred; (c) is not authorized by any power; (d) contravenes or fails to implement a public duty.**

82. *First*, it is not in disputed that the DPP has power to withdraw criminal proceedings. *Second*, there is nothing to show that the DPP exceeded its Constitutional and statutory powers in making the impugned decision. The decision has not been shown to be illegal or *ultra vires* or outside DPP's functions. It has not been shown that DPP acted without jurisdiction or in excess of his powers nor has it been demonstrated that the decision is so perverse or unreasonable that it would be against the sense of justice to allow it to stand. It is my view that the nature and circumstances of the decision fall into the category of areas which are not disturbed by the Courts unless the decision

under challenge is illegal, irrational, or un-procedural.

83. The *ex parte* applicant seeks an order of *Mandamus* to compel the DPP and the Magistrates court to proceed with the hearing of the criminal case and also to compelling the DPP to appoint a special prosecutor to take over prosecution of the criminal case. It is common ground that an order of *Mandamus* will issue to compel a person or body of persons who has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.^[47] The DPP in the exercise of his constitutional and statutory mandate evaluated the evidence in totality and concluded that it was not sufficient to sustain the trial. The DPP invoked the law and decided to terminate the trial. *Mandamus* is a judicial command requiring the performance of a specified duty which has **not been** performed. The DPP and the Magistrates Court have not refused to act. In fact it is the *ex parte* applicant who seeks to circumvent the legal process by pushing the DPP to disregard his constitutional mandate and take directions from a complainant.

84. *Mandamus* is employed to compel the performance, when refused, of a Ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, **but not to direct** the exercise of judgment or discretion in a particular way, nor to **direct the retraction or reversal of action already taken in the exercise of either.**^[48]

85. *Mandamus* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles.

86. The *ex parte* applicant also seeks an order of *Prohibition* directed to the Respondents herein jointly and severally prohibiting them from terminating the criminal case. The writ of *Prohibition* arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation. However, as stated above, the illegality of the impugned decision has not been established, hence, an order of *Prohibition* cannot issue.

87. The *ex parte* applicant also seeks an order of *Certiorari* directed to the DPP quashing the decision and subsequent formal application to terminate charges against the accused persons in the criminal case. A decision can only be quashed if the body acted without jurisdiction or in excess of its powers or if the decision is so perverse or unreasonable that it would be against the sense of justice to allow it to stand. This has not been established in this case.

88. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, for example where the applicant has unreasonably delayed in applying for judicial review, where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration, or where the judge considers that an alternative remedy could have been pursued. In this case, the orders sought in the circumstances of this case fly on the face of the provisions of Article 157 of the Constitution which guarantee the independence of the office of the DPP.

89. The grant of the orders of *Certiorari*, *Mandamus* and *Prohibition* is discretionary. The Court is entitled to take into account the nature of the process against which Judicial Review is sought and satisfy itself that there is reasonable basis to justify the orders sought. In this regard, it is important to mention the imperative need for the court to respect and uphold the constitutional mandate of the DPP. The provisions of the Constitution conferring powers upon the High Court to grant such remedies as *Certiorari*, *Prohibition* and *Mandamus* are a device to advance justice and the Rule of Law and not to frustrate or stifle it.

Final orders.

90. In view of my analysis of the facts, issues and the law enumerated above, the conclusion becomes irresistible that the *ex parte* applicant's application has no merit at all and is fit for dismissal. Consequently, I hereby dismiss the *ex parte* applicant's Notice of Motion dated 27th November 2017 with costs to the second, third, fourth and fifth Respondents.

Orders accordingly

Signed, Delivered and Dated at Nairobi this 28th day of September 2018.

John M. Mativo

Judge

^[1]Article 157 (6) of the Constitution.

^[2] Act No 11A of 2011.

^[3] Cap 488, Laws of Kenya.

^[4] {1985} KLR 91.

- [5] Citing *R vs Commissioner for Co-operatives ex parte Kirinyaga Growers Co-operatives Savings and Credit Society Ltd* {1999}1EA 245, 249.
- [6] {2000 1 LRC 301.
- [7] Citing *Ivan vs AG* {1999} 2LRC 716.
- [8] Cap 75, Laws of Kenya.
- [9] Citing *Republic vs DPP ex parte Victory Welding Works and Another*, NBI Misc No. 249 of 2012.
- [10] *AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council* [2006] ZACC 9; 2007 (1) SA 343 (CC).
- [11] *National Director of Public Prosecutions vs Zuma*, Harms DP
- [12] *National Coalition for Gay and Lesbian Equality and Others vs Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 24.
- [13] *Ferreira vs Levin NO and Others; Vryenhoek and Others vs Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (*Ferreira v Levin*) at para 26.
- [14] (67/14) [2014] ZASCA 58 (17 April 2014).
- [15] **Njeri Githang'a, Law Reporter, June 2013, <http://kenyalaw.org/kenyalawblog/a-Compilation-of-summaries-of-selected-cases-on-the-interpretation-of-the-constitution-of-kenya-2010/>. Accessed on 24th November 2017.**
- [16] Act No. 2 of 2013.
- [17] Prosecution Policy, (Revised June 2013), available at <https://www.npa.gov.za/sites/default/files/Library/Prosecution Policy>.
- [18] *Infra*.
- [19] <http://www.paclii.org/fj/other/prosecutors-handbook.pdf>.
- [20] Extract from a Speech by Anna Katzmann, SC at a dinner of the NSW Law Society's Government Lawyers CLE Conference on 30 October 2007. (Now the Hon. Anna Katzmann, Judge of the Federal Court of Australia).
- [21] (see *Boucher v the Queen* (1954) 110 CCC 263, 270).
- [22] Article 19 (2)
- [23] Article 19 (1)
- [24] Article 20(1)
- [25] *Republic vs Attorney General ex-parte Arap Ngeny* HCC APP NO. 406 of 2001
- [26] ***Van der Westhuizen v S* (266/10) [2011] ZASCA 36; 2011 (2) SACR 26 (SCA) (28 March 2011).**
- [27] *Ibid*.
- [28] Prosecution Policy, (Revised June 2013), available at <https://www.npa.gov.za/sites/default/files/Library/Prosecution Policy>.
- [29] *Ibid*.
- [30] *Ibid*.
- [31] *Ibid*.
- [32] Cap 80, Laws of Kenya.
- [33] *Judges and Environmental Law, A handbook for the Sri Lankan Judiciary*, Environmental Foundation Limited, at page 125 Available at www.sljti.org-Accessed on 5th June 2017.

[34] {1873} 17 LR Eq 358 at 374.

[35] Lord Woolf MR, Access to Justice, Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales, HMSO, London, 1995, p. 183.

[36] Interpreting similar provisions in the constitution of South Africa, the South African Constitutional court (Nicholas AJA), *Shabalala & 5 others vs A.G of Transvaal & Another* CCT/23/94

[37] In *Brümmer vs Minister for Social Development and Others* {2009} ZACC 21; 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC).

[38] *South Dakota vs. North Carolina*, 192 US 268(1940)

[39] Cap 75, Laws of Kenya.

[40] Citing *Rufus Riddlebarger vs Brian John Robbson* {959}EA 841.

[41] High Court Misc. Civil App No. 114 of 1997.

[42] Citing *Rufus Riddlebarger vs Brian John Robbson* {1959} EA 841.

[43] High Court Misc. Civil Application No. 114 of 1997.

[44] Cap 75, Laws of Kenya.

[45] High Court Misc. Civil App No. 114 of 1997.

[46] *Supra*.

[47] See *Kenya National Examinations Council vs R ex parte Geoffrey Gathenji Njoroge & 9 Others* {1997} eKLR.

[48] *Wilbur vs. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930). See also Jacoby, *The Effect of Recent Changes in the Law of "Non-statutory" Judicial Review*, 53 GEO. IJ. 19, 25-26 (1964).