



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
MILIMANI LAW COURTS  
ANTI-CORRUPTION AND ECONOMIC CRIMES COURT  
MISCELLANEOUS APPLICATION NO. 40 OF 2016

BETWEEN

REPUBLIC.....APPLICANT

-VS-

DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT  
THE CHIEF MAGISTRATE'S COURT (MILIMANI).....2<sup>ND</sup> RESPONDENT  
ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT  
ZABLON AGWATA MABEA.....EX-PARTE/APPLICANT

JUDGMENT

1. By a Notice of Motion dated 28<sup>th</sup> December 2016, and filed in Court on even date the Ex-parte Applicant seeks the following Orders;

*a. That Order for Declaration do issue that:*

- i. The institution, maintenance and prosecution of the Applicant in the Chief Magistrate's Court vide Criminal Case No. 19 of 2014 is an abuse of the criminal justice system and contravention of his Constitutional right to freedom and security of the person and right to secure protection of the law;*
- ii. The institution, maintenance and prosecution of the Applicant in the Chief Magistrate's Court vide Criminal Case No. 19 of 2014 is oppressive, malicious and an abuse of the process of the Court,*
- iii. The institution, maintenance and prosecution of the Applicant in the Chief Magistrate's Court vide Criminal Case No. 19 of 2014 amounts to selective prosecution and is gross abuse of the process of court;*

*b. Orders of Prohibition do issue against the Respondents prohibiting the continuance of the case against the Applicant in the Chief Magistrate's Court vide Criminal Case No. 19 of 2014.*

*c. Order that costs be borne by the Respondents.*

*d. Any other or further relief that the Honourable Court may deem just and expedient to grant in the circumstances.*

2. The Application was filed pursuant to leave granted under Order 53 Civil Procedure Rules on 21<sup>st</sup> December, 2016 vide the Chamber Summons dated 15<sup>th</sup> December, 2016.

3. The Application is supported by the Verifying Affidavit sworn by **Zablon Agwata Mabea** the Ex-parte Applicant on 15<sup>th</sup> December, 2016, Statutory Statement of 15<sup>th</sup> December, 2016 and the Annexures.

## **BACKGROUND**

4. The foundation of this case is that in a letter dated 2<sup>nd</sup> March, 2009, (**ZA1**) the Permanent Secretary Ministry of Information and Communication **Mr. Bitange Ndemo** did request the Permanent Secretary Ministry of Lands **M/s Dorothy Angote**, to carry out due diligence procedures in respect of land LR No. 9918/3 for ICT Park and provide an official search on the same. From the letter, it is evident that there had been previous correspondence on the same, between the two officers.

5. The communication also confirmed that following the Ministerial Tender Committee, Malili Ranch Ltd had been awarded the tender and had signified acceptance for the sale of 5,000 acres of land at a price of Kshs.200,000/= per acre. This letter was passed over to the Applicant who was the then Commissioner of Lands, for necessary action.

6. He directed the Registrar of Titles to conduct a search as requested and this was done. The Registrar of Titles **Mr. G. G. Gachihi** endorsed the Certificate of Search and certified it as a true copy of the original and the same was forwarded by the Applicant to the Permanent Secretary Ministry of Information and Communication vide a letter marked "**ZA-2**".

7. There arose allegations of irregularities and bid rigging in the purchase of the Malili Ranch for an ICT Park at Kshs.1 billion. An inquiry was opened to deal with the said allegations.

8. It is the Applicant's case that besides what is explained in paragraph 4 – 6, he did not play any role in this matter of purchase of the land in question. In spite all of this, he has been interrogated and has had to record a statement with officers. After investigations, he was found inculpable but later the 1<sup>st</sup> Respondent decided to prefer criminal charges against him vide Nairobi Chief Magistrate ACC Case No. 19 of 2014.

9. He was charged with others but some of them came to court to challenge the continuance of the proceedings and they were successful. They are;

- Johnson Ndunya Muthama – Nairobi Court of Appeal Civil Application No. 26 of 2016 (UR)
- Ronald Leposo Musengi – Nairobi High Court Constitutional Petition No. 436 of 2014.
- Julius Kilonzo Maweu – Nairobi High Court Criminal Appeal No. 189 of 2015.
- Bitange Ndemo – Nairobi Judicial Review Misc. Civil Application No. 192 of 2016

## **THE APPLICANT'S CASE**

10. It is the Applicant's case that the only role he played in this matter was to direct the letter dated 2<sup>nd</sup> March, 2009 (ZA-1) to the Registrar of Titles Mr. G. G. Gachihi for action. Upon receipt of the certified copy of the Certificate of Search from Mr. Gachihi, he forwarded it to the Permanent Secretary Ministry of Information and Communication (ZA-2).

That the Certificate of Search revealed the following entries;

- a. Certificate of title in favour of Malili Ltd., an entry number 1; LR 2171/1 dated 30<sup>th</sup> May, 1967;
- b. Certificate of change of name of Malili Ltd. to Joyce Ltd. an entry number 2 made on 11<sup>th</sup> December, 1970.
- c. Certificate of change of name from Joyce Ltd. to Malili Ranch Ltd. an entry number 3 made on 18<sup>th</sup> October, 1985.

11. It is his contention that after the Certificate of Search had been forwarded to the Permanent Secretary, Information and Communication, he was never involved in any other way in the matter of purchase of the land. He denied being paid any money from the proceeds of sale.

That in spite of all this, he was interrogated by officers from Ethics and Anti-Corruption Commission (EACC) and the Directorate of Criminal Investigations (DCI) who did not find him culpable.

12. He deposed that from his personal knowledge, there was no government money that was lost in the Malili Ranch project. That in fact, the title to the land was held by **Mr. Joseph Kinyua** the then Permanent Secretary to Treasury, (ZA – 5 & 6) after the full price was paid by the government.

13. He averred that the 1<sup>st</sup> Respondent after investigations and further investigations, found no loss to the government in the whole project and recommended for the closure of the file. This was on 2<sup>nd</sup> October, 2013 vide the resubmitted inquiry file No. KACC/F1/96 2010.

14. Later after the launch of the opening of Konza City, the 1<sup>st</sup> Respondent nominated Senior Counsel **Paul Kibugi Muite** to study the reports on the matter and make recommendations on those culpable. He also appointed the said Paul Muite as Special Prosecutor in the matter.

15. Senior Counsel Muite vide his letter dated 28<sup>th</sup> July, 2014 recommended that the Applicant be charged with the offence of conspiracy to defraud for facilitating **“transfer as a block, the then sub-divisional scheme notwithstanding”**. This was despite the fact that investigations were not complete (ZA–9). He contends that had any subdivision occurred, the company lawyer could be holding several titles and not just one as was the case (ZA–10 & 11).

16. He further deposed that Senior Counsel Muite in a letter dated 26<sup>th</sup> August, 2014 recommended that he should be charged with two offences viz (i) stealing contrary to Section 268 as read with Section 275 of the Penal Code, (ii) conspiracy to commit a felony contrary to Section 313 of the Penal Code. This he said was after the completion of further investigations. He was quick to point out that he had never been summoned by Senior Counsel Muite or any investigator to hear what the further investigation revealed.

17. He averred that in the said letter of 26<sup>th</sup> August, 2014 Senior Counsel Muite indicated that **Eric Mutua, Kamotho Waiganjo, Peter Kalua** and **Peter Mutua Kanyi** would be treated as prosecution witnesses as their statements would be crucial in securing convictions of those being charged (ZA–13). After this, Senior Counsel drafted charges which the 1<sup>st</sup> Respondent acted on.

18. He wondered why **Mr. Eric Mutua** who had admitted that he had received large amounts of money on behalf of the shareholders was being shielded by Senior Counsel Muite. He questioned the way the 1<sup>st</sup> Respondent had duly relied on the decision of Senior Counsel hence abdicating his duty.

19. He averred that his court prosecution is ill founded and is a violation of his fundamental rights and freedoms and meant to embarrass and vex him. He believes that his prosecution is an abuse of the court process.

## 1<sup>ST</sup> RESPONDENT’S CASE

20. The 1<sup>st</sup> Respondent opposed the Application vide the Replying Affidavit of **Gitonga Murang'a** a Principal Prosecution Counsel, sworn on 23<sup>rd</sup> January, 2017.

He deponed that an inquiry file was opened following persistent complaints by several shareholders of Malili Ranch Ltd. The complaints were that the Malili Ranch had been fraudulently amalgamated into over 5,000 acres of the individual shareholders parcels of land, which were sold to the Ministry of Information and Communication without their authority.

21. That this had been done by three of the officials namely Chairman, (**Joshua Munala**, deceased), Vice-Chair (**Peter Mutua Kanyi**) and Secretary (**Julius Maweu Kilonzo**). That they had been paid less what was due to them for 7.8 acres each, since each acre was going for Kshs.200,000/=. Secondly, that as at the time of the alleged sale, the land had been subdivided among the shareholders and there was no land to sell. This was therefore a fraudulent transaction, since they should have been issued with their own title deeds as early as 2008.

22. That investigations carried out revealed that there was an alleged resolution and minutes to the effect that the seven directors had resolved to sell over 5,000 acres of land to the Ministry of Information and Communication.

That on 26<sup>th</sup> April, 2014 the 1<sup>st</sup> Respondent received investigation files from the DCI which recommended the charging of a number of individuals for fraud related offences in relation to the government purchase of Malili Ranch.

23. The 1<sup>st</sup> Respondent made a decision to have the file reviewed and advised on by a Senior Counsel from private practice for the following reasons;

***i. One of the individuals recommended to be charged, Eric Mutua, then President of Law Society of Kenya, was a sitting member on the 1<sup>st</sup> Respondent's Advisory Board.***

***ii. That there had been previous investigations undertaken by the EACC and the DCI in relation to the subject matter and the 1<sup>st</sup> Respondent already rendered decisions on the same and as such a decision on the present file would necessarily entail review and/or reconsideration of the 1<sup>st</sup> Respondent's earlier decisions.***

24. Senior Counsel Paul Muite was appointed and gazetted as a public prosecutor vide Gazette Notice No. 595 of 27<sup>th</sup> August, 2014. The deponent averred that Senior Counsel with the 1<sup>st</sup> Respondent's Prosecution Counsels reviewed the investigation files and recommended for the charging of the Applicant alongside others. The reason was the role he played in failing to disclose to the Ministry of Information and Communication that the 5,000 acres of land had been subdivided and the subdivision plan submitted to the Ministry of Lands for issuance of Title deeds to individual shareholders, and was not therefore available for sale.

25. Finally, he deponed that the 1<sup>st</sup> Respondent independently reviewed the file and concurred with the recommendations for the Applicant to be charged. That the decision was made on the sufficiency of the evidence and Application of the law. To him, due process was followed and the 1<sup>st</sup> Respondent has discretion in choosing who will be a prosecution witness upon consideration of the evidence on a file.

### **THE 2<sup>ND</sup> AND 3<sup>RD</sup> RESPONDENTS' CASE**

26. The Attorney General filed Grounds of Opposition dated 20<sup>th</sup> January, 2017, on 24<sup>th</sup> January, 2017 on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. They are as follows;

***1. That there are no grounds advanced in the Statutory Statement dated 15<sup>th</sup> December, 2016 to warrant issuance of Judicial Review Orders against the 2<sup>nd</sup> Respondent.***

2. *That the 2<sup>nd</sup> Respondent has the jurisdiction and competence to hear and determine the case before it.*
3. *That there is no allegation of procedural or substantive impropriety and/or perceived or real bias made against the 2<sup>nd</sup> Respondent.*
4. *That the ex parte applicant will have his day in the trial court which is in a better position to scrutinize the evidence presented before it in determining whether such evidence proves the applicant's guilt or innocence.*
5. *That these proceedings have been brought after an inordinate delay.*

27. The parties filed written submissions through their respective counsels. The Ex-parte Applicant's submissions are dated 31<sup>st</sup> January, 2017 and were filed on the same day. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submissions are dated 1<sup>st</sup> and 2<sup>nd</sup> February, 2017 and filed on 1<sup>st</sup> and 2<sup>nd</sup> February, 2017 respectively. The submissions were highlighted before this Court on 2<sup>nd</sup> February, 2017.

### **THE APPLICANT'S SUBMISSIONS**

28. **Mr. Nyawara** for the Applicant submitted that the Applicant had come to court because he had been charged on no grounds at all as no witness had incriminated him or mentioned him. He framed three issues for determination by this Court, namely;

- i. *Whether the actions of the Respondents violate fundamental rights and freedoms of the Applicant?*
- ii. *Whether the Applicant is entitled to the Declarations sought?*
- iii. *Whether the Applicant is entitled to the Prohibition sought in the Application?*

He submitted that the institution, maintenance and prosecution of the Applicant in the Nairobi Chief Magistrate's Court ACC No. 19 of 2014 is an abuse of the criminal justice system. That the 1<sup>st</sup> Respondent in a discriminatory and selective manner, unlawfully, maliciously and without any basis recommended that the Applicant be charged with the charges already mentioned above. He referred to the case of **Republic –vs- Nema & Another Ex-parte Philip Kisia and Another [2013] eKLR** where the court stated as follows;

***“An attack on the liberty of a person should be premised on the law. Where the attack is not grounded on the law, one is tempted to say the prosecution is based on malice. It would not serve any purpose to take the 1<sup>st</sup> Applicant through a trial process that will not result in a conviction. This is not about the evidence that will be adduced against the 1<sup>st</sup> Applicant. It boils down to whether the charges are based on the law and I agree with the applicants that the two counts facing the 1<sup>st</sup> Applicant are unlawful.”***

29. Counsel submitted that from the various statements, communication and letters it was clear that there was no ground to form a basis for the charges levelled against the Applicant. That the recommendation by Senior Counsel Paul Muite was therefore meant to shield one Eric Mutua and was therefore arbitrary, malicious and discriminatory. He also cited the cases of **Republic –vs- Director of Public Prosecution & Other Ex-parte Bitange Ndemo Misc. Civil Application No. 192 of 2016; Ndarua –vs- Republic [2002]; Paul Ongili Owino –vs- Bernard Omondi Onginjo & 2 Others NAIROBI Constitutional Petition No. 508 of 2015; Githunguri –vs- Republic [1986] KLR 1 Joram Mwenda Guantai –vs- Chief Magistrate Nairobi . [2007] 2 EA 170; Kuria & 3 Others –vs- the AG [2002]e KLR 69**, to support his submission that the court will always intervene where there is evidence of abuse of a process.

30. It was counsel's submission that the 1<sup>st</sup> Respondent must exercise his discretion in accordance with the laid down standards. He made reference to Article 157 (11) of the Constitution and Section 4 of the Office of the Director of Public Prosecutions Act (ODPPA)

Articles (157) (11) provides

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

Section 4 of the ODPPA provides;

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

***(a) the diversity of the people of Kenya;***

***(b) impartiality and gender equity;***

***(c) the rules of natural justice;***

***(d) promotion of public confidence in the integrity of the Office; Office of the Director of Public Prosecutions 2013 18 No. 2***

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

***(f) the need to serve the cause of justice, prevent abuse of the legal process and public interest; (g) protection of the sovereignty of the people;***

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

***(i) promotion of constitutionalism.***

31. He referred to the case of ***Peter George Anthony D’Costa –vs- Attorney General & Another, NAIROBI Petition No. 83 of 2010***, where *Majanja J.* in quashing a criminal prosecution mounted against the petitioner stated;

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

32. He also referred to article 50 (2) (b), (c) and (j) of the Constitution which guarantees every and person the right to a fair trial which.

On this, he submitted that the decision to review the earlier decision by the 1<sup>st</sup> Respondent was made by Senior Counsel Paul Muite and the Applicant was never called to respond to the new evidence or even notified about it. On this, he referred to the Judgement in ***Ndemo’s case*** which he said applied to this case in point.

33. On whether the Applicant is entitled to a Prohibition Order as sought, he submitted that the criminal proceedings show that they have been instituted for a purpose other than the genuine enforcement of law and order. The purpose being to secure a conviction against the Applicant by shielding certain persons mentioned. He cited the cases of ***Ronald Leposo Musengi –vs- DPP & 3 Others [2015], Republic –vs-***

**AG Ex-parte Kipng'eno Arap Ngeny High Court Civil Application No. 406 of 2001; Kuria & 3 Others –vs- AG [2002] 2KLR 69** to expound on this point.

Finally, he submitted that ***Johnson Nduya Muthama, Ronald Leposo Musengi, Julius Kilonzo Maweu and Bitange Ndemo*** who were being prosecuted in Nairobi Chief Magistrate's ACC No. 19 of 2014 had successfully challenged their prosecution. He therefore prayed for the Notice of Motion to be allowed.

### **THE 1<sup>ST</sup> RESPONDENT'S SUBMISSIONS**

34. **Mr. Ashimosi** for the 1<sup>st</sup> Respondent opposed the Application submitting that the Replying Affidavit had shown how the shareholders' 5000 acres of land had been fraudulently amalgamated through collusion by the Directors and others at the Land Registry. The Shareholders were cheated out of their land and money as a result, because the Ministry of Lands had failed to disclose that the land had been subdivided (paragraph 17 of the Replying Affidavit). The Applicant was the then Commissioner for lands.

35. He submitted that when the file was sent to the 1<sup>st</sup> Respondent, he realized that he sat with one Eric Mutua on the advisory board and so referred the files to Senior Counsel Paul Muite for review and recommendations and not a decision. On what had been said about Eric Mutua in this matter and other decisions he responded by stating that Eric Mutua was acting as counsel in the matter. He submitted that there was nothing to show that the 1<sup>st</sup> Respondent had abrogated his duty or breached the Constitution by charging the Applicant.

36. He referred the Court to Articles 157 (6) and (10) of the Constitution, Section 6 of the ODPPA and the case of ***Paul Ng'ang'a Nyaga –vs- Attorney General and 3 Others Petition No. 518 of 2012, 2013 eKLR*** where it was held;

***“This court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they acted in contravention of the Constitution.***

He also referred to the case of ***Francis Anyango Juma –vs- The DPP & Another Petition No. 160 of 2012 [2012] eKLR***. Where the court observed thus;

***“Clearly, the intention under the Constitution was to enable the Director of Public Prosecution to carry out his constitutional mandate without interference from any party. This court cannot direct or interfere with the exercise by the Director of Public Prosecution of his power under the Constitution or direct him on the way he should conduct his constitutional mandate, unless there was clear evidence of violation of a party's rights under the Constitution or violation of the Constitution itself.”***

37. It was counsel's submission that the office of the Director of Public Prosecutions is independent as was held in the case of ***KCB Ltd. & 2 Others –vs- Commissioner of Police and Another. Nairobi Petition No. 218 of 2012 (2013) eKLR***

Mr. Ashimosi also referred to the case of ***George Joshua Okungu & Another –vs- Chief Magistrate Nairobi & Another (2014) eKLR*** where the court summarized some of the considerations that will not form the basis for the court to interfere with the DPP's Constitutional mandate.

38. He further submitted that the prayers in the Application would require the court to analyze and examine facts and evidence on the basis of which the guilt, innocence or otherwise of the applicant can be determined. This he said is not the duty of this Court as was held in the case of ***William Ruto & Another –vs Attorney General HCCC No. 1192 of 2004*** where the court stated;

***“That analysis of evidence should be done at the trial and not in the Constitutional Court.”***

39. In response to the submission on those who had succeeded in challenging their prosecution, he submitted that each case should be considered on its own merits. Further, that Mr. Muthama had only been granted stay pending appeal in the Court of Appeal while Julius Kilonzo succeeded because he had previously been tried for the same offence. He did not say anything about Bitange Ndemo & Ronald Leposo Musengi.

### **THE 2<sup>ND</sup> AND 3<sup>RD</sup> RESPONDENTS' SUBMISSIONS**

40. M/s Maina for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents relied on their grounds of opposition and submissions in opposing the Application. She submitted that the Applicant had not filed any grounds against the 2<sup>nd</sup> Respondent in the statement of facts. Further, that there were no allegations of procedural impropriety or bias raised against the 2<sup>nd</sup> Respondent. She submitted that the role of Judicial Review is limited and once the court is satisfied that the grounds for prohibiting a criminal trial have not been established, it cannot go ahead to try and determine the innocence or otherwise of an accused person.

41. Counsel cited the case of Republic –vs- AG and 4 Others Ex-parte Diamond Hashim Lalji & Ahmed Hasham Lalji [2014] eKLR where *Odunga J.* observed;

***“Judicial review applications do not deal with the merits of the case but only with the process. In other words, judicial review only determines whether the decision makers had the Jurisdiction. Whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the court to determine the merits of two or more different versions presented by the parties, the court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forms where such matters ought to be resolved. Therefore, judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The court in judicial review proceedings is mainly concerned with the question of fairness to the applicant in institution and continuation of the criminal proceedings and once the court is satisfied that the same are bona fides and that the same are being conducted in a fair manner, the High Court ought not to usurp the jurisdiction of the trial court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution’s evidence even if it were to be correct would not disclose any offence known in law, to allow the criminal proceedings to continue would amount to the court abetting abuse of the court process by the prosecution.”***

42. It was her further submission that the Applicant had not contended that he would not be able to receive a fair hearing before the trial court. That there was also no material placed before this Court to give rise to any apprehension that the trial court will not adhere to the provisions of Article 50 of the Constitution with respect to a fair trial. She asked this Court to exercise restraint and allow the trial court to make a merit finding on the issues which will be presented before it during the hearing. It was her prayer that the Court dismisses the Application against the 2<sup>nd</sup> Respondent.

43. The issue she wanted determined by the Court was whether there were any grounds to warrant the issuance of judicial review orders against the 2<sup>nd</sup> Respondent.

44. In a rejoinder, Mr. Nyawara for the Applicant submitted that it was now trite law and within judicial review that prosecution must be based on factual evidence. That in the letter dated 20<sup>th</sup> March, 2009 (ZA2), the Applicant had advised that the land was not available for sale. He referred to the statement of Rosalina (page 51) and the fact that the Applicant did not carry out the search as being confirmation that the Applicant’s prosecution was not fair. In response to the submissions by Counsel for the 2<sup>nd</sup>

Respondent, he submitted that the power by the 2<sup>nd</sup> Respondent to fairly hear the matter was not disputed. What they were challenging was the process leading to the charging of the Applicant by the 1<sup>st</sup> Respondent.

45. I have considered the Application, Affidavits, Annexures, Written and oral Submissions plus the Authorities and find the following to be the issues falling for determination;

*i. Whether the Applicant is entitled to the declarations sought;*

*ii. Whether the Applicant is entitled to the prohibition sought.*

46. The declarations being sought are three (3) in number and they all relate to the 1<sup>st</sup> Respondent's decision to charge the Applicant vide Nairobi Chief Magistrate's Court ACC No. 19 of 2014. The two issues for determination are inter related and I will deal with them simultaneously. The 1<sup>st</sup> Respondent exercises power donated by the following Articles of the Constitution which provide as follows:

Article 157 (6)

***“(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—***

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

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

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

Article 157 (10) provides;

***“(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.”***

Article 157 (11) provides;

***“(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.”***

Section 4 of the ODPPA No. 2 of 2013 has already been set out at paragraph 29.

47. All these provisions and principles are put in place to safeguard the office of the 1<sup>st</sup> Respondent against pressure and/or influence from any person or authority. The 1<sup>st</sup> Respondent is under the law and more so the Constitution, obligated to make independent decisions, while having regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

Before I move further to deal with the issues for determination, I wish to refer to a submission by M/s Maina for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. She submitted that the Applicant had not filed any grounds to support his Application for Orders against the 2<sup>nd</sup> Respondent. It is true there were no grounds raised

against the 2<sup>nd</sup> Respondent, and Mr. Nyawara confirmed that much. The decision being challenged was that made by the 1<sup>st</sup> Respondent as a result of which the Applicant was arraigned before the 2<sup>nd</sup> Respondent. Whatever decision the Court comes up with, the same will impact on the appearance by the Applicant before the 2<sup>nd</sup> Respondent hence its being enjoined in these proceedings.

48. It is now established law that the court should not usurp the constitutional mandate of the DPP to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. It is also clear that Judicial Review will not be used as platforms for evaluation of evidence for the sole purpose of declaring an applicant innocent or otherwise. In brief, Judicial Review is not concerned with the determination of the merits of a matter, rather its concern is with the decision making process. I wish to consider a few cases that have dealt with the issue at hand.

49. In the case of Njuguna S. Ndung'u –vs- EACC & 3 Others 2014, eKLR the court observed as follows;

***“The starting point is that the court ought not to usurp the constitutional mandate of the DPP or the authority charged with the prosecution of criminal offences to investigate and undertake prosecution in the exercise of the discretion conferred upon that office and the mere fact that he intended or ongoing criminal proceedings are in all likelihood bound to fail, it is agreed, is not without more a ground for halting those proceedings. That a petitioner has a good defence in a criminal process is a ground that ought not to be relied upon by a court in order to halt a criminal process undertaken bona fide since that defence is always open to the petitioner in those proceedings. However, if the petitioner demonstrates that the intended or ongoing criminal proceedings constitute an abuse of process and are being carried out in breach of or threatened breach of the petitioner’s constitutional rights, the court will not hesitate in putting a halt to such proceedings.”***

50. In the case of Joram Mwenda Guantai –vs- The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2EA 170, the Court of Appeal held;

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

51. In Kuria & 3 Others –vs- AG [2002] 2KLR 69 the court held;

***“The court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal scare-settling or vilification on issues not pertaining to that which the system was even formed to perform. .... A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society’s sense of fair play and decency and/or where the proceedings are oppressive or vexatious ..... The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta.”***

52. In Mohamed Gulan Huseein Fazal Karmali & Another –vs- The Chief Magistrate’s Court, Nairobi

**& Another [2006] eKLR, Nyamu J.** stated;

***“Whilst the power of the High Court to intervene to stop a criminal prosecution must be exercised sparingly, the High Court must always be ready to intervene to prevent any prosecution which is vexatious, oppressive, mala fides, frivolous or taken up other improper purpose such as undue harassment of a party or abuse of the process of the Court.”***

Further in the case of ***Peter George Antony D’Costa –vs- AG & Another, Nairobi Petition No. 83 of 2010 (U/R)*** the court stated;

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

53. Applying the principles laid down in the above authorities, I find that for an Applicant to succeed in an application of this nature, he/she must demonstrate that the decision to have him/her charged was arrived at in an unreasonable, arbitrary, biased and discriminatory manner and in violation of the Applicant’s constitutional rights.

The happenings in this matter have been clearly set out by the Affidavits, filed and the submissions by all counsels.

54. It is not disputed that the Applicant was the Commissioner for Lands at the time of these happenings. He has explained the role he played in this matter which is straight forward.

A letter dated 2/3/09 from the Permanent Secretary Ministry of Information and Communication to the Permanent Secretary Ministry of Lands was placed before him for action. To be actioned was the need for a search to be conducted in respect of Land Parcel No. 9918/3 which the Government of Kenya was purchasing from Malili Ranch Ltd. **(ZA1)**. He instructed the Registrar of Titles one Mr. Gichihi to do the search and upon receipt of the Certificate of Search, forwarded it to the Permanent Secretary Ministry of Information and Communication, **(ZA2)**.

55. Following complaints in respect of this transaction, the EACC carried out investigations and forwarded their final recommendations to the 1<sup>st</sup> Respondent vide the letter dated 5<sup>th</sup> August, 2013 **(ZA3)**. This report did not mention the Applicant as being among the suspects. Upon perusal of the inquiry file, the 1<sup>st</sup> Respondent in his letter to the EACC dated 2<sup>nd</sup> October, 2013 directed the closure of the file. However, on 22<sup>nd</sup> April, 2014 the DCI forwarded recommendations to the 1<sup>st</sup> Respondent after investigations into complaints over the same Malili Ranch. He recommended the arrest and charging of several persons, the Applicant included.

56. On 13<sup>th</sup> May, 2014 the 1<sup>st</sup> Respondent instructed Senior Counsel Paul K. Muite to review the files, decisions earlier made, which he did. Senior Counsel did a letter dated 28<sup>th</sup> July, 2014 **(ZA9)** with recommendations for some people including the Applicant to be charged. From the tone of the letter, these recommendations were done before the investigations were concluded. There is a rider to this letter which states; ***“Mr. Erick Mutua whose evidence is critical in securing convictions is willing to be a prosecution witness although clearly implicated himself.”***

57. On 26<sup>th</sup> August, 2014 Senior Counsel did another letter to the 1<sup>st</sup> Respondent **(ZA13)** indicating that the further investigations were now complete and he proceeded to make recommendations on who should be charged with what offences. He added that the new evidence consisted of further statements by ***Peter Mutua Kanyi, Eric Mutua, Anthony Njuguna, Peter Kalua and Directors of Malili Ranch.***

He then recommended that Mr. Eric Mutua, Kamotho Waiganjo, Peter Kalua and Peter Mutua Kanyi be treated as prosecution witnesses since their evidence, contained in the statements which they had voluntarily given was crucial to securing conviction of those being charged.

58. It is the conduct of this matter by the 1<sup>st</sup> Respondent through Senior Counsel that has grieved the Applicant hence the filing of this Application.

In response to all this, the 1<sup>st</sup> Respondent simply says that the Applicant will have his day before the trial court and that the 1<sup>st</sup> Respondent made an independent decision.

59. It has been stated in paragraph 17 of the Replying Affidavit of **Gitonga Murang'a** that the Applicant was recommended for charging because of the role he played by failing to disclose to the Ministry of Information and Communication that the 5,000 acres of land had been subdivided and the subdivision plan submitted to the Ministry of Lands for issuance of Title Deeds to individual shareholders and was not therefore available for sale.

60. It is not lost to this Court that the Applicant has been charged with stealing Contrary to Section 268 as read with Section 275 of the Penal Code. He also faces a charge of conspiracy to commit a felony Contrary to Section 393 of the Penal Code. These are specific offences which are remotely connected to the role played by the Applicant in the sale agreement in respect of Malili Ranch by failing to disclose certain information. There is no way the Applicant could have gone to do the search in respect of the Malili Ranch Title. The Permanent Secretary, Lands and the Registrar of Titles were heavily involved, in this assignment. It is not clear why the role of the two officers is not being mentioned in any of the recommendations. Their names are also not in the charge sheet and this Court has not been told that they too are Prosecution witnesses. The Registrar of Titles is the one who conducted the search and availed the Certificate of Search for onward transmission to the Permanent Secretary Ministry of Information and Communication.

61. Mr. Erick Mutua being Counsel for the sellers and who had a duty to confirm the status of the land for sale is not questioned on that. He is also the one who was paid on behalf of the shareholders. The complaints are that some shareholders have never been paid, while others have not been paid in full. According to Senior Counsel's recommendations, Mr. Mutua cannot be touched because he is willing to be a prosecution witness in order to sustain a conviction for the likes of the Applicant. I find this to be so ridiculous with all due respect to Senior Counsel.

62. The selection of those to be charged and those to be called as prosecution witnesses is very suspect. It all amounts to discrimination with the sole agenda of not coming to the bottom of what happened in this sale of Malili Ranch. The directors of Malili Ranch who knew the status of the shareholders and who participated in the sale arrangement do not appear in the list of suspects in the charge sheet! What does this really mean?.

63. Senior Counsel Muite states in his recommendations that despite the fact that Eric Mutua had incriminated himself in his statement, he could still be relied on as a prosecution witness in order to secure a conviction for those charged. If there was incriminating evidence against Mr. Mutua and others why were they not charged? Where did Mr. Mutua take the money he was paid by the government for the Malili Ranch shareholders? That was the complaint the DCI was investigating. The shareholders felt cheated of their land and money. In spite of all this, the 1<sup>st</sup> Respondent accepted the recommendation to have Mr. Mutua treated as a Prosecution witness.

64. The 1<sup>st</sup> Respondent had in his letter Ref. No. ODPP/CAM/012/5/46 dated 2<sup>nd</sup> October, 2013 recommended conclusion of the inquiry file because the government had lost no money in the purchase of the land. He further recommended that appropriate action be taken against the suspects for dereliction of duty. It is nowhere indicated whether the 1<sup>st</sup> Respondent's initial recommendations were acted on or not.

65. According to the recommendations by Senior Counsel Muite, further investigations and new evidence

by the new prosecution witnesses had led to the finding he made. The Applicant is complaining that he was never informed of what this new evidence was and he was never invited by Senior Counsel to say anything in respect to the alleged new evidence.

In the case of *Republic –vs- AG & Others Ex-parte Diamond Hashim Lalji & Ahmed Hashim Lalji [2014] eKLR Odunga J.* held;

***“Where a decision had been made to close an inquiry file it is my view that before reopening the investigations resulting from discovery of new evidence, the people sought to be charged ought to be given an opportunity to comment on the fresh evidence.”***

66. Article 50 (2) (b), (c) and (j) of the Constitution guarantees every person the right to a fair trial and this includes the right;

***“(b) to be informed of the charge, with sufficient detail to answer it;***

***(c) to have adequate time and facilities to prepare a defence;***

***(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;”***

It is obvious that the Applicant had a right to be informed of the new evidence that was incriminating him.

67. From the disposition and submissions by the 1<sup>st</sup> Respondent, this complaint by the Applicant has not been addressed nor controverted by the 1<sup>st</sup> Respondent. The conclusion is that it is admitted that the Applicant was never informed of the new incriminating evidence against him. This amounted to a violation of his right to a fair hearing considering that the inquiry file had already been closed by the 1<sup>st</sup> Respondent.

68. The decision to institute criminal proceedings by the DPP is discretionary and is not subject to the direction or control of any authority as provided for under Article 157 (10) of the Constitution and Section 6 of the ODPPA No. 2 of 2013.

This Court will always respect the independence of other constitutional bodies and only interfere with and interrogate their acts if there is sufficient evidence to show that they have acted in contravention of the Constitution.

69. One other complaint by the Applicant is that the 1<sup>st</sup> Respondent’s decision to charge him was not an independent one.

It is on record that before Senior Counsel Muite was brought on board, other investigations had been conducted by EACC and DCI and Mr. Eric Mutua’s name and others feature prominently yet the 1<sup>st</sup> Respondent dealt with the file and made recommendations with a decision to close the file. Does it mean that at that particular time of decision making, he was not on the same advisory board with Mr. Mutua? It is obvious that can’t be the only reason why Senior Counsel Muite was brought on board.

70. Perusal of the two recommendations by Senior Counsel Muite reveals a kind of finality in them. Senior Counsel besides making recommendations, drafted a charge sheet, proposed when to register the charges and the issuance of summons. This Court wonders at what point the input by the 1<sup>st</sup> Respondent who is the decision maker was obtained. Did he just endorse Senior Counsel Muite’s recommendations without bothering to know if the supposed to be suspects had been notified of the new found evidence? Did he agree with the suggestion that persons who had been incriminated and also incriminated themselves could be turned into prosecution witnesses for the sake of obtaining convictions against those to be charged? Sadly, that appears to be the position.

71. I am asking all these questions because there are no answers forthcoming from the 1<sup>st</sup> respondent. Besides indicating that the decision to charge had been arrived at independently and that there is sufficient evidence for the charge, there is no explanation for the change of goal posts by the DPP (1<sup>st</sup> Respondent). It is the process leading to the decision to charge the Applicant that is being interrogated and not the sufficiency of the evidence to charge.

72. While referring to this specific decision by the DPP in a matter arising from similar facts **Aburili J.**, in the case of **Bitange Ndemo –vs – DPP & 4 Others Misc. Civil Application No. 199 of 2016** stated the following at paragraphs 141 – 143 which I agree with entirely;

***“141 In my humble view, Senior Counsel Paul Muite’s advisory falls short of any logic when he concludes that because Eric Mutua and 2 others who are said to be key prosecution witnesses gave voluntary statements then they are the key to securing convictions of those being charged. It should be noted that the advisory of Senior Counsel Paul Muite in itself is not evidence for a prosecutor cannot be a witness in the case that he is mounting a prosecution. Therefore, this court in faulting the advisory given by Senior Counsel Paul Muite is not faulting the sufficiency or veracity of the available evidence to mount a prosecution, but the selective, biased, discriminatory, irrational, opinionated and oppressive manner in which Senior Counsel made the decision that the applicant be charged with offences for which the “star” witness had clearly exonerated the applicant from blame yet that “star” witness who is also said to be a suspect who had incriminated himself was being used as a prosecution witness to secure a conviction against the applicant! And the DPP who is in-charge of prosecution does not assess or question that opinion before dragging and arraigning the applicant to court.***

***142. It is not in doubt that one who shields a suspected criminal is himself culpable for aiding and abetting crime. It therefore follows that the decision to charge the applicant with a criminal offence(s) when on the face of it the key “star” prosecution witness exonerates him from blame is in itself an abuse of discretion and an exercise of discretion for an improper purpose meant to achieve nothing but playing to the public gallery.***

***143. By such conduct, I find that the Director of Public Prosecutions is also in breach of the duty to act fairly; he has failed to exercise statutory discretion reasonably; has acted in a manner to frustrate the purpose of the Constitution and the Act donating the power; he has impeded his discretion; has failed to exercise discretion and has acted irrationally and unreasonably (see Republic –vs – Minister for Home Affairs & Others, Ex-parte Sitamze Nairobi HCC No. 1652 of 2004 [2008]2 EA 323)”***

73. Without mounting his defence and/or getting into the merits or demerits of this case, I find that the Applicant has shown:

***i. That the charges against him were based on the recommendations by Senior Counsel, Paul Muite;***

***ii. That whatever new evidence was gathered by Senior Counsel was never brought to his attention for him to deny or accept it.***

***iii. That the 1<sup>st</sup> Respondent did not interrogate the recommendations given to him by Senior Counsel. Thereafter, he appointed Senior Counsel to prosecute the same matter he had interrogated and reviewed!***

***iv. That there was selective prosecution, by turning some persons who were potential suspects into prosecution witnesses.***

***v. That those in the Applicant’s Ministry and the Ministry of Information and Communication who dealt with the issue of satisfying themselves on the legal status of Malili Ranch Ltd. in terms of the certificate of official searches etc have not been included in the Prosecution.***

vi. ***That 1<sup>st</sup> Respondent has not explained the reason or reasons for the review of his decision of 2<sup>nd</sup> October, 2013.***

74. All the above goes to show a sinister motive and ill will behind the arraigning of the Applicant in court to face criminal charges. The conduct of the 1<sup>st</sup> Respondent in the matter relating to the Applicant leaves a lot of gaping holes. Firstly, he reviewed his own decision without giving the Applicant an opportunity to make a comment on the new evidence. He was not even notified of this new evidence. This violated his right to a fair hearing. Secondly, potential suspects were turned into prosecution witnesses in a very selective manner. Thirdly, was Senior Counsel Muite's appointment and gazettement as a special prosecutor. This was done despite the fact that Senior Counsel had reviewed and investigated the case, made recommendations, drafted the charges, registered the charges and issued summons in the case. This process alone is very telling.

75. In the case of ***George Joshua Okungu & Another***, (*supra*) the court held;

***“Where therefore the prosecution has been commenced or is being conducted in an arbitrary discriminatory and selective manner which cannot be justified, that conduct would amount to an abuse of the legal process.”***

76. It is clear that the money for the sale of the Malili Ranch Ltd. was paid to a known individual. The money was to be paid to the shareholders who owned the land. If this money was diverted, it is well known who diverted it and to whom it was diverted to. The shareholders should pursue that person/persons. The recommendation had been that the Applicant be charged for the role he played in the sale of 5000 acres of Malili Ranch Ltd. as a block and not as subdivided parcels. What does he end up with? One count of theft of shs.179,134,070/= jointly with others and a 2<sup>nd</sup> count of conspiracy to commit a felony, namely, stealing of shs.179,134,070/= jointly with others. One simple question to ask is whether stealing of shs.179,134,070/= and/or conspiring to steal the same sum of money, was the role the Applicant played in the sale of the land as a block instead of individual titles. It can clearly be seen that the Applicant was charged with the sole intention of defeating the ends of justice.

77. Considering all the above, I find that the decision to prosecute the Applicant was aimed at making the shareholders to believe that action had been taken in respect of their complaints. In other words the 1<sup>st</sup> Respondent was playing to the public gallery.

I find the decision to charge the Applicant to be arbitrary, discriminatory and selective and amounts to an abuse of the legal process.

I am satisfied that the Applicant has demonstrated that he is deserving of the declarations and prohibition Order sought in the Notice of Motion dated 28<sup>th</sup> December, 2016 and I make the following orders.

***A. It is hereby declared that the institution, maintenance and prosecution of the Applicant in the Nairobi Chief Magistrate's Court (Anti-Corruption) Court vide Criminal case no. 19 of 2014 is an abuse of the criminal justice system and a contravention of his constitutional right to freedom and security of the person and right to secure protection of the law.***

***B. It is hereby declared that the institution and prosecution of the Applicant in the Nairobi Chief Magistrate's Court (Anti-Corruption) Court vide Criminal case no. 19 of 2014 is oppressive, malicious and an abuse of the process of the court.***

***C. I declare that the institution, maintenance and prosecution of the Applicant in the Nairobi Chief Magistrate's Court (Anti-Corruption) Court vide Criminal case no. 19 of 2014 amounts to selective prosecution and is a gross abuse of the process of the court.***

***D. Orders of Prohibition be and are hereby issued prohibiting the continuance of the Nairobi Chief Magistrate's Court (Anti-Corruption) Court vide Criminal case no. 19 of 2014.***

*E. Each party to bear their own costs.*

Signed, dated and delivered this **28<sup>th</sup>** day of *February, 2017* at *Nairobi*

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***HEDWIG I. ONG'UDI***

***HIGH COURT JUDGE***