REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

JUDICIAL REVIEW NO. 1 OF 2016

(FORMERLY NAKURU HIGH COURT JUDICIAL REVIEW NO. 22 OF 2014)

IN THE MATTER OF AN APPLICATION BY FRANCIS WANGURU WAITHUKIA AND STEPHEN NJENGA MUNGAI FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLES 23(3) (F) AND 165(B)

AND

IN THE MATTER OF THE LAW REFORM ACT CAP. 26 OF THE LAWS OF KENYA SECTIONS 8 AND 9

AND

IN THE MATTER OF THE DECISION OF THE DIRECTOR OF PUBLIC PROSECUTIONS CONTAINED IN HIS LETTER DATED 16TH JANUARY 2014

AND

IN THER MATTER OF NAIVASHA CHIEF MAGISTRATE'S COURT CRIMINAL CASE NO. 415 OF 2014; REPUBLIC –VS- FRANCIS WANGURU MWITHUKIA AND STEPHEN NJENGA MUNGAI

AND

IN THE MATTER OF NAKURU HIGH COURT CIVIL CASE NO. 219 OF 2008 STEPHEN NJENGA MUNGAI AND NATHANIEL KAMAU NJOROGE –VS- STEPHEN NJENGA MUNGAI AND COMMISSIONER OF LANDS

REPUBLIC……APPLICANT

-VERSUS-

THE DIRECOTR OF PUBLIC PROSECUTIONS……...1ST RESPONDENT

THE CHIEF MAGISTRATE'S COURT AT NAIVASHA…2ND RESPONDENT

***EX-PARTE*:-**

FRANCIS WANGURU MWITHUKIA……..……1ST EX-PARTE APPLICANT

STEPHEN NJENGA MUNGAI……..…..…….2ND EX-PARTE APPLICANT

J U D G M E N T

The Motion

1. Pursuant to leave granted to the two *Exparte* Applicants herein on 4/7/2014 by **Musila J**, the said Applicants did on 17/7/2014 file their Substantive Motion. The Motion, expressed to be brought under Sections 1A and 3A of the Civil Procedure Act, Order 53 Rules 3 and 4 of the Civil Procedure Rules, Section 8 and 9 of the Law Reform Act and Articles 23 (3) (f) and 165 (6) of the Constitution seeks judicial review orders as follows:

> **"1. THAT the Honourable Court be pleased to grant to the Ex-parte Applicants:**
>
> > **a) AN ORDER OF CERTIORARI removing to this Honourable Court the decision of the 1st Respondent made on or about 16th January, 2014 to institute and/of commence criminal proceedings against the *ex-parte* Applicants for the purposes of the same being quashed.**
> >
> > **b) AN ORDER OF PROHIBITION directed at the 1st Respondent restraining the 1st Respondent, his servants, officers, agents and /or any other authority acting under his instructions from prosecuting or proceeding with the prosecution of the 1st ex-part Applicant with the charge of abuse of office contrary to Section 101 as reads with Section 102A of the Penal Code Cap 63 of the Laws of Kenya in Naivasha Chief Magistrate's Court Criminal Case No. 415 of 2014; Republic -Vs- Francis Wanguru Mwithukia and Stephen Njenga Mungai.**
> >
> > **c) AN ORDER OF PROHIBITION directed at the 1st Respondent restraining the 1st Respondent, his servants, officers, agents and/or any other authority acting under his instructions from prosecuting or proceeding with the prosecution of 1st and 2nd ex-parte Applicants with the charges of conspiracy to make a false document contrary to Section 309 as read with Section 357 (a) of the Penal Code Cap 63 of the Laws of Kenya in Naivasha Chief Magistrate's Court Criminal Case No. 415 of 2014; Republic -Vs- Francis Wanguru Mwithukia and Stephen Njenga Mungai.**
> >
> > **d) AN ORDER OF PROHIBITION directed at the 2nd Respondent prohibiting the 2nd Respondent from hearing or proceeding with the hearing and determination of the criminal case Naivasha Chief Magistrate's Court Criminal Case No. 415 of 2014.**
>
> **2. THAT the Court be at liberty to make such further and other orders that it deems fit to meet the ends of justice.**
>
> **3. THAT the costs of this application be provided for."**

2. Part of the grounds on the face of the Notice of Motion are that there existed no evidence linking the *Exparte* Applicants to the charges preferred against them by the Director of Public Prosecutions (DPP) and 1st Respondent herein. Further that the 1st Respondent in breach of his constitutional mandate had "**been influenced by factors outside public interest and administration of justice to exert pressure on the *Exparte* Applicants to settle a civil claim**."

3. The 2nd *Exparte* Applicant swore an affidavit in support of the Notice of Motion, which gives a history of the dispute, culminating in the impugned decision of the 1st Respondent. In summary, he depones that between 1983 and 1984, he lawfully applied for and was allocated by the commissioner for Lands, a residential plot in Naivasha. Subsequently he obtained a **Grant No. I.R. 76025** December, 1997 in respect of the said parcel, then surveyed and identified as **L.R. 1144/934.** (Hereinafter referred to as the suit property). He continued to hold proprietary interest in the land and duly paid ground rents and rates over the years.

4. However in 2007 one **Stephen Njenga Mwangi** (**S.N.M.)** ID. No 056996640 raised a claim over the plot to the police who commenced inquiries. The following year the said **S.N.M.** and one **Nathaniel Kamau Njoroge** (the Interested Party) the latter an alleged purchaser of the suit property filed a **Suit No. Nakuru HCC 219 of 2008** against the Commissioner of Lands and the 2nd *Exparte* Applicant.

5. The suit was however withdrawn in 2011 and fresh police investigations commenced by Criminal Investigative Division Naivasha. At the close of the second or third round of investigations, the Director of Public Prosecution's Nakuru office recommended to the Director of Public Prosecutions that a civil process and not the criminal process could resolve the dispute. For his part, the Director of Public Prosecutions having reviewed the matter directed on 16th January 2014, that charges be preferred against the *Exparte* Applicants for the offences of abuse of office contrary to Section 101 of the Penal Code (against the 1st *Exparte* Applicant) and conspiracy to make a false document contrary to Section 393 as read with Section 357 (a) of the Penal Code against the two *Exparte* Applicants jointly.

6. The deponent complains about the manner in which he was arrested and charged and asserts that the charges are intended to bear pressure on him to surrender the title deeds to the disputed plot. In his view the Criminal Case No. 415 of 2014 has been brought without a basis. He deponed that there was no evidence that the suit property was obtained by him illegally and charges brought by the Director of Public Prosecutions were aimed at avoiding the sustained pressure of the Interested Party. In his view, no fair trial can be mounted 30 years since the alleged offence. His view is that the prosecution is malicious, vexatious and oppressive and intended to pressure the Applicants concede to the claim of the Interested Party.

7. The 1st *Exparte* Applicant also swore an affidavit in support of the Motion, adopting the contents of the affidavit of the 2nd *Exparte* Applicant. The Respondents filed grounds of opposition on 8/10/2015, to the following effect. That the *Exparte* Applicants' motion is misconceived, frivolous, vexatious, incompetent and bad in law, and falls short of the requisite threshold. Secondly that the orders sought therein contravene Article 157 of the Constitution and Section 6 of the Office of the Director of Public Prosecutions Act.

8.Finally, that it is not within the purview of the judicial review court to analyse the prosecution evidence in order to declare the guilt or innocence of the *Exparte* Applicants herein. The Interested Party, upon being enjoined vide the court's order of 6/8/2014 (**Emukule J**, as he then was) filed an affidavit in opposition to the Substantive Motion, prior to the transfer of the suit to this court in February, 2016. The affidavit was filed on 30th June 2015. Therein the Interested Party states that he is the *bonafide* beneficial owner of the disputed plot, having purchased the same from the original allottee **S.N.M.** now deceased, in 2004; that he is the complainant in the criminal proceedings pending in the **Chief Magistrate's Court Naivasha** after the **Civil Case Nakuru HCCC 219 of 2008** was dismissed.

9. In support of the title of the deceased **S.N.M.** the Interested Party asserts that the allotment letter in his favour was proper and legal, but that the original thereof was stolen during a burglary in the said deceased vendor's home. He complains that the 1st *Exparte* Applicant abused his office as an officer in the Ministry of Lands and "hijacked" the allotment to the deceased vendor, through alteration of the latter's postal address. Thus he depones that the title used issued in the name of the 2nd *Exparte* Applicant was obtained through fraud and collusion between the two *Exparte* Applicants.

10. He says his only recourse is the criminal justice system so that the issues of fraud can be unraveled

and justice served. In this regard he depones that the *Exparte* Applicants have frustrated his spirited efforts to obtain justice and secure his right to equal protection by the law. He expresses the grievance that while the criminal proceedings were stayed by the court (**Mshila J**) in 2014, the 2nd *Exparte* Applicant has been enjoying the property illegally taken from him.

11. On 13/10/2015 the 1st *Exparte* Applicant filed a Further affidavit, to the following effect. The Interested Party is a stranger having no beneficial interest in the disputed plot. That the 1st *Exparte* Applicant was not party to the sale agreement between **S.N.M.** and the Interested Party. That the 1st *Exparte* Applicant has not been implicated by Department of Criminal Investigation in fraud, nor has the responsible ministry implicated him in any impropriety. That **S.N.M** had no "official documents" or allotment letter, but paid rents from 2004 in respect of property he did not own.

12. He accused the Interested Party of material non-disclosure by the failure to state that the Nakuru civil suit was withdrawn by the Plaintiffs, including the Interested Part and **S.N.M**, and further, that the former is seeking to use the criminal process to resolve a civil dispute. And that, by the proposed prosecution the 1st Respondent is guilty of breaching the constitutional rights of the 1st *Exparte* Applicant.

Submissions

13. On 20/7/2016, this court while allowing an adjournment sought by counsel for the *Exparte* Applicants noted that the *Exparte* Applicants and the Interested Party had already field written submissions and the matter was set for hearing by way of oral highlighting, which eventually took place on 22/9/2016.

14. At the start of the hearing the court was informed by Mr. Lutta for the Applicants that the 2nd *Exparte* Applicant had died and that the arguments made would be in respect of the 1st *Exparte* Applicant only. I do not see on record a copy of the death certificate in respect of the 2nd *Exparte* Applicant, however. In any event the Notice of Motion is primarily supported by the affidavit sworn by the said deceased 2nd *Exparte* Applicant which makes it difficult to draw a line between the two *Exparte* Applicants.

Submissions by the 1st Exparte Applicant

15. I propose at this stage to set out the respective arguments made by the parties through their written and oral submissions. The 1st *Exparte* Applicant isolated three substantive issues for determination by this court as follows: -

a) Whether in exercising its discretion herein the 1st Respondent acted reasonably.

b) Whether the 1st Respondent's conduct herein violated the principles of national justice and legitimate expectation.

c) Whether the impugned criminal proceedings are malicious and constitute an abuse of the court process.

16. On the first issue, the 1st *Exparte* Applicant points to the late commencement of three sets of police investigations since 2007, which culminated in the recommendation that the matter be adjudicated via a civil suit in 2013. That therefore, the decision by the 1st Respondent in 2014 directing the prosecution of the Applicants, despite the said recommendations was not sufficiently founded, but based on "a biased analysis of the evidence against the *Exparte* Applicants." The decision is therefore unreasonable and irrational.

17. The case of **Republic –Vs- Chief Magistrate Court of Nairobi Law Courts and 8 others exparte Simon Njomonge & Another [2013] eKLR** was relied on for the definition of irrationality. Further, that the actions of the 1st Respondent do not portray reasonableness in the exercise of discretion in the course

of decision making process. (See **Associated Provincial Picture Houses Ltd -Vs- Wednesbury Corporation (CA) [1947]** 223**.** Emphasising that no complaint had been received by the 1st Respondent from relevant ministries and offices, the *Exparte* Applicant asserted that the 1st Respondent exercised his discretion at the behest of the Interested Party.

18. On the second question, the Applicants take issue with the court proceedings in the lower court the plea and the issuance of warrant of arrest against the Applicant, prior thereto despite the Applicants having had no notice of the charges. According to the 1st *Exparte* Applicant this was done maliciously and in bad faith. This action, according to the Applicant violated the *audi alteram partem rule* and his legitimate expectation to be given notice. The case of **Republic –Vs- Nairobi City Council & Another Exparte Wainaina Kigathi Mungai [2014] eKLR** was called to aid in this regard.

19. On the third issue the Applicant argues that the criminal proceedings have been mounted, not in public interest but for the sole benefit of the Interested Party, who is a third party and stranger thereto. The oblique motive being to settle a civil claim to the suit property, which he had withdrawn in 2011.

20. The 1st *Exparte* Applicants cited **Halsbury's Laws of England Criminal Law, Evidence and Procedure:** Principals of Criminal Liability Nature of a Crime (Volume 11, 2006) Page 91 Paragraph 2 as to the nature and purpose of Civil and Criminal proceedings: Citing the age of the dispute herein the Applicant, relying on *interalia* **Stanley Mungai Githunguri -Vs- Republic [1986] eKLR**, **Justus Mwenda Kathenge -Vs- Director Of Public Prosecutions & 2 others [2014] eKLR** and **Kuria & 3 Others -Vs- Attorney General [2000] eKLR,** describe the impugned criminal prosecution as vexatious, an abuse of the court process and contrary to public policy. He therefore urged the court to prohibit any further proceedings in the impugned prosecution.

21. The 1st *Exparte* Applicant observed further that neither **S.N.M.** (now deceased), nor the Investigating Officer has responded to the Notice of Motion and that the deceased **S.N.M. '**conned' the Interested Party by selling to him property he did not own. Mr. Lutta dismissed the authorities of the 1st Respondent and Interested Party as irrelevant save for the South African case of **Bruce Robert Sanderson –Vs- the Attorney General Eastern Cape CCT 10/97** which he said supported the *Exparte* Applicant's position concerning unexplained delay by the Director of Public Prosecutions. Finally, he submitted that the 1st *Exparte* Applicant being an old man in retirement ought not to be burdened with a criminal trial brought without good cause or further investigations.

Submissions of the Interested Party

22. For her part, Miss Munyaka for the Interested Party restated the content of the affidavit by the Interested Party, and submitted that the dispute herein has been ongoing since 2004, and culminating with the DPP's directions in 2014. She defended the decision and the subsequent warrant of arrest issued against the *Exparte* Applicant, stating that there was nothing objectable as the DPP was merely carrying out his duties, as mandated under Article 157 of the Constitution and in good faith. That no malice or procedural impropriety has been demonstrated.

23. Besides she continued, the court cannot usurp the discretion of the DPP, much less try the merits of the criminal case on this forum. She argued that the *Exparte* Applicants should not anticipate a breach of their rights under Article 50 of the Constitution in the impugned prosecution. Further that, the Interested Party will suffer immensely if the criminal prosecution is stopped, yet he too has a legitimate expectation to have his grievance resolved in court.

Submissions by the 1st Respondent

24. In his submission, Mr. Mutinda supported the arguments made by the Interested Party. He emphasised the autonomous nature of the mandate of the 1st Respondent. His position is that the impugned prosecution was ordered by the Director of Public Prosecutions in the interest of the public and the administration of justice. That stay or prohibition of such proceedings can only be ordered in

exceptional situations **(See Goddy Mwakio & Another -Vs- Republic [2011] eKLR).**

25. In support of his submissions regarding prosecutions in public interest, he relied on the case of **Sanderson**. In his view the *Exparte* Applicants have not established malice or illegality on the part of the DPP. Asserting that the *Exparte* Applicants have not established their case to the required threshold, Mr. Mutinda added that they could besides, have recourse to a suit for malicious prosecution at the termination of the criminal trial in the lower court.

The Response

26. In his response, Mr. Lutta took issue with this latter submission. Discontinuing the Interested Party's submissions, he stated that forgery can be proved through civil or criminal proceedings. He challenged the claim that the dispute has been raging since 1990s observing that the issue herein arose in the years after 2000 whereas title was issued in 1997. So far as he was concerned, the imposter was **S.N.M.** (deceased).

Analysis and Determination

27. The basic facts of this case are not disputed, and can be restated briefly. The 1st *Exparte* Applicant and the 2nd *Exparte* Applicant (now allegedly deceased), were pursuant to complaints by the deceased **S.N.M.** to the Directorate of Criminal Investigation Naivasha, *interalia*, subjected to criminal inquiries that commenced in 2007. The inquiries related to the suit property, herein.

28. The gist of **S.N.M.'s** complaint was that he had applied for and had been the allocated suit property in the plot allocation committee meeting held on 23rd May 1984 at Naivasha. That the 1st *Exparte* Applicant was a member of the said committee, representing the Commissioner for Lands. That according to the minutes, the successful Applicant was **Stephen Njenga of P. O. Box 51976, Nairobi**. However, subsequently the address used by **S.N.M.** was altered to **P. O. Box 50480 Nairobi.** That by this means, the 2nd Interested Party "hijacked" the allotment letter intended for **S.N.M.** and therefore, he was unable to obtain a title. The Interested Party had meanwhile purchased the suit property from the now deceased **S.N.M.**

29. It is not in dispute that several officers investigated **S.N.M.'s** complaint and by the Interested Party, and gave their recommendations. In 2013 an officer in the 1st Respondent's office, one **M.N. Idagwa**, having reviewed the **Inquiry File No. 7/2011 – Plot No. 21 Naivasha** recommended to the Director of Public Prosecutions that the dispute was best resolved through a civil suit. However the matter did not rest there. The Director of Public Prosecutions upon receipt of the recommendation and having reviewed the file was of a different view.

30. In his letter to the Directorate of Criminal Investigation and copied to the Senior Assistant Director of Public Prosecutions, Nakuru the Director of Public Prosecutions, set out the pertinent statements by witnesses and concluded as follows:

> **"Clearly, the allotment was done in favour of D2 now deceased (S.N.M.) buts seems to have been hijacked by D5 (1st Exparte Applicant) in favour of D3 (2nd Exparte Applicant). D5 used his official capacity to effect the change in address in favour of D3 who then went on to process title to the property"**
>
> **At the time of the allotment the address box number 51976 belonged to Francis (Francis Nganga Gicharu) who has his office address number 30007. He was only issued with box 50840 in 1990 way after the allotment. It is clear from the minutes of the allocation committee held on, 23rd May 1984 that the successful Applicant was D2 (Deceased) who had used the address number 51976, Nairobi. The similarity in D2 and D3's names gave D5 the opportunity to use his position in office to alter and/or change the postal address in favour of D3. A civil suit had been field by D1 (Interested Party) and D2 against D3 and the**

Commissioner of Lands.

In the light of the above findings, we do direct that:

1. D5 be charged with offence of Abuse of office contrary to Section 101 (1) of the Penal Code.

2. Both D5 and D3 be charged with a second count of Conspiracy to defraud D2, contrary to Section 317 of the Penal Code.

3. A prohibition be placed against the title of the subject matter pending determination of the criminal proceedings.

You duplicate file is hereby retuned. Proceed accordingly."

31. Pursuant to these directions, the two *Exparte* Applicants were charged in Naivasha Chief Magistrate's Criminal Case No. 415 of 2014 with the two proposed offences. On 12/3/2014 they pleaded to the charges and were released on bond. The matter has not proceeded to hearing, because on 4/7/2014 the Applicants successfully sought leave to commence Judicial Review proceedings, which also operated as a stay of the lower court matter.

32. In dealing with the present matter this court, acting as a judicial review court must be cautious to avoid falling into the error of determining the respective cases espoused by the parties regarding their claims to the suit property or dealings therein. A court exercising a judicial review function is not concerned with the merits of the decision impugned, in this case the determination by the Director of Public Prosecutions to charge the *Exparte* Applicants with the respective offences.

33. The Substantive Motion before me is one brought under Order 53 Rule 3 and 4 of the Civil Procedure Rules. That notwithstanding the 2nd ground on the face of the Motion was that:

"There is no evidence linking the *Exparte* Applicants to the charges preferred by the 1st Respondent in the Criminal case"

In **Municipal Council of Mombasa –Vs- Republic and Umoja Consultants Limited Civil Appeal No. 185 of 2001** the Court of Appeal held that:

"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the person 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….. The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decision." See also Republic –Vs- Kenya Revenue Authority *exparte* Yaya Towers Limited.

34. In **Republic -Vs- The Commissioner of Lands *Exparte* Lake Flowers Limited Nairobi High Court Miscellaneous Application No. 1235 of 1998 Nyamu J,** foresaw and endorsed the expansion of Judicial Review remedies to cover new and emerging realities. The new constitution promulgated in 2010 heralded a new legal infrastructure in the country wherein the Bills of Rights takes primary. **Nyamu J.** in *Exparte* Lake Flowers stated *interalia*:

"Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality …….. The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant consideration in the decision making or take into account irrelevant considerations or act

contrary to legitimate expectations…….Judicial Review is a tool of justice; which can be made to serve the needs of a growing society on a case-to-case basis."

35. And in **Kuria and 3 Others –Vs- Attorney General [2002] 2 KLR 69** the court stated that:

"So long as the orders of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by anybody of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions…… This therefore implies the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. They law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit. The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged by Civil Law…….

(See also Keroche Industries -Vs- Kenya Revenue Authority & 5 Others Nairobi H.C. Miscellaneous Application No. 743 of 2006 [2007] 2 KLR 240).

36. With the foregoing in mind, the court understood the case of the 1st *Exparte* Applicant to be based on alleged irrationality (unreasonableness), procedural impropriety (in respect of principles of natural justice and legitimate expectation) and malice (abuse of discretion) on the part of the 1st Respondent in arriving at his impugned decision. I have already set out the affidavit evidence and submission made by the 1st *exparte* Applicant in that regard.

37. For their part the Interested Party and the Respondents support the decision of the 1st Respondent in the exercise of his mandate under Article 157 of the Constitution and the Office of Director of Public Prosecutions Act. Thus they dispute the grounds upon which the decision is impugned.

38. I have to say, at this early stage that the grounds cited by the Exparte Applicants in the application for leave appear more elaborate and therefore more coherent than the summary grounds in the Substantive Motion, the first of the latter which appears to go outside the remit of Judicial review proceedings. Because, as framed the said grounds appear to refer to the adequacy of the evidence marshaled by the investigators.

39. The court is being called upon to determine whether in the exercise of his functions as relate to this matter, the 1st Respondent:

a) abused his discretion.

b) was driven by ulterior motives or improper purpose.

c) acted irrationally and unreasonably.

d) acted unfairly

The court would be entitled to intervene by way of judicial review orders of the answers to these questions are in affirmative.

40. In **Keroche Industries Limited -Vs- Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** the court held that:

"On the issue of discretion Prof Sir William Wade in his Book *Administrative Law* has summarized the position as follows: The powers of public authorities are --- essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land ……regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfillment of duties which it owes to others; indeed, it exists for no other purpose…But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them… "

41. I propose to deal with all the identified issues together, because the respective facts and arguments relied on by the *Exparte* Applicants, the Respondents and Interested Party appear to overlap. Several complaints or allegations have been raised repeatedly by the 1st *Exparte* Applicants in this matter, in their attempt to establish their case. These include:

a) long delay prior to charge.

b) prolonged and serial investigations.

c) wanting evidence gather against the Applicants, and the DPP's seeming disregard of 3 investigators' recommendations and of prosecution counsel in favour of the Applicants, without new evidence being uncovered.

d) absence of a complaint by the Ministry of Lands and other relevant offices.

e) the alleged use of the criminal system to achieve an ulterior purpose, not achieved by the Interested Party in the Civil matter in order to pressure the *Exparte* Applicant(s) to give up title to the suit land and

42. The DPP's powers of prosecution are set out in Article 157 of the Constitution, which states:

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

(2) ……

(3) ……

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

(5) ……

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

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

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

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

(7) ……

(8) ……

(9) ……

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

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

(12) ……"

The provisions of Sections 4 and 6, in particular, of the Office of the Director of Public Prosecution's Act are in tandem with the above Article.

43. That in the exercise of his function the DPP enjoys autonomy, as emphasised by the Respondents, cannot be disputed. However in the exercise of the Constitutional and statutory mandate 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**." The Constitution however does not contain a definition of public interest.

44. In **Civil Application No. 29 of 2014 Mumo Matemu -Vs- Trusted Society of Human Rights Alliance & 5 Others [2014] eKLR**, the Supreme Court adopted in part the definition of public interest found in Black's Law dictionary as follows. Public Interest is defined in Black's Law Dictionary, 9th Edition (Page 135) as:

"**the general welfare of the public that warrants recognition and protection" or something in which the public as a whole has a stake, especially an interest that justifies governmental regulation."**

45. Thus public interest is necessarily distinct from private or personal interest even though there will be a point of conveyance as the total sum of the whole may amount to public interest. Thus the exhortation by **Nyamu J** in **Kenya Guards Allied Workers Union -Vs- Security Guards Services & 38 Others [2003] eKLR** to the effect that:

"……....where national or public interest is denied the gates of hell open wide to give way to deforestation, pollution, environmental, degation, poverty, insecurity and instability. At the end of the day, we must remember those famous words of a famous jurist: Justice is not a cloistered virtue. I must add that where justice is done and public interest upheld, it is acknowledged by the public at large…….Public interest must be the engine of the millennium and it must where relevant occupy centre stage in the courts."

46. It is, I think, clear that the Constitution requires the Director of Public Prosecutions in the exercise of his mandate to bear in mind the welfare of the public as a whole and the administration of justice and to avoid the abuse of the legal process. Thus in a case where Applicants challenged their prosecution some 13 odd years since the alleged offence as *interalia* driven by the ulterior motives, in **Republic –Vs- Director of Public Prosecutions & Another *Exparte* Kamani & Others Judicial Review Application case No. 78 of 2015; (2015) eKLR** the court stated in part that:

> **"……..where the Respondent is shown not to be acting independently but just reading a script prepared by someone else or that he has been pressured to go through the motions……..the court will not hesitate to terminate the proceedings in such circumstances, the powers being exercised by the Respondent would not be pursuant to his discretion but at the discretion of another person not empowered by law to exercise such discretion."**

47. While the DPP must be seen to be reasonable in the exercise of his powers, the courts must not usurp his powers or interfere so long as the exercise is within the law (**See Diana Kethi Kilonzo –Vs- Independent Electoral and Boundaries Commission & 2 Others [2013] eKLR**). What I hear the *Exparte* Applicants say, all one breath is that there is no evidential basis for their prosecution. Hence, the DPP decision to prosecute is irrational, unreasonable, an abuse of discretion and is intended for ulterior motives.

48. In the **Kamani case**, a similar complaint was raised by the Applicant. **Odunga J** stated:

> **"[T]he mere fact that the intended or ongoing criminal proceedings are in all likelihood going to fail, it has been held time and time again, is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are concerned not with the merits but with decision making process. That an Applicant had a good defence in the criminal process is a ground that ought not to be relied upon by a court……..to halt the criminal process undertaken *bonafides* since that defence is open to the Applicant in those proceedings. However, if the Applicant demonstrates that the criminal proceedings that the police intend to carry out are an abuse of process, the court will not hesitate in putting a halt to such proceedings."**

49. I associate myself with these words. There might be some merit in the *exparte* Applicant's complaint that the prosecution was brought some 30 odd years since the *offence was committed*. And further that several investigations carried out over 7 years between 2007 and 2013 appeared to exonerate the Applicants. However, it must be recalled that the 1st Respondent is not bound by the determination of the DCI or his junior prosecutors all who are his subordinates under the law (see Article 157 and Section 6 of the ODPP Act).

50. Secondly, it seems that only in 2004 did the deceased **S.N.M.** make his complaint to police. There is no evidence that he was aware of the alleged "hijacking" of his allocation of the suit property prior to 2004. Delay *per se,* unless it affects a fair trial cannot be a ground for prohibiting a prosecution especially where fraud is alleged. It is true that in this case **S.N.M** is deceased. It is also alleged that the 2nd *Exparte* Applicant is deceased; which if true must have happened after his affidavit of 16th July, 2014.

51. This case as I see it involves for the large part official documentation emanating from different offices. And the fact that none of the relevant Ministries have complained in respect of the matter is irrelevant. The complainant in this case is the state through the Director of Public Prosecution on behalf of the public (See the Criminal Procedure Code). The Interested Party is also a complainant in the criminal trial.

52. In the **Githunguri case** which the Applicants relied on, the Applicant was arraigned in court nine years after the alleged offence and six years after inquiries were made. A distinction must be made between the facts of the present case and **Githunguri's** case. While the Applicant therein had been notified publicly by the Attorney General six years before of the decision not to prosecute him, that is not true in this case. The recommendations or views of junior or senior police investigators or prosecution

counsel cannot amount to a promise made to the exparte Applicants herein that they would not be prosecuted.

53. The court in the **Githunguri case** even appeared to make allowance for a change of mind by a new incumbent in the Attorney General's office, to overturn a predecessor's decision not to prosecute, stating however that :

> **"But the right to change the decisions may be lost if as in the present case the Accused has been publicly informed that he will not be prosecuted and property has been restored to him. As a consequence of being led to believe that there would be no prosecution the Accused may have destroyed or lost evidence in his favour."**

54. From the multiplicity of documents and evidence adduced by the *exparte* Applicants in this case, that scenario does not apply. Under Article 50 (2)(e) every Accused person is entitled to be tried without undue delay – or unreasonable delay. This is an element of fair trial. The parties herein claimed support for their respective cases from the unanimous decision of the Constitutional Court of South Africa in the Sanderson case (Chaskalson P, Langa DP, Ackermann J, Goldstone J, Madala J, Mokgoro J, O'Reagan J, Sachs J and Kriegler J).

55. In his judgment in the **Sanderson** Case**, Kriegler J** observed that:

> **"In the main, the rights primarily protected by such speedy trial provisions are perceived to be liberty, security and trial-related interests. In R -Vs- Morin, these various interests are defined as follows:**
>
> > **The right to security of the person is protected in s. 11(b) by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings.**
> >
> > **The right to liberty is protected by seeking to minimise exposure to the restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions.**
> >
> > **The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh."**

56. Although **Sanderson** involved an Applicant who had already been charged and who complained of unreasonable delay after being charged, I think the observations by **Kriegler J** are insightful and illuminate the question of the delay before the charge and decried by the Applicants herein. Indeed, the observations appear to tie in with those made by the Court in Githunguri. This what **Krielger J** stated:-

> **"The critical question is how we determine whether a particular lapse of time is reasonable. The seminal answer in *Barker -Vs- Wingo* is that there is a "balancing test" in which the conduct of both the prosecution and the accused are weighed and the following considerations examined: the length of the delay; the reasons the government assigns to justify the delay; the accuseds assertion of his right to a speedy trial; and prejudice to the accused."**

57. Kriegler J observed that the "reasonableness" of delay was not a novel standard under South Africa Law. He therefore and suggested the use of "an objective and rational assessment of relevant considerations". He continued to observe that:-

> **"The amount of elapsed time is obviously central to the enquiry. The right, after all, is to a public trial "within a reasonable time after having been charged." Understanding how this factor should be incorporated into the enquiry is not straightforward. In the United States and Canada, time is considered to be a "triggering mechanism" which initiates the enquiry and it also functions subsequently as an independent factor in the enquiry. In my respectful view, time has a pervasive significance that bears on all the factors and should not be considered at the threshold or, subsequently, in isolation.**

The test for establishing whether the time allowed to lapse was reasonable should not be unduly stratified or preordained. In some jurisdictions prejudice is presumed - sometimes irrebuttably - after the lapse of loosely specified time periods. I do not believe it would be helpful for our courts to impose such semi-formal time constraints on the prosecuting authority. That would be a law-making function which it would be inappropriate for a court to exercise. The courts will apply their experience of how the lapse of time generally affects the liberty, security and trial-related interests that concern us. Of the three forms of prejudice, the trial-related variety is possibly hardest to establish, and here as in the case of other forms of prejudice, trial courts will have to draw sensible inferences from the evidence. By and large, it seems a fair although tentative generalisation that the lapse of time heightens the various kinds of prejudice that section 25(3)(a) seeks to diminish."

58. Kriegler J. stated that in considering whether delay is unreasonable, the court should inquire into the prejudice suffered or (likely to be suffered) by the Applicant, the nature of the case and systemic delay. In conclusion the learned judge stated:

"Having isolated some of the relevant considerations, how are they assimilated in determining whether or not a lapse of time is reasonable? The qualifier "reasonableness" requires a value judgment. In making that judgment, courts must be constantly mindful of the profound social interest in bringing a person charged with a criminal offence to trial, and resolving the liability of the accused. Particularly when the applicant seeks a permanent stay of prosecution, this interest will loom very large. The entire enquiry must be conditioned by the recognition that we are not atomised individuals whose interests are divorced from those of society. We all benefit by our belonging to a society with a structured legal system; a system which requires the prosecution to prove its case in a public forum. We also have to be prepared to pay a price for our membership of such a society, and accept that a criminal justice system such as ours inevitably imposes burdens on the accused. But we have to acknowledge that these burdens are profoundly troubling and incidental. The question in each case is whether the burdens borne by the accused as a result of delay are unreasonable. Delay cannot be allowed to debase the presumption of innocence, and become in itself a form of extra-curial punishment. A persons time has a profound value, and it should not become the play-thing of the state or of society.

Even if the evidence he had placed before the Court had been more damning, the relief the appellant seeks is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins - and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case - is far-reaching. Indeed it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will seldom be warranted in the absence of significant prejudice to the accused.

Ordinarily, and particularly where the prejudice alleged is not trial-related, there is a range of "appropriate" remedies less radical than barring the prosecution. These would include a mandamus requiring the prosecution to commence the case, a refusal to grant the prosecution a remand, or damages after an acquittal arising out of the prejudice suffered by the accused. A bar is likely to be available only in a narrow range of circumstances, for example, where it is established that the accused has probably suffered irreparable trial prejudice as a result of the delay.

59. Applying these principles to this case, I would endorse the position that though period of delay, herein emphasised is important, it is not a consideration to be taken in isolation, but must be considered in view of the nature of the case, the systemic delays (both investigative and prosecutorial) the possible trial related prejudice to an Applicant as well as the demands of public interest to bring to justice those charged with serious offences.

60. I have not seen anything in the *Exparte* Applicants' material to indicate that their delayed arraignment will adversely impact upon their ability to make a defence, which has nonetheless been robustly presented

herein. The Applicant (s) cannot anticipate that Article 50 of the Constitution which safeguards the right to fair trial will be breached in the trial. The nature of the case which the Applicants assert is that it is tied to a question of ownership of land; and in part that is why it has failed to go away. It must also be borne in mind that the complaint herein only reached the Director of Public Prosecutions for his decision after a period of a series of DCI investigations.

61. It is not entirely true as asserted by the Applicants however that all such inquiries terminated in the *Exparte* Applicants' favour. A letter dated 5th December 2012, authored by Mr. Mbaka, DCIO in the Directorate of Criminal Investigative Office Naivasha to the *Provincial Criminal Investigation Officer* Nakuru, and attached to the Replying affidavit of the Interested Party recommended boldly to the *Provincial Criminal Investigation Officer* that 1st *Exparte* Applicant and his counterpart ought to be charged with the offences of Abuse of office and Conspiracy to defraud. This letter makes reference to the *Provincial Criminal Investigation Officer's* letter of 22nd September 2011 requiring further investigation.

62. It is unlikely, judging from the *exparte* Applicant's level of access as demonstrated by their possession of internal police correspondence, that they were unaware of this particular communication. The oft repeated complaint of delay by the Applicants against the 1st Respondent or police ignores the Applicants' own delay to seek court intervention. For a period of about 6 – 7 years, the Applicants were allegedly "co-operating" with police investigators as and when called upon. It seems that they were happy to continue with the motions so long as nothing adverse to them came out of the investigations. Thus they too must take some responsibility for the delay in this case. Admittedly however, post charge delay is eminently more prejudicial than pre-charge. Hence the Applicants' apparent complacency in the 7 year period.

63. On the question whether the decision of the 1st Respondent is unreasonable, I have been referred to the **Wednesbury Principle** as enunciated in **Associated Provincial Picture House Limited -Vs- Wednesbury Corporation [1948] KB 223** where it was held in part that:

> **"……..the local authority had not acted unreasonably or *ultra vires* in imposing the condition (that children under 15 years be not admitted to Sunday Performances with or without an adult). In considering whether an authority having so uninhibited a power has acted unreasonably the court is only entitled to investigate the action of the authority with a view to seeing if it has taken into account any matters that ought not to be or disregarded matters that ought to be taken into account. The court cannot interfere as an appellate authority to override a decision of such an authority, but only as a judicial authority concluded to see whether it has contravened the law by acting in excess of its power."**

64. The court further stated that the decision impugned must be so unreasonable that no authority could have made it that is, the decision is close to absurd or suggesting that the concerned tribunal or body taken "leave of its senses." That is an extreme case, the underlying rationale being to pre-empt the temptation by a judicial review court substituting its own decision with the impugned one.

65. In my view a passage in the **Wednesbury Corporation case** in Lord Greene's Judgment best exemplifies this concept:

> **"It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could**

ever dream that it lay within the powers of the authority. Warrington LJ in *Short -Vs-Poole Corporation* [1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."

66. Considering the material placed before me in his case, and DPP's letter containing the impugned decision in light of the foregoing, I am not persuaded that the decision is out rightly unreasonable. On the face of it, the instructions are consistent with the considerations set out in Article 157 of the Constitution and Section 4 of the Office of Director of Public Prosecutions Act which sets out the guiding principles as follows:-

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

(a) the diversity of the people of Kenya;

(b) impartiality and gender equity;

(c) the rules of natural justice;

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

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

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

(g) protection of the sovereignty of the people;

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

(i) promotion of constitutionalism."

67. Concerning alleged abuse of discretion and malice, the *Exparte* Applicants had charged that the real motive behind the prosecution is the desire to exert pressure on the Accused person to give up the title documents to the suit property. That thereby, the prosecution will achieve the collateral purpose of obtaining what the Interested Party and the deceased **S.N.M.** were unable to achieve *via* the withdrawn civil suit. Thus the prosecution has been instituted with ulterior motives.

68. A deposition was made by the 'deceased' 2nd *Exparte* Applicant that a police officer confided in him regarding this conspiracy theory in the period when the charges were brought. While it is true that as the 1st *Exparte* Applicant has pointed out, this particular deposition was not controverted, that is a serious allegation that should not be accepted on face value. Granted, the civil suit filed by the Interested Party and the deceased **S.N.M.** was withdrawn in 2011. The suit was against the 2nd *exparte* Applicant and the Commissioner for Lands. The 1st *exparte* Applicant was not a party thereto. The original source of the information relating to the conspiracy theory is also obscure. It is most unlikely that the DPP released such damning information to a police officer.

69. The explanation given by the Interested Party that the proof of forgery necessitated a criminal process is a weak one too. However, there is no evidence that the 1st Respondent has any personal interest in the suit property. Secondly, the 1st *Exparte* Applicant has no title to surrender to the Interested Party, if the facts of this case are believed. The Interested Party however cannot be blamed for the coincidence that his alleged beneficial interest in the suit property has been frustrated since 2004 because of an alleged forgery affecting the related title. Nor can he be faulted for persisting, as he has in his attempts to unravel

the alleged forgery that has led to his debacle.

70. His spirited efforts in this regard are clearly demonstrated through the civil suit and multiple correspondences to various agencies in search of a solution. He too is entitled to justice under Article 48 and 50 of the Constitution. Unless it is demonstrated that the Office of Director of Public Prosecutions has "buckled" under undue influence from the Interested Party or third parties thus bringing the prosecution, I believe that all circumstances notwithstanding, his actions may well be a vindication of his office as anticipated in Section 4 (a), (b) and (e) of the Office of the Director of Public Prosecutions Act. It is, after all, the DPP's duty to prosecute for public interest and in defence of the rule of law.

71. Allegations that Office of Director of Public Prosecutions was 'pressured' or that the DPP was merely 'washing his hands' off a pesky complainant (Interested Party) are to my mind mere speculation as no proof thereof has been laid before the court. The interests of the Office of Director of Public Prosecutions are public while those of the Interested Party are private. However they converge where an offence, namely fraud, relating to property is alleged to have been committed.

72. The regulation of land ownership, allocations of public land interalia is undoubtedly a matter of public interest. **The Supreme Court in Advisory Opinion Reference 2 of 2014: In the matter of the National Land Commission [2015] eKLR** stated in paragraph 311 that:

> **"That the Ministry of Land is the special entity with authority to register and issue land title, in this Court's opinion, bears restating. Land title, by its singularity as the mark of entitlement to landed property, is the ultimate expression of a vital property right, quite apart from being the very reference-point in numerous financial and business transactions ¾ national and international. On that account, *the sole national repository to issue, and to guarantee the validity and integrity of title, is the central State machinery, as a player on the international plane, acting through the Executive organ.***" *(emphasis added).*

73. Section 193 (A) of the Criminal Procedure Code provides that:

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

74. Section 193A of the Criminal Procedure Code clearly envisages the concurrent litigation of civil and criminal proceedings arising from the same fact. Recently in **Petition No. 1 of 2016 Joel Kiplangat & 3 Others -Vs- Narok County Criminal Investigation Officer and 3 Others**, this court had occasion to consider this section. In that case, the impugned prosecution emanated from the same facts as concurrent civil proceedings.

75. In **Kiplangat**, this court cited the decision in **Commissioner of Police and Director of Criminal Investigations Department -Vs- Kenya Commercial Bank and Others in Nairobi Civil Appeal No. 56 of 2012; [2013] eKLR** as follows:

> **"While the law (Section 193 A of the Criminal Procedure Code) allows the concurrent litigations of Civil and Criminal proceedings arising from the same issues, and while it is prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly. In accordance with the laws of the land and in good faith…… It is not in the public interest or in the interest of administration of justice to use criminal process as a pawn in civil disputes." (sic)**

76. This court having found in **Kiplangat** no evidence of bad faith on the part of the prosecution, and considering the exhortation by the Court of Appeal in **Manilal Jamnandas Ramji Gohil -Vs- Director of Public Prosecution [2014] eKLR** observed that:

"No such exceptional circumstances (as stated in Manilal) have been demonstrated herein and it would militate against public interest to prohibit the Respondents from carrying out their lawful function to bring suspects to account for their alleged actions before a court of law. The rights of the Applicants must be balanced against societal interest (see Githunguri – Vs- Republic [1986] KLR 1 and Julius Kamau Mbugua [2010] eKLR."

77. Similarly on the available facts of this case, I am not satisfied that the impugned prosecution represents an abuse of discretion or that it has been brought by the Director of Public Prosecutions solely for the achievement of ulterior motives.

78. Finally, on the complaint that the Director of Public Prosecutions is guilty of breaching the rules of natural justice and that the exparte Applicants legitimate expectation was breached this court noted the following. The *Exparte* Applicants themselves assert that they have been given several opportunities to present their side of the matter over the seven years of police investigations.

79. I fully endorse the applicable law as stated in *Exparte* **Ngomonge** that:

"Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in process of taking a decision. The unfairness may be in non-observance of the rules of National justice or to procedural fairness towards me to be affected by the decision. It may also involve failure to adhere to a and observe procedural rules expressly laid down in statute or legislature instrument by which such authority exercise jurisdiction to make a decision."

80. However as regards the proceedings of the lower court on 27/2/2014 I am not certain whether the complaint made here is against the court or the Director of Public Prosecutions. Whatever the case, it is true that no explanation was made for the application for issuance of a warrant of arrest, by the Office of Public Prosecutions on that date against the *Exparte* Applicants. On 12/3/2014 however the prosecution stated that the investigating officer and the DCIO "had problems in getting Accused and thus applied for a warrant of arrest."

81. Mr. Lutta for the Applicant did confirm through his address to the court that there had been ongoing communication between the *Exparte* applicants, their counsel and the Investigating Officer in the material period. That at one point the investigating officer summoned the Accused to Nairobi but they were unavailable. That in a subsequent meeting arranged in the office of Mr. Lutta, the Investigating Officer produced a warrant of arrest and a charge sheet before arresting the *Exparte* Applicants. He complained that no advance notice had been given of the intention to charge the Applicants.

82. The facts in **Ngomonge** are distinguishable from this case however. The case involved the apparent misuse of police powers to impound a motor vehicle which had been attached through distress by the *Exparte* Applicant in his capacity as an auctioneer. The court found that the police unlawfully acted as an agent of the debtor from whom it was attached, and that the charges were intended to assist the debtor to settle a civil dispute.

83. I have considered the record of proceedings on 27/2/2014 and 12/3/2014 in the context of the entire matter. In my opinion, nothing turns on the failure, if any, by the Director of Public Prosecutions to give notice to the *Exparte* Applicants regarding the intention to bring charges. The Applicants were released on bond after plea and no further prejudice was occasioned to them by the default. The mere failure by the Office of Director of Public Prosecutions to give notice, of the impending charges, without more cannot be the basis for finding that there was a breach of the *audi alteram partem* rule.

84. Similarly, as regards legitimate expectation, the relevant law is correctly stated in **Republic –Vs- Nairobi City Council & Another *Exparte* Wainaina Kigathi Mungai [2014] eKLR** but the facts there have no bearing whatsoever on those in the present case. This dispute revolved payment of land rates and no prosecution was involved. Equally, no basis has been laid for the invocation of the doctrine of legitimate expectation in so far as notice is concerned.

85. In the case of **Kalpana H. Rawal -Vs- Judicial Service Commission & Others Petition No. 386 of 2015 [2015] eKLR** a five judge bench considered the application of the doctrine and observed that:

> **"When is an expectation legitimate? That question was answered by H. W. R. Wade & C. F. Forsyth (supra) at pages 449 to 450, thus:**
>
> ***It is not enough that an expectation should exist; it must in addition be legitimate….***
>
> ***First of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation…..***
>
> ***Second, clear statutory words, of course, override an expectation howsoever founded…..***
>
> ***Third, the notification of a relevant change of policy destroys any expectation founded upon the earlier policy….***
>
> ***Fourth, there is no artificial restriction on the material on which a legitimate expectation rests, may be based. Thus a legitimate expectation can be founded upon an unincorporated treaty, but it is seldom that the terms of the treaty will be sufficiently precise or known to the individual concerned.***
>
> ***Fifth, the individual seeking protection of the expectation must themselves deal fairly with the public authority. Thus taxpayers seeking clearance for their proposals must make full disclosure before the Revenue's assurances will be binding. The assurance must itself be clear, unequivocal and unambiguous.***
>
> ***Sixth, consideration of the expectation may be beyond the jurisdiction of the court. For instance, when it would involve questioning proceedings in Parliament contrary to the law of parliamentary privilege.*** **(Emphasis added)**
>
> **The learned authors stressed the importance of the promise being *intra vires* by stating at pages 450 to 451 that:**
>
> ***An expectation whose fulfilment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the powers of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice.*** (Emphasis added)
>
> **In order to successfully rely on the doctrine of legitimate expectation there is need to demonstrate that the promise was made by an authorised public officer; was reasonable; and was within the law. Any promise made outside the law cannot be legitimate and thus cannot give rise to any expectation. It is also necessary that an applicant places all the facts before the public authority before the assurance was given to him or her."**

86. In the present case, despite the admitted series of investigations by different police officers over a period of 7 years, there is no evidence that any promise was made by any of them to the Exparte Applicants that they would not be arraigned in court. The alleged favourable recommendations of the several investigators were internal Criminal Investigating Directorate communication and not correspondence addressed to the *exparte* Applicants. Seemingly, the *exparte* Applicants were kept well informed concerning the outcomes of the various investigation cycles.

87. Besides, the recommendations and or decisions by investigators or the prosecutorial counsel in Nakuru do not override the authority of the Director of Public Prosecutions. None of them can usurp the

DPP's constitutional mandate under Article 157 of the Constitution, by purporting to make promises which are not in their power to make or to keep. Equally, the fact that the civil suit herein was withdrawn in 2011 cannot be a ground to bar the DPP mounting a prosecution where he is persuaded of the public interest element therein.

88. The arraignment of the Exparte Applicants was a one-event and a practice or expectation drawn from previous summons of the Applicants to Criminal Investigating Division offices cannot found an expectation that the Office of Director of Public Prosecutions should have alerted the Applicants in advance of his intention to have them charged.

89. In the **Rawal case** the court observed at Paragraph 216:

> **"Here in Kenya, Nyamu, J (as he then was) explained the basis of the doctrine in the case of Keroche Industries Ltd v Kenya Revenue Authority and others (2007) eKLR as follows:**
>
> ***Legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher interest beneficial to all…which is, the value of the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation….public authorities must be held to their practices and promises by the Courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised."***

90. The Director of Public Prosecutions having given direction to prosecute the Applicants it seems that the police swang swiftly into action. It does seem that in the period material to the arraignment, the police had been unable to trace the Exparte Applicants. Thus there was created an urgency by the Director of Public Prosecutions instructions and an overriding interest to having the suspects brought to court justified a departure for the expected practice, if any.

91. Further, I do not think it is reasonable to expect that in all cases the DPP or police will announce in advance to suspects, their intention to charge them. The suspects may well so underground. The requirement under Article 49 (1) a) and f) of the Constitution and the Criminal Procedure Code is that once arrested, a suspect must be informed the reason for his arrest and speedily arraigned in court. Based on the Applicants' court address on 12/3/2014 when the charges were read, the Exparte Applicants upon arrest were duly notified of the reasons thereof through service of a copy of the charge sheet. Nothing turns therefore on the alleged breach of their legitimate expectation.

92. In light of the findings above, it is my view that the Substantive Motion herein must fail. The same is accordingly dismissed. I direct therefore, that there be a mention of the pending **Criminal Case Number 415 of 2014** on 6th April 2017 before the Chief Magistrate's Court Naivasha. I further direct that in view of the age of the matter, early hearing dates be taken. The case is to be scheduled to be heard on a day to day basis until conclusion, to obviate any further delays.

Delivered and signed at Naivasha, this 31st day of March, 2017.

In the presence of:-

Mr. Lutta for the Applicants

Mr. Mutinda for the Respondent

Mr. Onyango holding brief for Mr. Munyaka for the Interested Parties

Court Assistant - Lillian

C. MEOLI

JUDGE