REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 381 OF 2014

REPUBLIC.....APPLICANT

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

AND

SAMWEL KAMAU MACHARIA.....1ST INTERESTED PARTY

ROYAL CREDIT LIMITED.....2ND INTERESTED PARTY

MADHUPAPER INTERNATIONAL LIMITED.....3RD INTERESTED PARTY

EX-PARTE

ANNE MUTAHI; KAUSHIK SHAH; LES BAILIE; PATRICK OBATH; LAMIN MANJANG; KARIUKI NGARI; CHEMUTAI MURGOR; ROBIN BAIRSTOW; & NANCY OGINDE

JUDGEMENT

THE PARTIES & THE APPLICATION

1. Anne Mutahi, Kaushik Shah, Les Bailie, Patrick Obath, Lamin Manjang, Kariuki Ngari, Chemutai Murgor, Robin Bairstow and Nancy Oginde are the 1st to 9th ex parte applicants. The 1st Respondent is the Attorney General of the Republic of Kenya whereas the Director of Public Prosecutions (DPP) is the 2nd Respondent. Samwel Kamau Macharia, Royal Credit Limited and Madhupaper International Limited are the 1st to 3rd interested parties respectively.

2. On 7th October, 2014 the applicants received summons issued under Section 52(1) of the National Police Service Act, 2011 in regard to an enquiry into an alleged offence of stealing by directors contrary to Section 283 of the Penal Code. The applicants being aggrieved by the said decision moved this Court on 8th October, 2014 and obtained leave to commence these judicial review proceedings. At the time of granting leave, the Court also stayed the requisitions to compel attendance by the applicants at the

Directorate of Criminal Investigations headquarters.

3. Subsequently, the applicants through the notice of motion application dated 17th October, 2014 prayed for orders as follows:

> **"1. <u>An</u> order of Certiorari do issue to bring before this Honorable Court and quash the 9 Requisitions to Compel Attendance of the Applicants at the Directorate of Criminal Investigations Headquarters and signed by Chief Inspector Michael M. Kimilu purportedly issued pursuant to the provisions of section 52(1) of the National Police Service Act 2011 and dated 6th October 2014.**
>
> 2. **<u>An</u> order of Prohibition do issue to prohibit the Kenya Police or any of its agencies or departments from investigating any Complaint upon which the said 9 Requisitions to Compel Attendance directed at the 9 Applicants were issued.**
>
> 3. **<u>An</u> order of Prohibition to prohibit the Director of Public Prosecutions of the Republic of Kenya from prosecuting the Applicants in respect of any matter arising out [of] a complaint filed against the Applicants in respect of which the 9 Requisitions to Compel Attendance by the 9 Applicants were issued.**
>
> 4. **THAT the costs of this application in any event be awarded to the *ex-parte* Applicants."**

THE APPLICANTS' CASE

5. The applicants' case as gleaned from the papers filed in Court is that the 1st to 8th applicants are directors of Standard Chartered Bank (SCB) having been appointed between 19th February, 2004 and 16th August, 2011. The 9th Applicant is the company secretary having been so appointed in 1999.

6. According to the applicants, on 7th October 2014 the National Police Service through its Directorate of Criminal Investigations served upon SCB nine requisitions dated 6th October, 2014 signed by Chief Inspector Michael Kimilu requiring the applicants to attend the said police officer at the CID Headquarters on 9th October, 2014 at 10 a.m. The requisitions which were issued under Section 52(1) of the National Police Service Act, 2011, stated that Chief Inspector Michael Kimilu was making inquiries into an alleged offence of stealing by directors contrary to Section 283 of the Penal Code.

7. It is the applicants' case that Section 283 of the Penal Code provides for the offence of stealing by agent. They aver that the offence of stealing by directors is created by Section 282 of the Penal Code and it only relates to theft by directors of property belonging to their company. The applicants state that SCB has at no time made any complaint to the National Police Service of any theft of its property by any of its directors.

8. The applicants depose that the purported investigation was the subject of **Nairobi HCCC No. 1713 of 2001 Madhupaper International Limited & 2 others v Standard Chartered Bank Kenya Limited** which case was dismissed on 23rd April, 2010 for want of prosecution. The interested parties who were the plaintiffs in the dismissed suit had as a consequence filed **Nairobi Civil Appeal No. 58 of 2011** which is still pending for determination in the Court of Appeal.

9. Further, that the subject matter of that suit had been a subject of criminal investigations, and by a letter dated 17th October, 2005 the Attorney General advised the Banking Fraud Investigation Unit that there was no basis upon which a prosecution of SCB could be mounted as the dispute was more of a civil nature. It is also their case that by a further letter dated 26th October, 2005, the Attorney General had advised that the investigations had not revealed any evidence of value upon which to support any criminal charges against SCB and accordingly, the Attorney General decided not institute criminal proceedings against the bank.

10. The applicants aver that by a letter dated 20th May, 2014, the Banking Fraud Investigation Unit of the National Police Service advised the Chief Executive Officer of SCB of its intention to conduct further investigations. SCB responded through a letter dated 18th June, 2014, informing the said Investigation Unit, *inter alia*, that whereas they wished to co-operate with the investigators in relation to any further enquiries, they were of the view that the issues raised by the investigators did not constitute any new fact, information or circumstances supporting any valid grounds for further investigation. It is the applicants' deposition that instead of addressing the issues raised in their reply, the National Police Service had issued requisitions requiring them to attend the investigator on 9th October, 2014.

11. It is also the applicants' case that they were not directors at the time material to the matters which are subject of the intended investigation and without new evidence the requisitions to compel their attendance are only intended to serve a collateral purpose rather than a lawful one, thus an abuse of process and power.

12. The applicants further averred that the process placed into motion by the requisition to compel their attendance is a violation of their right to fair administrative action, and the same is arbitrary and capricious and in so proceeding, the National Police Service will be acting in excess of its statutory powers in acting upon mistaken premise and facts.

13. Finally, the applicants aver that the DPP will also be acting in excess of his constitutional and statutory powers in initiating criminal prosecution in a matter in which the Attorney General had previously advised that there was no basis or foundation for criminal prosecution. They also depose that the Attorney General had determined that the matter was a civil dispute.

THE 1ST RESPONDENT'S CASE

14. The 1st Respondent opposed the application through grounds of opposition dated 24th October, 2014 and filed in Court on 27th October, 2014. In summary, the 1st Respondent's case is that the applicants have not made any claim against the Attorney General; that the decision sought to be quashed was not made by the Attorney General; that it would be a breach of the rules of natural justice to issue orders against the police officer who made the requisitions since the said officer is not a party to these proceedings; that the jurisdiction of the police officer to issue the requisitions has not been challenged; that the applicants will not suffer any prejudice if they comply with the requisitions; and that it is against public interest to prohibit the police from investigating crimes.

THE 2ND RESPONDENT'S REPLY

15. The 2nd Respondent opposed the application through a Replying Affidavit sworn on 1st December, 2014 by Victor Mule, an Assistant Director of Public Prosecutions. The deponent avers that on 19th December, 2013, the Honourable Lady Justice Mumbi Ngugi delivered a judgment in **Nairobi High Court Petition No. 244 of 2006 Samwel Kamau Macharia & 2 others v Attorney General & another** in which she held that the DPP was mandated to review the decision whether to prosecute or not to prosecute SCB.

16. Mr. Mule depose that although the Judge was not directing the DPP to re-open investigations, the DPP nevertheless took the view that sentiments formally expressed by a Judge of the High Court in a judgment ought to be accorded consideration by the DPP in exercising his discretion to direct re-opening of investigations. It is Mr. Mule's averment that the DPP vide his letter of 7th April, 2014 referenced ODPP/CR/2034/1769 directed the Director of Criminal Investigations to re-open investigations in the matter as he is entitled to do under the provisions of the Constitution and the Office of the Director of Public Prosecutions Act, 2013.

17. It is the DPP's case that the decision to re-open the matter was also necessitated by further evidence and documents that the complainants had provided to the Judges and Magistrates Vetting Board (the Board) during the vetting of judges who had handled the appeal in the dispute over the Kshs. 55 million,

the subject of the criminal complaint.

18. According to the DPP there has never been any doubt whatsoever that SCB received the sum of Kshs. 55 million on the account of its customers, the complainants herein, but failed to credit the same to their account and instead fraudulently converted the same to its own use thus committing a serious criminal offence.

19. In support of the assertion that the decision of the Attorney General to close the case was not proper, Mr. Mule referred to a letter from the officer-in-charge of the Banking Fraud Investigation Unit of the Central Bank dated 9th January, 2003 to the interested parties informing them that the Attorney General after perusing the police file had taken cognizance of the financial and economic implications which could arise from criminal proceedings and advised that it was in the best interest of both parties to explore other possibilities with a view to resolving the matter amicably.

20. It is Mr. Mule's averment that it is clear to the DPP that the political and economic dynamics of the time gave preference to the interests of the bank over the public interest which requires prosecution of crimes irrespective of the status of the suspect. Mr. Mule deposes that the decision by the DPP tallies with the holding by Honourable Lady Justice Mumbi Ngugi that the DPP has an obligation to prosecute any party regardless of its or their status and should not be seen to fail in its duty when confronted with a situation that suggests wrongdoing on the part of a party like the bank, which in the words of the petitioners is a strong economic actor because of its economic status.

21. Further, that in directing that investigations be re-opened the DPP has also taken note of the current best practice in the world where in Europe, U.K. and the U.S.A. nearly all of the big multinational banks which were previously untouchable had been fined heavily for all manner of offences.

22. Mr. Mule wraps up the 2nd Respondent's case by stating that the applicants herein had been summoned to record statements following the re-opening of this matter on the directions of the DPP and the investigations and possible prosecution should be allowed to run their full course.

THE INTERESTED PARTIES' CASE

23. The interested parties opposed the application through the Replying Affidavit of the 1st Interested Party, Samuel Kamau Macharia filed on 2nd December, 2014. Their case is that in early August 1989 they arranged for the sum of Kshs. 134,570,000 being proceeds from the sale of the assets of the 3rd Interested Party to be received on their behalf by SCB. The arrangement between the purchasers and the 3rd Interested Party was that the payment of the purchase price was to be secured through bank guarantees issued and payable to SCB by City Finance Limited and Trade Bank Limited.

24. Bank guarantees of Kshs. 34,570,000, Kshs. 45,000,000 and Kshs. 55,000,000 were given to SCB. On 7th December, 1989, SCB confirmed to the interested parties that it had received Kshs. 34,570,000 and Kshs. 45,000,000 leaving the guarantee of Kshs. 55,000,000 unpaid until its due date. On 9th March, 1990 SCB confirmed to the interested parties that it had received the remaining Kshs. 55,000,000. In August 2001, the interested parties wrote to SCB demanding payment of Kshs. 55,000,000 but SCB refused to make payment.

25. The interested parties subsequently reported the matter to the Banking Fraud Investigation Unit and supplied all the information required for purposes of investigations. The interested parties also filed **Nairobi HCCC No. 1713 of 2001** against SCB seeking orders for payment of Kshs. 55,000,000. The civil suit was dismissed for want of prosecution and the matter is pending appeal. Through a letter dated 9th January, 2003, the Banking Fraud Investigation Unit wrote to the interested parties and SCB advising SCB to settle the matter amicably fearing the consequences of prosecution of SCB. It is the interested parties' case that SCB was never prosecuted.

26. The interested parties disclosed that they later filed **Nairobi High Court Constitutional Petition No.**

244 of 2006 Samuel Macharia & 2 others v The Attorney General & another seeking orders to compel the DPP to prosecute SCB and in a judgement delivered on 19th December, 2013, the Court held that the DPP could reopen the matter and carry out further investigations.

27. The interested parties aver that the applicants are seeking to review the judgement in **Petition No. 244 of 2006** (supra) through the back door. Further, that these proceedings are aimed at stopping the exercise of constitutional powers by the DPP.

THE APPLICANTS' FURTHER REPLY

28. In response to the papers filed by the respondents and the interested parties, the applicants filed a further affidavit sworn by the 9th Applicant on 10th February, 2015. The applicants reiterated that the summonses were served on each of them in their capacity as directors, allegedly on account of inquiries into an offence of stealing by directors contrary to Section 283 of the Penal Code. Further, that none of the summonses mentioned the complaint of theft by SCB as claimed by the 1st and 2nd interested parties. Also, that the summonses neither related to SCB nor summoned the applicants on behalf of SCB, or in connection with the matter of the sum of Kshs. 55 million claimed by the interested parties.

29. It is the applicants' view that the complaint of the interested parties was in connection with matters which occurred on 9th March, 1990 long before any of the applicants had been appointed as directors. Further, that none of the affidavits filed by the 2nd Respondent and the interested parties had shown the connection between the complaint made by the interested parties and the applicants. Also, that the issues raised by the applicants in these proceedings, which include the fact that the summonses did not specify the particular offence of theft by director on which the summonses were predicated had not been addressed.

30. In response to the 1st Interested Party's averment that there was a loss of Kshs. 55 million which was based on an alleged guarantee provided by Trade Bank Limited, the applicants deposed that although the guarantee was indeed released through a letter dated 8th March, 1990 there was no acknowledgement of receipt of any amount by SCB.

31. Turning to **High Court Petition No. 244 of 2006 (supra),** the applicants aver that despite the *obiter* observations relied upon by the interested parties, the petition was nevertheless dismissed and the interested parties had since filed a Notice of Appeal in respect thereof.

32. It is the applicants' position that the interested parties' complaint had been conclusively dealt with through the Attorney General's letter dated 17th October, 2005 addressed to the Banking Fraud Investigation Unit indicating that nothing valuable had come out of the further investigations conducted by the Unit and there was no basis upon which a prosecution of the bank could be undertaken as the dispute was more civil in nature. It is the applicants' position that there is no new evidence to warrant the reopening of the file considering that the Attorney General had found that there was no basis for prosecuting SCB.

33. The applicants depose that the Board did not refer to the dispute between the interested parties and SCB. It is their case that the Board was concerned with the handling of an appeal by the Court of Appeal in **Nairobi Civil Appeal No. 181 of 2004** which involved the interested parties and Kenya Commercial Bank Limited but the 2nd Respondent had dishonestly used the findings of the Board which were not relevant to the dispute between the interested parties and SCB against SCB.

34. According to the applicants, evidence that the proceedings before the Board related to Kenya Commercial Bank and not SCB is confirmed by the fact that the 1st Interested Party indeed initiated in the Supreme Court of Kenya **Application No. 2 of 2012, Samuel Kamau Macharia & The Official Receiver, Madhupaper International Ltd v Kenya Commercial Bank Ltd, Kenya Commercial Finance Co. Ltd & Kenya National Capital Corporation Ltd,** where he confirmed through his supporting affidavit that the Determination by the Board was in relation to **Nairobi Civil Appeal No. 181**

of 2004.

35. The applicants aver that by purporting to falsely and maliciously refer to an extract from the decision of the Board as concerning SCB, the 2nd Respondent and the interested parties were colluding to pervert the course of justice by attributing the grave finding of the Board, in respect of a dispute between the interested parties and Kenya Commercial Bank, to a wrong party with a view to reopening criminal investigations against such party, namely SCB.

36. The applicants conclude their response by deposing that the sanctions taken by foreign authorities against various banks, as alluded to at paragraph 9 of Mr. Mule's Replying Affidavit, are in regard to regulatory investigations and they involve many banks as evidenced by the annexures thereto. Consequently, those prosecutions are irrelevant to the instant case where the issue is an alleged claim for monies purportedly paid to SCB.

THE SUBMISSIONS OF THE PARTIES

37. The applicants challenge the decision of the 2nd Respondent to re-open investigations in regard to the interested parties' complaint in respect of the alleged theft of Kshs. 55 million by SCB. The matter had been previously investigated and the Attorney General, who was by then the authority in charge of criminal prosecutions, had ordered the closure of the file on the ground that there was no sufficient evidence to mount a criminal prosecution against SCB.

38. The applicants' attack on the decision of the 2nd Respondent to re-open the matter can be summarised as follows: that the matter for which they were summoned by the police officers is purely civil in nature; that SCB had not complained of theft by its directors to warrant their being summoned to give information in regard to an alleged theft by directors; that they were not the directors of SCB at the time of the alleged theft of the interested parties' money; and that the 2nd Respondent had not established a basis for reopening the matter.

39. The dispute between the interested parties and SCB started in 1990 when the 1st Interested Party alleged that SCB had received Kshs. 55 million on behalf of the interested parties but had failed to release the money to them. In a bid to get their money, the interested parties commenced **Nairobi HCCC No. 1713 of 2001** (supra) which was dismissed by the High Court for want of prosecution. The interested parties filed an appeal against the said decision and the appeal is still pending in the Court of Appeal.

40. The 1st Interested Party also reported an alleged theft of Kshs. 55 million by SCB to the Banking Fraud Investigation Unit. Several letters were exchanged between the 1st Interested Party, SCB, the Banking Fraud Investigation Unit and the Attorney General. On 9th January, 2003 the Banking Fraud Investigation Unit wrote to the 1st Interested Party conveying the opinion of the Attorney General advising the parties to resolve the matter amicably. The recommendation of the Attorney General was made despite the fact that the Banking Fraud Investigation Unit had recommended the prosecution of SCB.

41. It seems that no agreement was reached and the interested parties kept pushing for the prosecution of SCB. Following further investigations conducted by the Banking Fraud Investigation Unit as directed by the Attorney General, the Unit wrote to the Attorney General on 8th September, 2005 indicating that they had covered the areas that the Attorney General wanted covered and their opinion was that SCB ought to be prosecuted as earlier recommended.

42. The Attorney General responded to the Banking Fraud Investigation Unit's letter through a letter dated 17th October, 2005 and stated, *inter alia:*

> **"Nothing valuable came out of the further investigations. In the circumstances, there is no basis upon which a prosecution of the Bank can be mounted.**

The dispute is more civil in nature.

The file should be closed with no further police action.

Proceed accordingly."

43. Through a letter dated 26th October, 2005 signed by Keriako Tobiko, the Attorney General conveyed his decision to the interested parties' advocates as follows:

"I write with reference to the above captioned matter and to the numerous correspondence exchanged in respect thereof culminating in yours of 3rd October 2005.

I wish to advise that the further investigations ordered by the Hon. Attorney General into this matter have concluded and the report thereof has been submitted to and considered by the Attorney General. Regrettably, those investigations have not revealed any evidence of value upon which to support any criminal charges against the Bank. Accordingly Hon. Attorney General after serious consideration of the evidence availed and all the relevant circumstances, decided that the state shall not institute criminal proceedings against the Bank.

Be advised accordingly."

44. Keriako Tobiko is the current Director of Public Prosecutions and was also designated as the Director of Public Prosecutions in the above quoted letter.

45. Apparently the interested parties were not satisfied with this state of affairs and they proceeded to file **Petition No. 244 of 2006** (supra) seeking to quash the Attorney General's letter dated 26th October, 2006 and an order of mandamus to compel the Attorney General **"to act on the complaint against the said bank and its directors in accordance with the Constitution and the law."** On 19th December, 2013 Mumbi Ngugi, J delivered judgement and dismissed the interested parties' petition dated 2nd May, 2006 but with no order as to costs.

46. Before reaching her conclusion, the Judge made some observations which I will refer to in due course. Earlier on, the Board had made determinations in respect of Court of Appeal judges. Three of those judges had handled the interested parties' case. The Board in making its determinations made comments in reference to the 1st Interested Party's complaints.

47. On 28th January, 2014, the interested parties' counsel wrote to the 2nd Respondent seeking a "**review of the decision by the Attorney General not to prosecute"** and asking for the re-opening of **"investigations with a view to preferring charges in respect of what in our clients' view is a straight forward case of theft of their money by the Bank."**

48. On 7th April, 2014, the 2nd Respondent wrote to the Director of Criminal Investigations directing fresh investigations into the interested parties' complaint. The actions that followed the decision of the DPP have triggered these proceedings.

THE ISSUES FOR DETERMINATION

49. The issues that emerge in this case are: whether the Attorney General is a proper party to these proceedings; whether the applicants are liable for offences alleged to have been committed when they were not directors of SCB; whether the requisitions issued to the applicants are proper; and whether the DPP legitimately exercised his power in reviewing the decision not to prosecute SCB.

ANALYSIS & DETERMINATION

50. The Attorney General contends that no orders had been sought against his office and his presence in

these proceedings was not necessary. Further, that the police officer who issued the requisitions has not been made a party to this matter and it would be a breach of the rules of natural justice to issue any orders without hearing the officer.

51. The applicants' response is that the presence of the Attorney General and the DPP in these proceedings takes care of all the parties that are necessary in this matter.

52. In my view, the inclusion of the Attorney General in these proceedings may have been an act of precaution on the part of the applicants. Although Article 156 of the Constitution makes the Attorney General the principal legal adviser to the Government and a representative of the national government in court proceedings to which the national government is a party, the same provision is clear that the mandate of the Attorney General does not extend to criminal proceedings.

53. The requisitions that have resulted in these proceedings were issued after the DPP in exercise of power donated to him by Article 157(4) of the Constitution directed the Director of Criminal Investigations to carry out fresh investigations. I am of the opinion that it would have been sufficient for the applicants to proceed against the DPP alone in this matter. There is however no harm caused by the participation of the Attorney General in these proceedings.

54. As for the need to enjoin the officer who issued the requisitions as a party, I find that the same was not necessary. The officer was acting as an agent of the National Police Service which was in turn acting on the instructions of the DPP. He was not executing a personal duty but was performing an official function. His interests, if any, will be taken care of by the DPP.

55. The applicants submit that they were not in office at the time of the alleged crime and they are therefore not answerable to any crime that may have been committed when they were not in office. They assert that although a company can commit crimes it can only do so through its agents, servants or assigns who must themselves be responsible for the crimes. In support of this proposition they cited the case of **R v Grubb [1914-15] All E.R. 667** where it was stated that:

> **"A company has no mind and cannot have an intention, if the person directing and controlling the affairs of the company, and whose instructions the property has passed into the possession of the company and has been converted, intend to convert it fraudulently, he would be guilty of an offence whether the property was fraudulently converted to the use and benefit of the company or to his own use and benefit. If he did the acts with intent to defraud, it would not be an answer to prove that he did them as an agent or servant of another person, whether a company or an individual."**

56. It is the applicants' proposition that if any crime was committed by SCB, it could only have been done through the officials and the servants in office at the time of the alleged crime. The applicants' argument is untenable. The applicants are the soul of SCB which cannot legally operate without them. The directors are the ones who control the company and the directors are the ones responsible for the commissions and omissions of the company.

57. In **Lennard's Carrying Company Limited v Asiatic Petroleum Company Limited [1915] A.C. 705** it was rightly observed that:

> **"[A] corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company."**

58. A company which is legally recognized in a given jurisdiction is a business with perpetual succession and the directors and officers of the company carry out the business on behalf of the company and not on their own behalf. They act for the company and are responsible for the acts of the company whether past or present. The applicants' suggestion that they cannot be held liable for actions that took place before their appointment would be tantamount to suggesting that a company dies with the exit of directors. Such an assertion is not the correct statement of the law.

59. I now turn to the submission by the interested parties that these proceedings are being used by the applicants to review the judgement of Mumbi Ngugi, J in **Petition No. 244 of 2006 (supra).** The applicants' reply is that it is important to note that, contrary to the submissions by the interested parties, the judgment in question did not declare the decision by the Attorney General not to prosecute SCB void. It is the applicants' case that the interested parties have deliberately misrepresented to this Court the decision of the Court in the said petition.

60. Further, that the said judgment did not direct the 2nd Respondent to review its decision or conduct investigations as claimed by the 2nd Respondent and the interested parties. The applicants assert that if the judgment was indeed directing the 2nd Respondent to re-open the investigations, then it would be contrary to Article 157(10) of the Constitution.

61. These proceedings are aimed at invoking the supervisory jurisdiction of this Court over the DPP's exercise of constitutional and statutory power. It is noted that the exercise of the supervisory jurisdiction of this Court does not extend to a superior court-see Article 165(6) of the Constitution. It is thus important to first determine whether the issues before this Court were addressed in **Petition No. 244 of 2006** (supra).

62. The Learned Judge identified the issues that were before her as follows:

> **"25. The main issue for determination is whether the Attorney General acted contrary to the Constitution in failing to prosecute the bank on alleged theft of the amount of Ksh 55 million which it had received on behalf of the 1st petitioner and whether this Court should intervene to compel the office of the DPP to institute criminal proceedings against the bank.**
>
> 26. **A collateral issue raised by the respondent relates to whether the Court has jurisdiction to intervene in the matter as it is a civil dispute and further, that the prosecutorial powers of the state are discretionary and the Court ought not interfere."**

63. After analyzing the evidence she concluded that the petitioners had not provided evidence to make her conclude that the decision by the Attorney General not to prosecute SCB was unreasonable. She held that the Attorney General had considered the evidence before him and concluded that there was no evidence upon which to proceed against SCB.

64. However, before dismissing the petition, the Judge made certain comments which the DPP claims guided his decision to reopen the investigations of the interested parties' complaint against SCB.

65. I note that the outcome of the petition is that the Judge did not disturb the decision communicated by the Attorney General on 26th October, 2005 not to prosecute SCB. She, however, observed that the DPP could review the said decision.

66. Looking at the said judgement in its entirety, it is clear that the subject of the petition was the decision of the Attorney General not to prosecute SCB. The issues raised in this matter are fresh and different. They relate to the decision by the DPP to review the decision of the Attorney General not to prosecute SCB. It is therefore not correct to state, as the interested parties have done, that these proceedings are an appeal against or an application for review of the decision of Mumbi Ngugi, J.

67. Another issue is whether the requisitions issued to the applicants sufficiently conveyed to them what

was required of them by the investigator. The investigator told each Applicant that:

> **"I am making inquiries into an alleged offence of stealing by directors contrary to section 283 of the Penal Code. And whereas [I] have reasons to believe that you….have information which will or may assist me with my investigations. In exercise of the powers conferred to me under the provisions of sections 52(1) of the National Police Service Act (year 2011) I do hereby require you….to appear before me…."**

668. As correctly pointed out by the applicants, the offence of stealing by directors is established by Section 282 of the Penal Code, Cap 63 which states:

> **"Stealing by directors or officers of companies**
>
> **If the offender is a director or officer of a corporation or company, and the thing stolen is the property of the corporation or company, he is liable to imprisonment for seven years."**

69. The ingredients of the offence require that the accused be a director or officer of the company and the thing stolen be the property of the company. It follows therefore that the complainant ought to be the company. The applicants aver, and this averment has not been rebutted, that SCB has not lodged a complaint concerning the theft of its property.

70. However, it has emerged in these proceedings that Chief Inspector Michael Kimilu is investigating an alleged theft by agent. This offence is created by Section 283 of the Penal Code, Cap 63. One can therefore say that the requisition can be corrected and the police given room to carry out their work. Such a proposition would indeed be reasonable.

71. It must, however, be stated that it is important that a requisition should be clear and specific about the offence being investigated, especially if the person being summoned is going to be charged. In saying so, it must be remembered that the investigator was exercising the power donated to him by Section 52(1) of the National Police Service Act, 2011 which states:

> **"A police officer may, in writing, require any person whom the police officer has reason to believe has information which may assist in the investigation of an alleged offence to attend before him at a police station or police office in the county in which that person resides or for the time being is."**

72. The particulars of the offence being investigated must be stated in the requisition.

73. The requisition issued in this case is not clear about the offence that was to be investigated. The section of the law cited does not create the offence disclosed. SCB which is supposed to be the complainant in a case of theft by its directors had not lodged any complaint with the police. The requisitions are therefore misleading and are likely to prejudice the applicants by denying them an opportunity to adequately prepare for the interview by the investigator. In the circumstances I find and hold that the requisitions did not meet the requirements of Section 52 aforesaid and I quash the same. Of course the investigator is at liberty to issue proper requisitions.

74. The remaining issue is whether the DPP legitimately exercised his power to review the decision not to prosecute SCB. It must be noted from the outset that the DPP has power to review his or her decision to prosecute or not to prosecute. Section 5(4)(e) of The Office of the Director of Public Prosecutions Act, 2013 specifically empowers the DPP to **"review a decision to prosecute, or not to prosecute, any criminal offence."** In exercising this power, the DPP executes the prosecutorial mandate conferred upon that office by Article 157 of the Constitution.

75. Although this Court has supervisory jurisdiction over the exercise of constitutional and statutory powers by the DPP, the Court should only exercise its authority if the mandate granted to the DPP has not been **"exercised responsibly, in accordance with the laws of the land and in good faith"**-see the Court

of Appeal decision in **Commissioner of Police & the Director of Criminal Investigation Department & another v Kenya Commercial Bank & 4 others [2013] eKLR.**

76. Where the DPP has made a decision to prosecute, a person who is dissatisfied with such a decision can challenge it through judicial review proceedings. Also, where the prosecutor decides not to prosecute, the victim of crime can also move to court to seek a review of the decision in the manner in which the interested parties herein did through **Petition No. 244 of 2006** (supra). As was pointed out by the Court of Appeal in the English decision of **R v Christopher Killick [2011] EWCA Crim 1608 "… it has been established that there is a right by an interested person to seek judicial review of the decision not to prosecute …; it would therefore be disproportionate for a public authority not to have a system of review without recourse to court proceedings … As a decision not to prosecute is in reality a final decision for the victim there must be a right to seek a review of such a decision."**

77. The need to protect the interests of victims of crime is paramount hence the enactment of the Victim Protection Act, 2014 in compliance with Article 50(9) of the Constitution. The courts therefore have a duty to protect the power of the DPP to review his decision to prosecute, or not to prosecute. That, however, does not mean that the DPP's power can be exercised illegally, whimsically, capriciously, maliciously and unreasonably. There must be parameters to guide the DPP on when and how to exercise the power of review. Where the DPP fails to self-regulate and there is sufficient evidence that the power of review has been improperly invoked, the High Court will invoke its supervisory jurisdiction in favour of an aggrieved applicant.

78. In the United Kingdom the Crown Prosecution Service has established a policy to guide investigators and the prosecutors on the exercise of the power to review a decision to prosecute or not prosecute. When exercising such power, the prosecutor must start from the presumption that once a suspect is informed of a decision not to prosecute, she or he is entitled to rely on that decision. Section 10 of the Code for Crown Prosecutors of the United Kingdom explains that occasionally there are special reasons why the prosecution service will overturn a decision not to prosecute.

79. In a document titled: **Reconsidering a Prosecution Decision: Legal Guidance"** the Crown Prosecution Service on its website (www.cps.uk – 8th February, 2016) states that the reasons for review of a decision not to prosecute as set out at Section 10.2 of the Code for Crown Prosecutors include:

> **"a)cases where a new look at the original decision shows that it was wrong and, in order to maintain confidence in the criminal justice system, a prosecution should be brought despite the earlier decision;**
>
> b. **cases which are stopped so that more evidence which is likely to become available in the fairly near future can be collected and prepared. In these cases, the prosecutor will tell the defendant that the prosecution may well start again;**
>
> c. **cases which are stopped because of a lack of evidence but where more significant evidence is discovered later; and**
>
> d. **cases involving a death in which a review following the findings of an inquest concludes that a prosecution should be brought, notwithstanding any earlier decision not to prosecute."**

80. In my view, those are some of the reasons that should guide the DPP in making a decision whether or not to reopen a matter that is already closed. The victim of crime should make the application for review timeously. On his part the DPP should make the decision to review without unreasonable delay.

81. In order to arrive at the conclusion that the decision not to prosecute was wrong, the DPP will consider whether there was a significant misinterpretation of the evidence; an incorrect application of the law; or an unjustifiable failure to consider relevant prosecution policy.

82. In making his decision the prosecutor **"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" as required by Article 157(11) of the Constitution. The DPP ought to bear in mind that there is need for the public to have confidence in his office. Public confidence in the office of the DPP will diminish when a decision not to prosecute is haphazardly reversed only for the court to conclude that the revision was an abuse of process.

83. In order for a decision to be reviewed as a result of the discovery of new and important matter or evidence, the evidence ought not to have been available to the investigator or prosecutor at the time the decision not to prosecute was taken. The evidence must be significant. The new evidence should convince the prosecutor that had the same been available at the time the decision not to prosecute was made such a decision could not have been made. Forensic or other complex evidence which may not have been available at the time the decision was made will form a good basis for the review of the decision.

84. Where the prosecutor decides not to prosecute because the evidence is not available at that time, the suspect ought to be cautioned that although a decision not to charge had been made, the decision could be reviewed once evidence became available. The power given to the DPP to review a decision not to prosecute takes care of the public interest which requires that no crime should go unpunished.

85. In exercising the power to revisit a decision not to prosecute, the DPP needs to ensure that there has not been a substantial delay since the original decision not authorise the institution of proceedings. Delay on the part of the prosecutor would substantially prejudice the accused in advancing his or her defence. The decision to reopen a prosecution should be made in good faith and should not prejudice an accused person.

86. The DPP's reasons for revisiting the matter which is the subject of these proceedings are contained in the letter dated 7th April, 2014 addressed to the Director of Criminal Investigations. The letter states in part:

> **"9. In the light of the observations by the Court including in particular that the Standard Chartered Bank "seems to have dwelt with the matter of its customers funds in an opaque manner" and the further observation that the DPP "has an obligation to prosecute any party regardless of its status and should not be seen to fail in this duty when confronted with a situation that suggest wrongdoing on the part of a party like the bank"; I have reviewed the decision by the then Attorney-General not to pursue criminal proceedings against Standard Chartered Bank on the complaints by S. K. Macharia, Madhupaper International and Royal Credit Limited regarding the sum of Kshs. 55 million, the subject of the complaint. In so doing, I have looked at the new evidence/material availed by the complainants to the Judges and Magistrates Vetting Board and the Board's determination thereof….**
>
> **10. Having considered the views of the Hon. Lady Justice Mumbi Ngugi in her judgement referred to above, the new material/evidence presented to the Vetting Board by the complainants and the views of the Vetting Board, I am satisfied that this matter warrants fresh investigations.**
>
> **11.** ***Accordingly, I direct that you cause investigations to be re-opened and further statements recorded from the complainants regarding but not limited to the further evidence/material presented to the Vetting Board. Further and fresh statements should also be recorded from the Standard Chartered Bank."***

87. From the letter it is clear that the decision was based on the "**views of the Hon. Lady Justice Mumbi Ngugi in her judgement referred to above, the new material/evidence presented to the Vetting Board by the complainants and the views of the Vetting Board."** The question is whether the DPP merely acted on the views of the Learned Judge and the Board or actually made a considered decision in exercise of his power of review.

88. The Judge dismissed **Petition No. 244 of 2006 (supra)** on the grounds that:

> **"33. The office of the Attorney General or, under the current Constitution, the Office of the DPP exercises discretion as to whether or not to institute criminal proceedings against a person or body. In the discharge of its functions, the office of the DPP is subject only to the Constitution and the law. This court will not ordinarily interfere with the free exercise of the independence of that office unless it is shown that there is a breach of the Constitution or the law….**
>
> 34. **In the present case, the Attorney General considered the evidence before him and came to the conclusion that there was not enough evidence to prosecute the bank, as evidenced in his letter of 26th October 2005….**
>
> 35. **It was submitted on behalf of the 1st petitioner in impugning the decision not to prosecute that statutory powers can only be exercised validly if they are exercised reasonably. While that is indeed true, the petitioner has not, in his pleadings or submissions, demonstrated what standard of reasonableness this Court is to use to gauge whether the respondent acted reasonably and judiciously or what test of reasonableness, in light of the basis of the investigations, this Court is to employ in order to intervene in the exercise of discretion by the respondent. In other words, the court would have to descend into the minutiae of investigations and the outcome to determine whether or not there is enough evidence to charge the Interested Party.**
>
> 36. **This, I believe, the court cannot properly do, for that is the province of the respondent. Unless it is shown that, on the face of it, the exercise of discretion was so unreasonable, irrational or in breach of a particular law that the decision arrived at cannot be allowed to stand, I am afraid the Court cannot in the circumstances intervene to compel the respondent reach a different conclusion over the investigations. The Court cannot therefore issue the orders sought by the petitioners."**

89. The Judge therefore found that the Attorney General, in whose office the prosecutorial power of the State was then vested, had legally and reasonably exercised his power in arriving at the decision not to prosecute SCB.

90. The views referred to by the DPP are observations made after the Judge had arrived at her decision. She stated that:

> **"37. The Court, however, takes note of the deposition of Mr. Mule where he avers as follows:**
>
> ***"…as a new prosecutorial authority and in line with the spirit and principles of the Constitution of Kenya 2010, the office of the Director of Public Prosecutions would be prepared to reopen and reconsider the matter, review the totality of the evidence including any new and/ or additional evidence the petitioners or any other party may provide."***
>
> 38. **This, I believe, leaves room for the respondents to re-open the matter and carry out further investigations, bearing in mind the somewhat opaque manner in which the bank seems to have dealt with the matter of its customers' funds, and mindful also of the public interest expectations from his office under the new constitutional dispensation. Further, the office of the DPP should at all times in the conduct of its mandate bear in mind its constitutional obligation and the relevant law including the guiding principles under the Office of the Director of Public Prosecutions Act, No. 2 of 2013 ("the Act")**. **These principles include but are not limited to, promotion of public confidence in the integrity of the Office, promotion of constitutionalism, impartiality, rules of natural justice, the need to discharge the functions of the Office on behalf of the people of Kenya and observance of democratic values and principles.**

39.**Further, one of the functions of the DPP under section 5 of the Act is to:**

"implement an effective prosecution mechanism so as to maintain the rule of law and contribute to fair and equitable criminal justice and the effective protection of citizens against crime."

40. **Under section 5(4)*(e)* of the Act, the DPP is mandated to review a decision to prosecute, or not to prosecute, any criminal offence. The DPP has an obligation to prosecute any party, regardless of its or their status, and should not be seen to fail in its duty when confronted with a situation that suggests wrongdoing on the part of a party like the bank which, in the words of the petitioners, is a 'strong economic actor' because of its economic status.**

41. **Should the office of the DPP fail to deal with the matter for reasons that do not accord with its constitutional and statutory mandate, it is open to the petitioners to pursue private prosecution in accordance with the applicable law. To this end, the respondent is under an obligation, in accordance with the provisions of Article 35(1)(b) of the Constitution, to grant access to the petitioners should the petitioners so require, of all the information in its possession that would enable the petitioners pursue a private prosecution of the Interested Party."**

91. In my understanding, the Judge was only reminding the DPP of the need to exercise prosecutorial power in the public interest in order to engender public confidence in that office. The Judge also observed that the DPP had the authority to review the decision not to prosecute SCB. The Judge did not order the DPP to review his decision. The onus of reviewing the decision, if the DPP found it appropriate, belonged to him and him alone.

92. In **Ronald Leposo Musengi v Director of Public Prosecutions & 3 others [2015] eKLR,** Odunga, J reminded the DPP that prosecutorial power belonged to him and no one else. The DPP must be able to own and explain whatever decision he makes. In the cited case the Judge observed at paragraph 89 that:

"It is therefore clear that whereas the discretion given to the respondents to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt. Similarly where the Respondent is shown not to be acting independently but just reading a script prepared by someone else or that he has been pressurised to go through the motions of a trial, the Court will not hesitate to terminate the proceedings as 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.''

93. The DPP could not merely act on the reiteration of the Judge of the law that the DPP could review the Attorney General's decision. Had Mumbi Ngugi, J found that the earlier decision of the Attorney General not to prosecute SCB was improper she would have allowed the petition by the interested parties. She did not do so. In order for the DPP to act on the observations of the Judge, he was under a duty to establish that there were indeed grounds to warrant the exercise of his power to review the decision not to prosecute. In saying so, I find myself in agreement with the observation by the Supreme Court of Ireland (Denham, J) in the case of **Carlin v DPP Appeal No. 105/2008; [2010] (IESC) 14** that:

"7. The Director is an important independent office in the State and independent in the performance of his functions: Prosecution of Offences Act, 1974. A clear policy of non-intervention by the courts in the exercise of the discretion of the prosecutor, except in particular circumstances, has been stated in cases over the last few decades. An independent prosecutor is an important part of the fabric of a fair justice system. <u>The prosecutor must not only be independent but be seen to be independent. If the Director is seen to change his decision where there are no new factors but simply after representations by a victim or his</u>

family, it raises issues as to the integrity of the initial decision and the process, and thus may impinge on confidence in the system. It is important that a prosecutor retain the confidence of society in his process of decision making.

8. It is entirely appropriate that the Director have a process wherein he may review an earlier decision. The fact that he may review his decision is now a matter in the public domain.

9. It is essential that the Director remain independent. However, he is subject to the constitutional requirement of fair procedures. While the fair procedures appropriate at the investigation stage of a prosecution are not equivalent to those at trial in a court of law the process requires to be constitutionally firm.''

[Emphasis supplied].

94. The power to review a decision to prosecute or not to prosecute belongs to the DPP and the courts will only interfere with a decision to reopen a matter where the decision has no basis at all. It was incumbent upon the DPP to demonstrate to this Court that after an independent analysis of the circumstances surrounding the closure of SCB's file, he had reached a conclusion that the matter merited a reconsideration of the decision not to prosecute. There was need for the DPP to show the existence of the conditions for review of the decision not to prosecute. It was not enough for the DPP to simply state that the Judge had commented that he could reopen the matter. I therefore conclude that his first reason for reviewing the decision not to prosecute SCB did not meet any of the conditions required for exercising his power of review.

95. The second ground upon which the DPP based his decision was the evidence presented to the Board and the views of the Board. The interested parties state that they presented evidence to the Board on the matter and the Board made certain comments on the issue. On their part, the applicants aver through the further affidavit sworn on10th February, 2015 by the 9th Applicant that the court case referred to by the Board in its determination was between the interested parties on the one hand and Kenya Commercial Bank and others on the other hand.

96. I note that both sides (the interested parties through the letter to the DPP dated 28th January, 2014 and the applicants through the further affidavit sworn by the 9th Applicant on 10th February, 2015) only refer to portions of the Board's decision. I find it necessary to reproduce in full the comments of the Board on the 1st Interested Party's complaint to the Board. They are found in the document titled: **JUDGES AND MAGISTRATES VETTING BOARD DETERMINATIONS CONCERNING THE JUDGES OF THE COURT OF APPEAL** which was exhibited by the applicants. At pages 37 and 38 the Board stated that:

"One of the tasks imposed by the Act on the Board is to examine the work record of each judge, including past adjudications. It is in this connection that the Board was invited to look at a decision of the Court of Appeal in a well-known case in which Mr S. K. Macharia, a prominent business person, had been the litigant. Mr Macharia contended that three of the judges being interviewed by the Board, who had sat in the matter, should not be considered suitable to remain on the Bench. This was because of what he said was the manifestly biased manner in which, overturning a High Court ruling in his favour, they had made findings against him that had flown in the face of clear evidence that he had been unlawfully coerced, by pressure emanating from the then President, to pay Ksh 56 million to the Kenya Commercial Bank.

The Board must commend Mr. Macharia for his steadfastness in pursuing the matter and assisting the Board with comprehensive materials to back his contentions. He presented his arguments in a forthright manner and responded with dignity to prolonged questions by the counsel and members of the Board, as well to by the judge. Much of the material he placed before us was taken from the record in the appeal. It told a painful story of a hardworking and creative entrepreneur not only being forced by the economic necessity to surrender a

potentially profitable paper-making firm but also compelled as result of political interference to pay out what was then a huge sum of money in a manner that unjustly enriched the bank.

At the same time, much of the most telling detail of a story that was necessarily lengthy and complex, had not been presented in evidence at the trial. Furthermore, the issue, which turned essentially on questions of fact, is still potentially live. One of the judges stated that had he had knowledge of all the information now placed before him, he would in all probability have given a different decision. This judge proposed that the matter be referred to the Supreme Court, which could hear it if it could be shown that grave miscarriage of justice was involved and it was in the public interest for the appeal to be heard.

The Board is of the view that it is not itself in a position to make final determinations on the issues of coercion raised. The decision of the Court of Appeal was given in 2008, when no question of seeking to carry favour from the former President could arise. And central to the decision was a document signed by Mr Macharia, on the advice of his advocate who was noted for his courage and willingness to challenge injustice.

In the circumstances, the Board expressly leaves open the question of either the correctness or the propriety of the decision supported by the three judges. This is a matter that can be dealt with if application is made to the Supreme Court, where the full panoply of evidence can be considered and argument from the other side of the Bank can also enter the reckoning."

[Emphasis supplied].

97. The applicants assert that there is evidence which clearly shows that it was not mentioned in the decision of the Board. They contend that the Board expressly referred to Kenya Commercial Bank in its decision and an affidavit sworn by the interested parties in an application filed in the Supreme Court against Kenya Commercial Bank and others clearly demonstrated that the interested parties' complaint to the Board concerned Kenya Commercial Bank and not SCB.

98. The respondents and the interested parties did not challenge the applicants' averments, for indeed the complaint lodged before the Board by the interested parties did not concern SCB. The complaint before the Board was against three judges of the Court of Appeal who had overturned a decision made by the High Court against Kenya Commercial Bank in favour of the interested parties. The parties before me agree that the case against SCB was dismissed by the High Court for want of prosecution and an appeal filed by the interested parties is yet to be determined. It is therefore clear that the interested parties did not complain against SCB as can be seen from the decision of the Board.

99. It is thus not difficult to agree with the applicants that any evidence presented to the Board had nothing to do with SCB. It is also noted that although the Board made its decision in early 2012, it took the interested parties close to two years to request the DPP for a review on the strength of the determination by the Board. It can only be concluded that the interested parties were all along conscious of the fact that the decision of the Board had nothing to do with SCB.

100. It was therefore wrong for the DPP to rely on the determination by the Board on a matter not related to the dispute between SCB and the interested parties in deciding to revisit the decision not to prosecute SCB. The opinion of the Board was therefore not a ground for reviewing the decision not to prosecute SCB.

101. I agree with the applicants that the DPP had no reason for reopening of the interested parties' complaint against SCB thus necessitating the issuance of the requisitions in question. The power of the DPP to reopen a decision not to prosecute is not open-ended. It must be exercised within the parameters already stated in this judgement and for good reason. In this case the DPP exercised his power of review for no reason at all. That amounts to abuse of power. An illegitimate exercise of power, as has been done by the DPP in this matter, invites the exercise of supervisory jurisdiction by this Court.

102. Misunderstanding or ignorance of an established and relevant fact is a ground for grant of orders in judicial review proceedings. This principle of law was brought out by Scarman L J in **Secretary of State for Education and Science v Metropolitan Borough of Tameside [1976] 3 All ER 665** when he stated at page 675 that:

> **"Secondly, I do not accept that the scope of judicial review is limited quite to the extent suggested by counsel for Secretary of State. I would add a further situation to those specified by him; misunderstanding or ignorance of an established and relevant fact….**
>
> **Lord Denning MR has briefly referred to some of the case law on the matter; and in the short time available I have looked to see if there is authority which would belie what I believe to be the law, and there is none. I think that the law, which I believe to exist, follows from the cases to which Lord Denning MR has referred, and is really to be deduced from a well-known passage in Professor de Smith's Judicial Review of Administrative Action, where he says:**
>
> **'Secondly, a court may hold that it can interfere if the competent authority has misdirected itself by applying a wrong legal test to the question before it, or by misunderstanding the nature of the matter in respect of which it has to be satisfied. Such criteria are sufficiently elastic to justify either a broad or a narrow test of validity; and they seem to have become increasingly popular. Thirdly, a court may state its readiness to interfere if there are no grounds on which a reasonable authority could have been satisfied as to the existence of the conditions precedent. This test can be combined with the first and the second.' "**

[Emphasis supplied].

103. A public body should not engage its powers where no basis has been established for the exercise of its mandate. In order for a public body to act, grounds must first be established for taking action. Action taken for no reason amounts to abuse of power and can even form the basis for imputing malice and bad faith.

104. Further evidence of abuse of power by the DPP is also found in the averment by Mr. Mule that banks in other jurisdictions have been prosecuted. That averment had no relevance to the decision to review the decision not to prosecute SCB. The statement only confirms that the decision of the DPP was not based on sound grounds. In basing his decision on prosecutions in other jurisdictions which were not related to the case at hand, the DPP took irrelevant matters into consideration. A decision based on irrelevant considerations will attract judicial review orders.

105. It is also noted that although the decision of the Attorney General not to prosecute was made in 2005, the application for review was made by the interested parties nine years later. The interested parties may argue that new developments only occurred after nine years. Such an argument is however unsustainable as no new material evidence, as already demonstrated, had emerged to merit a review of the decision not to prosecute.

ORDERS

106. The requisitions issued to the applicants by Chief Inspector Michael Kimilu were thus premised on unlawful exercise of power by the DPP. The said requisitions are therefore quashed. Consequently, the Kenya Police and the DPP are prohibited from commencing any investigations or prosecution of the applicants based on the decision made by the DPP through the letter dated 7th April, 2014 to review the decision made by the Attorney General on 26th November, 2005 not to prosecute SCB. There will be no order as to costs.

Dated, signed & delivered at Nairobi this 26th day of Feb., 2016

W. KORIR,

JUDGE OF THE HIGH COURT