REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION – MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPLICATION NO.502 OF 2015

IN THE MATTER OF AN APPLICATION BY PRAXIDIS NAMONI SAISI FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF ANTI-CORRUPTION COURT CASE NO. 20 OF 2015

REPUBLIC OF KENYA

VERSUS

(1)NICHOLAS KARUME WEKE (2) ABRAHAM KIPCHIRCHIR SAAT (3)PETER AYODO OMENDA (4) GODWIN MWAGAE MWAWONGO (5) PRAXIDIS NAMONI SAISI (6) CALEB INDIATSI MBAYI (7) BRUNO MUGAMBI LINYIRU (8) SILAS MASINDE SIMIYU (9) MICHAEL MAINGI MBEVI

AND

IN THE MATTER OF AND/OR THE VIOLATION OF ARTICLES 10,22,23,27,28,29,41, 50,157,165 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE ABUSE OF POWERS CONFERRED BY SECTIONS 4, 5 AND 6 OF THE DIRECTOR OF PUBLIC PROSECUTIONS ACT NO. 2 OF 2013

AND

IN THE MATTER OF AND/OR THE BREACH OF SECTIONS 7(1) (2), 8, 9, 10, 11, AND 12 OF THE FAIR ADMINISTRATIVE ACTION ACT No. 5 OF 2015

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CHAPTER 26, LAWS OF KENYA

AND

IN THE MATTER ORDER 53 OF THE CIVIL PROCEDURE RULES 2010

AND

REPUBLIC ……..APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.…….RESPONDENT

AND

THE ETHICS AND ANTI-CORRUPTION

COMMISSION……..……1ST INTERESTED PARTY

THE CHIEF MAGISTRATE'S ANTI-CORRUPTION

COURT AT MILIMANI LAW COURTS,

NAIROBI….……2ND INTERESTED PARTY

EX PARTE

PRAXIDIS NAMONI SAISI……..…...…….APPLICANT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 2nd December, 2015, the ex parte applicant herein, **Praxidis Namoni Saisi**, seeks the following orders:

1. **THAT the Honourable Court be pleased to issue an Order of Certiorari to remove and bring to this Honourable Court for the purposes of quashing the decision of the 1st Interested Party to recommend to the Respondent that the Ex parte Applicant be charged with various anti-corruption offences and the decision of the Respondent to direct prosecution of the Ex parte Applicant Praxidis Namoni Saisi contained in the Press Statement from the Office of the Director of Public Prosecutions dated 13/11/2015 and in the charge sheet in Anti-Corruption Case No. 20 of 2015 Republic of Kenya vs Nicholas Karume and & 8 others before the Chief Magistrate's Court (Milimani Law Courts) Nairobi.**
2. **THAT the Honourable Court be pleased to issue an Order of Prohibition do issue prohibiting the Respondent from prosecuting, sustaining, proceeding, hearing, conducting or in any manner dealing with or completing the hearing of the charges laid or proceedings conducted in the Anti-Corruption Case Number 20 of 2015 between the Republic vs Nicholas Karume Weke& 8 Others before the Chief Magistrate's Court (Milimani Law Courts) Nairobi so far as they touch on or relate or howsoever concern the 5th Accused (the ex parte applicant herein) Praxidis Namoni Saisi in Counts I, III and IV or instituting any other charges in any other court against the Ex parte Applicant over the award of Tender No. Ref. GDC/HQS/086/2011-12 and the contract of that Tender No. Ref. GDC/HQS/086/2011-12 between Geothermal Development Company Limited and Bonfide Clearing and Forwarding Ltd in respect of rig move services.**
3. **Such further or other relief as this Honourable Court may deem just and expedient to grant in the circumstances.**
4. **THAT Costs of and incidental to the application be provided for.**

Applicant's Case

2. According to the applicant, an advocate of the High Court of Kenya, she is a Certified Public Secretary of Kenya, the General Manager and the Legal Services and Company Secretary Geothermal Development Company Ltd (hereinafter referred to as "the Company") and was admitted as an advocate of the High Court of Kenya in 1992. She disclosed that she has been a Certified Public Secretary since 2004 to date and was employed by the Company as Company Secretary and is presently the General Manager Legal Services and Company Secretary.
3. It was averred that the Company is a company incorporated under the ***Companies Act*** and fully owned by the Government of the Republic Kenya as a state corporation carrying on the business of the geothermal exploration, assessment, extraction, utilization and development of natural resources including geothermal heat and steam water and other resources commonly or conveniently used by persons carrying on the business of geothermal resource development.
4. She averred that on 29th October, 2015 and 30th October, 2015 she became aware through social media, electronic media and the Daily print that the 1st Interested Party (hereinafter referred to as "the Commission") had recommended to the Director of Public Prosecutions (the Respondent) for the Managing Director of the Company Ltd, **Mr. Silas Simiyu,** the applicant and members of the Tender Committee to be charged in Court over irregularities involving Rig Move Services in the 2012/2013 financial year. On 13th November, 2015 the Office of the Respondent issued a press statement and which it posted on its website that stated that the Respondent had on the same day made decisions on the files submitted to him by the Commission *inter alia* that having considered the files submitted to him by the Commission relating to allegations of irregular procurement of Rig Move Services by the Company from Bonfide Clearing & Forwarding Ltd (also referred to as "BCFL") in the financial year 2012/2013 recommending specific officials of the Company be charged with various criminal offences, he was satisfied that satisfied that there was sufficient evidence to sustain the proposed charges against the said Company officials and accordingly directed prosecution to ensue.
5. It was however contended that the applicant's name was not among the list of certain officers referred to in the Presidential Address in Parliament on 26th March, 2015. However, on 16th November, 2015 the applicant was summoned to the Commission's offices at Integrity Centre and when the investigating officer in charge of the Company matter at about 10.00 a.m. informed her that she was formally under arrest but would be released upon payment of Kshs. 100,000/= police bond and after completion of procedural processes where her finger prints were taken and a charge and caution administered before she was released at 4.30 p.m. after paying the police bond and ordered to report to the same EACC Police Station at Integrity Centre on 17th November, 2015 at 7.00 am for the Commission to convey her to the Anti-Corruption Court to answer to charges that had been read to her at the police station which charges related willful failure to comply with the law relating to procurement contrary to section 45(2)(b) as read with section 48(1)(a) of the ***Anticorruption and Economic Crimes Act, 2003*** and abuse of office contrary to section 46 as read with section 48 of the ***Anti Corruption and Economic Crimes Act*** no. 3 of 2003.
6. According to the applicant, the Company advertised in the Standard Newspaper 4th July, 2012 for a Tender No. Ref. GDC/HQS/086/2011-2012 provision of Rig Move Services for Menengai Geothermal Project and cited in Count I, III and IV in the Anti-Corruption Case No. 20 of 2015 as against the Applicant. However, the Tender No. Ref. GDC/HQS/086/2011-12 referred to in the particulars of offence at Count 1 of the charges in ***Anti-corruption Case No. 20 of 2015*** (hereinafter referred to as "the Criminal Case") was a procurement undertaken, processed by the Company pursuant to the ***Public Procurement and Disposal Act 2005*** (hereinafter referred to as "the Act) and the ***Public Procurement and Disposal Regulations 2006*** (hereinafter referred to as "the Regulations").
7. It was averred that the Tender No. Ref. GDC/HQS/086/2011-12 referred to in the particulars of offence at Count III and IV of the charges in the criminal case culminated in the signing of a contract, referred to in Counts III and IV of the charges in the said case as prescribed in the Act and the Regulations.

8. In the applicant's view, the anchor of Count III and IV of the Anti-Corruption charges thrust against her in the criminal case is based on the contract for Tender No. Ref. GDC/HQS/086/2011-12 entered between the Company and Bonfide Clearing and Forwarding Limited, that she failed to comply with the law relating to procurement to wit section 27(3) of the Act by signing a contract of Tender No. Ref GDC/HQS/086/2011-12 with Bonfide Clearing and Forwarding Ltd in respect of rig move services, a contract which contained a price of Kshs. 42,746,000/= per Rig Move which was in excess of prevailing market prices.
9. However, the contract shows that it was signed by the Managing Director as required by Regulation 7(c) of the Regulations in her presence hence the applicant was merely a witness to the signatory of the same since Regulation 7(c) of the Regulations places the responsibility for signing contracts for procurement on the accounting officer and who pursuant to Section 3 (I)(a) of the Act and in the case of the Company was the Managing Director/Chief Executive Officer.
10. The applicant further revealed that the contract, the subject of the prosecution in the criminal case on the face of it was not executed under Common Seal of the Company but signed for and on behalf of the Geothermal Development Company Ltd by the Managing Director/Chief Executive Officer.
11. To the applicant, section 68 of the Act 2005 stipulates that the person submitting the successful Tender and the procuring entity shall enter into a written contract based on the Tender documents, the successful Tender, any clarifications under section 62 and any corrections under section 63. Section 26 of the Act on the other hand provides for segregation of responsibilities in a public entity. Since Tender No. Ref. GDC/HQS/086/2011-12 was an open Tender under "Part V – Open Tendering" of the Act, each bidder quotes its price in the hope that its price will be the best price. Under Section 52(3)(i) of the Act the Tender Document sets out the procedures and criteria to be used to evaluate and compare the Tenders while section 66(2) of the Act stipulates that the evaluation and comparison is to be done using the procedures and criteria set out in the Tender documents and no other criteria is to be used.
12. The applicant averred that Tender No. Ref. GDC/HQS/086/2011-12 does not on the face of it and in terms of section 66(2) allow the introduction of criteria that was not contained in that Tender document. However the charge in Count I against the her is that "*being a member of the Geothermal Development Company Tender Committee and persons whose functions were concerned with the use of public funds in Geothermal Development Company jointly and willfully failed to comply with the law relating to procurement to wit Regulations 10(2)(e) of the Public Procurement and Disposal Regulations 2006 by confirming an award of Tender No. Ref GDC/HQS/086/2011-12 which contained a price of Kshs. 42,746,000/= per Rig Move to Bonfide Clearing and Forwarding Ltd in respect of Rig Move Services"*. In the applicant's view, this charge in hindsight calls upon the Tender Committee to embark on a comparison of prices for a service that is not contemplated by section 30(3) of the Act which such comparison is therefore ultra vires**.**
13. It was contended that section 30(3) of the Act stipulates that standard goods, services and works with known market prices shall be procured at the prevailing real market price and that though the Public Procurement Oversight Authority (PPOA) established under section 8 of the Act 2005 publishes market price index, the procurement by the Company, Tender No. Ref. GDC/HQS/086/2011-12 was not for a service whose price was published in the Public Procurement Oversight Authority (PPOA) market price index so that it could be said that the Tender Committee failed to comply with Regulation 10(e) to ensure that the procuring entity did not pay in excess of prevailing market prices. It was further contended that the procurement in Tender No. Ref. GDC/HQS/086/2011-12 was not standard goods, services and works with known market prices as stipulated at section 30 (3) to be procured at the prevailing real market price as set out in Public Procurement Oversight Authority published market index.
14. The applicant the Regulations 2006 stipulates that the functions of the procurement unit established at Regulation 8(1) shall act as a secretariat to the Tender Procurement and Disposal Committees and at Regulation 8(3)(z) the procurement unit shall carry out periodic market surveys to inform the placing of orders or adjudication by the relevant award committee. However, none of these are duties of the Tender Committee as set out in Regulation 10 of the Regulations.
15. It was therefore the applicant's case that provision of rig move services as per the Public Procurement Oversight Authority is not standard goods, services and works with known market

prices and the charges preferred against her are illusory, a phantom, an arrant abuse of the court process as no iota of the ingredients of an offence have any basis in law or on the face of it hence the decision by the Commission to recommend for her prosecution and the Respondent's decision to prosecute her in the premises is an enterprise in capriciousness , high handedness, abuse of the process of the court, using the criminal justice not for the enforcement of the law but the whims of others.

16. It was submitted on behalf of the applicant that the decision to prosecute the ex parte applicant is predicated on illegality, irrationality and procedural impropriety. It was contended that the Respondent made an error of law in the process of arriving at the decision that the Exparte Applicant be charged with the three offences since the Respondent did not understand correctly the law that regulated his decision making power – the ***Public Procurement and Disposal Act 2005*** and the ***Public Procurement and Disposal Regulations 2006*** and whereupon he could exercise or not his State Powers to prosecute if on the facts an offence had been committed or not under those procurement laws. This submission was based on **Council of Civil Service Unions and Others vs. Minister for The Civil Service [1984] 3 ALL ER 935**, at page 950 where **Lord Diplock** defined the ground of illegality as encapsulating the requirement *"that the decision maker must understand correctly the law that regulates his decision making power and give effect to it"*.

17. It was submitted that the Chief Magistrate's Court at Milimani Nairobi (the 2nd Interested Party) seised of Anti- Corruption Case No 20 of 2015 against the Ex parte Applicant does not have jurisdiction to exercise judicial review powers over the decision making process of the Respondent that led to his making the decision pursuant to his State Powers under Article 157(6)(a) of the Constitution that the Ex parte Applicant had committed offences and therefore ought to be charged. Therefore, it is for this Court under Articles 159(1), 165 (3) (a) & (e), (6) of the Constitution, section 8 and 9 of the ***Law Reform Act***, section 7 of the ***Fair Administrative Action Act 2015***, and Order 53 of the ***Civil Procedure Rules 2010*** to determine whether the Respondent made an error of law in arriving at the decision to prefer the charges (aforesaid) against the Ex Parte Applicant.

18. While reproducing the charges which were alleged against the ex parte it was submitted that had the Respondent not committed errors of law in interpreting the Act and the Regulations and applying those laws to the subject and the Contract to Tender no. Ref GDC/HQS/086/2011-12 he would have reached the decision that no offence(s) had been committed and none was capable of being committed by the ex parte Applicant on those fundamental foundational facts to trigger the exercise of his State Powers to prosecute at article 157(6)(a) of the Constitution.

19. While citing section 3 of the ***Interpretation and General Provisions Act*** Cap 2 of the Laws of Kenya with respect to the definition of "offence" it was submitted that the ***Public Procurement and Disposal Act 2005*** was enacted for the purpose of establishing procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the objectives of (a) to maximize economy and efficiency (b) to promote competition and ensure that competitors are treated fairly (c) to promote the integrity and fairness of the procedures (d) to increase transparency and accountability in the procedures (e) to increase public confidence in those procedures (f) facilitate the promotion of local industry and economic development while the ***Public Procurement and Disposal Regulations 2006*** were made by the Minster for Finance in exercise of powers conferred by section 140 of the Act and for the better carrying out of the provisions of the Act.

20. To the applicant, had the Respondent correctly interpreted the applicable law as to the applicability of Regulation 10(2)(e) of the Regulations in reaching his decision he would have come to the correct decision that the Tender Committee and by extension the Ex Parte Applicant did not have a duty in Tender no. Ref. GDC/HQS/086/2011-12 and the applicable laws, section 52(3)(i) and 66(2) to ensure that the procuring entity does not pay in excess of prevailing market price and therefore no offence as purported at Count 1 was capable of being committed by the Ex Parte Applicant. In support of this submission, the applicant relied on section 66(2) of the Act which provides that "*the evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used" and* submitted that the Respondent erred in law in making the decision that the Ex Parte Applicant failed to comply with Regulation 10(2)(e) as to have complied with that Regulation would have violated Sections 52(3)

(i), Section 66(2) of the Act that rank ahead of the Regulations and the Tender no. Ref GDC/HQS/086/2011-12.

21. It was submitted that the question of a prevailing market price by its intrinsic designation is that it is an objectively determined pre-existing (prevailing) price nameable at the time the subject Tender Award was made and not a subjective after the event (Tender Award) endeavor to set the same and the PPOA Market Price Index was the applicable reference point in the absence of the Tender having required the procuring entity to undertake its own market survey. Therefore the ex parte Applicant contended that the Respondent did not correctly or at all interpret section 30(3) of the Act in his decision making process to reach the conclusion that the ex parte Applicant failed to comply with Regulation 10(2)(e) and therefore ought to be charged with Count I in the charges against her since the charge is premised on a non-existent unnamed prevailing market price and that failure being incurable as "rig move services" the subject of Tender no. Ref: GDC/HQS/086/2011-12 is not "standard goods, services and works with known market prices.
22. It was therefore submitted that no offence known in law is extant on the material foundational facts and a correct interpretation of the applicable Act, Regulations and the subject Tender and the Respondent's charge preferred at Count I is an invention of the Respondent through a misapprehension of the law and this Court is empowered in its judicial review jurisdiction to quash the decision of the Respondent to purport to charge the Ex Parte Applicant with a non-existent offence. It is a travesty of the Rule of Law for the Respondent to purport to a charge a citizen in a Court of Law with a purported offence when the citizen has complied with the law and thereby leaving the logical inference that the Respondent is charging the person for complying with the law.
23. It was submitted that a correct understanding of section 27(3) of the Act and as to who the Act imposes the duty to sign procurement contracts is to be found at Regulation 7 and 7(c) of the Regulations. However, the Ex Parte Applicant is the Company Secretary and not the Chief Executive Officer and on the of face the contract the Ex Parte Applicant signed as a witness to the signatory of the contract who was plainly the Chief Executive Officer and not the Ex parte Applicant. It was therefore submitted that the Respondent in the process of making the decision to prefer Count III of the charge against the Ex Parte Applicant failed to correctly interpret the law to wit that the responsibility for signing contracts for the procurement activities on behalf of the Company is vested by Regulation 7(c) with the accounting officer, and in the material Tender the Managing Director & CEO and who in fact is the signatory to the contract of Tender which was not executed under Common Seal.
24. It was submitted that the Respondent through an error of law to wit wrong interpretation of section 27(3) of the Act as read together with Regulation 7(c) of the Regulations cast upon the ex parte Applicant a duty which the Act and the Regulations place on the accounting officer and based on the misapprehension of law preferred the charge in the alleged offence in Count III and which in fact and in law is a non-existent offence as against the Ex Parte Applicant on the material contract to Tender no. Ref. GDC/HQS/086/2011-12. In support of this position the applicant relied on **Republic vs. Director of Public Prosecution & 2 Others ex-parte Nyaboga Mariaria [2014] eKLR** where the Court stated at page 11 that:

    "In my view, to charge an advocate who was involved in a conveyancing transaction with obtaining money by false pretences when the evidence shows that the advocate was not a party to the transaction in question reeks of malice"

25. It was the applicant's case that similarly in the instant case (Anti-Corruption Case No 20 of 2015) to charge a Company Secretary who is also an advocate for attesting (witnessing) a signature of a signatory to a contract when on the face of the contract the Company Secretary was not a signing party of the contract in question reeks of malice.
26. Following on the foregoing argument it was submitted that on a correct interpretation of the law, the applicant is incapable of conferring a benefit of the Contract Agreement for Tender no. Ref. GDC/HQS/086/2011-12 as she is not a signatory for and on behalf of the Company and not a party to the transaction and more so when the signing of procurement contracts was not one of her areas of responsibility.
27. With respect to irrationality the applicant cited **De Smith's Judicial Review** (sixth edition) at

Page 559.

28. Reliance was also placed on **Council of Civil Service Unions and Others vs. Minister for the Civil Service [1984] 3 All ER** where the Court said:

"By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury' unreasonableness… It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to decide could have arrived at it".

29. It was submitted that there was an absence of logical connection between the decision of the Respondent and the material law; that there was no comprehensible rationale, foundation, basis, for the Respondent reaching the decision that the Ex parte Applicant as an attesting witness to the Contract Agreement should be metamorphosed into a signatory of the said Contract and thereby be made criminally culpable when the fact of the matter is that she is not a signatory and that to purport to transform a witness (attestor) to the signature of the signatory of a contract into also a signatory of that contract simply fails to add up and there is a self-evident error of reasoning, which robs the decision of logic that there is no logic in how a witness to a signature of a signatory of a contract by the mere act of being a witness can confer a benefit through the instrumentality of that contract. The applicant relied on **R (On the Application of Norwich and Peterborough Building Society vs. Financial Ombudsman Service Ltd [2003] 1 All ER (Comm.) 65** where the Court stated at Page 17:

"Mr Boswood in characterizing the decision as to 'relative onerousness' or compensation as 'irrational' was doing no more, he submitted, than saying that there were in it errors of reasoning which robbed the decision of logic; it was a decision which did not 'add up'--an analysis of 'irrationality' which he derived from Sedley J in R vs. Parliamentary Comr for Administration, ex p Balchin [1997] JPL 917. I respectively agree with that description of legal irrationality."

30. The Ex parte Applicant submitted that the manifest errors of reasoning inherent in the interpretation the Respondent brought to bear on the subject and the Contract Agreement to that Tender and the material provisions of the Act and the Regulations leading to the preferring of the charges in Anti-Corruption Case No 20 of 2015 robbed the decision off logic and relied on **Sedley, J's** decision **R vs. Parliamentary Commissioner for Administration, ex parte Balchin and Another [1998] 1 PLR 1**, at page 11 that:

"What the not very apposite term "irrationality" generally means in this branch of the law is a decision which does not add up-in which, in other words, there is a error of reasoning which robs the decision of logic."

31. With respect to procedural impropriety, the applicant relied on ***Blackstone's Civil Practice*** **2006** at page 961 (74.21) where it is stated that:

"Procedural impropriety is concerned with the procedure by which a decision is reached, not the ultimate outcome. In order to prove procedural impropriety, the applicant must show that the decision was reached in an unfair manner. If there is no statutory framework which expressly stipulates the relevant procedural requirements, there are two applicable common law rules under this head, namely;

(a) the rule against bias, which requires the public body to be impartial and to be seen to be so; and

(b) the right to a fair hearing whereby those affected by a decision of a public body are entitled to know what the case is against them and to have a proper opportunity to put their case forward."

32. The Ex parte Applicant contended that by virtue of the invented offences, non-existent offences thrust against her by the Respondent in the counts preferred against her in the criminal case, her right to a fair hearing of being entitled to know what the case is against her and for her to have a proper opportunity to put her case forward is rendered null and void.
33. To the applicant, the illegality, irrationality and procedural impropriety imprinted in the decision making process of the Respondent to prosecute the Ex-parte Applicant articulated hereinabove renders the prosecution of the Ex-parte Applicant bad in law as it is founded on no legitimate offence and absenting an offence, the power of the Respondent to prosecute is non-existent. To her on a careful reading of the material provisions of the Act, the Regulations, the Tender and the Contract Agreement, there is no breach of the law by the Ex parte Applicant as alleged in Count I, III, and IV. It was submitted that the condition precedent for a prosecution to ensue is the existence of an offence against a party charged. Lacking such an offence known in law, any caricature of an offence as invented by a prosecutor renders a prosecution bad in law and it that this is the reality in the charges preferred against Ex-parte Applicant in the criminal case. This submission was based on **Githunguri vs. Republic [1986] KLR 1** at page 18 and 19 where a three bench High Court constituted of Ag. Chief **Justice Madan** and **Justices Aganyanya** and **Gicheru** expressed themselves as follows:

"But from early times… the Court had inherently its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing – the Court had the right to protect itself against such an abuse…The power seemed to be inherent in the jurisdiction of every Court of Justice to protect itself from the abuse of its own procedure...every Court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the Court…Mr Chunga argued that to grant the application would be tantamount to curtailing or interfering with the powers of the Attorney-General under section26 of the Constitution. This argument of his compels us to say that he kept freewheeling for a long time before us because perhaps he did not understand the real purport of the application. No one has made any challenge to the powers of the Attorney-General, nor would any one succeed if he were to say that the Attorney-General's powers under section 26 can be interfered with. What this application is questioning is the mode (emphasis ours) of exercising those powers…No one will succeed in convincing us that the Court does not have inherent powers to exercise supervisory jurisdiction over tribunals and individuals acting in administrative or quasi-judicial capacity…A prosecution is not to be made good by what it turns up. It is good or bad when it starts. The long and short of it is that in our opinion it is not right to prosecute the applicant as proposed."

34. The Ex Parte Applicant also relied on **Mohammed Gulam Husseign Fazal Karmali & Another vs. Chief Magistrate's Court Nairobi & Another [2006] eKLR** where **Nyamu, J** examined the policy considerations for halting criminal proceedings, noting that the court has two fundamental policy considerations to take into account which were enunciated in the case of **M. Devao vs. Department of Labour (190) in sur 464 at 481** as:

"The first is that the public interests in the administration of justice require that the court protects its ability to function as a court of law, by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court processes may lend themselves to oppression and injustice…the court grants a permanent stay in order to prevent the criminal process from being used for purposes alien to the administration of criminal justice under the law. It may intervene in this way if it concludes that the court processes are being employed for ulterior purposes or in such a way as to cause improper vexation and oppression."

35. According to the applicant, as the contentions of the Commission do not answer the applicant's complaints the application ought to be allowed.

Respondents' Case

36. According to the Respondent, the Commission commenced investigations into allegations of irregular procurement at **Geothermal Development Company (GDC)** emanating from procurement of Rig Move services for Menengai Geothermal project, tender no. **GDC/HQS/OT/086/2011-12** which investigations revealed that this tender was awarded to **M/S Bonafide Clearing and Forwarding Company limited** at Kshs. **42,746,000** per rigmove in September 2012. This figure, it averred, represents an approximate escalation of about 300% when compared with a similar tender awarded to the same firm at Kshs. 19,500,000 per move in the previous year 2011.
37. It was averred that the complaint and investigation was concerning Procurement anomalies in the tender process which were summarized as follows:

i. The tender for Rig Move services was advertised on 2nd July 2012 in the *Daily Nation* and on 4th July 2012 in the *Standard Newspapers* with a closing date of 26th July 2012.
ii. A mandatory site visit of the project area in Menengai was done on 12th July 2012 as per minute/site attendance register and bidders were issued with site visit certificates.
iii. On 23rd July 2012 a Tender Opening Committee was appointed vide a memo signed by **Silas Masinde Simiyu** the Managing Director and CEO of GDC. This comprised **Justus Muhambi**, **Yussuf Hussein** and **Ludasia Ochieno**. On 26th July 2012, in the presence of bidder's representatives, tenders were opened and six firms submitted their bids as follows:

Name of the Firm	**Tender Sum**
Danki VenturesKshs.	Kshs. 22,105,540
Bonafide C & F Ltd	Kshs. 42,746,000
BBP Logistics EA. Ltd	Kshs. 19,250,000
Civicon Ltd.	USD. 233,740
P.N. Mashuru LTD.	Kshs. 18,038,000
Waki C& F	Kshs. 35,000,000

iv. On 25th July 2012 a Tender Evaluation Committee was appointed vide a memo signed by **Silas Masinde Simiyu** the Managing Director and CEO of GDC comprising **Joseph Muhati**, **Thomas Miyora**, **Lawrence Murungi** and **Victor Waswa** .

a. The evaluation committee carried out evaluation as stipulated in the tender document and submitted its report dated 14th August 2012. This report recommended M/s Bonafide Clearing and Forwarding at their tender price of Kshs. 42,746,000 per rig move.
b. Under the sub-head titled "justification" this report outlined the resources required for a rig move relating to two rigs. This was compared to those resources available at the Company. This section concluded by stating that the Company was not in a position to carry out rig move economically hence the need to outsource.
c. Under the sub-head titled "clarification sought" the committee deliberated whether it was a mandatory requirement for suppliers to provide proof of past contracts. This was in particular reference to BBP Logistics EA which had failed to meet other criteria that had disqualified them.
d. Under sub-head 5.3 Financial Evaluation, a title "Note" is included. This section observes a clarification concerning BBP Logistics' bid would have saved GDC Kshs. 23,000,000 per rig move.
e. This report was subsequently forwarded to **Michael Maingi Mbevi**. On 17th August 2012 **Joseph Muhati** states that he received pressure from **Michael Mbevi** and **Abraham Saat** through email

communications to change the evaluation report. On 28th August 2012, all the members of the evaluation committee were called to a meeting in their head office and present in the meeting was **Silas Masinde Simiyu**, **Michael Mbevi**, **Abraham Saat**, **Godwin Mwawongo** and **Bruno Linyiru**.

f. This meeting discussed the evaluation report dated 14th August 2012. As a result, the report was amended and signed on 28th August 2012.
g. In the revised report, dated 28 August 2012, the "justification" section was altered by omitting the tables and analysis of resources. The section titled "clarification" and "note" as well as their contents was also deleted.

v. On 29th August 2012 the **tender committee** sat to deliberate this tender. The committee comprised **Nicholas Weke**, **Bruno Linyuri**, **Dr. Peter Omenda**, **Godwin Mwawongo, Praxidis Saisi**, **Caleb Indiatsi** and **Abraham Saat**. Under minute MIN 6 TC 5/2012-13, the tender committee approved the award of tender no. **GDC/HQS/OT/086/2011-12** to **M/S Bonafide Clearing and Forwarding Company limited** at Kshs. **42,746,000** per rig move.
vi. A notification was done to the winning bidder and regret letters to those who lost the tender
vii. On 2nd October 2012 a contract agreement between GDC and M/S Bonafide Clearing and Forwarding Company limited was signed. **Silas Masinde Simiyu** signed the contract on behalf of the Company and **Amos Ngojo** signed on behalf of M/S Bonafide Clearing and Forwarding Company limited.

38. It was further averred that investigation further revealed that in the financial year 2010/2011, the Company procured rig move services for its Menengai Geothermal project vide tender no. GDC/HQS/OT/2010-2011 which tender was awarded to M/S Bonafide Clearing and Forwarding Company limited at Kshs. 19,550,000 per move. Further investigations revealed that KENGEN procurement for rig move services at Olkaria and Eburru Geothermal fields vide tender no. KGN-OLK-179-2012 resulted in an agreement dated 5th February 2014 between KENGEN and M/S Bonafide Clearing and Forwarding Company Limited and that the cost of rig moves under this contract ranged between Kshs. 13,565,040 and Kshs. 24,429,600.
39. Following the aforesaid investigations, the Commission recommended that **Silas Masinde Simiyu, Abraham Saat**, **Nicholas Weke, Peter Omenda, Godwin Mwawongo**, **Praxidis Saisi**, **Caleb Indiatsi** and **Bruno Linyuri** be charged with the offences named in the charge sheet in Anti Corruption Case of No. 20 of 2015 at the Chief Magistrate Court Nairobi after concluding that the Company did not get value for money since the tender price of Kshs. 42,746,000/= was above the normal market rates based on comparing tender GDC/HQS/086/2011-12 with tender GDC/HQS/038/2010:2011 and Kengen tender no. KGN/OLK-179-2012.
40. The Respondent averred that upon analysis of evidence on the investigation file, the DPP agreed with the Commission that there was sufficient evidence to charge all the accused persons in Anti corruption case no 20 of 2015 with the offences they have been charged with in the said case. In their view, the decision to charge the Applicant in this case alongside other suspects named in the said charge sheet was based on analysis of evidence on the investigation file and determination that the same was sufficient to prosecute the Applicant alongside others and was based on correct interpretation of the law relating to procurement and other applicable laws and regulations and in tandem with the Constitution and therefore there was no violation of the constitution or misinterpretation of any provision of the law that was done in the process leading to the decision to charge the Applicant.
41. To the Respondent, the challenges raised by the Applicant on the decision to charge her with the Anti Corruption case No 20 of 2015 constitute a defense available to her to raise during prosecution of the said case and not by way of judicial review which is concerned with the legality of the process leading to the decision to charge and not the merit of the decision to charge which ought to be determined by the trial court in the criminal case.
42. It was therefore the Respondent's case that the Applicant failed to demonstrate that the decision to charge was arrived at either through unlawful or illegal process or is contrary to the constitution or any provision of any written law or rules made thereunder or the rules of natural justice and accordingly prayed that the Notice of Motion filed herein be dismissed with costs.

The Commission's Case

43. According to the Commission, it received a complaint of failure to comply with procurement law by the Geothermal Development Company (GDC) Tender Committee emanating from procurement of rig move services tender no. GDC/HQS/OT/096/20011-2012 between July and August 2012 allegedly at an inflated contract price by the same service provider previously engaged by the Company which allegations were within the mandate of the Commission to investigate.
44. According to the Commission, investigations did reveal that the contract price for the said tender was unjustifiably inflated in comparison to the same rig move services undertaken by other government institutions during the same period by the same service provider. Further, it established that the Company's Tender Committee, disregarded its duty of care towards the Company in awarding the said tender, which in the alternative would have saved the Company 50% of the contract price. To the Commission, under the ***Anti-Corruption and Economic Crimes Act, 2003***, it is an offence for a person to willfully fail to comply with the law relating to procurement.
45. It contended that the issue on whether or not the charges are proper is an issue for a trial court and not a ground for this Honourable Court to stop prosecution and terminate the criminal case. In its view:

a. The Commission takes up complaints and initiates investigations independently after which it forwards its recommendations to the Respondent.
b. Apart from the mention of isolated provisions of the Constitution, the Applicant has not demonstrated in the Substantive Motion how her rights have been violated.
c. The Applicant herein is using this Court to subvert the criminal process.
d. The purported Substantive Motion herein does not raise any Constitutional issue for determination by this Honorable court.
e. The Applicant herein is using this Court to determine issues of fact which are within the jurisdiction and competence of the trial court.
f. The contested matters of fact are issues for determination by the criminal court and do not constitute grounds for preventing the prosecution of the Applicant.
g. During the trial, the Applicant shall be afforded the opportunity to defend herself.
h. The Constitution and the Criminal Procedure Code among other laws have adequate mechanisms for securing the rights of accused persons at the trial.
i. There is no likelihood that the Applicant will suffer irreparable harm unless orders are issued pending the hearing and determination of the Substantive Motion.
j. That there is no demonstration in pleadings or otherwise that any of the Applicant's rights have been violated.

46. To the Commission, the Applicant has not produced any evidence to demonstrate that the Commission has in this case acted otherwise than in accordance with its Constitutional and legal mandate. Further, the Applicant failed to demonstrate that she is unlikely to receive a fair trial before the criminal court where she has been charged among others or that the criminal proceedings before the said trial court will be conducted otherwise than in accordance with the law where her criminal culpability, if any, can only be determined.
47. It was contended that the Applicant all along had been accorded hearing in the investigation process and the entire investigations has been devoid of any malice and that throughout the entire investigation, the Commission acted independently, professionally and with due regard to the Constitution and the law.
48. It was asserted that Article 50 of the Constitution deals with the rights of accused persons during trial hence the substantive Motion was frivolous and vexatious and did not disclose any prima facie cause of action against the Commission.
49. While urging the Court to dismiss the motion, the Commission argued that the granting of the orders sought will be tantamount to fettering the Commission in the execution of its mandate and allowing the court to fully canvass on matters which should be left to the criminal trial.
50. It was submitted by the Commission that the Applicant was directly involved with the tender

process of Tender No. GDC/HQS/OT/086/2011-2012 as a member of the tender committee in Geothermal Development Company (GDC) since 2009. On 23rd July, 2012, a Tender Opening Committee for Tender No. GDC/HQS/OT/086/2011-2012 was appointed. The Tenders were opened and subsequently the Evaluation Committee carried out the evaluation exercise between the 1st and 15th August 2012. On 29th August, 2012, the Tender Committee, which included the ex parte Applicant, approved the Award at Kshs 42, 746,000/- per Rig Move to BCFL.

51. According to the Commission, the Evaluation Committee conducted a justification analysis as the Committee saw it important as it would have triggered the Tender Committee to re-evaluate whether there was need to hire Rig Move Services or fill the gaps of personnel and equipment. The Evaluation Committee concluded that the Company did not have the capacity to conduct the works and had to outsource. Moreover, the Evaluation Committee felt that the price quoted by BCFL of Kshs 42,746,000/-, was too high compared to similar services offered the previous year by the same company hence sought a clarification of the same, which clarification was not allowed.
52. According to the Commission, section 62(1) of the Act (now repealed) provides that *the procuring entity may request a clarification of a tender to assist in the evaluation and comparison of tenders.* It was disclosed that most of the Tender Committee members also sat in the previous Tender Committee for financial year 2010/2011 which confirmed the previous award at a cost of Kshs 19,550,000 per Rig Move to BCFL which previous award was well within the knowledge of most of the members of the Tender Committee, including the Applicant, for the financial year 2011/2012 which made an award of Kshs 42,746,000/-, without due regard of due diligence and prevailing market prices.
53. The Commission relied on section 2 of the said repealed Act which provided that*:*

The purpose of this Act is to establish procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives-

(a) to maximize economy and efficiency;

(b) to promote competition and ensure that competitors are treated fairly;

(c) to promote the integrity and fairness of those procedures;

(d) to increase transparency and accountability in those procedures;

(e) to increase public confidence in those procedures; and

(f) to facilitate the promotion of local industry and economic development.

54. Regulation 10(2)(e) of the ***Public Procurement and Disposal Regulations, 2006*** on the other hand provides that *the functions of the Tender Committee shall be to – ensure that the procuring entity does not pay in excess of prevailing market prices*. Besides the Tender Committee's knowledge of the cost of a similar exercise in the previous financial year, the law required the members to ensure that the procuring entity does not pay in excess of the prevailing market prices. Despite this the Tender Committee went ahead and made an award which was more than 100% higher than the prevailing market prices, totally disregarding the purpose of the ***Public Procurement and Disposal Act*** (repealed) as stated above.
55. It was contended that the ex parte Applicant and the accounting officer at the signing of the contract with BCFL on behalf of the Company had prior knowledge of the market price, the comparable prices presented by the other bidders as well as the previous tender price of the same work by BCFL but went ahead and executed the same at an unjustifiable tender price of Kshs 42,746,000/-.
56. Reliance was further placed on section 27(3) of the ***Public Procurement and Disposal Act*** (repealed) which provided that *each employee of a public entity and each member of a board or committee of the public entity shall ensure, within the areas of responsibility of the employee or*

member, that this Act, the regulations and any directions of the Authority are complied with.It was submitted that section 27(3) of the Act obliges each employee, member of the board or committee of a public entity to ensure within its area of responsibility that the regulations and directions of the Authority are complied with. However, the ex parte Applicant, being a member of the tender Committee and an employee of the Company, a public entity, and having prior knowledge of the award made the previous financial year to BCFL at an unjustifiable cost did not ensure compliance of the above mentioned sections of the Act in awarding the tender.

57. It was contended that after investigations the applicant's guilt can only be determined in a Court of law and that in the course of the investigations the applicant was given an opportunity of being heard and duly recorded her statements hence her constitutional rights were not breached.

58. According to the Respondents, it is in the public interest that criminal cases particularly those touching on misuse of public funds, be prosecuted expeditiously and relied on **Wilfred Karuga Koinange vs. Commission of Inquiry into Goldenberg Commission (Misc. Appl. 372 of 2006) [2006] eKLR** where **Anyara Emukule, J** expressed himself as follows:

> **"The state represents a community of individuals, who all contribute to the welfare of the state. In the wider context therefore, it is in the interest of the state, the community of Kenyans and all persons living within the territorial boundaries of Kenya, and perhaps beyond, that lawsuits including criminal prosecutions which particularly impinge upon the welfare of the state and therefore the community within the state be prosecuted in a sequence and within a reasonable time and not by way of a multiplicity of suits, motions over other motions and sometimes cross-motions…The multiplicity of such motions is but gerrymandering through the court corridors contributing nothing but delays in the dispensation of justice to the individual accused or the applicant and also the community of Kenyans because the issues raised, like in this case, and the previous applications, whether or not the disbursement of Kshs. 5.8 billions was legal or illegal should be determined in a proper trial, and should not be stayed by the court merely because they relate to issues raised 4, 8, 12 or more years ago.'**

59. According to the Commission, once corruption and economic crimes are conclusively investigated and suspects charged in a criminal court, it is in the public interest that the said crimes are expeditiously prosecuted, perpetrators punished and assets recovered.

60. Based on **Thuita Mwangi and 2 Others vs. The Ethics and Anti-Corruption Commission Petition No. 153 of 2013**, it was submitted that the issues raised in this application ought to be raised before the trial Court which is the right forum to determine the same.

Determination

61. I have considered the application, the affidavits both in support of and in opposition to the petition, the submissions for and against the grant of the orders sought and the authorities cited on behalf of the parties thereto.

62. It is, in my respectful view, important to understand the principles which guide the grant of the orders in the nature sought herein before applying the same to the circumstances of this case. Several decisions have been handed down which in my view correctly set out the law relating to circumstances in which the Court would be entitled to prohibit, bring to a halt or quash criminal proceedings. It is however always important to remember that in these types of proceedings the Court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings. The Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution and that the mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review. This is so because judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* 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 constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.

63. In **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170,** the Court of Appeal held:

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

64. In **Meixner & Another vs. Attorney General [2005] 2 KLR 189,** the same Court expressed itself as hereunder:

"The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion if acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution... Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power. Having regard to the law, the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision is correct."

65. However, in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69,** the High Court held:

"The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far that which the courts indeed the entire system is constitutionally mandated to administer... In the instant case, criminal prosecution

is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute. It is further alleged that the criminal prosecution is an abuse of the court process epitomised by what is termed as selective prosecution by the Attorney General. It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been be argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law...In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed...There is nothing which can stop the from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made...Under section 77(5) of the Constitution it is a constitutional right that no person who has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of the offence. What is clear from this constitutional right is that it prevents the re-prosecution of a criminal case, which has been determined in one way or another...A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution.....In the instant case there is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even of manipulation of court process so as to seriously deprecate the likelihood that the applicants might not get a fair trial as provided under section 77 of the Constitution...There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an "abuse of process", is a "manipulation", "amounts to selective prosecution" or such other processes, or even supposing that the applicants might not get affair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts. The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded,

whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial... In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names."

66. As was aptly put in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR**:

"the police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene".

67. Whereas Article 157(10) of the Constitution provides that the Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority, Article 157(11) provides:

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.

68. Apart from that, section 4 of the ***Office of Public Prosecutions Act***, No. 2 of 2013 provides:

In fulfilling its mandate, the Office shall be guided by the Constitution and the

following fundamental principles—

(a) the diversity of the people of Kenya;

(b) impartiality and gender equity;

(c) the rules of natural justice;

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

(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.

69. It is therefore clear that the terrain under the current prosecutorial regime has changed and that the

discretion given to the DPP is not absolute but must be exercised within certain laid down standards provided under the Constitution and the ***Office of the Director of Public Prosecutions Act***. Where it is alleged that these standards have not been adhered to, it behoves this Court to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, the Constitution itself. I associate myself with the sentiments expressed in **Nakusa vs. Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565** to the effect that :

"the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system….. In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of *Domnic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003* is that interpretation of the Constitution has to be progressive and in the words of Prof M V Plyee in his book, *Constitution of the World*: "The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time…….. In our role as "sentinels" of fundamental rights and freedoms of the citizen which are founded on laisez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent "sentinels" of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right."

70. Where therefore it is clear that the discretion is being exercised with a view to achieving certain extraneous goals other than those legally recognised under the Constitution and the ***Office of the Director of Public Prosecutions Act***, that would, in my view, constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion. As was held by **Wendoh, J** in **Koinange vs. Attorney General and Others [2007] 2 EA 256**:

"Under section 26 of the Constitution the Attorney General has unfettered discretion to undertake investigations and prosecute. The Attorney Generals inherent powers to investigate and prosecute may be exercised through other offices in accordance with the Constitution or any other law. But, if the Attorney General exercises that power in breach of the constitutional provisions or any other law by acting maliciously, capriciously, abusing the court process or contrary to public policy the Court would intervene under section 123(8) of the Constitution and in considering what constitutes an abuse of the court process the following principles are relevant: (i) Whether the criminal prosecution is instituted for a purpose other than the purpose for which it is properly designed; (ii) Whether the person against whom the criminal proceedings are commenced has been deprived of his fundamental right of a fair trial envisaged in the provisions of the constitution; (iii) Whether the prosecution is against public policy."

71. It is now clear that even in the exercise of what may appear to be prima facie absolute discretion conferred on the executive the Court may interfere. The Court can only intervene in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to

exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**

72. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the DPP to investigate and prosecute ought to be interfered with.
73. In this case it is the applicant's case that the decision by the Respondent to prefer the charges against her was reached without proper direction as to the relevant law; that Respondent failed to take into account the relevant matters and/or consideration and in particular the Tender Ref. No. GDC/HQS/086/2011-12; and that the charges leveled against her do not entitle her to know what the case is against her and to have an opportunity to put her case forward.
74. It is clear that in exercising their discretion to charge a person both the police and the DPP's office must take into account and must exercise the discretion on the evidence of sound legal principles. As was held by **Ojwang, J** (as he then was) in **Nairobi HCCC No. 1729 of 2001 – Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another**:

"...policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense...I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State's prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes".

75. Therefore the police are expected to be professional in the conduct of their investigations and ought not to be driven by malice or other collateral considerations. Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution. A prosecution can either be mounted based on an offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officers or agencies. However, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. I say ordinarily because the mere fact that the version of one of the parties is not considered is not necessarily fatal to the prosecution. However, where as it is alleged in this case exculpatory evidence is presented to the police in the course of investigation and for some reasons unknown to them they deliberately decide to ignore the same one can only conclude that the police are driven by collateral considerations other than genuine vindication of the criminal judicial process. Neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of malice and hence abuse of discretion and power.
76. In this case the applicant contends that the impugned criminal proceedings constitute an abuse of the criminal justice process, are oppressive and were reached without any evidentiary basis and in light of exculpatory evidence in the applicant's favour. In support of this line of submission the applicant alluded to the fact that she did not sign the contract through which BCFL is alleged to have been unlawfully conferred an undeserved benefit. To the applicant, had these facts been considered by the respondent, the respondent would have concluded that the applicant is not liable for the offence with which she is charged.
77. In exercising their discretion to charge a person both the police and the DPP's office must take into account and must exercise the discretion on the evidence of sound legal principles. As was held by **Ojwang, J** (as he then was) in **Nairobi HCCC No. 1729 of 2001 – Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another**:

"...policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery

or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense...I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State's prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes".

78. Therefore the police are expected to be professional in the conduct of their investigations and ought not to be driven by malice or other collateral considerations. Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution. A prosecution can either be mounted based on an offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officers or agencies. However, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. I say ordinarily because the mere fact that the version of one of the parties is not considered is not necessarily fatal to the prosecution. However, where exculpatory evidence is presented to the police in the course of investigation and for some reasons unknown to them they deliberately decide to ignore the same one may be justified in concluding that the police are driven by collateral considerations other than genuine vindication of the criminal judicial process. Neglect to make a reasonable use of the sources of information available before instituting proceedings may therefore be evidence of malice and hence abuse of discretion and power.
79. In this case, it is clear that counts III and IV are grounded on the execution of the contract. It was however contended by the applicant which contention was not disputed that the applicant only witnessed the signature of the Chairman of the Board. In those circumstances, can it be said that the applicant by merely attesting the said signature conferred a benefit on the entity to which the tender was awarded? With respect to count I, the applicant's case is that the consideration being used as a basis for the commencement of the criminal charges was not a criteria provided for in the tender document. It was the applicant's case that this charge in hindsight calls upon the Tender Committee to embark on a comparison of prices for a service that is not contemplated by section 30(3) of the Act which such comparison is therefore ultra vires. In other words the applicant contends that the basis upon which the criminal charges are preferred is outside the ambit of the tender documents hence the applicant was not expected to take the same into account in determining the award of the tender. It was further contended that since the Public Procurement Oversight Authority had not published the market price index for the goods which were being procured the applicant could not have by hindsight complied therewith. It was contended that what the members of the tender committee were accused of not having performed was the responsibility of the procurement unit established at Regulation 8(1) which acts as a secretariat to the Tender Procurement and Disposal Committees and which carries out periodic market surveys to inform the placing of orders or adjudication by the relevant award committee. In other words, the applicant's contention was that the blame was being placed on the wrong entity.
80. Section 66(2) of the repealed ***Public Procurement and Disposal Act*** provided as follows:

The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used.

81. Again the Respondent has not contended that the issue of comparison in past prices was one of the criteria in the tender document. If it was not, and there is no evidence to the contrary, then to expect the applicant to have introduced the same in determining the award of the tender would clearly have been a violation of the law. To decide to charge a person for not taking an action which would have amounted to a violation of an express provision of the law, is in my view

clearly irrational. This was the position adopted in **De Smith's Judicial Review** (sixth edition) at Page 559 that:

"Although the terms irrationality and unreasonableness are these days used interchangeably, irrationality is only one facet of unreasonableness. A decision is irrational in the strict sense of that term if it is unreasoned; if it is lacking ostensible logic or comprehensible justification. Instances of irrational decisions include those made in an arbitrary fashion perhaps by spinning a coin or consulting an astrologer or where the decision simply fails to add up-in which in other words there is an error of reasoning which robs the decision of logic…Less extreme examples of the irrational decision include those in which there is an absence of logical connection between the evidence and the ostensible reasons for the decision, where the reasons display no adequate justification for the decisions or where there is absence of evidence in support of the decision."

82. Whereas this is not the forum to determine the applicant's innocence or culpability, the DPP owes this Court a duty of placing before this Court material upon which this Court can feel that he is justified in mounting the prosecution.
83. ***The National Prosecution Policy***, revised in 2015 provides at page 5 that:-

Public Prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction. In other words, Public Prosecutors should ask themselves; would an impartial tribunal convict on the basis of the evidence available?

84. The said policy further states that:

Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.

The finding that there is a realistic prospect of conviction is based on the prosecutor's objective assessment of the evidence, including the impact of any defence and any other information that the suspect has put forward or on which he or she might rely. It means that an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged. This is a different test from the one that the criminal courts themselves must apply. A court may only convict if it is sure that the defendant is guilty.

85. I also associate myself with the decision in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** that:

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

86. As was held in **Githunguri vs. Republic [1986] KLR 1** at Page 22 line 22, to the effect that:

"A prosecution is not to be made good by what it turns up. It is good or bad when it starts."

87. In my view to permit the prosecutor to arbitrarily exercise his constitutional mandate based on ulterior criminal motives would amount to the Court abetting abuse of discretion and power and criminality. It was therefore held in **Regina vs. Ittoshat [1970] 10 CRNS 385** at **389** that:

"this Court not only has the right but a duty to protect citizens against harsh and unfair treatment. The duty of this Court is not only to see the law is applied but also, which is of equal importance, that the law is applied in a just and equitable manner."

88. Similarly in **Paul Imison vs. Attorney General & 3 Others Nbi HCMCA No. 1604 of 2003**:

"I do not think that our Constitution which is one of a democratic state would condone or contemplate abuse of power...The Attorney General in some of his constitutional functions does perform public duties and if he were to be found wanting in carrying them out or failing to perform them as empowered by the Constitution or any other law, I see no good reason for singling him out and failing to subject him to judicial review just like any other public official. I find nothing unconstitutional in requiring him to perform his constitutional duties. A monitoring power by the court by way of judicial review would have the effect of strengthening the principles and values encapsulated by the Constitution. To illustrate my point, Judicial Review tackles error of law and unlawfulness, procedural impropriety, irrationality, abuse of power and in not too distant future, human rights by virtue of the International Conventions which Kenya has ratified. In exercising the Judicial Review jurisdiction the court would not be sitting on appeal on the decisions of the Attorney General, he will still make the decisions himself but the lawfulness, etc. of his decisions should be within the purview of the courts..."

89. This Court therefore has the powers and the constitutional duty to supervise the exercise of the Respondent's mandate whether constitutional or statutory as long as the discretion falls foul of section 4 of the ***Office of the Director of Public Prosecution Act*** and Article 157 of the Constitution.

90. I also defer to **R –vs- DPP & Others Ex parte Qian Guo Jun & Anor [2013] eKLR** where the Court held that:

"Although the Court appreciates that the discretion given to the police to investigate offences and that given to the Director of Public Prosecutions ought not to be lightly interfered with, where an applicant places before court material which prima facie show that the dispute between the applicant and the interested part is purely civil in nature and that the criminal proceedings are being undertaken with ulterior motives, it behoves the respondents to place some material before the court which though not conclusively proving the guilt of the applicant warrants their action to charge the applicants. In absence of such material and in light of the material placed before the court by the applicant, the Court would be left with no option but to believe the applicant's version that being the only factual version before it.."

91. As was appreciated in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001**:

"Although the Attorney General enjoys both constitutional and statutory discretion in the prosecution of criminal cases and in doing so he is not controlled by any other person or authority, this does not mean that he may exercise that discretion arbitrarily. He must exercise the discretion within lawful boundaries...Although the state's interest and indeed the constitutional and statutory powers to prosecute is recognised, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious...In doing so the Court may be guided by the following principles: (i). Where the criminal prosecution amounts to nothing more than an abuse of the process of the court, the Court will employ its inherent power and common law to stop it. (ii). A prosecution that does not accord with an individual's freedoms and rights under the constitution will be halted: and (iii). A prosecution that is contrary to public policy (or

interest) will not be allowed...A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case. Evidence of extraneous purposes may also be presumed where a prosecution is mounted after a lengthy delay without any explanation being given for that delay...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...A criminal prosecution that does not accord with an individual's freedoms and rights, such as where it does not afford an individual a fair hearing within a reasonable time by an independent and impartial court, will be the clearest case of an abuse of the process of the Court. Such a prosecution will be halted for contravening the constitutional protection of individual's rights...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds."

92. As was held in **R. vs. The Judicial Commission into the Goldenberg Affair and 2 Others exp Saitoti HC Misc Appl. 102 of 2006**:

"It is not good for the DPP to argue that the Applicant should be arrested and charged so that he can raise whatever defences he has in a trial court. The Court has a constitutional duty to ensure that a flawed threatened trial is stopped in its tracks if it is likely to violate any of the applicants' fundamental rights."

93. That was the position in **Williams vs. Spautz [1992] 66 NSWLR 585**, at 600, where the High Court of Australia consisting of seven judges observed that:

"If the proceedings obviously lack any proper foundation in the sense that there is no evidence capable of sustaining a committal, they will obviously be vexatious and oppressive. In such a case, the proceedings themselves are an abuse of the process of the Local Court and will inevitably result in the discharge of the defendant...And that the charges against the defendant lack any foundation, the Supreme Court would be justified in intervening to halt the proceedings in limine in order to prevent the defendant from being subjected to unfair vexation and oppression...For a man to be harassed and put to the expense of perhaps a long trial and then given an absolute discharge is hardly from any point of view an effective substitute for the exercise by the court [of its inherent power to prevent abuse of its process."

94. Therefore where it is clear to the Court that based on the admitted factual scenario the charges leveled against the applicant are far-fetched it would not be permissible for the Court to permit the applicant face the charges simply because she will have an opportunity of defending herself. It is therefore clear that the said three counts facing the applicant are untenable.
95. Having considered the material placed before me I find merit in this application.

Order

96. Consequently, I grant the following reliefs to the applicant:

1. **An Order of Certiorari removing into this Court for the purposes of quashing the decision of the 1st Interested Party to recommend to the Respondent that the Ex parte Applicant be charged with various anti-corruption offences and the decision of the Respondent to direct prosecution of the Ex parte Applicant Praxidis Namoni Saisi contained in the Press Statement from the Office of the Director of Public Prosecutions dated 13/11/2015 and in the charge sheet in Anti-Corruption Case No. 20 of 2015 Republic of Kenya vs Nicholas Karume and & 8 others before the Chief Magistrate's Court (Milimani Law Courts) Nairobi, which decision is hereby quashed.**
2. **An Order of Prohibition prohibiting the Respondent from prosecuting Republic vs Nicholas Karume Weke& 8 Others before the Chief Magistrate's Court (Milimani Law Courts) Nairobi so far as it touches on or relates to or concerns the 5th Accused (the ex parte applicant herein) Praxidis Namoni Saisi in Counts I, III and IV or instituting any other charges based on the same facts.**
3. **THAT Costs of and incidental to the application are awarded to the applicant as against the Respondent.**

Dated at Nairobi this 19th day of April, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr. Masafu for Mrs Guserwa for the ex parte applicant

Miss Maina for Mr. Ruto for the 1st interested party

Cc Mutisya