REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

J.R. CIVIL APPLICATION NO. 102 OF 2016

(CONSOLIDATED WITH CASES NO. 120, 123, 89, 131,132 &134 ALL OF 2016)

IN THE MATTER OF AN APPLICATION

BY PATRICK OGOLA ONYANGO & 8 OTHERS FOR JUDICIAL REVIEW ORDERS OF CERTIORI AND PROHIBITION

AND

IN THE MATTER OF ARTICLES 165(6) & (7) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE PROCEEDS OF CRIME AND ANTI-MONEY LAUNDERING ACT (CAP 59B)

AND

IN THE MATTER OF CHIEF MAGISTRATES COURT, MILIMANI LAW COURTS

CRIMINAL CASE NO. 301 OF 2016; REPUBLIC VS JOSEPHINE KABURA IRUNGU And 10 Others

REPUBLIC ……...…….APPLICANT

VERSUS

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

THE CHIEF MAGISTRATES COURT AT NAIROBI…...…...2ND RESPONDENT

AND

PATRICK OGOLA ONYANGO …….....1ST EX PARTE APPLICANT

PAUL KINUTHIA GACHOKA …….....…….2ND EX PARTE APPLICANT

JOHN HOPE VANDAMME …….....3RD EX PARTE APPLICANT

BENSON GETHI WANGUI ….....4TH EX PARTE APPLICANT

CHARITY WANGUI GETHI …….....….5TH EX PARTE APPLICANT

JEDIDAH WANGARI WANGUI …….....……6TH EX PARTE APPLICANT

JOSEPHINE KABURA IRUNGU …….....……..7TH EX PARTE APPLICANT

MARTIN GACHORE WANJOHI…….....….8TH EX PARTE APPLICANT

SAMUEL MNDANYI WACHENJE …….....….9TH EX PARTE APPLICANT

AND

JOHN KAGO NDUNGU……...….....….INTERESTED PARTY

JUDGMENT

Introduction

1. This judgment concerns seven applications brought under the judicial review jurisdiction of the High Court.

2.The core question which threads through the seven consolidated applications is whether a person can be charged with the offence of money laundering prior to a firm and final determination by a court of law that there exist proceeds of crime as the subject of the money laundering. Alongside the core question, is also the question as to whether the 1st Respondent (" **the DPP** ") had correctly exercised his mandate to prefer criminal charges against the Ex –parte applicants. Finally, is whether the court may review and interfere with the trial of the Ex-parte applicants in Criminal Case No. 301 of 2016 (Chief Magistrates Court Nairobi) where the applicants are all accused persons.

Brief general background

3. The National Youth Service ("**the NYS**") is a program for the national government of Kenya. It targets youth between the ages of 18 to 36 years with a view to empowering them in entrepreneurship as well as vocational engagement. It seeks to mould the youth into a pool of disciplined and organized manpower. The NYS has been around for years. After 2013, the NYS was rebranded and re-launched. It got more involved in massive development projects all over the country. The NYS draws its budget from the exchequer, through the national government's share of the national revenue.

4. In 2014, the service was apparently hit by massive sleaze. Insiders were implicated. Outsiders too were implicated. The national government got to investigate. The alleged theft of an amount of over Kshs. 791,000,000/= was quickly reported to the various agencies fighting sleaze in Kenya. The Ethics and Anti-Corruption Commission, an independent commission established under Articles 88(1) & 248 of the Constitution was involved. The National Police Service too was roped in and so was the Director of Public Prosecutions.

5. The National Police Service, through the Directorate of Criminal Investigations, conducted its inquiry and scrutiny and returned the verdict that monies aggregating to Kshs. 791,385,000/= had been fraudulently acquired and or stolen from NYS. The investigations led the National Police Service and the

Director of Public Prosecutions to some twenty six (26) suspects. A decision to prosecute was made. Offences related to stealing were preferred against the twenty six suspects. A criminal case, No. 1905 of 2015 was commenced before the Chief Magistrates' court with the twenty six persons named as the accused persons. They were duly arraigned in court.

6. The investigations also led the National Police Service and the DPP to other suspects. The movement of the massive funds allegedly pilfered from the NYS pointed to cases of money laundering. The DPP consequently initiated prosecution of another twelve suspects for the offence of money laundering contrary to Sections 3 & 4 of the Proceeds of Crime and Anti-Money Laundering Act (Cap 59B) Laws of Kenya ("**the POCAMLA 2009**").

7. The Ex Parte Applicants herein were charged with the offences of money laundering. They were all charged in Criminal Case No. 301 of 2016 before the 2nd Respondent, the Chief Magistrates Court at Nairobi.

Specific Background Facts and Applicants' cases

8. All the seven judicial review applications were consolidated by the court on 20th April 2016. The substratum of the applications was majorly the same. The individual applicants were however different.

Patrick Onyango Ogolla – Ex Parte Applicant in Judicial Review No. 102 of 2016

9. Patrick Onyango Ogolla (" the 1st Applicant") filed his application on 4th March 2016 having been granted leave three days earlier. The leave had also been directed to operate as a stay of a all decisions and actions against the 1st Applicant by the Respondents herein. The 1st Applicant is an Advocate of the High Court. For this, he stated that he held a unique position in the circumstances of this case.

10. Together with ten co-accused, the 1st Applicant was charged with the offence of money laundering contrary to Section 3 of the POCAMLA 2009. The particulars of the charge against the 1st Applicant reveal that, jointly with Josephine Kabura Irungu, John Kago Ndungu and Ben Gethi Wangui, the 1st Applicant was engaged in an arrangement for the purchase of a motor vehicle (Registration No. KCB 750Z- Range rover) at Kshs. 23 million. The particulars also stated that he knew or ought reasonably to have known that the amount of the purchase was proceeds of crime namely part of the sum of Kshs. 791,385,000/= stolen from the NYS and the purpose of the purchase was to conceal the source of the transaction amount.

11. The 1st Applicant's case is that the decision by the DPP to prefer the charges was irrational, illegal and unreasonable for the basic reason that there is not yet any findings or prove that the sum of Kshs. 791,385,000/= is or forms part of the proceeds of crime. Consequently, no offence of money laundering can stand. It was also the 1st Applicant's case that prior to preferring a charge of money laundering against any accused person, the DPP must have irrefutable evidence and confirmation that the money handled by the accused person is or constitutes part of proceeds of crime.

12. The 1st Applicant further states that as the court was yet to make a finding as to whether the amount of Kshs. 791,385,000/= was actually stolen by the person accused to have stolen the same it was not possible to state that the same was being laundered. The 1st Applicant concludes that the decision to arraign him in court and prosecute him was thus maliciously and rashly made in bad faith. Additionally, the 1st Applicant also contends that his prosecution is not well founded and amounts to an abuse of the DPP's prosecutorial discretion and also of the process of the court.

13. The 1st Applicant sought from the court orders to quash the decision by the 1st Respondent to prefer charges of money laundering against the 1st Applicant. He also sought orders to prohibit any further proceedings in Criminal case No. 301 of 2016 before the 2nd Respondent. Additionally, the 1st applicant asked that the court do prohibit the proceedings in Criminal case No 301 of 2016 until such time as

Criminal Case No. 1905 of 2015 would have been finalized by the court.

Paul Kinuthia Gachoka and John Hope Vandamme- Ex Parte Applicants in Judicial Review No. 89 of 2016

14. Paul Kinuthia Gachoka and John Hope Vandamme ("the 2nd and 3rd Applicants) filed their joint Notice of Motion on 1st March 2016. Both are also co-accused in Criminal Case No. 301 of 2016. Their case may be retrieved from the statutory statement they filed on 23rd February 2016.

15. They are both charged with the offence of money laundering contrary to Section 3 of the Proceeds of Crime and Anti- Money Laundering Act, 2009. As at the time of filing their application, their prosecution was yet to be initiated. The DPP had however, by a statement of 15th February 2016, recommended the prosecution of both the 2nd and 3rd applicants alongside others. The initiation of their prosecution ultimately was confirmed by the DPP's Replying Affidavit sworn and filed herein on the 21st March 2016.

16. The particulars relating to the 2nd Applicant are that together with Antony Kihara Gethi and John Kago Ndungu, the 2nd Applicant between 1st December 2014 and 30th April 2015 was engaged in an arrangement for the purchase of motor vehicle (registration No. KCE 852T Land Cruiser) at a cost of Kshs. 5.2 million while knowing that the purchase amount was part of the sum of the Kshs. 791,385,000/= stolen from the NYS.

17. With regard to the 3rd Applicant, the particulars are that at about the same time, the 3rd Applicant together with Josephine Kabura, Anthony Kihara Gethi and John Kago Ndungu was engaged in an arrangement for the purchase of a motor vehicle (Registration No. KCD 536P Land Cruiser) at a cost of Kshs. 5.07 million while knowing that the purchase amount was part of the Kshs. 791,385,000/= stolen from the NYS. The particulars additionally state that the intention of both transactions was to conceal the source of the money.

18. The 2nd and 3rd Applicants contend that there were no proper investigations conducted prior to the decision to charge them in court with the criminal offences. The two applicants further contend that the decision to prosecute them was informed by extraneous matters outside the goals of justice. Finally, the two applicants contend, just like the 1st Applicant, that Criminal Case No. 301 of 2016 is an abuse of the process and of the criminal justice system.

19. Reliance has been placed largely by the 2nd and 3rd Applicants on an affidavit sworn by one of the co-accused Josephine Kabura Irungu to demonstrate that the DPP was selective in his choice of accused persons in so far as the NYS scam was concerned. The 2nd and 3rd Respondents also state that there is no nexus between them and the beneficiaries of the alleged theft of Kshs. 791,385,000/= from the NYS.

20. The 2nd and 3rd Applicants seek to quash the DPP's decision to have them charged with the offence of money laundering contrary to Section 3 of the POCAMLA. Further the 2nd and 3rd Applicants also seek orders prohibiting their arrest and arraignment in court.

Benson Gethi Wangui- Ex Parte Applicant in Judicial Review No. 120 of 2016

21. Benson Gethi Wangui ("the 4th Applicant") filed his Notice of Motion on 23rd March 2016.

22. The 4th Applicant is charged with the offence of stealing Kshs. 791,385,000/= from the NYS in Criminal Case No. 1905 of 2015. He is also charged with the offence of money laundering under the POCAMLA 2009 in Criminal Case No. 301 of 2016. In the latter case, the 4th Applicant is accused of laundering the amount of Kshs. 791,385,000/= contrary to Section 3 as read together with Section 16(a) of the POCAMLA 2009. The 4th Applicant contests this particular charge in the instant application.

23. The particulars, *inter alia*, are that jointly with others, the 4th Applicant engaged in an arrangement for the purchase of motor vehicle (Registration No. KCB 750Z- Range Rover) at a cost of Kshs 23 million whilst knowing that the purchase amount constituted part of the proceeds of crime being the amount of Kshs 791,385,000/= allegedly stolen from the NYS.

24. The 4th Applicant contends that in so far as there has been no determination that the sum of Kshs. 791,385,000/= was indeed stolen and was therefore proceeds of crime, the decision to prefer charges against the 4th Applicant, in Criminal Case No. 301 of 2016 was premature, irrational and unreasonable. Additionally, there is an abuse of the prosecutorial discretion and powers as well as of the court process.

25. Further the 4th Applicant contends that he is being subjected to double jeopardy in so far as he faces criminal charges in both Criminal Case No. 1905 of 2015 and No. 301 of 2016, both before the Chief Magistrates Court at Nairobi.

26. In consequence, the 4th Applicant seeks orders to remove into the High Court and quash the decision to charge him in criminal case no. 301 of 2016 as well as all the proceedings. The 4th Applicant also seeks orders prohibiting the DPP from prosecuting him and the Chief Magistrates' Court from proceeding with the hearing of the Criminal Case No. 301 of 2016 until the determination of Criminal Case No. 1905 of 2015.

*Charity Wangui Gethi and Jedidah Wangari Wangui- Ex Parte Applicants in Judicial Review No. 123 of 2016***.**

27. Charity Wangui Gethi and Jedidah Wangari Wangui ("the 5th and 6th Applicants" respectively), filed their motion on 18th March 2016. They seek similar orders as those sought by the 4th Applicant.

28. The 5th and 6th Applicants contend that as no court of competent jurisdiction has made any determination that the money the subject of the criminal court proceedings against them are proceeds of crime, the decision to prefer charges against them was irrational, unreasonable and an abuse of both the prosecutorial discretion and of the process of court.

Josephine Kabura Irungu- Ex parte Applicant in Judicial Review No. 131 of 2016

29. Josephine Kabura Irungu ("the 7th applicant") filed her Notice of Motion on 18th March 2016 seeking orders to prohibit the prosecution of criminal Case No. 301 of 2016. The 7th Applicant also seeks orders to quash the decision of the DPP to prefer charges against the 7th Applicant.

30. The 7th Applicant faults the investigations into the matter leading to her prosecution. She insists that the decision to prefer charges against her is tainted with illegality and irrational procedural impropriety. Additionally, the 7th Applicant contends that there is no evidence to link her to any money laundering.

31. It is to be noted that of the fifteen counts faced by various accused persons in Criminal Case No. 301 of 2016, the 7th Respondent is charged with thirteen counts of money laundering contrary to Section 3 of the POCAMLA 2009.

Martin Gachore Wanjohi- the Ex Parte Applicant in Judicial Review No. 132 of 2016

32. Martin Gachore Wanjohi ("the 8th Applicant") filed his Notice of Motion on 21st March 2016.

33. The 8th Applicant seeks an order of Certiorari to remove into the High Court and quash the DPP's decision to prefer charges against him. The 8th Applicant also seeks to prohibit the Chief Magistrate's Court from proceeding with or in any way entertaining Criminal Case No. 301 of 2016 until a determination and finding is made by a trial court of law that the amount of Kshs. 791,385,000/=

constitute proceeds of crime.

34. In Criminal Case No. 301 of 2016, the 8th Applicant is charged with one count of money laundering jointly with others. Specifically, the 8th Applicant together with others, is stated to have been engaged in transferring the amount of Kshs. 77.6 million to the 4th Applicants bank account whilst knowing that the said amount was part of the sum of Kshs. 791,385,000/= allegedly stolen from the NYS.

35. The 8th Applicant contends that in preferring to charge the 8th Applicant with the offence of money laundering before positively confirming that the sum of Kshs. 791,385,000/= was actually stolen from the NYS, the DPP acted irrationally and unreasonably.

Samuel Mndanyi Wachenje- Ex Parte Applicant in Judicial Review No. 134 of 2016

36. Samuel Mndanyi Wachenje ("the 9th Applicant") filed his Notice of Motion on 31st March 2016 and sought orders to quash the DPP' s decision to prefer criminal charges against the 9th Applicant. He also seeks to prohibit his prosecution in Criminal Case No. 301 of 2016. The 9th Applicant is also an accused person in criminal case no. 1905 of 2015.

37. In Criminal Case No. 1905 of 2015, the 9th Applicant has been charged together with twenty five other persons with the offence of stealing Kshs. 791,385,000/= from the NYS. In Criminal Case No. 301 of 2016, the 9th Applicant is accused of money laundering. It is stated that the 9th Applicant engaged in an arrangement for the purchase of motor vehicle (Registration No. KCE 874R Toyota Prado) at the price of Kshs. 5.2 million whilst knowing that the money constituted proceeds of crime as being part of the Kshs. 791,385,000/= stolen from the NYS.

38. The 9th Applicant also argues that there is a case for double jeopardy as the amount of Kshs. 791,385,000/= cuts across both criminal cases.

39.The 9th Applicant's contention is that in preferring money laundering charges against the 9th Applicant prior to a determination by the court that the amounts were proceeds of crime, the DPP acted irrationally unconstitutionally and unreasonably besides abusing his (the DPP's) prosecutorial discretion.

The Respondents' case

40. Having apparently identified the core common issue to be the Applicants' consternation with being charged with the offence of money laundering, the DPP filed the same Replying Affidavit sworn by Laura Spira with regard to each application. The Attorney General on behalf of the Chief Magistrate's Court also filed a singular set of grounds in opposition to the applications. Both the Replying Affidavits and the Grounds of Opposition were filed on 21st March 2016.

41. The DPP contends that the investigations into alleged theft of funds from the NYS following a complaint led the investigators to the individual applicants herein. The DPP states further that the evidence gathered pointed to the applicants as having either jointly or individually engaged in transactions and or arrangements involving the sum of Kshs. 791,385,000/=. Accordingly, there was a basis to prefer the criminal charges against the applicants.

42. Further, it was also the DPP's case that each criminal case is to be determined on its merits and that would apply to the two cases involving the applicants. None is dependent on the other. To the DPP, it will be upto the prosecution to prove the ingredients of the offence of money laundering including the fact that the amount of Kshs. 791,385,000/= was indeed proceeds of crime.

43. The DPP states that Sections 2, 3, 4 and 5 of the POCAMLA 2009 sets out the ingredients which are to be proven by the prosecution where the offence is one of money laundering and there was no legal requirement that the prosecution had to prove that there had been a conviction before preferring charges

for money laundering.

44. According to the DPP, the applicants are simply seeking to advance matters of evidence and defence which should be left to the trial court, where the applicants will be afforded all the fair trial rights including the right to be heard and to tender evidence in defence.

45. Further, the DPP contends that the orders sought of prohibition and certiorari could only be issued to interfere with decision made in excess of jurisdiction or where the rules of natural justice or laws had not been observed.

46. In the circumstances, the DPP concludes that he was only exercising a Constitutional mandate and had indeed properly exercised the mandate within the law. For completeness, the DPP adds that the grounds advanced by the applicants did not support the grant of judicial review remedies at all.

47. On behalf of the 2nd Respondent (the Chief Magistrate's Court), the Attorney General asserts that it is an independent constitutional institution with the mandate and capacity to determine and dispose of criminal cases.

Arguments in court

48. All the parties filed their respective written submissions. These were highlighted before me on 20 April 2016.

1st Applicant's submissions

49. The principal argument advanced by the 1st Applicant was that the offence of money laundering under the POCAMLA 2009 is one which requires prior proof that the monies or property involved are 'proceeds of crime'. In the instant case, it was submitted by the 1st Applicant's counsel Mr. Paul Nyamodi, that the DPP had not yet established or proved that the amount of Kshs. 791,385,000/= on which the charges against the 1st Applicant of money laundering was founded is proceeds of crime. In these respects, the 1st Applicant submitted that the DPP's decision to prefer money laundering charges was premature and founded upon fundamental misunderstanding or misapplication of the law and in particular of Section 3 of the POCAMLA 2009.

50. Additionally, counsel referred to Section 2 of the Act which defines 'Proceeds of Crime' as "*any property or economic advantage derived or realized, directly or indirectly as a result of or in connection with an offence*". Counsel also referred to the same section for the definition of the word 'offence' both to help advance the 1st Applicant's argument that a person can only be charged with money laundering once the predicate offence has been proven.

51. Mr. Nyamodi then referred to Article 157 of the Constitution which vests prosecutorial powers on the DPP and submitted that such powers must never be exercised irrationally and illegally. Such powers, too, he added could not be used to abuse authority but had to be exercised pursuant to Article 73(1) in a manner consistent with the purposes and objects of the Constitution.

52. Counsel concluded by stating that unless and until there was a determination by a competent court that the amount of Kshs. 791,385,000/= constituted proceeds of crime, the charges against the 1st Applicant had no foundational basis. Consequently, according to Counsel, Criminal Case No. 301 of 2016 had been irrationally and prematurely instituted.

53. In support of his submissions, the 1st Applicant placed reliance on various decided cases. Counsel referred to the case of **Republic *vs.* Chief Magistrate's Court Kibera Law Courts & 2 Others *Ex p* Qian Guo Jun & Others [2013]eKLR** for the proposition that an action taken by a public authority or body was deemed irrational "where there is such unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a

decision" and that it is a decision defiant of logic as well as acceptable moral standards.

54. Counsel also referred to the case **Republic *vs.* Attorney General *Ex p* Kipngeno Arap Ngeny, High Court Civil Application No. 406 of 2001** for the proposition that the High Court may interfere with a criminal trial in the subordinate court where it is proven that the case had no foundational basis or where the prosecution is an abuse of the process of the court or because it is oppressive vexatious and merely intended to embarrass the accused. On whether the court had powers to grant the reliefs of certiorari and prohibition sought by the 1st Applicant, counsel referred to the cases of **Associated Provincial Picturehouse Ltd *vs.* Wednesday Corp [1947] EWCA 1, Joram Mwenda Guantai *vs.* The Chief Magistrate, Nrb [2007] 2 EA 170, Kuria & 3 Others *vs.* Attorney General [2002] 2 KLR 69** and **Republic *vs.* Chief Magistrates Court Mombasa *Ex p* Ganijee & another [2002] 2 KLR 703.**

55. Besides, Mr. Nyamodi also drew the court's attention to the cases of **Republic *vs.* Electricity Commissioners *Ex p* Electricity Joint Committee [1924] 1 K B 171, Kenya National Examinations Council *vs.* Republic, *Ex p* Geofrey Gathenji Njoroge & 9 Others** and **Meixner & Another *vs.* Attorney General [2005] 2 KLR 189** all for the proposition that where a public body or tribunal abuses its powers or acts in excess of jurisdiction then the court was obligated to review the decision and restrain the body from abusing its powers or exceeding its jurisdiction.

2nd and 3rd Applicants' submissions

56. Mr. Stephen Mwanza Gachie urged the 2nd and 3rd Applicants' case.

57. Mr. Gachie's submissions were largely to the effect that the decision to charge the 2nd and 3rd Respondent was fundamentally flawed as even the DPP was still pursuing the investigations, which investigations in any event had not been appropriately conducted.

58. Counsel added that the decision to prosecute was not well founded as there was a significant doubt on the sufficiency of the evidence due to the 'bungled' investigations. Mr. Gachie submitted further that it was easy to conclude that there were ulterior motives in launching the prosecution.

59. Finally counsel submitted that there was no nexus between the alleged theft of Kshs. 791,385,000/= from the NYS and the purchase by the 2nd and 3rd Applicants of two motor vehicles. Counsel relied on the case of **Republic *vs.* Chief Magistrates Court Kibera & 2 Others *Ex p* Qian Guo Jun and 2 Others [2013]eKLR** for the proposition that if the discretion to prosecute was being abused or used for another collateral purpose then the court had to stop such prosecution

4th Applicant's submissions

60. Mr. Joseph Wagara appeared for the 4th Applicant and advocated his case.

61. The 4th Applicant largely adopted the submissions of the 1st Applicant asserting that the offences the 4th Applicant faced in Criminal Case No. 301 of 2016 could not be sustained so long as there had there had been no final determination and conviction that the amount of Kshs. 791, 385,000/= was indeed proceeds of crime.

5th and 6th Applicants' Submissions

62. The 5th and 6th Applicants' case was argued by Mr. Edward Oonge.

63. Again, Mr. Oonge like Mr. Nyamodi before him asserted that the prosecution of the 5th and 6th Applicants, in Criminal Case No. 301 of 2016, was ill-founded in and for so long as a court of competent jurisdiction had not returned a finding that the sum of Kshs. 791,385,000/= constituted proceeds of crime. Accordingly, the decision to charge the 5th and 6th Applicants with the offence of money laundering was

irrational and unreasonable.

64. Reference was made by Mr. Oonge to the case of **Republic *vs.* Montilla [2004] 1 WLR 3141** as well as the case of **Republic *vs.* Attorney General *Ex p* Kipngeno Arap Ngeny High Court Misc. Application No. 406 of 2001** for the preposition that a prosecution lacking a foundational basis ought to be prohibited by the court.

7th Applicant's submissions

65. Mr. Franklin Omino urged the 7th Applicant's case.

66. Mr. Omino stated that there was a case made out for judicial review of the decision by the DPP to prosecute the 7th Applicant as it was irrational and unreasonable as well as illegal. Mr. Omino faulted the investigations process where he stated the 7th Applicant was not involved as ought to have been the case. There had been grave procedural impropriety, so submitted counsel, as no opportunity was given to the 7th Respondent to explain herself.

67. Counsel also submitted that for so long as Criminal Case no. 1905 of 2015 was still being prosecuted, the offence of money laundering could not lie in Criminal Case No. 301 of 2016. There was also, according to counsel, a prejudicial case of double jeopardy for so long as the two cases subsisted and were being prosecuted simultaneously.

8th Applicant's submissions

68. Mr. Masika argued the 8th Applicants' case.

69. Mr. Masika's submissions were centered on the existence of Criminal Case No. 1905 of 2015. Counsel submitted that the decision to charge the 8th Applicant with the offence of money laundering Kshs. 791,385,000/= was unlawful, unreasonable and irrational in light of the salient provisions of Section 3 of the POCAMLA 2009, for so long as Criminal Case No. 1905 of 2015 was still subsisting and no verdict had been made therein.

70. Counsel relied on the case of **Pepper *vs.* Hart [1992] 3 WLR** for the proposition that statutes ought to be given purposive interpretation and that in the instant case offences under the money-laundering statute could only be founded after there had been a conviction and verdict that the money upon which the offence was founded was 'proceeds of crime'.

9th Applicant's case

71. Mr. Paul Amuga presented the 9th Applicant's case.

72. The 9th Applicant submitted that the court had the powers to prohibit and quash any prosecution. For this proposition reliance was placed on the cases of **Kuria & 3 Others *vs.* Attorney General [2002] 2 KLR 69** and **Meixner & Another *vs.* Attorney General [2005] 2 KLR 189.** The power by the court was to be exercised where there was abuse. In this case, counsel stated, the decision was oppressive and an abuse of the prosecutorial powers conferred by Article 157 of the Constitution as there was no foundational basis upon which the charges against the 9th Applicant could be laid.

73. It was also the 9th Applicant's contention that until the Criminal Case No. 1905 of 2015 had been finalized and a verdict returned that the amount of Kshs. 791,385,000/= was stolen from the NYS and therefore proceeds of crime, the impugned Criminal Case No. 301 of 2016 could not be sustained, let alone initiated.

Respondents' submission

1st Respondent

74. Mr. Mule appearing for the DPP submitted that all the applications were misguided and lacked merit. Stating that the offences in the two criminal cases (being No. 1905 of 2015 and No. 301 of 2016) were distinct, Mr. Mule stressed that the ingredients were also very different. According to counsel, there was no legal requirement for the prosecution to prove conviction for a predicate offence before preferring charges for money laundering. The essentials of the latter offence were outlined under Sections 2 through 4 of the POCAMLA 2009.

75. On the mandate of the DPP, Mr. Mule stressed that Article 157(6) of the Constitution gave powers to the DPP to prosecute. The conduct of such powers was also regulated by the Office of the Director of Prosecutions Act, No 2 of 2013. Accordingly and as the powers were expected to be exercised without the control or direction of any person, the court ought to not cross- the line even in the instant applications. In further support of this contention, counsel stated that the DPP only decided to institute the charges after an analysis of the evidence as compiled by the police service established that there was reasonably sufficient evidence to sustain the charges. Counsel denied that any external factors had influenced the DPP adding that in any event none had been proved by the applicants.

76. Counsel also submitted that the powers to investigate had been donated to the National Police Service who had established a reasonable suspicion as the investigations into the alleged theft of Kshs. 791,385,000/= had led the Police Service investigators to the applicants with evidence pointing to money laundering.

77. Mr. Mule insisted that the Applicants had failed to establish that other extraneous factors had influenced their prosecution or that the DPP had departed from the principles of natural justice to warrant a judicial review of the exercise of his discretion. Likewise, counsel stated that the applicants had been unable to show lack of authority or excess of jurisdiction.

78. Then relying on the cases of **William S.K. Ruto & another *vs.* Attorney General & another HCC App. No. 1192 of 2004** and **Thuita Mwangi & 2 Others *vs.* Ethics and Anti-Corruption Commission & 3 Others HCCP No. 369 of 2013,** counsel stated that it was for the trial court to deal with, test and confirm the quality and or sufficiency of the evidence and not a judicial review court. Counsel urged the court not to take the place of a trial court properly so enjoined under Articles 162(4) and 169 of the Constitution. According to counsel, the Applicants would have an opportunity to state their defences before the trial court and it would then be for the trial court to determine whether an offence had been committed. For this proposition counsel relied on the case of **Paul Stuart Imison & another *vs.* Attorney General & 2 Others HCCP No. 57 of 2009.**

2nd Respondent's submissions

79. Ms. Winnie Cheruiyot appeared for the Attorney General on behalf of the 2nd Respondent.

80. Ms. Cheruiyot commenced her submissions by stating that the applicants had not raised any issues liable to judicial review proceedings to warrant issuance of the orders sought. According to Ms. Cheruiyot, the issue as to whether there is evidence against the applicants is an issue of merit and judicial review deals only with the process. For this proposition counsel referred to the cases of **Republic *vs.* Chief Magistrates Court Nrb *Ex p* Stephen Oyugi Okero [2015]eKLR** and **Republic *vs.* Attorney General *Ex p* Diamond Hashim Lalji & Another [2014]eKLR.**

81. Ms. Cheruiyot added that the decision to investigate and prosecute the applicants could not be disturbed as the discretion abound had been exercised properly.

82. Finally, counsel added the orders sought could not issue as no good and valid reason had been given by the Applicants. Further, the 2nd Respondent was possessed with the requisite jurisdiction to handle the case. Counsel relied on the two cases of **Republic *vs.* Attorney General & 4 Others *Ex p* Kenneth**

Kariuki Githii [2014]eKLR and also **Kuria & 3 Others *vs.* Attorney General [2002] 2 KLR 69.**

Interested Party's Submissions

83. The Interested Party who participated in these proceedings was Mr. John Kago. He was represented by Mr. Dennis Mosota.

84. Adopting largely the submissions of the 1st Applicant, Mr. Mosota added that by charging the Applicants with the offence of money laundering before proving that there existed proceeds of crime the DPP had abused his powers contrary to Article 157(11) of the Constitution. According to Mr. Mosota, there was no legitimate basis for the prosecution of the applicants or the continued proceedings in Criminal Case No. 301 of 2016.

Discussion and Determination

85. I have considered the various applications as well as the Supporting Affidavits and the submissions made by the parties. I have also reflected on the Respondents' case as well as the submissions made on their behalf.

86. The DPP's prosecutorial powers have been challenged. Orders of certiorari and prohibition are sought by the Applicants to stall the decision to prosecute them as well as the ongoing prosecution. Ordinarily, these are orders sought to ensure jurisdictional control and to assist the court in the review and suspension of inferior tribunals and bodies exercising powers conferred by statute (and by the Constitution).

87. It should now be an acceptable and clear principle that judicial review may be made both on substantive grounds as well as procedural grounds.

88. Where review is sought on substantive grounds it may actually touch on the merits of the decision. Thus review may be sought on grounds of ultra vires (excess of powers): see **Credit Suisse *vs.* Allendale Council [1997] QB 307.** Review may also be made where there is alleged abuse of discretionary powers which may include taking into account irrelevant considerations or the exercise of discretionary power for improper purposes and unreasonableness or irrationality. Thirdly as well exercise of discretion may invite proportionality. Errors of law or mistake of fact may also invite judicial review. This is public office or body entrusted with discretion must direct itself properly on the law or its decision may be declared invalid: see **Republic *vs.* Home Secretary *Ex p* Venables [1998] AC 407** where it was also noted that the notion of error of law goes wider than a mere mistake of statutory interpretation.

89. I may perhaps also add that acting incompatibly with constitutional rights would also certainly entitle the court to intervene by way of judicial review on any action taken or decision made by a public body or authority : see Article 165(2)(d) of the Constitution.

90. With regard to judicial review on procedural grounds, much focus is laid on the statutory requirements leading to the decision as well as the rules of fair procedure, consistently referred to as rules of natural justice.

91. It has been variously argued that judicial review is concerned with the decision making process and never with the merits of the decision itself: see for example **Municipal Council of Mombasa *vs.* Republic & Umoja Consultants Ltd Court of Appeal Civil Appeal No. 185 of 2001, Republic *vs.* The Retirement Benefits Appeals Tribunal *Ex p* Augustine Juma and 8 Others [2013]eKLR, Kenya Pipeline Company Ltd *vs.* Hyosung Ebara Company Ltd & 2 Others Court of Appeal Civil Appeal No. 145 of 2011 [2012]eKLR, Republic *vs.* Kenya Revenue Authority *Ex p* Yaya Towers Ltd [2008]eKLR** amongst other cases.

92. In the case of **Pastoli *vs.* Kabale District Local Government Council and Others [2008] 2 EA 300** the court stated and held thus:

"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

93. I however hasten to state that the application of such doctrines as legitimate expectation, illegality(contrary to the Constitution) and proportionality in determining whether or not to grant judicial review orders is a clear indication that modern judicial review involves a reflection on the merit of the decision as well. One cannot therefore ignore looking at the merit even where the procedure appears to have been substantially complied with to the letter. The idea is to ensure that procedure is not applied simply out of formality and courtesy.

94. The contest between procedure and substance in the context of review of the exercise of the DPP's powers to prosecute also plays out well as I shall shortly in the subsequent paragraphs demonstrate. Suffice to state that, when the court is called upon to determine the existence of a foundational basis to prosecute, the court is effectively being invited to determine whether there was any merit in the decision to prosecute.

95. The applicants in the instant proceedings all seek the judicial review remedies of prohibition and certiorari to bring to a halt their prosecution in Criminal Case No. 301 of 2016 and to quash the decision to prosecute them. The question as to when the court will bring to a halt a decision of DPP to initiate and prosecute alleged offenders has been considered by courts within and outside of our jurisdiction. The courts have laid down various instances when the DPP's prosecutorial powers and process will be interphased by the court.

96. The starting point would however be both Article 157 of the Constitution as well as the Office of the Director of Public Prosecutions Act, No. 2 of 2013.

97. While Article 157 of the Constitution establishes the office of the DPP and grants it the requisite independence in matters prosecution, the Office of Director of Public Prosecutions Act lays down the manner of conducting the powers of the office of the DPP. Both under Article 157 (11) of the Constitution and Section 4 of the Office of Director of Public Prosecution Act, the discretionary power donated to the DPP to initiate any prosecution is not absolute and where appropriate the court will intervene.

98. Article 157(11) stipulates as follows:

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

99. On the other hand, Section 4 of the office of Director of Public Prosecutions Act, which seeks to promote Article 157 of the Constitution provides as follows:

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

(a) the diversity of the people of Kenya;

(b) impartiality and gender equity;

(c) the rules of natural justice;

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

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

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

(g) protection of the sovereignty of the people;

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

(i) promotion of constitutionalism.

100. Clearly, the DPP is to be guided by these constitutional and statutory provisions to help avoid incidents of abuse or excess of power in the exercise of such discretion which may invite the court's intervention. Thus in the case of **Vincent Kibiego *vs.* Attorney General, High Court Misc. Application No. 839 of 1999** Kuloba J observed as follows:

"If a criminal prosecution is seen as amounting to an abuse of the process of the court, the court will interfere and stop it…"

101. A criminal prosecution will amount to an abuse of the process of the court if, for any reason, it ought not to have been instituted in the first place.

102. Caution must however be taken to ensure that the DPP's prosecutorial powers are also not unnecessarily hinged or interfered with by the court. In in **Total Kenya Ltd & 9 others –vs- Director of Public Prosecutions & 3 others [2013] eKLR** , the court stated as follows:

*"**Although this court has inherent jurisdiction to stop abuse of its process by prohibiting criminal proceedings, where the same are found to be oppressive or otherwise an abuse of its process, such power must be exercised ever so cautiously so as not to stifle what is otherwise the lawful discharge of a constitutional mandate by the police service and the DPP."***

103. The powers of the DPP to prosecute and to decide when to prosecute are constitutional. Minimal interference or superintendence of such constitutional offices is called for. Reticence is the route the court ought to follow but where there is obviously an abuse of such prosecutorial powers with a resultant abuse of the court process or prejudice to an accused person, then the trial must be halted by the court.

104. The pigeon-holes and instances when the court will interfere are generally various.

105. In the Indian Supreme Court case of **State of Maharastra & Others –vs- Arun Gulab Gaurali & Others ,Criminal Appeal No. 590 of 2007** (dated 27th August 2010) the court indexed some of the instances when prosecution would be prohibited as:

"(i) Where institution/ continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice;

(ii) where it manifestly appears that there is a legal bar against the institution or continuance of the said proceedings, eg want of sanction;

(iii) where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety , do not constitute the offence alleged;and where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge"

106. A similar attempt was also made in **Macharia & another *vs.* Attorney general & Another [2001] KLR 448** . However as this court pointed out in the case of **Godfrey Mutahi Ngunyi *vs*. Director of Public Prosecutions & 4 Others [2015]eKLR :**

"[46]…in view of the infinite variety of cases in which the issue as to whether or not to stay prosecution of alleged offenders might arise, it is impossible to provide a rigid classification of the circumstances when stay may issue."

107. In the end, it is for the court to carefully balance the fact that it ought to ensure that it does not usurp or stall the constitutional mandate of the DPP conferred pursuant to Article 157: see **Kenya Commercial Bank Ltd & 2 Others *vs.* Commissioner of Police & Another HCCP 218 OF 2012 [2013]e KLR** on the one hand, and the need to ensure that the DPP does not abuse his powers to prosecute possible criminal offenders by ensuring that even such procedural principles as dictated by Section 4 of the Office of the Director of Public Prosecutions Act like observing the rules of natural justice are observed, on the other hand. In which event, the court ought truly only intervene in exceptional and clear cases.

108. To my mind consequently and contrary to the Respondents' assertions, the court has powers to enquire into the action of the DPP and review the same with a view to ascertaining whether both procedurally and substantively the decision to prosecute the applicants is flawed to the extent that an order quashing the same is merited and warranted. As was stated in the case **of Kuria & 3 Others *vs.* Attorney General [2002] 2 KLR 69.**

"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…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."

109. I would consequently not agree with the DPP when he submits that his, is an independent office which must be allowed to prosecute without any interference. And, I say no more on this point save to point out again that on several occasions the court has intervened and prohibited prosecutions when circumstances so demand.

110. In **Republic *vs.* Chief Magistrates Court at Mombasa Ex Parte Ganijee & another [2002] 2 KLR 703** the court was clear that criminal investigations or prosecution will not be entertained if the purpose is to help in advancing an individual's civil and private rights. The same position was expressed in the case of **David Mathenge Ndirangu *vs.* Director of Public Prosecutions & 3 Others [2014] e KLR** where the court stepped in to prohibit further prosecution and citing the case of **Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703** stated as follows**:**

"It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement or frustrations of their civil cases. That is an abuse of the

process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth...When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court...In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in..."

111. The Court of Appeal in **Commissioner of Police & another *vs.* Kenya Commercial Bank Ltd & Others NBI** Civil Appeal No. 56 of 2012 [2013] eKLR expressed the same sentiments with a rider however that caution ought to be exercised before interfering with the investigatory and prosecutorial powers of the Police Service and the DPP.

112. Besides prohibiting the use of prosecutorial powers to assist individuals in achieving other means or motives, the courts have also consistently used its prerogative and inherent powers to prohibit prosecution where appropriate.

113. In **Joram Mwenda Guantai *vs.* The Chief Magistrate NBI [2007] 2 EA 170 (C.A),** the court held as follows:

"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 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."

114. Earlier on in the case of **Kuria & 3 Others *vs.* Attorney General (Supra)** the court had also stated as follows:

"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…"

115. The court was clearly expressing the need for good administration in matters prosecution while at the same time ensuring that the public interest in ensuring that the accused of criminal offences face the law is also fully considered.

An Oxymoronic tide?

116. The courts' twin approach in ensuring that the discretion to prosecute is not abused if only to maintain public confidence in the criminal justice system and the same time balancing the public interest in seeing that criminals are brought to book has led to rather contradictory principles.

117. On the one hand the courts have consistently held that suspects investigated and charged before trial courts can only have their way before the trial court. It is stated that the trial court is the appropriate forum where evidence is to be tested and all defences raised: see the cases of **Thuita Mwangi & 2 Others *vs.* The Ethics and Anti–Corruption Commission Petition No. 153 of 2013 [2014]eKLR** and also **Republic *vs.* Commissioner of Police & Another *Ex p* Michael Monari & Another [2012] eKLR** where Warsame J (as he then was) stated as follows:

" 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 decision to charge act in a reasonable manner, the High Court would be reluctant to intervene."

118. On the other hand the courts have also been consistent that a prosecution which lacks a foundational basis must not be allowed to stand. The DPP is not supposed to simply lay charges but must determine on sound legal principles whether the evidence can sustain a charge prior to instituting the prosecution: see the cases of **Republic *vs* Director of Public Prosecutions *Ex p* Qian Guon Jun & Another [2013]eKLR, Republic *vs.* Attorney General *Ex p* Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001, Githunguri *vs.* Republic (Supra)** and **Republic *vs.* The Judicial Commission into the Goldenberg Affair and 2 Others *Ex p* Saitoti HC Misc Application No. 102 of 2006**.

119. In **Republic *vs.* Attorney General *Ex p* Kipngeno Arap Ngeny (Supra),** the court observed as follows:

"It is an affront to our sense of justice as a society to allow the prosecution of individuals on flimsy grounds. Although in this application we cannot ask the Attorney General to prove the charge against the accused, there must be shown some reasonable grounds for mounting a criminal prosecution against an individual. 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 achieve nothing more than embarrass the individual and put him to unnecessary expense and agony. The Court may, <u>in a proper case</u>, scrutinize the material before it and if it is determined that no offence has been disclosed, issue a prohibition halting the prosecution." **(emphasis mine)**

120. The same rather oxymoronic tide appears to obtain outside our jurisdiction. In Australia, in the case of **William *vs.* Spantz [1992] 66 NSWLR 585** the High Court was of the view that proceedings lacking in any proper foundation amount to abuse of process and ought to be stayed. Yet in England, the House of Lords was emphatic in the case of **Director of Public Prosecutions *vs.* Humphrey [1976] 2 ALL ER 497** at 511 that:

"A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval…If there is a power…to stop a prosecution on indictment in limine, it is in my view a power that should only be exercised in the most exceptional circumstances."

121. The approach in the **Director of Public Prosecution *vs.* Humphreys (Supra),** where the doctrine of issue estoppels was held to have no application to criminal proceedings, was followed by the High Court of Botswana in **State *vs.* Matere [1993] BLR 465.**

122. Thus while it appears true that the court has authority to prevent abuses of its process and safeguard an accused person from oppression and prejudice on basis of baseless charges, the courts have also been quick to observe and hold that where an indictment is properly drawn in accordance with established practice and pursuant to a decision by the DPP to institute the prosecution the rest must be left to the trial court clothed with jurisdiction to deal with it and the accused is thereat to present its defence.

123. It is these two principles in the context of challenges to prosecutorial powers of the DPP which lead to the inevitable inference that in matters of judicial review, it is not merely a question of process but also merit. How else would a court ascertain the presence of or lack of a foundational basis without questioning the merit of the DPP's decision? The court must reflect on both the law and the evidence to ascertain the foundational basis and in the process undertake a more substantive review of the decision by the DPP.

124. In the context of the instant case, the applicants' essentially urge me to follow the second of the two principles.

125. It is stated that there is no foundational basis for the charge against the applicants of money laundering contrary to Section 3, 4, 16 of the POCAMLA 2009. The Applicants advance the argument that they may only be charged with the crime of money laundering after the DPP has proven beyond doubt that the money which they are linked to are indeed "proceeds of crime" under the POCAMLA 2009. The DPP contests the applicants' contention, with the DPP stating that there is no need of prior proof of a predicate offence or crime upon which the charges are dependent. There is, in the DPP's argument, no need to even specify the crime.

126. Money Laundering is a global issue. It poses a threat to the integrity and stability of financial as well as governance structures of most economies. Most countries have also criminalized clearing or concealing the origins of proceeds of crime.

127. Kenya has its own anti money-laundering legislation; The Proceeds of Crime and Anti-Money Laundering Act (Cap 59B) Laws of Kenya. The United Kingdom has the Proceeds of Crime Act, 2002 ("POCA") as amended by the Serious Organized Crimes and Police Act, 2005. Both under POCAMLA 2009 and POCA 2002, it is a crime to deal with criminal property (or proceeds of crime): see Section 3, 4 and 7 of the POCAMLA, 2009.

128. The question which also arises in the instant applications is whether money laundering proceedings are 'standalone' or can only be proceeded on with once an indictment of the predicate offence upon which the money laundering offence is funded has been successfully prosecuted?

129. To answer the isolated questions, it would be appropriate to first understand both the statutory framework and also appreciate some decided case law on money laundering.

Statutory Framework

130. Under Section 2 of the POCAMLA 2009, "Money laundering" is stated to mean an offence under any of the provisions of Sections 3, 4 and 7 of the Act.

131. Section 3 of the POCAMLA 2009 stipulates as follows:

> ***3. Money Laundering***
>
> ***A person who knows or who ought to have reasonable known that property is or forms part of the proceeds of crime and***
>
> ***a. Enters into any agreement or engages in any arrangement or transaction with any one in connection with that property whether that agreement, arrangement or transaction is legally enforceable or not, or***
>
> ***b. Performs any other act in connection with such property, whether it is performed independently or with any other person, whose effect is to:-***
>
> ***i. Conceal or disguise the nature source, location, disposition or movement of the said property or the ownership thereof or any interest which any one may have in respect- thereof; or***
>
> ***ii. Enable or assist any person who has committed or commits an offence, whether in Kenya or elsewhere to avoid prosecution; or***
>
> ***iii. Remove or diminish any property acquired directly or indirectly as a result of the commission of an offence, commits an offence.***

Section 4 of the POCAMLA 2009 then proceeds to provide as follows:

> ***4. Acquisition, possession or use of proceeds of crime***
>
> ***A person who-***
>
> ***a) acquires;***
>
> ***b) uses; as***
>
> ***c) has possession of Property and who, at the time of acquisition use or possession of such property, knows or ought reasonably to have known that it is or forms part of the proceeds of a crime committed by him or by another person, commits an offence.***

132. Further, Section 7 of the POCAMLA 2009 states :

> ***7. Financial Promotion of an offence.***
>
> ***A person who knowingly transports , transmits, transfers or receives or attempts to transport, transmit, transfer or receive a monetary instrument or anything of value to another person, with intent to commit an offence, that person commits an offence.***

133. Finally, Section 16(1) of the POCAMLA 2009 provides the maximum penalties to be handed to those convicted of money laundering, under Section 3, 4 or 7 of the POCAMLA, 2009. The corporate bodies face penalties of upto Kshs. 25 million or the amount of the value of the property introduced in the offence, whichever is less. Natural persons on the other hand face jail terms of up to fourteen years or fines not exceeding Kshs. 5 million or the equivalent value of the property involved in the offence whichever is higher or both imprisonment and fine.

134. The applicants herein all face charges under Section 3 as read together with Section 16(1) of the POCAMLA 2009. To advance their respective cases their counsel all referred to the two statutory provisions. The additional provisions, being Section 4 and 7 of the POCAMLA 2009, have been indexed by myself to help understand the core ingredients of the offence of money laundering.

135. As the applicants also correctly pointed out that the offence of money laundering is hinged on the property the subject of the charge being or forming part of "proceeds of crime" under Section 3, it would also be more appropriate to index part of Section 2 of POCAMLA 2009 which defines "Proceeds of Crime". And it states thus:

> ***"proceeds of crime" means any property or economic advantage derived or realized, directly or indirectly, as a result of or in connection with an offence irrespective of the identity of the offender and includes, on a proportional basis, property into which any property derived or realized directly from the offence was later successfully converted transformed or intermingled, as well as income, capital or other economic gains or benefits derived or realized from such property from the time the offence was committed".***

136. Section 328 of Proceeds of Crime Act (POCA) 2002 of the United Kingdom, in my view is a condensed version of Section 3 of Kenya's POCAMLA 2009. Section 328 of the POCA reads as follows:

> ***328 (1). A person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.***

137. Critical, in my view, in determining the isolated issue is a determination of what needs to be proved by the prosecution beyond reasonable doubt in an offence of money laundering.

138. Neither the applicants nor the respondents and the Interested Party availed the court the benefit of any local case law on that point. I have had to seek guidance from the decided cases in the United Kingdom. I review briefly some of the cases in the following paragraphs.

139. In **Republic *vs.* Craig [2007] EWCA Crim 2913,** the Court of Appeal of England had opportunity to discuss the provisions of Section 328 of the POCA. A suggestion that the prosecution must first precisely establish atleast one allegation of criminal conduct to prove that there existed criminal property (or "proceeds of crime", in the language of Kenya's POCAMLA 2009) was rejected by the court. The court held that the *mens rea* of the offence of money laundering was that the accused knew or suspected that the property represented a person's benefit from criminal conduct.

140. Then in **Republic *vs.* NW and Others [2008] EWCA Crim 2 ,** the defendants were charged with money laundering when about £100,000 alleged to be proceeds from NW's criminal activity was wired from the United Kingdom to Jamaica. The defendants had no means of support and were on social benefits. £5000 was found in their homes. There was also evidence of frequent phone calls between the Defendants. The Prosecution could not however determine the offence which had generated the money. The trial judge returned a verdict of no case to answer as the offence had not been stated. In dismissing an appeal, the court held that for the purpose of prosecution of a money laundering offence and for elementary fairness the prosecution needed to establish at least the class or type of criminal conduct involved. The court also held that the prosecution did not have to establish precisely what crimes had generated the property in question.

141. Then came **Republic *vs.* Anwoir [2009] 1 WLR 980 ,** also a decision of the Court of Appeal. In **Republic *vs.* Anwoir (Supra),** the four appellants were charged with money laundering. Substantial amounts had been deposited into a bank account through a forex bureau. Police undercover operations indicated that one of the appellants had access to people who were willing to launder money from drug dealing. Appeals by three appellants failed. One appellant succeeded. The court held that from the facts of the case the proceeds of crime could come from drug offences/or VAT fraud. In the courts, view, in money laundering cases the prosecution could prove that property derived from crime in two ways. Firstly, by showing that it derived from conduct of a kind of kinds was unlawful. Secondly, and more importantly, by evidence of the circumstances in which the property was handled which were such as to give rise to the irresistible inference that it could be derived only from crime.

142. More recently was the decision of **Republic *vs.* Smith [2015] EWCA Crim 333**. The court cited

with approval the case of **Republic *vs.* Anwoir (Supra)** while holding that the prosecution could prove that property derived from crime by tendering circumstantial evidence. There was no need to prove an earlier conviction.

143. It is instructive that in all the cases above the focus was on what was to be proven by the prosecution. In none was there any suggestion by the court that the prosecution had first to establish that there had existed a conviction or a proven offence whence the property or money the subject of the money laundering came. In **R *vs.* NM (supra)** however the court was of the view that there was need for information showing the crime leading to the money being laundered.

144. Indeed, it would appear that of importance was the information availed to the accused.

145. Locally too the focus must thus be on the ingredients of the offence itself. In the context of the current applications, it is Section 3 of the POCAMLA 2009 that is relevant.

146. Section 3 of the POCAMLA 2009 outlines the offence of money laundering as may be committed by third parties. It is for the prosecution of those who launder on behalf of others. It is intended in my view to help the State to catch up with persons who in the course of their business or otherwise facilitate money laundering by or on behalf of others and especially the originators of the crime. The language relating to the physical acts is wide and must have been deliberately so legislated. Section 3 also imposes a subjective obligation on the accused person.

147. The physical acts of which a person may be accused of are clear. Entering or engaging in an arrangement in connection with property which forms or is part of proceeds of crime leads to criminal culpability under the POCAMLA 2009. Likewise performing any act whether independently or with others with a view to concealing or removing the property which forms or is part of the proceeds of crime or with a view to enabling or assisting the originator of the crime to avoid prosecution, also leads to criminal culpability.

148. The offence is however not complete in the absence of the subjective. The person who commits the physical act must also know or ought to reasonably have known "that the property is or forms part of the proceeds of crime".

149. Clearly therefore the engagement or arrangement which is the basis of the charge of money laundering must actually result in an identified individual or entity receiving or retaining property which at the time of the arrangement or engagement was or formed part of criminal property (proceeds of crime). It is for the prosecution to prove not only this *actus reus* but also the *mens rea*. The prosecution must prove that the accused was involved in an "engagement or arrangement" under Section 3 of POCAMLA. The prosecution must also prove knowledge or facts showing that the accused must be deemed to have known that the property received (whether money or otherwise) was part of or constituted proceeds of crime. It is for the prosecution to show the proceeds are the benefit of a criminal conduct. That they are 'proceeds of crime'. In summary thus, the prosecution need prove that:

i. The accused entered into or became concerned in an engagement or arrangement;

ii. Which he knew or ought to have known facilitated the acquisition, retention, use or control;

iii. Of criminal property (proceed of crime);

iv. By or on behalf of another person the effect of which would conceal or disguise the source of the proceeds.

150. It would appear to me therefore, and I so hold, that the prosecution need not prove, prior to any charges of money laundering, that there has existed a conviction or an affirmation of a predicate offence. The prosecution need not consequently show a determination by a court of law that there was theft or forgery or fraud that led to the acquisition of the proceeds or property the subject of the money laundering

proceedings.

151. The criminal origins of the proceeds may be proved in the same way as any other elements of an offence can be proved. The offence of money laundering must be deemed as 'stand alone' offence. In proving that the proceeds or property are proceeds of crime even circumstantial evidence will be crucial. There is in my view no need to await any prior convictions of other offences before launching the prosecution of alleged money launderers. It is thus of little wonder that ' proceeds of crime' as defined under POCAMLA 2009 as

> ***"proceeds of crime" means any property or economic advantage derived or realized, directly or indirectly, as a result of or in connection with an offence irrespective of the identity of the offender and includes, on a proportional basis, property into which any property derived or realized directly from the offence was later successfully converted transformed or intermingled, as well as income, capital or other economic gains or benefits derived or realized from such property from the time the offence was committed"*** (emphasis)

152. I have added the emphasis to illustrate that even the legislators appreciated instances when there may be no one to prosecute hence there may be no conviction for a predicate offence or crime. The need to prove a predicate offence before laying a charge of money laundering was effectively dispensed with.

153. The principal offender who committed the predicate offence may never be there to be prosecuted, yet access to the proceeds of crime would have been achieved. He may have left jurisdiction with assistance of others. He may be a fugitive. He may have passed on. Behind him though, he would have left money launderers. If the principal offender may not be indicted, would it then mean that the money launderers would never be prosecuted? In my view, that certainly cannot be what the legislators intended. They, in my view, intended to ensure that in a money laundering offence both the *actus reus* and the *mens rea* of the principal offences were strictly proven by the prosecution and not by mere reliance on previously held proceedings.

154. In the instant applications, the applicants have accused the DPP of having fundamentally misunderstood and misapplied the law by preferring charges against the applicants before any determination by a court of law that the predicate offence was committed. The DPP is accused by the applicants for acting irrationally and unreasonably or prematurely prompting the indictments.

155. I do not hold the view that the DPP can be faulted.

156. The information availed to the applicants on the offences with which they are charged is telling. The information in the form of particulars to the charge as detailed in the charge sheet would appear to reveal that the DPP appreciated the offence of money laundering. The charge sheet reads as follows in literally all instances.

> *STATEMENT OF THE OFFENCE*
>
> *MONEY LAUNDERING CONTRARY TO SECTIONS 3 AS READ WITH SECTION 16(1) (a) OF THE PROCEEDS OF CRIME AND ANTI-MONEY LAUNDERING ACT.*
>
> *PARTICULARS OF OFFENCE*
>
> *[NAME OF ACCUSED(S) between 1st December 2014 and 30th April 2015 in Nairobi County, jointly engaged in an arrangement for the purchase [transfer of] of [property purchased] at the cost of Kshs. … million while knowing or ought to have known that the said money was the proceeds of crime, namely Kshs. 791,385,000/= (seven hundred and ninety one million Three hundred and Eighty Five Thousand) stolen from the National Youth Service, whose effect was to conceal the source of the said money",.* (emphasis)

157. The particulars clearly captured the offence in reasonable terms to meet the requirements of Article

50(2)(b) of the Constitution. The ingredients to be proved are emphasized by me. I am not convinced that the charge as drafted is a revelation of a DPP who did not appreciate the offence. Quite the contrary, he did.

158. Additionally, the DPP was able to state through affidavit evidence how the investigations led the forensic investigators to the applicants. I must consequently conclude that there was a foundational basis for the various charges preferred against the applicants.

159. The ratio in the case of **Republic *vs.* Attorney General Ex Parte Kipngeno Arap Ngeny HCC Application No. 406 of 2001** that a criminal case commenced in the absence of a proper foundational basis should not be allowed to apply to the Criminal Case No. 301 of 2016 where the applicants are the accused. Instead, I view it that the defences if any that the applicants may have, must await to be heard and considered by the trial court.

160. The applicants also took issue with the manner of the investigations were conducted. As I pointed out earlier, the duty to investigate is heaped on the police Service together with the DPP. Investigations, no doubt ought to be conducted with due regard being paid to both the provisions the Constitution and to statute. The Applicants have not provided any evidence on how the investigations were flawed and of any evidence obtained as a result of such flawed investigations. I am unable consequently to find for the Applicants or any of them that the investigations were flawed and would prejudice their fair trial.

161. Finally, the 4th , 7th and 9th Applicants also cried foul over their prosecution in both Criminal Case No. 1905 of 2015 and Criminal case No. 301 of 2016. This they argued amounted to double jeopardy. They argue they will be prejudiced. I have found both as a matter of fact and of law that the offence of money laundering is a "stand alone " offence. It is not to be read together with the offence of stealing. The 4th, 7th and 9th Applicants face the offence of stealing in Criminal case No 1905 of 2015. The POCAMLA 2009, allows even those accused of stealing to be charged with the offence of money laundering. I am unable to discern how it may be stated , in the circumstances, that the 4th 7th and 9th Applicants are being tried twice over for the same offence. There is in my view, no jeopardy to be suffered simply by reason of the two cases being prosecuted simultaneously as the ingredients to be proven by the prosecution is certainly different.

162. My sympathies rest with the DPP as well as the Applicants. The DPP is in a quandary. He must not only prove the ingredients of the offence, including the subjective, to the acceptable standard but must then contend with the defences available to persons accused of money laundering, like the applicants. The burden of proof is not to be flexed. Yet it is not always easy to prove such offences as money laundering where the subjective is invited and the burden appears to shift from the onset. On the other hand, some if not all the applicants could well be innocent Kenyans going about their businesses. Their innocence is however not for this court to decide. It rests with the trial court.

Conclusion and summary of findings

163. On the reserved questions of law, in view of the above analysis, I conclude that both must be answered in the negative.

164. The DPP did not, in my view, misunderstand the law with regard to money laundering to be accused of having acted irrationally and unreasonably. Secondly, in my view, the DPP has not abused the powers of his office and neither has he acted unconstitutionally.

165. In the result, I hold that these are not appropriate applications where the judicial review powers may be invoked as no procedural impropriety has been shown and neither was the impugned decision to charge the applicants with the offence of money laundering wanting in both reason and merit on the face of the facts tabled before the court. As has been previously in this judgment pointed out, the court ought to ordinarily interfere with the exercise of the DPP's prosecutorial powers only in exceptional circumstances. Where the exercise shocks and is detrimental to the proper administration of justice and warrants intervention the court will interfere. But the court should exercise reticence and not second guess

the DPP where it is clear that the motive is to perform the function of his office pursuant to the constitutional and statutory provisions and mandate.

Disposition

166. The applications deserve to be dismissed and I hereby dismiss all the applications but with no orders as to costs.

167. I must also extend my appreciation to all counsel who fervently argued their respective clients' cause.

Signed Dated and Delivered at Nairobi this 29th day of June 2016

J.L. ONGUTO

JUDGE