REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISC. CIVIL APPLICATION NO. 333 OF 2014

IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION, SECTIONS 8 AND 9 OF THE LAW REFORM ACT AND ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF AN INQUIRY INTO ALLEGATIONS BY THE SHAREHOLDERS OF MALILI RANCH LIMITED THAT KSHS 1. BILLION PAID BY GOVERNMENT OF KENYA FOR PURCHASE OF THEIR PORTIONS OF LAND THAT TOTALED TO 5000 ACRES TO SET UP THE ICT KONZA CITY WAS MISAPPROPRIATED

AND

IN THE MATTER OF NAIROBI CHIEF MAGISTRATE'S COURT AT MILIMANI LAW COURTS ACC CASE NUMBER 19 OF 2014

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW AGAINST THE DECISION TO CHARGE AND PROSECUTE DAVID NDOLO NGILAI, JAMES KITUKU MUNGUTI AND LEONARD KYANIA KITUA

BETWEEN

DAVI NDOLO NGIALI……..1ST APPLICANT

JAMES KITUKU MUNGUTI…….……2ND APPLICANT

LEONARD KYANIA KITUA..……..…..……..3RD APPLICANT

VERSUS

THE DIRECTOR, DIRECTORATE OF

CRIMINAL INVESTIGATIONS……..……..1ST RESPONDENT

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

THE HON. ATTORNEY GENERAL..……...……3RD RESPONDENT

THE O.C.S. MUTHAIGA POLICE STATION……4TH RESPONDENT

THE CHIEF MAGISTRATE'S COURT AT

MILIMANI LAW COURTS…….5TH RESPONDENT

JUDGEMENT

Introduction

1. By a Motion on Notice dated 8th October, 2014, the *ex parte* applicants herein seek the following orders:

a. **An order of Certiorari to remove into this honourable court and quash the decision of the 1st, 2nd and 4th Respondents contained in the charge sheet presented to court on 27th August 2014 to prosecute the Applicants for the offences of stealing contrary to Section 268 as read with Section 275 of the Penal Code and Conspiracy to Commit a Felony contrary to Section 393 of the Penal Code.**
b. **An order of Certiorari to remove into this honourable court and quash the decision of the 5th Respondent dated 29th August 2014 commanding the Applicants to appear before the 5th Respondent on 5th September 2014 to take plea in Chief Magistrates Court at Milimani ACC Case Number 19 of 2014.**
c. **An order of Prohibition to prohibit the Respondents jointly and or severally from prosecuting and or conducting proceedings including but not limited to the court appearance, taking of plea and taking of evidence in Nairobi Chief Magistrate's court at Milimani ACC No. 19 of 2014 or any other court proceedings based on the same factual and evidentiary basis as Nairobi Chief Magistrate's Court at Milimani ACC No. 19 of 2014.**
d. **Costs of and incidental to these proceedings.**

Applicants' Case

2. The application is supported by a verifying affidavit sworn by **David Ndolo Ngilai** on 3rd September, 2014.
3. According to the deponent, the 1st, 2nd and 4th Respondents took a decision to charge the Applicants and conduct their prosecution before the 5th Respondent on allegations of stealing and conspiracy to commit a felony and consequent upon the said decision, the 5th Respondent issued a summons requiring their attendance for purposes of taking plea to the said charges on 5th September, 2014.
4. According to the deponent, the said step constitutes an abuse of the criminal justice process, is oppressive and was reached without any evidentiary basis and in light of abundant exculpatory evidence in the applicants' favour. To the deponent, the said decision is a blatant cover-up in favour of the real perpetrators of any wrong-doing in the transaction in question as it was made contrary to an express written opinion on the people the police had formed an opinion could be criminally culpable in the transaction in question and without any request for the investigating officers to conduct further investigations, if necessary, against them. Further the said decision was reached by or on the basis of a decision by a police station and an OCS whose station was not seized of the subject investigation and, therefore, had no basis and was contrary to public policy and violated the Applicants' right to fair administrative process.
5. It was deposed that on being served with the summons to appear in court, on 2nd September, 2014, the 2nd and 3rd Applicants as well as the deponent requested their advocate, **Mr. Muema Kitulu**, together with **Mr. Ongoya** Advocate to proceed to Nairobi area Criminal Investigation Department (CID), which is the police station where the applicants had recorded statement relating to this matter, and obtain the relevant statements as well as other material that may assist the said advocates prepare their defence. At the said CID Offices, the applicants met a **Mr.**

Kiragu who has been the investigation officer in this matter for over 5 years and who recorded statements from them and who kindly supplied the said advocates with the following material:

a. A copy of a letter dated 10th March 2014 from the Nairobi County Criminal Investigations Officer to the Director, Directorate of Criminal Investigations with the police recommendations based on the detailed investigations they had conducted in this matter.

b. A letter dated 22nd April, 2014 from the Directorate of Criminal Investigations to the Director of Public Prosecutions on the recommended actions in this matter.

c. A Statement of **Eric Kyalo Mutua** dated 24th November, 2009.

d. A Statement of **Eric Kyalo Mutua** dated 13th October, 2014.

e. A copy of the register of the members of Malili Ranch Ltd who received various payments from the transaction in question.

f. An assortment of cheques from the account of **Eric Kyalo Mutua** and Co. Advocates to various payees on account of the transaction in question.

g. An assortment of various meeting of purported meetings of Directors of Malili Ranch Ltd.

h. A confirmation of the Change of Directors of Malili Ranch Ltd dated 30th November, 2009.

i. An agreement purportedly entered into between Malili Ranch Ltd and Ms Gateway Logistics Ltd dated 3rd February, 2009.

j. A delivery book of the various shareholders' documents delivered to **Eric Kyalo Mutua** Advocates.

k. The deponent's Statement dated 19th March, 2013.

l. The Statement of **Leonard Kyania Kitua** dated 19th March, 2013.

m. The Statement of **Julius Mbau Nzuko** dated 29th May, 2013.

n. A copy of the star newspaper of April 29, 2014.

o. The Statement of **Peter Mutua Kanyi** dated 19th March, 2013.

p. The Statement of **Julius Maweu Kilonzo** dated 19th March, 2013.

q. The deponent's Statement dated 18th November, 2009.

r. A copy of the deponent's further statement dated 5th November, 2010.

s. A copy of the statement of **Leonard Kitua** dated 18th November, 2009.

t. The Statement of **Julius Mbau Nkyuki** dated 18th November, 2009.

u. A copy of the agreement dated 17th July, 2009 between Malili Ranch Ltd and the Permanent Secretary to the Treasury on behalf of the Ministry of Information and Communications.

6. According to the deponent, from the foregoing documents, it was apparent that:

a. All the money paid by the government of the Republic of Kenya for the benefit of the shareholders of Malili Ranch Ltd was paid directly into the accounts of **Eric Kyalo Mutua Advocates**.

b. That the said advocate disbursed the funds directly to the individual beneficial shareholders of Malili Ranch Ltd by cheques.

c. That the individuals by whom the said money was or is held and to whom the said/part of the said money was disbursed are clear from the foregoing documents and they do not include any of the three Applicants, except for the cases where either of them was a beneficial recipient as shareholder of the company and which is appropriately documented

d. That in the CID investigations and recommendations as forwarded to the DPP, there was no adverse recommendation made against any one of the applicants and from the inquiries made by the applicants' advocates to the investigations officer in their presence, there has been no recommendation by the DPP to the investigating officer to carry on with any further investigations implicating any of the applicants in the alleged fraud.

e. It is curious that whereas the investigating officer for the case is based at Nairobi Area Police and the case has all along been investigated by the said police station, the charge sheet for the case was prepared and signed by Muthaiga Police Station, a station that has neither investigated the case nor ever given the applicants a hearing before charging them hence it is a total violation of the rules of natural justice.

f. That it is not apparent, why in spite of police recommendations not finding the applicants culpable in the transactions in question, a decision was made to prosecute them without reasons for the same being communicated to them to respond or to the investigating officer to investigate the applicant and reach an informed investigation decision on the same.

7. It was deposed that the various minutes shown to the deponent were all prepared by **Eric Kyalo Mutua** Advocates at his office and he got the applicants to append their signatures thereon which they did trusting him as the company lawyer and the company secretary without either the purport or the implications thereof being explained to them by the said **Eric Kyalo Mutua** before they signed.
8. According to the deponent, none of the applicants was ever given copies of the said documents which were only signed on the last page and with the lapse of time, neither of them can authenticate the contents of the other pages which they never signed nor kept copies of. The deponent added that after recording their statements with the police, the same **Eric Kyalo Mutua** got them to sign some affidavits copies of which he did not give to the applicants and on seeking copies thereof from the investigating officer, **Mr. Kiragu**, he too did not have them on file hence the contents and the full purport of the said affidavits were never explained to them.
9. The applicants' case was therefore that they have been pawns in a wider fraudulent scheme and are now being used as sacrificial lamps to sanitize the real culprits in the said scheme, an action which, according to them, would constitute an abuse of the criminal justice system.
10. To the respondents:

a. The land parcel title No. LR 9918/3 out of which the 5000 acres was sold to the Government of Kenya was at all material times registered in the name of Malili Ranch Limited and even though some members had been allocated parcels of land within the 5000 acre piece titles had not been passed to any of them.

b. The agreed price of 1 billion shillings was all inclusive; that is to say, out of the price the Vendor was to meet the cost of sub-division and excision of the 500o acres, obtain consents, pay the advocates costs among other disbursements and expenses.
c. The vendor's advocates were defined as **Messrs E.K. Mutua & Co. Advocates** who are still the retained Advocates to date.
d. The sale agreement was executed on 17th June 2009 by the Chairman the late **Josiah Munuka** and secretary, **Mr Julius Kilonzo**.
e. The proceeds of the sale were paid to the firm of **E.K. Mutua & Co Advocates**.
f. The ex-parte applications came into office on 30th November 2009 after the death of **Mr Josiah Munuka** the former Chairman and arrest and charging of the secretary above mentioned and **Mr Peter Mutua Kanyi** to stand trial for charges similar to those in CM Criminal Case No. 19 of 2014.
g. The details of the sale of the 5000 acres were revealed to the ex-parte applicants after they came into office and the decisions what to pay the members whose allocations were to be interfered with had already been made and resolution passed though the board had legal right to change such resolutions if need be.
h. The contract of sale of 500 acres of land was executed between the Government of Kenya and Malili Ranch Limited and not with individual members of Malili Ranch Limited.
i. There has been no proof of the allegations so far that we the ex-parte applicants fraudulently obtained part of the purchase price, other than pursuant to a lawful compensation like any other member of the Malili Ranch Limited.
j. There has also not been any proof that any balance of the money paid to the firm of **E.K.Mutua & Company Advocates** is not held there up to now.
k. There has been no explanation whether the firm of **E.K. Mutua & Co Advocates** which acted as a stake holder, has been requested to account for the money received.
l. The applicants have been advised by **Mr Erick K. Mutua** that some of the persons due for compensation have refused or failed to collect their cheques from his chambers.
m. The agreement appointing M/S Gateway Logistics Limited as an agent of Malili Ranch Limited was executed between the Directors of the Company and the late Chairman of Malili Ranch Limited and **Mr Julius Kilonzo** who was the secretary then and it was dated 3rd February 2009, which was 10 months before the ex-parte applicants came into office.
n. In the two statements recorded by **Mr Erick K. Mutua Advocate** with the criminal investigations Department, he does not mention even one payment made to the applicants in their individual capacities; rather he mentions all payments of the former board members and other persons.
o. It has not been refuted by the respondent that all the applicants did was a transmit cheques drawn on the accounts **Erick K Mutua** Advocate to the allottees whose allocations were affected.
p. The 2nd respondents has not refuted the averments that the referred to were not authored by the applicants, but, rather by **Mr Erick K. Mutua Advocate** for Malili Ranch Limited as that even a member of the previous board was reported in the local press complaining of being forced to sign similar minutes.

11. The applicants' position was that when they took over it was their belief that the previous Board of Malili Ranch Limited, acted properly and within their mandate under the provisions of the company law in selling the land in question to the Government of Kenya for a far greater good of establishing a special ICT city within Machakos and hence we did not delve into the legality of the transaction itself. In any event, by the time they took office all decisions had been made and the land paid for.
12. It was further contended by the applicants that it was also their collective belief that the individual allottees were being compensated for their allotments at a price that far exceeded their expectations and in any event they were advised that, the previous board and given any allottees not willing to take compensation, an opportunity of being translocated to other parts of the farm.
13. The applicants disclosed that the sale of the 5000 acres to the Government of Kenya has elicited very emotive debate within the country and several politicians from the region have taken stands and held political rallies in which threats of dire consequences have been issued to various persons including board members of Malili Ranch Limited hence they reiterated that they

were mere pawns in a game of subterfuge between the 2nd respondent and the persons who may be most culpable for the alleged crimes.

14. Based on advice from their counsel they averred that for a charge of a criminal offence to be proven the prosecution must establish *mens rea* and *actus rea*. In the instant case there had been no attempt to do so and to declare that they should defend their innocence before the Magistrate's Court, just for the sake of it is an abuse of the court process and extremely prejudicial to their rights.
15. The applicants informed the Court that after this Honourable Court issued its orders of stay of proceedings against them in the criminal court the 2nd respondent opted to withdraw the charge sheet and substituted it with another where the applicants' names were missing hence rendering prayers 1 and 2 of their application herein irrelevant. To the applicants, by withdrawing the charge against them as soon as this Honourable court issued Order of stay, the 2nd respondent had demonstrated that his decision to charge the applicants along in the original charge sheet was not based on any sound evaluation of evidence before him and that the decision was at all material times capricious.
16. The applicants averred that upon withdrawal of charges against them, they would have readily withdrawn this motion, had the 2nd respondent not stated that he was still determined to have them arrested and charged on the same facts at a future date. In their view, the actions of the 2nd respondent therefore, are intended to frustrate, and commit them to a life or fear and uncertainly as the 2nd respondent plays god with the power donated to him by Article 157(6) of the Constitution of Kenya 2010.
17. It was contended that even though the opinion of the 1st respondent to the 2nd respondent is merely advisory, when the 2nd respondent's special prosecutor **Honourable Paul Muite** was appointed by the 2nd respondent vide Gazette Notice No. 5959 of 27th August 2014,he disregarded the investigations conducted by officers of the respondent for over 5 years and in merely two days and without conducting any further in investigations, came up with a different set of names of alleged perpetrators of the alleged crime and caused the Chief Magistrate's court to issue summons against the *ex parte* applicants and others currently charged in CM CR No. 19 of 2014 hence the conduct of the special prosecutor is in conflict the 4th respondents' position as indicated in the affidavit that "*the decision to charge the applicants was informed by the sufficiency of evidence on record*". This is despite the fact that the said decision does not explain the reasons for arriving at a different conclusion from that of the CID who interviewed hundreds of people and went through hundreds of documents and came to the conclusion contained in their recommendations to the 2nd respondent.
18. To the applicants, based on legal advice, the exercise of the 2nd respondents statutory discretion as stipulated by Article 157(6) of the Constitution of Kenya in the present case was contradictory to the caveat created by Article 157(11) of the Constitution in that:

a. The intended prosecution of the *ex parte* applicants is a blatant abuse of the court process.
b. The 2nd respondent has manipulated evidence provided to him with the intention of depriving the *ex parte* applicants the protection of the law.
c. The 2nd respondent has not demonstrated that the intended criminal charges against the *ex parte* Applicants is based on any proper factual foundation or existence of any material evidence that the 2nd respondent can rely on with certainty to establish a *prima facie* case against them, or a reasonable and probable cause for mounting a criminal prosecution and therefore that the intended prosecution will not be malicious.

19. That from the foregoing, it was asserted, it is clear that the intended prosecution of the *ex parte* applicants is mere harassment and is contrary to public policy and contravenes their individual right to freedom as enshrined in the Constitution of Kenya 2010.
20. On behalf of the applicants it was submitted that the decision to charge the applicants is an abuse of the criminal justice process, is oppressive and was reached without any evidentiary basis and in light of abundant exculpatory evidence in favour of the applicants. The decision is therefore a blatant cover-up in favour of the real perpetrators of the alleged crime since the decision to charge

them was made contrary to express written opinion by the criminal investigation department as to the people the CID had formed an opinion could be criminally culpable. Further, the documents discovered from the investigators exonerated the *ex parte* applicants and recommended that other persons be charged and stated only three former directors of Malili Ranch benefited from the fraud and the applicants were not among them. The respondents therefore failed to take into account the relevant factors in charging the applicants.

21. To the applicants, as the decision to charge the applicants was reached and charge sheet prepared by the Officer in Charge of Muthaiga Police Station whose station was not seized of the investigation touching on the case, the said decision amounted to shifting of the burden of proof by requiring them to demonstrate their innocence. The applicants relied on **R. vs. The Judicial Commission into the Goldenberg Affair and 2 Others exp Saitoti HC Misc Appl. 102 of 2006**.
22. It was contended that the 2nd respondent must have been aware that the applicants' actions were transparent and that they were not beneficiaries of the payments nor did they seek to enrich themselves. Further the 2nd respondent ignored the applicants' explanation on the circumstances surrounding the payments including the fact that they were not in the office when the sale was conducted nor did they handle the proceeds of the sale hence failed to demonstrate *mens rea* and *actus reus* in the applicants' case.
23. Based of section 89(2) of the Criminal Procedure Code, it was submitted that before charging any person the DPP is enjoined to ascertain reasonably that probably an offence has been committed. According to the applicants the decision to prosecute the applicants in the face of exculpating evidence is a violation of section 89(2) aforesaid and is not meant to vindicate justice and prosecute for punishment of offences.
24. On the authority of **Commissioner of Police & Others vs. Kenya Commercial Bank Ltd & Others [2013] eKLR**, **Investments and Mortgages Bank Limited vs. Commissioner of Police and Others [2013] eKLR**, **Josephine Akoth Anyango vs. DPP & Others [2014] eKLR** and **George Joshua Okungu & another vs. Chief Magistrate's Court Anti-Corruption Court At Nairobi & Another [2014] eKLR** Git was submitted that the court ought to quash the criminal proceedings the subject of this application.
25. It was contended that whereas the sale of the subject land was between Malili Ranch Limited and the Government of Kenya, the 2nd respondent has continued to treat the transaction as if it was a sale between individual members of the company and the Government contrary to the provisions of the Companies Act.
26. The other factors which according to the applicant were not considered were the fact that the purchase price was not to be passed on in its entirety to the affected members; that there were expenses incurred by the company during the excision and transfer of the property; that those members who wished not to be compensated were given an opportunity to be relocated; that the suit parcel was subject to deductions in form of road reserve; that the so called complainants were busy-bodies who have declined to collect their compensation from the Company lawyer or to ask for relocation; that the compensations to the said complainants is still held by the company lawyer; and that the transaction has elicited adverse debates both in the media and from several politicians. It was therefore submitted that the decision to charge the applicants was driven by ulterior motives and the desire to punt to political expediency.
27. The applicants also submitted that taking into account the fact that the investigations into the matter has taken 5 years, the delay I prosecuting the applicants has been unreasonable and they stand to be prejudiced if the intended prosecution is upheld and relied on **R. vs. Attorney General exp Kipngeno Arap Ngeny HC Misc. Appl. 446 of 1995** and **Githunguri vs. R [1986] KLR**.
28. It was submitted that the applicants who are over 80 years old are up against the might of the executive arm of the government hence they stand helpless yet they are innocent.
29. It was the applicants' case that they were duped by the Company lawyer into executing documents which are now being used against them yet they neither intended to enrich themselves nor were they beneficiaries to the transaction.

The 3rd and 5th Respondents' Case

30. The 3rd and 5th respondents filed the following grounds of opposition in response to the application:

1. **That the 5th Respondent acted within the premises of the law.**
2. **That the application as drawn and taken out is incurably defective incompetent and is otherwise an abuse of court process.**
3. **That the application is based on contradictory allegations which borders on mere belief, suspicion and speculations and hence incapable of any judicial review.**
4. **That there are no clear reliefs sought as the application is neither here nor there.**
5. **That the application is an abuse of court process and lacks merit.**

1st, 2nd and 4th Respondents' Case

31. On the part of the 1st, 2nd and 4th Respondents (herein below referred to as "the respondents"), it was disclosed that the Inquiry File leading to the present charges facing the Applicants was opened following allegations by several shareholders of Malili Ranch which were made between 2009 and 2014 to various Government Agencies including the 1st Respondent. The complaint lodged was that the amalgamation, sell of their individual parcels of land to the Government of Kenya by the Director of Malili Ranch was done without their authority and or consent. It was contended that all the complainants recorded their statements between the year 2013 and August 2014 and the 1st Respondent through the background and history of Malili Ranch Ltd and stated clearly the circumstances under which they all came to know about the sale of their land.
32. According to the respondents, the Applicants did record Police Statements on the role they played in the transaction, from which it was clear from that they knew the sale was unlawful, irregular but never raised any objection and in the month of November 2009, the Applicants and others agreed to proceed with the irregular and unlawful transaction after the death of Malili Chairman, **Josiah Munuka**.
33. The respondents disclosed that during the trial the Prosecution shall adduce evidence to show that the Applicants signed a number of documentation including Minutes of various meetings in relation to the unlawful sale of the land and that the evidence on record clearly shows the complaints raised by the Complainants who owned plots within the 5,000 acres that was sold to the Government of Kenya that the sale was unlawful, irregular and fraudulently done. Further, the evidence on the Police File clearly proves that resolutions provided and made by the Applicants and other Directors of Malili Ranch were all flawed and illegal and therefore of no legal consequence.
34. It was the respondents' case that upon analysis of the evidence on record the 1st Respondent recommended that the Applicant be charged with offences that are known to law as reflected in the charge sheet hence the decision to charge the Applicants was informed by the sufficiency of evidence on record and the public interest. Further, the 2nd Respondent has independently reviewed and analysed the evidence contained in the investigations file including the witness statements, documentary exhibits and statements of the applicants as required by law and it is on the basis of the said review and analysis that the DPP has given directions to prosecute the Applicants.
35. According to the respondents, under Article 157 (6) of the Constitution of Kenya 2010, the Director of Public Prosecutions exercises the state powers and functions of Prosecution including the institution, undertaking, taking over, continuance and or termination of criminal proceedings amongst other functions and duties and that in the discharge of its duties and functions, the Respondent is required to respect, observe and uphold the following Constitutional provisions, *inter alia*:

a. To have regard to public interest, the interests of administration of justice and the need to prevent and avoid abuse of the legal process under **Article 157 (11);**
b. Uphold and defend the Constitution;
c. The national values and principles of governance enshrined in **Article 10** in the application, interpretation of the Constitution as well in making and implementing the laws and public policy decisions;
d. Respect, observe, protect, implement, promote and uphold the rights and freedoms in the Bill of Rights enshrined in **Article 21(1)** of the Constitution;

e. To be accountable to the public for decisions and actions taken and generally observance of **Article 73 (2) (d)** of **the Constitution**;
f. To be accountable for administrative acts and observance of the values and principles of public service under **Article 232 (e) of the Constitution.**

36. It was further contended by the respondents that:

a. Under **Article 157(6)** of the Constitution of Kenya 2010, the Director of Public Prosecutions exercises State powers of prosecution and in that capacity, may institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed;
b. The Applicants have not demonstrated that in making the decision to prefer criminal charges against him, the Respondent has acted without or in excess of the powers conferred upon them by the law or have infringed, violated, contravened or in any other manner failed to comply with or respect and observe the foregoing provisions of the Constitution of Kenya 2010 or any other provision thereof.
c. The allegation by the applicants that the intended charges are intended to serve ulterior motives is without merit, evidentiary or legal reason or backing.
d. The Applicants' averment that the Respondents are bent on harassing and embarrassing him for no apparent reason is misconceived, unfounded, unmeritorious and baseless;

37. In their contention, the correctness of the facts or evidence gathered by the Respondents can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of evidence gathered in support of the charges and the Applicants have failed to demonstrate that the 2nd Respondent has not acted independently or has acted capriciously, in bad faith or has abused the legal process in a manner to trigger the High Court's intervention. Further, the Applicants have not demonstrated that the 2nd Respondent has exercised his powers contrary to the Constitution as provided under **Article 157(11).** To the said respondents, the Constitution, the ***Criminal Procedure Code*** and the ***Evidence Act*** provide sufficient safeguards to ensure that the applicants get a fair trial. It was their view that the Applicants have merely stated their rights and have failed to demonstrate with particularity how their rights will be infringed and violated or the damages that they are is likely to suffer as a result of the alleged infringement.
38. According to the respondents, a Police File case No. Cr. 121/761/2009 was opened in respect to investigations of stealing by Directors; the inquiry file No. 96 of 2009 was opened to inquire into the allegations of obtaining of Kshs. 40 million; the then Kenya Anti-Corruption Commission (KACC) commenced inquiry into allegations of procurement irregularities *vide* KACC/FI/INQ/96/2010, bid rigging and abuse of office against Ministry of Information and Communication officers emanating from the procurement of 5,000 (five thousand) acres from M/s Malili Ranch Ltd at a cost of Kshs. 1 billion by the said Ministry for purposes of an ICT Park; the 1st Respondent opened inquiry file *vide* CCIO NAIROBI AREA INQUIRY FILE NO. 20/2013 pursuant to complaints by various shareholders of Malili Ranch Ltd seeking for investigations to be carried out in respect to the sale of the 5,000 (five thousand) acres and that:

a. the investigations carried out established that transaction was not above board as it was shrouded by fraud and due diligence was not exercised when the entire process was undertaken;
b. the Applicants being Directors offered the land for sale without consent of the shareholders and evidence shall be adduced at trial to show that they were (and the interested parties) key beneficiaries of the proceeds of sale that arose from their fraudulent acts;
c. that each shareholder's portion measured 7.8 acres and each was therefore entitled to Kshs. 1,560,000/= (one million five hundred and sixty thousand shillings) only;
d. the evidence to be adduced at trial, shall prove that the Applicants and interested parties fraudulently benefited financially from the transaction;
e. the file in respect to the INQ File No. 20/2013 was then forwarded by the Nairobi County Criminal Investigations Officer to the Directorate of Criminal Investigations on the 13th day of March 2014;
f. the Directorate of Criminal Investigations forwarded INQ File No. 20/2013 to the Director of

Public Prosecutions on the 22nd day of April 2014 for purposes of perusal and directions

39. It was contended that the 1st Respondent Tender Committee on its sitting on the 9th day of May 2014 awarded **Paul Kibugi Muite S.C** to provide legal services tender and S.C signed an agreement 15th day of May 2014 in which he was required to review all the files related to the transactions of land belonging to Malili Ranch. Further investigations were carried out by the 1st Respondent and that **Paul Kibugi Muite**, **S.C** was then required to review the above files and make the necessary recommendations as per the tender that had been awarded. Pursuant thereto, on the 26th day of August 2014 **Paul Kibugi Muite**, **S.C** wrote a letter to the 2nd Respondent with recommendations in respect to the above filed.
40. To the respondents, the 2nd Respondent in carrying out review of the Investigations file, considered all the evidence on record before coming to the conclusion it made in regard to charging the Applicants and the other accused persons. Further, on the 28th day of August 2014 the 2nd Respondent acknowledge receipt of the letter dated 26th day of August 2014 by **Paul Kibugi Muite**, **S.C** wherein the 2nd Respondent considered the recommendations made in light of powers conferred upon DPP by the Constitution and pursuant to Section 85(2) of the ***Criminal Procedure Code***, the 2nd Respondent appointed **Paul Kibugi Muite**, **S.C** to be Public Prosecutor for the purposes of criminal cases and all related legal proceedings arising from or connected to the above subject matter.
41. To the respondents, the matters raised in the Applicants' Affidavits are matters of evidence that can only be assessed and considered by the trial court, lack any legal basis since the basis for the amendment of the charge was to comply with the Orders issued by this Honourable Court and are not backed by evidence that is legally allowed to be accepted by this Honourable Court and thus the prayers sought should be dismissed in its entirety.
42. In their submissions, the 1st, 2nd and 4th respondents contended that the correctness of the facts or evidence gathered by the Respondents can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of evidence gathered in support of the charges. What the Applicants seem to suggest is that this Court should review the evidence of all the Prosecution witnesses with view to prove their innocence and that is hardly the function of the judicial review court. In support of their submissions they relied on **Thuita Mwangi & Anor vs. The Ethics and Anti-Corruption Commission & 3 Others Petition No. 153 & 369 of 2013.**
43. It was submitted that it is evidently clear from the evidence on record including annexure attached to the Applicants affidavit that there exists a *prima facie* case against the Applicants and they must therefore stand trial. In support of his contention reliance was placed on **Republic vs. Commissioner of Police & Another exparte Michael Monari & Another (2012) eKLR**. cited with approval in **Erick Kibiwott & 2 Others vs. Director of Public Prosecution & 2 Others Judicial Review Civil Application No. 89 of 2014**, where it was held that:

"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…As long as the prosecution and those charged with the responsibility of making decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene."

44. According to the respondents, the Applicants have not demonstrated that there mere transfer of investigations from the Nairobi Area to CID Headquarters' has caused any prejudice and or it is illegal. The fact that the Applicants were allegedly given disclosures by a **Mr. Kiragu** is clear manifestation that it is an illegality on their part as they had not yet taken plea to be entitled to disclosure. Once a person has been charged, he or she is entitled to be supplied with all the evidence that the prosecution intends to rely on but in the instant case, the Applicants obtained the same before they had taken plea. To them, the Applicants are expected to appear before a competent Court that is expected to ensure and maintain principles of a fair trial since the Constitution of Kenya, 2010 guarantees the rights to fair trial under **Article 50** which a non-

derogable right.

45. It was the respondents' case that the totality of the Applicants' verifying affidavit is that they do have a defence and or explanations for the actions which were taken while they were officials of Malili Ranch and that the best placed Court to assess and weigh the evidence, is the trial Court but not this Honourable Court based on **Erick Kibiwott & 2 Others vs. Director of Public Prosecution & 2 Others** (supra) where it was held:

" … That an applicant has a good defence in the criminal process is a good 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."

46. The respondents submitted that the Applicants have merely stated their rights and have failed to demonstrate with particularity how their rights will be infringed and violated or the damages that they are likely to suffer as a result of the alleged infringement. The Applicants have not demonstrated that their trial and or investigations have been through an abuse of process to warrant this Honourable Court issue the orders sought.

47. Based on the decision of **Musinga, J** (as he then was) in **Paul Stuart Imison Another vs. The Attorney General & 2 Others Petition No. 57 of 2009**, it was submitted that the circumstances which the Court should take into consideration in grant of stay were laid out in the following manner:

"The instances in which a court can declare a prosecution to be improper were well considered in *Macharia & Another –vs- Attorney General & Another (2001) KLR 448*. A prosecution is improper if:

a. **It is for a purpose other than upholding the criminal law;**
b. **It is meant to bring pressure to bear upon the applicant/accused to settle a civil dispute;**
c. **It is an abuse of the criminal process of the court;**
d. **It amounts to harassment and is contrary to public policy;**
e. **It is in contravention of the applicant's constitutional right to freedom.**

48. Based on ***Bennett vs. Horseferry Magistrates' Court*** **(1993) 3 All E.R. 138, 151, HL**, it was submitted that an abuse of process justifying the stay of a prosecution could arise in the following circumstances:

a. **where it would be impossible to give the accused a fair trial**; **or**
b. **Where it would amount to** a **misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.**

49. While conceding that the power to stay is available to all courts, it was submitted that the power should only be exercised if exceptional circumstances exist which would result in prejudice to the Accused which cannot be remedied in other ways. In the instant case there exist no exceptional circumstances to warrant this Honourable Court to maintain the order of stay nor have the Applicants shown to this Court that they have been prejudiced in any way. The Applicants have not demonstrated any breach of his constitutional rights for them to continue to enjoy the fruits of a stay order hence the stay order granted on the 3rd day of September 2014 should be lifted.

50. It was submitted on the authority of the decision of **Mumbi Ngugi, J** in **Kipoki Oreu Tasur vs. Inspector General of Police & 5 Ors (2014) eKLR** that the fundamental principle of criminal law is to ensure that the guilty should be convicted as charged after due process. In that case, it was submitted the Judge held**:**

"The criminal justice system is a critical pillar of our society. It is underpinned by the Constitution, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or

restraint from the superior Courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated".

51. No matter which ground of abuse is alleged, it was submitted, the burden of establishing that the bringing or continuation of criminal proceedings amounts to an abuse of the court's process is on the Accused/Applicant. In the instant case, the Applicants have failed to discharge the burden and must be ready to face their trial as was stated by **Lenaola, J** in the case of **Daniel Ndungu vs. Director of Public Prosecutions & Another (2013) eKLR**:

    "In conclusion, the Petitioner ought to face his accusers, prove his innocence or otherwise and submit to the consequences of the Law should he be found culpable".

Determination

52. Having considered the application, the affidavits both in support of and in opposition to the application, the submissions for and against the grant of the orders sought and the authorities cited on behalf of the parties thereto, this is the view I form of the matter.
53. The principles which guide the grant of the orders in the nature sought herein are now well crystallised in this jurisdiction. What is important is the application of the same to the facts of each 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. However while applying the said principles to a particular case, the Court must always be cautious in its findings so as not to prejudice the intended or pending criminal proceedings so as not to transform itself into a trial court. The Court in judicial review proceedings is therefore not permitted to delve into the merits or otherwise of the criminal process as that would amount to unnecessarily trespassing into the arena specially reserved for the criminal or trial Court. This Court in determining the issues raised therefore ought not to usurp the Constitutional and statutory mandate of the Respondents to investigate and undertake prosecution in the exercise of the undoubted discretion conferred upon them.
54. As was held by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**:

    "The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision…"

55. It was well put by **Professor Wade** in a passage in his treatise on ***Administrative Law***, 5th Edition at page 362 and approved in the case of the **Boundary Commission [1983] 2 WLR 458, 475**:

    "The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended."

56. However, according to ***Judicial Review Handbook***, 6th Edition by **Michael Fordham** at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority or power.
57. Under the current Constitution, this Court is empowered to invoke its judicial review jurisdiction

in the proceedings of this nature in order to grant appropriate orders including the orders sought herein. In other words judicial review jurisdiction has now been fused with the remedies under the Constitution and this is clearly discernible from the remedies crafted under section 11 of the ***Fair Administrative Action, Act, 2015***. As was held by the South African Constitutional Court in **Pharmaceutical Manufacturers Association of South Africa & Another vs. Minister of Health Case CCT 31/99**:

"The common law supplements the provisions of the written Constitution but derives its force from it. It must be developed to fulfil the purposes of the Constitution and the legal order that it proclaims — thus, the command that law be developed and interpreted by the courts to promote the "spirit, purport and objects of the Bill of Rights." This ensures that the common law will evolve within the framework of the Constitution consistently with the basic norms of the legal order that it establishes. There is, however, only one system of law and within that system the Constitution is the supreme law with which all other law must comply. What would have been ultra vires under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality. In this respect, at least, constitutional law and common law are intertwined and there can be no difference between them. The same is true of constitutional law and common law in respect of the validity of administrative decisions within the purview of section 24 of the interim Constitution. What is "lawful administrative action," "procedurally fair administrative action" and administrative action "justifiable in relation to the reasons given for it," cannot mean one thing under the Constitution, and another thing under the common law…Although the common law remains relevant to this process, judicial review of the exercise of public power is a constitutional matter that takes place under the Constitution and in accordance with its provisions. Section 167(3)(c) of the Constitution provides that the Constitutional Court "makes the final decision whether a matter is a constitutional matter". This Court therefore has the power to protect its own jurisdiction, and is under a constitutional duty to do so. One of its duties is to determine finally whether public power has been exercised lawfully. It would be failing in its duty if it were to hold that an issue concerning the validity of the exercise of public power is beyond its jurisdiction."

58. Since our Constitution is incremental in its language, the grounds for the grant of judicial review relief ought to be developed and expounded and expanded so as to meet the changing needs of our society so as to achieve fairness and secure human dignity.
59. Therefore, the mere allegation that the intended or ongoing criminal proceedings are in all likelihood bound to fail, does not merit the grant of judicial review relief in the nature of either prohibiting or quashing criminal proceedings. In other words, an applicant who alleges that he has a good defence in the criminal process ought to advance that defence in a criminal trial rather than to base his application for judicial review thereon. However, if the applicant demonstrates by way of credible evidence that the criminal proceedings that the police or the Director of Public Prosecutions intends to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.
60. 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."

61. 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 from that which the courts indeed the entire system is constitutionally mandated to administer....."

62. In **Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703**, it was held:

"It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of 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..."

63. 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…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."

64. Proceedings of this nature, ordinarily, do not deal with the merits of the case but only with the process. In other words these proceedings determine, *inter alia*, whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made, whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters, whether the decision to commence the criminal charges go contrary to the applicant's legitimate expectation, whether the respondents' decision to charge the applicant is irrational. It follows that where an applicant brings such proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction to determine such a matter and will leave the parties to resort to the usual forums where such matters ought to be resolved. In other words, such proceedings are not the proper forum in which the innocence or otherwise of the applicants is to be determined and a party ought not to institute such proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in these kinds of proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and whether such proceedings amount to a violation of his rights and fundamental freedoms and once the Court is satisfied that that is not the case, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution's evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.
65. Therefore the determination of this case must be seen in light of the foregoing decisions. However, it is upon the *ex parte* applicant to satisfy the Court that the discretion given to the Respondent to investigate and prosecute ought to be interfered with.
66. In this case the applicants contend 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 abundant exculpatory evidence in the applicants' favour. In support of this line of submission the applicants have alluded to several facts which in their view show that they are not culpable. To the applicants, had these facts been considered by the respondents, the respondents would have concluded that the applicants are not liable for the offence with which they are charged. Some of these factors include the fact that that the purchase price was not to be passed on in its entirety to the affected members; that there were expenses incurred by the company during the excision and transfer of the property; that those members who wished not to be compensated were given an opportunity to be relocated; that the suit parcel was subject to deductions in form of road reserve; that the so called complainants were busy-bodies who have declined to collect their compensation from the Company lawyer or to ask for relocation; that the compensations to the said complainants is still held by the company lawyer.
67. 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".

68. 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.

69. In this case the evidence which the applicants contend exculpate them relate to whether or not they took part in the decision which gave rise to the institution of the criminal proceedings. According to the applicants by the time they came into the office, the questioned decisions had already been made. In other words the applicants contend that they are not culpable for any wrong doing which took place before they came into office. However section 23 of the ***Penal Code*** provides that:

Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission.

70. It therefore follows that the mere fact that an offence is committed by a company or other body corporate does not absolve the management from liability. The applicants however contend that they were not in charge of the company at the time the questioned decisions were made. That however, is not a matter which can be determined by this Court in these proceedings with finality. The applicants will have to adduce evidence to show who were in actual control and management of the company at the said period. In other words that is a matter for the defence.

71. Whereas the applicants may well be correct that there are several factors which go to show their innocence, these are not the proper proceedings in which the correctness of the evidence or the truthfulness of the witnesses is to be gauged. That task is solely reserved for the trial Court which is constitutionally bound to determine the proceedings in accordance with the law. Accordingly, the mere fact that the applicants view the evidence to be presented against them as patently false, concocted and/or misleading does not warrant this Court in interfering with the criminal process since that is an allegation which goes to the sufficiency and veracity of the evidence and the innocence of the Applicants, matters which are not within the province of this Court.

72. In **Thuita Mwangi & Anor vs. The Ethics and Anti-Corruption Commission & 3 Others** (supra), it was held:

" … I am afraid that the High Court at this point is not the right forum to tender justifications concerning the subject transaction let alone test the nature and veracity of these allegations. In… the Court held that "It is the trial Court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. It would be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court". Similarly…Lenaola J., captured this balance as follows; "(22).

The point being made above is that the DPP though not subject to control in exercise of his powers to prosecute criminal offences, must exercise that power on reasonable grounds. Reasonable grounds, it must be noted, cannot amount to the DPP being asked to prove the charge against an accused person at the commencement of the trial but merely show a prima facie case before mounting a prosecution. The proof of the charge is made at trial."

73. This Court appreciates that a distinction must be made between a situation where what is alleged is insufficiency of evidence as opposed to where the evidence to be adduced does not disclose an offence. In the former, the right forum to deal with the matter is the trial Court. In the latter, it would amount to an abuse of the criminal process to subject the applicant to such a process. Criminal process ought to be invoked only where the prosecutor has a conviction that he has a prosecutable case. Whereas he does not have to have a full proof case, he ought to have in his possession such evidence which if believable might reasonably lead to a conviction. He does not have to have evidence which disclose a *prima facie* case under section 210 of the ***Criminal Procedure Code*** since a decision as to whether a *prima facie* case is disclosed is a jurisdiction reserved for the trial Court. He however must have evidence which satisfy him that his is a case which ought to be presented before a trial Court. He must therefore consider both incriminating and exculpatory evidence in arriving at a discretion to charge the accused. Unless this standard is met, the Court may well be entitled to interfere with the discretion of the prosecutor since that discretion, as stated elsewhere in this judgement, is not absolute. 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."

74. Similarly as was appreciated in **Githunguri vs. Republic KLR [1986] 1:**:

"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. "

75. It was contended that the document discovered from the investigators exonerated the *ex parte* applicants and recommended that other persons be charged and stated only three former directors of Malili Ranch benefited from the fraud and the applicants were not among them hence the respondents therefore failed to take into account the relevant factors in charging the applicants. According to the applicants, the decision to charge them is a blatant cover-up in favour of the real perpetrators of the alleged crime. It was the applicants' case that they were duped by the Company lawyer into executing documents which are now being used against them yet they neither intended to enrich themselves nor were they beneficiaries to the transaction. Unfortunately the alleged perpetrators are not parties to these proceedings. Neither is the said company lawyer a party herein. To expect the Court to make adverse determinations against the said persons would amount to a violation of the rules of natural justice which this Court is sworn to protect. Accordingly, without sufficient material placed before me and as the said persons are not before me, I cannot make adverse findings against the said persons in these proceedings.

76. The applicants also submitted that taking into account the fact that the investigations into the matter has taken 5 years, the delay in prosecuting the applicants has been unreasonable and they stand to be prejudiced if the intended prosecution is upheld. In **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** it was held that:

"The function of any judicial system in civilized nations is to uphold the rule of law. To be able to do that, the system must have power to try and decide cases brought before the Courts according to the established law. The process of trial is central to the adjudication of any dispute and it is now a universally accepted principle of law that every person must have

his day in court. This means that the judicial system must be available to all...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."

77. Article 50 of the Constitution provides for the right to fair trial and under Article 50(1)(e) fair trial includes the right to have the trial begin and conclude without unreasonable delay. Therefore both the commencement and the conclusion of the trial must be conducted without an unreasonable delay. This delay in my view not only encompasses the period between the arraignment and the commencement of the hearing but also includes the period between the discovery of the commission of an offence and the arraignment in court. However what is reasonable depends upon the circumstances of the case such as the nature of the offence, the collation and collection of the evidence as well as the complexity of the offence. Whereas this Court is not competent to make a definitive finding thereon this view seem to resonate with the view expressed in **Bell vs. Director of Public Prosecutions and Another [1986] LRC 392** where the Privy Council expressed itself as follows:

"..in giving effect to the rights granted by sections 13 and 20 of the Constitution of Jamaica, the courts of Jamaica must balance the fundamental right of the individual to a fair trial within a reasonable time against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions."

78. Again of paramount importance is the effect of the delay on the viability of a fair trial.
79. However as was held by **Kriegler, J** in **Sanderson vs. Attorney General-Eastern Cape 1988 (2) SA 38:**

"Even if the evidence he had placed before the Court had been more damning, the relief the appellant seeks is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins - and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case – is far reaching. Indeed it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will seldom be warranted in the absence of significant prejudice...Ordinarily, and particularly where the prejudice alleged is not trial related, there is a range of "appropriate" remedies less radical than barring the prosecution. These would include a mandamus requiring the prosecution to commence the case, a refusal to grant the prosecution a remand, or damages after an acquittal arising out of the prejudice suffered by the accused. A bar is likely to be available only in a narrow range of circumstances, for example, where it is established that the accused has probably suffered irreparable trial prejudice as a result of the delay."

80. In **George Joshua Okungu & another vs. Chief Magistrate's Court Anti-Corruption Court At Nairobi & Another [2014] eKLR** the Court further held while citing **Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323**:

"It is therefore imperative that criminal investigations be conducted expeditiously and a decision made either way as soon as possible. Where prosecution is undertaken long after investigations are concluded, the fairness of the process may be brought into question where the Petitioner proves as was the case in *Githunguri vs. Republic* Case, that as a result of the long delay of commencing the prosecution, the Petitioner may not be able to adequately defend himself. Whereas the decision whether or not the action was expeditiously taken must necessarily depend on the circumstances of a particular case, on our part we are not satisfied that the issues forming the subject of the criminal proceedings were so complex that preference of charges arising from the investigations therefrom should take a year after the completion of the investigations. From the charges leveled against the Petitioners, the issues seemed to stem from the failure to follow the laid down regulations and procedures in arriving at the decision to sell the company's idle/surplus non core assets. In our view ordinarily it does not require a year after completion of investigations in such a matter for a decision to prosecute to be made. That notwithstanding, it is not mere delay in preferring the charges that would warrant the halting of the criminal proceedings. Rather, it is the effect of the delay that determines whether or not the proceedings are to be halted. In this case, there is no allegation made by the Petitioners to the effect that the delay has adversely affected their ability to defend themselves. In other words, the Petitioners have to show that the delay has contravened their legitimate expectations to fair trial."

81. In this case, whereas the applicants contend that there has been a long time lapse between the time the investigations were commenced and the preference of the charges, they do not contend that as a result of the said delay there has been a change in the circumstances which militate against a fair trial. Such change in circumstances may be shown for example by the fact of unavailability of the applicant's potential witnesses or evidence resulting from the said delay. I am therefore not satisfied that in the circumstances of this case the delay in bringing the charges against the applicants without more merits the termination or prohibition of the criminal trial. In this case the applicants have not contended that as a result of the long delay in bringing the criminal charges their defences have been compromised for example by making it impossible for them to efficiently present formidable defences which they could have done had the charges been preferred earlier on. In fact a consideration of the applicants' position reveals that in their views they have formidable defences to the prosecution case.
82. This position was emphasised by **Richardson, J** in **Martin vs. Tauranga District Court [1995]**

2 LRC 788 at 799 where he held:

"...where the delay has not affected the fairness of any ensuring trial though; for example unavailability of witnesses or the dimming of memories of witnesses so as to attract consideration...it is arguable that the vindication of the appellant's rights does not require the abandonment of trial process; that the trial should be expedited rather than aborted and the breach of Section 25(b) should be met by an award of monetary compensation. That would also respect victims' rights and the public interest in the prosecution to trial of alleged offenders."

83. In the same case, **Hardie Boys, J** aptly put it as follows:

"The right is to trial without undue delay, it is not a right not to be tried after undue delay. Further, to set at large a person who may be, perhaps patently, guilty of a serious crime, is no light matter. It should only be done where the vindication of the personal right can be achieved in no other satisfactory way. An alternative remedy may be an award of damages."

84. This position was alluded to in **Githunguri vs. Republic KLR [1986] 1** in which it was held:

"… as a consequence of what has transpired and also being led to believe that there would be no prosecution the applicant may well have destroyed or lost the evidence in his favour. Secondly, in absence of any fresh evidence, the right to change the decision to prosecute has been lost in this case, the applicant having been publicly informed that he will not be prosecuted and property restored to him. It is for these reasons that the applicant will not receive a square deal as explained and envisaged in section 77(1) of the Constitution. This prosecution will therefore be an abuse of the process of the Court, oppressive and vexatious…If we thought, which we do not, that the applicant by being prosecuted is not being deprived of the protection of any of the fundamental rights given by section 77(1) of the Constitution, we are firmly of the opinion that in that event we ought to invoke our inherent powers to prevent this prosecution in the public interest because otherwise it would similarly be an abuse of the process of the Court, oppressive and vexatious. It follows that we are of the opinion that the application must succeed in either event."

85. It was contended that the applicants who are over 80 years old are up against the might of the executive arm of the government hence they stand helpless yet they are innocent. With due respect old age *per se* has never been a defence to a criminal offence though it may be a factor in the exercise of discretion by the DPP as stated hereinabove. Whereas that may be a perfect ground for grant of bail, in my view that is not a ground for staying criminal proceedings since as recognised by all the parties there are sufficient constitutional and legal safeguards in our judicial system to protect persons undergoing criminal trials. On this point one needs to remind oneself of the decision in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** to the effect that:

"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."

86. It must, however, be appreciated that our criminal process entails safeguards which are meant to ensure that an accused person is afforded a fair trial. Article 50 of our Constitution accordingly provides *inter alia* as follows:

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right—

(a) to be presumed innocent until the contrary is proved;

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

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

(d) to a public trial before a court established under this Constitution;

(e) to have the trial begin and conclude without unreasonable delay;

(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

to remain silent, and not to testify during the proceedings;

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

(k) to adduce and challenge evidence;

(l) to refuse to give self-incriminating evidence;

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;

(n) not to be convicted for an act or omission that at the time it was committed or omitted was not—

(i) an offence in Kenya; or

(ii) a crime under international law;

(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

(3) If this Article requires information to be given to a person, the information shall be given in language that the person understands.

(4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

(5) An accused person—

(a) charged with an offence, other than an offence that the court may try by summary

procedures, is entitled during the trial to a copy of the record of the proceedings of the trial on request; and

(b) has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law.

87. I have reproduced the relevant provisions of Article 50 in order to show that our Constitution has provided extensive safeguards to accused persons when charged with criminal offences and therefore unless there is material upon which the Court can find that the applicants are unlikely to receive a fair trial before the trial Court, the Court ought not to interfere simply because the applicants may at the end be found to be innocent.
88. As was held in **Jago vs. District Court (NSW) 106**:

"An abuse of process occurs when the process of the court is put in motion for a purpose which, in the eye of the law, it is not intended to serve or when the process is incapable of serving the purpose it is intended to serve. The purpose of criminal proceedings, generally speaking is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and, on that account, is deserving of punishment. When criminal process is used only for that purpose and is capable of serving that purpose, there is not abuse of process...When process is abused, the unfairness against which a litigant is entitled to protection is his subjection to process which is not intended to serve or which is not capable of serving its true purpose. But it cannot be said that a trial is not capable of serving its true purpose when some unfairness has been occasioned by circumstances outside the court's control unless it be said that an accused person's liability to conviction is discharged by such unfairness. This is a lofty aspiration but it is not the law."

89. The trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of an appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words unless the applicants demonstrate that the circumstances of the impugned process render it impossible for the applicant to have a fair trial, the High Court ought not to interfere with the trial simply on the basis that the applicant's chances of being acquittal are high. was In **Erick Kibiwott & 2 Others vs. Director of Public Prosecution & 2 Others** (supra) this Court expressed itself as hereunder:

"…In determining the issues raised herein the Court will therefore avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial court. Dealing with the merits of the application, it is trite that 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. 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 proceedings are not concerned with the merits but with the decision making process."

90. It was contended that the decision to charge the applicants was made contrary to express written opinion by the criminal investigation department as to the people the CID had formed an opinion could be criminally culpable. To the applicants, the said decision is a blatant cover-up in favour of the real perpetrators of any wrong-doing in the transaction in question as it was made contrary to an express written opinion on the people the police had formed an opinion could be criminally culpable in the transaction in question and without any request for the investigating officers to conduct further investigations, if necessary, against them. This submission raises the issue as to the role of the Director of Public Prosecutions vis-à-vis the police. Under Article 157(4) of the Constitution, the Director of Public Prosecution is empowered to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and

the Inspector-General is obliged to comply with any such direction. However under Article 157(10), the DPP does 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, is not under the direction or control of any person or authority. In other words the DPP is not necessarily bound by the decision made by the investigating arms in determining whether to prosecute or not though pursuant to Article 157(11) in making a decision the DPP is enjoined to 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. In other words the DPP ought not to exercise his/her constitutional mandate arbitrarily.

91. To permit the prosecutor to exercise his constitutional power arbitrarily would amount to the Court abetting abuse of discretion and power. It was therefore held in **Regina vs. Ittoshat [1970] 10 CRNS 385** at **389** to the effect 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."

92. 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..."

93. 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.

94. In **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** it was held that:

"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."

95. A similar view was held in **George Joshua Okungu & another vs. Chief Magistrate's Court Anti-Corruption Court At Nairobi & Another [2014] eKLR** in which this Court cited with approval the holding in **Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323** and held:

"Whereas we appreciate the fact that the decision whether or not to prosecute the petitioners is an exercise of discretion this Court is empowered to interfere with the exercise of discretion 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… Under Article 47(1) of the Constitution, "every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair." It is therefore imperative that criminal investigations be conducted expeditiously and a decision made either way as soon as possible. Where prosecution is undertaken long after investigations are concluded, the fairness of the process may be brought into question where the Petitioner proves as was the case in *Githunguri vs. Republic* Case, that as a result of the long delay of commencing the prosecution, the Petitioner may not be able to adequately defend himself. "

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

97. It was pursuant to the foregoing that the Judge expressed himself in **Thuita Mwangi & Anor vs. The Ethics and Anti-Corruption Commission & 3 Others** (supra) as hereunder:

"The decision to institute criminal proceedings by the DPP is discretionary. Such exercise of power is not subject to the direction or control by any authority as Article 157(10)…These provisions are also replicated under Section 6 of the Office of the Director Public Prosecutions Act, No. 2 of 2013…In the case of Githunguri –vs- Republic (Supra at p.100), the Court observed…The Attorney General of Kenya…is given unfettered discretion to institute and undertake criminal proceedings against any person "in any case in which he considers it desirable so to do… this discretion should be exercised in a quasi-judicial way. That is, it should not be exercised arbitrarily, oppressively or contrary to public policy …"

98. However, the mere fact that the DPP's decision differs from the opinion formed by the investigators is not a reason for interfering with the constitutional and statutory mandate of the DPP as long as he/she believes that he/she has in his/her possession evidence on the basis of which a prosecutable case may be mounted. Conversely, the mere fact that the investigators believe that there is a prosecutable case does not necessarily bind the DPP. As is rightly recognised by **Sir Elwyn Jones** in ***Cambridge Law Journal*** – April 1969 at page 49:

"The decision when to prosecute, as you may imagine is not an easy one. It is by no means in every case where a law officer considers that a conviction might be obtained that t is desirable to prosecute. Sometimes there are reasons of public policy which make it undesirable to prosecute the case. Perhaps the wrongdoer has already suffered enough. Perhaps the prosecution would enable him present himself as a martyr. Or perhaps he is too ill to stand trial without great risk to his health or even to his life. All these factors enter into consideration."

99. In my view, old age may also be a factor for consideration by the DPP. I also agree with the position that the exercise of discretion though quasy-judicial, the decision of what steps ought to be taken to enforce the criminal law is placed on the officer in charge of prosecution and it is not the rule, and hopefully it will never be, that suspected criminal offences must automatically be the subject of prosecution since public interest must under our constitution be considered in deciding whether or not to institute prosecution. See ***The International and Comparative Law Quarterly*** Vol. 22 (1973):

100. However, it is upon the DPP to consider those factors and not upon this Court to determine for him/her when such factors militate against the institution of criminal proceedings. I associate myself with the decision of the High Court of Uganda in the case of **Uganda vs. Jackline Uwera Nsenga Criminal Session Case No. 0312 of 2013,** to the effect that:

"...the DPP is mandated by the Constitution (See Art. 120(3)(a)) to direct the police to investigate any information of a criminal nature and report to him or her expeditiously… Only the DPP, and nobody else, enjoys the powers to decide what the charges in each file forwarded to him or her should be. Although the police may advise on the possible charges while forwarding the file to DPP … such opinion is merely advisory and not binding on the DPP (See Article 120(6) Constitution). Unless invited as witness or amicus curiae (friend of Court), the role of the police generally ends at the point the file is forwarded to the DPP."

101. This position was similarly appreciated in **Charles Okello Mwanda vs. Ethics and Anti-Corruption Commission & 3 Others (2014) eKLR** in which **Mumbi Ngugi, J** held that:

"I would also agree with the 4th Respondent (DPP) that the Constitutional mandate under 2010 Constitution with respect to prosecution lies with the 4th Respondent, and that the 1st Respondent has no power to 'absolve' a party and thereby stop the 4th Respondent from carrying out his constitutional mandate. Article 157(10) is clear…However, in my view, taking into account the clear constitutional provisions with regard to the exercise of prosecution powers by the 4th Respondent set out in Article 157(10) set out above, the 1st

respondent (EACC) has no authority to 'absolve' a person from criminal liability…so long as there is sufficient evidence on the basis of which criminal prosecution can proceed against a person, the final word with regard to the prosecution lies with the 4th Respondent (DPP) …"

102. In this case, it is the respondents' position that upon analysis of the evidence on record the 1st Respondent recommended that the Applicants be charged with offences that are known to law as reflected in the charge sheet and that the decision to charge the Applicants was informed by the sufficiency of evidence on record and the public interest. It was contended that the 1st Respondent has independently reviewed and analysed the evidence contained in the investigations file including the witness statements, documentary exhibits and statements of the applicants as required by law and it is on the basis of the said review and analysis that the DPP has given directions to prosecute the Applicants. This Court cannot on the basis of the conflicting versions presented before it arrive at a decision whether the DPP indeed has in his possession such evidence as would enable him mount a prosecutable case. For this Court to embark on that voyage would amount to usurping the powers of the trial Court. In **Meixner & Another vs. Attorney General [2005] 2 KLR 189,** the Court of Appeal 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. The other grounds, which the appellants claim were ignored ultimately, raise the question whether the evidence gathered by the prosecution is sufficient to support the charge. The criminal trial process is regulated by statutes, particularly the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court, which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence and that is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court."

103. It was contended that the transaction the subject of these proceedings has elicited adverse debates both in the media and from several politicians hence the decision to charge the applicants was driven by ulterior motives and the desire to punt to political expediency. The issue of adverse publicity was dealt with in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** as hereunder:

"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..."

104. I am also in agreement with the sentiments expressed in **Dream Camp Kenya Ltd vs. Mohammed Eltaff and 3 Others Civil Appeal No. 170 of 2012** that:

"Every litigation is inconvenient to every litigant in one-way or another. Also no one in his right senses enjoys being sued and ipso facto no one cherishes litigation of any nature unless it is absolutely necessary. With respect, we accept litigation is expensive and no litigant would enjoy the rigours of trial. The aftermath of vexatious and frivolous litigations is normally taken care of by way of costs. The discomfort of litigation would not certainly render the success of the intended appeal nugatory if we do not grant the application sought. If the learned Judge is eventually found wrong on appeal, and the applicant succeeds in its intended appeal, then the orders so made by the learned Judge would be quashed and the applicant would be compensated for in costs."

105. As was held in **Jago vs. District Court (NSW) 106**:

"..it cannot be said that a trial is not capable of serving its true purpose when some unfairness has been occasioned by circumstances outside the court's control unless it be said that an accused person's liability to conviction is discharged by such unfairness. This is a lofty aspiration but it is not the law."

106. It has not been alleged that there is a risk that as a result of the adverse publicity so far generated by the transaction in issue, the applicants' right to fair trial is threatened. In fact no allegation has been made against the trial Court along those lines and in these proceedings no orders are expressly sought against the trial Court. The trial Court is in fact yet to commence the criminal proceedings involving the applicants.

107. It was further contended that the decision to charge the applicants was reached by or on the basis of a decision by a police station and an OCS whose station was not seized of the subject investigation and, therefore, had no basis and was contrary to public policy and violated the Applicants' right to fair administrative process. The applicants however did not cite any legal provision which specifies that investigations into an alleged commission of a criminal offence can only be conducted by a particular police station. I am not convinced that the mere fact that the decision to charge the applicants was allegedly made by a different police station from that which purportedly conducted the investigations is a ground for prohibiting the intended prosecution. In any case, the decision whether or not to prosecute falls squarely on the shoulders of the DPP rather than on the police.

108. It was submitted that the decision to charge the applicants was driven by ulterior motives and the desire to punt to political expediency. However there was no tangible evidence to show that this was the case. The mere fact that politicians, as they are wont to do, were attracted to the ongoings in Malili ranch for whatever motive cannot be imputed to the DPP. In determining whether or not to halt criminal proceedings, the Court must consider the dominant motive for bringing the criminal proceedings. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the ***predominant*** purpose is to further some other ulterior purpose and 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. See **Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another** (supra) and **R vs. Attorney General exp Kipngeno Arap Ngeny** (supra).

109. Where it is not the predominant purpose the Court ought not to interfere. Where the ground relied upon to halt the same is some collateral motive which on its own does not warrant the halting of the said proceedings, the Court ought not to take such exceptional step of bringing to an end criminal proceedings where there possibly exist other genuine motives. Therefore, even if it is

true that politicians have developed an unnecessarily keen interest in the transaction the subject of these proceedings, that would not, necessarily, warrant the halting of the criminal proceedings if that is not the dominant motive for instituting the same. I am not in this case convinced, and it has not been alleged, that the predominant purpose of the commencement of the criminal proceedings is for the achievement of a collateral purpose other than the vindication of a criminal offence.

110. The mere fact that an applicant goes through the motion of a trial does not amount to a waiver of his rights to institute appropriate proceedings for damages if it turns out that the criminal proceedings ought not to have been instituted in the first place. However to base this Court's decision on that ground would require very cogent grounds and solid material to do so. It was in recognition of this fact that the House of Lords in **Director of Public Prosecutions vs. Humphreys [1976] 2 All ER 497 at 511** cautioned 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."

111. It was also along those lines that, in my view, **Ojwang', J** (as he then was) in **Republic v Attorney General & another Ex parte Vaya & another** (supra), expressed himself that:

"One critical custodian of this public policy is the Attorney General in his prosecutorial role; and in a matter such as the one in hand, this Court ought not hold that no prosecutions may be brought against persons suspected of committing offences touching on national resource use. Accordingly I hold that there is no public policy to limit the competence of the Attorney General to prosecute persons in the position of the applicants."

112. Having considered the issues raised herein, it is my view that the same are challenges on the merits of the decision to prosecute the applicants and the exercise of the discretion of the 2nd respondent. The former can be properly dealt with by the trial court. However, the challenge to the exercise of the discretionary powers conferred upon the 2nd respondent does not, in my view, meet the threshold for interfering therewith.

Order

113. Consequently, I find no merit in the Motion on Notice dated 8th October, 2014 which Motion is hereby dismissed with costs to the respondents.

Dated at Nairobi this 30th day of October, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kitulu for the Applicants

Mr Ondimu for the 1st, 2nd and 4th Respondents

Cc Patricia