



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.66 OF 2012**

**BETWEEN**

**JOSHUA CHELELGO KULEI.....PETITIONER**

**AND**

**THE REPUBLIC.....RESPONDENT**

**AND**

**PRAKASH BHUNDIA.....1ST INTERESTED PARTY**

**PETER KIPYEGON LAGAT.....2ND INTERESTED PARTY**

**WILSON GACHANJA.....3RD INTERESTED PARTY**

**EZEKIEL KOMEN.....4TH INTERESTED PARTY**

**GAS COMPANY LTD.....5TH INTERESTED PARTY**

**ASHAR LTD.....6TH INTERESTED PARTY**

**SIAN ENTERPRISES LTD.....7TH INTERESTED PARTY**

**AGRID LIMITED.....8TH INTERESTED PARTY**

**THE ETHICS AND ANTI-CORRUPTION COMMISSION.....9TH INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. The Petitioner, Joshua Chelelgo Kulei and the 1st to 7th Interested Parties were charged in the Nairobi Chief Magistrate's Anti-Corruption Court in Anti-Corruption Case No. 5 of 2010 on 28th January 2010, with the following offences;

**“JOSHUA CHELELGO KULEI, PRAKASH BHUNDIA, PETER KIPYEGON LAGAT, WILSON**

**GACHANJA, EZEKIEL KOMEN, THE GAS COMPANY LIMITED, ASHAR LIMITED, SIAN LIMITED**

**COUNT I**

**CONSPIRACY TO DEFRAUD CONTRARY TO SECTION 317 OF THE PENAL CODE, CHAPTER 63, OF THE LAWS OF KENYA**

**1. PRAKASH BHUNDIA 2. PETER KIPYEGON LAGAT 3. WILSON GACHANJA 4. THE GAS COMPANY LIMITED:** On the 14th day of May, 1999 in the City of Nairobi within the Nairobi Area of the Republic of Kenya, jointly conspired to defraud Kenya Pipeline Company Ltd by facilitating the transfer of 12 pieces of land parcel numbers Mombasa MN/VI/3854, MV/VI/3855, MV/VI/3856, MV/VI/3857, MV/VI/3858, MV/VI/3859, MV/VI/3860, MV/VI/3861, MV/VI/3862, MV/VI/3862, MV/VI/3904, MV/VI/3905, and MV/VI/3906, which had been irregularly excised from land belonging to Kenya Airports Authority to Messrs East African Gas Company Limited, a joint venture between Kenya Pipeline Company Limited and the Gas Company Limited.

**COUNT 2**

**ABUSE OF OFFICE CONTRARY TO SECTION 101(1) AS READ WITH SECTION 102A OF THE PENAL CODE, CHAPTER 63 OF THE LAWS OF KENYA**

**PARTICULARS OF THE OFFENCE**

**PETER KIPYEGON LAGAT:** On the 28th day of February, 1996 in the City of Nairobi Area in the Republic of Kenya, being the Managing Director of the Kenya Airports Authority, arbitrarily and in abuse of the authority of his office directed the firm of Gordon Wayumba and Associates to survey land belonging to the Kenya Airports Authority on which Moi International Airport, Mombasa, is situated and to excise all plots that had allegedly been allocated from the head title thereof, when no such prior allocation had been done, an act which was prejudicial to the rights of the Kenya Airports Authority.

**COUNT 3**

**ABUSE OF OFFICE CONTRARY TO SECTION 101(1) AS READ WITH SECTION 102 A OF THE PENAL CODE, CHAPTER 63 OF THE LAWS OF KENYA**

**PARTICULARS OF THE OFFENCE**

**WILSON GACHANJA:** On the 8th day of August, 1996 in the City of Nairobi within Nairobi Area in the Republic of Kenya, being a person employed in the public service, to wit the Commissioner of Lands in the Ministry of Lands and Settlement, arbitrarily and in abuse of the authority of his office directed Mr. Peter Kangethe Kahuho, the Senior Lands Officer, Coast Province, to issue letters of allotment in respect of alienated public land belonging to the Kenya Airports Authority on which Moi International Airport , Mombasa is situated, an act that was prejudicial to the rights of the Kenya Airports Authority.

**COUNT 4**

**BREACH OF TRUST BY A PERSON EMPLOYED IN THE PUBLIC SERVICE, CONTRARY TO SECTION 127 (1) AS READ WITH SECTION 127 (2) OF THE PENAL CODE, CHAPTER 63 OF THE LAWS OF KENYA**

**PARTICULARS OF THE OFFENCE**

**EZEKIEL K. C. KOMEN:** Between 18th May, 1999 and the 9th day of June, 2003 in Nairobi Area within the Republic of Kenya, being a person employed in the Public Service, to wit, the Managing Director of the Kenya Pipeline Company Limited and a signatory to the bank account of East African Gas

Company Limited, committed a breach of trust affecting the public by irregularly authorising payments out of the bank account of the said East African Gas Company Limited, thereby occasioning the misappropriation of the equity of Kshs.65,272,727.25 contributed to the said East African Gas Company Limited by the Kenya Pipeline Company Limited.

#### **COUNT 5**

#### **OBTAINING BY FALSE PRETENCES, CONTRARY TO SECTION 313 OF THE PENAL CODE, CHAPTER 63 OF THE LAWS OF KENYA**

#### **PARTICULARS OF THE OFFENCE**

##### **1. JOSHUA CHELELGO KULEI 2. ASHAR LIMITED:**

On the 19th Day of May, 1999 at Nairobi in the Nairobi Area of the Republic of Kenya, with intent to defraud, jointly obtained Kshs.12 Million from East African Gas Company Limited by falsely pretending that Ashar Limited had rendered engineering and foundation laying services on behalf of East African Gas Company Limited.

#### **COUNT 6**

#### **OBTAINING BY FALSE PRETENCES, CONTRARY TO SECTION 313 OF THE PENAL CODE, CHAPTER 63 OF THE LAWS OF KENYA**

#### **PARTICULARS OF THE OFFENCE**

**1. JOSHUA CHELELGO KULEI 2. SIAN LIMITED:** On the 17th day of June, 1999 at Nairobi in the Nairobi Area of the Republic of Kenya, with intent to defraud, jointly obtained Kshs.5,999,980/- from East African Gas Company Limited by falsely pretending that Sian Limited had paid lands rent, rates and assessment fees on behalf of Messrs Gas Company Limited.

They all pleaded not guilty to the said offences except the 1st Interested Party who was not present in Court.

2. They all thereafter availed themselves in Court on diverse dates between 18th February 2010 and 28th September 2010 for the mention of the criminal case. In those instances the Prosecutor/State Counsel informed the Court that the 1st Interested Party was a British citizen based in Britain and that the State had instituted extradition proceedings against him. He therefore applied for a warrant of arrest against the 1st Interested Party, which order was granted. The case was then mentioned severally thereafter and on 11th February 2011, the Prosecutor informed the Court that the State was no longer proceeding with the extradition case and accordingly, the criminal case was set down for hearing on 18th and 19th October 2011. On the 18th of October 2011, the State applied to substitute the charge under **Section 214 of the Criminal Procedure Code, (Cap 75 Laws of Kenya)** by adding Agrid Ltd, the 8th Interested Party as the 9th accused person. Agrid Ltd was not in Court on that date and the State applied for summons against it and an adjournment to enable it avail the said Company's representatives in Court. The trial Court granted both applications.

3. It was against that background that Mr. Katwa, learned advocate for the Petitioner (*1st accused person in the criminal case*) filed an application dated 3rd November 2011 for the Court to refer the matter to the High Court for constitutional interpretation claiming *inter alia* that the Petitioner's fundamental rights had been violated since the case was brought to Court fifteen years from the date the offence was allegedly committed and that there was unreasonable delay in the prosecution of the case which facts have occasioned prejudice to the Petitioner. And that his rights to fair trial had been violated as there was selective prosecution of the suspects in the whole saga.

4. The presiding Magistrate in her Ruling of 20th January 2012 allowed the application and on 7th

February 2012 while forwarding the file to this Court, framed the following questions for determination by the High Court;

***“(a) Whether or not it is fair and just to initiate a case Fifteen Years (15) after the alleged date of the commission of the offence. That relevant Companies have disposed of their documents 6 years after the occurrence of the event and also the Banking records have been disposed of.***

***(b) Whether the Applicant can expect a fair and just trial within reasonable time having been charged alongside persons who have not been summoned or produced in Court.***

***(c) Whether or not the delay to commence the hearing of the case since January, 2010 has caused irreparable prejudice to the Applicant's Fundamental Rights to fair trial within reasonable time.***

***(d) Whether or not the investigating officer's selective prosecution of the Applicant has diluted the basis of fair trial and whether the investigating officer is motivated by ulterior motives in holding the accused persons in Court for an unreasonable time.***

***(f)(i) Whether or not the office of the Attorney General, in its role as an adviser of the Government of Kenya [under whose office the Directorate of Public Prosecution fell at the time of the filing of the criminal charges] can decide to charge the suspects and prosecute them, whilst it is the same office of the Attorney General that supervised, approved and endorsed the whole transaction constituting the background of Counts 1 to 7 of the charges against the accused and especially Counts 5, 6 and 7 against the 1st accused/Applicant.***

***(ii) Whether or not the office of the Attorney General, in its status as one of the Directors and sitting at the Board of Kenya Pipeline Company Limited [hereinafter referred to as KPL] can make a fair decision to charge and prosecute the suspects notwithstanding that he sat and approved the conception, logistics and implementation of the project upon which it is alleged the crimes in Count 1 to 7 are founded.***

***(g) Whether or not the charges, as preferred in Count 1 to 7 can be premised on a parcel of land allegedly owned by Kenya Airports Authority [K.A.A], when in fact the land was never owned by K.A.A. at any time, and the maps relied upon by the prosecution confirm that the parcels did not belong to K.A.A. at any time and K.A.A. never held any certificate of Title to establish its ownership of the parcel at any material time in the history of the land”***

Subsequently, the Petitioner also filed a Notice of Motion dated 20th July, 2012 seeking a determination of the same questions pursuant to the provisions of **Articles 19, 20, 22, 25, 27, 28, 40, 47, 48, 49, 50 and 159 of the Constitution, 2010 and Rules 7, 8, 24 and 25 of the Constitution of Kenya [Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of Individual] High Court Practice and Procedure Rules 2006, Criminal Procedure Act, Cap 75 at Sections 89, 90, 92, 93, 94, 96, 100, 110, 112, 113, 117, 134, 135, 136 and 137.**

### **Factual Background**

5. The factual background, context and circumstances leading to this Petition are as stated in the Affidavit of the Petitioner sworn on 20th July 2012 in support of the Notice of Motion application dated 20th July 2012 and the Affidavit of Prakash Bhundia sworn on 16th July 2012 and his Supplementary Affidavit sworn on 3rd May 2013. Those facts are that;

6. Sometimes in 1995/1996, the shareholders of the 5th Interested Party, Gas Company Ltd, came to

Kenya to invest in Liquefied Petroleum Gas (LPG) as a substitute to wood fuel and also for the liberalization of the petroleum sector in Kenya. The 5th Interested Party was then incorporated as a Kenyan Company on 28th February 1996 to undertake the said project. The 5th Interested Party made advanced progress in acquiring land and equipment for the intended facility and as at June 1998, the project was 80% complete. On 16th June 1997, Kenya Pipeline Company Limited (KPC) on behalf of the Government of Kenya put out a notice in the newspapers asking for an expression of interest to build a 3,000 tonne LPG terminal based on a design already carried out by its own consultants. On 28th July 1997, the 5th Interested Party responded to the advert by stating that it was already at an advanced stage of building a much larger terminal (larger than 3,000 tonne LPG) and inquired whether KPC would be interested in joining it as a Joint Venture Partner. By that time, the 5th Interested Party had expended USD 12,000,000.00 on the project on its own and the project was in fact over 80% complete.

7. KPC responded to the 5th Interested Party's offer on 31st December 1997 and on 15th October 1998 negotiations started. Several meetings were held in that regard which culminated in the signing of a memorandum of understanding and the incorporation of The East African Gas Company Ltd on 18th February 1999, a Kenyan company in which the shareholding was; KPC at 45% and Gas Company at 55%, following approvals from the Ministries of Energy and Finance as well as the Office of the Attorney General. The directors of the new Company were Prakash Bhundia, the 1st Interested Party and Ezekiel Komen, 4th Interested Party. The parties to the Joint Venture signed a Memorandum and Articles of Association dated 10th February 1999 prior to the Company's incorporation.

8. Subsequently, the joint venture company, East African Gas Company Ltd (*the Gas Company*) issued tenders for civil and building works contracts by advertisements, and responses were received and evaluated. Clearspan Ltd, a general contractor was awarded the contract and civil works commenced. It is alleged that the East African Gas Company Ltd continued to pay for the engineering works and for the equipment which included four huge 65metre x 10metre tanks weighing, while empty, 500 tonnes each.

9. On 7th April 2000, the KPC Managing Director, Ezekiel Komen, the 4th Interested Party, presented a notice of KPC's withdrawal from the Gas Company and in September 2000, KPC issued a letter allowing the Gas Company to continue with the project on its own, which it did.

10. Following KPC's withdrawal from the project, negotiations started between the 5th Interested Party and KPC over the losses incurred by the Gas Company. It was agreed that the Gas Company would repay the Kshs.65Million contributed by KPC to the joint venture and upon the payment, KPC would transfer its 45% shares to the Gas Company and there would be no further liability on the part of KPC. At the time of withdrawal, it is alleged that KPC owed the Gas Company Kshs.73,350,000.00 and USD 5,850,000.00 but later paid Kshs.65,000,000.00 only leaving the balance due and payable.

11. The Gas Company in the meantime sought land to house its investment and upon the advise of the Kenya Chamber of Commerce, it purchased certain parcels of land at point and in the condition they were in although the land parcels in question had already been allotted to other people. It therefore acquired leasehold interests over the following parcels of land viz. L.R. Nos. MV/VI/3854, MV/VI/3855, MV/VI/3856, MV/VI/3857, MV/VI/3858, MV/VI/3859, MV/VI/3860, MV/VI/3861, MV/VI/3862, MV/VI/3897, MV/VI/3904, MV/VI/3905, MV/VI/3906 and MV/VI/3907. It is now claimed by the Petitioner that the interest and titles to these parcels of land was given by the Government consistent with the invitation for investors and are genuinely from the hands of the officials from the Ministry of Land that were responsible for allocating, surveying and administering and issuing titles to land. That the 5th Interested Party paid the premiums due, survey fees and all other outgoings to acquire the titles. And that it has since paid all the land rates as demanded by the Government and the project was undertaken above board.

### **The Petitioner's case**

12. The Petitioner's case is as contained in his written submissions dated 21st November 2013.

13. It is his contention that he has been subjected to infinite and inhuman losses at the hands of the

Government as to the investments, business opportunities, bank liabilities, cash flow and contracts that arose out of the project explained above. That notwithstanding the evident injuries the Government has caused the 1st and 5th Interested Party, it has now gone further to prefer criminal charges against them while in fact an agreement had been reached that the 5th Interested Party would refund the Kshs.65,272,727 contributed by the KPC on an *ex gratia* basis so as to get rid of the dispute. That the 1st and 5th Interested Parties were in the process of obtaining monies to refund the Kshs.65,272,727 when charges were lodged in the Anti-Corruption Criminal Court which act was malicious and done in bad faith.

14. It is the further Submission of the Petitioner that the original scope of the investigations culminating in the case was to address two issues namely; whether or not the East Africa Gas Company was a bogus company held out to defraud the Government of Kenya and whether or not the said company in fact defrauded the Government of Kshs.130,000,000. However, he claims that the investigations and observations of the investigating officer looked at in the context of the six charges in the Anti-Corruption Case No.5 of 2010 would show that the charges do not bear any resemblance to those investigative issues.

15. Regarding the role of the Attorney General, it is the Petitioner's case that the Attorney General was involved in the approval of the joint venture project by *inter alia* sitting in the Board of Directors of KPC where the joint venture was accepted, due diligence done, funds released and the Memorandum and Articles of Association of the Gas Company agreed upon and also that on his advice, the Ministry of Energy and Ministry of Finance approved the joint venture project. He thus claims that it is in bad faith for the same Attorney General to come back and prosecute parties with whom he negotiated with and agreed upon before commencement of the project. That the Attorney General was in that regard exercising his role as the ultimate advisor to the Government under whose office the Directorate of Public Investigations (DPP) fell at the time the decision was made to bring the criminal charges against the Petitioner and the Interested Parties herein. And that it was the same Office of the Attorney General that supervised, approved and endorsed the joint venture MOU, constituting the background of Counts 1 to 7 of the charges against the Petitioner and the Interested Parties, *vide* letter dated 3rd December 1998. He thus submitted that to the extent of the Attorney General's complicity in the events being prosecuted, the Attorney General's decision to charge the Petitioner and Interested Parties is unjust, unfair and without good conscience and therefore the proceedings should be terminated since the decision to charge was not taken objectively and is oppressive.

16. It is also his position that the prosecutor lacks independence in the prosecution herein because the decision to abandon the extradition proceedings against the 1st Interested Party was on the advice of the Crown Office in Britain which claimed that the said proceedings were unfounded and were weak for lack of *prima facie* evidence. He claims therefore that the DPP who took up the prosecution of the criminal case abdicated his constitutional duty at the instance of the Crown Office and he referred the Court to the case of **Republic v Attorney General & Another Ex Parte Ngeny (2001) KLR 612** and also **Githunguri v Republic (1986) KLR 1** where it was held that while the Court cannot curtail the State's power to prosecute criminal offences, the mode of the exercise of the power can be checked and balanced by the Court.

17. It is the Petitioner's further contention that the prosecution went to unreasonable lengths to implicate/incriminate the Interested parties and himself while craftily exonerating some persons and that in failing to accord equal treatment to all persons, the prosecution has violated the principle of equality before the law, right to fair administrative action, right to human dignity and fair trial within a reasonable time.

18. With regard to delay in prosecution, the Petitioner claims that his prosecution was delayed first, by failure to initiate prosecution for 15 years after the alleged offence and delay of up to 3 years after charging and taking plea before the hearing could start; that he cannot expect a fair trial and justice within reasonable time in view of his being charged alongside persons who have not been produced in Court since 27th January 2010 when the charges were presented to Court. He has also been constrained to take a plea while awaiting the availability of the 2nd, 6th and 7th and now 9th Interested Parties thus causing him irreparable prejudice and a breach of his right to fair trial within a reasonable time. Secondly, by

causing him to take plea on 20th January 2010 and then taking up to two years before amending the charged and still not commencing the trial, the prosecution has caused him great prejudice. He thus claims that the delay aforesaid has caused him irreparable injury and the charges against him should be quashed.

19. He further claims that the delay has caused him total imbalance because the evidence he would have relied on to prove his innocence has been disposed of from the relevant company and banking records. And further that due to passage of time, his recollection of the events in which the criminal case was founded has faded and it would thus be in the interests of justice that the charges should be dismissed as the delay is unjustifiable, unexplained and inexcusable. He relies on the *Ngeny Case (supra) and Tirop v Attorney General, Misc Applic No. 1201 of 2001, Githunguri Case (supra) , Republic v Attorney General & 3 Others ex parte Kamlesh Pattni (2013) e KLR* and *Jacob Kiprono Maiyo & 2 Others v Republic (2006) e KLR* which have juxtaposed delay with the right to fair hearing and explained the unfairness in circumstances of inordinate delay in starting a prosecution. Further they have analysed the connection between the right to fair hearing and inordinate delay in starting a prosecution and the actual prosecution of a case. I will revert to these authorities later in this Judgment.

20. It is the Petitioner's contention that in any event, the actions of an employee and/or director of a corporate body should not attract criminal culpability at personal level. That the actions of the employees of Sian Enterprises, the 7th Interested Party, together with Ashar Ltd, the 6th Interested Party, which form the substance of the charges facing the Petitioner cannot constitute a legitimate platform for criminal charges directed at him personally . He relies on the English case of *R v ICR Haulage Ltd (1994) KB 551 at 559* where it was held that employees were to be regarded as victims and not perpetrators of a company's fraudulent dealings.

21. Further, that he was discriminated against in being selected for trial although other parties involved including the Attorney General, individuals at the Ministry of Energy and Ministry of Finance (who approved the joint venture project), individuals at the Ministry of Lands (who prepared, processed and issued titles) and members of the KPC Board, were not prosecuted alongside himself. He relies on the *Tirop Case (supra)* where it was held that where a certain procedure was wrong and raises criminal culpability, all persons involved should be charged. It is also his contention that there are persons who received over 70% of the joint venture money and who were excluded from liability and the decision to prosecute him for having received only 30% of the joint venture money was unjustified And further that it was discriminatory for Sian Enterprises and Ashar Enterprises to be charged while they only received about 28% of the money given out by KPC and yet other beneficiaries such as lawyers, employees, consultants, contractors and the Kenya Revenue Authority who received over 72% of the funds were left out of the prosecution. He relies in that regard on the case of *Peter George Antony D'costa v Attorney General and Another, Nairobi Petition No. 83 of 2010* where it was stated that the Court process must be used in good faith and where abused, the Court should stop such an abuse.

22. In conclusion and according to the Petitioner, the Government and the prosecution are estopped from disowning the acts and approvals of actions and events related to the joint venture when it was an active participant in the whole project including in the issuance of titles and its involvement in negotiations to resolve the dispute by civil process.

23. The Petitioner therefore prays for the following orders;

***“(1) That there be stay of proceedings in respect to Nairobi Chief Magistrate's Criminal Anti-Corruption Case No.5 of 2010 pending the hearing and determination of the constitutional reference.***

***2. That orders do issue to call up and quash in toto the Respondent's decision to present charges of conspiracy, obtaining by false pretence, breach of trust and abuse of office, breaching Section 317, 313, 127(1) and (2) and 101(1) of the Penal Code, Cap 63, Laws of Kenya in Nairobi Chief Magistrate Criminal Case No.5 of 2010.***

3. *That orders do issue to restrain the Chief Magistrate AntiCorruption Court and any other Magistrate from admitting onto its record and or entertaining any criminal charges similar to the charges made out against the Applicants in Criminal Case No.5 of 2010 or any other charges based on the same facts alleging conspiracy, obtaining by false pretence, breach of trust and abuse of office.*
4. *That the Applicant's fundamental rights including rights to equality before the law, freedom from discrimination, right to human dignity, right to protection of property, right to fair trial, right to protection of property, right to fair administrative action, rule of law and fair hearing within reasonable time, have been violated.*
5. *That an order does issue that the Applicants are bona-fide owners of all those land parcels referred to as L.R. No.MN/VI/3854, MN/VI/3855, MN/VI/3856, MN/VI/3857, MN/VI/3858, MN/VI/3859, MN/VI/3860, MN/VI/3861, MN/VI/3862,MN/VI/3904, MN/VI/3905 and MN/VI/3906,*
6. *That an order do issue that the Respondent did not pay the fair value of the 45 shares [out of 100 shares] that were agreed upon to be taken by the Respondent, hence the Respondent did not acquire the shares through Kenya Pipeline Company Limited (KPCL) and the Permanent Secretary, Ministry of Finance.*
7. *That the Respondent do pay the Applicant damages for all the injuries, losses and prejudice they have been occasioned by the Respondents' acts of commission and or omission.*
8. *That the Court does given any such other orders, writs and or directions as it may deem just and fair in the interest of Justice.*
9. *That the Respondent pay costs.”*

#### **Respondent's case**

24. The Respondent, Director of Public Prosecutions (DPP) opposed the Motion and filed the following Grounds of Objection dated 22nd October 2012;

*“(1) The said Application is misconceived, frivolous, vexatious,incompetent, improperly before Court and shall at the earliest opportunity crave leave of the Court to have the same dismissed with costs.*

*(2) That there is no limitation of time in law for the commencement of criminal proceedings.*

*(3) That the fact that some companies have disposed of their documents and banking records is not a bar to prosecution. It is not the duty of the Accused person or the Petitioner to decide which documents the prosecution shall rely on and in any event, the High Court has no capacity at this stage to decide on the documents to be relied on during the prosecution of the matter as to do so would be tantamount to hearing the criminal case which it has no jurisdiction to do. The fact that documents have been disposed of as by law required is not a bar to prosecution.*

*(4) That the Board of the Kenya Pipeline Company Limited (hereinafter “KPL”) only approved the projects the subject of the criminal charges facing the Petitioner and others and the implementation was left to the relevant officers. It is atthe implementation stage that several offences were committed and which form the basis of the criminal charges in the Subordinate Court.*

*(5) That the laws of Kenya provide for fair trial as well as other numerous legal*

*safeguards in all criminal proceedings which are enshrined in the legal safeguards in all criminal proceedings which are enshrined in the Constitution of Kenya, the Evidence Act, Cap.80, the Criminal Procedure Code, Cap.75, the Penal Code, Cap.63, The Magistrate's Courts Act, Cap.10, all of the laws of Kenya amongst others. It has not been exhibited that the Petitioner will not or is unlikely to be accorded the protections provided under the foregoing provisions of the law.*

*(6) The High court cannot make a finding as regards the ownership of the parcels of land as proposed in question number (g) of the Notice of Motion dated 20th July 2012.*

*(7) It has never been exhibited by the Petitioner how the investigating officer is selectively prosecuting the Petitioner nor how he is motivated by ulterior motive in the prosecution under way. In any event, the decision to prosecute and the prosecution under way is the constitutional mandate and responsibility of the Director of Public Prosecutions and not any investigating agency.*

*(8) That once the criminal proceedings are commenced, the matter rests wholly in the hands of the Court and the investigating officer has no control thereof. It cannot therefore be said that the investigating officer is holding the accused persons in court for unreasonable time without trial.*

*(9) That it is for the trial Court to decide the guilt, innocence or otherwise of the Petitioner and not the High Court as proposed in the Notice of Motion herein. The High Court cannot decide whether or not the Petitioner is innocent or guilty.*

*(10) It has not been exhibited how the Constitutional and fundamental rights of the Petitioner/Applicant have been contravened which in effect renders the Notice of Motion incompetent.*

*(11) That Section 193A of the Criminal Procedure Code Cap.75 permits concurrent criminal and civil proceedings.*

*(12) That the criminal charges preferred against the Petitioner/Applicant have nothing to do with the decision of the board of KPL and reference to the decision of the KPL and the Attorney-General is only made to mislead the Court to make a finding on behalf of the Applicant.*

*(13) The members of the board of KPL and the company (KPL) are distinct entities in law and the decisions of the board are not the decisions of the individual members sitting on the board. The individual members therefore cannot be found to be culpable. In any event, the High Court cannot decide against whom criminal charges should be preferred as this decision rests with the Director of Public Prosecution.*

*(14) That the High Court has no jurisdiction to make any finding in terms of prayers 6 of the Notice of Motion dated 20th July 2012.*

*(15) That as can be deduced from the proceedings of the lower Court, the delay in the prosecution of the criminal case under reference has not been caused solely by the actions of the State.*

*(16) The decision whether or not to prefer charges is the mandate of the Director of Public Prosecutions and in the exercise of such powers, the Director of Public prosecutions does not act under the direction or control of anyone or any institution”.*

He also filed written submissions dated 3rd May 2013.

25. It is his submission that this Court has no jurisdiction to entertain the Motion for two reasons; firstly, the Court cannot quash the criminal charges as the Petitioner was first presented in Court on 1st February 2010 and in that case, **Order 53 Rule 2** of the **Civil Procedure Rules** can only be applied where an application is brought within six months from the date of the impugned decision is made and therefore the current Application is out of the prescribed time. Secondly, this Court cannot effect the orders sought in regard to ownership of Land Parcels L.R. No. MV/VI/3854, MV/VI/3855, MV/VI/3856, MV/VI/3857, MV/VI/3858, MV/VI/3859, MV/VI/3860, MV/VI/3861, MV/VI/3862, MV/VI/3897, MV/VI/3904, MV/VI/3905, MV/VI/3906 and MV/VI/3907, as that is a matter for the exclusive jurisdiction of Courts contemplated under **Article 162(2)(b)** of the **Constitution**.

26. As for the alleged delay in bringing the criminal proceedings against the Petitioner and the Interested Parties, the Respondent, while relying on the South African Case of **Ptrue Bothma and Petrus Arnoldus Els and Others CCT 21 of 2009** argues that the Court must be guided by the length of the delay; the reason the government assigns to justify the delay; the accused's assertion of a right to a speedy trial and the prejudice suffered by the accused and added that each case must be looked at on its own merits.

27. It is also his contention that the matters complained of by the Petitioner are prematurely before the High Court as they form the defence in the trial Court and as such can only be canvassed before a trial Magistrate and not by this Petition.

28. The Respondent further submits that the decision to charge the Petitioner cannot be said to be an abuse of the Court process nor is it made with ulterior motive because the Respondent has the constitutional powers to prosecute, and in that regard, he referred the Court to the cases of; **Surjit Singhunjam v Principal Magistrate, Kibera Misc Applic. No.519 of 2005, Republic v The Chief Magistrate, Nairobi Exparte Helmut Rame Misc. Applic. No.152 of 2006** where the Court found that the police have a duty to investigate any complaint once such a complainant is made and also relies on the case of **Bryan Yongo v Attorney General HCCC Civil Case No.61 of 2006** where it was held that it was the duty of the trial Court to take evidence from both the prosecution and the defence and to weigh that evidence and determine the case one way or another.

29. The Respondent has also made the point that the Affidavits of 20th July 2012 sworn by the Petitioner and that of Prakash Bhundia sworn on 16th July 2012 contain matters of fact which amount to a defence in the pending criminal proceedings and this Court lacks jurisdiction to entertain such matters as they can only be presented at the hearing of the criminal case. He relies also on the decision in **William Ruto & Anor v Attorney General HCC No.1192 of 2004** where it was held that analysis of evidence should be done at the trial and not in the Constitutional Court.

#### **4th Interested Party's Case**

30. The 4th Interested Party, Ezekiel Komen, supports the Application. He filed a Replying Affidavit sworn on 9th February 2013 and written Submissions dated 11th October 2013.

31. He submits that under **Section 219** of the **Criminal Procedure Code** and **Article 50(2)** of the **Constitution**, criminal prosecution must be initiated promptly and without undue delay. He relies on the **Pattni Case(supra)** where it was held that a delay of 9 years and 8 months in a prosecution amounted to an inordinate and inexcusable delay. He claims that it was an abuse of the court process to bring a prosecution founded on an alleged crime whose date of commission was 15 years ago and refers to the case of **R v Brentford Justices, ex parte Wong (1981) 1 ALL ER 887** where it was held that magistrates had the discretion to hear a summons to quash if the prosecution amounted to an abuse of the Court process and where the police had deliberately attempted to gain time by laying the information without immediate prosecution and according to the Court, there was inexcusable delay in that case. Reliance is also placed in the decision in **John Muruitu Kigwe and Another v Republic HCCRC 223 of 2000** where it was held that the court has the inherent power to terminate proceedings that are an abuse of the process and thus protect citizens from malicious prosecutions that may lead to unnecessary infringement and curtailment of their rights.

32. He therefore claims that due to passage of time, he would suffer irreparable prejudice and miscarriage of justice that is incurable under **Section 382** of the **Criminal Procedure Code** since the evidence he would have relied on to prove his innocence will have been disposed of due to passage of time and waning of recollection of his witnesses and thus it would be in the interests of justice to have **Nairobi ACC No. 5 of 2010** terminated forthwith.

33. It is his further submission that the selective choice of the Petitioner and Interested Parties for prosecution coupled with the lengthy unexplained delay to prosecute, renders the trial unfair and discriminative contrary to **Article 27** of the **Constitution** and it shows that the Attorney General had ulterior motives and was driven by malice when he commenced the prosecution aforesaid.

34. The 4th Interested Party contends that he has been charged with the offence of “*breach of trust by someone employed in the public service*” but he only acted as an agent of KPC since all the transactions made by KPC were authorised by the Company's Board and therefore he cannot be held liable for acts done in his capacity as an employee of the company. He relies on the case of **R v Haulage Ltd (1944) KB 551** for that proposition.

35. He further contends that the Office of the Attorney-General had shown bias which has prejudiced the rights of the Petitioner and himself since as a Director in the Board of KPC, the Attorney-General supervised, approved and endorsed the transactions constituting the charges. That therefore his decision to charge casts doubt on his impartiality especially given the fact that at the material time, all prosecutions were conducted under his direction and authority and claims that the decision to prosecute him jeopardizes his right to a fair and impartial trial. He relies on the case of **Metropolitan Properties Co (F.G.C) Ltd v Lannon and Others (1968) 3 ALL ER 305 at 309** where it was held that a man may be disqualified from sitting in a judicial capacity if he is biased in favour of one side or against the other. He thus contends that in failing to accord equal rights to all persons, the prosecution had violated the principle of equality before the law. That there cannot be fair play in circumstances where the Attorney-General would purport to charge the Petitioner and the 4th Interested Party while he was privy to the background of the transactions that form the charges and thus it is unsafe to continue with the intended trial as it will jeopardize the rights and freedom of those charged. He therefore prays that **Nairobi ACC No.5 of 2010** be terminated without any trial being conducted.

### **9th Interested Party's Case**

36. The 9th Interested Party, the Ethics and Anti-Corruption Commission, in response to the application filed a Replying Affidavit sworn by Soita Wasike, a forensic investigator with the Commission, on 23rd November 2012. It also filed written submissions dated 28th November 2013.

37. It is its submission that this Court does not have jurisdiction to determine the ownership of Land Parcels L.R. Nos. MV/VI/3854, MV/VI/3855, MV/VI/3856, MV/VI/3857, MV/VI/3858, MV/VI/3859, MV/VI/3860, MV/VI/3861, MV/VI/3862, MV/VI/3897, MV/VI/3904, MV/VI/3905, MV/VI/3906 and MV/VI/3907 as that was a matter for the exclusive jurisdiction of Courts contemplated under **Article 162(2)(b)** of the **Constitution**. In addition, even if it had jurisdiction, the issue of ownership could not be determined through affidavit evidence as the Petitioner has purported to do.

38. It is its further submission that it was not within the jurisdiction of this court to determine whether or not the charges facing the Petitioner and Interested Party in **Nairobi ACC No.5 of 2010** disclose an offence. That a challenge to the competence of the charges facing the Petitioner can only be properly ventilated and resolved before the trial Court which is sufficiently empowered under the provisions of **Section 89(5)** of **Criminal Procedure Court** to determine that issue. In that regard reference is made to the decision in **William S. K. Ruto (supra)** and also the decision in **Meixner & Another v Attorney General (2005) 2 KLR** where the Court of Appeal held that it was the trial Court that is best equipped to deal with the quality and sufficiency of the evidence gathered to support any criminal charge and it would indeed be a subversion of the law regulating criminal trials for a judicial review Court to usurp those functions.

39. On the issue of alleged loss of evidentiary material due to passage of time and in particular the 15 years of the alleged occurrence of the facts giving rise to the relevant criminal case, the 9th Interested Party contends that the Petitioner has not tendered any evidence to prove that claim and that authorized officials of the companies have not sworn any affidavits to attest to the said disposal of records and the nature of evidence that is alleged to have been lost has not been given. Further, that the Petitioner's fear that his recollection of events or memories of his witnesses due to passage of time is prejudicial, equally applies to the prosecution witnesses and is not necessarily prejudicial to him alone.

40. It further submits that the DPP has powers under **Article 157(6) (a)** of the **Constitution** to institute and undertake criminal proceedings against any person before any Court except a Court Martial in respect of any offence alleged to have been committed and that Courts are reluctant to interfere with the decisions of the DPP to prosecute and have only done so on rare occasions. It relies on the English case of ***Reg v D.P.P ex parte Kebilene AC (2000) 2 AC 326*** where it was stated that even if the prosecuting authority was mistaken in law or fact in charging, that does not in itself constitute a reason to disturb its decision to do so.

41. On the issue of delay in commencing the criminal proceedings after the alleged commission of the offence, EACC claims that there is no period stipulated in law within which ***Nairobi ACC No.5 of 2010*** should have been instituted. That the right to a fair trial protected under **Article 50(2)(e)** of the **Constitution** does not refer to delays in investigations but is only available during the trial process itself and time begins to run after the charging of the accused persons. In any event, that criminal offences are investigated by the relevant authorities when they become known to the said authorities and that no evidence had been tendered to demonstrate undue delay in investigations in the present case. Reliance in that regard is placed on the case of ***Julius Kamau Mbugua v Republic (2010) e KLR*** where it was held that a trial within a reasonable time guaranteed under **Section 77(1)** of the **Repealed Constitution** relates to the whole of the judicial process starting when a person is charged and ending at the determination of the trial. The import of that holding is that delay cannot be an issue in the case of investigations into an alleged offence.

42. On alleged selective discrimination in the prosecution of the Petitioner, the 9th Interested Party submits that the Petitioner had failed to specifically plead the nature of discrimination that he was allegedly subjected to. Relying on the case of ***Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission and Another (2006) e KLR*** where it was held that an applicant must demonstrate that he was subjected to restrictions which other persons of another description were not subjected to, it claims that the Petitioner has not demonstrated that he was selectively prosecuted on the ground that persons who ought to have been charged with him in ***Nairobi ACC No.5 of 2010*** have not been charged as expected. That the Respondent had reasonable and probable cause to believe that all the accused persons and entities had committed the criminal charges in question and that summons under **Section 91** of the **Criminal Procedure Code** in respect of the 1st Interested Party were issued which were frustrated by the hiding out of the 1st Interested Party in England. And that even if the efforts made by the Respondent to produce the 1st and 5th Interested Parties have been insufficient, the trial Court can direct the prosecution to proceed with its case in the absence of those accused persons.

43. As to the issue of delay in commencing the hearing of the criminal case, it is the submission of the 9th Interested Party that the prosecution had failed to demonstrate that the alleged delay was occasioned by the prosecution and that it is the duty of the trial Court which has the control of the trial to ensure that a speedy trial is observed. That in the present case, the 9th Interested Party had demonstrated the efforts that have been made by the State to produce the 1st and 5th Interested Parties before the trial Court, including requests from the Government of Kenya to the United Kingdom for mutual legal assistance and the extradition proceedings and the challenges that were encountered.

44. It is its further submission that even where unreasonable delay has been proved, barring the prosecution from conducting a prosecution even before the trial begins and consequently without an opportunity to ascertain the real effect of delay on the outcome of the case will have far reaching and

radical implications on the administration of justice. It relies on the South African case of **Sanderson v Attorney General, Eastern Cape (CCT 10/97) ZACC 18** in that regard and adds that the Petitioner has failed to demonstrate that he has suffered irreparable prejudice as a result of the delay and further relying on the **Sanderson Case (supra)** it urges the point that a stay will not remedy the main prejudice of which the Petitioner complains, since it will not clear his name and reputation.

45. On the issue whether the Attorney General(AG) can prosecute in respect of a transaction that he has approved, the 9th Interested Party contends that the criminal case is being undertaken by the office of the DPP which is separate and distinct from that of the AG. That the mere fact that the AG approved the Memorandum of Understanding for a joint venture between the Gas Company and Kenya Pipeline Co Ltd cannot be understood to mean that he approved the commission of criminal acts in the implementation of the said transaction. Further, that the Petitioner has failed to demonstrate that the specific acts which he is alleged to have committed in respect of the joint venture were approved by the Attorney General. Lastly, that the argument that the AG approved the said joint venture does not in any event confer on the Petitioner and Interested Parties, immunity from investigations and prosecution for any criminal offence(s) they might have committed.

46. The 9th Interested Party therefore prays that the Notice of Motion dated 20th July 2012 be dismissed .

## **Determination**

### **Jurisdiction**

47. Before embarking on the determination of the questions framed for interpretation by the trial Court, the jurisdiction of this Court has been challenged by the Respondent and the Interested Parties on three fronts. Firstly, that this Court has no jurisdiction to quash the charges preferred against the Petitioner since they were presented to Court on 1st February 2010 and that **Order 53 Rule 2** of the **Civil Procedure Rules** provides that an application for certiorari must be brought within six months from the time the decision being quashed is made and thus the current Application is out of the prescribed time.

48. Upon consideration of the objection to jurisdiction, my answer is that this Court has jurisdiction and in that regard, I am alive to the provisions of **Order 53 Rule 2** of the **Civil Procedure Rules, 2010** which provides that proceedings for orders of certiorari must be brought within 6 months of the occurrence of a proceeding or the making of a decision being challenged.

49. That is the law as I understand it in relation to traditional judicial review applications. However, the Notice of Motion Application before me as well as the Constitutional reference from the Magistrates Court arises from **Nairobi ACC No.5 of 2010** where the trial Magistrate referred this matter to the High Court for the determination of constitutional questions raised by the Petitioner; that his fundamental rights of fair trial, equal protection of the law, not to be discriminated against and human dignity, had been violated. To my understanding, the learned Magistrate made the reference in accordance with the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of The individual) **High Court Practice and Procedure Rules, 2006** that were in force at the time. **Rules 24, 25, 26, 27 and 28** provided that;

***“24. Where in proceedings in a Subordinate Court a question arises as to the contravention of any of the provisions of sections 70 to 83 (inclusive) of the Constitution, and the presiding officer is of the opinion that the question raised is not frivolous or vexatious, he may refer the question to the High Court in FORM E set out in the Schedule to these Rules.***

***25. Where a party to proceedings in a subordinate court alleged contravention of his fundamental rights or freedoms under sections 70 to 83 (inclusive) of the Constitution in relation to himself, he shall apply informally to the presiding officer during the pendency of the proceedings that a reference be made to the High Court to determine the question of the alleged violation.***

26. *If the presiding officer is satisfied that there is merit in the allegation made under rule 24, and that it has not been made frivolously or vexatiously, he shall grant the application where upon the court shall frame the question to be determined by the High Court in FORM F set out in the Schedule to these Rules.*

27. *As soon as is practicable, and in any case not later than twenty one days from the date from framing the question, the subordinate court shall refer the matter to the High Court.*

28. *The Registrar shall within seven days of receipt of the reference under rule 25 place the matter before a judge to fix a hearing date or give further directions”.*

50. As can be seen elsewhere above, the Magistrate framed the questions for interpretation by this Court. None of the questions can properly be said to be in the nature of judicial review. But, I am aware that the Petitioner in his Notice of Motion dated 12th July 2012 has also sought for an order of certiorari to quash the proceedings before the Magistrate's Court in Nairobi ACC No.5 of 2010. I see nothing wrong in making that prayer because a judicial review order is one of the reliefs available under **Article 23(3)** of the **Constitution** in cases where the High Court finds that there has been a denial, violation or infringement of a right of fundamental freedom of an individual. This Article provides that;

*“(1) ...*

*(2) ...*

*(3) In any proceedings brought under Article 22, a Court may*

*grant appropriate relief, including—*

*(a) a declaration of rights;*

*(b) an injunction;*

*(c) a conservatory order;*

*(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;*

*(e) an order for compensation; and*

*(f) an order of judicial review. ”*

51. In stating as above, I am aware that although the present proceedings were largely predicated on a procedure known to the Repealed Constitution, **Section 19** of **Schedule 6** to the **Constitution** allows application of the Rules aforesaid. Secondly, it was argued that this Court cannot effect the orders sought with regard to ownership of Land Parcels L.R. Nos. MV/VI/3854, MV/VI/3855, MV/VI/3856, MV/VI/3857, MV/VI/3858, MV/VI/3859, MV/VI/3860, MV/VI/3861, MV/VI/3862, MV/VI/3897, MV/VI/3904, MV/VI/3905, MV/VI/3906 and MV/VI/3907 as that was a matter for the exclusive jurisdiction of Courts contemplated under **Article 162(2)(b)** of the **Constitution**.

52. I must agree with the Respondent in that regard. **Article 165(5)** provides as follows;

*“(1) ...*

*(2) ...*

*(3) ...*

(4) ...

(5) *The High Court shall not have jurisdiction in respect of*

*matters—*

(a) *reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or*

(b) *falling within the jurisdiction of the courts contemplated in Article 162(2)*”.

The Constitution has clearly limited the jurisdiction of this Court in matters reserved for the courts established under Article 162(2). **Article 162(2)** has also mandated Parliament to establish Courts with the status of the High Court to hear and determine disputes relating to the environment and use and occupation of, and title to land. **Article 162(3)** then provides that Parliament shall determine the jurisdiction and functions of the Courts contemplated in **Article 162(2)**. It was on the basis of this provision that Parliament enacted the **Environment and Land Court Act No. 19 of 2011** which came into effect on 30th August 2011. The object of the Act states as follows;

***“An Act of Parliament to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes”.*** (Emphasis added).

Even if this Court were to assume for a moment that it had jurisdiction over title to land (which is not the case), there is no material evidence before this court to enable it make that determination. Land ownership is an emotive issue in Kenya whose ownership cannot be determined on affidavit evidence only. I therefore find that this court has no jurisdiction to determine the issue of ownership of the land parcels referred to above.

53. Thirdly, it has been argued that this Court has also no jurisdiction to determine whether or not the charges facing the Petitioner and the 1st to 8th Interested Parties in **Nairobi ACC No.5 of 2010** as framed disclose an offence. The Respondent and the 9th Interested Party have claimed that a challenge on the competence of the charges facing the Petitioner can only be properly ventilated and resolved before the trial court.

54. I must state right from the outset that it is the general position of this Court, with certain exceptions, that it is not its business to determine whether or not the charges as framed disclose an offence that would be the function of the trial court and this Court must be careful not to usurp the mandate of that Court.

**Section 89(5) of CPC** bears me out on this one. It states that;

***“Where the Magistrate is of the opinion that a complaint or formal charge made or presented under this section does not disclose an offence, the magistrate shall make an order to admit the complaint or formal charge and shall record his reasons for the order”.***

In view of the above cited provisions, the Petitioner only needs to move the trial magistrate to strike out the charge for being defective. I do not see how a defective charge raises constitutional issues, in any event.

55. The same reasoning would apply to the issue whether or not the charges contained in Counts 1 to 7 can be premised on a parcel of land that was never owned by Kenya Airports Authority. As stated earlier, this Court does not have the benefit of the evidence on the ownership of the land and the issue is best ventilated at the trial Court or any other court with jurisdiction to do so. In my view, for this Court to

proceed with such a determination then it will be curtailing and prejudicing the trial especially with regard to the evidence and defence to be adduced at the hearing. In so holding I am guided by the Court of Appeal reasoning in *Mexiner & Another v Attorney General (supra)* where it was stated 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 (read the High Court) was to usurp the function of a trial Court.”***

56. That being so, I am unable to detect an abuse of the Court process as argued by the Petitioner. I did not also hear the Petitioner to be alleging that he will not receive a fair trial before that Court and **Article 50** is in certain terms that the Petitioner's rights to fair trial are firmly secured and one of the cardinal rules of the right of an accused person is to be presumed innocent until proved guilty to the required standard before the trial Court. I will revert to the issue of fair trial later in the Judgment.

57. I have dealt with the issues of jurisdiction at this stage for obvious reasons; That jurisdiction is everything and without it the Court has no power to make any further step - See *The Owners of Motor Vessel “Lillian S” v Caltex Oil Kenya Limited (1989) KLR 14.*

58. Having found as I have done above, and looking again at the questions framed for determination by the Magistrate, and alive to the fact that under **Rule 30** of the **Rules** aforesaid that the Court is mandated to determine the questions as framed by the Magistrate, I am of the view that the following are the issues for determination;

- (i) *Whether or not it is just and fair to initiate criminal proceedings after 15 years of the commission of an alleged offence.*
- (ii) *Whether or not the delay in commencing the hearing of the criminal case has caused irreparable damage to the Petitioner and is in violation of his constitutional rights of equity before the law, fair trial, freedom from discrimination, right to human dignity and right to fair administrative action.*
- (iii) *Whether the Petitioner can expect a fair trial in the absence of persons summoned and not produced in Court.*
- (iv) *Whether the prosecution of the Petitioner is actuated by ulterior motives,*
- (v) *Whether or not the Office of the Attorney General who was one of the Directors of KPC and having been involved in the alleged criminal transaction, can charge the Petitioner and interested parties and prosecute them while the same office supervised, approved and endorsed the transaction subject of the criminal charges.*

### **Whether or not it is just and fair to initiate criminal proceedings after 15 years of the Commission of the Offence**

59. The Petitioner, the 1st and 4th Interested Parties contend that there was inordinate delay in bringing the charges against them which in itself is a sign of ill motive on the part of the AG and DPP. I have seen the Charge in the criminal case. It states that the offences were allegedly committed around 2nd October 1996 and the Petitioners and Interested Parties were only charged on 2nd January 2010. A simple countdown would therefore reveal that it took 13 years and four months for the Petitioner to be charged. It is against this background that the Petitioner and Interested Party contest that their right to fair trial was violated.

60. On my part, I am aware that there are no limits to the prosecution of serious criminal offences except where there are limitations imposed by statute. In so far as the time factor is concerned in the instant charges, the AG and later the DPP were at liberty to prosecute the allegations constituting a

criminal offence. However, the primary question for consideration at this point is therefore whether that delay is in accord with the Petitioner's and Interested Parties constitutional guarantees. To answer that question I will resort to the following authorities for guidance;

61. The starting point will be the ***Githunguri Case (supra)***. Mr Githunguri was in 1984 charged before the Chief Magistrate, Nairobi with four Counts of allegations of contraventions of the Exchange Control Act (now Repealed). Two of the offences were alleged to have been committed in 1976 and the third in 1979. The fourth Count was an alternative to the third Count. He was charged nine years after the alleged commission of the offences and six years after the completion of investigations and 4 years after the Attorney General had communicated his decision to him that he would not be charged.

He made Judicial Review Application in the High Court seeking a prerogative order prohibiting the Chief Magistrate from further continuing to hear the criminal case on the ground that the Attorney General had decided to proceed with the prosecution notwithstanding, that in an earlier Reference to the High Court sitting as a Constitutional Court, the High Court had held that the prosecution of the Applicant was in the circumstances stated, vexatious and harassing, an abuse of the process of the Court and contrary to public policy. In the absence of any rules of procedure, the High Court converted the Application to one under Section 84(1) for enforcement of the infringement of rights to fair trial and to trial within a reasonable time and held that both rights had been infringed and granted an order of Prohibition.

The Court in granting the said order stated as follows;

***“We are of the opinion that to charge the Applicant four years after it was decided by the Attorney-General of the day not to prosecute, and thereafter also by neither of the two successors in office, it not beign claimed that any fresh evidence has become available thereafter, it can in no way be said that the hearing of the case by the Court will be within a reasonable time as required by Section 77(1). The delay is so inordinate as to make the non-action for four years inexecutable in particular because this was not a case of no significance, and the file of the case must always have been available in the Chambers of the Attorney-General. It was a case which had received notable publicity, and the matter was considered important enough to be raised in the National Assembly”.***

Thereafter, there was the ***Ngeny Case (supra)*** where Mr. Ngeny sought to challenge a delay of 9 years before the mounting of his prosecution. The Court stated that it was important to consider the cause of that delay and added as follows;

***“In the case before us, the delay was nine years. No attempt has been made to explain it. The subject matter of the charges against the Applicant is a colossal sum involving an institution that was strategic to the Government when the losses were occasioned; so why did the State not mount a prosecution immediately? Nine years is too long a delay. We cannot think anything else but that the criminal prosecution against the Applicant was motivated by some ulterior motive. It is not a fair prosecution. It was mounted quite late: Nine years after the Applicant had vacated the relevant public office alleged to have been abused. We were told, and this was not challenged, that having been out of office for that long, he does not have in his possession material to prepare his defence. This we believe. We are of the view that to allow delayed prosecutions is akin to putting a noose around the necks of individuals and then saying to them: 'Go, you may go. We shall decide your fate as and when we wish.' This is to keep the individual in fear. This does not accord with constitutional guarantees of individual rights and freedoms and is nothing more than an abuse of the process of the Court”.***

I am in agreement with the principles stated in the above two cases. However, I do not think that the Petitioner can benefit from the findings in those cases because firstly, Mr. Githunguri had been promised, through an official public pronouncement that he would not be prosecuted. Secondly, the Constitutional Court in that case had already held that in the circumstances, his prosecution after nine years was inordinate and thus an abuse of the Court process unless there was a discovery of important and credible evidence in that regard and that to charge him thereafter was a clear abuse of the Court process.

62. I have also read the affidavit of Soita Wasik, a Forensic investigator with the Ethics and Anti-Corruption Commission, who explained the steps taken in the investigation of this matter and eventual the charging of the accused persons. He stated in conclusion as follows;

*“That explanation is reasonable and is not to be dismissed lightly”.*

Elsewhere above, I have reproduced that explanation and it is against that background that I find that the State has explained the delay in mounting the criminal proceedings against the Petitioner and the Interested Parties. The delay is justified in the circumstances and I so hold.

63. Are the Petitioners and the 1st to 8th Interested Persons protected by **Article 50 (2) (e)** of the **Constitution**? This Section provides that;

*“Every accused person has the right to a fair trial, which includes the right-*

*....*

*(e) to have a fair trial begin and conclude without unreasonable delay”*

What is clear to my mind is that **Article 50(2)(e)** entrenches the right to a fair trial for all accused persons and the obligation imposed by this provisions binds the courts to ensure that criminal proceedings and trials conducted before them are fair. The Court of Appeal in *Julius Kamau Mbugua -v-Republic Criminal Appeal No 50 of 2008* discussed the extent of the right to fair trial and held that it protects the accused persons while facing trial and not before trial. The Court stated that;

*“On the other hand, Section 77(1) is part of the provisions of Section 77 which are intended to secure the protection of the law – that is to ensure that Rule of Law prevails in the administration of criminal justice. Section 77(1) guaranteed any person charged with a criminal offence a fair, and speedy trial before a competent Court. Unlike Section 72(5) which guaranteed a speedy trial to only suspects held in custody and who are charged with non-capital offences, Section 77(1) guaranteed a speedy trial to every suspect – those in custody for capital offences and those on bail pending trial. The trial within a reasonable time guarantee in Section 77(1) relates to the whole of the judicial process starting when a person is charged and ending at the determination of the trial. It refers to the duration or length of the trial process. In contrast, Section 72(3)(b) relates to extra judicial incarceration before a person is charged in Court.”.*

The definition given by the Court of Appeal above is in line therefore with the submissions made by the 9th Interested Party that the right to fair trial does not cover the investigations period but starts right at the time one has been charged in court.

64. It must be remembered that the *Julius Kamau Mbugua Case (supra)* was decided under the Repealed Constitution whose **Section 77(1)** provided that;

*“If a person is charged with a criminal offence, then, unless the charge is withdrawn the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law”.*

65. Under the Constitution, 2010, one of the components of a fair trial is that the trial **“begins and conclude(s) without unreasonable delay”**. This brings me to the question of the protection, if any, that the Constitution gives in relation to pre-trial delay? It is no accident that **Article 50** of the **Constitution**, which deals with the rights to a fair trial is by far the longest Article in the Bill of Rights. It has set out the protections accorded to accused persons. **Blacks Law Dictionary defines “Accused”** as;

**“1. a person who has been blamed for wrong doing ...**

**2. A person against whom legal proceedings have been**

*initiated”*

Given this definition, it is imperative to note that **Article 50** operates as soon as someone becomes an accused person and that the said person has the right to have the trial begin and conclude without unreasonable delay. In my view, although **Article 50(2)(e)** does not expressly deal with pre-trial delays, it must be construed as providing careful thought for procedural protections. I did not hear the Petitioner to contend that he had a right to be swiftly put on trial. Rather his complaint is that, the 15 years' delay (13 years' and 4 Months, in my calculation) has had serious effects on his capacity to present his defence at the trial as the delay has caused him irreparable damage because the evidence he intended to rely on to prove his innocence has been disposed off from the relevant company and banking records. And further that due to passage of time, his recollection of the events in which the criminal case was founded has faded. To paraphrase, it is not so much the delay itself that has violated his rights, but its effect which has deprived him the possibility of being tried fairly.

66. The question before me now therefore is whether his rights under **Article 50(2)(e)** have been violated in the context above. Clearly they have not in so far as the pre-trial delay complained of is concerned.

67. I say so because as can be seen above, the right to a fair trial is not exclusively anchored under **Article 50(2)(e)**. The Article has also provided other safeguards which the Petitioner has not taken issue with. Indeed, the right to a fair trial is broader than the list of specific rights set out in **Article 50** as it embraces a concept of substantive fairness. In this context therefore, the pre-trial delay must be evaluated as an element in determining whether the delay would inevitably taint the overall substantive fairness of the trial. Does the delay prejudice the accused person in any way? Is it an abuse of the Court process? These are factors that the Court must deal with while considering the effects of delay in the conclusion of a prosecution once hearing has started. In the *Ptrue Bothma Case (supra)* the South African Constitutional Court stated that a Court when considering whether a stay should be granted out of the alleged prejudice flowing from pre-trial delays, should also consider the same factors as those in the event of delay during prosecution.

68. Further, in *R v Morin (1992) 1 SCR 771*, the Canadian Supreme Court while considering an application for stay of proceedings for infringement of the right to be tried within a reasonable time held that;

*“the general approach to the determination as to whether the right has been denied is not by the application of mathematical or administrative formula but rather by a judicial determination balancing the interest which the section is designed to protect against the factors which either inevitably lead to the delay or are otherwise the cause of the delay”.*

69. In addition, in *Zanner v Director of Public Prosecutions Johannesburg 2006(2) SACR 45 (SCA) 2 ALL SA 588*, the Supreme Court of Appeal had to deal with whether a ten year delay in instituting criminal proceedings for murder, called for a stay of prosecution. Maya, AJA highlighted the importance of the nature of a crime in the balancing enquiry. She observed as follows;

*“The right of an accused to a fair trial requires fairness not only to him, but fairness to the public as represented by the State as well. It also instills public confidence in the criminal justice system, including those close to the accused, as well as those distressed by the horror of the crime ....it is also not an insignificant fact that the right to institute prosecution in respect of murder does not prescribe ...Clearly, in a case involving a serious offence such as [murder], the societal demand to bring the accused to trial is that much greater and the Court should be that much slower to grant a permanent stay”*

70. I am in agreement with the above expression of the law and in the instant case, all the accused persons in **ACC No.5 of 2010** are charged with offences relating to fraud. The Petitioner claims that he will suffer irreparable prejudice in mounting his defence for the records he would have used for his defence have been destroyed by the company and also by the banking sector and that his recollection and

that of his witnesses in regard to the events leading to the charges has faded. In the **Ptrue Botma Case (supra)** the Court defined what is meant by irreparable or insurmountable trial prejudice as follows;

***“irreparable prejudice must refer to something more than the disadvantage caused by the loss of evidence that can happen in any trial. Thus, irretrievable loss of some evidence, even if associated with delay, is not determinative of irreparable trial prejudice. Irreparability should not be equated with irretrievably”.***

71. In **R v Carosella (1997) 1 S.C.R 80**, proceedings were brought against a teacher who had allegedly committed gross acts of indecency with the complainant when she had been in grades seven and eight, some twenty-something years before. Notes taken by the Sexual Assault Crisis Center during an interview with the complainant were shredded by the organisation as a general policy to prevent the Center from being subpoenaed to produce such documents in criminal trials. Evaluating the shredding in a different way, L'Heureux-Dube J for the minority observed at paragraph 59 as follows;

***“The Criminal justice system, being very much a human enterprise, possess both the strengths and frailties of humanity. Lacking a flawless method for uncovering the truth, or a crystal ball which can magically recreate events, the court attempts to determine an accused's guilt or innocence based on the evidence before it. This search for justice does not operate perfectly, and in every trial there is likely to be some evidence bearing upon which the case which does not appear before the tier of fact. Still, society expects courts of law to ascertain that person's guilt or innocence by way of trial, and, subject to the uncertainties inherent in any human enterprise, to render a verdict that is true and just. It is a crucial role which should not be abdicated except in the most extreme cases.”***

And at para 72:

***“While the production of every relevant piece of evidence might be an ideal goal from the accused's point of view, it is inaccurate to elevate this objective to a right, the non-performance of which leads instantaneously to an unfair trial”.***

Later in 72 she quoted the following passage from a judgment by Mc Lachlin J:

***“The Canadian Charter of Rights and Freedoms guarantees not the fairest of all possible trials, but rather a trial which is fundamentally fair.....what constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process, like complainants and the agencies which assist them in dealing with the trauma they may have suffered. Perfection justice is as chimeric as perfection in any other social agency. What the law demands is not perfect justice, but fundamentally fair justice”.***

72. I agree and I adopt the words of L'Heureux-Dube J and McLachlin J in the instant case as if they were mine. It is clear by now that it is not merely the trigger of an enquiry as to crime and the prejudice to be caused but a balance of all interests involved that is the important consideration throughout. There is therefore no clear period that has been drawn by law as acceptable within which to mount a prosecution. Each complaint in that regard will be evaluated on a case to case basis and premised on the nature, gravity and extent of the prejudice suffered or likely to be suffered by the accused. In the **Zanner Case (Supra)** the South African Constitutional Court stated as follows;

***“Although the time period was central to the enquiry of whether it was unreasonable, the fact of a long delay cannot of itself be regarded as an infringement of the right to a fair trial but must be considered in the circumstances of each case. The accused must show definite and not speculative prejudice’.***

73. It is against the above background that upon a consideration of the facts placed before me, I find that the Petitioner has failed to demonstrate irreparable prejudice that he has or may suffer. In so finding I am guided by the reasoning of the Court in the **Ptrue Bothma Case (supra)** where it further observed as follows;

***“It is notable that in the only case where a stay was granted, it was the State that had been responsible for the loss of crucial documents. This was the precipitating factor that introduced an element of unfairness that went not only to the untoward harm caused to the defence, but to the integrity of the criminal process. It is simply not fair for the State to prosecute someone and then deliberately or through an unacceptable degree of negligence deprive that person of the wherewithal to make a defence. This is qualitatively different from the irretrievable weakening of a defence that flows from loss of evidence of the kind that could happen even with short delays, but be intensified by long delays. Witnesses die, evidence disappears, memories fade. These factors, the natural products of delay, may not necessarily be sufficient to establish unfairness. If, as a result of the lack of evidence, the judicial officer dealing with the matter is unable to make a clear determination of guilt, then the presumption of innocence will ensure an acquittal”.***

74. The above expression fits the present case and in that regard, I note that the Petitioner did not in any way suggest that the prosecutor was responsible for the loss of the crucial documents he alleges that he would rely on in the trial. The issue is purely speculative as he did not also demonstrate the nature of those documents he alleges are lost. I must therefore agree with the 9th Interested Party that the prosecution or rather the State, faces the same prejudice of faded memories, lost witnesses and even documents because of lapse of time, a factor beneficial to the Petitioner. The extent of that prejudice if at all, can only in any event be properly measured by the trial Court hearing all the relevant evidence. It must be remembered that the key controlling element, as far as fairness of the trial is concerned, would be the presumption of innocence. The gravity of the offence and public interest in ensuring that perpetrators of crime are brought to book can never justify a conviction if the evidence is insufficient. On presumption of innocence, Sachs J in S. V. Coetzee and Others (1997) ZACC 2; 1997 (4) BCLR 437(CC) stated as follows;

***“There is a paradox at the heart of all criminal procedure, in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become. The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences, massively outweighs the public interest in ensuring that a particular criminal is brought to book. Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system. Reference to the prevalence and severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a satisfactory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, housebreaking, drug-smuggling, corruption ... the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases”.***

75. I agree with the learned Judge and even if I had found that the delay was irreparably prejudicial to the Petitioner and his co-accused, I do not think that an order quashing their trial would have been most appropriate. I say so being guided by the cases of;

**(i) Martin v Tuaranga District Court, (1995) 2LRC 788** where the Court held as follows;

***“...the right 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 is, 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”.***

**(ii) Sanderson (supra)** where Kriegler J stated that;

***“the qualifier, 'reasonableness' requires a value judgment. In making that judgment courts must be constantly mindful of the profound societal interest in bringing a person charged with a criminal***

***offence to trial and resolving the liability of the accused. Particularly when the applicant seeks a permanent stay, this interest will loom very large. The entire inquiry must be conditioned by the recognition that we are not atomized individuals whose interests, are divorced from those of the society. We all benefit by our belonging to a society with a structured legal system, a system which requires the prosecution to prove the case in a public forum”***

In fact in the **Sanderson Case (supra)**, the Constitutional Court of South Africa held that the relief of quashing the proceedings would be radical both philosophically and an acquittal could only be available in a narrow range of circumstances, for example where it is established that the accused has probably suffered irreparable prejudice as a result of the delay.

At home in **Julius Kamau Mbugua Case (supra)** the Court held as follows;

***“Had we found that the extra judicial detention was unlawful and that it is related to the trial, nevertheless, we would still consider the acquittal or discharge as a disproportionate, inappropriate and draconian remedy seeing that the public security would be compromised If by the time an accused person makes an application to the court, the right has already been breached and the right can no longer be enjoyed, secured or enforced, as is invariably the case....”.***

In conclusion on this aspect of the case, it is obvious to me that although time was taken before the prosecution was commenced, I see no prejudice suffered and there are sufficient safeguards in the law to protect the Petitioner and his co-accused. Further, the charges that the Petitioner and his co-accused are facing are of great public interest and relate to a period when Kenya saw massive looting of public resources. For the innocence or otherwise of the accused persons to be proved, that public interest must also be taken into account.

I am also alive to the fact that sometimes powerful individuals may hamper the commencement of prosecution and only when their power has waned, can the prosecutorial regime have the leeway to perform its functions.

76. In any event, balancing all factors at play in this case, and noting the explanation given by the 9th Interested Party, I am satisfied that the delay in commencing the prosecution was fully justified and I so find.

### **Whether or not the delay in commencing the hearing of the criminal case has caused irreparable damage to the Petitioner**

77. The Petitioner contends that there has been a delay in the prosecution of his case. That he was caused to take a plea on 20th January 2010 and then it took up to two years before the charges were amended and as that time the prosecution had been ready to start its case.

78. In response, the 9th Interested Party contends that the delay was not occasioned by the prosecution and it was the duty of the trial Court which has the control of the trial to ensure that a speedy trial is observed. That it has also demonstrated the efforts that had been made by the State to produce the 1st and 5th Interested Parties before the trial Court, which included requests from the Government of Kenya to the United Kingdom for mutual legal assistance and the extradition proceedings as well as the challenges that were encountered.

79. As stated above, the right to a trial without unreasonable delay is one of components of a fair trial under **Article 50**. The Court of Appeal in **Julius Kamau Mbugua Case (supra)** summarized the following principles on the right to a trial within a reasonable time after considering international jurisprudence;

***“(i) The trial within a reasonable time guarantee is part of international human rights law and although the right may not be textually in identical terms in some countries the right is qualitatively identical.***

**(ii) The right is not an absolute right as the right of the accused must be balanced with equally fundamental societal interest in bringing those accused of crime to stand trial and account for their actions.**

**(iii) The general approach to the determination whether, the right has been violated is not by a mathematical or administrative formula but rather by judicial determination whereby the Court is obliged to consider all the relevant factors within the context of the whole proceedings.**

**(iv) There is no international norm of “reasonableness”. The concept of reasonableness is a value judgment to be considered in particular circumstances of each case and in the context of domestic legal system and the economic, social and cultural conditions prevailing.**

**(v) Although an Applicant has the ultimate legal burden throughout to prove a violation, the evidentiary burden may shift depending on the circumstances of the case. However, the Court may make a determination on the basis of the facts emerging from the evidence before it without undue emphasis on whom the burden of proof lies.**

**(vi) The standard of proof of an unconstitutional delay is a high one and a relatively high threshold has to be crossed before the delay can be categorised as unreasonable.**

**(vii) Although the procedure for raising a violation of the right varies from one jurisdiction the the other, the violation of the right should be raised at the earliest possible stage in the proceedings to enable the Court to give an effective remedy otherwise the right may be defeated by the doctrine of waiver where applicable.**

**(viii) The purpose of the right is to expedite trial and is designed principally to ensure that a person charged should not remain too long in a state of uncertainty about his fate.**

**(ix) The right is to trial without undue delay. It is not a right not to be tried after undue delay except in Scotland and it is not designed to avoid trials on the merits.**

**(x)(a)The remedy for the violation of the right varies from jurisdiction to jurisdiction. In some jurisdictions such as Canada and New Zealand it seems that permanent stay of proceedings is the normal remedy for violation of the right.**

**(b) Under the common Law and under the jurisprudence of European Court of Human Rights, a permanent stay of proceedings is considered a draconian remedy only granted where it is demonstrated that the breach is so severe that a fair trial cannot be held.**

**(c) In most of the Commonwealth countries with Bill of Rights and a Constitution based on the West Minister model, and, in South African the remedies are flexible – Courts can grant any relief it considers appropriate in the circumstances of the case.**

**(d) In some jurisdictions, where the applicant is already convicted, the quashing of a conviction is not considered a normal remedy and the Court could take into account the fact that the Applicant has been proved guilty of a crime, the seriousness and prevalence of the crime and design an appropriate remedy without unleashing a dangerous criminal to the society”.**

80. In the present matter, I must repeat for emphasis that the Petitioner was availed in Court for the first time on 28th January 2010. He attended Court on diverse dates between 18th February 2010 and 28th September 2010 for the mention of the criminal case. The case could not be set down for hearing in those instances because the State had instituted extradition proceedings against the 1st Interested Party who was a British citizen. On 11th February 2011, the Prosecutor informed the Court that the State had abandoned the extradition case and the case was set for hearing on 18th and 19th October 2011. On the 18th of

October 2011, the State applied to substitute the charges under **Section 214** of the **Criminal Procedure Code, (Cap 75 Laws of Kenya)** by adding Agrid Ltd, the 8th Interested Party as the 9th Accused person. Agrid Ltd was not in Court and the State applied for summons and an adjournment to enable it avail the 9th accused person. The trial Court granted both Applications and it was at this point that the Petitioner through his counsel, Mr. Katwa, alleged a violation of his rights to be tried within a reasonable time.

81. With that background in mind, in ***R v Lord Advocate (2003) 2 LRC 51*** Lord Clyde held that;

***“the Convention seeks to identify a common minimum standard of protection applicable internationally to the states parties to the convention. The period must give rise to real concern. The complexity of the case, the conduct of the accused and the manner in which the case has been handled by the administrative and judicial authorities have then all to be assessed. An unreasonable time is one which is excessive, inordinate and unacceptable. Under the jurisprudence of European Court of Human Rights, the elements of prejudice is not an essential ingredient of the violation”.*** (Emphasis added).

82. Lord Clyde further stated among other things that the violation of any element of the right to fair hearing within a reasonable time must be decided within the context of the whole proceeding and should also be raised at the earliest stage.

83. In this case since the plea taking, there has been a delay of say two years before the hearing of the case commenced. It is instructive to note that the reasons given for that delay is largely because of the need to procure the attendance of the 1st Interested Party whom the State had started extradition proceedings in Britain. In my view, the State was not involved in a deliberate attempt to delay the trial in order to hamper the defense and I am unable to find otherwise.

84. From the Affidavit evidence before me, I am clear in my mind that the State has therefore put all the efforts towards securing the attendance of Prakash Bhundhai and no deliberate delay can be apportioned to it and I so find. I do not find also that there was a violation of the Petitioner's right to be tried within a reasonable time. He neither demonstrated the prejudice the two years' delay has caused him nor how the State is to be blamed for that delay. I will say no more.

**Whether the Petitioner can expect a fair trial in the absence of persons summoned and not produced in Court.**

85. It is the Petitioner's contention that the prosecution went to unreasonable lengths to implicate/incriminate the accused persons while craftily exonerating some persons and that in failing to accord equal treatment to all persons, the prosecution has violated the principle of equality before the law, the rights of the accused person to fair administrative action, right to human dignity and freedom from discrimination.

86. In response, the Respondent contends that the Petitioner had failed to demonstrate that he was selectively prosecuted and that persons who ought to have been charged with him in **Nairobi ACC No.5 of 2010** have not been charged as expected. That the 9th Interested Party and the Respondent had reasonable and probable cause to believe that all persons who were suspected to have committed the criminal charges in question were indeed charged in the said criminal case.

87. Under the Repealed Constitution, the Attorney General (A.G) had powers to institute and undertake criminal proceedings against any person in respect of whom an offence is alleged to have been committed. For avoidance of doubt, **Section 26** of the Repealed Constitution stated that;

***“(1) There shall be an Attorney-General whose office shall be an office in the public service.***

***(2) The Attorney-General shall be the principal legal adviser to***

*the Government of Kenya.*

- (3) *The Attorney-General shall have power in any case in which he considers it desirable so to do -*
- (a) *to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person;*
- (b) *to take over and continue any such criminal proceedings that have been instituted or undertaken by another person or authority; and*
- (c) *to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or another person or authority.*
- (4) *The Attorney-General may require the Commissioner of Police to investigate any matter which, in the Attorney-General's opinion, relates to any offence or alleged offence or suspected offence, and the Commissioner shall comply with that requirement and shall report to the Attorney-General upon the investigation.*
- (5) *The powers of the Attorney-General under subsections (3) and (4) may be exercised by him in person or by officers subordinate to him acting in accordance with his general or special instructions.*
- (6) *The powers conferred on the Attorney-General by paragraphs (b) and (c) of subsection (3) shall be vested in him to the exclusion of any other person or authority:*

*Provided that where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the Court.*

(7) *For the purposes of this section, an appeal from a judgment in criminal proceedings before any court, or a question of law reserved for the purpose of those proceedings to any other court, shall be deemed to be part of those proceedings:*

*Provided that the power conferred on the Attorney-General by subsection (3) (c) shall not be exercised in relation to an appeal by a person convicted in criminal proceedings or to a question of law reserved at the instance of such a person.*

(8) *In the exercise of the functions vested in him by subsections (3) and (4) of this Section and by Sections 44 and 55, the Attorney-General shall not be subject to the direction or control of any other person or authority."*

88. Under the above provisions therefore, the AG often delegated his powers to the Commissioner of Police to investigate and prosecute crimes. The Commissioner of Police in turn used his officers, including the investigating officers, to investigate and prefer charges if need be. In such a case, the investigating officer only needed to establish reasonable suspicion before preferring charges. **Section 14(1)** of the **Police Act** states that;

*"The force shall be employed in Kenya for the maintenance of law and order, the preservation of peace and order, the preservation of peace and detection of crime, the apprehension of offenders and enforcement of all laws and regulations with which it is charged."*

In *Surjit Singh Hunjan v Principal Magistrate (supra)* the Court held that the police have a duty to investigate any complaint once the same is made by anyone and after such investigations, the police ought to take appropriate action.

89. Based on the outcome of police investigations, the Petitioner was charged with the offences stated elsewhere above. To my mind, it is not the place of this Court to determine who committed those

offences because that is the duty of the trial Court. In this case, I have not been convinced that the AG or the Police acted maliciously, unfairly or oppressively in their investigations and subsequent decision to charge. The Petitioner in fact did not seem to have any problem with the charges because nothing could have stopped him from challenging the charges at the plea taking stage or soon thereafter. All that the Petitioner is saying here should have been said at the trial Court, and he still has the opportunity to do so.

90. I am certain therefore that there cannot be discrimination arising from the fact that the Police in their investigation and decision to charge, did not take action against other persons whom the Petitioner deems should have been taken action against. It is not in the place of the Petitioner to decide who should be charged or not. The AG and now the DPP have the discretion to prefer charges against any person in respect of whom they find sufficient evidence to prefer charges and omissions to charge individuals persons perceived by the Petitioners as co-accused persons is not fatal to the criminal proceedings against him neither is it discriminatory. In so finding, I find support in the holding of Mumbi J in **Hon James Ondicho Gesami v The Hon. Attorney General & 2 Others, Petition No. 376 of 2011** where she expressed herself as follows;

*“The Petitioner also argues that there has been failure of legal process and discrimination against him as he has been singled out for prosecution yet under Section 23(1) of the CDF Act, the member of Parliament is only one member and should not be singled out for criminal prosecution. He also argues that such failure of legal process is manifested by his prosecution for the same offence that he is a witness to in Nyamira Criminal Case No.190 of 2011 Republic v Gilbert Ateyi Onsomu. With respect, I do not find anything discriminatory in the preferment of criminal charges against any party in respect of whom he finds sufficient evidence to prefer charges. I do not know of anything in the law that would require that all members of the CDF Committee for West Mugirango Constituency be prosecuted for alleged misappropriation of funds unless there was evidence against them.” (Emphasis added)*

I adopt the same reasoning here. Accordingly, I find that the allegation of selective prosecution against the Petitioners is unmeritorious.

**Whether or not the Office of the Attorney General can charge the Petitioner and prosecute him while the same office supervised, approved and endorsed the transaction subject to the criminal charges**

91. The Petitioner contends that the Attorney General was involved in the approval of the joint venture project by *inter alia* sitting in the Board of Directors of KPC where the joint venture was accepted, due diligence done, funds released and Memorandum and Articles of Association agreed upon and also that his clients ,the Ministry of Energy and Ministry of Finance approved the joint venture project. He thus claims that it is in bad faith for the same Attorney General to come back and prosecute parties with whom he had reached an agreement on the project.

92. The DPP and the Ethics-Anti Corruption Commission counter that by arguing that the DPP has powers under **Article 157(6) (a)** of the **Constitution** to institute and undertake criminal proceedings against any person before any court except a Court Martial in respect of any offence alleged to have been committed in Kenya.

93. Under the Constitution, 2010, the State's prosecutorial powers are vested in the DPP. **Article 157(6)** of the Constitution states;

“(1) ...

(2) ...

(3) ...

(4) ...

(5) ...

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

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

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

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

I have already stated elsewhere above that the decision to institute criminal proceedings by the AG and later the DPP is discretionary. Furthermore in exercise of that power, the DPP shall not be under the direction or control by any authority including this Court. **Article 157(10)** states;

“(1) ...

(2) ...

(3) ...

(4) ...

(5) ...

(6) ...

(7) ...

(8) ...

(9) ...

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

94. To my mind, the fact that the prosecution arose out of a transaction allegedly approved by the AG who, under the Repealed Constitution exercised the same powers as the DPP, cannot be a bar against the Petitioner's prosecution so long as it is demonstrated that the said prosecution is not malicious and has a legal basis. In any event, the Petitioner and his co-accused have an opportunity to tender their defence before the trial Court so that it can be established whether or not there is any culpability on their part and/or any ulterior motive by the DPP. In this respect, I agree with Majanja J. in *Thuita Mwangi & 2 Others v Ethics & Anti-Corruption Commission & 3 Others, Nairobi High Court Petition Nos 153 of 2013* where he stated as follows;

***“The discretionary power vested in the DPP is not an open cheque and such discretion must be exercised within the four corners of the Constitution. It must be exercised reasonably, within the law and to promote the policies and objects of the law which are set out in Section 4 of the office of the Director of Public prosecutions Act. These objects are as follows; the diversity of the people of Kenya, impartiality and gender equity, the rules of natural justice, promotion of public confidence in the integrity of the Office, the need to discharge the functions of the Office on behalf of the people of***

***Kenya, the need to serve the cause of justice, prevent abuse of legal process and public interest, protection of the sovereignty of the people, secure the observance of democratic values and principles and promotion of constitutionalism. The Court may intervene where it is shown that the impugned criminal proceedings are instituted for other means other than the honest enforcement of criminal law, or are otherwise an abuse of the Court process”.***

95. In fact , the instances where a court may declare a prosecution improper were laid down in **Macharia & Another v AG & 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”.***

Similarly in **Kuria and Others v AG (2002) 2 KLR 69** it was held as follows;

***“(i) For an Application of such a nature to succeed, there is need to show how the Court process is being abused or misused, there is need to indicate or show the basis upon which the rights of the Applicants are under serious threat of being undermined by the criminal prosecution.***

***(ii) There is public interest underlying every criminal prosecution which must be jealously guarded. At the same time there are private interests of the Applicant to be protected and it is therefore imperative for the Court to balance these considerations”.***

96. I am in agreement and would only add that this Court would have gladly found in favour of the Petitioner had he met the test set out above. Sadly, he has not. To stop his prosecution merely because the Attorney General was a member of the Board of KPC and no criminal culpability on his part has been disclosed, would not be in the wider interests of justice.

This Court has on very rare occasions stopped an on-going prosecution where malice and ulterior motive has been proved and also where the Court process was being abused – see for example **Kathenge v DPP, Petition No.372 of 2013.**

In good conscience however, the same cannot be said of the present case and the reasons are set out elsewhere above. Each case must turn on its own facts and circumstances and this one must fail for reasons given.

### **Conclusion**

97. Having answered all the questions framed by the trial Magistrate in the negative, then no orders sought by the Petitioner in his Notice of Motion can be granted and I need not address any other issue(s) that may have been raised in submissions including whether the Petitioner and some of the recipients of the money from the joint venture had began negotiations with a view to refunding the said monies.

98. But having said so and despite my clear findings above, the expectation of an expeditious trial process cannot be an idle one in any event. The trial Court and the Office of the Director of Public Prosecutions must commence the case against the Petitioner and Interested Parties without further ado and if not, then the charges should be terminated. In the event, and exercising powers conferred by

**Article 159(2)(b)** and **Article 165(6)** of the **Constitution**, I shall order the Chief Magistrate, Anti-Corruption Court to take charge of the proceedings in **Anti-Corruption Case No.5 of 2010** and hear it on a day to day basis until determination thereof. This is important for the Petitioner ,who I am sure is desirous of clearing his name by proving his innocence at the earliest possible opportunity and to enable him live freely and without the gauntlet of that case hanging around his neck, if he really believes in his innocence.

As the original record of that Court is before me, the same shall be transmitted to the said Court for a mention date on a date to be agreed between the parties. Thereafter, hearing dates must be fixed promptly.

99. Save for the above directions, there are no further orders to be made.

100. As to costs, let each party bear its own costs.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF MARCH, 2014**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Irene – Court clerk

Mr. Katwa for Petitioner

Mr. Kosgey for 7th Interested Party

Mr. Mule for Respondent

Mr. Wando for 9th Interested Party

Miss Wairimu holding brief for Mr. Naeku for 7th Interested Party

Mr. Sekwe holding brief for Mr. Moimba for A.G

Mr. Omindo for 2nd Interested Party

**Order**

Judgment duly read.

**ISAAC LENAOLA**

**JUDGE**

**Further order**

Mention before the Chief, Anti-Corruption Court on 1/4/2014

Judgment to be supplied to parties. Petitioner and Interested parties at liberty to apply.

**ISAAC LENAOLA**

**JUDGE**

28/3/2014