REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 153 OF 2012

REPUBLIC ……...…….....……APPLICANT

VERSUS

THE ATTORNEY GENERAL.....….....1ST RESPONDENT

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

COMMISSIONER OF POLICE..……....…...3RD RESPONDENT

ETHICS & ANTI-CORRUPTION COMMISSION…….....4TH RESPONDENT

AND

BAHADURALI HASHAM LALJI…….....….....INTERESTED PARTY

EX PARTE.....DIAMOND HASHIM LALJI AND AHMED HASHAM LALJI

JUDGEMENT

Introduction

1. By an amended Notice of Motion dated 29th July, 2012, the *ex parte* applicants herein, **Diamond Hashim Lalji** and **Ahmed Hasham Lalji**, substantially seek the following orders:

1. **An order of certiorari do issue quashing the decision of the Director of Public Prosecutions to prosecute the Applicants in respect of all investigations/reinvestigations relating to CID Inquiry File No. 36 of 2004 and Inquiry File KACC/AT/1/2007 or any matters relating thereto.**
2. **An order of prohibition prohibiting the Attorney General, the Director of Public Prosecutions, the Commissioner of Police and the Ethics and Anti-Corruption Commission either jointly and/or severally, their servants or agents from harassing, arresting, charging or prosecuting the Applicants in respect of all investigations/re-investigations relating to CID Inquiry File No. 36 of 2004 and Inquiry File KACC/AT/1/2007 or any matters relating thereto.**
3. **An order of prohibition do issue directed to the Chief Magistrate, Mombasa and/or any**

other magistrate prohibiting him from taking plea, hearing or proceeding with or determining Mombasa Chief Magistrate's Criminal Case No. 1172 of 2012 (Republic vs. Ahmed Hasham Lalji & Diamond Hasham Lalji) or any charges arising from the transactions giving rise to the charges in the said Mombasa Chief Magistrate's Case No. 1172 of 2012.

4. **Costs of this Application.**
5. **Any other and/or further relief that the Honourable Court may deem just and expedient to grant.**

Applicant's Case

2. The application was supported by affidavit sworn by **Diamond Hasham Lalji**, the 1st applicant herein on 12th April, 2012 and a further undated affidavit filed on 24th July, 2012.
3. According to the deponent, the interested party herein, who is his brother together with his other brothers as well as a company known as Atta (1974) Ltd between 1995 and 1998 variously filed two suits being HCCC No. 3484 of 1995 (hereinafter referred to as the first suit) and 189 of 1998 9hereinafter referred to as the second suit) at Nairobi against the deponent and the 2nd applicant as well civil remedies for alleged fraudulent appropriation of the assets of Atta (1974) Ltd but both suits were struck out with the costs in the second suit being awarded to the deponent and the four other defendants therein on 21st July, 2000.
4. Following the striking out of the second suit, the plaintiff therein, who are brothers to the applicants appealed to the Court of Appeal which appeal is still pending. That notwithstanding in 2004 during the pendency of the said appeal, the interested party lodged a complaint with the police against the applicants based on the same subject of the civil suits.
5. One and a half years later the deponent inquired about the investigations but instead of receiving a response started receiving threatening calls and in April 2006 he was summoned to appear before the Kenya Anti-corruption Commission offices to which he duly complied on 26th April, 2006 where he was informed that the inquiry was in respect of the matter relating to his earlier statement and that the Commission was only offering technical assistance on legal aspects of the investigations as requested y the 3rd Respondent and to prove this the Commission furnished him with a letter to the third party confirming that the Commission had no mandate to investigate offences allegedly committed prior to 1993.
6. According to the deponent, it was agreed between him and the officers that the officers would confirm to him that the investigations were still ongoing and that further requests for documents would be in writing and further that further attendance by the deponent would be before the 3rd Respondent's offices at the CID Headquarters in light of the fact that the Commission was just offering technical assistance.
7. Subsequently a request for documents was made in writing and the deponent summoned to appear before the 3rd Respondent's said offices though the deponent complained that the request was unreasonable and impossible to fulfil as one of the documents requested for was a Trust Deed left by the deponent's father sixty two years ago when the deponent was six years old while one of the documents a Power of Attorney was the subject of the pending civil litigation but in respect of which a false affidavit had been sworn by the donor.
8. According to the deponent, it became clear to him that the complainants were using officers from the 3rd Respondent as a discovery process for the civil suits in order to boost the said suits. It was further deposed that the 3rd Respondent's action was an attempt to harass and intimidate the applicants into settling a purely civil and family dispute by using criminal process.
9. According to the deponent, he was aware based on information received from his late brother **Esmail Hasham Lalji** that the Director of CID had closed their file and the communication to that effect was communicated to them as the complainants. Further vide a letter dated 3rd March 2005 the said Director communicated to the interested party their inability to establish criminal culpability on the part of the applicants and suggested that the interested party pursues the pending civil action.
10. While preparing to attend the said summonses, the deponent received a letter from a gutter press asking him to respond to allegations of ongoing investigation and further received threatening

telephone calls and requisition to attend at the Commission's offices. On the deponent's complaints, he said he received threats from the investigator one **Julie Adell-Owino** and that new developments had been made but which he believed was as a result of his questioning of the gutter press information. Based on information from his advocates the deponent deposed that the disclosure contained in the said gutter press constituted an offence under section 33(1) and punishable under section 33(2) of the ***Anti-Corruption and Economic Crimes Act, 2003*** and that the officers of the Commission were as a result seeking to go to any length to cover their actions. In his view these were the same allegations whose file had been ordered closed.

11. The deponent further received a letter from another gutter press in respect of the same issue and complained to the 1st respondent about these intimidations and threats but received no reply thereto. However, the Commissioner later gave him a letter dated 29th January, 2009 in which the 1st respondent through the 2nd Respondent concurred with the recommendations of the Director of the Commission that the file should be closed and the file was thus closed by the 1st Respondent. With this second closure of the file the deponent though his nightmare was over.
12. However while in South Africa for medical treatment of his wife, he received a call from an officer of the 4th Respondent informing him that he was needed at their offices in Mombasa the following morning and despite his pleas that he was in South Africa, the officer informed him that he was under pressure to charge him and further he started receiving threatening calls to settle the civil suit. Apart from that he received information from the 2nd Applicant that the officers of the 4th Respondent were interested in arresting and charging the deponent and were under immense pressure to do so. However due to the 2nd Applicant's advance age he was bonded to appear in Court on 10th April, 2012. As a result of the foregoing the 2nd Respondent fell into deep shock, collapsed and was admitted at Mombasa Hospital with cardiac problems and uncontrolled hypertension/diabetes. According to him the 4th Respondent's officers intended to incarcerate him over the Easter but since he was not available he was bonded to appear 20th April, 2012, a Friday with similar intentions.
13. According to him, the offences that they were to be charged with were allegedly committed in 1991 and 1992 around 20 years ago which in light of the earlier closure of the files would, without explanation or justification, be tantamount to abuse of the Court process which the Court ought not to countenance. This is more so taking into account that the civil suits were filed in 1995 and 1998 while the complaint to the police was made 14 years after in April 2004 hence evidence that the criminal process was meant to enable them achieve what they had failed to achieve through the civil process hence an abuse of the criminal process.
14. It was further deposed by the deponent that the officers of the 4th Respondent informed him that on 23rd February, 2012, the 3rd Respondent pursuant to representations made by the complainants, the appellants before the Court of Appeal, directed that the applicants be charged with the offences for which the files had been closed an action which according to him is unbelievably arbitrary, unjust, oppressive and unlawful and meant to pressurise the 2nd Applicant and the deponent to settle the said pending family and civil disputes and amounts to prosecutorial impropriety and abuse of office, an action the Respondents will not stop unless prohibited from doing so.
15. The deponent, in the further affidavit deposed that he was informed by his advocate in July 2012 that he had been charged together with the second applicant in Mombasa Law Courts on several counts relating to the ones in which the files had been closed twice though on 2nd May 2006 one of the CID Officers informed him that the investigations were still going on. It was deposed that had he known that the files had been closed he would not have cooperated with the Officers of the Commission. However having seen the charge sheet in Mombasa Chief Magistrate's Case No. 1172 of 2012 – **Republic vs. Ahmed Hasham Lalji and Diamond Hasham Lalji**, he was of the view that the same substantially deals with the facts and evidence which are the subject of the two civil matters in the High Court and in the Court of Appeal. He deposed that unlike the 2nd applicant the officers have never taken any charge and cautionary statement from him.
16. According to him the Directed had abrogated his duties by acting on instructions from third parties and that his decision to recall and review a filed closed by the Attorney General based on no new evidence, in the absence of any new and compelling matters and without giving the applicants a hearing is an abuse of his powers and exposes the applicants to abuse of criminal

process. To him, once the Director of the Commission recommended to the Attorney General that the matter be closed and the same was closed, the Commission became functus officio and any purported further investigations by the 4th Respondent is an abuse of their investigative powers and is null and void.

17. He was therefore of the view that unless prohibited the Respondents will continue with the abuse of their offices and the criminal justice system and the Chief Magistrate would similarly proceed with the matter notwithstanding the abuse of the process yet according to him, the proceedings before that Court are unconstitutional, unlawful and an abuse of the process of the Court and are hence contrary to Article 157 of the Constitution.

1st and 3rd Respondents' Case

18. On their part the 1st and 3rd Respondents in opposition to the application filed the following grounds of opposition:

1. **That the ex parte applicant has not shown any case against the 1st and the 3rd Respondents.**
2. **That the 1st Respondent has been wrongfully sued and enjoined in these proceedings in view of the constitutional provisions of Article 156 and 157 of the Constitution of Kenya.**
3. **The order sought cannot issue.**

2nd Respondent's Case

19. On behalf of the 2nd Respondent a replying affidavit was filed sworn by **Mercy Gateru**, one of the counsels conducting the matter on behalf of the Office of the Director of the Public Prosecution on 15th June, 2012.
20. According to her, it is true the matter had been investigated by the CID and closed with No Further Action by the Director of Criminal Investigations vide a letter dated 3rd March, 2005.
21. Subsequently, the interested party made representations to the Kenya Anti Corruption Commission the predecessor of the 4th Respondent causing the investigations to be reopened and leading to a recommendation by its then Director, **Rtd Justice A G Ringera**, vide his letter dated 10th March, 2008 to the 1st Respondent for the prosecution of the applicants while taking into consideration certain matters before preferring the charges. Accordingly, the 1st Respondent directed the Director of KACC to close the investigations file.
22. However being dissatisfied with the decision to close the file the interested party made numerous representations to the 2nd Respondent prompting the 2nd Respondent to recall the investigation file for review and based on recommendations by the former Director of KACC, **Prof. P. L. O. Lumumba**, the 2nd Respondent concurred with the recommendations of the Commission that there were sufficient evidence to commence criminal proceedings and directed that the applicants be arrested and charged accordingly.
23. According to the deponent, the decision to review the earlier decision was based purely on the evidence gathered by the 4th Respondent and that notwithstanding the long period that had lapsed since the events giving rise to the said proceedings, criminal proceedings could still be commenced since there is no time bar to such proceedings. In her view since the decision was made in light of available evidence the same does not constitute harassment or abuse of office on the part of the 2nd Respondent and that the earlier decision was amenable to review under Articles 50 and 157 of the Constitution as the same was based on considerations of the 4th Respondent which do not bind the 2nd Respondent.
24. Since the 2nd Respondent is not a party to the civil proceedings alluded to by the applicants, the 2nd Respondent is not precluded from initiating criminal proceedings in line with section 193A of the ***Criminal Proceedings Code*** as the criminal proceedings are not calculated to aid any of the parties in the resolution of the civil dispute hence the prosecution should be allowed to proceed.

4th Respondent's Case

25. The 4th Respondent opposed the application vide a replying affidavit and a further affidavit sworn by **Peter Muriithi**, its Forensic Investigator on 15th June 2012 and 17th August, 2012 respectively.
26. According to the deponent, the application is incompetent as the same is brought against the defunct Kenta Anti-Corruption Commission which ceased to exist in law on 5th September, 2011 with the coming into effect of the ***Ethics and Anti-Corruption Commission Act, 2011***.
27. He further submitted that the Director of Public Prosecutions cannot be prohibited from prosecuting the ex parte applicants in absence of an order quashing the decision to prosecute.
28. According to him the investigation the subject matter of inquiry file No. KACC/AT/1/2007 was initially conducted by the Criminal Investigations Department of the police force before being referred to the KACCC for further investigations. The said commission according to him was mandated by the provisions of section 7(1)(c) of the ***Anti-Corruption and Economic Crimes Act, 2003*** to assist any law enforcement agency of Kenya in the investigation of corruption or economic crime and corruption under section 2(1)(c) of the said Act includes fraud and since the investigations touched on allegations of fraudulent conduct of the applicants, it was within the statutory mandate of the Commission.
29. The deponent however averred that the 4th Respondent was a stranger to the civil cases and hence could not comment thereon though the same are not pursuant to section 193A a bar to criminal prosecution.
30. According to the deponent a complaint was received by the CID in April, 2004 to the effect that the ex parte applicants who were directors of Atta (1974) Ltd with the collusion of the Company Secretary and Auditor fraudulently transferred the business and assets of the said Company to M/s Atta (Kenya) Ltd without the express authority of the other directors and upon conclusion of investigations KACC recommended that the persons named therein be charged with committing the offences disclosed. According to him there is no evidence that the KACC exceeded its jurisdiction or abused its powers with respect thereto to warrant intervention by the Court. Having completed its investigations and forwarded the same to the Director of Public Prosecutions, it was deposed that the 4th Respondent became *functus officio*.
31. Since the 4th Respondent's role was then limited to making recommendations, the same are not amenable to judicial review. He further deposed that there is no evidence that the 4th Respondent released information relating to the investigation to any person or that relating to harassment of the applicants.
32. However although vide its letter dated 29th January, 2009 the Director of Public Prosecutions directed the closure of the inquiry file, he vide another letter dated 9th November 2011 directed the EACC to resubmit the relevant duplicate file for his further consideration and appropriate direction and after going through the evidence gathered he, vide his letter dated 23rd February 2012 directed that the applicant be charged with the offences disclosed in the original report.
33. In his view the DPP is empowered under Article 157(6) of the Constitution to institute and undertake criminal proceedings against any person before any Court other than the Court Martial in respect of any offence alleged to have been committed and under Article 157(1) thereof he does not require the consent of any person or authority to do so and is not under the direction or control of any person or authority in exercising his constitutional functions. Without evidence of dishonesty, abuse of office or mala fides on the part of the DPP or any other exceptional circumstance, the Court cannot interfere with his mandate.
34. It was further contended that any challenge to the competence of the charges facing the applicants can be ventilated and resolved before the trial court which is sufficiently empowered under section 89(5) of the ***Criminal Procedure Code*** to determine such issues. To the deponent, the applicants are trying to ventilate their defences before this Court yet this Court is not a trial court hence not best equipped to deal with the quality and sufficiency of the evidence gathered to support the charges arising out of the investigations the subject of the inquiry file. In his view the applicant have not demonstrated that they are likely to receive an unfair trial before the trial court.
35. The 4th Respondent's position was that the order of certiorari cannot be granted as no leave was sought and obtained to apply for the same under Order 53 rule 1 of the ***Civil Procedure Rules*** and that leave to amend is not the same as leave to seek orders of judicial review. It was therefore asserted that prayers 1 and 3 in the Motion cannot be granted.

36. Since the report referred to by the deponent of the supporting affidavit was contrived and unlawfully obtained the same was obtained contrary to Order 18 rule 3(1) of the ***Civil Procedure Rules*** and ought to be struck out.

Interested Party's Case

37. In opposition to the application the interested party filed an affidavit sworn by himself on 30th May 2012.
38. While denying that the complaint to the police was based on the same facts and evidence as the civil suits, the interested party contended that under section 193A of the ***Criminal Procedure Code***, the fact that any matter in issue in any criminal proceedings is also directly in issue in any pending civil proceedings is not aground for any stay, prohibition or delay of the criminal proceedings.
39. According to him, he had no knowledge of most of the matters deposed to by the applicants but clarified that whereas HCCC No. 198 of 1998 was on fraudulent transfer of assets of Atta (1974) Ltd, HCCC No. 3484 of 1995 was broader and included the theft of the assets of Atta (1974) Ltd and other matters.
40. On the letter closing the file, the deponent deposed that the letter in his possession which was sent to him is materially different from the one relied upon by the applicant and that his letter does not contain the words "no further police action". According to him the 1st applicant is a controversial figure whose name has featured in many controversies. He however denied that the Commission had recommended that the file be closed and to the contrary averred that the Commission stated the matter was still alive.
41. According to him, the applicants fraudulently transferred the assets of numerous companies that belonged to the **Hasham Lalji** brothers including the interested party to themselves, including the assets of Atta (1974) Ltd leaving the plundered companies empty shells and used the funds therefrom to purchase other businesses in which they were beneficiaries including one owned jointly with a nominee company of **Nicholas Biwott**, then a powerful Member of Parliament and Cabinet Minister, Matrix Investments Company but through **Akbar Esmail Advocate**. To the interested party, the applicants enjoyed economic power and political protection and he encountered difficulties trying to seek justice.
42. It was contended that the said Advocate also acted for many Hasham Lalji family companies including those whose assets were fraudulently transferred such as the assets of Atta (1974) Ltd which were transferred to Atta (Kenya) Ltd; Cookies Ltd transferred to Premier Cookies Ltd in which Matrix Investments Ltd became a shareholder of 50%; Kenwheat Industries Ltd transferred to Premier Flour Mills Ltd as well as Hasham Lalji Properties Ltd and Kilima Farm Limited.
43. The interested party contended that as long as the applicants had political protection during the KANU regime and as long as the independence of the judiciary under the old regime remained questionable his chances of justice were very slim and that he renewed his search for justice after 2002 general elections despite the applicants still enjoying immense political power and Government protection. He was therefore of the view that the delay cannot be questioned as that would make the applicants beneficiaries of their own interference with the due process of the law.
44. According to the interested party though he lodged his complaint in August 2003 and not 2004 as alleged, the CID curiously made proposals offering to facilitate a settlement with the accused on the said complaint and despite seeking the reasons for the closure of the file non was forthcoming. To the interested party, he did not expect justice from the CID since the Applicants' counsel on record was also counsel to the Director of CID and after learning of the closure of the file about the fraudulent transfer of the assets of Atta (1974) Ltd by the CID sometimes in March 2005, he again complained in April, 2005 after following the conclusion of the investigations the KACC recommended to the 1st Respondent the prosecution of the Applicants herein. However the KACC while concluding that there was sufficient evidence to sustain charges of fraud expressed its doubts with respect to the quality of evidence to be adduced at the trial in light of the 18 year delay in prosecuting the offences.
45. However at the insistence of the interested party, the Office of the Director of Public Prosecutions directed that the Applicants be charged as earlier recommended. It was therefore averred that at no time did the KACC find that there was no evidence to charge the Applicants with fraud as there

was always evidence with the delay being the only concern. In the interested party's view, there is no limitation of time to charge a person with a criminal offence in our Constitution or the ***Penal Code***.

Applicant's Submissions

46. It was submitted that this Court must test and enforce laws in a fair and rational manner and the best forum to take up, develop and promote the objects and principles of the Constitution and the rule of law as far as the same relates to a fair trial. According to the applicants the instant application invokes the supervisory jurisdiction of under Article 165 of the Constitution since it seeks to have the Court exercise its supervisory jurisdiction over the subordinate courts and over the respondents being persons, bodies or authorities exercising judicial or quasi-judicial function. In support of this submission the applicant relied on **Regina vs. Ittoshat [1970] 10 CRNS 385 at 389** to the effect that:

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

47. The applicants further relied on **Paul Imison vs. Attorney General & 3 Others Nbi HCMCA No. 1604 of 2003**.
48. It was further submitted based on **Hui Chi-Ming vs. R [1992] 1 AC 34** that all courts have an overriding duty to promote justice and prevent injustice and from this duty there arises an inherent power to 'stay' or stop a prosecution in the magistrate's courts if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court.
49. The applicants also relied on **R vs. Crown Court at Derby, ex parte Brooks [1984] 80 Cr. App. R 164** to the effect that:

"The power to stop a prosecution arises only where it is an abuse of the process of the court. It may be an abuse of the process if either (a) the prosecution have manipulated or misused the process of the courts so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality; or (b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable."

50. Further reliance was sought on **Crispus Karanja Njogu Vs. Attorney General HCCR Appl. NO. 39 of 2000, Kipng'eno Arap Ng'eny vs. AG [2001] KLR 612, Floriculture International Ltd and Others vs. Attorney general Misc. Civ. Application No. 114 of 1997, Mitchell and Others vs. The Director of Public Prosecutions and Another [1987] LRC 127P.**
51. On the basis of Article 50(2)(e) of the Constitution, it was submitted that the right to a speedy trial is not separate and distinct from a right to a fair trial and therefore as far as possible, persons charged with criminal offences must be tried without unreasonable delay hence a delay of twenty years between the time of the alleged criminal offence and the charge is irremediable and hence a stay ought to be granted since the delay is itself an abuse of the process. The applicants cited **Githunguri vs. R [1985] 91** as the authority in support of this submission. According to them the case of **Aboud vs. Attorney General (NSW) [1987] 10 NSWLR** is an authority for the proposition that the Court should give consideration to the minimisation of the anxiety and concern of the accused and protection of the reputation and social economic interests of the accused from the damage which flows from a pending charge.
52. It was submitted that the 4th Respondent under the repealed *Kenya Anti-Corruption Act* and ***Anti-Corruption and Economic Crimes Act***, was not and never was the investigator of the criminal case sought to be prosecuted by the DPP and neither KACA nor KACC and not even EACC has statutory mandate to investigate a ***Penal Code*** offence that allegedly arose from an incident that took place twenty (20) years ago.
53. In the applicants' view the DPP's decision to revive a criminal prosecution that had been abandoned by his predecessor, the Attorney-General, lacks legal capacity since by doing so he

would be sitting on appeal against the decision of the Attorney General. It was contended that his action has failed to meet basic requirements of fairness and the due process attached to the lawful exercise of his prosecutorial power hence acting ultra vires and his decision is inconsistent with the provisions of Article 157(11) of the Constitution. To them the DPP is using his powers towards the achievement of an unauthorised end and has ignored relevant considerations. To the applicants section 193A of the ***Criminal Procedure Code*** can operate retrospectively.

54. It was averred that the decision to institute criminal proceedings against the ex parte applicants was manifestly unjust and disclosed bad faith on the part of the Director of Public Prosecutions and involved oppressive and gratuitous interference with the rights of the applicants and cannot find justification in a fair and democratic society. The same was further contended to be irrational. These submissions were based on **Associated Provincial Picture House Ltd vs. Wednesbury Corporation [1972] 2 All ER 680, Council of Civil Service Union vs. Minister For Civil Service [19841 3 ER 935** and **Ezekiel Muchesi vs. Republic [2006] eKLR.**
55. As there is investigative impropriety it was contended that the applicants are unlikely to receive fair trial.
56. According to the applicants as there was no objection to the amendment of the Motion, the Respondents acquiesced therein and are estopped from challenging the reliefs introduced by the said amendments as Order 53 rule 4(2) of the ***Civil Procedure Rules*** allows amendments. It was further submitted that under Order 19 rule 7 of the said Rules as read with Article 159 of the Constitution the Court ought to administer justice without undue regard to technicalities.
57. According to the applicants they were condemned unheard when the prosecution reopened closed investigations which had been abandoned without affording the applicants a hearing. To them any intended prosecution will be against the applicants' legitimate expectation based on fairness and the need to prevent abuse of power by public bodies.
58. To the applicants whereas under Article 157(4) of the Constitution the DPP can direct the Inspector General to carry out investigations that power does not encompass the authority to direct the Anti-Corruption to carry out investigations. To them the DPP has nor exercised his prosecutorial discretion in a fair and judicious manner and has not had regard to the public interests, the interest of administration of justice and the need to prevent and avoid abuse of the legal power.
59. The Court was therefore urged to exercise and invoke its inherent power to grant the orders sought herein.

1st and 3rd Respondents' Submissions

60. On behalf of the 1st and 3rd Respondents it was submitted that they had no role to play in the pending criminal case hence there is no cause of action against them more so as no connection has been made between the previous closed inquiry by the 3rd Respondent to the inquiry by the 4th Respondent.
61. It was their submissions that as the applicants have already been charged there is nothing to prevent or forbid by an order of prohibition.

2nd Respondent's Submissions

62. On behalf of the 2nd Respondent, it was submitted that the DPP properly exercised his powers under the Constitution in re-opening the matter since under Article 47 of the Constitution the DPP is under a duty to consider any petition presented to him in a criminal matter and exercise his discretion on whether or not to prosecute the matter.
63. As far as the DPP was concerned there was a recommendation that the matter be closed and the issue be pursued as the respondent expressed reservation on the possibility of prosecution. Though the interested party petitioned the DPP it was submitted that the petition did not amount to directions to the DPP by a party to prosecute since upon request the DPP would exercise his mind and discretion on the mater based on available evidence since the decision of investigative agencies does not bind the DPP.
64. It was submitted that the DPP's decision was based on public interest and having passed the

evidential test the DPP found it fit to reopen the case. While admitting that there was no new evidence it was submitted that the DPP was convinced there was a prosecutable case and the reservation of the 4th Respondent can be dealt with at the trial hence a case has not been made out to justify the orders sought since there is no bar to prosecution.

4th Respondent's Submissions

65. In its submissions the 4th respondent reiterated the averments contained in the replying affidavit sworn on its behalf herein and was of the view that this Court lacks jurisdiction to adjudicate over and grant the orders sought in prayers 1 and 3 of the amended motion as the applicant did not seek and obtain leave to apply for the same. The mere fact that the Respondents did not oppose the application to and cannot have the effect of conferring leave on the applicants since the Court did not set out to reopen the application for leave in granting the amendment. In support of this submission the said Respondents relied on Embu HCJR No. 27 of 2011 – **Boniface Mulama & 2 Others vs. KACC & Others**.
66. Since the 4th Respondent's functions are limited to investigation and making recommendations it was submitted that one doing so it became functus officio and its recommendations are not amenable to judicial review based on **Njoya and 6 Others vs. Attorney General & Another [2004] 1 KLR 233**.
67. In the 4th Respondent's view the closure of the file was based on grounds other than the insufficiency of evidence. The fact that the 4th Respondent submitted its file to the DPP, it was submitted cannot give rise to a cause of action against the 4th Respondent and that the decision of the DPP to prosecute cannot be impeached based on the grounds relied on by the applicants.

Interested Party's Submissions

68. On behalf of the interested party it was submitted while reiterating the grounds and circumstances under which judicial review reliefs are to be granted that the applicants have not demonstrated any exceptional circumstances whatsoever that would justify or persuade the Court to directly target the decision to prosecute them.
69. It was submitted that the Attorney General and the DPP were/are constitutionally empowered to institute criminal proceedings against the applicants and it is doubtful that they acted ultra vires.
70. According to the interested party there is no time limit for the filing of charges against suspects in criminal cases, save as provided in section 219 of the *Criminal Procedure Code*. However it was held in **Githunguri vs. Republic [1986] KLR 1** that there is no time limit to the prosecution of serious offences. To the interested party the decision to prosecute the applicants does not violate Article 50 of the Constitution.
71. On the issue of legitimate expectation it was contended that the applicants had not been permitted to enjoy a certain advantage and which they continued to enjoy in order for the doctrine to apply. According to the interested party, the communications relied upon by the applicants were never sent to the applicants in order for them to be the basis of legitimate expectation. It was further submitted based on **Republic vs. George Okelo & Another [2012] Another eKLR** that there is no evidence that the Director of Criminal Investigations or the Director of the 4th Respondent unequivocally communicated to the ex parte applicants that they would not be charged, hence the issue of non-preservation of evidence does not arise.
72. According to the interested party allowing persons under investigation to be given an opportunity to decide whether they can or cannot be charged or not, when to be charged or to be called to make representation prior to proffering of criminal proceedings, would make a mockery of the criminal justice system since the rationale would be that no sane individual would agree that criminal charges be proffered against him or her.
73. In the interested party's opinion the legitimate expectation as stated by the applicants is more akin to commercial disputes may be with public bodies and institutions and does not bind the institution of criminal proceedings as in the instant case.
74. On natural justice it was submitted based on **Lloyd vs. McMahon [1987] 1 All ER 1118 and Russell vs. Duke of Norfolk and Others [1949] 1 All ER 109 at 118** that the requirements of

natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.

75. According to the interested party since the prosecution was based on the evidence and the investigations carried out by the 4th Respondent there is no evidence that the decision was unreasonable.
76. It was submitted that granting the orders as sought would amount to freezing *ad infinitum* the criminal prosecution before the court which would be a travesty if not a mockery of justice and clearly not in the public interest since the Court has to balance the fundamental right of the individual to a fair trial within a reasonable time against the attainment of justice in the context of the prevailing legal administration and the prevailing economic, social and cultural conditions.
77. While praying that the application be dismissed the interested party's view was that in the circumstances of this case, there ought to be no order as to costs.

Determination

78. Having considered the application, the affidavits both in support of and in opposition to the application, the grounds of opposition and the submissions for and against the grant of the orders sought, this is the view I form of the matter.
79. Before dealing with the issues raised herein, it is my view that the principles guiding the grant of the orders in the nature sought herein ought to be reiterated. Several decisions have been handed down which in my view correctly set out the law relating to circumstances in which the Court would be entitled to prohibit, bring to a halt or quash criminal proceedings. It is however always important to remember that in these types of proceedings the Court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings. As judicial review proceedings are concerned with the process rather than merits of the challenged decision or proceedings the court is not entitled to make definitive findings on matters which go to the merit of the impugned proceedings. In determining the issues raised herein the Court will therefore avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial Court.
80. The Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is open to the applicant in those proceedings.

However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, *ipso facto*, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. Section 193A of the ***Criminal Procedure Code*** on this issue provides:

> ***Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.***

81. However caution ought to be exercised and as was held by the Court of Appeal in **Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others Nairobi Civil Appeal No. 56 of 2012 [2013]eKLR:**

"While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court."

82. Therefore, in the exercise of the discretion on whether or not to grant an order of prohibition, the court takes into account the needs of good administration. See **R vs. Monopolies and Mergers Commission Ex Parte Argyll Group Plc [1986] 1 WLR 763** and **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK).**

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

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

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

"The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion if acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution... Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power. Having regard to the law, the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision is correct. The other grounds, which the appellants claim were ignored ultimately, raise the question whether the evidence gathered by the prosecution is sufficient to support the charge. The criminal trial process is regulated by statutes, particularly the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court, which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would

have caused the judicial review court to embark upon examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence and that is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court."

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

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

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

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

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

"A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say

with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable".

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

"the police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court…As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene."

89. Finally, in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** it was held that:

"The function of any judicial system in civilized nations is to uphold the rule of law. To be able to do that, the system must have power to try and decide cases brought before the Courts according to the established law. The process of trial is central to the adjudication of any dispute and it is now a universally accepted principle of law that every person must have his day in court. This means that the judicial system must be available to all.....Although the Attorney General enjoys both constitutional and statutory discretion in the prosecution of criminal cases and in doing so he is not controlled by any other person or authority, this does not mean that he may exercise that discretion arbitrarily. He must exercise the discretion within lawful boundaries.....Although the state's interest and indeed the constitutional and statutory powers to prosecute is recognised, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters.....The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious.....In doing so the Court may be guided by the following principles: (i). Where the criminal prosecution amounts to nothing more than an abuse of the process of the court, the Court will employ its inherent power and common law to stop it. (ii). A prosecution that does not accord with an individual's freedoms and rights under the constitution will be halted: and (iii). A prosecution that is contrary to public policy (or interest) will not be allowed.....A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case. Evidence of extraneous purposes may also be presumed where a prosecution is mounted after a lengthy delay without any explanation being given for that delay..... A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence.....A criminal prosecution that does not accord with an individual's freedoms and rights, such as where it does not afford an individual a fair hearing within a reasonable time by an independent and impartial court, will be the clearest case of an abuse of the process of the Court. Such a prosecution will be halted for contravening the constitutional protection of individual's rights.....In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution

is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds."

90. It is therefore clear that whereas the discretion given to the 2nd respondent to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt.
91. Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and once the Court is satisfied that the same are bona fides and that the same are being conducted in a fair manner, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution's evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.
92. Therefore the determination of this case must be seen in light of the foregoing decisions. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the DPP to investigate and prosecute ought to be interfered with.
93. The first issue I intend to deal with is with respect to the parameters of an amendment envisaged under Order 53 rule 4(2) of the ***Civil Procedure Rules***. That provision provides:

The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavits.

94. It however must be kept in mind that under rule 1(1) of the said Order:

No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

95. It must also be remembered that rule 2 of the said Order provides for limitation under certain specified circumstances and provides:

Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal

and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

96. This provision is derived from section 9(3) of the ***Law Reform Act***.
97. Therefore the power to grant leave to amend the Motion cannot be exercised in such a way as to defeat the provisions of section 9(3) of the ***Law Reform Act***. To argue that an amendment pursuant to Order 53 rule 4(2) is permissible to introduce a relief for which leave was neither sought nor granted is likely to lead to situations where parties may go round the limitation provided under section 9(3) aforesaid by seeking orders for which no limitation are provided and later on introduce a relief which is expressed by statute to be barred by limitation by way of amendment. To allow that to happen would in my view amount to upholding the provisions of a subsidiary legislation contrary to the express provisions of an Act of Parliament and that is prohibited under section 31(b) of the ***Interpretations and General Provisions Act***, Cap 2 Laws of Kenya which provides that no subsidiary legislation shall be inconsistent with the provisions of an Act.
98. This Court in **Republic vs. Kenya Railways Corporation ex parte Sheets and Hardware Ltd & Another Nbi JR ELC Miscellaneous Civil Suit No. 2 of 2009** dealing with a similar issue expressed itself as follows:

"Before I deal with the merits of the application, it is important to note that these proceedings were commended by Chamber Summons dated 19th January 2009 filed on 22nd January, 2009. According to the said application the applicant was Sheets and Hardware Limited and leave was sought to allow the said applicant apply for judicial review orders of prohibition and certiorari. According to the Statement filed together with the same application, the applicant was expressly stated as Sheets and Hardware Limited and it was stated that it was the said applicant who was the registered proprietor of the two land parcels Nos. LR 209/1253 and 209/1254. On 23rd January 2009, this Court granted leave to the applicant to apply for the said orders. The applicant however applied after leave had been granted and the substantive Motion filed vide an application dated 5th September 2011,for leave to amend its said Motion which application was allowed on 23rd January 2012. One of the effect of the said amendment was that a second party was introduced into these proceedings being Kirit Patel...In my view, the mere fact that a Court has allowed an application for amendment does not validate the claim. Even where parties are joined to ordinary civil proceedings, the Court my at the end of the day disallow the claim of the party who was joined despite having allowed such joinder... It is therefore clear that for an applicant to apply for judicial review the applicant is enjoined to apply for leave to do so. In my view, without leave having been sought and obtained the Court has no jurisdiction to grant judicial review orders under sections 8 and 9 of the *Law Reform Act* as read with Order 53 of the *Civil Procedure Rules*. In this case the only person who sought leave and to whom the said leave was granted was Sheets and Hardware Limited and not Kirit Patel. It follows that even without going into the merits of the application the application in so far as it seeks orders in favour of the said Kirit Patel is incompetent and the claim by the said person is struck out."

99. The importance of the leave is, as was held by **Waki, J** (as he then was) in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996**:

"to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending

even though misconceived…"

100. It is also meant to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralysed for months because of pending court action which might turn out to be unmeritorious. See **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321.**
101. It is therefore my view that since no leave was sought and obtained to apply for prayers 1 and 3 in the Motion, notwithstanding the amendment of the Motion those prayers are incompetently before this Court. The same are accordingly struck out.
102. It was contended that without quashing the decision by the DPP to prosecute the applicants the Respondents cannot be prohibited from proceeding with the said prosecution.
103. In my view where a decision has been made, a party cannot seek to prohibit the same without having the same quashed. However where the decision is in the process of being made and the only decision that was taken was that the action in question be undertaken, I do not see why the Court cannot in those circumstances prohibit the decision from being concluded even without quashing the decision that the same be undertaken. That is my understanding of the decision of the Court of Appeal in **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge & Others Civil Appeal No 266 of 1996** where the Court expressed itself as follows:

"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, *where a decision has been made*, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. *Prohibition cannot quash a decision which has already been made*; it can only prevent the making of a contemplated decision…Prohibition is an order from the High Court directed to an inferior tribunal or body which *forbids that tribunal or body to continue proceedings* therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings……Only an order of *certiorari* can quash a *decision already made* and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter." [Emphasis mine].

104. It is therefore clear that the Court was emphatic that the remedy of prohibition is only lost where a decision has been made and not where the proceedings in question are still continuing. Accordingly, since the applicants herein are seeking to stop the Respondents from *inter alia* continuing with their prosecution, the mere fact that a decision was made to prosecute them and the prosecution has in fact commenced, is not a ground to decline to entertain an application seeking to prohibit the continuation of the said prosecution.
105. In **Kuria & 3 Others vs. Attorney General** (supra) it was held that

"It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been be argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit.....The intrusion of judicial review remedies in criminal proceedings would have the

effect of requiring a much broader approach, than envisaged in civil law... In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed... There is nothing which can stop the Court from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made....."

106. This was this Court's holding in **Republic vs. Director of Public Prosecutions & Others ex parte Eric Kibiwott & Others Nbi Judicial Review Civil Application No. 89 of 2014.**

107. The 2nd respondent took issue with this Court's power to grant the orders against it. It seemed to have taken the view that this Court has no power to interfere with the exercise of his constitutional mandate. However as was held in **Paul Imison vs. Attorney General & 3 Others Nbi HCMCA No. 1604 of 2003**:

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

108. This Court therefore has the powers and the constitutional duty to supervise the exercise of the 2nd Respondent's mandate whether constitutional or statutory as long as the challenge properly falls within the parameters of judicial review. See **R vs. Attorney General exp Kipngeno Arap Ngeny** (supra).

109. The next issue is whether the "decision" of the 4th Respondent can be quashed. That the 4th Respondent's decision could only be implemented by the 2nd Respondent is not contested. The 2nd Respondent however was not bound by the recommendations for prosecution made by the 4th Respondent. In ***Halsbury's Laws of England 4th Edn. Vol. II page 808 para 1508*** it is stated that:

"The rule generally applies, at least with full force, only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation

designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be found."

110. In **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354** the Court stated:

"The notice that is under challenge in these proceedings gave the applicants 14 days to vacate the disputed land. The letter (Notice) was written based on the findings of the Ndungu Report on land whose recommendations have not acquired any statutory form. They are mere recommendations and have no force of law and it is doubtful whether the said Report can be a basis for issuance of such notice as the one under attack in this application."

111. Accordingly to the extent that the 4th Respondent simply made recommendations rather than a determination which was subject to the decision of the 2nd Respondent the same on its own was not capable of being implemented without further action hence would not be subject of an order of prohibition. As was held by the Court of Appeal in **The Republic vs. The Rent Restriction Tribunal and Z. N. Shah & S M Shah Ex Parte M M Butt Civil Appeal No. 47 of 1980,** an order for prohibition may be granted where an inferior court or tribunal is about to step outside its jurisdiction otherwise the application is premature.

112. As the ultimate decision to charge the applicants lay with the 2nd Respondent, it is my view that nothing turns upon the issue raised by the applicant to the effect that the 4th Respondent had no powers to investigate crimes allegedly committed 20 years ago. In any case the decision whether or not the said evidence ought to be admitted can be properly be determined by the trial Court. As was by **Ochieng, J** in **John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003**, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate.

113. With respect to reopening of the case, I did not understand the applicants to contend that the 2nd Respondent had no jurisdiction to reopen the matter at all. Save for the contention that the reopening of the case amounted to sitting on appeal against the decision of the Attorney General, the other issues as I understood the applicants militated against the reopening of the matter. In my view I do not agree with a blanket view that where a criminal investigation has been purportedly closed it can never be reopened under any circumstances. In my view the discretion to close the matter and a reversal of the same must depend on the particular circumstances of the case. The interested party contends that the prevailing political atmosphere did not lend itself to a successful prosecution of the applicants taking into account their status vis-à-vis the then regime. Whereas this Court is not competent to make a definitive finding thereon this view seem to resonate with the view expressed in **Bell vs. Director of Public Prosecutions and Another [1986] LRC 392** where the Privy Council expressed itself as follows:

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

114. It was however contended that the decision by the Attorney General and the Office of the Director of Public Prosecution to close the file gave rise to legitimate expectation on the part of the applicants that the matter would not be reopened. However as was held in **Keroche Industries Ltd vs. Kenya Revenue Authority & Others [2007] KLR 240,** stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her

in a different way. In this case there is no evidence that a promise was made to the applicants that they would not be prosecuted. As rightly pointed out by the Respondents the communication with respect to the closure of the case was not directed to the applicants. Accordingly no promise was made to the applicants along those lines.

115. The position however, is that legitimate expectation cannot override the law. This was the position in **Republic vs. Kenya Revenue Authority ex parte Aberdare Freight Services Limited [2004] 2 KLR 530** where it was held:

"…a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others. Judicial resort to estoppel in these circumstances may prejudice the interests of third parties. Purported authorisation, waiver, acquiescence and delay do not preclude a public body from reasserting its legal rights or powers against another party if it has no power to sanction the conduct in question or to endow that party with the legal right or inventory that he claims… Legitimate expectation is founded upon a basic principle of fairness that legitimate expectation ought not be thwarted – that in judging a case a judge should achieve justice, weigh the relative "strength of expectation" of the parties. For a legitimate expectation to arise the decision must affect the other person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision maker not to be withdrawn without giving him first an opportunity of advancing reasons for contending that they should be withdrawn… A representation giving rise to legitimate expectation must however be based on full disclosure by the applicant. Thus where he does not put all his cards face up on the table it would not be entitled to rely on the representation. In this case any legitimate expectation has clearly been taken away firstly by the conduct of the applicant and the provisions of the Statute Act and therefore there is no discretion."

116. In my view, based on the material before me, legitimate expectation does not arise here as there is no allegation that the Attorney General and/or the 2nd Respondent either promised the applicants or conducted themselves in a manner that would amount to legitimate expectation and even if that were so legitimate expectation cannot operate against the law.

117. It was however contended that there was a long period of delay between the time of the alleged commission of the offences and the commencement of the prosecution. In **Kibiwott's Case** (supra) this Court expressed itself as follows:

"Article 50 of the Constitution provides for the right to fair trial and under Article 50(1)(e) fair trial includes the right to have the trial begin and conclude without unreasonable delay. Contrary to the position taken by the interested party, it is my view that both the commencement and the conclusion of the trial must be conducted without an unreasonable delay. This delay in my view not only encompasses the period between the arraignment and the commencement of the hearing but also includes the period between the discovery of the commission of an offence and the arraignment in court. However what is reasonable depends upon the circumstances of the case such as the nature of the offence, the collation and collection of the evidence as well as the complexity of the offence. Again of paramount importance is the effect of the delay on the viability of a fair trial."

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

"Whereas we appreciate the fact that the decision whether or not to prosecute the petitioners is an exercise of discretion this Court is empowered to interfere with the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where

the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable… Under Article 47(1) of the Constitution, "every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair." It is therefore imperative that criminal investigations be conducted expeditiously and a decision made either way as soon as possible. Where prosecution is undertaken long after investigations are concluded, the fairness of the process may be brought into question where the Petitioner proves as was the case in *Githunguri vs. Republic* Case, that as a result of the long delay of commencing the prosecution, the Petitioner may not be able to adequately defend himself. Whereas the decision whether or not the action was expeditiously taken must necessarily depend on the circumstances of a particular case, on our part we are not satisfied that the issues forming the subject of the criminal proceedings were so complex that preference of charges arising from the investigations therefrom should take a year after the completion of the investigations. From the charges levelled against the Petitioners, the issues seemed to stem from the failure to follow the laid down regulations and procedures in arriving at the decision to sell the company's idle/surplus non core assets. In our view ordinarily it does not require a year after completion of investigations in such a matter for a decision to prosecute to be made. That notwithstanding, it is not mere delay in preferring the charges that would warrant the halting of the criminal proceedings. Rather, it is the effect of the delay that determines whether or not the proceedings are to be halted. In this case, there is no allegation made by the Petitioners to the effect that the delay has adversely affected their ability to defend themselves. In other words, the Petitioners have to show that the delay has contravened their legitimate expectations to fair trial. The effect of the long delay in prosecuting the applicant was considered in *Githunguri vs. Republic* Case, where the Court expressed itself as follows:

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

119. That 20 years between the commission of the alleged offence and the commencement of the prosecution of the applicants is a long time under any circumstances is not in doubt. However as was held by **Kriegler, J** in **Sanderson vs. Attorney General-Eastern Cape 1988 (2) SA 38:**

"Even if the evidence he had placed before the Court had been more damning, the relief the appellant seeks is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins - and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case – is far reaching. Indeed it prevents the

prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will seldom be warranted in the absence of significant prejudice...Ordinarily, and particularly where the prejudice alleged is not trial related, there is a range of "appropriate" remedies less radical than barring the prosecution. These would include a mandamus requiring the prosecution to commence the case, a refusal to grant the prosecution a remand, or damages after an acquittal arising out of the prejudice suffered by the accused. A bar is likely to be available only in a narrow range of circumstances, for example, where it is established that the accused has probably suffered irreparable trial prejudice as a result of the delay."

120. In this case no allegations have been made that due to the conduct of the trial Court the applicants will be unable to get a fair trial. In my view delay per se does not necessarily imply that the applicants will be unable to obtain a fair trial. The applicants ought to go further and demonstrate by credible evidence that as a result of the delay, a trial fair to the applicants cannot be possible, for example, due to inability to collect evidence or secure the witnesses. No such allegations have, however, been made in this application. The court has not been addressed on the nature of the prejudice that the applicants stand to suffer by the continuation of the criminal proceedings. As was held in **Jago vs. District Court (NSW) 106**:

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

121. It must always be remembered that the decision whether or not to grant judicial review is an exercise of judicial discretion and like all discretion must be exercised judicially based on material and not capriciously or whimsically. This position was emphasised by **Richardson, J** in **Martin vs. Tauranga District Court [1995] 2 LRC 788 at 799** where he held:

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

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

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

123. Although it was alleged that the criminal proceedings have been reopened with a view to achieving collateral and extraneous purposes I am not satisfied based on the evidence on the record that this is so. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the ***predominant*** purpose is to further some other ulterior

purpose and as long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene. See **Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another** (supra) and **R vs. Attorney General exp Kipngeno Arap Ngeny** (supra).

124. Where it is not the predominant purpose the Court ought not to interfere. I am not in this case convinced that the predominant purpose of the commencement of the criminal proceedings is for the achievement of a collateral purpose other than the vindication of a criminal offence. In any case as already stated hereinabove under section 193A of the ***Criminal Procedure Code***, the concurrent existence of the criminal proceedings and civil proceedings even if ***any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings*** would not, *ipso facto*, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. Dealing with the same issue it was held in **Kuria & 3 Others vs. Attorney General** (supra) that:

"A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution.....In the instant case there is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even of manipulation of court process so as to seriously deprecate the likelihood that the applicants might not get a fair trial as provided under section 77 of the Constitution. It is not enough to simply state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an "abuse of process", is a "manipulation", "amounts to selective prosecution" or such other processes, or even supposing that the applicants might not get affair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts. The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial... In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names."

125. The applicants however contend that section 193A cannot operate retrospectively. It is not alleged that the enactment of the said provision has had the effect of taking away substantive rights. In my view it was more of a procedural amendment and the law as I understand it is that when the law is altered during the pendency of an action or proceeding, the rights of the parties are to be decided according to the law as it existed when the action or proceeding was begun unless the new statute shows a clear intention to vary or affect such rights and such intention may be even by implication. But in the case of an enactment, which alters or affects only procedure or practice of the Court, the general principle is that it has a retrospective effect unless it has some

very good reason against it. See **John Mwangi vs. Francis Mwangi Njuguna Civil Application No. 96 of 1997, Municipality of Mombasa vs. Nyali Ltd [1963] EA 371; Patel vs. Republic [1968] EA 97; Patel vs. Benbros Motors Tanganyika Ltd [1968] EA 460.**

126. It was contended that the applicants' rights to a hearing was violated by the reopening of the investigations and deciding to prosecute them without being afforded a hearing. In my view any investigations worth its name entails the consideration of the versions of both the accused and the complainant. To only take into account one side of the story without considering the other side may in my view amount to improper investigative process. However, whether or not to do so depends on the circumstances of the alleged offence. Where a decision has been made to close an inquiry file, it is my view that before reopening the investigations resulting from discovery of new evidence the people sought to be charged ought to be given an opportunity to comment on the fresh evidence. In this case, however, the 2nd and 4th Respondent's position was that there were no fresh investigations and that the 2nd Respondent only reviewed the existing evidence afresh and on that basis arrived at the decision to charge the applicants. That being the position, and as this Court cannot, based on the material on record, decide either way, the alleged breach of the rules of natural justice does not arise.

127. Our criminal process entails safeguards which are meant to ensure that an accused person is afforded a fair trial and the trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of an appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words unless the applicants demonstrate that the circumstances of the impugned process render it impossible for the applicant to have a fair trial, the High Court ought not to interfere with the trial simply on the basis that the applicant's chances of being acquittal are high. In other words a judicial review court ought not to transform itself into a trial court and examine minutely whether or not the prosecution is merited.

128. Having considered the issues raised in this application, I am not satisfied based on the material before me that the applicants will not receive a fair trial before the trial court more so as no allegations are made against the Court which, contrary to the provisions of Order 53 rule 2(2) of the ***Civil Procedure Rules*** ought to have been, but was not served.

129. A look at the only relief remaining in this application clearly demonstrates that the grant of the order in the manner sought would leave the criminal case in limbo indefinitely. However, in **Republic vs. Judicial Service Commission *ex parte* Pareno [2004] 1 KLR 203-209** it was held that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.**

130. The question that the Court has to ask itself is whether in light of the decision I have come to in respect of the competency of prayers 1 and 3 of the Motion, the grant of prayer 2 would be efficacious taking into account the fact that charges have now been laid against the applicants. In my view the grant of prayer 2 would not achieve the intended purpose. To the contrary it would leave the trial Court and the proceedings before it rudderless.

131. Having considered the issues raised herein I am not satisfied that the case meets the legal threshold for prohibiting the criminal case from proceeding.

132. With respect to the costs I have considered the submissions made by the interested party herein that costs in judicial review proceeding especially when the cause of action involves an allegation of the infringement of constitutional rights coupled with criminal proceedings, ought not to be

granted. I am however not prepared to make such a sweeping holding. As was rightly held in **Motsepe vs. Commissioner for Inland Revenue Authority 1997(2) A 898 (CC)**, such a holding would have the undesirable effect of lulling the litigants into a false sense of security that they are free to challenge the constitutionality of statutory provisions in this Court, no matter how spurious the grounds for doing so may be and how remote the possibility that this Court will grant them access and that this can neither be in the interests of administration of justice nor fair to those who are forced to oppose such attacks. In my view I do not see why the general rule that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order, should not be followed taking into account that unlike in criminal cases where the case is between the accused and the State, in judicial review applications, other actors may be roped in who may not necessarily be parties in the criminal trial. I however agree that some of the matters to be taken into consideration include the nature of the proceedings and whether the interests of the administration of justice warranted the proceedings in question. Apart from that the conduct of the parties to the proceedings is similarly a crucial factor in the exercise of the Court's discretion with regard to costs.

133. Before I conclude this Judgement I wish to express my sincere gratitude to learned counsel who appeared in this matter for their research. If I have not referred to all the decisions cited, it is not out of lack of appreciation for their industry.

Order

134. In the result I find no merit in the amended Notice of Motion dated 29th July, 2012 which I hereby dismiss but as the matter pits family members against one another and as there was clearly a delay involved in the commencement of the prosecution there will be no order as to costs.

135. It is so ordered.

Dated at Nairobi this 28th day of July 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Bowry and Mrs Ondieki for the Applicants.

Miss Maina for Miss Masaka for the 1st and 3rd Respondents.

Mr Waudo for the 4th Respondent.

Mr Tebino for Mr Ahmednasir for the interested party.

Cc Kevin.