



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 390 OF 2013

**IN THE MATTER OF AN APPLICATION BY STEPHEN SOMBA KATHIMA FOR JUDICIAL
REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

IN THE MATTER OF THE LAW REFORM ACT, CAP 26, LAWS OF KENYA

AND

NAIROBI CRIMINAL CASE NO. 1531 OF 2013

BETWEEN

REPUBLIC

AND

STEPHEN SOMBA KATHIMA.....ACCUSED

AND

IN THE MATTER OF MILIMANI CMCC NO. 9962 OF 2005

BETWEEN

PETER KINYANJUI GATITU.....PLAINTIFF

AND

STEPHEN SOMBA KATHIMA.....DEFENDANT

AND

**IN THE MATTER OF AN APPLICATION BY STEPHEN SOMBA KATHIMA FOR JUDICIAL
REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

INSPECTOR GENERAL, NATIONAL POLICE SERVICE.....1ST RESPONDENT

THE CHIEF MAGISTRATE, MILIMANI LAW COURTS, NAIROBI.....2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

AND

PETER KINYANJUI GATITU.....INTERESTED PARTY

EX-PARTE: STEPHEN SOMBA KATHIMA

JUDGEMENT

1. By a Notice of Motion dated 7th November, 2013, the *ex parte* applicant herein, **Stephen Somba Kathima**, seeks the following orders:
1. **THAT this honourable court be pleased to issue an order of Certiorari to remove to the High Court and quash the decision of the 1st and 3rd Respondents to charge and prosecute the Applicant before the 2nd Respondent in Nairobi Criminal Case No. 1351 of 2013 (Republic versus Stephen Somba Kathima).**
2. **THAT this honourable court be pleased to issue an order of Prohibition directed to the 1st and 3rd Respondent prohibiting and/or to restraining them from prosecuting and/or continuing to further prosecute the Applicant in Nairobi Criminal Case No. 1531 of 2013 (Republic versus Stephen Somba Kathima).**
3. **THAT this honourable court be pleased to issue an order of prohibition directed to the 2nd Respondent or any other Magistrate prohibiting and/or to restraining him/her from hearing and/or further hearing and/or determining the proceedings in Nairobi Criminal Case No. 1531 of 2013 (Republic versus Stephen Somba Kathima).**
4. **THAT this honourable court be pleased to give further orders and/or directions as it may deem fit and just to grant.**
5. **THAT costs of this application be provided for.**
2. The application was supported by an affidavit sworn by the applicant herein on 30th October, 2013.
3. According to the applicant, he is the legal allottee from the Nairobi City County formerly known as the Nairobi City Council of Plot No. 398, situated at Patanisho Phase 11 Scheme, Kayole, within Nairobi County (hereinafter after the suit plot). According to him, he became possessed of the suit plot after the same was allocated to him by an Association under a scheme known Embakasi Patanisho Jua Kali Association when the said plots were being allocated by the association to squatters within Soweto slums, Kayole, Nairobi County. Immediately he became possessed of the suit plot, he constructed permanent structures thereat.
4. According to the applicant, the dispute involving the suit plot has been subject of proceedings between the interested party and himself in Milimani CMCC No. 9962 of 2005 since 8th September, 2005, when the interested party herein filed a plaint in Milimani CMCC No. 9962 of 2005 seeking orders as set out in the plaint annexed to the affidavit. Simultaneous thereto, the interested party herein filed a chamber summons application seeking temporary orders of injunction as set out in the chamber summons application annexed to the same affidavit and pursuant thereto, an order of temporary injunction was issued *ex parte* in favour of the Interested party the same day.
5. Upon being served with the interested party's chamber summons application aforesaid, the applicant filed a replying affidavit and a further affidavit by one **Nahashon Gichagi Macharia**, an official of the Association who has since passed on, on 16th September, 2005. To the said replying affidavit, the applicant annexed all the ownership documents he had for the suit plot including

certificate of ownership No. 248 and explained how he became possessed of the suit plot. After several adjournments, the interested party's chamber summons application aforesaid was eventually heard *inter parties* but the same was dismissed on 15th November, 2005. Subsequent thereto, the interested party served the applicant with summons to enter appearance and the applicant filed a defence on 21st February, 2007 and the interested party replied thereto on 26th February, 2007 hence the pleadings in Milimani CMCC No. 9962 of 2005 closed in February 2007. However, despite the suit being set down for hearing on numerous occasions, the same has never proceeded for hearing for one reason or another.

6. In the meanwhile on or about 31st October, 2011, the interested party applied and was granted leave to amend his plaint in the said suit and pursuant thereto, the interested party filed the amended plaint on 14th December, 2011. On or about 11th September, 2012, the interested party filed his list of documents, list of witnesses and his statement in accordance with Order 11 of the **Civil Procedure Rules**, 2010, but mischievously did not file the statements of his witnesses therewith. The applicant also filed his list of documents, list of witnesses, his statement and his witness statement in accordance therewith on or about 8th October, 2012. According to him, his witness in the said suit is one **William Wanohi Wanjama**, who was the chairman of the Association.
7. Immediately he served the interested party with his list of documents, list of witnesses, his statement and his witness statements, the interested party filed the statement of his witness wherein he replicated what the applicant's witness had stated in his statement and further on or about 29th January, 2013, the Court allowed the interested party to amend his statement wherein he changed his earlier statement on how he became possessed of the suit despite objections by the applicant's advocate's objections. Thereafter a pre-trial conference in the said suit was held on 1st March, 2013 and the parties agreed on the issues which were duly filed on 2nd April, 2013 and the suit was set down for hearing on 31st October, 2013.
8. In the meanwhile on or about 7th August 2013, a **Mr. Mwenda** of CID headquarters summoned the applicant through the applicant's telephone to appear before him on the basis of a complaint that had been lodged by the interested party thereat over the suit plot. Despite the applicant explaining to the said **Mr. Mwenda** that the dispute involving the suit plot was subject of civil proceedings in Milimani CMCC No. 9962 of 2005, the said **Mr. Mwenda** declined to take any statement from the applicant but instead summoned the applicant's witness in the said suit, **William Wanohi Wanjama** and through intimidation, duress, undue influence and threats of arrest coerced the said witness to write a statement denying that the applicant was the owner of the suit plot.
9. According to the applicant, whereas the suit plot is situated within the jurisdiction of Kayole Police Station and any purported offences, if any, ought to have been reported at the nearest police station namely Kayole Police Station, the interested party lodged the complaint at CID headquarters to exert undue pressure upon him and on or about 1st October, 2013, he was arrested and detained at Muthaiga Police station wherein after he was charged before the chief magistrate in Nairobi Criminal Case No. 1531 of 2013 - **Republic versus Stephen Somba Kathima** - (hereinafter referred to as the criminal case) on 2nd October, 2013 with the following offences:-

i. Forcible detainer contrary to Section 91 as read with Section 36 of the Penal Code.

ii. Making a false document contrary to Section 347(a) as read with Section 349 of the penal code.

10. Thereafter the applicant was released on a cash bail of Kshs 100,000 and the Criminal Case set down for hearing on 19th November, 2013.
11. According to the applicant, in relation to the offence of forcible detainer it is alleged that the interested party has been entitled by law to the possession of the suit plot since 2nd January, 2001, notwithstanding the fact that the ownership of the suit plot is subject to proceedings in Milimani CMCC No. 9962 of 2005 aforesaid, which suit is still pending hearing and determination. Further the criminal proceedings aforesaid have been instituted almost 8 years after the interested party

- had knowledge of the certificate the applicant is alleged to have falsely made and more than 12 years from the date he committed the alleged offence and worse still after his main witness one **Nahashon Gichangi Macharia** passed on. Apart from coercing the applicant's my only other witness in Milimani CMCC No. 9962 of 2005 one **William Wanohi Wanjama**, the applicant contended that the police officers aforesaid and/or the agents of the 1st respondent through intimidation, duress, undue influence and threats of arrest have also coerced and intimidated other officials of the Association not to testify on the applicant's behalf in Milimani CMCC No. 9962 of 2005 and/or be his witnesses in the criminal case aforesaid and that the interested party has resorted to use of police and other extrajudicial means to deprive him of the suit plot through unlawful, illegal, unconstitutional and underhand means.
12. According to the applicant, if the proceedings in the said Criminal Case are allowed to proceed, there is likelihood of the court in the Criminal Case and in the Civil Suit making conflicting decisions over the same subject matter. To the applicant, the involvement of the police and the criminal process to resolve an ownership dispute through harassment and intimidation is oppressive, in bad faith, vexatious an abuse of the powers vested upon the 1st respondent's agents. He further contended that the acts of the respondents and/or their agents are illegal and in excess and/or without jurisdiction and utter disregard the **Police Act**, Cap 84, Laws of Kenya and the Constitution of Kenya and that the acts of the respondents and/or their agents are *ultra vires* and inconsistent with their statutory powers in accordance with the law yet he has a constitutionally guaranteed right to equal protection and equal benefit of the law under Articles 27 and his right to property under Articles 40 of The Constitution of Kenya, 2010 which has been and will be infringed, violated and/or will continue to be violated and/or infringed with impunity if the sought orders are not granted.
 13. Apart from that it was the applicant's case that he has a constitutionally guaranteed right to a fair trial under Articles 50 of The Constitution of Kenya, 2010 which right entails being tried without unreasonable delay and which right has been and will be infringed, violated and/or will continue to be violated and/ or infringed with impunity by the respondents since the offence which he is charged with is alleged to have been committed in the year 2001, more than 12 years ago.
 14. In view of the foregoing it was the applicant's prayer that this Court ought to protect him from being subjected to harassment, intimidation, mental anguish and suffering and deprivation of the suit plot by the interested party in fraudulent collusion with the agents of the 1st Respondent through such abuse of the criminal process.

Respondent's Case

15. In opposing the application, the Respondents filed a replying affidavit sworn by **Francis Mwenda Murithi**, the investigating officer of the criminal case on 12th January, 2014.
16. According to him, the Land Fraud Investigation Unit is an elite unit mandate with the investigations of reported fraud cases involving or related to land; beside performing other functions of the National Police Service and in particular, the Directorate of Criminal Investigations as provided for under **Section 35** of the **National Police Service Act, 2011**.
17. He deposed that on 16th June 2013, a complaint was received at public complain section regarding plot No. 398 situated at Mworoto Estate within Kayole Area (the suit property) from **Peter Kinyanyui Gatitu** (herein after referred to as the complainant) and the same was later referred to Land Fraud Investigation Unit before it was assigned to him for investigation. According to him, the complainant averred that, on 2nd January 2001 he was allocated plot No. 398 by **Patanisho Jua Kali Association** and issued with a ownership Certificate serial No. 435, which was signed by the six association officials namely **William Wanjohi Wanjama** (Chairman), **Stanley Ritho** (Secretary), **Paul Irungu** (project organizing secretary), **Kelvin Ireri** (Treasurer) and **Clement Karaya** (Project Patron). After the allocation he did not develop the plot immediately due to lack of funds and in the course of time the applicant took possession and developed the plot without his authority.
18. In the course of Investigations the deponent discovered that the complainant had initially reported the matter at Kayole Divisional CID Headquarters vide OB NO.21 of 12/09/2007 however it was never investigated to its logical conclusion hence the complainant reported the same at CID

- Headquarters upon the inception of Land fraud investigation unit in the year 2013.
19. The deponent deposed that he commenced investigations, by recording the statement of the complainant detailing the acquisition process, who also mentioned that he had already filed a civil suit at Milimani Commercial Courts Civil Case No. 9962 of 2005 against the applicant which is pending determination. In the deponent's endeavors to ascertain the *bonafide* owner of the suit property he traced three former officials of **Patanisho Jua Kali Association (William Wanjohi, Clement Karaya and Kelvin Ireri)** and recorded their statements, in which the officials confirmed that plot no. 398 was allocated to **Peter Kinyanjui** on 2nd January 2001 and not to the Applicant (**Stephen Somba**), and they furnished him with their specimen and known signatures for forensic analysis. In the course of his investigations, the deponent also summoned the applicant at CID headquarters where he recorded his statement indicating that he was also allocated the suit property on 2nd January 2001 by the same officials and issued with ownership certificate No. 248 and the applicant furnished him with a certified copy of the same which he submitted together with the specimen/known signatures for forensic examination, and in his report ref: **CID/ORG/8/3/1/971 CI Alex Mwogera** a forensic document examiner at CID headquarters opined that, signatures on the certified copy of certificate in the name of **Stephen Somba** were not made by the same author when compared with the specimen/known signatures provided by the aforementioned association officials. On the same report **CI Alex Mwogera** confirmed that signatures on the certificate in the name of **Peter Kinyanjui** was made by the same author when compared with the specimen/known signatures availed by the association officials.
 20. In the course of the investigation he established one of the three officials (**William Wanjohi Wanjama**) had filed a witness statement in the civil suit No. 9962 of 2005 at Milimani Commercial Courts in support of the application (**Stephen Somba**) which contradicts the statement he recorded with him and also the forensic document examiner report. According to the deponent, the said **William Wanjohi Wanjama** gave his statement and specimen to him voluntarily and was not in any way influenced, intimidated or coerced and that at no time have the officials of the association been intimidated or influenced not to testify on behalf of the applicant and he is at liberty to utilize their testimony if he so wishes.
 21. According to him, the question of making false documents cannot and has never been addressed in the pending civil suit between the parties as the same is criminal in nature and has only been recently confirmed by the report of the forensic document examiner. He deposed that he visited the suit property together with the scenes of crime personnel and established that indeed the applicant has constructed a commercial house thereon and the same was photographed as evidence. He also recorded a statement from the applicant/accused on the 7th August 2013 and did an inventory of the documents that he provided during investigations which included a certified copy of the ownership certificate in his name.
 22. To him, the existence of a civil suit cannot operate as a bar to criminal proceedings.
 23. Upon completion of the investigation he arrested the Applicant explained the reasons for arrest and proceeded to prefer charges against him.

Interested Party's Case

24. In opposition to the application, the interested party filed a replying affidavit sworn by himself on 15th January, 2014.
25. According to him, the Applicant is misleading the court when he says that he is the legal allottee of plot No. 398 situated at Kayole According to the interested party, he is the legal allottee of the said parcel of land as it was allotted to him on 2nd January 2001 by Embakasi Patanisho Jua Kali Association and he was issued a certificate. The said Association, he deposed, was allotting these plots to squatters in the area as part of the government resettlement scheme. Thereafter, the interested party paid all requisite charges to the association and immediately took possession thereof until sometime in 2005 when he visited the said plot with the intention to start a construction project when he found the Applicant had already started construction and was claiming that the property was his and that it had also been allotted to him by the same Association that had allotted it to the interested party and he has been in possession of the property to date.
26. The interested party deposed that the dispute as to ownership was initially taken to the area Chief

and the Association committee members to try and resolve but that did not yield any fruits and that is when he decided to take the matter to court. He therefore filed a civil suit against the Applicant being Nairobi Chief Magistrate's Court Civil Suit No. 9962 of 2005 which suit has severally been in court but has never taken off for one reason or the other. He admitted that he reported the matter at Kayole police station sometime in 2007 but no action was taken. According to him, the issue of where the matter was reported is non-issue as there is no hard and fast rule as to where a criminal matter should be reported. When in 2013 he discovered that he could get assistance from the CID land fraud department, he decided to take the matter there for investigation and specifically for purpose of ascertaining which documents/certificates were genuine and valid, and after all necessary parties were summoned to the CID offices for interrogation and the documents examined by a document examiner, it was discovered that the Applicant had uttered a false document and as such criminal proceedings were commenced against him being Nairobi Criminal Case No. 1531/2013.

27. In the interested party's view, the investigators at the CID offices in commencing investigation into this matter were doing so legally and in conformity with their mandates and statutory obligations and the investigations were done fairly and without any discrimination against the Applicant. Further, the acts of the Respondents were in no way illegal, in bad faith, in abuse of power or in excess or want of jurisdiction as what was done according to the Law and by following the due and laid down procedures. He deposed that he was advised by the CID investigator one **Francis Mwenda** at the CID offices that no witness and/or person who was summoned in relation to this matter was coerced, intimidated or threatened in making false statements and what was said by the said people and/or witnesses was said out of their own free will contrary to the allegations by the Applicant. The interested party denied that he was using the court to deprive the Applicant of the property as alleged at clause 43 of the Applicant's statement. To the contrary, what he was trying to do is ascertain the true ownership of the suit property through all means available to him and the fact that he used one means does not mean that he waived his right to use the other available means and as such instituting civil proceedings did not bar him from pursuing criminal proceedings as and when the need arose.
28. The interested party was therefore of the view that the involvement of the police was so that proper investigations were conducted into the matter and that the decision to commence the criminal process was as a result of the findings of the investigators. There were no other ulterior intentions/motives in taking the matter to the CID for investigations as he only wanted the truth to come out for the true owner of the property in dispute to be identified. He denied that any unlawful, illegal, unconstitutional and underhand means were used to obtain the information that led to the arrest and subsequent charge of the Applicant. To him, all parties were called to the CID offices and given an opportunity to explain themselves including the Applicant and the documents involved were examined by a document examiner who wrote a report to that effect and as such the decision to charge the Applicant was arrived at legally, sound and with good reason.
29. Contrary to the position taken by the applicant, the interested party's view was that there is no threat of conflicting decisions being reached by the two courts because the criminal proceedings will not determine the issue of ownership as that is not the subject of those proceedings but the issue of uttering false documents and forcible detainer. The issue of ownership is still the subject of the civil proceedings and will be determined in the court. To him, the decision of the criminal court will only add weight to the civil case and not determine the issues before the Civil Court as the two are separate entities guided by separate statutes and procedures of law, are tried differently and seek for different reliefs. There is therefore nothing in Law that stops him from pursuing both criminal and civil proceedings in my pursuit of justice.
30. The interested party's position was therefore that the reliefs being sought do not touch on the proceedings in the civil case and as such there is no justifiable reason why the proceedings in being Nairobi Chief Magistrates court Civil Suit No. 9962 of 2005 should be stayed and they should therefore be allowed to proceed to trial. He deposed that he would be greatly prejudice if the court allows the stay orders to remain in force as he would be barred from the proceeding with the civil case yet the civil case is not subject to the current Application. In any event any eventual orders that will be made in this civil case. Thus the civil case should be allowed to proceed for hearing as this court rules on whether or not to prohibit the hearing and determination of the criminal case. To the interested party, if the proceedings in the two courts are allowed to continue

- the Applicant will have an opportunity to confront the evidence in both and defend himself at trial and no prejudice will be occasioned to him as the case will have determined on merit.
31. Based on the advise from his advocates, the interested party averred that no violation of the Applicant's constitutional rights has been occasioned and that both himself and the applicant are equally protected by the constitution and guaranteed the right to property and as such if the court allows this Application it will only be protecting the Applicant at his expense. Further there is no limitation as to when criminal proceedings against the Applicant can be instituted plus the Applicant is to date continuing with the offences as he is still in possession of his property and continues to use documents as his proof of ownership of the property.
32. The interested party contended that the department of land fraud at the CID headquarters was put in place sometime in year 2012 and was therefore not initially in place. Therefore when he came across the information that there is such a department sometimes last year, he decided to report his issue there for assistance since he did not get any at Kayole police station.
33. It was therefore the interested party's case that the Application herein lacks merit and should be dismissed with costs as among other reasons the legal principles governing the granting of the judicial review orders sought have not been satisfied by the Applicant against the interested party and prayed that the Application be refused.

Applicant's Rejoinder

34. In a rejoinder the applicant filed a further affidavit sworn on 3rd February, 2014 in which he deposed that whereas mere existence of a civil suit cannot operate as a bar to criminal proceedings, an abuse of court process if criminal justice system is used to advance ulterior motives. To him, the respondent's agents and in particular **Francis Mwenda Murithi** is abusing the power bestowed upon him by the **National Police Service Act**, 2011 in deciding to institute criminal proceedings against him in the said criminal case which are as a result of poor and improper investigations or not at all since if he did, he could not have caused him to be charged in the said criminal case and would established that the interested party herein is colluding with officials of the association and in particular **Clement Karaya Wanyigi** to deprive him of the suit property. According to the applicant, if proper investigations had been conducted devoid of ulterior motives, the investigations officer, **Francis Mwenda Murithi**, would have found that the interested party contradicted himself for almost three occasions on how he became possessed of the suit plot. Further, the said **Francis Mwenda Murithi** has deliberately failed to inform this court the outcome of the investigations by the Kayole CID officers whose existence are doubtful and what action the interested party took between the year 2007 and 2013, almost 6 years, after no investigations were carried out by the Kayole Divisional CID headquarters.
35. The applicant reiterated that the foregoing notwithstanding, the criminal proceedings aforesaid have been instituted almost 8 years after the interested party had knowledge of his ownership certificate the applicant is alleged to have falsely made and more than 12 years from the date he committed the alleged offence and worse still after his main witness one **Nahashon Gichangi Macharia** passed on. To the applicant, the said **Francis Mwenda Murithi** has not availed any evidence to show that the purported elite unit at the CID headquarters is the only entity that is mandated to investigate fraud cases involving or related to land as intimated at paragraph 2 or at all and/or Kayole CID officers have no mandate to investigate fraud cases involving and /or related to land. To him, Kayole Police Station was vested with proper jurisdiction to investigate any complaint involving and/or related to the suit plot, if any, by the interested party lodge the complaint at CID headquarters mischievous and exert undue pressure upon him.
36. It was his view that the statement by the said **William Wanjohi**, **Clement Karaya** and **Kelvin Ireri** alluded to in the replying affidavit of the Respondent have deliberately and mischievous not been annexed with intent to conceal material particular to this court.
37. The applicant's position was that the delay in prosecuting him and after my witnesses have passed on is unreasonable, mischievous, an abuse of the court process and a violation of his constitutionally guaranteed right to a fair trial. He deposed that the other officials of the Association one **William Wanjohi** and **Samuel Kariuki** have been coerced, intimidated, unduly influenced and threatened with arrest by the said **Francis Mwenda Murithi**. However, the said persons indicated to him their willingness to testify on my behalf if their safety is guaranteed.

38. From the contents of paragraph 16 of his replying affidavit, the applicant deposed that the Interested Party has confirmed his using the criminal proceedings aforesaid as a collateral attack and/or to boost his case in Milimani CMCC No. 9962 of 2005 and that he stands to suffer great prejudice and injustice if he is subjected to both the civil and criminal proceedings simultaneously.

Applicant's Submissions

39. It was submitted on behalf of the Applicant that notwithstanding the provisions of Article 157 of the Constitution, the discretion bestowed upon the Respondent should be exercised in a quasi-judicial way rather than arbitrarily, oppressively or contrary to public policy. The said discretion should be exercised to promote the policies and object of the law as set out in section 4 of the **Office of the Director of Public Prosecutions Act**. Accordingly, the Court will always intervene where impugned criminal proceedings are instituted for other means other than the honest enforcement of criminal law and reliance was placed on **Vincent Kibyege Saina vs. Attorney General High Court Miscellaneous Civil Application No. 839 of 1999**. It was further submitted based on **Michael Monari & Anor. vs. The Commissioner of Police & 3 Others Nairobi HC Msc. Appl. No. 68 of 2011** that the Court has the power and duty to prohibit the continuation of a criminal prosecution if extraneous matters divorced from the goals of justice are the guiding factor..
40. It was submitted that the interested party at paragraph 12 of the replying affidavit deposed that what he was trying to do was to ascertain the true ownership of the suit property through all means available to him hence is abusing, misusing and manipulating the criminal justice system for ulterior motives. According to the applicant, the respondent's discretion is being abused or used to achieve some collateral purpose not geared towards the vindication of the commission of criminal offence since the interested party has deposed at paragraph 16 of the replying affidavit that the decision of the criminal court will only add weight to the civil case.
41. It was further submitted that the Court has powers to grant an order of prohibition to a person who is a victim of oppression. The Court, it was submitted ought to protect the applicant's constitutionally guaranteed rights under Articles 27, and 50 of the Constitution. It was submitted that the criminal case was instituted almost 8 years after the interested party had knowledge of the impugned certificate and almost 12 years after the date of the alleged offence was committed. In deciding to charge the applicant after such a long period of time when the applicant's witness has passed on, the Respondent has contravened and/or violated the fundamental rights and freedoms of the Applicant.
42. While reiterating the contents of the verifying affidavit, it was submitted that a criminal prosecution commenced in the absence of proper factual foundation or basis is always suspect for ulterior motives or improper purpose. Since the issue of ownership and/or who is entitled to possession of the suit plot is yet to be determined in the Civil Suit, there is no reasonable and probable cause for mounting a criminal prosecution against the Applicant on a false and mistaken notion that the interested party is by law entitled to possession of the suit plot.

Respondent's Submissions

43. On behalf of the Respondents, it was submitted that the application lacks merit and does not disclose any ground for judicial review since the applicant has only asserted that there is no material evidence on which the resection can say with certainty that they have a prosecutable case. In challenging the sufficiency of the prosecution case, the applicant has delved into the merit of the case rather than the decision making process. In support of this submission the Respondent relied on **Thuita Mwangi and Others vs. The Ethic and Anti-Corruption Commission and Others Petition No. 153 of 2013** and contended that the accuracy and veracity of evidence in a case can only be tested by a trial court that is equipped to handle such matters and this can only be possible if the prosecution is allowed to tender evidence before a trial court. The case of **Michael Monari & Anor. vs. The Commissioner of Police & 3 Others** (supra) as well as **Francis Mbugua vs. Commissioner of Police and 2 Others Petition No. 79 of 2012** were cited in support. It was submitted that the contentions of the applicant amount to tendering evidence before the wrong forum and that the evidence gathered so far such as the forensic expert report are

- sufficient proof of commission of a criminal offence.
44. With respect to the period taken, it was submitted that criminal cases are only prosecutable when they are discovered and in this case the same was only discovered when the certificate was subjected to forensic examination.
45. It was submitted based on *Kenya National Examinations Council vs. Republic* Civil Appeal No. 266 of 1996 that the applicant has not shown that the grounds for grant of judicial review have been proved. Based on **Beatrice Ngonyo Kamau and 2 Others vs. Commissioner of Police and Others Petition No. 251 of 2012**, it behoves a petitioner to show by tangible evidence that the DPP in exercising his wide prosecutorial powers has acted against the public interest, against the interest of the administration of justice and has abused the legal process and on the authority of **Paul Ng'anga Nyaga & 2 Others vs. The Hon. AG & 2 Others Petition No. 518 of 2012**, it was submitted that a court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they acted in contravention of the Constitution and the Court cannot prevent the police or the Director of Public Prosecutions from carrying out investigations on reasonable suspicion that an offence has been committed in that they are executing their constitutional duty and obligation. According to the Respondent, under section 193A of the ***Criminal Procedure Code***, the fact that any matter is 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. In light of the findings in the report by the forensic examiner concerning the authenticity of the certificate, it was submitted that the criminal charges cannot be said to be unfounded.

Interested Party's Case

46. On behalf of the interested party it was submitted that the grounds relied upon by the applicant do not warrant the grant of the orders sought since the decision to charge the applicant with the offences in question was reached after proper and legal investigations were conducted hence the decision to charge the applicant was not for any other purpose but to ensure that a crime that had been committed is punished.
47. According to the interested party the criminal and civil proceedings can go together hence there is no abuse of the criminal process. In his view there are no constitutional rights of the applicant which have been violated or infringed. In support of his position, the interested party relied on **Republic vs. Director of Public Prosecutions & 2 Others Ex Parte Yobesh Amoro [2012] KLR** and **Republic vs. Director of Public Prosecutions & Another ex parte Cyrus Cheboi Rotich [2012] EKLK**.

Determination

48. It is trite that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review 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.

49. 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. This is case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations”

50. 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).

51. 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.”

52. 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.”

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

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform.....A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society’s senses of fair play and decency and/or where the proceedings are oppressive or vexatious... The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court’s) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far that which the courts indeed the entire system is constitutionally mandated to administer... In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute. It is further alleged that the criminal prosecution is an abuse of the court process epitomised by what is termed as selective prosecution by the Attorney General. It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit.....The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law... In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings

are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed... There is nothing which can stop the from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made.....Under section 77(5) of the Constitution it is a constitutional right that no person who has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of the offence. What is clear from this constitutional right is that it prevents the re-prosecution of a criminal case, which has been determined in one way or another. However, it does not mean that a civil suit and a criminal case cannot co-exist at any one particular time. This is because the section envisages the re-prosecution of a criminal case substantially dealt with either in fact or law, a case in which issues have been laid to rest. There is no mention in the section that the simultaneous existence of a civil and criminal cases is constituting double jeopardy. The courts have, however stated that the power to issue an order of prohibition to stop a criminal prosecution does not endow a court to say that no criminal prosecution should be instituted or continued side by side with a civil suit based on the same or related facts, or to say that a person should never be prosecuted in criminal proceedings when he has a civil suit against him relating to matters in the criminal proceedings... The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution... 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 fair 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.”

54. 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...”

55. 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”.

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

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

57. It is therefore clear that whereas the discretion given to the 3rd 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.

58. 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.
59. 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.
60. In this case it is the applicant's case that the criminal charges contravene his right to fair trial under Articles 27 and 50 since the same is being undertaken after the lapse of a very long period of time and when his main witness has passed away. In George Joshua Okungu & another v Chief Magistrate's Court Anti-Corruption Court At Nairobi & another [2014] eKLR this Court cited with approval the holding in R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001 to the effect 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."

61. In Okungu's Case (supra) the Court further held while citing Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323:

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 leveled against the Petitioners, the issues seemed to stem from the failure to follow the laid down regulations and procedures in arriving at the decision to sell the company's idle/surplus non core assets. In our view ordinarily it does not require a year after completion of investigations in such a matter for a decision to prosecute to be made. That notwithstanding, it is not mere delay in preferring the charges that would warrant the halting of the criminal proceedings. Rather, it is the effect of the delay that determines whether or not the proceedings are to be halted. In this case, there is no allegation made by the Petitioners to the effect that the delay has adversely affected their ability to defend themselves. In other words, the Petitioners have to show that the delay has contravened their legitimate expectations to fair trial. 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 infeasible 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. ”

62. In this case, the criminal charges have been brought 12 years after the alleged offence was committed. The explanation given by the Respondents is that it was not until recently that a forensic examination report was availed. However, it is clear that the interested party had reported the matter to Kayole Police Station sometimes in the year 2007 but no action was taken. No explanation has been given why the said Police Station did not take action immediately. Forensic investigations have been in this country since time immemorial. It cannot be said that forensic science has just been known to us. No explanation has been given why the Kayole Police Station was unable to resort to such evidence when the matter was reported to it.
63. Whereas delay ipso facto would not justify the Court in prohibiting criminal proceedings, where the said delay has the effect of either giving the applicant a legitimate expectation that criminal charges will not be levied or where as a result of unjustifiable delay the applicant is thereby deprived of the ability to fairly defend himself, the Court would be justified in granting an order prohibiting the criminal trial. In this case the applicant contends that as a result of the delay in bringing the criminal charges, his main witness has passed away. In my view, the loss of potential witnesses as a result of long delay in bringing the charges may be a ground for halting criminal proceedings.
64. It is also the applicant's case that criminal proceedings are being abused or used to achieve some collateral purpose not geared towards the vindication of the commission of criminal offence. In his affidavit, the interested party who is the complainant in the criminal case averred:

12. THAT I am not using the court to deprive the Applicant of the property as alleged at clause 43 of the Applicant's statement. What I am trying to do is ascertain the true ownership of the suit property through all means available to me and the fact that I used one means does not mean that I waived my right to use the other available means and as such instituting civil proceedings did not bar me from pursuing criminal proceedings as and when the need arose.

13. THAT the involvement of the police was so that proper investigations were conducted into the matter. The decision to commence the criminal process was as a result of the findings of the investigators. There were no other ulterior intentions/motives in taking the matter to the CID for investigations as I only wanted the truth to come out for the true owner of the property in dispute to be identified.

16. THAT in any event I am advised by my advocates on record which advise I very believe to be true that the decision of the criminal court will only add weight to the civil case and not determine the issues before the Civil Court as the two are separate entities guided by separate statutes and procedures of Law, are tried differently and seek for different reliefs. There is therefore nothing in Law that stops me from pursuing both criminal and civil proceedings in my pursuit of justice.

65. What comes out from the foregoing paragraphs is that the interested party resorted to the criminal

process as a means of achieving his claim to the suit land and further as a mechanism for gathering evidence to bolster his civil case. In other words the interested party's interest in the criminal case which was initiated by his complaint is geared towards achieving some collateral purposes which are not geared towards the vindication of the commission of a criminal offence. As demonstrated in the authorities cited hereinabove such intention cannot be countenanced moreso where the trial process is likely to be unfair to the accused as a result of the long delay in commencing the criminal charges.

66. In **Musyoki Kimanthi vs. Inspector General of Police & 2 others [2014] eKLR**, Majanja, J, found and held the purpose of the lodging the complaint was to assist the plaintiff in the **ELC Case** make out its case that the defendant's title to the suit property was a forgery and that the very purpose of the civil proceedings was to establish the owner of the suit property and the police were drawn in to assist the plaintiff make out its case. The learned Judge accordingly found that if the criminal case against the petitioner continued, it would amount to an abuse of the court process and accordingly quashed the criminal proceedings and prohibited the prosecution of the petitioner in the criminal case.
67. It must be emphasised that in granting an order of prohibition the Court is not concerned about the innocence or otherwise of the applicant. This recognition was made in **Okungu's Case** (supra) where the Court expressed itself as follows:

It is therefore clear that whereas the discretion to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt. Similarly where the commencement or continuation of the criminal prosecution will result in abrogation of the Petitioner's rights and freedoms enshrined in the Constitution, the Court is under a duty to bring such proceedings to a halt. In so doing, it must be emphasised that the Court is not concerned about the innocence or otherwise of the Petitioner. The Court's duty is only to ensure that the Petitioner's rights and freedoms as enshrined in the Constitution are protected and upheld. As was held Wendoh, J in *Koinange vs. Attorney General and Others* [2007] 2 EA 256, the jurisdiction of the Court in Constitutional matters is limited to inquiring into the allegations of violation of fundamental rights as alleged by the applicant and what remedies, if any, the court can grant. As was stated in the case of *Githunguri vs. Republic KLR* [1986] 1:

"We speak in the knowledge that rights cannot be absolute. They must be balanced against other rights and freedoms and the general welfare of the community. We believe we are speaking correctly and not for the sake of being self laudatory when we say the Republic of Kenya is praised and admired by other people and other systems for the independent manner in which justice is dispensed by the courts of this country. We also speak knowing that it is our duty to ask ourselves what is the use of having a Constitution if it is not honoured and respected by the people. The people will lose faith in the constitution if it fails to give effective protection to the fundamental rights. The people know and believe that to destroy the rule of law you destroy justice thereby also destroying the society."

68. Having considered the application herein I am satisfied, just like Majanja, J was in the above cited case that to proceed with the criminal trial after the lapse of 12 years without any compelling reason when the applicant's main witness has passed away coupled with the fact that the interested party's principal motive is the collation of evidence to strengthen his civil case warrants the halting of the criminal trial.
69. I do not see any bar to the interested party calling the maker of the forensic report to give evidence in support of his case if he so wishes.

Order

70. In the result I find merit in the Notice of Motion dated 7th November, 2013.

71. Consequently I grant the following orders:

1. **An order of Certiorari removing to this High Court for the purposes of being quashed the decision of the 1st and 3rd Respondents to charge and prosecute the Applicant before the 2nd Respondent in Nairobi Criminal Case No. 1351 of 2013 (Republic versus Stephen Somba Kathima) which decision is hereby quashed.**
2. **An order of Prohibition directed to the 1st and 3rd Respondent prohibiting and/or to restraining them from prosecuting and/or continuing to further prosecute the Applicant in Nairobi Criminal Case No. 1531 of 2013 (Republic versus Stephen Somba Kathima).**
3. **An order of prohibition directed to the 2nd Respondent or any other Magistrate prohibiting and/or to restraining him/her from hearing and/or further hearing and/or determining the proceedings in Nairobi Criminal Case No. 1531 of 2013 (Republic versus Stephen Somba Kathima).**
4. **The costs of this application are awarded to the Applicant to be borne by the 1st and 3rd Respondents.**

Dated at Nairobi this 22nd day of July 2014

G V ODUNGA

JUDGE

Delivered in the presence of: