REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW CIVIL APPLICATION NO. 89 OF 2014

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF PROHIBITION

AND

IN THE MATTER LAND DISPUTE RELATING TO LAND PARCEL NO. 9723 (IR 15449) OTHERWISE KNOWN AS SERGOIT RIVER FARM

AND

IN THE MATTER OF CHIEF MAGISTRATE COURT AT NAIROBI CRIMINAL CASE NO. 1351 OF 2012

ERICK KIBIWOTT TARUS ……...……..……1ST APPLICANT

EZEKIEL KIPKULEI KOMEN……...……..…….2ND APPLICANT

BENJAMIN KIPKORIR KUTO……...…….3RD APPLICANT

VERSUS

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

CHIEF MAGISTRATE NAIROBI……..…..……..…2ND RESPONDENT

INSPECTOR GENERAL OF POLICE…….....……..3RD RESPONDENT

AND

KARIM LALJI (Legal Representative

of the Estate of the late Esmail Lalji)…….…...1ST INTERESTED PARTY

ANNE NYONGIO KIMETEI……..……..…..2ND INTERESTED PARTY

TOM MAINA CHEPKWESI…….....….3RD INTERESTED PARTY

BENJAMIN KIPKORIR ROTICH……..…..4TH INTERESTED PARTY

HASHAM LALJI PROPERTES LTD…..…….5TH INTERESTED PARTY

Ex parte: **ERIC KIBIWOTT & 2 OTHERS**

JUDGEMENT

1. By a Notice of Motion dated 12th March, 2014, the *ex parte* applicants herein, **Erick Kibiwott Tarus, Ezekiel Kipkulei Komen and Benjamin Kipkorir Kuto**, seek the following orders:

1. This Honouable Court be pleased issued an order of Prohibition stopping the Director of Public Prosecutions, the Inspector General of Police and the Chief Magistrate, Nairobi from commencing, proceeding and/or continuing with the Prosecution of the Applicants before the Chief Magistrate's Court at Nairobi in Criminal Case Number 1351 of 2012 arising out of the complaint lodged by Annah Kimitei concerning lad parcel LR No. 9723 Sergoit Farm, Eldoret also known as Title Number Kiplombe/Kiplombe Block 11.

2. Costs of this application be provided for.

2. The application was supported by an affidavit sworn by **Erick Kibiwott Tarus** sworn on 5th March, 2014.

3. According to the deponent, he was the 1st Plaintiff in Nairobi High Court Suit No. 90 of 2004 (OS) which case was filed by himself and 51 others in 2004. He deposed that by an order of this Honourable Court given on 10th February, 2005 by **Mr. Justice Ransley**, it was held that they had acquired individual registrable rights of their individual portions under prescription and adverse possession in the suit property. He added that the Honourable Attorney General was a party to the suit and the order was given upon hearing both the Attorney General and their advocate.

4. According to the deponent, the land awarded to them by the High Court excluded a total of 318 acres which they recognize and admit in the suit to be portion of the property belonging to the late **Nyongio Kimitei**. **Annah Kimitei**, the said deceased's widow and administrator of her late husband's estate is the complainant in the Criminal Case before the Chief Magistrate.

5. On 3rd March, 2006 the **Honourable Lady Justice Mugo** issued a further Order authorizing the Deputy Registrar of the High Court to execute all documents relating to the Land Control Board and transfer of their individual land parcels to them. On 16th November, 2006 the **Honourable Land Justice Aluoch** gave an order setting aside the Honourable order given by **Mr. Justice Ransley** and gave leave to the Complainant in the criminal case to defend the High Court suit.

6. Upon obtaining the vesting order, the same was registered against the title LR. No. 9723 Sergoit Farm at Lands Office in Ardhi House and the then Minister for Lands, the **Honourable Amos Kimunya** also gazetted conversion of the land parcel from a holding under the ***Registration of Titles Act*** (Cap 281) to one under the ***Registered Lands Act*** (Cap 300) and some title deeds were issued to some of the Plaintiffs, pursuant to the Court Order of the High Court.

7. It was deposed that the complainant instructed Messrs Kwengu & Company Advocates to represent her in the High Court and she filed her documents in the case which case has variously been fixed for hearing but has never taken off and was set for hearing on the 25th, 26th and 27 March, 2014. However as they were preparing for the hearing before the High Court for the HCCC No. 90 of 2004 (OS) the deponent, together with the two other Applicants herein were arrested and charged with the offence of defrauding

the said **Anna Kimitei** of the same land awarded to them in the suit by **Mr. Justice Ransley** on 10th February 2006. To the deponent, this is precisely the same dispute which is subject matter of the High Court case set down for hearing on 25th, 26th and 27th March, 2014 aforesaid and all the issues canvassed in the fairly new Criminal Case No. 1315 of 2012 concerning the three of them are on all fours, identical and exactly the same as in the much older High Court Suit No. 90 of 2004 (OS) with the Complainant in the Criminal Case being a party in the High Court case and is represented by counsel. The Hon. Attorney General is also a party in the suit, being that the Government authorized and supervised the allocation of the individual parcels of land to them, the accused/Plaintiffs.

8. It was the deponent's position that the Applicants herein have not been indolent but had the High Court case fixed for hearing severally, but the same was unable to proceed due to various reasons, not of the Applicant's making, i.e. on 26th February, 2009, 20th September, 2011, 19th June 2012. On the other hand, the Criminal case has been fixed for hearing for 5 consecutive days the week prior to the hearing of the High Court case, i.e. on 10th, 11, 12th, 13th and 14th March, 2014 and there is a real likelihood of very serious conflict between the two cases as the High Court will be determining the issue of Adverse Possession and prescriptive rights of the plaintiffs, the Applicants herein and the accused persons in the lower court, whereas the lower court will be determining conspiracy to defraud the same land, subject matter of adjudication before the High Court.

9. The deponent deposed that he was the 1st Plaintiff in the High Court suit and the 3rd accused in the lower court; the 31st Plaintiff in the High Court is the 5th Accused in the Criminal Case; while the 39th Plaintiff is son of the 5th Accused, who gave his portion of land of 5 acres to his son, the 39th Plaintiff in the High Court.

10. According to the deponent, in the CID Referral Form, which is the official record and summary of the Criminal complaint in the Chief Magistrates case 1351 of 2012 the Complainant states as follows:-

NATURE OF REPORT: THAT on 10/1/1981 that her late husband NYONGIO KIMETEI bought a parcel of land known as L.R No. 15449/1 LR No. 9723 measuring approximately 795 Ha from BAHADURALI NYRAN who handed over the necessary documents appertaining to the land. In the year 1985 five other persons started to claim owner ship of 477 Ha. purporting to have acquired the same from the original seller and the government. The five suspects are ERIC TARUS, WILFRED KIMALAT, JOSIA MAGUT, EZEKIEL KOMEN and BENJAMIN KUTO. She reported this matter to Eldoret Police Station in the year 1997 and no action has been taken. She reports for further investigation. (annexed marked "7A")

11. According to the deponent, all the suspects named in the CID Report by the Complainant are parties to the High Court suit as follows:-

(a) Eric Tarus is the 1st Plaintiff

(b) Wilfred Kimalat is the 13th Plaintiff

(c) Josia Magut is the 15th Plaintiff

(d) Joseph Komen , the son of Ezekiel Komen who was given the 5 acre parcel by his father is the 39th Plaintiff

(e) Benjamin Kuto is the 31st Plaintiff

However, the CID Report is misleading in its material particulars in that the land does not measure 795 hectares, i.e. 4,000 acres. Its size is 795 acres.

11. According to him, in the High Court Suit No. 90 of 2004 (OS), the Complainant's counsel had filed

all the documents including Witness Statements and Order 11 of the ***Civil Procedure Rules*** has been fully complied with by all the parties in readiness for the hearing in the month of March, 2014 aforesaid and based on her witness statements before the Chief Magistrate and the High Court, it is quite obvious that the issues raised in both the criminal and civil jurisdictions are the same. To the deponent, the envisaged conflict in the judgments that may emanate from both cases, i.e., from the Chief Magistrate and the High Court may result to an obvious serious miscarriage of justice. Should the trial judge make findings that the accused/Plaintiffs have acquired registrable rights under Adverse Possession and Prescription, and at the same instant, the Chief Magistrate make findings that land fraud had been committed, both from exactly the same set of facts, we could well be serving sentence as real and actual proprietors of the land for which we could contemporaneously be in jail for. The deponent emphasised that **Mr. Justice Ransley** vide the order, given on 10th February, 2005 already held that the accused/Plaintiffs had acquired registrable rights by Adverse Possession and Prescription.

12. To the deponent, Police Investigators have indeed overstepped their mandate as follows: The Registrar of Lands at Ardhi House who effected the **Honourable Mr. Justice Ransley's** Vesting Order, upon its extraction and registration against the title by the accused/Plaintiffs has, for doing her work as per the Court Order been arrested and charged as accused No. 6 before the Chief Magistrate together with the Plaintiffs with the Offence of abuse of office; the Uasin Gishu District (County) Registrar of Lands who issued title deeds to the accused/Plaintiffs following official Government conversion of the applicants' holdings under ***Registration of Titles Act*** (Cap 281) to those under the ***Registered Lands Act*** (Cap 300) *(both now repealed)* was also arrested and charged, together with the accused/Plaintiffs with the offence of abuse of office; The gazettement of the conversation of the land so as to facilitate issuance of titles was done by the **Honourable Amos Kimunya** who was, the then Minister for Lands and Housing; the police investigation team had also set out to arrest and charge the advocates who filed and argued the High Court Suit No. 90 of 2004 (OS) before the Honourable **Ransley, J**. However, following an official written complaint by the advocate to the Director of Criminal Investigations, the threats were abandoned. On the basis of the withdrawal by the police of the intention to arrest the advocate for nothing more than doing his work within the law, the advocates withdrew Judicial Review Application Number 437 of 2013, **Z.N. Gathaara – versus Inspector General of Police and the Director of Public Prosecutions**; the 7th accused, **Bahadurali Hasham Lalji Nurani** is a brother of one **Diamond Nurani**, the person believed by the accuse/Plaintiffs to be behind their travails in the Criminal case in an otherwise civil matter which is squarely in the able hands, and being handled by the High Court ELC Division at the High Court in Nairobi; and that the Respondents have constantly kept amending the charge sheet reflecting various persons as the complainants, firstly, **Anna Kimitei**, then the original pre-colonial white settler owner, one **Donald James Gear**. Upon being pressed by the Defence to furnish the statement of the said **Donald Gear**, the Respondents re-amended the charge sheet to once more reflect **Anna Kimitei** as the complainant.

13. There has been a simmering dispute of the ownership of 477 acres of land between the **Nurani** brothers leading to arrest of accused No. 7 in this instant case. The charges against accused No. 7 have been subsequently withdrawn in between his being charged and the date of the next mention. An earlier Criminal Case against another of his brothers involving forgery and transfer of the same land parcel, i.e. ***Chief Magistrate Criminal Case No. 1362 of 1997 Republic –vs- Esmail Hasham Lalji Nurani*** was also never concluded. In that case, the Complainant clearly colluded with the said to (sic) defraud the Applicants herein of the portion of the land allocated to them by Government. To the deponent, the Complainant in the current Criminal Case before the Chief Magistrate was also the Complainant before the Chief Magistrate against **Esmail Nurani**, the 3rd Nurani brother, who forged Transfer and obtained title in his name. The forged entry to the Registrar still bears the name of the accused in Criminal Case No. 1362 of 1997, **Republic –vs- Esmail Hasham Lalji Nurani**. The 7th Accused is actually the person who lawfully transferred the 477 acres of the land to the Government for distribution to the accused/Plaintiffs and other Kenyans as follows;

(a) 20 acres for social amenities

(b) 80 acres to the 1st Complainant

(c) 377 acres into 5 acre portions to the accused/applicants and other Kenyans

14. The above events and trend show that there is a real likelihood that the **Nurani** and/or **Mrs Anna Kimitei** and/or both, could jointly be involved in a scheme to abuse the due process, by misusing police powers to intimidate and harass us, the accused/Plaintiffs. It is instructive that the dates for hearing before the Magistrate's Court, i.e. the 10th, 11th, 12th, 13th and 14th March, 2014 are a week ***before*** the High Court commences hearing the much older 2004 civil case.

15. Based on the foregoing the deponent believed that that the criminal case, in view of the earlier and much older pending civil case involving exactly the same questions is a ploy to use the police and prosecutorial powers beyond the purview of the core duty of the Respondents, i.e. maintaining law and order. To him, the complainant, being a party and being represented by counsel and having actively participated vigorously in the Civil High Court matter, would suffer absolutely no prejudice or denial of justice, if she were to await the findings of the Honourable trial judge in the High Court.

16. He reiterated that there is real likelihood of a clash between the Chief Magistrate and the High Court, which could only be avoided by an Order of Prohibition issuing, prohibiting their trial before the Chief Magistrate so as to facilitate uninterrupted disposal of the High Court suit.

17. He contended that the audacity of the Respondents is best manifested by the particulars of the Charge in Count No. 3 where they refer to the pending High Court No. 90 of 2004 (OS) and arrogate to themselves the power to determine and interpret an order issued in the OS by the High Court, alleging that the same has been disobeyed necessitating criminal charges before the Magistrate, yet the order allegedly disobeyed and giving raise to the charge before the magistrate may well be subject matter of evidence during the hearing of the suit before the High court. Further, there is a real likelihood that the judge trying the civil case may face a situation where the Plaintiffs could be jailed and be serving sentence on issues, facts and the law applicable in the matter, before the High Court has had time to hear, adjudicate and determine.

1st and 3rd Respondents' Case

18. In opposing the application, the 1st Respondent filed the following grounds of opposition:

1. THAT the 1st respondent has and continues to act within the premises of the law as mandated by the constitution as well as statute in trying the petitioners for offences recognized by law.

2. THAT the order of prohibition as sought by the applicants is not available.

3. THAT the matters presented before the court are not within the purview of Judicial Review court but a trial court which proceedings should not be stopped .

4. THAT the matters pertaining to the suit in the Chief magistrates court (CMCR 1351 OF 2012) allude to elements of criminal offences within the laws of Kenya which led to investigations culminating into the arrest and charging of the applicants before the court.

5. THAT Sections 193A of the Criminal procedure Act (CAP 75) Laws of Kenya clearly does not in any way stay or prohibit the handling of the criminal and civil matters concurrently given the hybrid nature of the case.

6. THAT the application is an abuse of court process and lacks merit and should be dismissed.

19. Apart from that the 1st and 3rd Respondents filed a replying affidavit sworn by **Cpl Thomas Othoo**, the lead investigating officer stationed at CID Headquarters investigations Branch, Nairobi on 28th

20. According to him, a complaint was made on the 21st day of March 2012 by one **Anna Nyongio Kimitei** (acquired by virtue of letters of administration granted on 30th January 199, subsequent to the demise of her husband **Nyongio Arap Kimitei**) who reported that her parcel of land registered as LR No. 9723 IR No. 15449 also known as Sergoit River Farm measuring 795 acres situated within Uasin Gishu County was invaded by persons who claimed to be owners of the same land. The complainant further alleged that the said persons had moved the High Court in Nairobi and fraudulently obtained orders vesting the property to themselves while calling themselves Trustees of Sergoit River Farm.

21. Following the commencement of investigations it was revealed that the said parcel of Land was originally allotted to one **Donald James Gear** who employed **Nyongio Arap Kimitei** as his Farm Manager and also a driver; that, on or about 1958, **Donald James Gear** while intending to leave the county, proposed to **Nyongio Arap Kimitei** to buy the Farm at a price of Kshs. 84,000/=; that **Nyongio Arap Kimitei** being unable to pay the full purchase price approached **Bahadurai Nurani** who agreed to jointly purchase the farm from **Donald James Gear** at Kshs. 84,000/=; a subsequent transfer was thereafter made by **Bahadurali Naruni** who agreed to leave the farm under the management of **Nyongio Arap Kimitei** when he left for Canada in 1985; that sometime later, the Provincial Commissioner of Rift Valley the late **Hezekiah Oyugi** directed the District Commissioner Uasin Gishu to supervise the farm as it was being subdivided as a Government Project and this occurred during the tenure of the first applicant as the Chief of Kiplombe Location in Uasin Gishu County; that further on, the Provincial Commissioner who chaired the Provincial Land Control Board Meeting on the 28th and 29th April 1981 (in the absence of **Nyogio Arap Kimitei** and **Bahadurali Nurnani** who were not invited to attend), approved the transfer of 60% of the farm belonging to **Bahadurali Nurani** in the following proportions: (i) 20 acres of land as donation to Government of Kenya; (ii) 80 acres to **Erick Kibiwott Tarus** (1st Applicant) upon payment; and, the rest being 377 acres to **Nyongio Arap Kimitei;** that subsequent thereto on the 13th March, 1985, the interested party, **Mr. Benjamin Rotich** the District Commissioner of Uasin Gishu (then) chaired the Moiben Land Control Board Meeting (in the absence of **Nyongio Arap Kimitei** and **Bahadurali Nurnani**) and approved an alternative subdivision of the 795 acres of farm land into two portions measuring 477 acres and 318 acres respectively. The 477 acres was apportioned vide min Nos. 73, 74, 75 & 76/1985 in the following manner: (i) 377 acres transferred to the Government of Kenya; (ii) 80 acres transferred to **Erick Kibiwott Tarus**; and, (iii) 20 acres as donation to the Government.

22. It was further deposed that it was clear from the aforesaid Land Control Board Meetings that neither **Nyongoi Arap Kimitei** nor **Bahadurali Nurani** were invited to attend nor aware of the same. Following the death of **Nyongio Arap Kimitei** on 19th June 1988, his widow the complainant upon realization of the above transfers moved to the High Court in Nakuru where she filed Succession Cause No. 185/1988 and obtained Letters of Administration on 30th January 1989 and thereafter registered a Caveat to the Commissioner of Lands ownership of the 795 acres of farmland.

23. In 1994, the complainant in an attempt to resolve the issue sought the assistance of **Esmail Nurani** on the basis that various government officials frustrated her efforts to obtain her entitlement. However **Esmail Nurani** under false pretences obtained a power of attorney from her in respect of the said farmland together with the original title deed and proceeded to register the said property in 28th November 1994 to be held as tenants in common. **Esmail Nurani** later charged the title deed to the defunct **Delphis Bank Ltd** now **Oriental Commercial Bank** for a loan of Kshs. 300,000 Swiss Franc and he was later charged in Court with an offence of fraud vide Chief Magistrate Nairobi Criminal Case No. 1362/1997. Subsequent to the above events, the 1st, 2nd and 3rd Applicants among others whilst purporting to be Trustees of Sergoit River Farm, moved the High Court in Nairobi through a Civil Suit No. 90/2004 and secured a Vesting Order on 10th February 2005 by virtue of adverse possession and they immediately thereafter through their Advocate **Z.N. Gathara** wrote to the Commissioner of Lands vide letter dated 30th March 2005 requesting that the farmland which was under *Registration of Titles Act* be converted to ***Registered Land Act*** a curious request which was however honoured by **Agnes Wangu Gerald Kuria**, (6th accused and Senior Registrar of Titles, at the Land Registrar's office) vide Legal Notice No. 95/2005. The said **Agnes Wangu Gerald Kuria** on the 22nd December 2005, subsequent to the conversion of titles directed the District Land Registrar, **Tom Mainja Chepkwesi**, to transfer parcels

of land to the Applicants herein and thereafter to transfer the remainder of the land to the estate of **Nyongio Kimitei**. The Applicants herein proceeded to register themselves are proprietors to the converted titles and District Land Registrar **Tom Mainja Chepkwesi** issued fresh titles in 2006 (in the absence of the surrender of the Original Grant No. 15449).

24. Upon discovery of the foregoing, the complainant, moved the same court that issued the vesting orders on the basis of being the administrator of the estate of **Nyongio Kimitei**, the owner of the original title at which point the court joined her as an interested party and set aside the vesting orders and the order vacating the vesting order was served the District Land Registrar Eldoret, **Tom Mainja Chepkwesi**. However the upon receipt of the order, the District Land Registrar failed to register the order as required by law and in his capacity as the District Land Registrar proceeded to issue title deed number Kiplombe/Kiplombe 11 (Sergoit River Farm) this being a parcel of the farmland, to the 1st Applicant on 25th September 2009 and also registered the said title without booking the details in the presentation book as is required. Further investigations carried out revealed that the Provincial Administration assisted the purported members of Sergoit River Farm to invade, subdivide and obtain vacant possession of the said farmland prior to the issuance of the Court order on adverse possession.

25. According to the deponent, the conversion of the farmland ought to have been undertaken subsequent to the surrender of the original title deed which in this case did not occur as required by law rendering the conversion unlawful. In addition thereto, the said letters confirm that the Government of Kenya never acquired ownership of the farmland as purported by the trustees. Further, it is curious that the Chief Land Valuer pursuant to the order of the court in his letter dated 24th July, noted that LR No. 9723 (IR No. 15449) being the farmland, was never valued for acquisition between the years 1980 and 2005 by the relevant purported government authorities. In addition thereto the director of Adjudication and Settlement affirms vide his letter dated 19th July 2012 that there are no records to confirm that the Government set the said farmland as a settlement scheme and as such it remains private land.

26. The deponent further deposed that investigations conducted further revealed that monies deposited in the District Treasury in the year 1985 in respect of Sergoit River Farm was by individuals other than the Applicants and there were a myriad of evidence not mentioned hereinabove implicating the Applicants and others not before this court into the questionable acquisition, sub-division and registration of the said farmland.

27. According to him, the conclusion of investigations it was clear that the acts undertaken in terms of the acquisition, subdivision and registration of the said title deeds by the Applicants and the involvement of the Applicants prior to and subsequent the issuance of the said titles allude to elements that substantiate criminal offences within the laws of Kenya and as a result, the Applicants and others not before this court were arrested and charged with various offences as indicated in the Charge Sheet. It was therefore his view the charges referred to in Criminal Case No. 1351/2012 are properly before the Trial Court and disclose offences recognized under the laws of Kenya hence the Applicants were arraigned in court on the 3rd September 2012.

28. Based on advice from the Prosecution Counsel he believed that under Section 193A of the ***Criminal Procedure Code***, the fact that and matter in issued 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; that under Article 157(6) of the Constitution of Kenya 2010, the Respondent exercises the state powers and functions of Prosecution which entails the institution, undertaking, taking over, continuance and or termination of criminal proceedings amongst other functions and duties; that in addition thereto, the Respondent in the discharge of its duties and functions, is required to respect, observe and uphold the following Constitutional provisions, *inter alia;* (i) to have regard to public interest, the interests of administration of justice and the need to prevent and avoid abuse of the legal process under Article 157(11); (ii) uphold and defend the Constitution; (iii) the national values and principles of governance enshrined in Article 10 in the application, interpretation of the Constitution as well in making and implementing the laws and public policy decisions; (iv) respect, observe, protect, implement, promote and uphold the rights and freedoms in the Bill of Rights enshrined in Article 21(1);

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

29. In his view, the Applicants have not demonstrated that in making the decision to prefer criminal charges against them, that the Respondent acted without or in excess of the powers conferred upon them by law or infringed, violated, contravened or in any other manner failed to comply with or respect and observe the foregoing provisions of the Constitution or any other provision thereof. To the contrary, the Respondent independently reviewed and analysed the evidence contained in the investigations file as submitted (including the witness statements, documentary exhibits) as required by law and it was because of the said review and analysis that criminal proceedings commenced against the Applicants herein.

30. Based on information received from the said Prosecution Counsel the deponent believed that the Applicants are seeking to curtail the mandate of the criminal justice system actors as enshrined within the Constitution of Kenya; that the Applicants have not adduced sufficient evidence before this Court on merit to show that prejudice has been occasioned and damage suffered may render the continued prosecution of the criminal proceedings an outright abuse of the court process; that the accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of evidence gathered and properly adduced in support of the charges; that the Respondent does not require the consent of any person or authority for the commencement of criminal proceedings; that the Respondent does not act under the direction or control of any person or authority and as such Article 249(2) of the Constitution, provides that an independent office is subject only to the Constitution and the law and is not subject to the direction or control by any person or authority; and that the allegation by the Applicants is without merit, legal reason or backing.

31. The deponent, therefore urged the Court to exercise extreme care and caution not to interfere with the Constitutional powers of the Respondent to institute and undertake criminal proceedings and should only interfere with the independent judgment of the Respondent if it is shown that the exercise of his powers is contrary to the Constitution, is in bad faith or amounts to an abuse of process. In his view, the Applicants averments that the charges are trumped up geared towards harassment and/or intimidation and are well calculated to interfere with their enjoyment of rights is misconceived, unfounded, unmeritorious and baseless and they have failed to demonstrate that the Respondent has not acted independently or has acted capriciously, in bad faith or has abused the legal process in a manner to trigger the High Court's intervention. They have further failed to demonstrate that the Respondent lacked jurisdiction, acted in excess of jurisdiction or departed from the rules of natural justice in directing that the Applicants be charged with criminal offence(s). He therefore urged the Court to dismiss the application in its entirety.

1st and 2nd Interested Parties' Case

32. On their part the 1st and 2nd interested parties herein, **Karim Lalji** and **Anne Nyogio Kimitei** while opposing the application filed the following grounds of opposition:

a. The Notice of Motion as drawn cannot be granted, an order of Prohibition against the prosecution cannot be granted without and before granting an order of Certiorari to quash the decision of the Director of Public Prosecution to Prosecute taken under Article 157 of the Constitution of Kenya;

b. Section 193A of the Criminal Procedure Coder (Chapter 75 of the Laws of Kenya) provides and permits criminal proceedings and civil proceedings over the same subject matter simultaneously;

c. Without prejudice to ground (b) above, the civil matter is an adverse possession while the Criminal case is against fraud;

d. The application is, with respect an abuse of court process.

3rd Interested Party's Case

33. The third interested party, **Tom Mainja Chepkwesi**, on his part filed what was termed as a "replying affidavit" but was in support of the application sworn on 24th April, 2014.

34. According to him, he was the District Land Registrar at Eldoret, whereafter he went to Busia District now county. According to him, the Constitution, the ***Judicature Act*** and the spirit of all other statutes and precedents, and equity recommend that the courts do give regard to the substance, merits, and justice of disputes as opposed to concentration of technicalities. In the circumstances he prayed for orders of prohibition sought in the motion and additionally any other or further orders the court may deem fit and just in the circumstances of the case including orders of certiorari that the respondents and the interested party have recommended as ought to have been sought for.

35. According to him, out of the 8 counts in the case, the charges against himself are set out in count 1, 2 and 4 which charges he denied. After setting out the circumstances surrounding the issue in contention, he averred that his actions were justified by the Court orders, directive from senior lands office, and a ministerial gazette notice converting the land regime. To him the actions of transferring titles were administrative and as the prosecution has not quoted breach of any written law, administrative actions cannot be a basis for prosecution.

36. He averred that in 2006 he issued fresh titles before surrender of original grant. To him, the prosecution herein is unfounded as they have not quoted any provision of the law making it a criminal offence to issue titles before an original grant is surrendered. He contended that that the prosecution is malicious as interpretation of the meaning and import of an order made in a civil court belongs to the civil court(s) making the order not the criminal court; breach of any court orders attracts contempt proceedings which should be undertaken in the civil court where the order was made and ideally does not attract criminal prosecution as attempted herein; and the law allegedly contravened by (un-admitted allegation of) failure to register an order is not stated by the prosecution and no such law(s) exists. He further asserted that his being prosecuted for failure to book details on a presentation book is an abuse of Court process because booking any details in a presentation book is an administrative process which does not and cannot found a criminal case and at worst it attracts disciplinary action from an employer.

37. Based on advice from his lawyer, he believed that the allegations against him are therefore unfounded in fact, equity and the law and that the investigators in this case were motivated by ulterior motives. To him, the allegations of fraud conspiracy, abuse of office are all issues that could and can be raised at the civil suits correctly obtaining and that the judges presiding over the civil cases relevant to this case have competence to determine all these allegations. In his view, the decision to bring the criminal case herein was informed by a desire to shop for a forum that is hoped to be more favourable as opposed to the clear weak case that the complainant brought as a civil case and an attempt by the prosecution, to use state resources and to use the might of criminal law to make a case on behalf of the complainant and save her from incurring expenditure in continuing with the civil case, and to place the accused persons at a disadvantage in circumstances where both the complainant and the accused would otherwise be on equal footing in a civil court.

38. He therefore urged the Court, in the interest of justice, and the substance of the merits to grant the orders sought plus any other or further orders as it may deem fair, just and appropriate, inclusive of an order of certiorari to bring into court and quash the decision of the prosecution and that of the magistrate to bring into court and or prosecute, and or to entertain and or to determine the Criminal Case No 1351 of 2012 and any other similar complaint from same facts and circumstances. Further he sought that the order for prohibition to stop the Director of Public Prosecutions, the Inspector General of police and the Chief magistrate of Nairobi from proceeding and or continuing with the prosecution of the Applicants Criminal Case Number 1351 of 2012, be allowed as prayed, or any other criminal case based on the same set of facts.

4th Interested Party's Case

39. On the part of the 4th interested party, **Benamin Kipkoroir Rotich**, he on 25th March, 2015 swore a similar affidavit which was titled a "replying affidavit" but which, just as that sworn by the 3rd interested party supported the application.

40. According to him, at all material times he was the District Commissioner of the then Uasin Gishu District which is part of the Uasin Gishu County and was therefore a Person Employed in the Public Service of the Republic of Kenya. As such he was in terms of the Provisions of section 5 and schedule 1 of the ***Land Control Act*** the Chairman of the Moiben Land Control Board established under the provisions of the said Act.

41. On the 25th July 1985 he received instructions from the office of the Honourable the Attorney General by copy of a letter addressed to the District Land Registrar Eldoret and copied to The Provincial Commissioner of the then Rift Valley Province to proceed and have the relevant consents of the said Moiben Land Control Board being accorded in respect of 318 Acres as one block in favour of Nyongio Kimitei, 20 acres for schools and other social amenities, 80 acres in favour of Eric Tarus and 377 acres into five acres plots to be allocated to the landless persons. In order to ensure compliance with the said instructions he was to liaise with the District Land Surveyor and the District Land Registrar Uasin Gishu which he did. Thereafter the said Moiben Land Control Board issued the said consents to the said controlled transactions which were forwarded by the said Office of the Honourable the Attorney General to the Land Registrar Eldoret by a letter dated the 17th October 1985 which was copied to the said Provincial Commissioner and myself.

42. According to him, it is clear that the charge preferred against him is an abuse of the process of the Honourable court in that as a person employed in the public service he was merely executing the lawful instructions, orders, directions and commands of his superiors which he was legally and duty bound to obey, adhere to and faithfully execute. To him, it is also clear that in executing the said lawful instructions, directions, orders and commands the particulars of the charge preferred against him purport to criminalize the said lawful instructions, directions orders and commands.

43. He further averred that he was aware that the Applicants in the present proceedings are also part of the Plaintiffs in Nairobi High Court Civil Suit No. 90 of 2004 (OS) fixed for hearing on the 25th, 26th and 27th March 2014 before the ELC Division of this Honourable Court and that in the present proceedings the 1st accused **Tom Mainja Chepkwesi** in the said Chief Magistrate number Criminal Case 1351 of 2012 and the estate of the late **Lalji Nurani** have been granted leave to be joined as interested parties therein. He was therefore of the view that it is an imperative that in order for the issues in all these cases to be effectually and completely adjudicated upon and all questions involved thereto settled the said issues and questions are best dealt with in the current proceedings and those in Nairobi High Court Civil Suit No. 90 of 2004 (OS) as they are civil in nature.

5th Interested Party's Case

44. On behalf of the 5th Interested Party, **Martin Bett**, its Legal Officer filed a replying affidavit sworn on 12th May, 2014.

45. According to the deponent, the 5th Interested Party, **Hasham Lalji Properties Ltd** was founded by the late **Hasham Lalji** and with the main shareholders being five brothers **Sultan Hasham Lalji**, **Bahadurali Hasham Lalji**, **Esmail Hasham Lalji** (deceased) and **Ahmed Hasham Lalji** and **Diamond Hasham Lalji**, a co-owner of Sergoit River Farm, LR No. 9723.

46. According to him, the said property known as Sergoit River Farm, LR Bo. 9723 was initially owned by **Donald James Gear** which property was subsequently, jointly bought by **Hasham Lalji Properties Ltd** jointly with the late **Nyogio Kimitei**. It was understood amongst the shareholders herein the brothers that whoever would be registered as proprietor, would be registered so in trust for all the other brothers. He deposed that **Hasham Lalji's** share of property is 60% while the late **Nyongio Kimitei** owned 40%. However after finalization of the sale transaction, **Donald James Gear** passed title of ownership to

Diamond Hasham Lalji with **Mr. Nyongio Kimitei** but were to hold the same in equal share, with **Diamond Hasham Lalji** holding the property in trust and on behalf of the company which had financed purchase the farm. According to him, the original owner herein **Donald James Gear** executed the final transfer document in 1981 which was in support of the 1964 consent letter that validated transfer and ownership to **Mr. Diamond Hasham Lalji** and the late **Nyongio Kimitei**.

47. Based on the information from the Directors of the 5th Interested Party he deposed that the purported transfer of the 60% shareholding to the late **Nyongio Kimitei** was never sanctioned by the Directors and Shareholders of the company and neither were they aware of the same and **Mr. Bahadurali Hasham Lalji** had no authority or consent to dispose of the property to the **Nyongio's**. Further, the purported land control board meeting affirming that the Government had purchased the 60% shareholding was a total deception by the Applicants to conceal their illegality in dispossessing the Hasham Lalji Group its shares of the property and their criminal acts were established when they were charged in criminal case No. 1351 of 2012.

48. To him, from various statements made by **Bahadurali Lalji** and **Esmail Lalji** they indeed confirmed that they were holding the property in trust and for the benefit of the company and at no time did they agree to dispose of the property to either an individual or institution. Therefore the transfer of property to any person without regard to **Hasham Lalji's** share being preserved to the shareholders of the company were a forgery, criminal, unlawful and unauthorized by the directors and shareholders of the company and various correspondences from the land office questioned the manner the 60% shareholding was acquired and how the transfers were effected to various individuals.

49. According to him, contrary to the allegation that there is a dispute between them the shareholders over this property, there is no such dispute at all. To the contrary, it was agreed that the shareholder was registered as a trustee for all and that the late **Esmail Hasham Lalji** who fraudulently transferred the property and purported to dispose or deal with it had no consent and authority of the other shareholders and the Applicants are fully aware that the charges preferred against them in criminal case No. 1351 of 2012 will be sustained based on the evidentiary value that confirm high criminal culpability, and their pursuit to have it dispensed with or prohibited with this honourable court is to have justice delayed or denied.

Applicant's Submissions

50. It was submitted on behalf of the Applicant that the applicants are but some of the beneficiaries of a legal process carried out by the government hence there is no reason why they have been selectively chosen for prosecution while the other beneficiaries are left. According to the applicants the prosecution is being undertaken by the very government which processed titles which are now in their favour. It was further submitted that the charges re false in their material particulars hence the trial from the onset is an abuse of the due process of the law and ought to be stopped.

51. According to them unless the trial is stopped the applicants will be subjected to maliciously prosecution. In their view on the facts, the charge of fraud cannot be sustained against them since the transactions went through the legal requirements and the relevant consents were obtained. It was submitted that since it is the Republic that instituted, directed, ordered and completed the subdivisions and allocation of the land the subject of the criminal charges over 30 years ago, it is the height of audacity and an extreme form of abuse of process, for the said Republic to arrest, charge and prosecute the Applicants under false allegations of fraud.

52. It was submitted that under Article 157(11) of the Constitution the Director of Public Prosecutions is enjoined to have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process and if this is not adhere to the Court has the powers to intervene and based on **Commissioner of Police and Others vs. Kenya Commercial Bank and Others Nairobi Civil Appeal No. 56 of 2012 [2013]eKLR** it is not in the public interest or in the administration of justice to use criminal justice process as a pawn in civil disputes. It was therefore submitted that notwithstanding the provisions of section 193A of the CPC which allows parallel proceedings in both

Criminal and Civil jurisdiction, this is a classical case of abuse of process and hence the prohibition should issue. In support of this submission the applicants relied on Petition No. 471 of 2013 – **Josephine Akoth Onyango and Another vs. The DPP and 4 Others**.

53. In his oral highlight **Mr Gathaara**, learned counsel for the applicants submitted that since the Attorney General saw nothing wrong with the process leading to the acquisition of the subject land there is no way the DPP can purport to charge the applicants with fraud 30 years later.

4th Interested Party's Submissions

The 4th interested party, **Benjamin Kipkorir Rotich**, in support of the application submitted while appreciating that that the Applicants substantively sought only for the prayer of prohibition and not certiorari, the failure by the Applicants to pray for an order of certiorari is not fatal to their application. Citing **Republic vs Chief Magistrates' Court at Mombasa Ex Parte Ganijee & Another (200) 2 KLR 703** which was quoted in the case of **George Joshua Okungu & Mary Kiptui Vs The Chief Magistrate's Court Anti- Corruption Court at Nairobi and Hon. Attorney General – Petition Nos 227 & 230 of 2009 (Okungu's Case)** it was submitted that if there is anything that remains to be done in the proceedings in question, the order of prohibition will issue to stop further proceedings. According to the 4th Interested Party he was carrying out his duties as the Chairman of the Land Control Board as directed by his superior. It was submitted that it is now settled law that this Honourable Court has jurisdiction to halt criminal proceedings where there is a violation of fundamental rights and freedom of an accused person or an abuse of the Court process. In support of this submission the 4th Interested Party relied on **High Court at Nairobi (Milimani) - Constitutional and Judicial Division Petition No. 471 of 2013 – Josephine Akoth Onyango & Another v The Director of Public Prosecutions & 2 others and Sehit Investments Limited & 2 others; High Court at Nairobi (Nairobi Law Courts) - Constitutional Petition 52 of 2011 – Joses Ntwiga v Commissioner of Police & 2 others [2011] eKLR; High Court at Nairobi (Milimani) - Petition Nos 227 & 230 of 2009 - George Joshua Okungu & another v The Chief Magistrate's Court Anti-Corruption Court at Nairobi & another [2014] eKLR; High Court at Nairobi (Nairobi Law Courts) – Petition 104 of 2012 – Investments & Mortgages Bank Limited (I&M) v Commissioner of Police and the Director of Criminal Investigations Department & DPP & 2 others [2013] eKLR; High Court at Nairobi (Nairobi Law Courts) Miscellaneous Civil Application 249 of 2012 – Republic v Director of Public prosecution Exparte Victory Welding Works Limited & another [2013]eKLR; and High Court at Nairobi (Milimani) Constitutional and Human Rights Division – Petition No. 442 of 2013 – Musyoki Kimanthi vs. Inspector General of Police & 2 others [2014]eKLR and contended that** his prosecution by the 1st and 3rd Respondent is being used to harass, intimidate or coerce him for personal gain, ulterior motives or for purposes totally unrelated to the protection of public interest. The 4th Interested Party further relied on **Justice Manjanja's** decision in the case of **Joses Ntwiga v Commissioner of Police & 2 others in the High Court at Nairobi (Nairobi Law Courts) - Constitutional Petition 52 of 2011 [2011] eKLR** where it was held that

"Our Courts have made it quite clear that the coercive machinery of the state cannot be used for such purposes and if they are, the court has inherent jurisdiction to prevent an abuse of the process. This principle, I hold, is captured in the rubric of Article 29 (a) of the Constitution".

55. It was submitted that any person aggrieved by the decision of the Land Control Board could have appealed against the said decision. Further as long as the 4th interested party never acted maliciously, he had immunity in respect of his actions. To charge the interested Party with the offence of Abuse of Office merely because some persons were unhappy with the decision taken thereto is not only against the public interest, it is oppressive an abuse of the process of the Court and against the sound Administration of Justice.

56. It was further submitted that to charge the 4th interested party after such a long lapse of time violated his right to speedy trial. Further, the decision to prosecute the Interested Party arose from written instructions to him by the office of the Honourable the Attorney General which is the precursor to the

office of the Director of Public Prosecutions (1st Respondent). That prosecution has been sanctioned by the same office as it were that issued the order, instructions and/or command for which the Interested Party stand accused. This clearly amount to the abuse of the legal process is arbitrary and discriminatory in the extreme.

57. To the 4th respondent, the pursuit of the Criminal Case against the Interested Party and the other accused persons will not avail the complainant and neither will she be recompensed for the loss of the said 477 acres through the said proceedings. The mere fact that the Attorney General who should have represented the 4th Respondent is his accuser, it was submitted, is a manifestation that his prosecution is motivated by malice ill will and caprice and should therefore be stopped by an order of inhibition by this Honourable Court.

58. He therefore contended that the criminal prosecution against him is intended to harass and intimidate him for ulterior motives or purposes totally unrelated to the protection of the public interest and it is therefore selective, arbitrary, discriminatory and punitive and that this is a proper case for an order of prohibition to issue against the 1st, 2nd and 3rd Respondents from sustaining, proceeding, hearing, conducting or in any manner dealing with the charges laid against him in **Nairobi Chief Magistrate's Court Criminal Case No. 1351 of 2012** and that he be awarded the costs of this application.

59. In his oral highlight, **Mr A G N Kamau**, learned for the said interested party while reiterating the foregoing added that the complainant, the 2nd interested party herein has no locus to sustain either the civil or the criminal case since she is not the proprietor of the land in dispute.

1st and 3rd Respondents' Submissions

60 On behalf of the 1st and 3rd Respondents, **the Director of Public Prosecutions** and **the Inspector General of Police**, it was submitted on the authority of **KNEC vs. Republic Civil Appeal No. 266 of 1996** that an order of prohibition is rendered powerless against a decision which has already been made before the order is issued hence the order of prohibition sought herein has already been overtaken by events.

61. It was submitted that since under sections 107 and 109 of the ***Evidence Act***, Cap 80, the burden is upon the applicants to demonstrate that the respondents have acted ultra vires, without jurisdiction or in contravention of the rules of natural justice, the applicants have failed to meet the standard of proof in the instant application.

62. According to these respondents, the DPP is empowered by Article 157(6) of the Constitution to institute, undertake and take over prosecutions and under Article 157(10) the DPP is precluded from requiring the consent of any person or authority to commence criminal proceedings and is not under the direction or control of any person or authority. It was submitted that the decision to institute charges against the applicants was independently made, reviewed and analysed on the basis of evidence in support thereof. In support of their submissions the Respondents relied on **Mexiner & Another vs. Attorney General Civil Appeal No. 131 of 2005**, **Republic vs. The Chief Magistrate Nairobi Law Courts ex parte Helmuth Rame Misc. Appl. No. 152 of 2006**, **Bryan Yongo vs. Attorney General High Court Civil Case No. 61 of 2006** and **Kinano Kibanya vs. R Criminal Appl. No. 3 of 2003**.

63. **Miss Kithiki**, learned counsel for the said Respondents submitted while reiterating the foregoing following the setting aside of the vesting order, the order setting aside the same was transmitted to the 3rd interested party but who nevertheless proceeded to subdivide the title and issue fresh title. The 4th interested party on the other hand chaired the Board Meetings in the absence of the proprietors of the subject land hence the said subdivision was criminal. As the land was private land, its conversion did not change its status.

64. It was submitted that the trial is yet to start and the applicants are out on bail and further they have not demonstrated that there is a breach of the rules of natural justice which burden is upon them.

65. To learned counsel there is no time bar to bringing of criminal proceedings. In her view the civil suit and the criminal case are different and what the applicants are trying to do is to put forward their defence before this Court hence the application ought not to be allowed.

3rd Interested Party's Case

66. On behalf of the third interested party, **Tom Maina Chepkwesi**, it was submitted by his counsel **Mr Katwa Kigen** that before the coming to Court the prosecution must have a culpable case and where it has ulterior motive other than the prevention of an offence the Court has to intervene. Learned counsel further contended that in light of the discrepancy in the acreage of the land in question, the 3rd interested party does not know the case he is to face. Therefore if the prosecution cannot understand the facts it cannot claim to have a prosecutable case. It was contended that the dispute is a family dispute which belongs to a civil court and not to a criminal court. It was submitted that the charge in the criminal case is informed by ulterior motives since the complaint obtained title from the 5th interested party. It was submitted that Eric Tarus obtained his title pursuant to a court order and there was a gazette notice from the Minister.

67. According to learned counsel the 3rd interested party is the County Land Registrar for Uasin Gishu and relied on the Court order, the Minister and the Chief Lands Registrar's letter. To him the legal person recognised in the land regime is the Chief Lands Registrar and not the third interested party hence the 3rd interested party cannot be said to have acted arbitrarily. If as it is alleged he failed to register a court order contempt of Court proceedings ought to have been taken against him rather than instituting criminal proceedings. Since all these actions were undertaken at the instance of the Attorney General who at the time was responsible for prosecution, it was averred that this is the height of abuse of court process hence the Court has jurisdiction to intervene where there is an abuse of the Court process. Based on **Okungu's Case**, it was submitted that the subject prosecution is shady and suspect since it is the Attorney General who ought to be standing trial.

2nd Respondent's Submission

68. On behalf of the 2nd Respondent, **the Chief Magistrate, Nairobi**, it was submitted that since the issues between the applicants and the interested party are both civil and criminal in nature, proceedings under one jurisdiction are not a bar to any other proceedings under other jurisdiction since section 193A of the ***Criminal Procedure Code*** permits simultaneous and concurrent civil and criminal proceedings.

69. Since the criminal proceedings before the 2nd Respondent commenced way back in 2012, it was submitted that the same are proper and there is no reason to prohibit the same more so as the horse has already bolted from the stable.

70. According to the 2nd Respondent, the applicants have not made out a case for judicial review proceedings as all the evidence are subject to the trial court for examination and determination and not for a judicial review court.

71. To the 2nd Respondent, the decision to charge the applicants was a culmination of thorough and extensive investigations and which decision was done within the provisions of the law. That decision, it was contended still stands and has not been challenged. Further judicial review orders being discretionary must only be issued in deserving cases. In this case the applicants have not demonstrated that they deserve the same apart from generalised allegations. To the 2nd Respondents the applicants have not demonstrated the grounds for grant of judicial review orders.

72. Mr Odhiambo, learned counsel for the 2nd Respondent added that there is no element of bias, excess of jurisdiction and ulterior motives hence the proceedings are proper and the applicants will have their day in Court where they can raise their concerns.

1st and 2nd Interested Partes' Submissions

73. On behalf of the 1st and 2nd interested parties, **Karim Lalji** and **Anne Nyongio Kimetei**, it was submitted by **Mr Bwire**, their learned counsel that the instant Motion is incapable of being granted as drawn since it only seeks prohibition and costs without seeking to quash the decision to prosecute the applicants which was made in 2012. Without an order of certiorari, it was submitted that the order sought herein cannot be granted.

74. Learned counsel contended that this Court's jurisdiction does not encompass the evaluation of facts. In his view the matter revolves around enterprises which purported to implement orders which were set aside. To him, the issue of time lapse requires evidence which would be in the realm of the trial court. Apart from that the issues raised herein are defences which ought to be adduced at the trial.

75. It was contended that the finding by the Director of Public Prosecution of the commission of the criminal offences is well beyond the land court since in the civil case the issue is that of adverse possession while the criminal case is dealing with a criminal offence. In his view the simultaneous existence of criminal and civil cases is permitted and there is a process to ensure the trial is fair.

5th Interested Party's Case

76. The 5th interested party, **Hasham Lalji Propertes Ltd**, on the other hand submitted through its learned counsel, **Mr Nyangau**, that the filing of this applicant shows lack of good faith and was meant to scuttle the criminal trial.

77. According to learned counsel the basis of making this application is the land case which case was filed by the applicants themselves and not the interested parties. In his view there is no prejudice if the criminal trial proceeds and this Court ought not to supervise the lower Court.

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 I deal with the contentions of the parties herein, I wish to deal with the issue whether an interested party in judicial review proceedings can seek the grant of orders in his favour. The position of an interested party in judicial proceedings is provided for under Order 53 rules 3(2) and 6 of the ***Civil Procedure Rules***. The said provisions provide as follows:

3 (2) The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.

6. On the hearing of any such motion as aforesaid, any person who desires to be heard in opposition to the motion and appears to the High Court to be a proper person to be heard shall be heard, notwithstanding that he has not been served with the notice or summons, and shall be liable to costs in the discretion of the court if the order should be made.

80. It is clear from the foregoing that a party who falls under rule 6 aforesaid can only be heard in opposition to the application. It follows that no favourable orders can be granted to that applicant save for orders dismissing the application and for costs.

81. However the position of a party directly affected is not clear. It is however clear that under rule 1 of Order 53, a party seeking judicial review orders must seek leave of the Court. The application for leave is required to be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavit verifying the facts relied upon. 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…"

82. 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.**

83. Therefore a party to whom leave has not been granted by the Court cannot purport to ride on the leave granted to another party and seek orders of judicial review as opposed to declaratory orders in a Constitutional petition for example. Accordingly, it is my view and I hold that the interested parties may only enjoy the effect of the orders granted in judicial review to the extent the consequences of grant the judicial review orders in question to the applicants necessarily benefits the interested parties.

84. The next issue for determination is whether in the circumstances of this case, the Court can grant orders of prohibition without necessarily issuing orders to quash the decision to charge the applicants. 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].

85. 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.

86. Submissions were made on behalf of the applicants that in light of the vesting order made in Nairobi High Court Suit No. 90 of 2004 (OS) by which order the applicants were granted vesting orders, the effect of the continuation with the impugned criminal trial would be to risk arriving at a decision contrary to the said vesting order. It is however not in doubt that the said vesting order was set aside by the Court. The effect of setting aside the said order in my view is that the order is non-existence and the position reverted to where the partes were before it was made. The fact that it had been issued is now nolonger here nor there. The effect of granting leave to defend the suit in my view was that the hearing was to commence *de novo*. Dealing with such circumstances the Court of Appeal in **Peter Okeyo Ogila vs. Rachuonyo Farmers Co-Operative Union Ltd. Civil Appeal No. 79 of 1992** expressed itself as follows:

"The circumstances of this case are somewhat peculiar. The only issue before the Court was what would be a fair and reasonable compensation to award to the appellant for his injuries. Mr. Justice Githinji attempted this by reference to decided cases, he then arrived at a total figure. That judgement was set aside...In those circumstances, Mr Justice Wambilyanga before whom case for assessment has duty to hear and assess the damages de novo. He has to apply his own mind to the matter and decide for himself, what would be a fair and reasonable compensation. He took some evidence that will enable him to do this. But he did not exercise his judicial function of making his own assessment. He merely reproduced the judgement which had been set aside and increased it by a small sum to take account of inflation. In our opinion, this course is impermissible and the judgement not being his, is a nullity...As this matter has suffered considerable delay, we direct that the fresh hearing shall be done as a matter of urgency."

87. In **Nation Media Group Limited vs. Busia Teachers Co-Operative Credit and Savings Society Limited & Another Civil Appeal No. 209 of 2005** the Court Appeal held:

"A consent order having been entered that the trial do start *de novo,* the superior court's decision not to proceed with the hearing of the suit *de novo,* and to rely on the previous proceedings taken before the earlier Judge was without jurisdiction, and in breach of the order requiring hearing *de novo* of the suit before the superior court."

88. What comes out from the foregoing decisions is that where a Court orders that the proceedings start *de novo,* the Court to which the matter is remitted has to start the hearing afresh. No reference can therefore be made to the orders which were made in the matter which was set aside unless the order setting aside the earlier proceedings was conditional and the conditions were not complied with. Accordingly I do not agree with the contention that the Court to consider the fact that a vesting order had been made in the previous proceedings.

89. Before dealing with the merits of the application it is 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.

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

91. 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"

92. 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).**

93. 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."

94. 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."

95. 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 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 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 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."

96. 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..."

97. 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".

98. 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".

99. It is therefore clear that whereas the discretion given to the 1st 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.

100. 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 he 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.

101. 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.

102. In this case it is the applicants' case that the criminal proceedings have been instituted after a very long period of time after the alleged offences were committed. Article 50 of the Constitution provides for the right to fair trial and under Article 50(1)(e) fair trial includes the right to have the trial begin and conclude without unreasonable delay. Therefore both the commencement and the conclusion of the trial must be conducted without an unreasonable delay. This delay in my view not only encompasses the period between the arraignment and the commencement of the hearing but also includes the period between the discovery of the commission of an offence and the arraignment in court. However what is reasonable depends upon the circumstances of the case such as the nature of the offence, the collation and collection of the evidence as well as the complexity of the offence. Again of paramount importance is the effect of the delay on the viability of a fair trial. 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 **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 buse 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."

103. 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 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 s 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. ”

104. In this case, whereas the applicants contend that there has been a long time lapse between the time of the alleged commission of the offences in question and the preference of the charges, they do not contend that as a result of the said delay there has been a change in the circumstances which militate against a fair trial. Such change in circumstances may be shown for example by the fact of unavailability of the applicant's potential witnesses or evidence resulting from the said delay. I am therefore not satisfied that in the circumstances of this case the delay in bringing the charges against the applicants without more merits the termination or prohibition of the criminal trial. In this case the applicants have not contended that as a result of the long delay in bringing the criminal charges their defences have been compromised for example by making it impossible for them to efficiently present formidable defences which they could have done had the charges been preferred earlier on. In fact a consideration of the applicants' position reveals that in their views they have formidable defences to the prosecution case.

105. The other issue which has been raised is that the concurrent civil and criminal proceedings are likely to lead to conflicting decisions. In the civil case the applicants herein claim the land in question by way of adverse possession while in the criminal case, they are charged with conspiracy to defraud. In these proceedings the Court cannot and is not entitled to determine the strengths of both the criminal and the civil cases so as to reach a finding as to which of the two is unlikely to succeed. 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. The question that the Court has to ask itself is what is the collateral aim that the impugned criminal trial is meant to achieve. The applicants have not expressly stated the collateral aim in question. It has not for example been alleged that the said criminal proceedings are meant to coerce the applicants into abandoning their claim to the suit land. What the applicants allege is that there is a possibility of the criminal court finding them guilty of the commission of a criminal offence while the civil court finding them to be entitled to land in question by way of adverse possession. Whereas the applicants have alleged that the criminal proceedings are being used to intimidate and harass them, they have not explained in what way this is being done. In matters such as this where the Court is being asked to interfere with the Constitutional duties of the Director of Public Prosecution, it requires more than mere averments in order to justify the Court's intervention. In my view the allegations of harassment and intimidations made herein amount to no more that mere averments.

106. It is trite that a criminal trial does not necessarily deal with ownership of the property in question. In claims for adverse possession the mere fact that the facts constituting the allegations of the commission of the criminal offence are similar to the facts upon which the plaintiffs claim adverse possession does not necessarily mean that such findings are mutually exclusive. An act of trespass for example may constitute the basis upon which one may claim land by way of adverse possession since some of the elements of adverse possession are lack of consent and possession adverse to the interest of the proprietor of the land

in question. In that case, it is in fact the act of trespass, a criminal offence, which taken together with the other elements of adverse possession which form the basis of the claim for adverse possession. Accordingly, in the circumstances of this case I am not satisfied that the mere fact that there is a possibility of the two courts arriving at what may on the face of it be deemed to be inconsistent findings necessarily destroys the other claim. To the contrary a finding which seems inconsistent with the other may well be relied upon to prove the other claim. In other words taking into account the provisions of section 193A of the ***Criminal Procedure Code***, I find that this ground, on its own, does not warrant the orders sought herein.

107. It was contended that since the Attorney General saw nothing wrong with the process leading to the acquisition of the subject land there is no way the DPP can purport to charge the applicants with fraud 30 years later. This argument would have had weight if it was carried further to show that the Attorney General's conduct gave rise to a legitimate expectation that the applicants were not going to be prosecuted. 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. However, the legal position 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."

108. In my view, based on the material before me, legitimate expectation does not arise here as there is no allegation that the Attorney General either promised or conducted himself in a manner that would amount to legitimate expectation and even if that were so legitimate expectation cannot operate against the law. The **Okungu Case** was also cited with respect to the position taken by the Attorney General in this matter. However, unlike in the **Okungu Case** where the decision makers were turned into the prosecution witness thereby denying the petitioners an opportunity to call them as witnesses, in this case it has not been alleged that the Attorney General cannot be called as a defence witness in the criminal trial now that the office is separate from that of the Director of Public Prosecution.

109. It was contended that the evidence relied upon by the prosecution are conflicting hence the applicants are unable to know the exact case they are to face. In my view the trial Court is usually in a better position to scrutinise the evidence presented before it in determining whether such evidence prove the accused's guilty beyond reasonable doubt. Unreliable or inconsistent evidence may well be a ground for acquitting the accused. It was the applicants' case that contrary to the position taken by the Respondents they are not culpable since some of the accused persons were only doing their jobs while others were acting on instructions from their superiors. These contentions in my view are better applied in

their defences in the trial court since this Court cannot embark on the minute examination of the case facing the applicants in order to make conclusive findings thereon. To paraphrase the decision in **Meixner & Another vs. Attorney General** (supra) to set out on that voyage would have the effect of embarking upon an examination and appraisal of the evidence to be adduced before the trial Court with a view to show the applicants' innocence yet that is hardly the function of the judicial review court.

110. Considering the issues raised herein the applicants' contentions are that the criminal charges cannot be successfully prosecuted. Whereas that may be so and the applicants may well prove at the trial that the they are after all innocent, it is not for this court to consider the strength of the prosecution case vis-à-vis the defence and make a determination as to which one has more weight. As opposed to where the prosecution has no evidence at all the court will not halt a prosecution simply because the court is of the view that the evidence would not in all probability lead to a conviction. To do that would amount to this court in a judicial review proceedings stepping into the shoes of the trial court and usurping the powers of the trial court.

111. Similarly, it is not for this Court to stop the Director of Public Prosecutions (the DPP) in his tracks simply because the Court believes that the DPP ought to have done better. The constitutional discretion given to the DPP ought not to be lightly interfered with especially if on the evidence in his possession if true may well sustain a prosecution. In this case it is contended that some of the accused persons made decisions which were contrary to law, that the process of conversion of the land in question was not lawful and that these unlawful actions deprived the complainant of the land in question. I cannot say based on the material before me that these allegations do not constitute any offence known to law. In any event that is an issue which may well be raised before the trial court. 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 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 2nd respondent towards that direction.

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

Order

113. In the result I find no merit in the Notice of Motion dated 12th March, 2014 which I hereby dismiss with costs.

114. It is so ordered.

Dated at Nairobi this 18th day of July 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Gathaara for the Applicants and holding brief for Mr AGN Kamau for the 4th interested party

Miss Mutsoli for Mr Odhiambo for the 2nd Respondent

Miss Keitany for Mr Katwa for 3rd interested party and holding brief for Miss Kithiki for the 1st Respondent

Cc Kevin