



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO.96 OF 2011

IN THE MATTER FOR AN APPLICATION BY WILDLIFE LODGES LIMITED, THE APPLICANT FOR LEAVE TO APPLY FOR ORDERS OF PROHIBITION DIRECTED AT THE KENYA ANTI-CORRUPTION COMMISSION

IN THE MATTER OF CIVIL CASE NUMBER 1248 OF 2003, WILDLIFE LODGES LIMITED VERSUS COUNTY COUNCIL OF NAROK AND WILDERNESS LODGES LIMITED AND HCCC MISC. CIVIL APPLICATION NO. 1350 OF 2003 REPUBLIC VERSUS THE COUNTY COUNCIL OF NAROK, THE PERMANENT SECRETARY, MINISTRY OF LOCAL GOVERNMENT, THE DISTRICT LANDS REGISTRAR, NAROK DISTRICT EXPARTE WILDLIFE LODGES LIMITED AND NAKURU MISC. CIVIL APPLICATION NUMBER 79 OF 2010 IN THE MATTER BETWEEN WILDERNESS LODGES LIMITED AND THE COUNTY COUNCIL OF NAROK, THE CHAIRMAN OF THE COUNTY COUNCIL OF NAROK AND THE CLERK OF THE COUNTY COUNCIL OF NAROK

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, ANTI-CORRUPTION AND ECONOMIC CRIMES ACT, THE LAW REFORM ACT, CAP. 26 LAWS OF KENYA AND ORDER 53 RULES 1(1) & 2 OF THE CIVIL PROCEDURE RULES

BETWEEN

REPUBLICAPPLICANT

VERSUS

KENYA ANTI-CORRUPTION COMMISSION.....1ST RESPONDENT

WILDERNESS LODGES LIMITED.....2ND RESPONDENT

COUNTY COUNCIL OF NAROK.....3RD RESPONDENT

***EX-PARTE*: WILDLIFE LODGES LIMITED**

JUDGEMENT

Introduction

1. By a Notice of Motion dated 10th November, 2013, the *ex parte* applicant herein, **Wildlife Lodges Limited**, seeks the following orders:

1. **An order of prohibition prohibiting the 1st Respondent and/or any other officer acting under**

its authority from proceeding with investigations and or carrying out further investigations in matters connected with or related to Civil Case Number 1248 of 2003 between Wildlife Lodges Limited versus County Council of Narok and Wilderness Lodges Limited in so far as it relates to the Ex parte Applicant and or all that property known as NAROK/CIS-MARA/KOYAKI 3 wherein the Ex-parte Applicant operates a Lodge known as Keekorok Lodge.

2. An order of prohibition prohibiting the 1st Respondent and/or any other officer acting under its authority from proceedings with investigations and or carrying out further investigations in matters connected with it related to Misc. Civil Application Number 1350 of 2003 between Wildlife Lodges Limited versus County Council of Narok in so far as it relates to the Ex-parte Applicant and or all that property known as NAROK/CIS-MARA/KOYAKI 3 wherein the Ex-parte Applicant operated a Lodge known as Keekorok Lodge.
 3. An order of Prohibition prohibiting the 1st Respondent and/or any other officer acting under its authority from proceeding with investigations and or carrying out further investigations in matters connected with or related to High Court of Kenya at Nakuru Misc. Civil Application Number 79 of 2010 in the matter between Wilderness Lodges Limited and the County Council of Narok, the Chairman of the County Council of Narok and the Clerk of the County Council of Narok and in the matter of the purported minutes of the Special Full Meeting of the County Council of Narok in so far as it relates to or touches upon the Ex-parte Applicant and or all that property known as NAROK/CIS-MARA/KOYAKI 3 wherein the Ex-parte Applicant operated a Lodge known as Keekorok Lodge.
 4. Costs of this suit be paid by the Respondent and the 1st Interested Party, jointly and severally.
2. Following the grant of leave and a direction that the leave would operate as a stay, a Notice of Motion dated 3rd August, 2011 was filed herein seeking to strike out these proceedings and in the alternative to set aside the order for stay. The ground upon which the said application was brought were that substantially that the Court had no jurisdiction to stay investigations as there were no proceedings capable of being stayed and that the effect of the stay granted would handicap the 1st Respondent in its investigations.
 3. Directions were subsequently given that the two applications would be heard and determined together.

Applicant's Case

4. The application was supported by an affidavit sworn by **Arif Hafiz**, a Director of the Applicant herein on 20th April, 2011.
5. According to the deponent, on 6th November 2003 the **Honourable Justice Nyamu** in Misc. Civil Application Number 1350 involving the Applicant herein against County Council of Narok, gave Leave to the Applicant herein to institute Judicial Review proceedings for orders of Certiorari, prohibition and mandamus as against the County Council of Narok in matters related to all that parcel of land known as NAROK/CIS-MARA/KOYAKI 3 in the Masai Mara Game Reserve (hereinafter referred to the suit land) and the said leave was to operate as a stay of all dealings in respect of the suit land.
6. Upon failure by the Respondents in Misc. 1350 of 2003 to comply with the court orders, the Applicant made an application dated 1st December 2003 seeking to compel the County Council of Narok with the court orders that were issued on 6th November 2003 and on 1st December 2003 after hearing counsel for the Applicant in Civil Case No. 1248 of 2003, between Wildlife Lodges Limited versus County Council of Narok and Wilderness Lodges Limited **Justice Nyamu** issued the following orders;

(a) **THAT it is hereby ordered that the actions of the County Council of Narok on the 30th November 2003 to forcefully evict the Plaintiff and also its subtenants in its bid to hand over possession of all that parcel of land known as NAROK/CIS-MARA/KOYAKI 3 to Wilderness Lodges Limited is in Contempt of the order of the**

High Court (Honourable Justice Nyamu on the 6th November 2003) in HCCC Misc Civil Application No. 1350 of 2003 Republic versus the County Council of Narok, The Permanent Secretary, Ministry of Local Government, the District Lands Registrar, Narok District Ex-parte Wildlife Lodges Limited and therefore null and void.

(b) THAT a mandatory injunction be and is hereby issued to compel the First Defendant and/or its employees and/or agents and/or assigns and or/ anybody whosoever to return possession of the Plaintiff's business at Keekorok Lodge, Narok on Land Parcel Reference Number NAROK/CIS-MARA/KOYAKI 3, Masai Mara Game Reserve together with the sub-leased accommodation, and adjacent premises to the Plaintiff save in so far as regards the rights it has as landlords.

(c) THAT an injunction be and is hereby issued to restrain the Second Defendant and/or its employees and/or agents and/or assigns and or/ anybody whosoever from taking possession and taking over the running of or the conduct of the Plaintiff's business at Keekorok Lodge, Narok on Land Parcel Reference Number NAROK/CIS-MARA/KOYAKI 3, Masai Mara Game Reserve together with the sub-leased accommodation, and adjacent premises to the Plaintiff save in so far as regards the rights it has as landlords.

7. According to the deponent, even after the Court issued the orders of 1st December 2003 the Interested Party herein did not comply with the same but instead filed an application dated 3rd December 2003 and upon hearing submissions from all parties the **Honourable Justice J.B. Ojwang** in the said Civil Case Number 1248 of 2003 issued the following orders:

(i) The Application by Notice of Motion filed by the second Defendant on 3rd December 2003 may be set down for hearing on the basis of priority once the second Defendant within 28 days from the date of this Ruling hands over the suit premises with its operations to the first Defendant.

(ii) In the meantime the Plaintiff will have leave to make any such applications as may be necessary and in relation to the suit premises and the operations conducted thereon.

(iii) The Managing Director of the second Defendant shall within the next 30 days, appear before a judge in Chambers, to show that he has duly complied with the joint order above, or in the alternative to show cause why he should not be committed for contempt.

(iv) That the Acting Town Clerk of the first Defendant, the Treasurer of the first Defendant and the Advocates of the first Defendant, Moitael Ole Kenta shall each and all within the next seven days take due action to purge their contempt of the court orders of 6th November 2003 and 1st December 2003 and they shall each and all appear before a judge in Chambers ten days from the date of this ruling to show that they have purged their contempt or in the alternative to show cause why they should not be committed for contempt.

8. Due to the failure of the Interested Party to comply with the Court Orders, the Applicant approached the Honourable Court and the Applicant was granted various reliefs by way if a Preliminary Decree dated 7th June 2010 in compliance with the orders issued on 6th November 2003, 1st December 2003 and 2nd January 2004 took possession of the suit premises and the running of the Keekorok Lodge constructed and being on the suit premises.

9. Subsequently the Applicant and the County Council of Narok agreed that the County Council of Narok varies the lease held by the Applicant over the suit premises and gives the Applicant a further term of 33 years.

10. However, being dissatisfied with the decree dated 7th June 2010 in HCCC No. 1350 of 2003 issued pursuant to the resolutions of the Full Council Meeting of the County Council of Narok held on 18th June 2010, granting the right to the Applicant to continue to be in possession, operation and occupation of Keekorok Lodge over the suit land, the Interested Party applied for leave by way of Judicial Review in the High Court of Kenya at Nakuru Misc. Civil Application No. 79 of 2010 for order of Certiorari to remove into the Honourable Court and quash the resolutions contained in the minutes of the county council of Narok's said Full Council Meeting which case is still pending and the leave applied for has yet to be granted.
11. It was deposed that the Applicant has since the foregoing been running its business in compliance with all the requirements of the County Council of Narok as the Landlord and paying all the amount that are due and payable to the County Council of Narok.
12. However, it has now come to the attention of the Applicant herein that whilst the HCCC Number 1248 of 2003 and Misc. Civil Application Number 1350 of 2003 are still pending and the orders issued therein are still persisting the Respondent herein at the instigation of the Interested Party has started harassing the County Council of Narok and or its officers and the Applicant herein with a view of pressurizing the County Council of Narok into rescinding and or changing the terms of the lease granted to the Applicant herein in disobedience of the aforesaid court orders and in violation of the Applicant's right to the use of the suit premises. In the deponent's view, the act of carrying out investigations by the Respondent herein on matters touching the suit premises at the instigation of the Interested Party amounts to a gross abuse of power conferred on the Respondent under the provisions of the **Anti-Corruption and Economic Crimes Act**, the same is arbitrary and manifestly unreasonable and irrational and fails to take into account the relevant considerations, as *inter alia*:-
 - a. Criminal law process has no applicability in transactions of purely commercial and civil nature.
 - b. The Respondent has no mandate or powers to use its investigatory powers to coerce one party in a litigation matter into giving up its rights for fear of being prosecuted and or investigated.
 - c. This Court has vide its three orders issued in 6th November 2003, 1st December 2003 and 2nd February 2004 confirmed the rights of the parties in those cases until this court orders otherwise it is not open to the Respondent herein to investigate with a view of pressurizing parties to change and or abandon their rights.
 - d. The Respondent's action offends the public policy doctrine requiring grievances of civil nature to be addressed through civil action as opposed to criminal proceedings.
 - e. In the circumstances of the matter, the purported offences for which the Respondent is investigating do not meet the threshold of reasonable suspicion of commission of an economic crime or conduct constituting corruption required under the **Anti-Corruption and Economic Crimes Act** to warrant the Applicant to be harassed into giving up its right to private property.
 - f. The investigations are merely designed to harass and intimidate the Applicant and are being carried out in bad faith and the constitution thereof will offend the public policy doctrine requiring investigations to be carried out with a view of resolving and or deterring criminal activities and not for personal gain of an individual or with malice.
 - g. In order to subvert the contempt application pending against the Interested Party, the Interested Party is using the backdoor method by instigating the Respondent for investigations as aforesaid.
 - h. There is no investigation involving the probity of any Judges who have heard or are hearing the matters referred to in this application and the subject matter of this application.

Unless the Judges are under investigation then the investigations by the Respondent are unfair, prejudicial and unwarranted invasion of the Applicant's rights to fair trial and the same is an abuse of the court process.

j. There is no application by the Respondent or any other person to set aside the orders the Applicant has obtained to date other than the activities of the Interested Party especially in Misc. Civil Application No. 1350 of 2003.

k. If the Respondent has any interest in these matters, it has every right and opportunity in law to be enjoined as a party and to argue its case whatsoever that case is in the course of proceeding in various courts.

l. The current form of investigations by the Respondent are backdoor investigations seeking to gain an unfair advantage over the Applicant and the County Council of Narok.

13. It was contended that the continuation of the investigations by the Respondent is manifestly unlawful and has gravely affected the operations of the Applicant in running its business erected and carried on at the suit land and the applicant is apprehensive that the Respondent may at any time arrest its officers of close down or carry away documents and or the machinery necessary for running the said business. Further, the continuation of the investigations aforesaid by the Respondent herein have also greatly affected the County Council of Narok to a point that the Applicant is apprehensive that the County Council of Narok may due to the said pressure and fear of prosecution of its officers rescind the lease granted to the Applicant and or vary the terms thereof to the detriment of the Applicant herein.

14. The deponent asserted that this court has supervisory jurisdiction over the actions of the Respondent and to grant the prayers sought in order to safeguard proper exercise of the constitution, statutory and judicial powers within the parameters of law and to prevent abuse of power by the Respondent.

15. To the deponent, the Respondent's functions under the ***Anti-Corruption and Economic Crimes Act*** do not include and cannot possibly include the harassing of individuals and or intimidation with a view of forcing parties to give up their rights.

Respondent's Case

16. In opposing the application, the Respondents filed a replying affidavit sworn by **Abraham Kemboi**, an investigator with the Ethics and Anti-Corruption Commission, the successor in title to the Kenya Anti-Corruption Commission, the 1st Respondent herein on 17th January, 2012.

17. According to him, at the material time relevant to this proceedings, the Commission was a statutory body created under the ***Anti-Corruption and Economic Crimes Act***, No. 3 of 2003 (hereinafter, "the Act") and was mandated under Section 7 *inter alia* to investigate any matter that, in the Commission's opinion, raises suspicion of the occurrence or imminent occurrence of conduct constituting corruption or economic crime and conduct liable to allow, encourage or cause conduct constituting corruption or economic crime; to investigate the conduct of any person that, in the opinion of the Commission, is conducive to corruption or economic crime; to investigate the extent of liability for the loss of or damage to any public property and to institute civil proceedings against any person for the recovery of such property or for compensation and recover such property or enforce an order for compensation even if the property is outside Kenya or the assets that could be used to satisfy the order are outside Kenya.

18. In his view, it is apparent from a reading of the relevant law that an investigation is commenced when in the Commission's opinion, (and not any other entity), there is suspicion that corruption or economic crime has occurred or is about to occur and that the exercise of its investigations mandate is not subject to the non-existence of civil proceedings touching on the subject matter. Apart from that the Commission and its Director under Section 10 of the Act, is declared to be independent and not subject to the direction or control of any other person or authority, and is accountable only to Parliament.

19. He deposed that the powers and functions of the Commission aforesaid have been retained under

- the ***Ethics and Anti-Corruption Act***, particularly at Section 11 and 13 and under Section 25 of the ***Anti-corruption and Economic Crimes Act***, the commission must investigate every complaint referred to it or otherwise inform the complainant the reasons why it cannot do so.
20. The deponent averred that the Respondent, in exercise of its mandate, both on its own motion and upon receipt of complaints, has been conducting investigations into various contracts and activities that have been entered into or undertaken by Narok County Council (hereinafter, “the Council”), a public body within the meaning of the Act and its properties constitute public properties. One of the complaints the Commission received and investigated relates to the manner of awarding leases to the suit land on which stands the hotel popularly known as Keekorok Lodge.
 21. According to him, preliminary investigations indicate that in virtually all awards of leases over the property, no attempt was made to follow the procurement regulations or the ***Local Government Act*** and that since the 2001, the main and fiercest contestants have been Wildlife Lodges Ltd and Wilderness Lodges (hereinafter referred to as “the Companies”). In aid of their respective quests, the companies have instituted a multiplicity of suits and preliminary investigations also reveal that the Companies have abused the court record to perpetuate fraud against each other by recording purported consents which were not duly approved by the council, the Attorney General’s Office or the Ministry of lands. For instance, the State Counsel who is alleged to have signed the consent letter dated 9th July 2010 denied that he is in conduct of the matter and having executed the same.
 22. He averred that in these proceedings, the Applicant Wildlife Lodges has made scandalous and unfounded allegations against the Commission on the basis of which the Court has granted not only leave to apply for orders of Judicial Review but, regrettably from the point of view of the Commission, an order that the leave so granted do operate as stay of the investigations by the Commission into the Keekorok affair based solely on a letter authored by the Advocate for the Applicant a copy of which is annexed to the verifying affidavit. However, no officer for instance, either from the Council or the Applicant, has come forth to state on oath that he has been threatened by the Commission with incarceration and prosecution unless the Council or the Applicant agree to relinquish the hotel to Wilderness Lodges.
 23. While admitting that he was aware that there are a number of cases had been filed in respect of the property he however denied being aware of the full details thereof. He asserted however that all the cases are all of a civil nature and seek various reliefs with respect to the property and the respective rights of the Companies and that the judges who decide these civil matters are determining competing claims of the parties and not holding a criminal investigation or trial and to state that “unless the judges are under investigation...then the investigations by the Respondent are unfair, prejudicial and unwarranted invasion of the Applicant’s rights’ is a vain attempt to provoke the court against the Commission.
 24. The deponent’s position was none of the cases seeks to investigate corruption or economic crimes and that none of them seeks prosecution of those suspected of committing corruption or economic crime relative to the Keekorok affair or punishment for those found criminally culpable.
 25. That notwithstanding, it was contended that in exercise of its mandate, the Commission is investigating *inter alia* whether corruption or economic crime was committed in the process leading up to the award of the lease to the property, whether to Wildlife Lodges or Wilderness Lodges hence it is however preposterous to insinuate that the Commission is executing its mandate for the private benefit of one of the parties. The Council and its properties, the Hotel included being public concerns, it is not right to describe the Keekorok affair as purely private commercial concerns in which the application of the criminal law has no place. To the contrary, a number of laws, in the Act and in other legislations, have provisions for protection of public properties and criminal sanctions for transgressions.
 26. It was asserted that from the preliminary investigations, it was clear that Narok County Council has serious governance challenges which cannot be enforced by civil litigation but by rigorous enforcement of public law and that the enforcement of public law does not involve being joined in the civil proceedings between the companies and the council as suggested but involves thorough, timely and unhindered investigations and prosecution of those suspected of corruption or economic crimes in accordance with the law.
 27. To the deponent, the Applicant need not be apprehensive of legitimate investigations if it has faith in the integrity of its dealings with the Council though it should not abuse the court’s process to evade scrutiny for corruption or economic crimes.

28. It was asserted that the shortcomings in governance with respect to the Keekorok Affair are threatening to completely dissipate the property and that for instance, it transpired that the former Acting Clerk to the Council had approved the creation of a charge over the property for Kshs. 155 million in favour of Wilderness Lodges notwithstanding the fact that its title to the property was under serious challenge by the Applicant at the material time.
29. Based on the information received from the Commission's advocates, the deponent deposed that there is Constitutional separation of powers between the Executive, the Judiciary and the Legislature and that the Commission as a law enforcement agency falls within the Executive though it is independent and is only accountable to parliament; that the pendency of civil proceedings with third parties is not a bar to criminal proceedings, let alone investigations, touching on the same subject matter and that the multiplicity of pending civil proceedings, if concluded, will not determine whether corruption or economic crimes have been committed nor punish those implicated; that no single judge, let alone the Commission, understands what the many cases are about.
30. It was therefore urged that these proceedings should be struck out with costs to the Respondent.
31. In a further affidavit sworn by the same deponent on 4th July, 2013, it was deposed that the suit property had been transferred to a third party and that upon carrying a search at the Lands Registry it was established that on or about 28th December 2012, the property was transferred to Hyatt Hotels International Ltd.
32. In the premises, it was averred that the Ex-parte Applicant has used the court order obtained in these proceedings as a shield of impunity to deal with the property in a manner to frustrate investigations and defeat justice which is a blatant abuse of the court process and manifest bad faith. In the deponent's view, it demonstrates the inherent dangers of stopping a watchdog institution such as the 1st Respondent from exercising mandate. To him, this case is now moot as the Ex-parte Applicant *ex facie* no longer has any interest in the property.

3rd Respondent's Case

33. In opposition to the application, the 3rd Respondent filed a replying affidavit sworn by **Simon M. Sopia**, the administrative officer of Narok County Government, successor to the 3rd Respondent herein.
34. According to him, following the General Elections held 4th March 2013 and the subsequent establishment of the Narok County Government which effectively took over the responsibilities of the now defunct County Council of Narok, an internal review of all existing litigation was undertaken with the objective of ascertaining their status and consequence. Alongside this process, the County Government also procured a fresh panel of Advocates and subsequently allocated various matters to individual pre-qualified firms depending on their competencies with appropriate instructions on how to proceed with them.
35. Of particular concern to the County Government was pending litigation in respect of proprietorship of what is popularly known as Keekorok Lodge erected on the suit land. At various times, the said land was leased by the Council to Wilderness Lodges Limited as well as to Wildlife Lodges Limited, leases which have given rise to litigation before this Honourable Court as well as the High Court of Kenya at Nakuru, namely:-

(a) Nairobi HC Misc. 1350 of 2003 R v The County Council of Narok and 2 others ex parte Wildlife Lodges Limited a judicial review application in which the parties recorded a consent on 25th August 2010. This consent has been challenged by Wilderness Lodges Limited and this Honourable Court has allowed the said application thereby setting aside the said consent order.

(b) Nairobi HCCC No. 1248 of 2003 Wildlife Lodges Limited v County Council of Narok & Wilderness Lodges Limited – a suit that is pending

(c) Nakuru HC JR No. 79 of 2010 R v County Council of Narok and Others ex parte Wilderness Lodges Limited – Judicial Review Application challenging

resolutions of the Council passed on 18th June 2010. The matter is pending.

(d) Nairobi HCCC (Commercial) No. 865 of 2010 County Council of Narok v Commercial Bank of Africa and Wilderness Lodges Limited- a suit by the Council challenging the lease granted in favour of Wilderness Lodges Limited and the charge which had been created over the said lease in favour of Commercial Bank of Africa. This suit was dismissed/struck out with costs to the Defendants on 21st May 2013 due to the Council's failure to comply with directions of the Court.

(e) Nairobi HC Misc. App. No. 96 of 2011 R v Kenya Anti-corruption Commission ex-parte Wilderness Lodges Limited – Judicial Review proceedings by Wilderness Lodges Limited seeking to stop investigations as to conduct of officials of the County council of Narok with respect to dealing over the said land. The matter is pending.

36. In the deponent's view, the mere existence of these suits is not a bar to any lawful investigations of alleged offences that may have occurred with respect to dealing over the said land and Narok County Government is not aware of the allegations being advanced by the Ex-parte Applicant and has not received any communication from the Ethics and Anti-Corruption Commission either directing or/requesting it to rescind or change the terms of the lease as alleged.
37. The deponent averred that the Narok County Government has no objections to investigations being carried out pursuant to the Constitutional mandate of the Ethics and Anti-Corruption Commission and is cognizant of the fact that in the event that the Ethics and Anti-Corruption Commission was to go outside of its mandate as prescribed in law, the Ex-parte Applicant or any other aggrieved person will not be without legal remedies.

Applicant's Submissions

38. On behalf of the Applicant, it was submitted that despite the existence of court orders, the investigations in matters affecting the suit land have persisted yet the 1st Respondent has acknowledged that there are multiple suits between the applicant and the 2nd Respondent herein.
39. It was submitted that in its ruling of 2nd February, 2004, the Court found that all the issues revolving around the lease to the ex parte applicant are of a civil nature and that the ex parte applicant is the bona fide lessee over the suit land. Therefore a reopening of an investigation into the circumstances surrounding the grant of the said leases over the suit land would circumvent the said order and would be in contempt of court and would amount to an abuse of power hence entitling this court to invoke its supervisory powers.
40. In order to settle the matters pending in HC Misc. 1350 of 2005 a consent was entered into by the respective counsel hence the issue of the manner in which the Council granted the lease cannot be a subject of investigation by the 1st Respondent hence the purported investigations are only designed and calculated to assist the 2nd Respondent to have an unfair advantage over the applicant in the pending civil suits. This, it was submitted, was manifested by attempts by the police to compel the State Counsel who recorded the consent to disown the same.
41. It was submitted that the aim of the investigations is to circumvent the orders given by the Court thereby destabilising the adjudication of rights currently enjoyed by the applicant with respect to the suit properties. The rights of the parties having been determined, it is no longer open to the 1st Respondent to initiate or continue with investigations in respect thereon hence the only reason why the 1st Respondent has commenced the said investigations is to pressurise the Council, its officers and the ex parte applicant to rescind or change the terms of the lease granted to the applicant.
42. It was submitted that the Court in the circumstances has the jurisdiction to supervise the actions of the 1st Respondent. While submitting on the circumstances under which the Court exercises the said supervisory jurisdiction, it was submitted that the said investigations are not intended to be carried out in good faith and several decisions were cited in support of the applicant's case.
43. In his oral highlight, **Mr Nyiha**, learned counsel for the applicant clarified that the applicant was not trying to stop an investigation but only issues in civil cases before this Court where certain

- orders adjudicating rights have been made in favour of the applicant in respect of the lease which cannot be the subject of an economic crime. By allowing the 1st Respondent to carry out investigations, it was submitted it does not allow it to open civil cases.
44. According to learned counsel, once attempts to coerce the State Counsel who recorded the consent at the behest of the 2nd Respondent failed, the 2nd Respondent went to the 1st Respondent which jumped into the fray where the police had failed and the 1st Respondent intends to use its powers to give the 2nd Respondent an advantage.
45. Relying on a number of authorities it was submitted that though the same deal with prosecution, the same principles apply to investigations.

1st Respondent's Submissions

46. On behalf of the 1st Respondent it was submitted that what the applicant seeks to prohibit are investigations rather than proceedings hence it was not open to the Court to stay the investigations. In support of this submissions the 1st Respondent relied on **Republic vs. Minister of Information and Communications & 5 Others ex parte Econet Wireless Kenya Ltd [2006] eKLR** at page 6.
47. It was submitted that the order of prohibition sought cannot issue because the questioned investigations has happened. While admitting that the same were ongoing, it was submitted that further investigations cannot be prohibited unless the original investigations are quashed. Without challenging the decision to investigate, the claim for prohibition is without challenge and this submission was based on **Kenya National Examination Council vs. Republic ex parte Gathenji Njoroge and Others [1997] KLR.**
48. Since there is no contention that the Commission has no authority in law to undertake the investigations, it was submitted that an order of prohibition cannot issue.
49. It was submitted that the allegation of harassment of the Council had no basis and was a mere hearsay.
50. It was submitted that the Commission cannot be barred from investigating merely because there is in existence a dispute over the public property between private parties and parties cannot acquire immunity from criminal investigations and prosecution by merely filing suits against themselves.
51. **Mr Murei**, learned counsel for the 1st Respondent, while highlighting the submissions, submitted that the orders sought herein even if they were to issue are incapable of being complied with. To grant the orders sought would mean that there would be nothing left to investigate hence that would amount to impunity and that could be in contravention of section 7 of the ***Anti-Corruption and Economic Crimes Act***. Section 25 of the same Act enjoins the Commission to investigate every complaint made to it and if it cannot do so must give a valid reason therefor. As the applicant has already transferred the property to another entity, it was submitted that the application is moot.

2nd Respondent's Submissions

52. On behalf of the 2nd Respondent, it was submitted that the institution of these proceedings by the applicant was odd since the proceedings are instituted to prohibit the investigation of the conduct of officials of the 3rd Respondent yet the said officials are not the ones who have commenced the proceedings. In effect a private person is seeking to prohibit the body constitutionally and statutorily mandated to investigate state officials from doing so.
53. It was submitted that the inquiry being undertaken by the 1st Respondent has nothing to do with the dispute between the applicant and the 2nd Respondent but it is whether the conduct of the officials of the 3rd Respondent is aboard board. Citing the relevant constitutional and statutory provisions, it was submitted that the inquiry being undertaken by the 1st Respondent is wholly within its statutory mandate and the court ought not to interfere unless compelling evidence of actual abuse of power is presented even in the face of pending civil proceedings which overlap.
54. While highlighting the foregoing, **Mr Amoko**, learned counsel for the 2nd Respondent submitted

- that being a private person the 2nd Respondent was wrongly impleaded in the matter since no orders can be obtained against it.
55. Learned counsel however submitted that there is no breach of statutory obligations and there is no evidence of abuse of power. In his view, the existence of civil proceedings in which interim orders were made and ostensible reliefs granted by consent cannot confer immunity to bar investigations by the 1st Respondent since investigations by the 1st Respondent is not for determination of private rights but to inquire as to whether an economic crime has been committed and whether the public has incurred any loss and whether the public officers conducted themselves in accordance with the Code of Ethics. This, it was submitted, is within the 1st Respondent's mandate when conducting investigations. If in the course of conducting investigations it determines that there is fraud any party can move the Court for relief and that is an issue which cannot be determined in advance.
56. The 1st Respondent, it was contended, only investigates the facts and what is disclosed and what is being investigated is Keekorok and not the applicant or the 2nd Respondent.
57. The consent, it was submitted has been stayed and the issue for investigation is whether the consent was in the public interests or in their own interest and that is a matter which can only be investigated by the 1st Respondent. He reiterated that here a private authority is seeking to prohibit the investigations of public officials from whom it has obtained a benefit.
58. This Court, it was submitted, only interferes where it is shown that there is a compelling proof of abuse of the rights of the parties which does not exist in the instant case.

3rd Respondent's Submissions

59. On behalf of the 3rd Respondent, **Mr Kemboy** submitted that the mandate of the 1st Respondent is to carry out investigations either on own motion or on complaint within constitutional or statutory limits. According to him, the applicant seeks to stop the 1st Respondent from carrying out the Constitutional mandate without alleging that it is a rogue, that the investigation is irrational or that it is illegal.
60. It was submitted that the application is speculative, premature and an abuse of the Court process.
61. With respect to the rights allegedly accrued in the civil cases, it was submitted that mere investigation is not capable of defeating the said rights and that the 1st Respondent's actions are subject to approval by the Director of Public Prosecution. Until the process is completed this application has no merit and is for dismissal.
62. It was submitted that the 3rd Respondent does not welcome the attempt by the applicant to shield its officers from investigations and the Court ought to dismiss the application.

Determination

63. I have considered the application, the material in support thereof and those in opposition thereto. The first issue I wish to deal with is the position of the 2nd Respondent in these proceedings. That the 2nd Respondent is a private legal entity is not in doubt. In **Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005, Nyamu, J** (as he then was held:

“The other reason why the claim must fail is that the 5th and 6th respondents are not public bodies but only some juristic land owners. Thus the remedies of *mandamus*, prohibition or *certiorari* are only available against public bodies. The 5th and 6th respondents could be sued in respect of the ownership of the land should the applicants have evidence that the alienation was not done in accordance with the outlined provisions of the relevant Land Registration Acts under which the parcels fall, they might also have relief for full compensation under the Trust Land provisions of the Constitution if as stated above, land adjudication and registration or the setting apart were not done as envisaged under the Constitution and the Land Adjudication Act. There is no proof that the alternative remedies as set out above would be less convenient, beneficial, or effectual.”

64. It follows that whereas the 2nd Respondent was no doubt a necessary party to these proceedings, it ought not to have been joined as a respondent but rather as an interested party since no judicial review orders could issue against it.
65. It has been contended that since the investigations have been commenced, the order of prohibition sought cannot be granted without quashing the decision to commence the investigations. It is however conceded that the investigations are yet to be completed. 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].

66. 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 investigation, the mere fact that a decision was made to investigate and the investigation has in fact commenced, is not a ground to decline to entertain an application seeking to prohibit the continuation of the said investigations.
67. It is important to keep in mind that before the Court is an application seeking to prohibit investigations rather than a trial. In **Republic vs. Chief Magistrate Milimani & another Ex-parte Tusker mattresses Ltd & 3 others [2013] eKLR** this Court expressed itself as follows:

“The Court must in such circumstances take care not to trespass into the jurisdiction of the investigators or the Court which may eventually be called upon to determine the issues hence the Court ought not to make determinations which may affect the investigations or the yet to be conducted trial. That this Court has power to quash impugned warrants cannot be doubted. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the police to investigate allegations of commission a criminal offence ought to be interfered with. It is not enough to simply inform the Court that the intended trial is bound to fail or that the complaints constitute both criminal offence as well civil liability. The High Court ought not to interfere with the investigative powers conferred upon the police or the Director of Public Prosecution unless cogent reasons are given for doing so... The warrants were issued to enable the allegations be investigated. Whether or not the investigations will unearth material which will be a basis upon which a decision will be made to commence prosecution of the ex parte applicants or any of them is a matter which is premature at this stage to dwell on.”

68. It was also contended that since the 1st Respondent has the Constitutional and statutory mandate this Court cannot interfere with its said powers.
69. It is trite that the Court ought not to usurp the Constitutional mandate of the 1st Respondent to investigate any matter that, in the commission's opinion, raises suspicion of the occurrence or imminent occurrence of conduct constituting corruption or economic crime under section 7 of the Act. Just like in cases of prosecution, the mere fact that the allegations made are likely to be found worthless, is not a ground for halting investigations into the complaints made or brought to the attention of the 1st Respondent since the purpose of a criminal investigations conducted bona fide is to consider both incriminating and exculpatory material and not just to collect evidence on the basis of which a criminal charge may be laid.
70. It must always be noted that judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence to the complaint 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 to bring to the attention of the investigators in the course of the conduct of the investigations.
71. However, if the applicant demonstrates that the investigations that the 1st Respondent Commission intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such investigations since investigations must be carried out independently and must be carried out in good faith without malice or for the purpose of achieving some collateral goal divorced from the purpose for which the investigatory powers are given to the Commission.
72. The fact however that the facts constituting the basis of an investigation may or is the basis of a civil suit, is no ground for staying the criminal investigation if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal investigations and civil proceedings would not, *ipso facto*, constitute an abuse of the process of the court unless the commencement of the criminal investigations 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.

73. 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 a 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”

74. 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).**
75. 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.”

76. 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.”

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

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform.....A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society’s senses of fair play and decency and/or where the proceedings are oppressive or vexatious... The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior

motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far that which the courts indeed the entire system is constitutionally mandated to administer... In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute. It is further alleged that the criminal prosecution is an abuse of the court process epitomised by what is termed as selective prosecution by the Attorney General. It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit....The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law... In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed... There is nothing which can stop the from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made.....Under section 77(5) of the Constitution it is a constitutional right that no person who has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of the offence. What is clear from this constitutional right is that it prevents the re-prosecution of a criminal case, which has been determined in one way or another. However, it does not mean that a civil suit and a criminal case cannot co-exist at any one particular time. This is because the section envisages the re-prosecution of a criminal case substantially dealt with either in fact or law, a case in which issues have been laid to rest. There is no mention in the section that the simultaneous existence of a civil and criminal cases is constituting double jeopardy. The courts have, however stated that the power to issue an order of prohibition to stop a criminal prosecution does not endow a court to say that no criminal prosecution should be instituted or continued side by side with a civil suit based on the same or related facts, or to say that a person should never be prosecuted in criminal proceedings when he has a civil suit against him relating to matters in the criminal proceedings... The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution... A prerogative order is an order of serious nature and cannot and should not be granted

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

78. 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...”

79. 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”.

80. 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”.

81. It is therefore clear that whereas the discretion given to the 1st respondent to investigate any matter that, in the commission’s opinion, raises suspicion of the occurrence or imminent occurrence of conduct constituting corruption or economic crime 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 investigations to a halt. It is no defence to the Commission to contend that the decision to commence investigations cannot under any circumstances be interfered with.

82. Judicial review applications do not deal with the merits of the case but only with the process. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant in the process of the investigations 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 investigative body or authority and trespass onto the arena of the investigator by determining the merits or otherwise of the subject of the investigation unless it is shown that there is no complaint at all and what purports to be a complaint is a fishing expedition.

83. 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 Commission to investigate any matter that, in the commission’s opinion, raises suspicion of the occurrence or imminent occurrence of conduct constituting corruption or economic crime ought to be interfered with.

84. In this case it is the applicant’s case that the investigation is being carried out with a view to destabilising the orders already secured by the applicant and for the purposes of giving the 2nd Respondent an advantage in the civil cases. The question that this Court has to determine is whether the applicant has presented satisfactory evidence to prove this allegation. The applicant’s case is hinged on the fact that certain orders were secured in its favour including one to the effect that the applicant was properly entitled to the lease entered into between it and the Council. It is

- however on all fours that the cases in which the alleged orders were granted are still pending and that the said orders were granted on an interim basis. I am therefore not satisfied based on the material before me that the sole purpose of the investigation is to destabilise the orders granted therein.
85. In any case mere investigation cannot destabilise orders granted by a competent court. In this case whatever decision the 1st Respondent makes would have to be transmitted to the Director of Public Prosecution who would have to decide whether or not to prefer the appropriate charges. Even then the preferring of the charges per se would not have the effect of varying the orders granted in the said civil cases.
86. It was further contended that the investigations are being conducted with a view to giving advantage to the 2nd Respondent and harassing the County Council of Narok and or its officers and the Applicant herein with a view of pressurizing the County Council of Narok into rescinding and or changing the terms of the lease granted to the Applicant herein in disobedience of the aforesaid court orders and in violation of the Applicant's right to the use of the suit premises. To prove this the applicant contended that the police having failed to convince the State Counsel who recorded a consent in one of the pending cases, the 2nd Respondent secured the assistance of the 1st Respondent who agreed to step in and undertake investigations with a view to scuttling the existing orders.
87. In order for the applicant to succeed it must show that not only have the investigations which were being done by the police have been taken over by the 1st Respondent and that not only is the 1st Respondent acting with ulterior motives but that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence. Although it was alleged that the criminal proceedings have been reopened with a view to achieving collateral and extraneous purposes I am not satisfied based on the evidence on the record that this is so. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the ***predominant*** purpose is to further some other ulterior purpose and as long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene. See **Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another** (supra) and **R vs. Attorney General exp Kipngeno Arap Ngeny** (supra).
88. Where it is not the predominant purpose the Court ought not to interfere. I am not in this case convinced that the predominant purpose of the commencement of the criminal proceedings or investigations is for the achievement of a collateral purpose other than the vindication of a criminal offence. In any case as already stated hereinabove under section 193A of the ***Criminal Procedure Code***, the concurrent existence of the criminal proceedings and civil proceedings even if ***any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings*** would not, *ipso facto*, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim.
89. I have considered the manner in which the orders sought are crafted and I agree with the Respondents that if granted in the manner sought, it would have the effect of prohibiting not only investigations against the applicant but investigations against other people connected with the transactions between the applicant and the 2nd Respondent. In effect by granting the orders in the manner sought this Court at the behest of the ex parte applicant shall have prohibited not only investigation of the applicant but other persons who are not parties to this application notwithstanding the merits of the said investigations.
90. Apart from that the position as stated in ***Halsbury's Laws of England 4th Edition Vol. II page 805 paragraph 1508***, is that the grant of judicial review remedies being discretionary, the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles. In **Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209** it was held that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the

most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa HCMA No. 96 of 2000.**

91. In my view to grant the orders as sought herein whose effect would be to shield other parties not before the Court would be contrary to public interest, promote and abet impunity. In effect it would instead of promoting law and order engender administrative chaos by unjustifiably restricting the Respondent's investigatory powers.
92. Apart from that it has been contended, a contention not controverted by the applicant that the applicant has since parted ways with the proprietorship of the leasehold interests in the suit land. According to the certified copy of the register exhibited, whereas the lease was issued to the ex parte applicant on 26th March 2012, on 28th December 2012, the same leasehold was transferred to **Hyatt Hotels Ltd**, a non-party to these proceedings That being the position, it would be unwarranted to prohibit any investigations in respect of the suit land.
93. Having considered the instant application, it is my view that this is not an appropriate case to exercise my discretion in favour of the applicant.
94. Before I conclude, I must express this Court's displeasure at the language adopted by the 1st Respondent herein. The 1st Respondent in my view adopted a very condescending attitude towards the judicial officers who handled the relevant civil cases. It is in my view highly inappropriate for parties to make derogatory remarks in respect of court orders without taking legal steps to set them aside. Such an attitude has no place in our judicial system and legal counsel who draw such affidavits ought to be very cautious and ought not to allow themselves to be seen to be abetting such disgraceful conduct.
95. Having said that the order which commend itself to me and which I hereby grant is that the Notice of Motion dated 10th November, 2013 lacks merit and is dismissed but with no order as to costs.

Dated at Nairobi this 22nd day of September, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nyiha for the Applicant

Miss Jeptai for Mr Murei for the 1st Respondent

Mr Odundo for Mr Amoko for the 2nd Respondent

Mr Taib for Mr Kemboy for the 3rd Respondent