



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

J.R. MISC. CIVIL APPLICATION NO. 305 OF 2012

IN THE MATTER OF AN APPLICATION BY KAMLESH MANSUKHLAL DAMJI PATTNI FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY WAY OF ORDERS OF CERTIORARI AND PROHIBITION AND

IN THE MATTER OF THE DECISION OF THE DIRECTOR OF PUBLIC PROSECUTIONS CONTAINED IN HIS LETTER DATED 27TH JANUARY 2012 AND

IN THE MATTER OF THE CRIMINAL PROCEDURE (AMENDMENT) ACT 2003

REPUBLIC.....APPLICANT

- VERSUS -

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC

PROSECUTIONS.....2ND RESPONDENT

THE COMMISSIONER OF POLICE.....3RD RESPONDENT

THE CHIEF MAGISTRATE

NAIROBI LAW COURTS.....4TH RESPONDENT

EX PARTE: KAMLESH MANSUKHLAL DAMJI PATTNI

JUDGMENT

The Application

1. The application before me is a Notice of Motion application dated 28th August 2012 and expressed to be brought under Section 3A of the Civil Procedure Act, Order 53 Rules 3(1), 4(1) and 7(2) of the Civil Procedure Rules and all other enabling provisions of the law and inherent jurisdiction of this court.

2. Vide the application, the Applicant, Kamlesh Mansukhlal Damji Pattni seeks the following orders:

1) An order of certiorari to remove into this court and quash the remarks, decision and finding of the 2nd Respondent contained in the 2nd Respondent's letter dated 27th January 2012 addressed to the Applicant's Advocates Messrs. Kalove & Company Advocates.

2) An order of prohibition do issue against the 1st 2nd and/or 3rd Respondents and/or any other authority, body or persons from prosecuting or continuing to prosecute the Applicant and his associated companies including Goldenberg International Limited in Nairobi Chief Magistrates Court Criminal Case No. 518 of 2006; Republic vs. Kamlesh Mansukhlal Damji Pattni and Others in whatever manner whatsoever or in any other matter relating to the Goldenberg affair or the Bosire Report or otherwise.

3) An order of prohibition do issue against the 1st 2nd and 3rd Respondents and/or any other authority, body or persons from arresting, charging or prosecuting, suing or commencing any proceedings against the Applicant and or his associated companies including Goldenberg International Limited in relation to any matters touching upon or related to the Goldenberg affair or arising from the Bosire Report or otherwise.

4) An order of prohibition do issue against the 4th Respondent from hearing or continuing to hear Nairobi Chief Magistrates Court Criminal Case No. 518 of 2006; Republic vs. Kamlesh Mansukhlal Damji Pattni and Others as it relates to the Applicant and his associated companies including Goldenberg International Limited.

5) The Applicant be granted leave to apply by way of Judicial Review for the aforesaid orders of Certiorari and Prohibition.

6) The grant of leave to the Applicant to institute these Judicial Review proceedings do operate as a stay of proceedings in Nairobi Chief Magistrates Court Criminal Case No. 518 of 2006: Republic vs. Kamlesh Mansukhlal Damji Pattni and Others as they relate to the Applicant and his associated companies including Goldenberg International Limited and do operate as a stay of the decision of the 2nd Respondent taken on 27th January 2012 and contained in his letter dated 27th January 2012 addressed to the Applicant's advocates Messr. Kalove & Company Advocates.

7) The costs of and incidental to this application be provided for in any event.

8) Such further or other relief as the Honourable Court may deem fit, just and expedient to grant.

3. The application is based on grounds set out in the Applicant/Petitioner's Statutory Statement and Verifying Affidavit sworn on 26th July 2012.

Application for leave

4. Prior to the filing of the substantive motion before the court, the Applicant through an application filed on 10th August 2012 applied for leave to bring the judicial review proceedings. The application was heard *ex-parte* on the said 10th August 2012 and leave to institute the substantive motion granted. In granting leave, this court made the following observations and reasoning:

*“This is an application for leave to commence judicial review proceedings. It is stated that the urgency of the matter is that the magistrate who has been handling the criminal case CMCC No. 518 of 2006 has been elevated to the position of Judge and the prosecutor who was prosecuting the case deployed to the Commission of Inquiry dealing with the Saitoti Helicopter crash. As such, the applicant is aggrieved that the criminal proceedings which he claims commenced way back 22 years ago are going to be prolonged further. The applicant fears that the uncertainty in the prosecution of the criminal case will continue to haunt him even further. This despite the applicant having secured settlement of the matter through consent orders given in HCCC No. 589 of 1999. He also asserts that the main complainant Central Bank of Kenya has since stated that it no longer has any claims against the Applicant particularly having procured surrender of the Grand Regency Hotel. He states that the understanding between the parties was that the surrender of the Hotel settled all criminal and civil claims against him. At this *ex-parte* level of the application, and given that I am only required to satisfy myself that the applicant has made a *prima facie* case for grant of leave, I am not required to venture into the possible merits of the main application. For these reasons, I am satisfied as to the urgency of the matter in view of the recent developments relating to the judicial officer who was handling the criminal case and the prosecutor who was prosecuting the case. I will therefore certify the application urgent and admit it for hearing during the current vacation. With regard to the main application, I have had to quickly peruse through lengthily statutory statement and supporting documentation all of which reveal the following points:*

1) Consent orders settling all pending claims between the applicant and the respondent were recorded in Hccc No. 589 of 1999 on 29/4/2008 and in Hccc No. 1111 of 2003 on 9/4/2008.

2) A settlement agreement dated 8/4/2008 was entered into between KACC and the applicant in which the former undertook not to prosecute the applicant.

3) Other government bodies such as CBK also consented to settlement and expressly indicated it no longer had in interest in pursuing the claims, both criminal and civil.

4) A plea bargain attempt is still in pursuit between the applicant and the Attorney General.

Prima facie therefore, I find that there are plausible grounds upon which the applicant may wish to challenge the decision of the Director of Public Prosecutions against terminating the criminal proceedings. I am therefore minded to grant the main chamber summons application in so far as leave to commence judicial review proceedings relates and in so far as the stay sought in terms of prayers 1, 2, & 3 and on condition that the Judicial Review application is lodged within 21 days from today. Orders accordingly”.

5. As to whether the above bases for grant of leave would be vindicated in the substantive application would emerge in the analysis and conclusions that we shall draw in due course, having considered the merits of the application.

Background to the application

6. The background to the application is set out in detail in the Statutory Statement and Verifying Affidavit of the Applicant aforesaid.
7. The Applicant states that he was one of two shareholders in Goldenberg International Limited, a company incorporated in July 1990. From on or about November 1990 the company was engaged in the exportation of gold and diamond jewelry under the Local Manufacturers (Export Compensation) Act, Cap 482 scheme which provided for the payment by the Customs and Excise Department of 20% export compensation to eligible exporters on the value of goods exported. The company applied for and was granted an additional 15% payment on its exports of gold and diamond jewelry which was paid from Treasury and treated as customs refund. In the course of implementation of the export compensation scheme, the Applicant and his companies Goldenberg International Limited and Exchange Bank Limited were paid export compensation of KShs.5.8 billion was paid to Goldenberg which sum covered pre-shipment finance, retention accounts, Forex Cs, spot and forward contracts and others. In or around the year 1993/94 queries arose as to the propriety of the said undertakings including but not limited to questions of whether or not gold and diamonds were exported by Goldenberg International Limited. The payment of KShs.5.8 billion payment to Goldenberg by Treasury was faulted amid claims of cheque kiting and other transactions that were considered to be either illegal or irregular or fraudulent. As a consequence, the export compensation scheme was terminated as were the other diverse transactions of the Applicant and Exchange Bank Limited. Arising from the alleged illegal, irregular and/or fraudulent transactions, the Applicant, Goldenberg International Limited and others were charged with various offences in nine separate criminal cases.
8. The Applicant names the following criminal cases that were instituted arising from the alleged irregular transactions involving himself and Goldenberg International Limited as Chief Magistrates Court Criminal Case Nos.2271 of 1994, 4053 of 1994, 46 of 1995, 1092 of 1995, 2208 of 1995, 1474 of 1997 9438 of 1998, 741 of 1999 and 392 of 1999. There was also a private prosecution brought by the Law Society of Kenya being Chief Magistrates Court Criminal Case No.1 of 1994 which was terminated by the Attorney General. Out of all the criminal cases instituted against the Applicant and Others by the 1st Respondent by 24th February 2003 there remained only four criminal cases namely Chief Magistrates Court Criminal Case No. 4053 of 1994, Chief Magistrates Court Criminal case No.1474 of 1997 (which was instituted following the termination of Chief Magistrates Criminal Case No. 2208 of 2003 by the High Court pursuant to a Judicial Review application), Chief Magistrates Court Criminal Case No. 741 of 1999 Chief Magistrates Court Criminal Case No. and 392 of 1999. (See Exhibit KMDP.2 in the Applicant's Verifying Affidavit). All the other cases were terminated or dismissed in one way or another. Of the four said cases, only Chief Magistrates Criminal Court Case No 1474 of 1997 started before the then Principal Magistrate Uiter Kidullah and after 26 prosecution witnesses had given evidence over many weeks, the trial magistrate Ms. Uiter Kidullah was on 13th September 1999 appointed to be the Director of Public Prosecutions. In addition, the then prosecutor Mr. Bernard Chunga was appointed to be the Chief Justice on the same date. The Applicant claims that this development brought the said case to a standstill.
9. The Applicant claims that on 24th February 2003 the 1st Respondent attempted to terminate the said four cases pending against the Applicant by entering Nolle Prosequi (see Exhibit KMDP.3). This, he states, was for the sole purpose of facilitating the establishment of the Judicial Commission of Inquiry into the Goldenberg Affair (hereinafter "**the Bosire Commission**") which was established pursuant to Gazette Notices 1237 and 1238 dated 24th February 2003, the same day as the 1st Respondent attempted to enter the *Nolle Prosequi*. The rationale was to enable the Commission to sit and hear evidence on the Goldenberg Affair without flouting the *sub-judice* rule. The then presiding Chief Magistrate declined to accept the said Nolle Prosequi and referred the matter to the High Court as a Constitutional Reference. He states that Bosire Commission sat and took evidence for almost three years before its conclusion, with the publication of its report on 3rd February 2006. The Applicant claims that the three years constituted an additional three-year delay in concluding the criminal cases against him and others.
10. The Applicant states that following the publication of the Bosire Report on 3rd February 2006, the 1st Respondent preferred fresh charges against the Applicant, Goldenberg International Limited and others in Chief Magistrates Court Criminal Case No. 518 of 2006 arising from the Goldenberg affair. The complainant in respect of those charges was Central Bank of Kenya, as discernible in a new charge sheet dated 5th April 2012 (**Exhibit KMDP.5a**) which was introduced. The new charge sheet contained additional seven new counts as compared to the old charge sheet which had only four charges.
11. The Applicant contends that the new charges were instituted on the basis of the Bosire Commission report. The report had observed that the Applicant as the promoter of Goldenberg International Limited and its shareholder and director was the Goldenberg alter ego hence criminally responsible for everything done by the company.
12. The Applicant laments that the prosecution was recommended in spite of judgments in both the **Hon. Professor George Saitoti Judicial Review application H.C. Miscellaneous Application No. 102 of 2006 ("the Saitoti case")** and in the **Eric Cheruiyot Juridical Review application H.C. Civil Application No. 416 of 2006 ("the Kotut case") (Exhibit KMDP.7)**, which found the Bosire report to be highly flawed and the decisions and findings of the Bosire Commission to have violated a wide range of issues contestable by the aggrieved persons through judicial review proceedings.
13. With regard to the plea bargaining attempt, the Applicant states that by letter dated 18th May 2010 (**Exhibit KMDP.11**), the Applicant requested to enter into a plea agreement with the 1st Respondent for the withdrawal of the charges against him in Nairobi Chief Magistrates Court Criminal Case No.518 of 2006 arising from the Goldenberg affair, pursuant to the provisions of Section 137 of the Criminal Procedure Code (Amendment) Act 2008. By letter dated 21st February 2011 (**Exhibit KMDP.12**) signed by the 2nd Respondent as the then Chief Public Prosecutor in response to the Applicant's advocates' letter dated 18th May 2010, the 1st Respondent wrote to the Applicant's advocates, informing the Applicant of the Attorney General's observations and directions on the Applicants offer for a plea agreement. The Attorney General's directives were that the Applicant should submit specific proposals for settlement for his consideration. Additionally, the Applicant was required to give full disclosure. The letter was copied to the Police, Treasury and Central Bank of Kenya for their comments and observations. In a lengthy response letter dated 10th May 2011 containing several annexures, the Applicant through his Advocates provided the proposals and disclosures requested. However, the Applicant states that by letter dated 27th January 2012 from the office of the 2nd Respondent to the Applicants Advocates, the 2nd Respondent declined the plea bargaining offer.
14. It is against the above rejection of the plea bargaining offer that the application before this court is substantially founded.

Grounds in support of the application

15. The Applicant's case is founded on a raft of grounds upon which the orders sought should be granted. These include alleged dereliction of duty and abuse of office on the part of the 1st Respondent; bad faith on the part of the 2nd Respondent; errors of fact; breach of the right to a fair trial and protection of the law; breach of the right to trial within a reasonable time; frustration of legislative purpose; unfairness, arbitrariness, inconsistency and capriciousness; illegal exercise of discretion; violation of the principle of legitimate expectation and natural justice; violation of the principle of proportionality; violation of the principle of equality of arms, unreasonableness and breach of fundamental rights and freedoms of the person including the right to a fair trial and the right to trial within a reasonable time.

16. In my review of the said grounds, I find that the grounds appear to fall into two categories. The first category relates to the conduct of the 1st and 2nd Respondents and the decision of the 2nd Respondent contained in his letter dated 27th January 2012 and which the Applicant contends violate a wide spectrum of administrative action that raise grounds of a judicial review nature that are available to the Applicant for the intervention of this court. The second category relates to the violation of the Applicant's constitutional rights to a fair trial and a trial within a reasonable time guaranteed by the Constitution of Kenya, 2010. I shall examine these in turn in the course of this judgment.

Opposition to the application

17. The application is opposed. The 2nd Respondent relies on a replying affidavit sworn by James Mungai Warui, a Principal Prosecution Counsel in the Office of the 2nd Respondent on 16th October 2012. The affidavit, besides responding to factual matters raised in the verifying affidavit of the Applicant, denies that the delay in prosecution of the criminal case has prejudiced the Applicant's rights under the Constitution. The deponent further avers that the 2nd Respondent has a constitutional discretion to consider whether or not to accept a plea bargain agreement and that his failure to do so in this case was due to the fact that the proposals forwarded by the Applicant were not acceptable to the 2nd Respondent.

18. The 1st, 3rd and 4th Respondents filed grounds of opposition to the application on 5th November 2012. In the grounds, the said Respondents contend that the Applicant has failed to demonstrate sufficient grounds to warrant issuance of the orders sought in the said application; that the order of prohibition sought against the Respondents is incapable of being issued as it is aimed at an action that was taken six years ago; that the Applicant seeks to challenge the constitutional and statutory mandate of the Respondents and that the orders sought, if granted, would amount to the court exercising the mandate of an independent constitutional body.

19. On 24th September 2012, the court gave directions on the hearing of the application through which the parties agreed to put in written submissions by or before 29th October 2012. Matter was then fixed for highlighting of submissions on 5th November 2012. All the parties duly complied with these directions and as of 5th November 2012, the following material had been placed before the court:

- i. The 2nd Respondent's replying affidavit sworn on 16th October 2012 by state counsel James Mungai Warui who had the conduct of the matter on behalf of the 2nd Respondent;
- ii. The Applicant's written submissions dated 22nd October 2012 by Kalove & Company;
- iii. The 2nd Respondent's written submissions by the 2nd Respondents counsel on record James Mungai Warui dated 2nd November 2012;
- iv. Grounds of Opposition dated 5th November 2012 on behalf of the 1st, 3rd and 4th Respondents by Litigation Counsel G.K Oenga for the 1st Respondent the Attorney General; and
- v. Written Submissions of the 1st Respondent the Attorney General on behalf of the 1st, 3rd and 4th Respondents dated 5th November 2012 by Litigation Counsel G.K Oenga.

Interested parties

20. By Notice of Motion dated 15th October 2012, Elijah Kipng'eno Arap Bii, an accused person in Chief Magistrates Court Criminal case No. 518 of 2006 through the firm of Simani and Associates applied for leave to be joined in these proceedings as an Interested Party. The application was based on grounds that being one of the accused persons in the Chief Magistrates Criminal Case No. 518 of 2006 alongside the Applicant in this matter, he was directly affected by the proceedings in this matter. The application was heard and allowed on the said 15th October 2012 and the said Elijah Bii made an Interested Party to the application herein. The said interested party subsequently put in a supporting affidavit and written submissions in support of the application before me. The written submissions were dated 5th November 2012.

21. Further, on 5th November 2012, the date fixed for highlighting of submissions, the proceedings were disrupted just as the parties prepared to highlight submissions by the sudden appearance of Mr. Toyo advocate, instructed by Messrs. Havi & Company Advocates, who sought to be allowed to come on record on behalf of a body claiming to be an interested party in these proceedings in the name of International Centre for Policy and Conflict (hereinafter called "ICP & C"). Mr. Toyo told the court that the body was the Petitioner in Constitutional Petition No. 279 of 2011 seeking to recover Kshs.5.8 billion from the Applicant. The court, on hearing Mr. Toyo directed that the firm of Messrs. Havi & Company make a formal application for leave to come on record. The matter was adjourned to 2.30pm in the afternoon of the same day to give the said law firm time to apply formally to come on record. At the adjourned hearing in the afternoon, Mr. Havi appeared and made submissions and statements without having filed and served any formal application for joinder of ICP & C. The submissions were strenuously opposed by Mr. Kalove for the Applicant, Mr. Simani for the Interested Party, Mr. Kiage for the 1st, 3rd and 4th Respondents and

Mr. Warui for the 2nd Respondent. All the stated advocates argued that Mr. Havi's client had no *locus standi* in the matter and was just a busy body trying to gatecrash in the proceedings in order to derail the proceedings for ulterior motives. In spite of the strong submissions against granting ICP & C audience in the matter, I made a ruling allowing the organization to participate in these proceedings in the following terms:

“Having heard the parties, I direct that the International Centre for Policy and Conflict shall have audience in the court provided that this shall not hamper the directions already granted in this matter. The parties are directed to proceed with highlighting of written submissions and the International Centre for Policy and Conflict is allowed to oppose the application as desired”.

22. Although in my considered view ICP & C had not shown what, if any, right or fundamental freedom in the Bill of Rights of the Centre that had been denied, violated, infringed or threatened, this court, by allowing the Centre to make its submissions in the matter obviated any complaint from the party that it had been denied the right of access to the court as would have suggested any intention to thwart the ends of justice in this matter. That the body was accorded audience and fully participated at the hearing of the matter now dispels any such complaints or challenges as it may have wished to raise be it within the judicial process herein or administratively with the judiciary.

23. With the ruling aforesaid, all parties were allowed to make oral highlights of their submissions as previously directed. ICP & C made its written submissions through Mr. Havi Advocate.

Applicant's Submissions

24. For the Applicant, learned counsel Mr. Kalove submitted that the Applicant was first charged with criminal charges over the Goldenberg Affair in the year 1993. Since then, he had been in and out of courts in both civil and criminal courts. Initially, the Applicant faced nine criminal cases but that the Attorney General terminated these to pave way for the Bosire Commission of Inquiry into the Goldenberg Affair. The commission rendered its report in August 2006. The ex-parte Applicant was then charged pursuant to that report. Although the Bosire report recommended further investigations, the Applicant was charged in Criminal Case No. 518 of 2006 without further investigations. By letter dated 18th May 2010, the Applicant requested for a plea bargain with the Attorney General (“A-G”) under section 137 of the Criminal Procedure Code (Amendment) Act 2008. The Director of Public Prosecutions (“DPP”) however declined the offer for plea bargain through letter dated 27th January 2012.

25. Mr. Kalove submitted further that the Applicant had for long been persecuted and prosecuted by the AG and DPP. As it were, the trial magistrate in Criminal Case No. 518 of 2006 had been elevated to the position of judge. This meant further delay. The inordinate delay could never afford the Applicant a fair trial. Further, the DPP in rejecting the plea bargain agreement had not taken into account that the ex-parte Applicant had restituted the Government by handing over the Grand Regency Hotel Ltd. In addition, Mr. Kalove submitted that the civil dispute and all debts ensuing therefrom that was the genesis of the matter involving Goldenberg International Limited and the Central Bank of Kenya (“CBK”) had been settled vide three agreements entered into between the Applicant and CBK on 29th September 1994. CBK having been the victim and having secured settlement of all the pending claims with the Applicant, there was no longer a complainant in the criminal case. He submitted further that the Bosire report had been found to have been fatally flawed due to serious transgressions as per the judgments in the cases of *Saitoti* and *Kotut*. Further, when the plea bargaining was entered into, the DPP had invited all concerned parties for their comment and none had objected to the plea bargaining the Applicant was seeking. If anything, the CID in their letter expressed grave shortcomings of availability of witnesses and their ability to remember what had transpired. Mr. Kalove cited the case of *Githunguri* where Lesiit J. held that delay of a criminal case for 9 years was inordinate. He concluded by submitting that there were binding agreements between the Applicant, CBK and the then Kenya Anti-Corruption Authority (“KACC”) that absolved the Applicant from prosecution.

Elijah Arap Bii (Interested Party's) submissions

26. Mr. Simani for the Interested Party submitted that Mr. Bii was a co-accused in Criminal Case no. 518 of 2006. He submitted that the Interested Party was the only party that was bound to be affected by the orders that the court would make in the application, as the other co-accused besides the Applicant, Mr. Wilfred Koinange, was now deceased. He submitted that the matter went back to the year 1993, had been investigated by the then A-G and the Applicant charged in Criminal Case No. 1474 of 1997. The Interested Party was a witness in that case and gave evidence but case was terminated through a *nolle prosequi*. He submitted that although the Bosire report in part 674, 675 and 676 and at part 846 and 847 had recommended that investigations be made against the Interested Party before prosecution, Mr. Bii had been without investigation charged with abuse of office and conspiracy. Even then, Mr. Simani submitted that the principal witnesses in the case had either died or disappeared. He referred the court to see page 1028 – 1032 of Vol. 2 of the application, where it was shown that 4 of the witnesses had died. In the circumstances, Mr. Bii was unlikely to get a fair trial. He submitted further that CBK the complainant had secluded itself from the court. KACC had also stated that it had no interest in the matter. The CID had also said the same. A three-judge bench had considered the question of fair trial in the Saitoti and Kotut cases and same findings reached by the said three-judge bench applied to Mr. Bii's case. The High Court had also expunged 40 paragraphs of the Bosire Report, rendering the report useless. As the report related to one transaction, the court effectively trashed the whole report. The criminal charges facing the Applicant and the Interested Party being founded on the Bosire report could therefore no longer stand. Mr. Simani declared Goldenberg as dead as the money has been paid back. He urged the Respondents to accept this and save Mr. Bii further agony, as he had been tormented for the last 20 years.

1st, 3rd and 4th Respondent's submissions

27. Mr. Kiage, for the 1st 3rd and 4th Respondents submitted that the order of certiorari was directed at the DPP. As regards the 2nd prayer seeking prohibition against 1st, 2nd & 3rd respondent from prosecuting or continuing to prosecute the Applicant, Mr. Kiage submitted that the prayer could not be granted as the decision to prosecute had been made by the 1st Respondent way back in the year 2006. He submitted that an order of prohibition cannot lie against a decision that is in the past, as was in the application before court. He cited the case of *Kenya National Examination Council vs. Githinji* where the court of Appeal held that an order of prohibition looks into the future. As regards continuing prosecution he submitted that the grounds relied on do not warrant blocking prosecution of the criminal matter. As regards the

third prayer of the application, Mr. Kiage submitted that the prayer was very wide, with far reaching effects hence was not justified. Such a prayer if allowed would insulate the Applicant totally against future criminal liability notwithstanding discovery of new evidence. Mr. Kiage submitted that in criminal matters there was no limitation of time. He emphasized that Article 157 of the Constitution establishes the office of the DPP. And gives the bearer of that office power to commence or terminate prosecution. Further Section 137 of the Criminal Procedure Code which provides for plea bargaining contained what considerations should be made when considering plea bargaining. As long as such considerations were met, a decision by the DPP could not be challenged on the ground that that decision was right or wrong. He cited the **Kunste Case**, where it was held that the purpose of Judicial Review is to ensure that a person is accorded fair treatment. If therefore the DPP took all considerations, this court lacked jurisdiction to terminate the proceedings.

2nd Respondent's Submissions

28. On behalf of the 2nd Respondent the DPP, Mr. Warui Mungai associated himself with the submissions made on behalf of the 1st 3rd and 4th Respondents. He argued that the application should be dismissed as the challenge to the Bosire Report was time barred. He submitted that In HCCC Misc. Appl. 132 of 2006, the same issues had been raised but abandoned. The same had also been argued in Civil Appeal No. 112 of 2006. In any event, Mr. Mungai submitted that the report by Bosire is not what triggered Criminal Case No. 518 of 2006. This position was supported by the prosecution documents served upon the Applicant. On the issue of CBK, Mr. Mungai argued that CBK was a witness and not the complainant. Settlement with CBK did not constitute a reason to grant orders of prohibition as the Government of Kenya was the complainant. On the plea bargaining, he submitted that when the DPP looked into issue, he established that this was a matter of great public interest which ought to be allowed to go to full trial. The DPP had acted within the powers granted to him under Section 137 of the Criminal Procedure Code. Disagreeing to grant plea bargaining within the powers of the DPP could not therefore be faulted. Mr. Mungai submitted further that the court could not compel the DPP to proceed with the plea bargaining as Article 157 of the Constitution allowed the DPP to act without the influence of any other person. On the issue of delay in prosecuting the case, Mr. Mungai submitted that the history of the case showed that the Respondents were not to blame. The Applicant himself had actively contributed to the delays. Mr. Mungai cited the cases of **Frank Peter Zana vs. DPP** and **Sanderson vs. AG of Eastern Cape** for the proposition that delay in itself cannot find a basis against fair trial. On the disappearance of witnesses, he argued that this could only work for the Applicant. On the issue of media publicity, the Applicant had not demonstrated how that had adversely affected the criminal case. In any event, in a similar case **Kamlesh pattni Vs. AG** it had been held that media publicity per se did not prejudice a case.

ICP & C's submissions

29. Mr. Havi, for ICP&C submitted that as the proceedings brought under the Notice of Motion dated 28th August 2012 had existed since then, the prayers seeking to quash criminal case No. 518 of 2006 could not be granted as Order 53 Rule 2 of the Civil Procedure Rules was clear that certiorari cannot be granted after six months since the proceedings commenced. In the circumstances he submitted that the application was barred on account of limitation. For that reason, he urged the court to dismiss the motion with costs to the Respondents and ICP&C.

Determination

30. I have carefully considered the application, the affidavits and annexures filed herein and the rival oral and written submissions by the respective counsel for the parties. I make my view of the application as below.

Issues arising

31. In paragraph 16 of this judgment, I observed that the issues arising in the application before me may be classified into two broad categories - the first relating to the question of whether or not the conduct of the 1st and 2nd Respondents and in particular the decision of the 2nd Respondent contained in his letter dated 27th January 2012 have violated prejudiced or otherwise impaired the rights of the Applicant as to merit intervention of this court by way of judicial review and, secondly, whether the Applicant's constitutional rights to a fair trial and in particular a trial within a reasonable time as guaranteed by the Constitution of Kenya, 2010 have been violated to merit redress from this court. Besides these broad categories, it did emerge in the course of highlighting of submissions that this court may need to address the preliminary question of whether or not the court has jurisdiction to entertain the application as a whole in view of the time limitation imposed for the bringing of applications seeking orders of certiorari under 53 Rule 2 of the Civil Procedure Rules, 2010.

32. Accordingly, the issues that I see arising for my determination are three-fold, namely;

1) Whether the judicial review application herein is statute-barred;

2) Whether the decision of the 2nd Respondent comprised in the letter dated 27th January 2012 addressed to the advocates for the Applicant is amenable to judicial review by way of an order of certiorari; and

3) Whether the Applicant's constitutional rights to fair trial and in particular a trial within a reasonable time as guaranteed by the Constitution of Kenya, 2010 have been violated to merit redress from this court in terms of the orders of prohibition sought.

I will consider each of these issues in the analysis below.

Analysis of issues

ISSUE NO. 1: *Whether the judicial review application herein is statute-barred;*

33. This Court's jurisdiction to hear and determine the Applicant's Judicial Review application and to grant the orders sought therein is contested through the Grounds of Opposition filed on 5th November 2012 behalf of the 1st, 3rd and 4th Respondents filed herein and also in the oral submissions by Mr. Havi, counsel for ICP & C. Mr. Havi in particular was categorical that as the proceedings herein were brought under the Notice of Motion dated 28th August 2012, and as they had existed since then, the prayers seeking to quash Criminal Case No. 518 of 2006 could not be granted as Order 53 Rule 2 of the Civil Procedure Rules was clear that certiorari cannot be granted after six months since the proceedings commenced. In the circumstances he submitted that the application was barred on account of limitation. These sentiments were also echoed by Mr. Warui Mungai for the 2nd Respondent.

34. My considered view on the issue of jurisdiction is that, based on the material placed before me, the Applicant and other co-accused were, following the conclusion of the hearings of the Commission of Inquiry into the Goldenberg Affair and the publication of its report on 3rd February 2006 ("the Bosire report"), charged on 17th March 2006 with diverse offences purportedly arising from the Goldenberg Affair in Chief Magistrates Court Criminal Case No. 518 of 2006. On 18th May 2010, the Applicant initiated on plea agreement negotiations pursuant to Section 137 of the Criminal Procedure (Amendment) Act 2008 with the 1st Respondent and which were subsequently taken over by the 2nd Respondent. By letter dated 27th January 2012, the 2nd Respondent brought the said plea agreement negotiations to an end and informed the Applicant that his trial in Criminal Case No. 518 of 2006 would continue. Being aggrieved by the decision of the 2nd Respondent, the Applicant filed an application by way of Chamber Summons dated 26th July 2012 supported by the Applicant's Statutory Statement dated 26th July 2012 and Verifying Affidavit also sworn on 26th July 2012. Consequently, the Application for Judicial Review was made within the 6 months period.

35. It is indeed discernible that on 17th March 2006, the Applicant was charged with only four counts, which charge sheet was on 5th April 2012 withdrawn and a new charge sheet introduced by the 2nd Respondent containing eleven counts. The Applicant and the co-accused were made to take a fresh plea of the eleven counts, as compared to the four counts in the withdrawn charge sheet of 17th March 2006. This new charge sheet was preferred on 5th April 2012, which was four months before the judicial application herein was lodged on 26th July 2012. Consequently, I find that this court has jurisdiction to hear and determine the application.

36. Ultimately, while not necessary for the present purposes in view of the foregoing analysis as to the application's compliance with Order 53 Rule 2 of the Civil Procedure Rules aforesaid, I need no prompting in pointing out that this Court would still have had to grapple with Article 159 (2) of the Constitution which provides that in exercising judicial authority, the courts should administer justice without undue regard to procedural technicalities.

ISSUE NO. 2: Whether the decision of the 2nd Respondent comprised in the letter dated 27th January 2012 addressed to the advocates for the Applicant is amenable to judicial review by way of an order of certiorari

37. The question that this court needs to answer is whether the 2nd Respondent's decision terminating plea negotiations between himself and the Applicant vide his letter dated 27th January 2012 is amenable to judicial review and, if so, whether the Applicant has made the case for intervention of this court by way of an order of certiorari.

38. From the lengthy Statutory Statement in support of the application before me, I am able to identify at least six pillars upon which the Applicant's case for quashing of the 2nd Respondent's is founded and which the Applicant feels ought to have, if properly considered by the 2nd Respondent, resulted in the acceptance of his plea offer as communicated vide letter dated 18th May 2010. These are:

i) Restitution efforts

The Applicant argues that it was patently obvious from the letter of 27th January 2012, that the 2nd Respondent in taking his decision to terminate the plea negotiations failed to evaluate or give due weight or due credence to restitution of the complainant by the Applicant in the course of the plea agreement negotiations. The Applicant contends that in dismissing the matter of the Grand Regency Hotel and its surrender to the Government and by placing sole reliance for his decision on the argument that the matter went beyond such surrender, the 2nd Respondent erroneously made the finding that the Applicant had made no concrete proposal or offer of settlement. The Applicant maintains that he advanced a number of matters for consideration by the 2nd Respondent in the plea agreement negotiations but that these were ignored by the 2nd Respondent. These matters include:

- a) The matters contained in the letter dated 10th May 2011 from the Applicant to the 2nd Respondent which included details of surrender of assets by the Applicant by way of restitution including the surrender of the Grand Regency Hotel pursuant to the consent agreements with the Central Bank of Kenya and the Kenya Anti-Corruption Commission and orders made thereon;
- b) The letter from the Central Bank of Kenya dated 28th July 2011 (Exhibit KMDP -15, pg. 1033 Plaintiff's bundle) and letter from Treasury (pg. 1033 9B) neither of which raised any objection to the contemplated plea agreement. The Applicant claims that the 2nd Respondent would have referred to such objections in his letter date 27th January 2012 if any such objections had been raised;
- c) The contents of Agreements identified as "A", "B" and "C".
- d) The total amount of Kshs. 24 billion restituted by the Applicant as is indicated in the Applicant's letter dated 10th May 2011 and addressed to the 1st Respondent. The Applicant claims that this amount of restitution has never been disputed by CBK, Treasury and the CID which is a paramount consideration when a plea bargain is being considered.

ii) Letter from CID expressing reservations against prosecution

The Applicant claims that the 2nd Respondent did not pay due attention to the contents of the letter addressed to him by the Director of Criminal Investigations Department dated 6th July 2011 which, *inter alia* raised issues of a constitutional nature and identified the challenges facing the prosecution. This letter, claims the Applicant, was complemented by the letters from the Central Bank of Kenya and from Treasury neither of which raise any objection to the contemplated plea agreement.

iii) Settlement Agreements

The Applicant contends that the 2nd Respondent failed to consider the contents of the Settlement Agreement dated 8th April 2008; Consent Agreement and Consent Order dated 9th April 2008 in HCCC. No 1111 of 2003 (pg. 924 Plaintiff's bundle) and the Consent Agreement and Consent Order dated 29th April 2008 (pg. 918 Plaintiff's bundle) in HCCC No. 589 of 1999, which clearly demonstrate that Central Bank of Kenya has no claims and/or complaints against the Applicant or his associated companies including Goldenberg International Limited.

iv) Breach of fundamental right to fair trial

The Applicant argues that in reaching his decision contained in his letter dated 27th January 2012 to terminate the plea agreement negotiations and continuing with the prosecution of the Applicant in Chief Magistrates Court Criminal Case No, 518 of 2006, the 2nd Respondent overlooked and failed dismally to consider the implications of his decision and actions on the Applicant's constitutional rights of the presumption of innocence, the right to a fair trial and the right to trial without delay.

v) Statutory provisions on plea bargaining

The Applicant claims that his offer for a plea agreement was founded on Section 137 of the Criminal Procedure Code (Amendment) Act 2008 but that the 2nd Respondent in reaching its decision was not guided by the provisions of the said Criminal Procedure Code (Amendment) Act 2008 and instead went on a frolic of his own. He faults 2nd Respondents for ignoring all other legal considerations which defeats the legislative purpose of the Section which was to end lengthy and protracted criminal cases. In the Applicant's view, the 2nd Respondent should have acted so as not to clog up the courts especially in view of the consent orders in HCCC. No. 589 of 1999 and HC. Misc. Application No. 1111 of 2003, which clearly showed that the Applicant had satisfactorily compensated any alleged loss incurred.

vi) The Bosire Report

The Applicant argues that the Bosire report had recommended that further investigations be conducted on the recommended suspects before fresh charges were preferred. This had not been done, as was held in the **Kotut Case** (supra). The Applicant claims that in considering the question of whether or not the Attorney General had conducted any further investigations or obtained any further evidence to found any charges against Kotut at page 99 the court held:

***“The argument that further evidence was obtained by the Attorney General is an afterthought to found charges against the applicant on the basis of a flawed report but claim that those charges are based on further evidence of the Investigation Team which this court cannot question.*”**

The Applicant claims that the report having been found to be flawed as against two of the 14 persons listed in the report including the Applicant herein whose conduct was said to be criminal in nature, the entire report was flawed as against them and each of them.

39. In response to the above contentions by the Applicant, the Respondents avoided detailed factual responses and relied heavily on legal arguments vindicating the 2nd Respondent's decision to terminate the plea negotiations.

40. Mr. Kiage, for the 1st, 3rd and 4th Respondents submitted that the Article 157 of the Constitution that establishes the office of the DPP gives the bearer of that office power to commence or terminate prosecution. Further Section 137 of the Criminal Procedure Code which provides for plea bargaining contained what considerations should be made when considering plea bargaining. As long as such considerations were met, a decision by the DPP could not be challenged on the ground that that decision was right or wrong. He cited the **Kunste Case**, where it was held that the purpose of Judicial Review is to ensure that a person is accorded fair treatment. In his view, if the DPP had taken all considerations, this court lacked jurisdiction to terminate the proceedings.

41. For the 2nd Respondent, Mr. Warui Mungai submitted that settlement with CBK did not constitute a reason to grant orders of prohibition as the Government of Kenya was the complainant. On the plea bargaining, he submitted that when the DPP looked into issue, he established that this was a matter of great public interest which ought to be allowed to go to full trial. The DPP had acted within the powers granted to him under Section 137 of the Criminal Procedure Code. Declining to grant plea bargaining within the powers of the DPP could not therefore be faulted. Mr. Mungai submitted further that the court could not compel the DPP to proceed with the plea bargaining as Article 157 of the Constitution allowed the DPP to act without the influence of any other person.

42. I have carefully considered the above rival positions. In my view, going by the grounds discussed above, it would be no overstatement to observe that the Applicant has raised reasonably sound grounds in support of his contention that the 2nd Respondent's rejection of his request for plea bargain should be reviewed and probably quashed by this court. Indeed, the letter of 10th May 2011 from the Applicant's lawyers to the 2nd Respondent written in response to the latter's request for full disclosure would have to me been the ultimate deal clincher as it contains in-depth details of the historical and factual matters that the 2nd Respondent was expected to consider in reaching a decision on the plea request. In addition, the fact that the complainant in this case the Central Bank of Kenya together with other interested parties such as the KACC and the CID have been shown to either have no further claims against the Applicant or to have reservations against pursuit of the Applicant both in criminal and civil proceedings is a development that the 2nd Respondent would have been expected to find persuasion in

considering the plea request. Certainly, the beating that the **Bosire Report** got from the courts in the **Saitoti** and **Kotut** cases was another development that militated against the criminal proceedings sought to be blocked by the Applicant. And there could be other compelling grounds in favour of a negotiated plea.

43. Unfortunately, I take the view that in the context of the present application that seeks judicial review of the 2nd Respondent's decision, these grounds, no matter how strong, do not come into play. Such matters are not, in the context of judicial review proceedings, considerations that a court of law would hold against the 2nd Respondent, to the extent that his decision on whether or not to accept the plea offer is concerned.

44. It is trite law that the function of judicial review is not to probe the correctness or otherwise of administrative action or decisions, but rather to interrogate whether or not the established process and parameters for the making of the administrative decision in question is observed and properly followed.

45. In the Article "**General Principle of Judicial Review on Administrative Action in Indian Legal System**" a leading scholar **Pan Mohamed Faiz** argues that the underlying object of judicial review is to ensure that the authority does not abuse its power and that the individual receives just and fair treatment and not to ensure that the authority reaches a conclusion which is correct in the eye of law. He writes further as follows:

"It is the solemn duty of the judiciary under the Constitution to keep different organs of the State within the limits of the power conferred upon them by the Constitution by exercising power of judicial review as sentinel on the quo vive. Thus, judicial review aims to protect citizens from abuse or misuse of power by any branch of the state. Judicial quest in administrative matters is to strike the just balance between the administrative discretion to decide matters as per government policy, and the need of fairness. Any unfair action must be set right by administrative review. In judicial review, the court is not concerned with the merits or correctness of the decision, but with the manner in which the decision is taken or order is made. A court of law is not exercising appellate power and it cannot substitute its opinion for the opinion of the authority deciding the matter. The areas where judicial power can operate are limited to keep the executive and legislature within the scheme of division of powers depends upon the facts and circumstances of each case. The dimension of judicial review must remain flexible". (See: <http://faizlawjournal.blogspot.com>)

46. In the application before me therefore, it matters little that the Applicant put forth weighty and poignant grounds behind the plea bargain request. What suffices is that the 2nd Respondent, in rejecting the plea request, acted within his constitutional and statutory mandate, even if the ensuing decision was absurd in the light of the grounds advanced.

47. I have perused the letter of 27th January 2012 (**Exhibit KMDP-14**) from the 2nd Respondent to the Applicant's advocates which is sought to be quashed under the application before me. The letter reads:

"Your aforesaid request for a plea agreement under Section 137 of the Criminal Procedure Code (Amendment) Act 2008 has been placed before the Director of Public Prosecutions (DPP) who has noted that your letter dated 10th May 2011 which was in response to ours dated 21st February 2011, does not contain any or any specific proposals for his consideration. Instead your letter is a mere attempt to show why your client should not have been charged. The DPP has further noted, that as observed by the Hon. Attorney General on 21st February 2011, the Goldenberg scam extends far beyond the matters relating to the Grand Regency Hotel and that therefore the surrender of the said hotel back to Central Bank of Kenya (CBK) cannot and (should not) be used as a ground to justify termination of the pending criminal proceedings. Accordingly, the DPP has directed that there being no concrete proposal or offer for settlement, the plea negotiations must terminate. In consequence, the criminal case should proceed to full trial".

48. From the letter, I am able to make out that the 2nd Respondent rejected the plea bargain on the basis that he had found the Goldenberg scam to extend beyond the matters relating to the Grand Regency Hotel. This ground, whether correct or otherwise, evidenced that the 2nd Respondent considered the request, based on the facts placed before him by the Applicant. He had also contacted the CBK, KACC and the CID as affected parties and obtained their views although it is not explicit that he took these into consideration. Anyhow, the 2nd Respondent in my view conformed with the statutory obligations bestowed upon the him under Section 137 of the Criminal Procedure Code as far as plea agreements relate. As a judicial review court therefore, I cannot fault the conclusion reached by the 2nd Respondent and need only satisfy myself that he did comply with the statutory steps set out for plea bargaining.

49. In any event, I would concur with submissions by counsel for the Respondents that the office of the Director of Public Prosecution as constitutionally established is an independent office that is not amenable to the control or direction of this court in its ordinary discharge of its mandate. Article 157 (10) and (11) of the Constitution provides thus:

"the director of Public Prosecutions shall --- not be under the direction or control of an person or authority and...the Director of Public Prosecutions shall have regard to --- the interests of the administration of justice and the need to avoid abuse of the legal process".

50. Consequently, I find that the Applicant has failed to establish a case meriting quashing of the decision of the 2nd Respondent as comprised in the letter of 27th January 2012.

51. In effect therefore, prayer 1 of the application before me dated 28th August 2012 fails.

ISSUE NO. 3: Whether the Applicant's constitutional rights to fair trial and in particular a trial within a reasonable time as guaranteed by the Constitution of Kenya, 2010 have been violated to merit redress from this court in terms of the orders of prohibition sought.

52. The Applicant raises various issues concerning alleged violation of his constitutional rights in the manner in which the prosecution of Criminal Case No. 518 of 2006 as well as previous other criminal cases preferred against him arising out of the Goldenberg Affair have been handled or managed. In particular, the Applicant argues that the 1st Respondent in deciding to charge the Applicant afresh on 17th March 2006 after the publication of the flawed Bosire Report and 14 years after the events occurred was contrary to the provisions of the Constitution and totally overlooked its provisions particularly the applicant's fundamental rights and freedoms and in particular Article 50 (2) (a) and (e) of the Constitution in so far as they related to the Applicant. Similarly the Applicant faults the 2nd Respondent's decision to terminate the plea agreement negotiations in January 2012 and to subject the Applicant to a fresh plea. The Applicant in addition avers that the 2nd Respondent's decision taken in January 2012 to terminate the plea negotiations and to continue with the prosecution of the Applicant in Chief Magistrates Court Criminal Case No. 518 of 2006 and to further charge the Applicant and others afresh in the said case on 5th April 2012 was taken nearly 20 years after the events occurred, which violated the Applicant's constitutional right to a fair trial and his right to trial within a reasonable time. The submissions by counsel for the Appellant stated above buttress these arguments. The Applicant therefore claims that the said Respondents were each obliged to uphold the Constitution. He therefore urges this court to enforce such rights through the judicial review proceedings in this matter.

53. The above submissions were echoed by Mr. Simani, appearing for Mr. Elijah Arap Bii (Interested Party) who submitted that the matter went back to the year 1993, had been investigated by the then A-G and the Applicant charged in Criminal Case No. 1474 of 1997. The Interested Party was a witness in that case and gave evidence but case was terminated through a *nolle prosequi*. Although the Bosire report in part 674, 675 and 676 and at part 846 and 847 had recommended that investigations be made against the Interested Party before prosecution, Mr. Bii had been without investigation charged with abuse of office and conspiracy. Even then, the principal witnesses in the case had either died or disappeared. In the circumstances, Mr. Bii was unlikely to get a fair trial.

54. The 2nd Respondent through Mr. Warui Mungai however denied any violations of the Applicant's constitutional rights to a fair trial. Mr. Mungai submitted that the report by Bosire is not what triggered Criminal Case No. 518 of 2006 and neither was CBK the complainant in the criminal cases. Settlement with CBK did not constitute a reason to grant orders of prohibition as the Government of Kenya was the complainant. On the issue of delay in prosecuting the case, Mr. Mungai submitted that the history of the case showed that the Respondents were not to blame, as the Applicant himself had actively contributed to the delays. On the disappearance of witnesses, he argued that this could only work for the Applicant. On the issue of media publicity, the Applicant had not demonstrated how that had adversely affected the criminal case. In any event, in a similar case *Kamlesh pattni Vs. AG* it had been held that media publicity per se did not prejudice a case. Mr. Kiage, for the 1st 3rd and 4th Respondents merely took issue with the third prayer of the application, which he found to be very wide hence not justified. He took the view that if such a prayer was it allowed would insulate the Applicant totally against future criminal liability notwithstanding discovery of new evidence. Mr. Havi made no submissions for or against the constitutional issues arising.

55. My view on this final issue as follows:

56. Article 50 (1) of the Constitution of Kenya, 2010 explicitly provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court. Article 50(2) then goes on to specifically provide that an accused person has the right to a fair trial, which includes the right to, inter alia;

- a) Be presumed innocent until the contrary is proved; and
- b) Have the trial begin and be concluded without unreasonable delay.

57. Instructively, Article 25 (c) of the Constitution lists the right to a fair trial as one of the fundamental rights and fundamental freedoms that shall not be limited despite any other provision in the Constitution. In effect, the right to a fair trial is sanctified and insulated from derogation even under other provisions of the Constitution itself.

58. In addition, this court has a constitutional duty to enforce fundamental rights under the Constitution. The Court is empowered by Article 23 (1) and (3) (a), (b) and (c) of the Constitution 2010 -

“to hear and determine applications for redress of a denial, violation or infringement of or treat to, a right or fundamental freedom in the Bill of Rights’ and to grant appropriate relief including a declaration of rights, an injunction, a conservatory order or an order of judicial review”.

59. I will now examine the two attributes of the right to fair hearing set out in Article 50 of the Constitution.

a) Presumption of innocence

60. The Applicant claims to have already been condemned as guilty of the criminal offences he is charged with thereby denying him the presumption of innocence for the following reasons:-

- i) The findings of the Bosire Commission that the Applicant's conduct in the Goldenberg affair was unlawful and criminal in nature;
- ii) The 1st Respondent's press release dated 15th March 2006 (**Exhibit KMDP 6 pg. 532**) publicly stating that offences had been committed and directing the prosecution of the persons named in his press release including the Applicant and Goldenberg

International Limited.

iii) The wide publicity received by the Bosire report and the 1st Respondent's said press releases.

61. With regard to the findings of the Bosire Report, I note that in paragraph 707 at page 257 of the report the Commission observed:

“Pattni is therefore shown conclusively and largely on his own admissions and documents, to be a perjurer (one who gives false evidence on oath) a forger, a fraudster and a thief”.

The report then concludes at paragraph 846 on page 300 –

“Regarding those persons whose acts or omissions are, in our view, contrary to the law, and are criminal in nature, we have agonized over whether or not to recommend prosecution. We have, however, decided against such recommendation as there are many imponderables on what the Attorney General considers before deciding to prefer criminal charges against any person or group of people. In view of that we will list the names of those who in our view were in one way or another, responsible for those acts and omissions for the attention of the Attorney General for any possible criminal or civil action”.

62. In my view, the above observations and conclusions did indeed impair the Applicant's presumption of innocence in that the Bosire Commission all but concluded that the Applicant was guilty of the offences of fraud, forgery and theft stated identified in their report. Only through abundance of caution did the Commission leave it to the Attorney General to place the last nail on a sealed fate as regards the Applicant's guilt for the said offences.

63. With regard to the 1st Respondent's Press Statement dated 15th March 2006, the potential damage to the Applicant's presumption of innocence was addressed in the **Kotut Case** by **Justices Nyamu, Wendoh and Dulu** who had this to say at pg. 101 of the judgment:

“... we find the press releases by the Honourable the Attorney General extremely self-serving and at the same time extremely prejudicial to the subsequent trial of the applicant ... in our view, the press releases have the potential of literally converting the trial, as against the applicant into a press trial and whereas the presumption of innocence constitutionally begins after the charge against an accused, the press releases and wide publicity they received did in practical terms, impair the applicants presumption of innocence on the ground”

64. I would fully associate myself with the above sentiments as it is a matter of public notoriety that the Applicant in this matter has had to contend with adverse and intrusive media coverage in nearly all aspects of his life of which his court battles top the agenda. I therefore agree with the contention that the publication of the press statement dated 15th March 2006 has the potential to impair Applicant's presumption of innocence, which is protected under the Constitution.

65. As regards the publicity surrounding the publication of the Bosire Report, the adverse impact of the press releases by the 1st Respondent discussed above, in my view, applies in equal measure. Further, to the extent that the criminal prosecution was commenced on the basis of the recommendations of the Bosire Report in spite of the findings and recommendations of the Bosire Report having found to be flawed in the **Saitoti** and **Kotut** cases aforesaid, such prosecution was a scornful of the presumption of innocence. This position was not helped by the fact that the 1st Respondent commenced prosecution without further investigations as recommended by the Commission.

66. Overall, I am persuaded from the foregoing analysis to find that the Applicant's presumption of innocence was infringed in the three instances discussed.

The right to trial within a reasonable time

67. The arguments put forth by the Applicant is that his right to be tried within a reasonable period of time has been infringed in view of the time it has taken to prosecute him. He further cites other impediments to the impending trial that he sees as militating against a fair trial such as loss of memory of potential prosecution or defense witnesses; death of witnesses in the intervening period as well as the loss of vital documentary evidence. With regard to the notion of fair trial within the confines of trial, the Applicant argues that he stands to suffer from the long period of time that has elapsed since the events occurred in 1990/1993.

68. It is not contested that over 20 years have elapsed since the Applicant was first charged with criminal offences arising from the Goldenberg Affair. The issue then is whether in continuing to prosecute the case there would be a negative impact on the right to be afforded a fair trial.

69. The right to fair trial and trial within reasonable time has been variously considered by courts in this country, including in two celebrated cases involving **Githunguri v Republic**. In the first case of **Githunguri vs. Republic (1985) KLR 91** a three- judge bench comprising of **Simpson CJ, Sachdeva and Mbaya J** held as follows:

“The preferment of a charge against any person nine years after the alleged commission of the offence, six years after a full inquiry in respect of it and five years after the decision of the office of the AG not to prosecute and to close the file is vexatious, harassing and an abuse of the process of the court and contrary to public policy unless a good and valid reason exists for doing so, such as the discovery of important and credible evidence or the return from abroad of the person concerned”

70. Similarly, in **Githunguri vs. Republic (1986) KLR 1 Madan Ag. CJ, Aganyanya and Gicheru JJ held:**

“The Applicant’s complaint is clearly that the hearing of the case against him will not be within a reasonable time and also that he shall not be afforded a fair hearing. (we interpret the expression fair hearing to mean a ‘square deal’ and also as being synonymous with a fair trial because so many years have elapsed...in some countries the power to prevent an abuse of process of the court or to stop a prosecution because it is oppressive or vexatious is to be found in the common law and it also exists in the inherent power of the court. The great importance of this power is illustrated by it being statutorily enacted in Section 84 (now Article 230 of the Constitution). It is a pre-requisite for the exercise of the power that at least one of the three pre-requisites specified in section 77 (1) (now Articles 25 (c), 50 (2) (a) and (e) should) exist. The applicant contends that part of those pre-requisites exist in this case i.e. no hearing within a reasonable time, secondly, not a fair trial hearing in the sense stated above.

“Even if none of the pre-requisites exist as required by section 77(1) it would still be open to this Court to say under its inherent powers and also by virtue of the Judicature Act Cap 8, that it would not be in the public interest sometimes also referred to as public policy to allow the prosecution launched against the applicant to continue and to issue Orders of Prohibition to stop it. It is as much in the public interest that breaches of the law should be punished as it is to ensure that in the process of doing so, people are not bashed about so that they lose respect for the law”.

The Court went on to conclude:

“We are of the opinion that to charge the applicant four years after it was decided by the A-G of the day not to prosecute and thereafter also by neither of his two successors in office, if not being claimed that any fresh evidence has become available thereafter, it can in no way be said that the hearing of the case by the Court will be within a reasonable time as required by Section 77(1). The delay is inordinate as to make the non-action for four years inexcusable in particular because this was not a case for no significance”.

71. In the **Kotut** judgment in **Misc. Civil Application No. 416 of 2006** the court in making findings on and addressing the issue of a fair trial had this to say

“We therefore find that the Attorney General’s action is not within time as required under section 77 (1) of the Constitution (now Article 50 (2) (e) of the Constitution) and that in the circumstances described the applicant cannot have a fair trial... As the charges are based on a flawed Commissioners’ report as against the Applicant, which flaws cover nearly every known ground in judicial review, such trial would not be fair or seen to be fair...The Attorney General in the exercise of his powers under section 26 of the Constitution (now Article 156of the Constitution) cannot reasonably be said to have been unaffected by the flawed report in the circumstances. In our judgment we find that the applicant cannot possibly be afforded a fair trial”.

72. In the Kotut case aforesaid, a delay of thirteen years from when the events occurred was held to merit prohibition of the 1st Respondent from filing and prosecuting any criminal charges against the applicant in respect of the Goldenberg affair. A similar delay of thirteen years in the **Saitoti case** was also decided in similar manner.

73. In the case of **Republic v Pattni HCCC No.299 of 2003** (the **“Pattni case”**) it was held that where there was inordinate delay the Attorney General could lose his right to prosecute. In that case, it was held that delay of nine years from when the events occurred in commencing prosecution was inordinate. In that case, Pattni was acquitted in respect of a murder charge brought against him. The trial Judge **Hon. Lady Justice Lessit** in acquitting the accused held:

“I am suggesting that once the Attorney General decides not to pursue a matter his right to change his mind may be lost where there has been inordinate delay. I am convinced that 9 years and 8 months of inertia is inordinate and inexcusable”.

74. To my mind, the reasoning in the **Pattni case** above applies equally to an inordinate delay to commence a trial and inordinate delay in concluding the trial, as is the position in the application before me.

75. I may at this juncture comment on the submissions by the Respondents in reply to the Applicant’s case under this head. Firstly, the submission by the 2nd Respondent that delay does not *per se* constitute a ground for finding a violation of the right to fair trial withers in the face of the Constitution as it is explicit that an accused person must be accorded a fair trial without delay. No exception is made by the Constitution on this requirement. The reality is that unless trial begins and concludes without unreasonable delay, an accused person’s constitutional rights are violated not only because of the delay but also because of other incidental consequences of delay such as loss of memory of witnesses, witnesses falling by the wayside in one way or another, and loss of documents among other pertinent considerations. These are already manifest in the present application. Secondly, counsel for the 2nd Respondent submitted that the CBK was not a complainant in this case and that it was indeed the Government of Kenya. This submission is erroneous and misleading to the court as the new charge sheet amended on 5th April 2012 and annexed at page 532 Vol. 2 of the Applicant’s bundle of documents clearly stipulates that CBK is the complainant. As such, given that the complainant and the Applicant reached a settlement of the former’s claim, the rationale of pursuing the criminal proceedings with no apparent complainant is open to question, even in the face of the constitutional discretion bestowed upon the 2nd Respondent with regard to commencement or termination of prosecution. Thirdly, on the argument that the Applicant cannot obtain the prohibitory orders as these only look into the future, my understanding of the application is that the Applicant not only seeks to quash the decision to prosecute him but also prays for orders to prohibit further prosecution in the Chief Magistrates Court Criminal Case No 518 Of 2006. As regards to the reservations expressed with regard to prayer 3 of the application, I agree that the prayer is drafted in a manner to seek to insulate the Applicant from any future criminal liability. I concur further that no basis has been laid for justifying such wide orders especially when there is no statutory limitation of time in criminal matters. The law does not impose time limitation for the prosecution of offences except where a limitation is imposed by statute. In the premises, the 2nd Respondent should remain at liberty to prosecute, provided however that in doing so, he meets due compliance with the rights conferred on an accused person by the Constitution.

76. Having reviewed the parties’ submissions aforesaid, I find similar circumstances emerging from the facts of the application before me.

The events in respect of which the Applicant and others have been charged occurred between 1990 and 1993. The Applicant and others were first charged in 1994 and were again charged in 2006 in Chief Magistrates Court Criminal Case No. 518 of 2006 on the basis of the same events. In the intervening 14 year period, effectively nothing much happened to conclude any case. Almost seven years later now 2013, Chief Magistrates Court Criminal Case No. 518 of 2006 has barely commenced and there is no knowing, if allowed to proceed when it will be concluded. In addition, several *Nolle Prosequi* orders have been entered on the application of the 1st Respondent over the years as discussed in paragraph 9 of this judgment. These including the *Nolle Prosequi* of 24th February 2003 (Page 82 Applicant's Bundle Vol. 1) that the Applicant states to have been necessitated by the need to operationalize the Bosire Commission. These have been reaffirmed by the courts in various orders including the order of *Lady Justice Achode* of 11th July 2012 (Pg 120 – 121 Applicant's Bundle Vol. 1) and the order of *Hon. Lucy Nyambura* Senior Principal Magistrate of 17th July 2012 (pg. 123 – 125 Applicant's Bundle Vol.1). The Bosire Report itself recommended that fresh investigations before the Applicant and other named persons could be charged with the criminal charges contested. This was never done. No new evidence was therefore relied upon as a basis for the fresh criminal charges preferred in May 2006. Indeed it may apt to mention here that the Director of Criminal Investigations Department in his letter dated 6th July 2011 (**Exhibit KMDP.14**) deals with challenges facing the prosecution and raises constitutional issues including the issue of inordinate delay and fair trial of the Applicant having regard to the death of several witnesses the disappearance of others and the loss of original documents which had been in the possession of the police. In the said letter the Director did not object to the intended plea agreement nor did he explicitly state that the CID was opposed to the settlement or that any amount was required to be recovered from the applicant. To lay fresh charges against the Applicant and others fourteen and more years after the events occurred is inordinate delay and or fail to conclude a criminal case after the passage of 20 years or more with the Applicant having the noose hanging over his neck by the state can in no manner whatsoever be a reasonable time. Neither the 1st nor 2nd Respondents have offered any explanation or any reasonable explanation to the inordinate delay in taking any action or in concluding this or any other case against the Applicant and others. As the court found in the *Githunguri Case Republic (1986) KLR1*

“The applicant was entitled to the order of prohibition sought because first, as a consequence of what had transpired and also being led to believe that there would be no prosecution, the applicant may well have destroyed his evidence and secondly, in the absence of any fresh evidence, the right to change the decision to prosecute the applicant has been lost the applicant having publicly been informed that he will not be prosecuted and property restored to him. The prosecution of the applicant would be an abuse of the process of the court, oppressive and malicious, and it would not be in the public interest to continue with the prosecution”.

77. In the result, I find the reasoning and conclusion in the *Githunguri Cases*, the *Kotut Case*, the *Pattni Case* and the *Saitoti* case applying to the present application in all fours and fully concur and find that the Applicant before me cannot possibly have a fair trial in the circumstances examined in this judgment. My conclusion is emboldened by the fact that in the *Githunguri, Kotut and Saitoti cases*, the findings I rely upon were reached by different panels of three-judge benches. So that if I were to be wrong in my conclusion, then not fewer than ten judges would face the same flack I would be subjected to (God forbid!).

78. It cannot be gainsaid that Article 50(2)(e) of the Constitution is not limited to the commencement of the trial but also applies to the conclusion thereof. The Applicant in this case had been charged with diverse offences since year 1993. As of now, none of these have ever been concluded, many years later. Notwithstanding the convoluted history of the charges brought against the Applicant and others, being placed at a considerable and grave risk to freedom for nearly the past two decades is astounding, by any standards. Being placed at such risk for an indeterminable period of time with no end in sight must leave the conscience of the drafters of the Constitution shattered. For it is not the treatment the Constitution contemplated for any accused person, irrespective of their status in society. Criminal trials, decrees the Constitution, should be commenced and concluded within a reasonable time. That is all we are saying in respect of the present application. That is what other judges have held before, in cases where delays ranging from 4 years to 13 years have been found to be inordinate and inimical to the right to fair trial. Such judicial decisions include the judgments of the panels of three judges in the *Githunguri, Kotut and Saitoti cases* aforesaid. The duration of delay in the case of the present Applicant is stated to be 20 years hence the comparisons can be drawn.

79. The Applicant raises various other violations of his rights which he sees as going into buttressing his contention that his right to a fair trial has been infringed. These include possible repetition of the trial owing to appointment of the trial magistrate as a Judge in August 2012, which in effect would mean further lost time; perceived violation of his right to protection of the law, violation of his legitimate pre-trial expectation that the 1st Respondent would act within the law and act fairly and within his constitutional mandate and other contraventions over which that he seeks this court's intervention by way of judicial review reliefs. My view on these is that in the light of the conclusions already reached in this judgment, these may not require my specific analysis and findings as they are sub-sets of the larger basket of the right to fair trial, which has already been determined.

Media publicity

80. Before I conclude this judgment, let me comment on the Applicant's concern about the impact of adverse media publicity to his right to presumption of innocence and his right to a fair trial. The general position in my view is that the Constitution of Kenya that the Applicant relies upon in seeking the reliefs sought in the present application is the very Constitution that guarantees freedom of the media, freedom of expression and, where applicable, the right to access to information. The limitations to the exercise of these rights are also set out in the Constitution. Consequently, adverse media publicity can only be curtailed within the limitations set out in the Constitution. However, as already discussed in paragraph 63 of this judgment, the court in the *Kotut case* did find that press releases by the 1st Respondent had an adverse impact on the Applicant's constitutional rights to the presumption of innocence and to a fair trial particularly due to the element of subjectivity in such reporting. The court went ahead to brand media publicity to be capable of converting into “trial by press”, at the extreme. My view is that adverse media publicity may negatively impact upon the rights of an accused person, particularly where the reporting extends to opinions that amount to pre-judging the Applicant's guilt. The Kenyan jurisdiction is replete with skewed media reporting of court proceedings, which at times defies the *sub-judice* rule. For this particular Applicant, it is within public domain that his protracted court battles have consistently attracted immense media interest and publicity, at times fair, at times negative, at times intrusive and at times skewed. However, at the end of the day, I am convinced that where media publicity is seen as carrying the potential to infringe upon any right of an accused person, it should be for the trial court to intervene and set parameters of reporting that respect such rights. For the present purposes, I am unable to give much weight to past media publicity as a basis for the grant of the orders sought.

Conclusion

81. The role of the court in cases such as the present application is carve out a balance between the need for persons who have committed crimes to be prosecuted and made to account for their acts or omissions as by law prescribed and in the public interest while at the same time ensuring that justice is administered in a manner that accords with the same law and indeed respects the public interest in having justice dispensed fairly. This is what is now known in international criminal justice system as the concept of proportionality. On this issue of proportionality, the 1980 Committee of the Council of Ministers of the Council of Europe referred to at page 105 of the *Saitoti case* defines proportionality as follows:

“An appropriate balance must be maintained between the adverse effects which an administrative authority decision may have on the right, liberties or interest of the person concerned and the purpose which the authority is seeking to pursue.”

82. Likewise, on the same issue of equality of arms, **Nyamu J** (as he then was) in the **SENNIK case HC Misc. Civil Application No.625 of 2006** quoted with approval the definition of equality of arms in the Jamaican case **CAPBELL v JAMAICA** 24th March 1993 UN doc. BAOR A/48/40 Vol. II -

“The right to equality of arms is an essential feature of a fair trial and it is an expression of the balance that must exist between the prosecution and the Defence”.

83. We will have discharged our humble judicial duty if we can achieve the same balance and equality of arms in the present application.

84. Granted, the Respondents in the present case may or may not have concrete evidence for the intended further prosecution of the Applicant and other co-accused. But that is not the issue here. The real question that we have had to grapple with is whether the conduct, attention and management of the various criminal cases against the Applicant by the 1st and 2nd Respondents have met the established constitutional threshold for the treatment of an accused person, as to disentitle the Applicant from the orders of Judicial Review he is seeking. I do not, with respect, find so. The Notice of Motion before me is not frivolous, in view of the constitutional transgressions that we have identified and which go into the core of the right to fair trial.

85. The Applicant's case is a mirror image of the cases of *Saitoti* and *Kotut* that we have extensively cited in the course of our judgment. It arises from the same set of transactions within the now famous Goldenberg Affair. The constitutional issues arising in this case are the very issues that informed the courts in those cases in arriving at the respective decisions to prohibit further prosecution of the accused persons in the cases. The delay in commencing prosecution, the flawed Bosire Report, the issues of lost documents and unavailability of witnesses are such common issues that are at play in the present application. Yet for the present application, there is in addition the reality of settlement agreements reached with the complainants, a negative report by the Criminal Investigation Department on prospects of further investigations yielding any new evidence and the unavailability of witnesses due to death or other reasons, besides fading memories for the available ones.

86. In the *Saitoti case* the court found that the Bosire Commission in imputing, suggesting or implying the commission of a criminal offence by the Applicant before any charges were preferred infringed upon the right to equality of arms and was therefore disadvantageous to the Applicant in any future trial. That finding applies squarely to the present application.

87. This court has found that the Applicant's and the Interested Party's fundamental rights and freedoms guaranteed by the Constitution have been violated by the state in several respects and on this ground and only on this ground, has issued prohibitory orders against the state, effectively bringing to an end any current or future criminal proceedings against the Applicant and the Interested Party (Mr. Bii) arising from or in any way connected to the Goldenberg affair or Bosire Report.

88. Ultimately, the protection of a person accused of any criminal conduct as afforded by the Constitution of Kenya must be observed. All persons in Kenya whether innocent or guilty are equal before the law. All persons in Kenya are entitled to the protection of the law. Any person charged with any criminal offence must be reassured by the prosecuting authority and the state that their prosecution would be conducted in strict compliance with the Constitution. This court has the jurisdiction and authority without fear or favour to prohibit any conduct that goes against the Constitution, be it by an individual, the state or any other body.

89. Consequently, I find that both the 1st Respondent and the 2nd Respondents in their respective conduct of the criminal cases involving the Applicant and his co-accused have failed to meet the constitutional thresholds for a fair trial as well as the principle of equality of arms aforesaid. This, without more, renders further prosecution of the cases unconstitutional.

90. One may wish to raise the question as to whether, having upheld the 2nd Respondent's right to terminate the plea bargaining negotiations and decided to carry on with the prosecution of the accused, the finding of the continued prosecution unconstitutional is not a contradiction of positions by this court. I do not think so. This court has found in favour of the independence of the 2nd Respondent in relation to the institution, control and termination of prosecution, including plea bargaining, as mandated under Article 157 of the Constitution and Section 137 of the Criminal Procedure Code. This finding of itself does not, however, absolve the 2nd Respondent from adherence with the Bill of Rights as relates to the rights of an accused person. That is the clarification that I find necessary to underscore, to obviate any confusion in the two sets of findings.

91. As I conclude, it will be foolhardy not to observe that that the verdict of this court in the present application is bound elicit din, clamour and hostility in public opinion and sections of the media, in view of predispositions by the media and public opinion with regard to the notoriety of the Applicant, the pre-judgments already made due to the extensive publicity of the Goldenberg affair and the serious charges the Applicant and the Interested Party have been facing all the years from 1994. Such hostility is expected to erupt, as it did indeed erupt following the handing down of the verdicts in the *Saitoti and Kotut* judgments. Yet the said judgments still stand. The discharge of a judge's constitutional mandate is never easy. It is not meant for the faint-hearted. Any reaction arising from a decision made by a judge should be

seen as one of the many vagaries of the calling, as long as the judge's appreciation of the law and facts, his analysis and conclusions and, above all, the judge's conscience, remain sanctified. I am therefore comfortable and well prepared for any such reaction.

92. Indeed, I am gratified to note that although my judgment has been arrived at purely on the basis of analysis of facts, evidence and the law, the conclusion reached echoes opinions already made public by commentators who have raised concerns as to the cost and time implications of inordinate delay in getting old graft cases finalized. In a headline report published in "*the Standard*" newspaper of 11th July 2011, the Chief Justice of the Republic of Kenya Dr. Willy Mutunga was reported to have said:

"We are either serious (on old graft cases) or count our losses, drop them and stop throwing good money after bad. KACC should initiate public discussions and seek national consensus".

93. In the same newspaper, the then KACC Director Dr. Patrick Lumumba was quoted as stating:

"Old corruption cases must be finalized. Goldenberg cases are in court. We will not be prisoners of our past, but the rear view mirror will be in us".

94. In my judgment therefore, I find that the Applicant's Notice of Motion application dated and filed on 28th August 2012 fails in terms of prayers 1 and 3 and succeeds in terms of prayers 2 and 4. I consequently grant prayers 2 and 4 of the application.

95. I further direct that the orders granted do issue to the Interested Party Elijah Kipng'eno Arap Bii in so far as they relate to him.

96. As regards costs of the application, in view of the application having partially failed and partially succeeded, each party shall meet its own costs.

IT IS SO ORDERED

DATED AND SIGNED AT KERICHO THIS 20TH DAY OF MARCH 2013.

J.M.MUTAVA

JUDGE

READ AND SIGNED AT NAIROBI THIS 25TH DAY OF MARCH 2013

J.KAMAU

JUDGE