



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**CONSTITUTIONAL REFERENCE NO.165 OF 2011**

ROSEMARY WANJA MWAGIRU .....1<sup>ST</sup> PETITIONER  
STEPHEN MBUGUA MWAGIRU .....2<sup>ND</sup> PETITIONER  
ROBERT GITHUI ..... 3<sup>RD</sup> PETITIONER

AND

THE HONOURABLE ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT  
TATU CITY LIMITED .....2<sup>ND</sup> RESPONDENT  
KOFIANF COMPANY LIMITED ..... 3<sup>RD</sup> RESPONDENT  
DIRECTOR OF PUBLIC PROSECUTION.....4<sup>TH</sup> RESPONDENT

**JUDGMENT**

**Introduction**

1. In the petition dated 29<sup>th</sup> March 2011, the petitioners challenge the charges and criminal proceedings brought against them in **Chief Magistrate's Criminal Case No. 2077 of 2010 (Republic v Rosemary Wanja, Stephen Mbugua Mwangiri and Robert Githui** which they allege have been brought at the behest of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.
2. The central issue that the petition raises is whether the prosecution of the petitioners is an abuse of the court process, having been brought primarily, as they allege, to pressurize the 1<sup>st</sup> and 2<sup>nd</sup> petitioners into settling a dispute between themselves and the majority shareholders in the 2<sup>nd</sup> and 3<sup>rd</sup> respondent in a way that favours the majority shareholders.

**The Parties**

3. The 1<sup>st</sup> and 2<sup>nd</sup> petitioners, who are mother and son, are the minority shareholders in the 2<sup>nd</sup> and 3<sup>rd</sup> respondent companies, holding 14.4% of the shares allotted in the 2<sup>nd</sup> respondent and 15.8% of the shares allotted in the 3<sup>rd</sup> respondent. They hold the said shares in trust for their family. The 3<sup>rd</sup> petitioner is an advocate in the firm that acted for the petitioners in their dealings and disputes with the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

4. The 2<sup>nd</sup> respondent is a public limited liability company which owns coffee estates at Ruiru near Thika whose user has been converted to residential to establish what is now popularly known as 'Tatu City'. The 3<sup>rd</sup> respondent is a private limited liability company which also owns coffee estates at Ruiru and Thika.

### **The Facts**

5. Certain facts giving rise to this petition are undisputed and emerge from the pleadings of the parties. They are that certain differences emerged between the 1<sup>st</sup> and 2<sup>nd</sup> petitioners, the minority shareholders, and the majority shareholders in the 2<sup>nd</sup> and 3<sup>rd</sup> respondents sometimes in May 2010. The 1<sup>st</sup> and 2<sup>nd</sup> petitioners as minority shareholders felt oppressed by and excluded from the management of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.
6. The 3<sup>rd</sup> petitioner, on instruction by the 2<sup>nd</sup> petitioner, obtained from the Registrar of Companies a list of directors of the then Waguthu Holdings Ltd. Upon receiving from the 3<sup>rd</sup> petitioner the document which listed the directors of Waguthu Holdings Ltd, the 1<sup>st</sup> petitioner and her daughters placed caveats against immovable properties which are registered in the name of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. In addition to registering the caveats, the petitioners offered to sell their shares to the majority shareholders.
7. The majority shareholders agreed that there should be an amicable separation and made an offer to buy their shares. However, according to the petitioners, the minority shareholders deemed the offer made by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents unreasonable and unfair and asked for independent valuation but the respondents broke off negotiations prompting the filing of **Milimani Winding Up Causes Nos. 29 and 30 of 2010**. In these causes, the minority shareholders sought either winding up orders in respect of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents or, in the alternative, that their shares be bought by the majority shareholders. On their part, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed an application seeking an order for the striking out of the winding up petition.
8. Sometime between 1<sup>st</sup> October, 2010 and 18<sup>th</sup> October, 2010, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents reported to the police that the petitioners had allegedly committed crimes in connection with the registration of caveats.
9. In November 2010, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed an application against the 1<sup>st</sup> and 2<sup>nd</sup> petitioners, who are the petitioners in Milimani High Court **Winding Up Causes Nos. 29 and 30 of 2010**, as well as their Counsel, the 3<sup>rd</sup> petitioner, seeking their committal to civil jail allegedly for disobeying the orders of stay made on 14<sup>th</sup> October 2010 in the Winding Up causes.
10. In the same month, November 2010, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed against the 1<sup>st</sup> petitioner and her two daughters **High Court Civil Suit No. ELC 561 of 2010** in which they sought to remove the caveats registered against the respondents' immovable properties. Thereafter, on 2<sup>nd</sup> December 2010, the petitioners were arrested and taken to CID Headquarters to record statements with regard to offences committed in connection with the lodging of the caveats. They were subsequently on 6<sup>th</sup> December 2010, charged with forging a certain document following a complaint by the Chairman of the board of directors of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. The charge sheet read as follows:

**“CHARGE FORGERY CONTRARY TO SECTION 349 OF THE PENAL CODE**

**ROSEMARY WANJA NJAU**

**STEPHEN MBUGUA MWAGIRU**

**ROBERT GITHUI**

***On 11<sup>th</sup> June 2010 at Nairobi, within City centre within Nairobi area jointly with others not before the court, forged a certain document namely CR 12.C 1135765***

*Registrar of company report dated 10<sup>th</sup> June, 2010 purporting to be a genuine document issued by the assistant Registrar of company Wilson Gikonyo.”*

11. The 1<sup>st</sup> petitioner was also charged with an additional count of uttering a false document contrary to section 353 of the Penal Code.

### **The Petitioners' Case**

12. The petitioners' basic contention is that the charges preferred against them in **Chief Magistrate's Criminal Case No. 2077 of 2010** are false, fabricated and malicious for the reason that the criminal case is meant to pressurize them to settle the dispute between them and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in a way that favours the majority shareholders. In particular, the petitioners view the criminal charges as being intended to pressurise the 1<sup>st</sup> and 2<sup>nd</sup> petitioners to withdraw **Milimani Winding Up Causes Nos. 29 and 30 of 2010**; put illegal pressure on the petitioners to withdraw or remove the caveats they have placed against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' immovable property which are the subject of **High Court Civil Case No. ELC 561 of 2010** in which the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are the plaintiffs; to compel the 1<sup>st</sup> and 2<sup>nd</sup> petitioners to pay moneys demanded by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in **Milimani HCCC Nos. 831 and 859 of 2010**; and to compel the 1<sup>st</sup> and 2<sup>nd</sup> petitioners to either withdraw the five suits pending before this Honourable Court, namely **Milimani High Court Winding Up Cause Nos. 29 and 30 of 2010, Nairobi High Court Civil Case No ELC 561 of 2010, Milimani High Court Civil Cases Nos. 831 and 859 of 2010**, or to compromise the said suits on terms advantageous to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and prejudicial to the 1<sup>st</sup> and 2<sup>nd</sup> petitioners.

13. The petitioners contend that the 1<sup>st</sup> and 4<sup>th</sup> respondents contravened their quasi-judicial duties implied in **Article 157(6)** of the Constitution when deciding to charge them. They cited the case of **Githunguri v Republic [1985] KLR 91** in support of their case that the respondents disregarded their quasi-judicial duties to the petitioners which requires that such power ought not to be exercised 'arbitrarily, oppressively or contrary to public policy.'

14. The petitioners further aver that the institution and maintenance by the 1<sup>st</sup> and 4<sup>th</sup> respondent of the **Nairobi Chief Magistrate's Court Criminal Case No 2077 of 2010** constituted a callous abuse of the process of the Chief Magistrate's Court. They again relied on the decision of the Court in **Githunguri v Republic (supra)** for the proposition that this Honourable Court has power to prevent an abuse of the process of the Chief Magistrate's Court. They also rely on several other authorities, local and from other jurisdictions, which I shall revert to later in this judgment.

15. The petitioners contend that through the institution of the criminal case, the respondents have contravened and continued to contravene the petitioners' rights under Article 27(1) to equality before the law and to equal benefit of the law, and also their right of access to justice and the right to fair administrative action under Articles 47 and 48 of the Constitution.

16. In their petition dated the 29<sup>th</sup> March, 2011, the petitioners seek the following reliefs:

- i. ***A declaration that the respondents have contravened the petitioners' rights under Articles 27,29,31,47,48 and 49 of the Constitution.***
- ii. ***A declaration that the 1<sup>st</sup> and 4<sup>th</sup> Respondents have contravened Article 157(6) of the Constitution.***
- iii. ***A declaration that the institution and maintenance of the Nairobi Chief magistrates Court Criminal Case No 2077 of 2010 is an abuse of the process of the criminal court as the predominant object is to exert illegal pressure on the 1<sup>st</sup> and 2<sup>nd</sup> petitioners to withdraw Milimani High Court Winding Up Causes Nos 29 and 30 of 2010 to exert illegal pressure on the 1<sup>st</sup> petitioner to remove caveats lodged on properties belonging to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and compromise Nairobi High Court Civil Suit ELC No. 561 of 2010, to exert illegal pressure on the 1<sup>st</sup> and 2<sup>nd</sup> petitioners to accede to the demands that they pay the***

*amounts of money claimed in Milimani High Court Civil Case Nos 831 and 859 of 2010 or otherwise compromise the said suit and Milimani High Court Winding Up Causes Nos 29 and 30 of 2010 on terms advantageous to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and prejudicial to the petitioners.*

- iv. *An Order that the criminal proceedings in Criminal Case No 2077 of 2010 Republic –v- - Rosemary Wanja Mwangiru, Stephen Mbugua Mwangiru & Robert Githui, before the Chief Magistrate’s Court at Nairobi, be stayed permanently.*
- v. *As an alternative to 3 above, an order of certiorari do issue to remove from the Chief Magistrate’s Court Criminal Case No 2077 of 2010 and bring to this Honourable Court for quashing the charges preferred against the petitioners.*
- vi. *A declaration that the 2<sup>nd</sup> petitioners’ fundamental right of protection from torture in human and/ or degrading treatment as provide for under Article 29 of the constitution have been contravened by the respondents.*
- vii. *A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> petitioners’ right to be informed promptly of the reason for their arrest as per the provisions of Article 49(1) (a) of the constitution was violated.*
- viii. *A declaration that the 2<sup>nd</sup> petitioner’s right to communicate with his advocate as provided for under Article 49(1)(c) of the constitution was violated.*
- ix. *A Declaration that the 2<sup>nd</sup> petitioner’s right to privacy provided for under article 31(a) of the constitution was violated*
- x. *A Declaration that the petitioners’ right to freedom and security as provided for under Article 29 of the constitution was violated*
- xi. *An order of prohibition stopping the prosecution of the Criminal Case No 2077 of 2010 – Republic – v- Rosemary Wanja Mwangiru, Stephen Mbugua Mwangiru & Robert Githui,*
- xii. *A permanent injunction do issue restraining the Criminal Investigations Department officers in Muthaiga Police Station or any other police station from harassing the Petitioners in relation to the caveats lodged at Land’s Office or any other matter thereto.*
- xiii. *An Order that the respondents do pay the petitioners’ vindicatory damages/ general damages.*
- xiv. *An order that the 1<sup>st</sup> and 4<sup>th</sup> respondents do pay the petitioners exemplary damages.*
- xv. *That the costs of this petition be provided for.*
- xvi. *Any other orders that this Honourable Court may deem fit to grant.*

17. In his submissions on behalf of the petitioners, Learned Senior Counsel Dr. Kamau Kuria, submitted that this Court is given great flexibility in fashioning remedies for breach of fundamental rights. Counsel emphasized that the petitioners and the respondents were involved in commercial disputes pending before the Court and that the respondents were using the criminal process to give a commercial advantage to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

18. Dr. Kuria further urged the court that in assessing whether there is a collateral purpose for a prosecution, the court should look at the relationship between the petitioner and the complainant and the timing of the prosecution. He contended that the present matter was in the nature of a civil dispute which had now been ‘criminalized’ through the criminal process.

## The Case for the 1<sup>st</sup> and 4<sup>th</sup> Respondents

19. The 1<sup>st</sup> and 4<sup>th</sup> respondent have filed a Replying Affidavit sworn on 29<sup>th</sup> April 2011 by Sgt. Patrick Maloba, a police officer attached to the Criminal Investigations Department (CID) and the investigating officer in this case, and written submissions dated 16<sup>th</sup> June, 2011 together with a list of authorities.
20. In his affidavit, Sgt Maloba explained that around 2<sup>nd</sup> December 2010, they received a complaint from some of the directors/shareholders of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, whereupon he commenced investigations into alleged offences. He contended that at all material times, they handled the petitioners in a civil manner and acted in accordance with the law and denied claims that they harassed the petitioners in the course of the investigation and arrest.
21. The 1<sup>st</sup> and 4<sup>th</sup> respondents maintain that the police have a statutory duty to conduct investigations upon receipt of a complaint. It was their case that although there existed differences between the petitioners and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, there was nothing to suggest that the 1<sup>st</sup> and 4<sup>th</sup> respondents were influenced by these differences in their lodging of the criminal prosecution against the petitioners.
22. They dismissed the petitioners' allegation that a civil dispute was converted into criminal offences, contending that an offence of forgery is a serious felony, and that notwithstanding the existence of a civil suit, it was a criminal offence and only a trial court could mete out appropriate punishment. **Section 193A of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** was cited to buttress the point that civil and criminal cases can run concurrently. Reference was also made to the case of **William S.K. Ruto and Another v Attorney General, Civil Suit No. 1192 of 2005** for the argument that civil cases would not be a bar to the criminal cases and that it is up to the trial court to analyse the sufficiency of the evidence presented before it.
23. Mr Okello, counsel for the 1<sup>st</sup> and 4<sup>th</sup> respondents, submitted that where breaches of fundamental rights are alleged, they must be brought out clearly, which the petitioners had not done in the particular case. He submitted that the petitioners were ventilating a criminal case in the present court yet it was not the duty of this court to assess evidence.
24. Counsel further submitted that the orders of prohibition prayed for could not issue as the petitioner had not demonstrated that the 1<sup>st</sup> and 4<sup>th</sup> respondents had acted in excess of jurisdiction, without jurisdiction or in breach of natural justice. Reference was made to **Halsbury's Laws of England, vol. 1 4<sup>th</sup> edition** at para 130 where it is stated as follows regarding the grounds of prohibition:

***“Prohibition lies not only for excess of or absence of jurisdiction, 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.”***

25. Counsel contended further that the issue of 'bad blood' between the petitioners and the complainant was irrelevant as long as there was reasonable ground to charge on the evidence available to the DPP. Counsel reiterated that the police were acting on their mandate and they would be failing in their duty if they did not investigate.

## The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' Case

26. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents, filed a response in opposition contained in the Replying affidavit sworn on 1<sup>st</sup> April 2011 by Josphat Kibogo Kinyua, director of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. Their case is that they made a complaint to the police that the petitioners obtained a false Form CR 12 dated 11<sup>th</sup> June, 2010 and whilst knowing the contents thereof to be false, used it to register caveats on the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' properties on the false claim that the 1<sup>st</sup> and 2<sup>nd</sup> petitioners

are the only shareholders and directors of the 2<sup>nd</sup> respondent.

27. It was their claim that they have never sought the negotiated withdrawal of **Winding Up Causes Nos. 29 and 30 of 2010** instituted by the 1<sup>st</sup> and 2<sup>nd</sup> petitioners; that they have never negotiated the removal of the caveats but have filed **HCCC ELC No. 561 of 2010(OS)** seeking an order for the removal of the caveats, and **HCCC. Nos. 831 and 859 of 2010** seeking damages for loss suffered as a result of the caveats; and that they were keen on pursuing the determination of the five pending civil suits through the due process of law.
28. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents further contend that the criminal complaints and charges of forgery and uttering a false document were based on evidence and asserted that the petitioners had not claimed or demonstrated that the two charges and the evidence upon which they are intended to be proved are unsustainable. It was also their assertion that existence of a civil suit was no bar to criminal proceedings and relied on the case of **Wambua v Hon Attorney General & 2 others [2004] eKLR**, where in analysing the implication of **section 193A** of the Criminal Procedure Code it was stated as follows;

*“The above provisions means that even though a civil suit is pending before the court, criminal proceedings can also be preferred against the applicant and the police are not in breach of sub-judice rule as alleged by the applicant. Both civil and criminal proceedings regarding a similar issue can co-exist in a court of law.”*

29. They averred that it was therefore incumbent upon the petitioners to wait for their day in the Magistrate’s Court to meet and challenge the evidence in support of the charges of forgery and uttering the Form CR 12 and mount their defences before the trial court, relying in this regard on the case of **Meme v Republic & Another [2004] 1 KLR 637**.

#### **Determination**

30. Several issues have been canvassed regarding the origin and substance of the controversy between the petitioners as the minority shareholders on the one hand and the majority shareholders in the 2<sup>nd</sup> and 3<sup>rd</sup> respondents on the other. A lot has also been said about the substance of the pending civil suits and the merits or otherwise of the evidence forming the basis for the impugned criminal charges. However, in my view, the germane issue for determination in this matter is whether the Court should intervene and quash the criminal proceedings in **Nairobi Chief Magistrate’s Court Criminal Case No 2077 of 2010** against the petitioners on alleged charges of forgery and uttering false documents contrary to section 349 of the Penal Code (**Chapter 63 of the Laws of Kenya**). In considering this issue, I will deal first with the powers vested on the state to carry out prosecutions for criminal offences

#### **Power to Prosecute**

31. The State powers of prosecution are vested in the Director of Public Prosecutions (DPP) under **Article 157** of the Constitution, the pertinent part of which provides as follows;

*“(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may-*

- a. *institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.”*

32. The decision to institute criminal proceedings by the DPP is discretionary. Such exercise of power is not subject to the direction or control by any authority as Article 157(10) stipulates:

*“(10) The Director of Public Prosecutions shall not require the consent of any*

*person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”*

33. Thus, the office of the DPP is an independent office and the court will in ordinary circumstances be reluctant to restrain the exercise of its powers. That notwithstanding, the process of the court must not be misused or otherwise used as an avenue to settle personal scores. The criminal process should not be used to harass or oppress any person through the institution of criminal proceedings against him or her. Should the Court be satisfied that the criminal proceedings being challenged before it have been instituted for purpose other than the genuine enforcement of law and order, then the court ought to step in and stop such manoeuvres in their tracks and prevent the process of the court being used to unfairly wield State power over one party to a dispute. In this respect, I will adopt the words of the Court in the case of **Investments & Mortgages Bank Limited (I & M) v Commissioner of Police and The Director of Criminal Investigations Department & DPP & 2 others, Nairobi HC Petition No. 104 of 2012** [2013]eKLR where Majanja J remarked as follows:

*“27. I agree with the respondents that it is within their mandate to investigate crimes where there is reasonable basis of commission of offence and that in performance of their duties, they are independent institutions. The office of the Director of Public Prosecutions established under Article 157 is an independent office which is empowered to conduct its duties free from any influence or control by any authority. Its actions must be within the law and in accordance with what the constitution dictates. One such dictate is that in the exercise of their powers, it is to “have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.” Article 244 enjoins the National Police Service to amongst other things “comply with constitutional standards of human rights and fundamental freedoms.””*

34. Further, in **Kenya Commercial Bank Ltd and 2 Others v Commissioner of Police and Another, Nairobi Petition No. 218 of 2011 (Unreported)** Majanja J observed at paragraph 25 as follows:

*“[25] The Office of the Director of Public Prosecutions and Inspector General of the National Police Service are independent and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within the limits provided for by the law. But these offices are subject to the Constitution and the Bill of Rights contained therein and in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under the Constitution.”*

35. These are sentiments that I wholly agree with. However, it should be borne in mind that the Court, in intervening in a criminal prosecution, is not concerned about the merits of the case nor with the weight of the evidence that is to bear upon the accused in the criminal case. That is the province of the trial court. As was stated in **Meixner & Another v Attorney General [2005]2 KLR:**

*“It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. It would be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.”*

36. In stepping in in such a matter, the Court exercises the supervisory powers vested upon it by **Article 165** of the Constitution. The office of the DPP exercises quasi-judicial powers and is subject to the Constitution and the law which it must abide by. In the case of **Githunguri v**

**Republic [1985] KLR 91**, at page 100, the Court of Appeal observed, with regard to the Attorney General's powers to institute proceedings under the former Constitution:

*“The Attorney-General in Kenya by section 26 of the Constitution is given unfettered discretion to institute and undertake criminal proceedings against any person “in any case in which he considers it desirable so to do.”... this discretion should be exercised in a quasi-judicial way. That is, it should not be exercised arbitrarily, oppressively or contrary to public policy...”* (Emphasis added).

37. Under the current Constitution, **Article 157** places an obligation on the office of the DPP, in exercising powers conferred under the Constitution, to prevent and avoid abuse of the legal process. Article 157(11) states that:

*“In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”*

38. In the case of **Meme v Republic & another [2004] 1 KLR 637**, at page 678, the court described the phrase ‘abuse of court process’ in the following terms:

*“An abuse of the Court’s process would, in general, arise where the Court is being used for improper purposes, as a means of vexation and oppression, or for ulterior purposes; that is to say, Court process is being misused.”*

39. In quashing criminal proceedings in the court below in the case of **Peter George Antony D’costa v Attorney General and Another, Nairobi Petition No. 83 of 2010**, Majanja J. observed as follows;

*“The process of the court must be used properly, honestly and in good faith, and must not be abused. This means that the court will not allow its function as a court of law to be misused and will summarily prevent its machinery from being used as a means of vexation or oppression in the process of litigation. It follows that where there is an abuse of the court process, there is a breach of the petitioners’ fundamental rights as the petitioner will not receive a fair trial. It is the duty of court to stop such abuse of the justice system.”*

40. It is, I believe, undisputed, as provided under **Section 193 A** of the **Criminal Procedure Code**, that the institution of civil proceedings does not preclude the State from undertaking criminal proceedings against a party with respect to an issue which is also directly in issue in a pending civil suit:

*“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.”*

41. That notwithstanding, it is the duty of the Court to exercise its inherent jurisdiction so as to prevent its process being used to perpetrate injustice or otherwise as an abuse of its process. Since **Githunguri v Republic (supra)**, it has been established that the High Court is entitled to exercise its jurisdiction to avert abuse of power, discretion or process.

42. Abuse of process is one of the parameters the Court may use to gauge whether the DPP exercised powers within the four corners of the Constitution. This principle was aptly captured in the case of **R v Attorney General & Another ex parte Hussein Mudobe H.C Misc Civil Application No. 898 of 2003**, in which the court stated as follows;

***“Notwithstanding the provisions of S 193A of the Criminal Procedure Code the court is still bound to ensure that its process is not abused and also to protect itself against the abuse of its process by litigants....in the context of criminal proceedings, there are two fundamental policy considerations in which the court must take into account in dealing with the abuse of process. Referring to the two considerations in MODEVAO V DEPARTMENT OF LABOUR[190]INZLR 464 at 481 in a passage which Manson CJ quoted in JAGO(1989) 168 CLR AT 30 Richardson J, reproduced the two policy considerations as follows;***

***“The first is that the public interest in the administration of justice require that the court protects its ability to function as a court of law ensuring that its processes are used fairly by state and citizen alike. The second is that, unless the court protects its ability to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court processes may lend themselves to oppression and injustice.... The court grants a permanent stay in order to prevent the criminal processes from being used for purposes alien to the administration of criminal justice under the law. It may intervene in this way if it concludes...that the court processes are being employed from ulterior purposes or in such a way...as to cause improper vexation and oppression.”***

### **Whether the Prosecution is an Abuse of Process**

43. Having considered the circumstances in which the Court may exercise its jurisdiction to stop abuse of power, discretion or process, the next issue to determine is whether, in the circumstances of this case, the impugned criminal case against the petitioners is an abuse of the court process. The answer to this lies in the unique facts and circumstances of the matter.
44. It is not in contention that there are several civil suits whose subject matter relates to the caveats and the winding up of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, namely **Milimani High Court Winding Up Cause Nos 29 and 30 of 2010; Nairobi High Court Civil Case No ELC 561 of 2010 and Milimani High Court Civil Cases No 831 and 859 of 2010**. It is necessary to set out briefly the nature of these suits and the issues in dispute in order to put them into perspective against the criminal proceedings in Nairobi Criminal Case No 2077 of 2010 and the issues now before the Court.
45. In **Milimani High Court Winding Up Causes Nos 29 and 30 of 2010**, the 1<sup>st</sup> and 2<sup>nd</sup> petitioners sought orders to wind up the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. On 15<sup>th</sup> October 2010, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents obtained orders of stay of further proceedings. Subsequently, on 5<sup>th</sup> November 2010, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed an application for committal to civil jail against the petitioners for allegedly disobeying the court order issued in the Winding Up Causes.
46. In **Milimani High Court Civil Case No 831 of 2010**, the 2<sup>nd</sup> respondent, by way of plaint dated 3<sup>rd</sup> December 2010, sued the 1<sup>st</sup> and 2<sup>nd</sup> petitioners accusing them of falsely and maliciously lodging caveats against its properties and proceeding to petition to wind up the company. The 2<sup>nd</sup> respondent in that suit also sought payments for, amongst other things, losses occasioned as a result of delays in the Tatu City project and additional costs and interest arising as a result of the lodging of the caveats by the petitioners.
47. The suit in **Milimani High Court Civil Case No. 859 of 2010** is dated 9<sup>th</sup> December 2010 and was filed by **Kofinaf Company Limited**, the 3<sup>rd</sup> respondent herein against the 1<sup>st</sup> and 2<sup>nd</sup> petitioners. The suit also relates to the lodging of caveats and the Winding Up petition, among other things, which it claimed caused it losses and good will. In the suit, the plaintiff accuses the defendants of ***‘wrongfully, maliciously and unlawfully [lodging] caveats against the plaintiff’s properties in order to subvert the restructuring and disposal strategy with a view to extorting undue compensation for the defendants purported interest in the plaintiff.’*** The plaintiff sought

among other things, compensation for losses arising out of failure to complete the sales transactions entered into.

48. Lastly, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have pending in court **Nairobi High Court Civil Case No ELC 561 of 2010** against the 1<sup>st</sup> petitioner and her two daughters. It was filed on 18<sup>th</sup> November, 2010 and sought to have the caveats lodged by the 1<sup>st</sup> and 2<sup>nd</sup> petitioners removed and withdrawn from the register of the properties.

49. What emerges from the above analysis of the civil suits pitting the 2<sup>nd</sup> and 3<sup>rd</sup> respondents against the 1<sup>st</sup> and 2<sup>nd</sup> petitioners is that the issue of the caveat placed against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' properties is at the heart of all the litigation between the parties. As is also apparent from the analysis in the earlier part of this judgment, the criminal case also revolves around the impugned caveats. Thus, the subject issue of the caveats is directly in issue in both the pending civil suits and in the criminal prosecution. This is a key factor in determining whether or not the impugned criminal case is an abuse of the process of the Court.

50. On 2<sup>nd</sup> December 2010, the criminal complaint was lodged by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents over the alleged forgery of Form CR-12 used to lodge the caveats. The complaint was made after the petitioners had filed the Winding Up petitions in respect of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents; and in respect of which Winding Up petitions the 2<sup>nd</sup> and 3<sup>rd</sup> respondents had instituted contempt proceedings for alleged contempt of orders issued in the petitions against the petitioners. It was also after the 2<sup>nd</sup> and 3<sup>rd</sup> respondents had filed **Nairobi High Court Civil Case No ELC 561 of 2010** seeking to have the caveats lodged by the petitioners withdrawn.

51. Thus, an examination of the events unfolding prior to the institution of the five civil suits and the eventual institution of the criminal complaints by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents causes serious unease about the institution of the criminal process. Given the timing of the criminal complaint and the institution of the criminal prosecutions immediately following upon the filing of five civil claims involving the same parties over the same subject matter, and an application for orders of contempt against the petitioners in the Winding Up Causes which they had lodged against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, it is difficult to reach a conclusion other than that the criminal case was calculated to harass, coerce, oppress or otherwise intimidate the petitioners.

52. The term '**galloping litigant**' employed so eloquently by Kuloba J (as he then was) at page 30 of his judgment in the case of **Vincent Kibiego Saina v Attorney General, High Court Misc Civil Appl. No. 839 of 1999** aptly describes the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in this case:

*“ A galloping litigant, moving scenes of the same forensic battle from one jurisdiction to another, engulfing nearly all institutions and means of dispute resolution either simultaneously or successively, with little or no merit, and putting a pinch of criminality on or otherwise civil dispute, must be stopped; and if a subordinate court entertains him, the High court must check it. Experience has shown some litigants who will dress up their disputes in so many garments and present them to every authority available within our national borders, and even personalities with no legal powers here, to assist in the resolution of the same dispute. They vex their opponents and everyone else they may be minded to vilify, intimidate and blackmail.”*

53. The learned Judge went on to conclude as follows at pages 31 of the said judgment:

*“... The timing of the criminal cases appears to be putting unlawful pressure on the applicants to give in to the demands of “the interested party”. The powers to prosecute the applicants in the criminal cases were not used responsibly or properly. These powers are being exercised oppressively. There is disproportionate and*

*excessive litigation over the same thing by essentially the same actors. The “interested party” in taking his civil dispute to the police with a pinch of criminality attached to it, acted in bad faith, and this is not a bona fide employment of the law. The prosecution is abusing the process of the court, and is undermining the civil process...There is no fairness demonstrated by the actors in the criminal prosecutions as they move against the applicants. Extraneous purposes are being served by the criminal proceedings. Those proceedings are vexing the applicants; they are oppressive in the circumstances. The mala fides of the “interested party” has tainted the whole criminal process, and attaches to the police who have undertaken the prosecution. The criminal proceedings are likely to put pressure on the applicants to get to their knees and surrender their bona fide dispute of the claims in the civil suit.”*

54. While appreciating that in many instances parties who are rightly and properly brought before the criminal justice system will often cry violation of rights and allege that the matters at issue are best determined through a civil process, I agree with Kuloba J, (Rtd) that there are instances where parties, in order to get their way in a civil dispute, will employ every process possible, including lodging criminal complaints and getting state officers or state agents charged with the responsibility of investigation and prosecution for criminal offences, to play in their corner, in breach of the state agents’ constitutional or statutory mandate. This is what appears to have happened in the present case.

55. Indeed, one senses some frustration on the part of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents who, in the affidavit of Josphat Kibogo Kinyua, accuse the petitioners of seeking to delay the determination of the issues related to the caveats by seeking to delay the hearing of the civil cases. Nonetheless, it cannot be proper that a party unhappy with the civil process seeks to speed things up, as it were, by (mis)using the criminal justice process, and I therefore find that the criminal complaint and subsequent criminal prosecution initiated pursuant to the complaint by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and undertaken by the 1<sup>st</sup> and 4<sup>th</sup> respondent in **Nairobi Chief Magistrate’s Criminal Case No. 2077 of 2010** was for a purpose other than the honest enforcement of the law. It is therefore an abuse of the court process and should not be permitted to continue.

56. My finding in this regard, however, should not be read as a validation of the petitioners, or an exoneration from criminal liability with regard to the Companies Registry form used to register the caveats the subject of the civil disputes. It is simply to recognize that in the circumstances of this case, the criminal proceedings may well be intended to give an advantage to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents against the petitioners, a possibility that the court should not countenance.

57. The respondents have argued that the Court has no power to grant the orders of prohibition sought by the petitioners in the circumstances of this case. I must respectfully disagree. **Article 23(3)** of the Constitution gives the Court power to grant appropriate relief, including orders of injunction and judicial review, in matters brought before it pursuant to the provisions of Article 22 of the Constitution. An order of prohibition is ‘appropriate relief’ that the Court has jurisdiction to grant.

58. As was observed by the Court of Appeal in **Joram Mwenda Guantai v The Chief Magistrate, Nairobi, Civil Appeal No. 228 of 2003** at pages 8 and 9:

*“...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. It was succinctly put in Stanley Munga Githunguri vs Republic [1985] KLR 91 that 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 that the High Court has an inherent power and a 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.”*

59. An order of prohibition is therefore appropriate in the particular circumstances of this case to stop the abuse of the court process in the prosecution of the petitioners in Nairobi **Chief Magistrate’s**

**Criminal Case No. 2077 of 2010.** I therefore make orders as follows:

- i. That the institution and maintenance of Nairobi Chief Magistrates Court Criminal Case No 2077 of 2010 is an abuse of the process of the court.**
- ii. An order of prohibition is hereby issued stopping the criminal proceedings in Chief Magistrate's Criminal Case No. 2077 of 2010.**
- iii. The respondents are hereby restrained from in any manner whatsoever instituting criminal proceedings against the petitioners in relation to the caveats lodged at Land's Office by the petitioners and which are the subject of litigation in Nairobi High Court Civil Case No ELC 561 of 2010 and Milimani High Court Civil Cases No 831 and 859 of 2010.**

60. As I observed elsewhere, the grant of these orders is not a validation or exoneration of the petitioners. Further, with regard to the alleged violation of the petitioners rights in the process of their arrest, particularly as pertains to the 2<sup>nd</sup> petitioner, as pointed out by Counsel for the 1<sup>st</sup> and 4<sup>th</sup> respondents, there is insufficient material before me to enable me make a finding with regard to the alleged violations, which have been denied by the respondents. In the circumstances, I am unable to grant the orders for damages, or to award costs. Each party shall therefore bear its own costs of the petition.

61. I am grateful to the parties for their well-researched submissions, arguments and supporting authorities. If I did not make reference to any of the authorities in the judgment, it is not because they were not of assistance to the Court.

**Dated, Delivered and Signed at Nairobi this 12<sup>th</sup> day of November 2013.**

**MUMBI NGUGI**

**JUDGE**

**Dr. Kamau Kuria instructed by the firm of Kamau Kuria & Kiraitu Advocates for the Petitioners.**

**Mr. Okello and Mr. Kaumba instructed by the Director of Public Prosecutions**

**Mr. Havi instructed by the firm of Havi & Co. Advocates for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.**