



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISCELLANEOUS APPLICATION NO. 12 OF 2010

**IN THE MATTER OF: AN APPLICATION FOR ORDERS OF JUDICIAL REVIEW BY
CROSSLEY HOLDINGS LIMITED**

AND

**IN THE
MATTER OF: THE KENYA ANTI-CORRUPTION COMMISSION AND THE ATTORNEY-
GENERAL**

REPUBLIC APPLICANT

VERSUS

KENYA ANTI-CORRUPTION COMMISSION 1ST RESPONDENT

THE HON. ATTORNEY GENERAL 2ND RESPONDENT

MIWANI SUGAR COMPANY (1989) LIMITED.....INTERESTED PARTY

AND

EX – PARTE

CROSSLEY HOLDINGS LIMITED

JUDGMENT

A. Pleadings:-

1. Ex – parte applicant’s pleadings:

On the 11th of February, 2010 the *ex parte* applicant **Crossley Holdings Limited** moved the court seeking for leave to bring Judicial Review proceedings against **Kenya Anti-Corruption Commission (KACC)** as the 1st respondent and **The Hon. the Attorney General (A.G)** as the 2nd respondent and for the leave to operate as stay. The court granted both prayers. The said application was supported by a statement of facts and a verifying affidavit. The stay order was at some point vacated then reinstated, for now it remains in force.

The substantive motion herein was filed on the 20th of April, 2010 the same sought for the following orders;

“A. Judicial review by an order of certiorari to remove into the Honourable court and quash the report, findings, recommendations and decisions made by the Kenya Anti-Corruption Commission as set out in Gazette Notice No. 353 of 2010 published in the Kenya Gazette of 15th January, 2010 on paragraph KACC/INQ/AT/08/2008 a) relating to the applicant Crossely Holdings Limited.

B. Judicial review by an order of certiorari to remove into this Honourable court and quash the decision made by the Attorney General on 9th December, 2009, accepting the recommendation to prosecute of the Kenya Anti-Corruption Commission as set out in the Gazette Notice No. 353 of 2010 published in the Kenya Gazette of 15th January, 2010 on paragraph KACC/INQ/AT/08/2008 a) relating to the applicant, Crossley Holdings Limited.

C. Judicial review by an order of prohibition directed to the Kenya Anti-Corruption Commission, the Attorney General and any person(s) on their behalf or authorized by them, prohibiting them and each of them from the initiation and prosecution of criminal charges against Crossly Holdings Limited its directors, officers and servants in respect of the matters set out in Gazette Notice No. 353 of 2010 published KACC/INQ/AT/08/2008 a) relating to the applicant, Crossley Holdings Limited, or otherwise.

D. The costs of this application be paid by the respondents jointly and severally.

It is the *ex-parte* applicant’s case that it purchased the property subject matter **L.R. NO. 7545/3 (I.R.**

21036) in a public auction on the 24th of December, 2007 in an auction pursuant to a court decree and where it emerged the highest bidder out of 5 others, and thereafter it proceeded to register the property in its name, having obtained relevant consents and clearances.

It also its case that, the property at the time of purchase belonged to Miwani Mills Company Limited); further that the Kenya Sugar Board

(The interested part) did not hold a debenture over the property as alleged at the time; that the land subject matter was not public land as the land was not owned by a Company where the Government held any share; the land subject matter was not worth Kshs 2 billion as has been alleged by the respondents, as a Government valuer gave it a value of Kshs 696,600,000; that indeed the notice of execution of the decree resulting into the auction was served upon the judgment debtor before the auction; the said auction was advertised in a newspaper with wide circulation nationally on the 6th of December, 2007; and although the receivers of Miwani Sugar Company (1989) Ltd (in receivership) was aware of the intended sale they did apply to set aside the decree; although the said receivers filed an application seeking to set aside the decree but the same was not pursued until after the auction and several months later; neither did the receivers apply to stay the auction, nor file a caveat; they did not alert the bidders of their interest if any on the land either and therefore the intended prosecution is based on a falsehood; the allegations by the 1st respondent that there was a “**maze of conspiracies**” is contrary to available evidence and an unlawful basis for the intended prosecution; that the Miwani Sugar Co. (1989) Limited has never been the owner of the said land, it never held a charge mortgage or debenture on the land; the 1ST respondent’s report is grounded on major errors of facts and law, which include conclusions unsupported by evidence; in that both the 1st and respondents in making their respective findings, recommendations and decisions acted in breach of the Principles of Natural Justice, the complainant at the material time, the receivers Miwani Sugar Co. (1989) Limited (under receivership) were **Mr. Kipngetich Bett & Mr. Martin Owiti Odero. Mr. Bett** was then a member of the Advisory Board of the 1st respondent, thus there was a conflict of interest, which situation made the 1st respondent simultaneously the complainant, and the investigator in it’s own cause, which is illegal, another officer of KACC **Mrs. Olga Sewe** is related to **Miss Pauline Sewe** an associate in the law firm acting for the receivers, which information was not brought out, these conflicts have been of the “gravest prejudice” to the applicant as this information was indeed used against one party in a civil suit; further the said findings of the 1st respondent were biased and the 2nd respondent may not have been aware of the conflict of interest. The report was not full, fair and impartial. It further is the *ex parte* applicants case that the intended prosecution is for extraneous purposes, is oppressive and brought in bad faith; it is in violation of Public Officers Ethics Act, No. 5 of 2003; the findings, recommendations and decisions of the respondents are unreasonable, irrational within the Wednesbury Principles, an abuse of office, oppressive and a manifest violation of the applicant’s right to protection of the law under the Constitution of Kenya; and in particular right to a fair hearing for the reasons above and as there are also several civil cases related to the subject matter pending in court namely;

a) **Kisumu High Court Case No. 225 of 1993. Nagendra Saxena V Miwani Sugar Mills Limited.**

b) **Court of Appeal No. 261 of 2008 at Kisumu. Nagendra Saxena V Miwani Sugar Mills Co. (1989) Ltd (in Receivership), John Kimani t/a Jogi Auctioneers, Crossley Holdings Limited.**

c) **Nairobi High Court Civil Case No. 459 of 2008 at Milimani. Crossley Holdings Limited V Miwani Sugar Co. (1989) Ltd.**

2. The 1st Respondent's pleadings

The 1st respondent filed a replying affidavit in opposition sworn by **Stanley Wang'ong'u Miriti** and dated 19th April, 2010, an investigator with the 1st respondent. He stated that alongside others they carried out investigations which established that **L. R. NO. 7545/3** measuring 9.394 acres belonged to Miwani Sugar Co. (1989), Ltd and the same had been irregularly transferred to the *ex parte* applicant. He gave the circumstances of the case as follows;

a) That on or about 29th of May, 2007 Ian Maina Gakoi Advocate appeared before a Deputy Registrar one A. A. S. H. Elkindy and sought for reissue of summons in HCCC No. 225 of 1993 Nagendra Saxena V Miwani Sugar Mills Ltd.

b) The said case had purportedly been filed on 28th June 1993, where the plaintiff sought for US\$ 400,000, a claim allegedly for services rendered in 1987.

c) The application in (a) was granted on 20th June, 2007, and judgment entered thereafter in default of appearance for the sum of US\$ 400,000 plus costs and interest at 20% per annum to run from 1987 until payment in full.

d) On 4th October, 2007 the High Court dismissed an application seeking to have the property L. R. No. 7545/3 sold in settlement of the decree but despite the order the property was advertised and sold by public auction at which auction the applicant purportedly bought the same.

That upon conclusion of its investigation and in compliance with Section 35 of The Anti-Corruption And Economic Crimes Act (**ACECA**), the 1st respondent compiled a report wherein I made recommendations and forwarded the same to the 2nd respondent, recommending that a number of personalities be charged. On its part the 2nd respondent directed a number of people including the *ex parte* applicant be charged, that despite the *ex parte* applicant's allegations, the 1st respondent at all times acted within its mandate; and that all issues being raised by the *ex parte* applicant herein can be canvassed at the trial court. The 1st respondent further denied any influence by an Advisory Board member one **Kipngetich K. Bett** asit embarked on its work. The investigations herein were carried out much after the said **Mr. K. K. Bett** had ceased being a member of KACC Advisory Board as for the allegations touching on **Mrs. Olga Sewe** the same are farfetched, baseless and without any material foundation. It was the 1st respondent position that Miwani Sugar Company (1989) Limited (in Receivership) was formed by the Government in 1989 to purchase the land and all assets of Miwani Sugar Mills Ltd which was then having operational difficulties; in 1990 the debenture holders of Miwani Sugar Mills Limited were paid off through

promissory notes. The promissory notes issued by the Government were long term and the company could therefore not be sold. The Government holds 49 shares of the said company. Further that **Mugo J** declined to grant an order for execution of the decree since the receiver manager of the Miwani Sugar company (1989) limited had not been served and in total disregard of the said order of the 19th of October, 2007 a notification of sale was issued on the instruction of **Ian Maina Advocate** and signed by the deputy registrar. That despite the *ex parte* applicant's assertion that Miwani Sugar Co. (1989) Limited had nothing to do with the land, the notification of sale by the Auctioneers were served upon it, further that the public auction took place and a hurried process to transfer the property commenced. That the 1st respondent's investigations also revealed that the auctioneer did not receive any money from the purchaser either by way of deposit or final purchase price; although the auctioneer and the *ex parte* applicant's representatives claim that the total prize was paid to the decree-holder by financiers in India where the decree-holder also resides there is no proof of the same, that on the same day of the auction the advocate for the decree-holder appeared before the same deputy registrar **Mr. Elkindy** and obtained an order directing the Registrar of Titles to issue a fresh title in the name of the *ex-parte* applicant. However on 13th June, 2008, **Hon. Justice Mwera** ruled that the deputy registrar had no powers to enlarge time under Order 49 of the Civil Procedure nor purport to issue fresh ones as he did, the summons were invalid and all consequential acts and orders that arose from the fraudulent acts and/or omissions were a nullity. The public stands to lose huge sums of money and criminal process should take its course.

3. 2nd Respondent's Pleadings

The 2nd respondent filed a replying affidavit in opposition on the 21st of April, 2010, sworn by one **Geoffrey Obiri** a State Counsel. He stated that the 2nd respondent thoroughly reviewed the 1st respondent's report and following such review and evaluation he reached his own independent finding and conclusion having been satisfied that the sale and transfer of the property subject matter **L. R. 7545/3, to** the *ex parte* applicant was both illegal and fraudulent and that there was enough evidence to charge the suspects singly and jointly with various corruption and fraud offences both under the Penal Code and **ACECA**. That various material facts revealed were as follows;

- a) **The deputy registrar received a letter dated 23rd May, 2007 in H.CCC NO. 225 of 1993 requesting for re-issue of summons, the application for re-issue was granted by the deputy registrar *ex parte* 14 years allegedly after issuance of the original summons.**
- b) **The original summons were allegedly signed by Mrs Olga Aketch Sewe who denied and cited forgery.**
- c) **Mwera J on 13th of June, 2008 made a ruling that the deputy registrar had no such jurisdiction.**
- d) **Mugo J dismissed an application to have the property subject matter sold in settlement of the decree obtained from the same deputy registrar on 2nd July, 2007.**

- e) In disregard of the court order a notification of sale was issued on 19th October, 2007.
- g) On 24th December, 2007 a purported sale by public auction was conducted and the *ex parte* applicant declared the highest bidder for a price of Kshs 725, million.
- h) Further the process of transfer was replete with fraudulent acts and irregularities in that;
- i) The district land valuer Mr. Odongo Phillips Kabita valued the subject property for Kshs 735,565,000, which irregular valuation was submitted to the land registrar.
- ii) On 3rd January, 2008, a sum of Kshs 90,000/= was paid to Nyando County Council and a certificate issued in respect of plot No. 7545/3 this was unprocedural as the outstanding debt was Kshs 9,266,565.45.
- iii) On 2nd November, 2007 Ian Maina Gakoi submitted an application as seller of land parcel No. 7545/3 to Nyando Control Board.
- iv) Mr. John Ng'ang'a Mbugua the District Officer Nyando from 5th November, 2007 submitted that no such application was filed.
- v) Further investigations revealed name Crossley Limited was entered in the Land Control Board application. Register and ordered the transfer of L. R. No. 7545/3 was not in the
- vi) Genuine consent letter No. 103500 had been given to M/s Agro – Chemicals Housing Cooperative Society on 8th December, 2005, the property subject matter falls under Miwani Division Land Control Board.

It was further stated that the issues raised in the application are those of evidence and may be considered by the trial court, the intended prosecution is in no way a violation of the applicant's Constitutional or fundamental rights or freedom as alleged, neither is the decision unreasonable as the pendency of a civil case is not a bar to criminal proceedings, neither is it an attempt to pressurize the applicant in any way.

4. The interested party's pleadings.

The interested party also opposed the application through a replying affidavit of **Mr. Kipnetich Arap Korir Bett** filed on the 27th October, 2010, to the effect that the interested party is the proprietor and legal owner of the land known as 7545/3 (I. R. NO. 21035); that the interested party is also the complainant; the land subject matter is public land and has been as such during all material times, the Government having acquired shares therein. That an agreement on the 9th of April, 1990 between Miwani Sugar Limited (1989) Company (in Receivership) on one hand, Bank of Baroda, Chase Bank and Credit Limited and Government of Kenya on the third part confirms the Government had vested interest, there is also an agreement between the Government and Venessa Holdings Limited which shows that the subject matter is owned by the Government. On the said property are other assets and the cumulative value of the land and assets thereon was at the material time Kshs 2,035,169,175. That evidence on record show that no sale could have legally taken place and the purported transfer is therefore fraudulent.

B. Submissions

5. The ex parte applicant's submission

The same were dated the 17th November, 2011 and were highlighted by **Mr. Nowrojee** advocate on the 28th September, 2011 the same may be summarized as follows;

The decision of the 1st respondent and adopted by the 2nd was unlawful *inter alia*, as there was a breach of natural justice, it was illegal as it exceeded the respondent's statutory mandate, it was perverse, irrational and an abuse of statutory power, further it was based on selective analysis of the pertinent and relevant law. The actions of the two respondents were *ultra vires* in that the 1st respondent's report was a farce and cannot stand scrutiny of the law; further the subject matter was private property and not public as alleged.

He submitted further that at the heart of the dispute is **L. R. 7545/3 (I. R. 21036)** which the respondents claim to be public land yet it is not, that the land was not and has never belonged to the interested party as the interested party is not hold a debenture over the said property; the said land is not worth Kshs 2 billion either as alledged. As for the auction; the notice of execution was served by registered mail to Miwani Sugar Mills Ltd and the scheduled auction took place on 24th December, 2007. That the interested party was aware of the sale as the advertisement was in a daily Newspaper that has wide national circulation and that indeed the Receivers of the interested party applied to court in **KSM HCC NO. 225 OF 1993** on 14th December, 2007 to set aside the decree which the auction was executing yet at the same time took a date for 4th February, 2008 for inter parte hearing well after the auction. The Receivers did not apply to stay the auction. They neither lodge any caveat despite the knowledge, nor did they attend the auction nor inform the bidders of their claim if any on the land. It was further argued that to attempt to stop a sale through criminal proceedings is illegal and an abuse of Court process. In this regard the court was referred to the case of **Speaker National Assembly V Njenga Karume** (2008) KLR (EP) 423.

Mr. Nowrojee further contended that the findings and recommendations of the respondents upon greater scrutiny are evasive and manifestly contradictory and is an attempt by them to abuse powers granted to them by the Constitution and Statute. There is no indication of when the complaint was lodged; On one hand the 1st respondent's affidavit states that it was established that Miwani Sugar Company (1989) Ltd (In Receivership) owns LR NO. 7545/3, at the same time he confirms title was always in the name of Miwani Sugar Mills Limited and was never transferred to Miwani Sugar Co. (1989) Ltd. He also argued that the judgment-debtor and Miwani Sugar Mills the previous owner and its directors have never complained. In support of the assertion of bias it was submitted that investigations commenced back in 2008, when **Mr. K. K. Bett** sat as an Advisory Member of KACC Board although **Mr. Wang'ong'o** gives information to the contrary. **Mr. Nowrojee** submitted also that, there was a contradiction in the statements made by the signature examiners as regards **Olga Sewe's** signature; one says it was written in different style yet another says it is similar suggesting therefore that none was a forgery.

As regards the affidavit of **Mr. Geoffrey Obiri** it was argued that he laid emphasis on irregularities leading to the auction yet failure to follow procedure in a Civil engagement is not a basis for criminal prosecution; again the valuation by **Mr. Odongo Phillips Kabira** was higher than the one by city valuers; and that the rates paid to Nyando County Council cannot invalidate a sale, a demand for the shortfall would cure deficit any; and there was an attempt to deface the consent obtained by the *ex parte* applicant from the Land Control Board.

Lastly on the 1st respondent, it has no mandate to cover commercial transactions such as the auction of the land herein, especially in the absence of a complaint by the judgment-debtor. Counsel referred to the case of **O'Reilly V Bamet London Borough Council EXP. Nilish Shah (1983) 1 All ER.**

As regards the 2nd respondent, it was argued that he did not analyze independently the report of the 1st as required of him statutorily. That he accepted the report that the land was public and the Kenya Sugar Board had a debenture on the land, this shows glaring misapprehension of law and facts and is an indication of lack of scrutiny of the report and making of an independent decision by the 2nd respondent; that the respondents have made erroneous of fact, such errors of facts and "unsustainable conclusion" also constitutes unreasonableness.

The respondents did not prove how the *ex parte* applicant played a role in the alleged fraudulent acts leading to the public auction, the decision therefore to prosecute the *ex parte* applicant and its directors is irrational and amendable to judicial review within the meaning of **Wednesbury** unreasonableness, It was an act of bad faith and an abuse of statutory power and liable to be quashed. The court was referred to **R V Commissioner for Co-operatives ex parte, Kirinyaga Tea Growers Co-operative Society & Credit Society Ltd (1999) I.E.A.**

Mr. Nowrojee summed up by saying that the criminal proceedings have been instituted as collateral to challenge the existing civil proceedings; and to pressurize the *ex-parte* -applicant so that he does not pursue its rights, it is contrary to public policy and is an abuse of court process as the issue of ownership which is at stake cannot be prosecuted in criminal proceedings. The court therefore ought to issue orders of prohibition to prevent abuse of its processes. The *ex parte* applicant's counsel referred the court to **Githunguri V R (1986)KLR 1**

As the argument that the applicant remedies lie in a full and exhaustive trial is unsustainable.

6. The 1st Respondent's submissions.

Mr. James Olola Advocate submitted on behalf of the 1st respondent. The submissions same may be summarized as follows;-

The orders being sought for by the applicant are totally unwarranted, spurious, and solely aimed at delaying the trial which has since been instituted in the subordinate court against the *ex-parte* applicant and 7 others. That Section 7 of **ACECA** mandates the Commission to receive complaints at the request of the National Assembly, the Minister, the Attorney General or on its own initiative to investigate any matter which in its opinion raises suspicion, or conduct that constitutes corruption or economic crime or conduct liable to allow, encourage or cause conduct constituting corruption or Economic Crime, that following a complaint by the interested party, to the effect that assets of Miwani Sugar Co. (1989) Ltd (in receivership), valued at Kshs 2 billion had been irregularly disposed off, the 1st respondent commenced investigations, compiled a report and submitted it to the 2nd respondent, with recommendations that a number of people be charged for various offences; and on his part after going through the report the 2nd respondent recommended 8 persons be charged.

He submitted further that it is not for this court to see if the decision of the respondents is based on factual errors. This court should only be concerned with the decision making process and not the merit of the decision. It is also not for this court to consider the sufficiency or otherwise of the evidence in support of the criminal charges as this will go to the merit of the charge, which is the mandate of the trial court.

He also contended that the investigations and compilation of the report was within the 1st respondent's mandate. He made reference to the case of **Meixner & another V Attorney General (2005) 2 KLR**.

He submitted further that there is no demonstration by the *ex-parte* applicant of how the 1st and 2nd respondents abused or acted in excess of power. The *ex-parte* applicant had been charged already and in any event prohibition cannot lie when the act sought to be prohibited has taken place as the *ex parte* applicant has already been charged in **KSM CMCR NO. 429 OF 2010**. In this regard he referred to **Kenya National Examination Council V R Ex parte – Geoffrey Gathenji Njoroge & 9 Others - NRB Civil Appeal No. 266 of 1996 (unreported)**. It was also his argument that there is no evidence that the criminal case is not brought for purpose of upholding the law but for oppressive and extraneous purposes. And this application is an attempt by the *ex-parte* applicant to have the criminal case abandoned.

Further submissions were to the effect that the *ex parte* applicant being a limited liability company does not have the *locus standi* to bring a representative suit for purposes of seeking to bar the 2nd respondent from taking action against the other parties. The application is therefore bad in law, misconceived and an

abuse of court process. In any event there is no bar; **Section 193A** of the Criminal Procedure Code confers concurrent jurisdiction on civil and criminal matters which appear to be civil in nature. Further there no substantially similar issues in the civil and criminal proceedings. **Mr. Olola** referred the court in this regard to **James Mutua Musila V Chief Magistrate Kibera & 2 Others (2005) KLR & Peter Ndirangu Kinuthia V O.C.S Kikuyu Police Station & Another. C. A. Civil Application No. 173 of 2002** (unreported).

Mr. Olola also argued that the concept of unreasonableness cannot be used where a public officer has exercised his discretion *bona fides* or expressed his judgment *bonafides*. The court must be cautious and vigilant and he made reference **Associated Provincial Picture Houses V Wednesbury Corporation (1948) 1 KB 273**

As to the decree leading to the auction it was argued that the same was irregularly obtained despite a court order declining to allow the land subject matter to settle the decree; an auction took place yet no monies were paid to the auctioneer. At the lands office the property was fraudulently transferred and arising from the applicant's fraudulent acts and/or omissions, the public stands to lose huge sums of money.

As regards the application it was submitted that it is defective as the Statutory Statement sets both the facts and evidence contrary to the rules, the verifying affidavit is verbose, argumentative, it cites law and legal authorities, the verifying affidavit and statement of facts are silent on the irregularities perpetrated by the accused persons.

7. The 2nd Respondent's submissions

The 2nd respondent submitted through **Miss E. Kamau**, that the registration of **L. R. 7545/3 (I. R No. 21038)** was done fraudulently; consent letters and clearances certificates obtained through forgery and fraud hence the intended prosecution.

That the decision by 2nd respondent was based on in depth interrogation of the 1st respondents report, this court cannot sit on appeal on the 1st respondent's decision. Counsel referred to the case **Chief Constable of North Wales V Evan (1982) 2 All. ER**. Learned State Counsel further argued that it is the duty of the trial court to take the evidence from the prosecution and the defence to weigh that evidence one way or another including checking on the Construction or otherwise of the charge sheet.

Further in considering the 1st respondent's report the 2nd respondent was satisfied that there were sufficient grounds to charge the *ex parte* applicant and others with the various offences as recommended by 1st respondent.

That there has been no proof of departure from natural justice in this case. The directors of the *ex parte* applicant appeared before the 1st respondent & recorded statements alongside others and the 2nd respondent did consider the statements as contained in the 1st respondent's report.

8. Interested party's submissions

Mr. Bundotich for the interested party submitted that an Order of certiorari does not lie herein in that the decision complaint of has been acted upon as the *ex parte* applicant has been charged and the matter is now before the trial court. As for the order of prohibition is to prohibit the initiation and prosecution of the *ex parte* applicant, the *ex parte* applicant cannot seek orders to protect parties not named or enjoined but in any event orders cannot be sought to prohibit what has already taken place.

Mr. Bundotich made reference to **HCC NO. 225 OF 1993** where the court declared the proceedings issuing the decree that gave rise to the auction a nullity which means that the provisional title issued to the *ex-parte* applicant is a nullity and its claim of ownership therefore does not lie. He stated further that it is clear that there were various irregularities, meaning that the proceedings and sale of the property were illegal and criminally actionable in which case **S. 77** of the Constitution does not apply.

He urged further in that the circumstances of this case, there is no evidence that the applicant's right to a fair hearing will be infringed and the application has been taken over by events and is an abuse of court process.

9. Issues for consideration

After considering the pleadings and lengthy submissions by all parties, the issues for determination in my view are as follows;

- 1. whether in the investigation, preparation and compilation of the report and in the recommendations, there was breach of natural justice by the 1st respondent.**
- 2. Whether the respondents and in arriving at the decision to prefer charges against the *ex parte* applicant acted within their mandate and the Constitution.**
- 3. Whether the report and ultimately the decision of the respondents was based on errors of fact and law.**

4. Can the judicial review orders of certiorari and prohibition issue in the circumstances of this case.
5. Is the prosecution of the *ex parte* applicant oppressive, are the respondents vexing their muscle in a bid to exert extraneous matters in the application of Section 193 of the Criminal Procedure Act?
6. Whether in granting/considering for prohibition the court will be interfering with the Attorney General's mandate.
6. Have the prayers for the Judicial Review Orders of certiorari to quash the decision of the respondents and prohibitory orders to prohibit the initiation and prosecution of the *ex parte* applicant taken over by events.

10. Undisputed facts

1. That on the 28th of May, 2007 an Advocate named Ian Maina Gakoi appeared for Nagendra Saxena in H.C.C.C NO. 225 of 1993 before Deputy Registrar Abdul El-Kindy and sought for reissue of summons to enter appearance and the said order was granted.
2. on 20th June, 2007 the advocate applied for judgment in default of appearance and was granted the same in the sum of US\$ 400,000 plus costs and interest at 20% from 1987 until payment in full.
3. On 29th June, 2007 the plaintiff's costs were assessed at Kshs 542,182.00.
4. On 2nd July, 2007 a decree for the entire sum was issued.
5. An auction was held on 24th December, 2007 and M/s Crossley Holdings Limited emerged the highest bidder and later the property was transferred to it.
6. There were pending civil matters regarding the ownership of the property both in High Court

Kisumu & Nairobi and Court of Appeal at the time of institution of this application.

7. That the 1st respondent investigated the matter, compiled, made recommendation for prosecution to the 2nd respondent who agreed with the report and directed prosecution of 8 people including the *ex parte* applicant.

8. A criminal case no. CMCR has been instituted as against the 8.

11. Analysis opinion and conclusion.

In 1987 one **Nagendra Saxena** purportedly sued Miwani Sugar Mills Ltd for US\$ 400,000 for services rendered through one **Hawala Advocate** in **H.C.C.C NO.225 of 1993**. The suit remained unprosecuted until the year 2007 when a new advocate **Ian Maina Gakoi** activated the same and sought for re-issue of summons before a deputy registrar. Service of the said summons was said to have been effected upon the defendant therein by registered mail, after which judgment was requested for in default of appearance and was granted the same day. Shortly thereafter the bill of costs was granted *ex parte* and a decree and execution orders issued.

The property was subsequently sold by public auction. The notification of sale was sent both to Miwani Sugar Mills by post and Miwani Sugar Co (1989) Ltd (in receivership) by leaving a copy at the offices. The receivers had information and they instructed an advocate who made an application to set aside the decree but apparently did not stay execution of the intended auction and interestingly took a date for hearing *inter parte* the application for setting aside a whole 3 months after the intended auction. Nothing was heard of the application until 2008 at the instigation of yet another firm of advocates, who did due diligence due to an intended private sale by interested party, when it was discovered that the *ex parte* applicant had been registered as the owner.

To-date the *ex parte* applicant has yet to take possession, hence its suit H.C.C.C. NO.459 OF 2008 in Milimani Nairobi court where the *ex-parte* applicant is seeking for possession *inter alia*.

The respondents including the interested party argue that the suit leading to the public auction i.e. **H.C.C.C. NO. 225 of 1993** was a nullity, firstly, because there was indeed no proof that the court fees for the said suit had been paid for and secondly the deputy registrar had no jurisdiction or powers to re-issue the summons as he did after a lapse of 14 years. His actions were illegal and out to assist in a betting a crime, thirdly no consideration was paid after the auction, fourthly, the process of registration of the title in the *ex- parte*'s name was fraudulent and based on forged documents.

The *ex parte* applicant argued that it was not a party to the suit leading to the issuance of the judgment and was not involved in the process of obtaining the decree or execution orders, that it was a purchaser in an auction. As regards the sale the *ex parte* applicant's position is that the sale price was paid directly to the decree holder in India. Further the matter of the sale was a private commercial transaction as the suit

property did not belong to the public or the interested party either.

Was there breach of natural justice on the part of the 1st respondent in the investigations, compilation and recommendations made in the report to the 2nd respondent?

The report was compiled upon the 1st respondent obtaining a complaint from the receivers of the interested party, who were placed on “the job” by Kenya Sugar Board who claim an interest in the land subject matter based on a debenture. .

The 1st respondent’s report includes interviews/statements by a host of people involved in **H.C.C.C.225 OF 1993**, the sale and transfer of the land subject matter including the directors of the *ex parte* applicant, to this extent therefore one may rule out the element of bias as alleged.

Mrs Olga Sewe is a witness so to speak as she has alleged forgery on her signature; **Mr. K. K. Bett** was a member of 1st respondent Advisory Board however it was not shown by the *ex parte* applicant how the two influenced the report. However the report failed to consider the allegation that the property is not public property and no conclusive information is available in the report.

As to whether there was bias that led to the “errors” of facts that I will be addressing later in this opinion.

Did the respondents act within their mandate?

Section 7(1) of **ACECA** gives the 1st respondent the mandate to investigate any matter that in its opinion raises suspicion related to and involving corruption and economic crimes and in **Section 7(2)** it may undertake the investigation at the request of the 2nd respondent, the National Assembly, the Minister or upon receipt of a complaint or on its own motion.

Section 35 of **ACECA** mandates the 1st responded to report its investigation to the 2nd. It provides as follows;-

“35(1) following an investigation the Commission shall report to the Attorney- General on the results of the investigations,

(2) The Commission’s report shall include any recommendation the Commission may have that a person be prosecuted for corruption or economic crime.”

The *ex-parte* applicant, however seem to have a problem with the investigations herein as it argued that the investigations cannot be done on private commercial transaction, secondly the previous owners did not make any complain over the transaction and therefore the interested party who has no legal interest cannot be a complainant.

Section 45 of the said act defines an offence against public property to mean

“45(1) A person is guilty of an offence if the person fraudulently or otherwise unlawfully-

(a) Acquires public property or a public service or benefit”

The 1st respondent would therefore be within its mandate for investigating and making recommendations for prosecution. Likewise the 2nd responded can charge where there is acquisition of public land fraudulently. If the land is however private and the engagement a private commercial transaction and the parties involved do not complain, then there is no mandate on the part of the 1st respondent to act.

Was the report based on errors of facts and law such that the report was premised on erroneous assumptions?

The report based its findings on the fact that public land had been transferred to *the ex parte* applicant fraudulently. The issue whether the transfer was fraudulent and/or illegal has been subject of civil litigation both in the High Court and the Court of Appeal and the verdict is out. Therefore the million dollar question now is whether the property is public land.

The title document indicates that previous owner before registration of the *ex parte* applicant was Miwani Sugar Mills Limited. No transfer of title was effected to any other entity not even Miwani Sugar Company (1989) Limited. The certificate of incorporation of title of the same was registered against the title but no transfer was effect. There is no indication either or evidence that the Government had shares in Miwani Sugar Mills Limited.

There was attempt by the respondent to show that the Government by way of several agreements paid off banks that had debentures against the assets and the property subject matter. None of the agreements and debentures were registered against the title and if indeed the Government had acquired shares and/or interest in Miwani Sugar Mills Limited this was not brought out in evidence. Miwani Sugar Mills Limited and Miwani Sugar Company (1989) Limited directors or share holders were not disclosed either. Nothing would have been easier than to prove the Government’s share in the same by way of transfer documents or share certificate.

Why is there lack of documentation on the part of the Government to show the extent of its interest if any or as alleged? Where are the transfer documents transferring the assets and land subject matter from Miwani Sugar Mills a private company to Miwani Sugar Company (1989) Limited, allegedly formed to take over the assets and liabilities of Miwani sugar Mills limited? In my view it is not enough to show that the Government was exempted from paying stamp duty in the intended transfer from one to the other. It is not enough either to show agreements where the Government purportedly took over the loans of a private company. The title deed is the only document that would conclusively answer the question of ownership. What was placed before the court is a provisional title showing that the title was in the name of Miwani Sugar Mills Limited before the purported interest of the *ex-parte* applicant was registered. Indeed none of the respondents claim that the Government had any shares in the same.

Technically speaking therefore the transaction or the alleged fraud was against a private entity whose directors remain unknown indeed none of its director's complaint or sought for any investigations. At the time of transfer and the auction the interested party had not come on board. Their debenture in any event is on the assets of Miwani Sugar Company (1989) limited.

Are the judicial review orders of Certiorari and Prohibition available? The above orders are certainly available against public bodies which the respondents are where they act in excess of jurisdiction or for illegality, irrationality and unreasonableness.

The 1st and 2nd respondents mandate and indeed their decisions were based on the fact that the property subject matter is public land. the available evidence is to the contrary. The title is clear on who was the owner before the auction, it was Miwani Sugar Mills limited. Did the Government hold any interest in Miwani Sugar Mills Limited? No proof was forthcoming the erroneous facts led to erroneous application of the law.

I also find the decision Irrational and unreasonable in that the alleged crime took place 14 years ago. All along the receivers of the interested party were aware of the alleged auction and transfer; they even filed proceedings in court, no explanation is given as to why did they wait for so long to make the complaint, why would the the 2nd respondent would prefer the charges after 14 years. In **Githinguri versus Republic (supra)** the court held inter alia,

“There is no time limit for the prosecution of serious offences except where a limitation is imposed by statute and the Attorney-General is therefore free to prosecute provided that he does not offend the fundamental rights conferred on an accused person by section 77(1) as protected by section 84(1) of the Constitution

To charge the applicant four years after it was decided by the Attorney-General not to prosecute, and thereafter also by neither of the successors in office, if no being claimed that any fresh evidence had become available, it cannot be said that the hearing of the case would be within reasonable time as required by section 77(1) of the Constitution. The delay was so inordinate as to make the non-

action for four years inexcusable

The prosecution of the applicant would be an abuse of the process of court, oppressive and malicious and it would not be in the public interest to continue with the case.”

The delay of 14 years is so inordinate, unreasonable and against the Principle of hearing within a reasonable time which is part of the rights embodied in the new Constitution, and with the knowledge regarding the court’s verdict on ownership, to continue with the criminal case would be irrational, oppressive and malicious as against the *ex-parte* applicant and its directors.

In the case of **Associated Provincial Picture Houses**

Limited versus Wednesbury Corp [1948] the Court of Appeal in England held that a court can interfere with a decision Of a public body where the same is;-

“so unreasonable that no authority could even have come to it.”

This authority has been applied locally with approval and in several cases.

Although Section 193A of the Criminal Procedure Act allows multiplicity of action in civil and criminal the courts have held before that where there is a remedy in a different cause then that cause be applied as opposed to the criminal one.

In **Republic versus Commissioner of Police ex parte Tarus** (2003) K.L.R at 582 **Khaminwa J** held in part.

“1 ----

2. Where a remedy is elsewhere provided and available to a person to enforce an order of a criminal court in his favour there is no valid reason why he should be permitted to involve the assistance of a criminal law for the purpose enforcement.

3. Criminal law is not to be used oppressively to punish acts which is truth might be technically a breach of criminal law, but which contain no real vice and which can only be best handled under a process other than the criminal process namely any of different systems of Civil redress applicable.

4. If a case is more suitable for a trial in the civil court than it can be resolved in a criminal tribunal then a decision to pursue criminal option must be suspect for ulterior motives other than search for justice.

5. A prosecution that is oppressive and vexatious is an abuse of the court process.

6. Although the Attorney General is not subject to control in the exercise of his powers to prosecute criminal offences, he must exercise that power upon reasonable grounds.”

In **Kigoroglo versus Rune Sherika (1969) E. A. 426** was quoted by Khaminwa J in the case above where the court stated:-

“where a remedy is elsewhere provided and available to a person to enforce an order to in his favour I see no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved.”

In **Republic versus Chief Magistrate’s court at Mombasa ex parte Gamjel & Another (2002) KLR at 703 Waki J** where it emerged that the matters complained of by the interested party were purely civil and could be adjudicated by a civil court had this to say;

“1. It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement or frustration of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be they should not be allowed to stand if their predominant purpose is to further some ulterior purpose.

2. The interested party in this matter was more attracted by the desire to punish the applicant or to oppress him into according to his demand by brandishing the sound of punishment under the criminal law, than in any genuine desire to punish for a crime on behalf of the public. The predominant purpose was to further ulterior motive which the High Court could not allow. Certiorari would lie where a public body’s action are unreasonable and/or irrational.”

Is the prosecution of the *ex parte* applicant oppressive or is the interested party and the respondents

vexing muscle in a bid to exert pressure on the *ex-parte* applicant?

As we speak both the court of Appeal and the high court found the proceedings culminating in the auction a nullity the sale that took place was a nullity and consequently no transfer passed. This settled the issue of ownership. In the absence of a transfer to any other person or entity, for now the land ought to revert to Miwani Sugar Mills limited. There one other matter still pending in a civil court. For now any institution of a criminal case against the *ex-parte* applicant will appear to be in consideration of extraneous matters. No money was lost or indeed property for that matter based on the court's verdict.

Have the prayers for judicial review order of certiorari to quash the decision of the defendants and for prohibition to issue against the respondents prohibiting them from initiating and prosecuting the *ex-parte* applicant been taken by events.

I think not. Although the *ex parte* applicant's directors were charged the said decisions cannot be said to have been fully discharged and the prayer for certiorari, to remove into this court the report and the findings, recommendations and decisions of the respondents published in the Kenya gazette on the 15th January 2010 relating to the *ex-parte* applicant, Crossley Holdings Limited, and the letter of 9th December 2010 respectively succeeds in that the decisions are unreasonable, irrational and against the provision of the Constitution.

The criminal proceedings were initiated but the case is yet to be prosecuted due to the existing stay order. For the same reasons enumerated above the 2nd respondent is hereby prohibited from prosecuting the *ex-parte* applicant and by extension its directors in **CR.M.C.C** No 429 of 2010 or any other criminal court for the alleged offence.

Each party will meet their own costs.

DATED AND DELIVERED THIS 18TH DAY OF MAY 2012.

ALI-ARONI

JUDGE

In the presence of:

.....present for *ex-parte* Applicant

.....present for 1st Respondent

.....present for 2nd Respondent

.....present for interested Party