REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 1322 OF 2002

GREGORY & ANOTHER ..... APPLICANTS

VERSUS

REPUBLIC THRO' NOTTINGHAM & 2 OTHERS ..... RESPONDENTS

RULING

The background to these proceedings was laid in High Court Criminal Applications Numbers 348/2002; 305/2002; 1074/2002; 1178/2002; 1392/ 2001; and Civil Applications Numbers 1322/2002 and 996/2002. The applications for direction were heard before the Honourable Chief Justice Chunga as he then was, and he gave his ruling on 24th January, 2003. The burden of his ruling, as pertains to the present proceedings, is that he effected consolidations of the seven applications coming before him, and ruled that Miscellaneous Applications No 996 of 2002,and No 1322 of 2002 be heard together. He held that these two cases do have a common origin, common issues and similar facts.

It is on this basis that this Court has proceeded to hear the two consolidated cases.

Application No 996 of 2002 was commenced by Originating Summons dated 23rd August, 2002 and filed on the same day. The Originating Summons was brought under sections 70, 77 and 84 (6) of the Constitution of Kenya and the pertinent subsidiary legislation, namely the Constitution (Fundamental Rights and Freedoms of the Individual) Practice and Procedure rules, 2001 and all other enabling provisions of the law. The applicants were seeking Court Orders of the following particulars:-

(a) a declaration that the intended institution, prosecution and maintenance in the Nairobi Chief Magistrate's Court of Private Prosecution No 1 of 2001 against the applicants as the eight and ninth defendants, after the Attorney-General had entered *nolle prosequi* in a previous prosecution in CMCC No 240 of 2000, is unlawful and unconstitutional;

(b) a declaration that the intended private prosecution of the applicants, is a violation of their constitutional rights to a fair trial under section 77 of the Constitution and to the equal protection of the law under section 70 of the Constitution and will subject the applicants to double jeopardy;

(c) a declaration that the intended institution of the private prosecution against the applicants constitutes an abuse of the due process of law, and is *mala fides* and oppressive to the applicants and is contrary to law and public policy;

(d) an order directing that the proceedings in the application for leave to institute the intended private prosecution, with the applicants as the eight and ninth defendants in Private Prosecution No 1 of 2001, be

terminated forthwith;

(e) an order prohibiting the Chief Magistrate, Nairobi, from hearing or further hearing or proceeding with the application for leave to file the intended private prosecution against the applicants;

(f) an order that the respondents do pay the costs of this action.

The following grounds are stated on the face of the Originating Summons, to support the application:

(i) the Constitutional rights of the applicants are threatened by the pending private prosecution;

(ii) the private prosecutor lacks constitutional or other authority to revive a prosecution after the Attorney-General has entered *nolle prosequi* under section 26 of the Constitution and section 82 of the Criminal Procedure Code (Cap 75, Laws of Kenya);

(iii) the intended prosecution of the applicants would be a violation of their constitutional rights to a fair trial under section 77 of the Constitution and to the equal protection of the law under section 70 of the Constitution;

(iv) the Criminal process is not fairly invoked and is intended for extraneous, ulterior and improper purposes;

(v) the intended private prosecution against the applicants is *mala fides*, oppressive, vexatious and constitutes an abuse of Court process.;

(vi) the intended private prosecution is against public policy.

The evidentiary basis of this action and for the assertions of fact on the face of the application, is found in the depositions of Andrew Douglas Gregory, the first applicant, dated 23rd August, 2002, and filed on 28th August, 2002. It is necessary to set out the most material aspects of this evidence by affidavits:-

(a) that ABN Amro Bank, acting by virtue of powers conferred upon it by debentures dated 22nd June, 1993 and 14th February, 1994 on 11th April,1997 appointed the first and the second applicants as joint receivers and managers of Rosafric Ltd, one of the respondents, and in this capacity they served until 19th January, 2001;

(b) that, as receivers and managers, the two applicants made no claim over any monies disputed between ABN AMRO Bank and the respondent, and they at no time sought to recover monies on their own behalf;

(c) that, in connection with his role as receiver/manager, the deponent together with three other persons became the subject of complaint, and on the basis of this complaint the Attorney General instituted proceedings, in Chief Magistrate's Court Criminal Case No 240 of 2000 (*Republic v Bernard Martens, William Johann Lemstra, Andrew Gregory & Timothy Thagana*), in which the deponent was the third accused;

(d) That on 29th August, 2000 the Attorney-General entered *nolle prosequi* terminating the prosecution of the proceedings in CMCC No 240 of 2000, which led to the Chief Magistrate terminating the proceedings on 11th September, 2000;

(e) that the respondents have moved the Chief Magistrate's Court by Misc Criminal Application No1 of 2001 seeking leave to institute private prosecution against the applicants as well as other persons;

(f) that the deponent believes the advice of his counsel, that the particulars of the offence intended to be brought against him are similar to those of CMCC No 240 of 2000 wherein *nolle prosequi* was entered by the Attorney-General.

To the Originating Summons application, the respondents, through their advocates, Murgor & Murgor Advocates, filed on 28th April, 2003 grounds of opposition drawn on the same date. These grounds may be set out here in a summarized form:

(ii) the respondent do have a constitutional right to initiate the private prosecution of the applicants;

(iii) neither the respondents nor the Chief Magistrate's Court has violated any constitutional or other rights of the applicants;

(iv) the applicants have yet to be tried and acquitted of the proposed charges in the intended private prosecution;

(v) neither public policy nor the public interest has been compromised by the intended private prosecution;

(vi) the discharge of accused persons under Section 82 of the Criminal Procedure Code does not constitute a procedural bar to the private prosecution intended;

(vii) the laws of the country, including the Penal Code (Cap 63) apply equally to citizens as well as non-citizens;

(viii) the termination and subsequent discharge of the accused person in Chief Magistrate's Criminal Case No 240 of 2000 was obtained by fraud and deception and entailed another offence, that of conspiracy to defeat the course of justice;

(ix) the Attorney-General has not recorded and cannot, but for good cause, record his opposition to the intended prosecution;

(x) the applicants have filed an identical application before the subordinate court and should await the outcome of that application after which they can appeal, or otherwise invoke the jurisdiction of the High Court.

(xi) The second applicant has not been charged by the state in Chief Magistrate's Criminal Case No 240 of 2000.

At the very beginning of submission, counsel for the respondent sought to have the applicants' case deferred, to make room for the presentation of the grounds of opposition. Dr Muigai, counsel for the applicants, objected to the proposed approach to trial, in view of the fact that Mr Mwige for the Respondent had not contended that he had preliminary points of law to raise. Dr Muigai submitted that if the opposition being presented was not on ***preliminary*** points of law, then it should not preempt the substantive application, and its essential contentions should instead be made as part of the submissions in response to the applicant's case. Counsel submitted, and which submission was accepted by the Court, that only arguments on fundamental legal questions going to jurisdiction should justify the respondent's intervention at this early stage. This position was supported by Mr Majanja for the applicants in Civil Application No 1322/2002, by Mr Nagpal for the third, fifth and fifteenth interested parties, by Mr Areba for the first interested party, and by Mr Bowry for the 10th, 11th, 13th and 14th interested parties. The Court's direction was that the applicants' case be presented without interruption, and all oppositions to the same be consolidated with the respondent's submissions and presented as part of the response to the applicants' case.

Just as counsel for the applicants was about to commence his submissions, Mr Ogeti for the Attorney-General made a request to be allowed to draw, file and serve an affidavit. This was objected to by counsel for the applicants, who noted that although the Republic had been named as a party in the Originating summons of 23rd August, 2002 the Attorney- General has remained silent and has never indicated his wish to file any pleadings or affidavit.

Counsel for the applicant submitted that the informal application made on behalf of the Attorney – General was coming as an afterthought; gave no indication of the nature of the averments to be made in the proposed affidavit; was intended to achieve delay; and was not in good faith. Mr Nagpal for the third, fifth and fifteenth interested parties, supported Dr Muigai's position, and further submitted that whatever the Attorney- General had to say was at this stage limited to making statements pertaining to law rather than fact; and hence the hearing should proceed. The Court upheld the objection and allowed Dr Muigai for the applicants to make his submissions.

Counsel stated the essence of the applicant's case as being, to have declared unlawful and unconstitutional the intended private prosecution of the applicants. He submitted that the intended private prosecution was unlawful because the Attorney-General who was the custodian of the public interest, had terminated the prosecution of the applicants, on the same charges upon which the intended private prosecution was based, by entering *nolle prosequi*. He submitted that any prosecution in these circumstances would be oppressive, would subject the applicants to double jeopardy, and would threaten the constitutional rights of the applicants. The main ground in support of the application was that a private prosecutor had no authority to revive prosecution after it had been terminated by the Attorney-General. It was one of the grounds advanced, that private prosecution in these circumstances would amount to a violation of the applicants' rights to the equal protection of the law. It was also stated as a ground for the application, that the private prosecution was being pursued for ulterior and improper purposes.

In his submissions based on the depositions on file, Dr Muigai submitted that the two applicants in Miscellaneous Civil Application No 996 of 2002 were only receiver-managers for Rosafric Ltd, one of the respondents, and had no other relation with any of the parties with whom, the respondents were seeking to join them as joint accused, in the intended private prosecution. There were two documents which led to the initiation of a prosecution which was later terminated. The Banking Fraud Investigation Department's report of 12th October, 1999 addressed to the Attorney-General recommended the prosecution of several persons, including the first applicant. This recommendation was acted upon by the Director of Public Prosecutions, Mrs U P Kidula, who in her letter of 31st January, 2000 addressed to the Officer-in-Charge at the Banking Fraud Investigations Department, stated in part as follows:-

"Due to the fact that the matter is very urgent as the properties of the complainants may be sold I am going along with your recommendations that you charge the suspects with the offence of Attempting To Obtain By False Pretences C/S 313 as read with Section 389 of the Penal Code"

The first Applicant and others were later charged in Criminal Case No 240 of 2000, with the offence of attempting to obtain by false pretences contrary to Section 313 of the Penal Code as read with Section 389 of the Penal Code. These proceedings were, however, later terminated when, on 29th August, 2000 the Director of Public Prosecutions entered *nolle prosequi*, in these terms:

" In exercise of the powers conferred on the Attorney- General by Section 82(1) of the Criminal Procedure Code Cap 75 Laws of Kenya delegated to me by Legal Notice Number 331 of 1996, I hereby enter *Nolle prosequi* and inform this Honourable Court that the Republic intends that proceedings against the above named accused persons who are charged with the offences of attempting to obtain by False Pretences Contrary to Section 313, Fraudulent False Accounting Contrary to section 328 (b) (ii) and making a document without authority contrary to Section 357 all of the Penal Code SHALL NOT continue"

This instrument was duly signed by Mrs U P Kidula, the then Director of Public prosecutions.

Counsel for the applicants noted that while the decision taken by the Director of Public Prosecutions remained and has remained unaltered todate, the respondents have served notice that they intend to initiate and to conduct private prosecution No 1 of 2001, joining the first applicant as the eighth accused, and the second applicant as the ninth accused. It is stated in the charge that, between 1996 and 2001, the applicants jointly with others, attempted to obtain some 10 Million Dutch Guilders, by unlawful means, from the complainants. Dr Githu Muigai for the applicants submitted that the charge contained in the private prosecution was substantially the same as that which had been brought before the Chief

Magistrate's Court, and in respect of which the Director of Public Prosecutions had, on 29th August, 2000 entered *nolle prosequi* by virtue of powers entrusted to the Attorney-General and delegated to her. At a preliminary level, Dr Muigai submitted that a charge of this kind would have been entirely wrong in its foundation, because the applicants had not been part of any durable business set-ups in relation to any of the persons or institutions bearing the brunt of accusation; they were only receivers and managers, with a temporary and limited role. They had been appointed under a debenture, and they had duly complied with their instrument of appointment. Counsel submitted that the two applicants only came into the picture of the relationship between ABN-AMBRO bank and Rosafric Ltd, the institutions bearing the burden of blame, long after the subject now being made the subject of criminal charges, had come to pass. In these circumstances, and still at the preliminary level in his submissions, counsel contended that the intended prosecution, and in relation to the two applicants, was a grave abuse of the Judicial Process.

From that threshold, Dr Muigai came to the backbone of the applicant's case: by virtue of Section 26 of the Constitution, the Attorney-General had terminated the prosecution which was then being conducted against the first applicant and others. It was urged that this constitutional act not only terminated Criminal Case No 240 of 2000, but also closed the doors on any possibility of a private prosecution being re-instituted against the persons who had been discharged. Counsel submitted in the premises, that the respondent's attempt to re-open prosecution against the applicants and others, was unconstitutional and had no foundation in law. It was on this point, as was apparent from the submissions of the good number of counsel who appeared before the Court, that the real merits of the case would have to be canvassed, and thus on which a finding one way or the other would be made. It was equally clear that this point would serve as the point of convergence of the claims of the several parties who were brought together through consolidation.

Dr Githu Muigai for the applicants, submitted that every time the Attorney- General enters *nolle prosequi* he does so in the public interest, after taking into account all questions of public policy, and this attribute, thus, must vest a finality in the Attorney-General's decision. On this principle, counsel framed a question for the consideration of the Court:

"Is it constitutionally permissible that a private prosecutor should institute criminal proceedings after the Attorney General has already entered *nolle prosequi*, in respect of the proceedings now sought to be reinstituted by the private prosecutor, where there has been no challenge to the Attorney-General's decision?"

Counsel did concede, indeed, that the Attorney-General's right to enter *nolle prosequi* was not unfettered, and could be queried in Court and, where the Court was convinced that the exercise of this power was actuated by ulterior purpose, the decision to enter *nolle prosequi* could be quashed. Such was the holding of a High Court Constitutional Bench in *Crispus Karanja Njogu v Attorney-General*, Criminal Application No 39 of 2000. The following passage in that ruling is pertinent:

".....we find that the exercise of the power of ..... entry of *nolle prosequi* by the Attorney-General ..... before the Senior Resident Magistrate's Court ..... was capricious, oppressive, against public policy and amounts to an abuse of the court process. The *nolle prosequi* dated 22nd March 1999 presented to the trial Magistrate is therefore declared invalid. Consequently, we direct that the criminal proceedings in the said case against the accused/applicant [do] proceed before the trial Magistrate under Section 208 of the Criminal Procedure Code."

The Attorney-General in that case, had attempted to enter *nolle prosequi*, but the decision became contentious and the matter was referred to the High Court by virtue of Section 67 of the Constitution which provides for constitutional reference in such circumstances. The Constitutional Bench held that, while the Attorney-General did indeed have wide powers in relation to the conduct of prosecution, by virtue of Section 26 of the Constitution, the proper exercise of these powers were subject to the High Court's oversight.

Now counsel for the applicant submitted that the foregoing principle had no application to the present case, because the respondents had taken no steps to challenge the decision by the Attorney-General to

enter *nolle prosequi* in Criminal Case No 240 of 2000. The effect of this argument was that there would be a qualification to the principle laid down in *Crispus Karanja Njogu v Attorney General* (Crim Appl No 39 of 2000). This qualification would be that in the absence of a frontal challenge to the Attorney-General's *nolle prosequi* decision, by an express invocation of the High Court's authority of oversight, then the Attorney-General's decision ought to be upheld. This interpretation is, in our view, supported by the emphasis which counsel sought to place on the components of section 26 of the Constitution. Dr Muigai underlined the fact that section 26 (3) (a) conferred upon the Attorney-General the power to institute criminal proceedings; section 26 (3) (b) the power to take over and continue criminal proceedings; and section (3) (c) the power to take over and discontinue criminal proceedings. For good measure, counsel also cited section 82 of the Criminal Procedure Code (Cap 75), which empowered the Attorney-General to enter *nolle prosequi* in criminal proceedings at any stage, and to re-institute proceedings against any person who has been discharged at any stage. We think the argument being advanced here was that the Constitution had reposed in the Attorney-General this instrument, *nolle prosequi*, as a special device under his control, but subject to the High Court's oversight, for managing the prosecutorial process in the name of the Republic. Counsel recalled the provision of section 26 (3) of the Constitution, that the Attorney-General was required to exercise independence, in the conduct of prosecution.

Dr Muigai submitted that the respondents, at this moment, are in the same position as if they themselves had initiated Criminal Case No 240 of 2000 in respect of which the Attorney-General had entered *nolle prosequi*; and this is because they were the complainants then., as they are now. He submitted that, once the Attorney-General acts as he did in this case, it is in principle unacceptable that the same complainants should return to the very same class of court, seeking to re-start the prosecution; rather they should be coming to the High Court, invoking its oversight jurisdiction, and openly and frontally challenging the Attorney-General's entry of *nolle prosequi*, in a constitutional reference. This case for an open challenge to the prosecutorial discretion, which otherwise vests in the Attorney-General, is in our view highly meritorious, as it seeks to advocate transparent procedures in questioning the prosecutorial authority which, we believe, is a vital process in the maintenance of law and order as well as the safeguarding of peace and civilization.

Counsel argued that the respondents have, in effect, attempted to usurp the powers of the Attorney-General. He submitted that the respondents should be held to have no authority to override the exercise of the prosecutorial discretion by the Attorney-General. Dr Muigai submitted that there can be no residual authority in any person or body to re-institute a case in respect of which *nolle prosequi* has been entered. He maintained that it would be unconstitutional to allow such challenge to a *nolle prosequi* decision, as it would do violence to the whole purpose of Section 26 of the Constitution which grants independence to the Attorney-General, in the exercise of prosecutorial powers.

Counsel cited the High Court case, *Kimani v Kahara* [1985] KLR 79, on the mode of exercise of the power of private prosecution. The learned judges in that case, Simpson and Sachdeva, JJ endeavoured to lay down the proper conditions under which private prosecution should take place. In their words (p 89):

"When an application is made under Section 88 [of the Criminal Procedure Code (Cap 75)] to conduct a prosecution, we think that the Magistrate should question the applicant to ascertain whether a report has been made to the Attorney-General or to the police and with what result. If no such report has been made the magistrate may either adjourn the matter to enable a report to be made and to await a decision thereon or in a simple case of trespass or assault proceed to grant permission and notify the police of that fact".

We understand the learned judges in that case to be saying that the task of conducting prosecution primarily belongs to the Attorney-General, and any private person who wishes to perform the prosecutorial role should first request the Attorney-General to undertake the task. The court will not, however, be averse to the private individual undertaking the prosecution task if (a) the Attorney-General is not inclined to take up the task, and (b) the complaint in question is one that essentially turns on limited, private rights. Now, we have to note that the learned judges in *Kimani v Kahara* were of the clear view, and we are inclined to agree with them, that no private individual should undertake prosecution in broad matters that will incorporate the public interest. The learned judges expressed themselves as

follows (p 89):

"The Magistrate should also ask himself: How is the complainant involved? What is his *locus standi*? Has he personally suffered injury or danger or is he motivated by malice or political consideration? In thepresent case it is alleged that the public has been defrauded. No case either in England or Kenya was brought to our notice in which a private prosecutor has prosecuted on behalf of the public interest. To prosecute on behalf of the public is to usurp the functions of the Attorney-General".

The objective purpose of the opening for a private litigant to institute prosecution was well stated in the English House of Lords case, *Gouriet v Union of Post Office Workers and others* [1977] 3 ALL ER 70, and as will be noticed, the central role of the Attorney-General in prosecuting on matters of public interest stands out. In the judgment of Lord Wilberforce, the following passage appears (p 79):

"Enforcement of the law means that any person who commits the relevant offence is prosecuted. So it is the duty..... of the Director of Public Prosecutions or of the Attorney-General, to take steps to enforce the law in this way. Failure to do so, without good cause, is a breach of their duty ..... The individual, in such situations, who wishes to see the law enforced has a remedy of his own: he can bring a private prosecution. This historical right which goes right back to the earliest days of our legal system, though *rarely exercised in relation to indictable offences, and though ultimately liable to be controlled by the Attorney-General (by taking over the prosecution and, if he thinks fit, entering a nolle prosequi)* remains a valuable constitutional safeguard against inertia or partiality on the part of authority".

Our understanding of the foregoing passage from the *Gouriet* case is that the scope for a private person to commence and proceed with a private prosecution is somewhat limited: it generally excludes serious criminal matters; it largely applies where limited private interests are involved; it is in any case subject to the wider powers of the Attorney-General which can only be questioned within the ambit of the High Court 's oversight powers.

Dr Muigai for the applicants submitted that the Attorney-General, when he entered *nolle prosequi* in Criminal Case No 240 of 2000, is to be taken to have acted properly and in good faith, and duly acted in his capacity as the custodian of the public interest in matters legal. Counsel submitted that it would be improper for the respondents to attribute the Attorney- General's action to bad faith, as it was exclusively the responsibility of the Attorney-General to determine whether or when to terminate a prosecution case by entering *nolle prosequi.* Counsel, relied on the High Court's Constitutional Bench decision in *Githunguri v Republic* [1985] KLR 91, to support his submission. In that case it had been thus held (p 92):

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

Dr Muigai also drew the Court's attention to two scholarly articles on the exercise of prosecutorial powers, one entitled "Control of Prosecution in the United Kingdom", by Dr Bernard M Dickens, published in the January 1973 (Vol 22) issue of *The International and Comparative Law Quarterly*; and the other entitled "The Office of Attorney-General", by the then Attorney-General of England, the Rt Hon Sir Elwyn Jones, in the April 1969 (Vol 27) issue of *The Cambridge Law Journal*. Dr Dickens writes (1973) ICLQ at p11:

"It is recognized that one reason ..... for the selection of offences as requiring the consent of the Director [of Public Prosecutions] is to protect members of the public from oppressive prosecution, but the basic issue in all cases is whether, in the whole of the circumstances, the public interest requires that proceedings should be taken in a particular case".

Now this rationalisation of the role of the State Law Office in the management of the conduct of

prosecutions is accomplished in the following passage from the article by Sir Elwyn Jones ([1969] CLJ at p 49):

"The decision when to prosecute, as you may imagine, is not an easy one. It is by no means in every case where a law officer considers that a conviction might be obtained that it is thought desirable to prosecute. Sometimes there are reasons of public policy which make it undesirable to prosecute the case. Perhaps the wrongdoer has already suffered enough. Perhaps the prosecution would enable him to present himself as a martyr. Or perhaps he is too ill to stand his trial without great risk to his health or even to his life. All these factors enter into the consideration".

On the basis of such authority, counsel submitted that it be recognized that the primary role in the conduct of prosecutions belongs to the Attorney- General, and all prosecution must be carried out under the supervision of the Attorney-General. The Attorney-General, as he exercises his discretion in such matters, takes into account pertinent issues of law and fact and, it was submitted, in the case of the subject-matter of these proceedings, he had duly weighed the grievances of the respondent against the public interest. In emphasis of the substantive as well as titular centrality of the State Law Office in the conduct of prosecution, Dr Muigai cited the case of *Mohanlal Karamshi Shah vs Ambalal Chhotabhai Patel & Five others* (1954) 21 EACA 236, in which the following passage appears:

"The confusion that has arisen in this case, and probably in many others of a like character, is, we think, due to the fact that the parties have failed to realize that even in a private prosecution the prosecutor is in law the Crown at the instance of the private prosecutor, whoever he may be. That this must be so flows directly from the provisions of Section 82 of the Code, which gives the Attorney-General a residuary control over every criminal case at any stage thereof".

Counsel submitted that the effect of the intended application the subject of these proceedings, was that, as the Attorney-General had duly exercised the discretion vested in him by the Constitution, a private prosecutor reinstituting the same or substantially the same prosecution, was *ipso facto* presuming to sit on appeal over the decision of the Attorney-General and then, preposterously, proceeding to take cover under the umbrella of the State Law Office. Such a position, counsel submitted, was untenable in law; and thus the state of affairs being sought by the respondents was, in effect, not available as a legal option. As he tendered this argument, which in our opinion, is meritorious, counsel sensed that there could be, as a riposte, the charge that the respondent's avenues of redress were being blocked. Counsel submitted, and correctly, with respect, that it is not the case that there will, as a result, be no remedy for the respondents. The Attorney-General's position is still subject to review: this is what we have referred to earlier as the oversight jurisdiction of the Court. Counsel argued, and correctly, in our view, that the respondents' remedy in thesecircumstances is not to enter into a turbulent competition with the Attorney- General, but instead, to bring the matter before the Court, seeking a review.

Counsel for the applicants submitted that, to allow the intended prosecution would undermine, by dint of backdoor manoeuvres, the Attorney-General's authority duly exercised under Section 26 of the Constitution. Counsel submitted that the Constitution has established Constitutional Benches of the High Court as fora where persons such as the respondents, who allege a violation of their rights, should find a remedy; but they should not be allowed to challenge the proper exercise of the Attorney-General's prosecutorial powers through actions in the subordinate Court. Counsel argued, and rightly,. as we see it, that the vital constitutional question as to the exercise of the State's prosecutorial powers must be retained and solved at the High Court level.

Counsel submitted that the respondent's private- prosecution intent amounted to an unlawful lateral challenge to constitutionally – prescribed prosecutorial authority, and this constituted a grave abuse to the process of justice. Counsel submitted, and we are in agreement, that the correct position in law, with regard to the termination of ongoing prosecution, must be as follows:-

(i) private prosecution when lawfully instituted, is subject to the Attorney General's authority to enter *nolle prosequi* and to terminate;

(ii) the course of prosecution under the charge of the Attorney- General may not ordinarily be interrupted or terminated by the private individual;

(iii) a termination of prosecution deliberately effected by the Attorney- General, through entry of *nolle prosequi*, is not subject to reversal by the private citizen.

Still building on these fundamental issues of legal principle, counsel for the applicant submitted that if a residual power were to be granted to a private prosecutor to challenge the Attorney-General's exercise of the prosecutorial power in any manner but through the process of constitutional reference before the High Court, then this would be a recipe for chaos in the administration of Criminal justice. Such chaos, counsel submitted, would take the form of the administration of justice being brought into disrepute in the perception of the people.

Dr Muigai for the applicants submitted too that the private prosecution intended by the respondents would constitute a violation of certain constitutional rights of the applicants: the right to equal protection of the law as provided for under Section 70 of the Constitution, and the right to a fair trial as provided for under Section 77 of the Constitution. Counsel cited the provision of Section 70, which states in part that:-

"every person in Kenya is entitled to the fundamentals rights and freedoms of the individual", but "subject to respect for the rights and freedoms of others and for the public interest"

and he argued that the "public interest" element is attributable to the Attorney-General as the custodian, in the matter of the administration of criminal Justice. Therefore, counsel submitted, the intended private prosecution by the respondents, by negating the assigned management of the public interest in the hands of the Attorney- General, was an attempt to undermine the applicants' right to the protection of the law, and on that account a direct challenge to the country's constitutional law. Counsel cited also the provision of Section 77 (1) of the Constitution which states:

"If a person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by a independent and impartial Court established by law."

Dr Muigai argued that this end, of impartial trial, could not be achieved unless the prosecution itself was conducted by a competent authority – and that failing this, there would not have been due compliance with Section 77. Competence in this regard would be lost, counsel argued, if the prosecutor was incompetent; and when the private prosecutor lacks the competence, he ought to be stopped *in limine*. Counsel submitted that the intended prosecution was oppressive and contrary to law. To illustrate this point, counsel remarked the fact that the second applicant was never physically at the place where the respondents allege the commission of criminal acts took place, and indeed he had not at all featured in the prosecution which had been commenced and then terminated by the Attorney-General. Counsel submitted that there would be no proper basis for prosecution in these circumstances. He cited the decision of the Constitutional Bench in *Samuel Kamau Macharia & Another vs Attorney- Genernal & Another*, Miscellaneous Application No 356 of 2000, in support of his argument. In that application, the learned judges, Mwera, Mitey and Rawal, JJ state as follows:-

"Counsel for the applicants submitted that the Attorney- General's discretion to arraign a person in Court should be exercised in a quasi-judicial way. We entirely agree"

And the learned Judges proceeded to hold as follows:-

".....we are satisfied, and we declare that the institution, prosecution and maintenance of the ..... criminal case ..... against the applicants ..... is for a purpose other than upholding the criminal law; that the said prosecution is meant to bring pressure to bear upon the applicants to settle the two civil disputes; that the prosecution of the applicants is an abuse of the criminal process of the Court; that the prosecution of the applicants amounts to harassment and is contrary to public policy and that the prosecution of the applicants is a contravention of their rights under Section 77 of the Constitution."

Counsel for the applicants relied on this decision to demonstrate that the intended prosecution by the respondents did not show a genuine case intended to be initiated for the purpose of enforcing the criminal law. The evidence available, counsel submitted, would show that the process of criminal justice was being used as a means of circumventing the application of the relevant provisions of the Constitution.

Counsel for the applicants in Miscellaneous Civil Application No 1322 of 2002, Mr Majanja, was in agreement with the quite compressive submissions made by Dr Githu Muigai, and would only make minor additions turning on the facts set out in the affidavit sworn by Timothy Thagana on 14th November, 2002. Mr Thagana was an employee of ABN – Amro Bank, and had dealt with Rosafric Limited in his capacity as an employee. He had been one of those charged in Court together with the applicants in Miscellaneous Civil Application No 996 of 2002. But, as with his co-accused in that case, the applicant had been freed after the Attorney-General terminated prosecution proceedings. Mr Majanja submitted that a private prosecution being instituted after entry of *nolle prosequi* by the Attorney-General had no basis in law. Counsel submitted that the respondents had no authority to "set aside" the *nolle prosequi* entered, and that the only body with authority to do so was the High Court.

Mr Majanja conceded that the respondents did have a right to initiate private prosecution, on the authority of the case *Kimani vs Kahara* (1985) KLR 79: but this would be subject to the residuary control of the Attorney- General, exercised by virtue of Section 26 of the Constitution.

Mr Majanja invoked Section 84 of the Constitution to support the submission that the respondents were bound, as a condition for any action by way of initiating a private prosecution, to come before the High Court. Section 84 (1) of the Constitution states in part as follows:-

"..... If a person alleges that any of the (fundamental rights provisions) has been, is being or is likely to be contravened in relation to him ..... then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress."

Counsel argued, on the basis of Section 84 (1), that if the respondents had felt that there was a breach or a threatened breach of their fundamental rights, their clear and open remedy was not to purport to prosecute, in a situation in which the prosecution previously commenced had been terminated by the Attorney-General, but rather, to challenge the *nolle prosequi* itself; and this meant filing proceedings in the High Court and nowhere else. Counsel observed, correctly, with respect, that the Chief Magistrate's Court, before which the respondents had come, has no authority to determine constitutional questions, whereas the High Court has original jurisdiction to hear and determine such matters. Counsel cited the case, *Githunguri vs Republic* (1985) KLR 101 to demonstrate that it was improper for the respondent to bring before the Subordinate Courts a matter that was essentially of a constitutional nature. The Constitutional Bench in that case stated as follows: (P 101).

"Do Magistrates have ..... inherent powers to refuse to hear a summons if the prosecution amounts to an abuse of the process of the Court? ..... No East African authority attributing such powers to Magistrates has been cited to us and we can foresee dangers arising from attributing such a discretion to Magistrates....."

The clear line of argument which credits the Attorney-General with the main responsibility for prosecuting in criminal cases was firmly supported by still other counsel. Mr Nagpal, representing an interested party, submitted that if the Respondents were unhappy with such a state of the law, then their right recourse would have been to invoke the High Court's review jurisdiction, in relation to the *nolle prosequi* entered by the Attorney-General. Mr Nagpal submitted that any perceptions regarding the reasons for entry of *nolle prosequi* by the Attorney General should have been urged before a Constitutional Bench, and not by conducting own prosecution before the Chief Magistrate's Court. Counsel submitted that, as nothing had happened since the Attorney-General entered *nolle prosequi* to warrant the institution of criminal proceedings, the intended prosecution by the respondent was actuated by vengeance and was an abuse of the process of the Court. Counsel submitted that it was an oppression against the applicants to expose them to repeated prosecution based on substantially the same claims.

Mr Nagpal made a new submission regarding the operation of the Attorney- General's authority to enter *nolle prosequi*: that while there are in most cases aggrieved persons behind criminal prosecution, they are not consulted, and are not required to be consulted when *nolle prosequi* is being entered. Now if such persons had to be consulted, as a condition to entry of *nolle prosequi,* then so many people would seek to reverse the Attorney- General's decision, and they would swamp the Courts with their own criminal prosecutions, in a manner that might lead to absolute chaos in the Court's case management; and this would be contrary to the public interest.

Mr Nagpal submitted that a private prosecutor is apt to be moved by one perception: "I have been wronged:" and he is unlikely to consider other relevant issues or be guided by a notion of public interest or public policy. This, counsel argued, tends to make the private prosecutor a usurper; he makes himself the judge of the competence and the propriety of the Attorney-General's decision. This assessment was shared too by Mr Bowry, who represented several interested parties. He considered as evidence of intended abuse of Court process the fact that in the original case in which the Attorney-General had entered *nolle prosequi*, there were only four accused persons; but now the number of those intended to be prosecuted has risen to seventeen. Mr Bowry's clients had not originally been charged, and counsel attributed this to the proper exercise of the discretion of the Attorney- General. Counsel submitted that the intended prosecution amounted to a usurpation of the constitutional powers of the Attorney-General.

Mr Mwige who represented the respondents stated as the basis for the intended private prosecution the accusation that a fraud had been committed, to the prejudice of the respondents, involving employees of ABN – Amro Bank and all the seventeen persons to be charged before the Chief Magistrate's Court. The consequence of the alleged fraud was that the respondents had been left with a large debt-liability purportedly secured on their family home and property. The respondents were relying on a report formulated by the Banking Fraud Investigations Department of the Central Bank of Kenya, dated 12th October, 1999. Mr Mwige stated as was common ground, that the Attorney-General had relied on this report to commence criminal proceedings before the Magistrate's Court, in Criminal Cases No 214 of 2000 and 240 of 2000, but which cases he later terminated, on 29th August, 2000 by virtue of his powers conferred by Section 26 of the Constitution. The respondents had applied before the Chief Magistrate on 11th April, 2001 to be allowed to bring the intended private prosecution; and the reason, as counsel stated, was that the Attorney-General had misapplied his powers to terminate the criminal case, as he had not acted independently. Counsel stated that as soon as Private Prosecution No 1 of 2001 was filed on 11th April, 2001, there was a plurality of applications challenging the competence of the proposed trial, and this took the form of two constitutional applications (No 1322 of 2002 and No 996 of 2002), one Criminal Revisions Application (No 305 of 2002) and two Judicial review Applications (No 348 of 2002 and No 1178 of 2002.)

Mr Mwige for the respondents disputed the validity of these various challenges to the intended private prosecution. He began from the principle, which is not itself denied by the applicants, that a right to initiate and conduct private prosecution does exist in Law (*Kimani vs Kahara* (1985) KLR 79, at page 87; *Gouriet vs Union of Post Office Workers & Others* (1977) 3 ALL ER 70, at Page 79).

Counsel submitted, relying on Section 263 of the Constitution, that there exists a constitutional right to conduct private persecution, because such action may be taken before the Attorney-General takes over the conduct of the prosecution. The specific clause being relied on here is Section 26

(3) (b), which provides that the Attorney -General

"shall have power in any case in which he considers it desirable so to do, to take over and continue any such criminal proceedings that have been instituted or undertaken by another person or authority."

Does this provision imply a general right in the hands of any person, any time, to commence criminal proceedings in relation to any matter, subject only to the wider powers of the Attorney-General to take it over? We do not think so. If it were so, then the State Law Office would have no special role in the initiation of prosecutions, and it would be a task for all and sundry. Such a prospect would be harmful to the ordered management of the administration of criminal justice, and would be liable to disrupt the Court

process and throw the Court's case – management arrangements out of gear. In short, counsel's claim of a general right of private prosecution is not tenable, as the outcome would be contrary to the public interest. We would hold, on this point, that the conduct of criminal prosecutions is essentially the responsibility of the Attorney-General conducted by virtue of Section 26 of the Constitution, even though, in a proper case and subject to judicial approval, a private individual may initiate and conduct a criminal case.

Relying on Section 82 (1) of the Criminal Procedure Code (cap 75), Mr Mwige for the respondents urged, and in our view correctly, that a discharge of an accused person on account of *nolle prosequi* entered by the Attorney – General, is only a *temporary reprieve*, as the subject may later be arraigned before the Court yet again. Counsel posed the question: who exactly may later re-institute criminal proceedings? And his answer was: the Attorney – General himself or a private prosecutor. From this position, counsel further submitted that if the respondents felt aggrieved by the entry of *nolle prosequi*, then they should have the right in law to re-institute criminal proceedings. This submission is quite contrary to the position taken by counsel for the applicants, who have argued that there should be no fractious rivalry between the private individual and the Attorney – General, on who is to institute criminal prosecution; and thus, if the Attorney – General, after considering all the relevant questions of public policy, terminates a criminal case, he himself should retain the right to reopen that case, for good cause, but it should not be open to the private litigant to countermand the Attorney – General's position and to re-institute the criminal proceedings.

The process of the criminal law is a vital aspect of the administration of justice, and is one of the key spheres of public policy and public interest, in the overall conduct of national governance. In this domain of the public interest, we believe, the dictates of public order would require that the Attorney – General should function as the primary decision – maker, of course, subject to the legislative directions of the Parliament and the oversight of the High Court. The fact that the independence of the Attorney – General is provided for in section 26 (8) of the Constitution entails that any challenge to the manner in which he has discharged his responsibility must be brought before the High Court in the first instance, both as a matter of principle, and on account of an express requirement set out in Section 123 (8) of the Constitution.

On the basis of these principles we would hold that where the Attorney – General has entered *nolle prosequi* in a criminal prosecution, he should in general be the only person who may, for good cause, re-commence the trial process. However an open window is left to a private prosecutor who disagrees for good cause, such as bad faith or corruption; but such a private prosecutor must apply directly to the High Court challenging the decision of the Attorney – General.

It is quite clear that a crucial factor in the respondent's determination to bring a private prosecution against the applicants is the perceived influence of a leading civil servant on the Attorney – General's decision to enter *nolle prosequi*. To us it does not seem right that a complaint of such a nature can justify the direct institution of criminal proceedings as proposed by the respondents. This Court views the State Law Office as a vital agency in the management of governmental functions, and perceives the office of the Attorney – General as an independent, constitutionally protected office against which informal allegations of improper influence should not be made. Any challenges to the constitutional decision – making by the Attorney – General must be made in the High Court, in a special application, and failing this we would consider that any decision to enter *nolle prosequi* in a criminal trial has been properly taken.

To the argument that institution of private prosecution against the applicants following the entry of *nolle prosequi* would constitute a breach of the applicants' fundamental rights, Mr Mwige for the respondents submitted that the Court's responsibility to protect fundamental rights runs both ways, and that only by instituting the intended prosecution would the respondents be able to protect their own constitutional rights. Counsel made specific reference to the respondents' equal right to the protection of the law, as well as the right to home and property which it was claimed, the respondents stood to lose if the allegations of fraud were not pursued in criminal prosecution. Mr Mwige submitted that these rights would be denied if the respondents were not allowed to conduct their private prosecution case.

The submissions on this point made on behalf of the respondents are somewhat open-textured – in particular the claim that if the respondents are not allowed to conduct the proposed private prosecution, then their property rights will be compromised. This would not, we think, be a valid argument, as complex property- rights issues requiring technical and professional modes of proof are generally protected through civil litigation. Indeed, from the official correspondence that preceded the terminated prosecution, there is some evidence that civil proceedings would have been in contemplation. The position of the respondents in this regard will not very well compare with the plight of the applicants who have had criminal proceedings against them properly terminated, but who are now threatened with fresh prosecution on substantially the same charges, mounted by private prosecutors. We have not, with respect, been able to see much merit in the submissions of counsel on this point.

Counsel for the respondents disputed the submission made for the applicants, that the proposed private prosecution is frivolous and *mala fides*. He argued that the institution of criminal proceedings by a private individual is not illegal nor an abuse of the process of the Court. He urged that since proof beyond reasonable doubt was required in all criminal cases, the same would apply to the intended prosecution, and hence the applicants had nothing to lose. Counsel submitted that if the respondents were not allowed to prosecute their case, then the applicants would have been accorded an immunity to which they were not entitled. The object of the respondents, counsel submitted, was to ward off attempts to defraud them.

We stated earlier on that, at the commencement of this hearing, Mr Ogeti representing the Attorney – General had made an unsuccessful request to be given leave to draw, file and serve an affidavit. The Court had not quite appreciated what, apart from likely delay in the proceedings, would be achieved by filing such papers. This matter, however, took a different turn at the end of the proceedings, when Mr Horace Okumu, Senior Principal State Counsel in the office of the Attorney – General, sought to address the Court. His statement of the Attorney – General's position on the present proceedings was puzzling, especially in the light of the position we have taken on the constitutional authority of the Attorney – General, in relation to the conduct of criminal proceedings. Relying on the case *Crispus Karanja Njogu v Attorney General*, Criminal Application No 39 of 2000, Mr Okumu stated the recognized position, that the High Court is entitled to know why the Attorney – General had entered *nolle prosequi*, whereas the Subordinate Court is not so entitled. He stated that, when the Attorney – General directed that the applicants be prosecuted in January 2000, investigations were still in progress, but before all the suspects were arrested and charged, the Attorney – General received a letter, Ref OP 32/20A dated 23rd August, 2000 from the Head of the Civil Service, Dr Richard Leakey, and the letter stated that it would be in the national interest to terminate the criminal proceedings. Mr Okumu stated that on the basis of that letter the Attorney – General did direct that *nolle prosequi* be entered under Section 82 (1) of the Criminal Procedure Code (Cap 75). He stated that after the termination of the proceedings, on 24th January, 2001 the Attorney – General received a complaint that the applicants were once again attempting to obtain money from the respondents by false pretences. Before the Attorney – General could make any response, the respondents had filed a private prosecution case before the Chief Magistrate. All the applicants then filed applications in the High Court challenging the private prosecution, and these were served upon the Attorney – General who consequently has been represented before the Court. Mr Okumu now stated that the Attorney – General had no objection to the conduct of private prosecution as proposed by the respondents. He stated that the Attorney – General had reconsidered the circumstances in which he had entered *nolle prosequi*, and formed the impression that his action had been procured by misrepresentation. Mr Okumu reported that the Attorney-General was opposed to the application before the Court, and he supported the right of a private individual to prosecute, in the prevailing circumstances. The Attorney – General had indicated that, depending on the outcome of the present judgment, he will take over the prosecution of the case and re-institute charges.

Mr Okumu's statement led to a submission by counsel for the applicants that the Court was being subjected to some kind of intimidation. Mr Okumu responded that it was only an indication that if the respondent's case was upheld, then the Attorney-General would take over the case and proceed with prosecution. We have decided to ignore these representations, as our decision must rest only on the merits of the case presented before us, and on what we believe to be the correct principles of law.

On the merits of the case, Mr Okumu for the Attorney – General was in agreement with the submissions

made for the respondent. He submitted that as the Attorney – General had conducted investigations and then terminated the criminal proceedings, it was in order for the Subordinate Court to allow prosecution. Counsel argued that the discharge of the accused through *nolle prosequi* should not operate as a bar to subsequent proceedings by a private prosecutor.

We note that no authority was placed before us to support such an argument, which, in any case, we have already held not to be in accordance with the law. The Attorney – General has a special, constitutional role in the conduct of prosecutions and he is under duty to take into account and to safeguard the public interest; so that it will not be open to a member of the public to override the discretion of the Attorney-General in entering *nolle prosequi*, save through a specific application to be heard and determined by the High Court. We agree with counsel for the applicants that Mr Okumu, in his submissions on the competence of a private person to re-commence criminal proceedings after *nolle prosequi* has been entered, is wholly wrong. We also agree with counsel for the applicants that the exercise of the Attorney – General's powers under section 26 of the Constitution is not subject to oversight by any person or authority except the High Court.

We are in agreement with counsel for the applicant who submitted that the course of criminal prosecution must be conducted in a manner centrally directed, and that the alternative would lead to chaos and would be inimical to the public interest. Dr Muigai illustrated this point by citing an apt passage from the case *Roy Richard Elirema & another v Republic*, Criminal Appeal No 67 of 2002. The learned judges of the Court of appeal there remarked:

"In Kenya, we think, and we must hold that for a criminal trial to be validly conducted within the provision of the Constitution and the {Criminal Procedure} Code, there must be a prosecutor, either public or private, who must play the role of deciding what witnesses to call, the order in which those witnesses are to be called and whether to continue or discontinue the prosecution....."

From this passage it will be clearly seen that the Attorney-General, armed with his authority conferred by section 26 of the Constitution, is always in the picture whether or not he is the one conducting any particular criminal prosecution.

On Mr Okumu's submissions that the Attorney –General was in favour of the respondents proceeding with private prosecution, Mr Majanja submitted that the issue before the Court is not whether or not the Attorney- General properly entered *nolle prosequi*, but rather, that the *nolle prosequi* as a constitutional instrument that terminates prosecution, remains in place and has not been vacated. We consider this to be a valid argument, and add that a Subordinate Court *has no competence to annul such a constitutional act*. On this technicality alone, the prosecution now resting with the Chief Magistrate's Court is incompetent, so long as the High Court has not declared the *nolle prosequi* a nullity.

Mr Nagpal submitted that the statement made on behalf of the Attorney- General, in its effect, is that section 82 of the Criminal Procedure Code (Cap 75) does not debar a private prosecution being brought following the entry of *nolle prosequi.* But such a position is untenable, because it would do violence to the whole purpose of section 82 of the Criminal Procedure Code. This Section carries a marginal note: "Control of Criminal Proceedings by the Republic". We are in agreement with Mr Nagpal that the intent of the Act of Parliament is that the Republic be in control of the conduct of criminal proceedings, and that the agent of the Republic in this respect is none other than the Attorney General. Section 82 does not grant a general prosecutorial licence, to all- and –sundry; had it done so, then the concept of *nolle prosequi* would be denuded of purpose and would not be such an essential instrument in criminal justice. We find ourselves in agreement with counsel, that the Attorney-General has a residual power to re-commence prosecution after *nolle prosequi* has been entered; but the private individual lacks this power, unless it is specifically given by the High Court.

The respondents' case rests on two main planks (i) one based on the evidence which they are possessed of, that there is fraud being committed with a view to depriving them of their properties, and they associate the applicants with such wrongs; (ii) and the second, based on a perceived right to re-institute, in the Subordinate Court criminal proceedings which have previously been terminated by the Attorney-

General, through entry of *nolle prosequi*.

The applicants have challenged those foundations to the intended private prosecution, and have prayed for orders prohibiting the intended private prosecution. We have anxiously considered the relevant trial papers and the submissions of counsel, and some of our holdings on points of law have already emerged in this judgment. We will now summarise some of the crucial issues addressed in the hearing, and thereafter make the necessary orders.

The central issue which is the common theme in the consideration of the several applications, is whether a private individual may re-commence criminal proceedings which have previously been terminated through entry of *nolle prosequi* by the Attorney –General. On this issue the following specific questions have emerged:

(a) What is the scope of the Attorney-General's powers to conduct criminal proceedings?

(b) By what method may the Attorney-General's exercise of the power to terminate criminal proceedings be challenged?

(c) How is the public interest safeguarded in the conduct of private prosecution?

(d) How is the independence of the Attorney-General in the conduct of prosecutions guaranteed?

(e) Does private prosecution guarantee that the prosecution is conducted by competent authority?

We will consider these question in the order in which they have been enumerated.

1. What is the scope of the Attorney-General's Powers to Conduct Criminal Proceedings?

The answer to this question is clear both from the provision of Section 26 of the Constitution of Kenya, and from the authority already referred to in this judgment. No doubts are to be entertained about the fact that the Attorney-General, the "Principal Legal adviser to the Government of Kenya" {S. 26(2)} is the Republic's custodian of the constitutional and legal authority for the conduct of criminal prosecutions. He may exercise all powers as his discretion dictates (S. 26 (3)),

"(a) to 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 by that person;

(b) to take over and continue any such criminal proceedings that have been instituted or undertaken by another person or authority; and

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or another person or authority."

While it is clear that criminal prosecution may be commenced by a person other than the Attorney-General, we have no doubts at all that such occasions must be few and limited, and even when they come to pass, the Attorney-General's authority remains entirely uncompromised and he can at his own discretion, take over the case in question and either continue it or terminate it.

2. By What Method May the Attorney-General's Exercise of the Power to

Terminate Criminal Proceedings Be Challenged?

It follows that the Constitution has no place for contests between the Attorney-General and anyone else, over the question as to who will exercise the prosecutorial powers in any given case. When a private person exercises the power to prosecute, this is seen as an exceptional case in which, in view of the circumstances obtaining, there is legitimate cause for such proceedings to be initiated. The private

prosecutor, therefore, requires leave of the Court, and it is for the Court to consider the merits of the intended prosecution and to authorize institution of the proceedings. But even then, the Attorney –General remains in the background and, at his discretion, he could take over the conduct of those proceedings or even terminate them. There is no doubt, of course, that powers so broad are amenable to distortion or abuse. Suppose the Attorney-General, while conducting a prosecution that to all right-thinking people ought to be pursued, abruptly terminates the proceedings by entering *nolle prosequi,* can this be challenged under the law? It is now clear from case law that the exercise of the power to terminate criminal proceedings is quasi-judicial in nature: *Kimani v Kahara* [1985] KLR 79*; Gouriet v Union of Post Office workers & Others* [1977] 3 All ER 70. By the fact alone of this quasi-judicial character, it follows that an aggrieved person, by the Attorney-General's termination of criminal proceedings, may invoke the High Court's judicial review jurisdiction. But it has to be remembered that the Attorney-General's discretion is a constitutional one. This necessarily means that a misapplication of that discretion can be challenged by constitutional reference; and this means, *in the High Court.* We can thus say that the High Court, but not the Subordinate Court, has an oversight jurisdiction over the exercise of the Attorney-General's power to terminate criminal prosecutions.

To hold as we have done, that the Attorney –General's exercise of his discretion to terminate criminal proceedings can only be challenged by an application in the High Court, is to hold that the respondents in the present case cannot lawfully file criminal proceedings in the Chief Magistrate's Court after the Attorney-General has entered *nolle prosequi* in respect of the same subject-matter. It is not permissible for the respondents to challenge the constitutional authority of the Attorney- General in this manner, without first making recourse to the High Court. As the authority of the Attorney-General in respect of criminal prosecutions is founded upon the Constitution, a challenge to this authority must be direct, and can only be dealt with in the High Court.

3. How is the Public Interest Safeguarded in the Conduct of Private Prosecution?

It is clear from the authorities considered in this Judgment that the conduct of criminal prosecutions is always a matter of public interest. Therefore, the Attorney-General who is responsible for the conduct of public prosecution in the name of the Republic, is under a duty to safeguard the public interest as he manages the prosecutorial process. It is equally clear from the submissions of counsel, and from the authorities referred to, that the private individual is not in general to be regarded as the custodian of the public interest. On this account , the private prosecutor must not set himself in competition with the Attorney-General, in the conduct of prosecutions. This principle underlies our holding that, where the Attorney-General terminates the conduct of criminal prosecution which he himself had initiated, it will not be open to the private prosecutor to informally revive the terminated proceedings. The private prosecutor will be required in such a case, to first make an application before the High Court challenging the exercise of the Attorney-General's discretion.

4. How is the Independence of the Attorney –General in the Conduct of Prosecutions Guaranteed?

To protect the Attorney-General in the exercise of his powers in relation to the conduct of private prosecutions, section 26(8) of the Constitution stipulates:

"In the exercise of the functions vested in him by subsection (3) and (4) of this section..... the Attorney-General shall not be subject to the direction or control of any other person authority"

Counsel for the respondents tendered some information, on the basis of which they maintained that the Attorney-General, when he terminated the proceedings that are in question in this case, had not complied with section 26(8) of the Constitution. Now the question whether or not, indeed, the Attorney-General did not exercise his independence as required, is, we believe, a triable constitutional question which neither the respondents nor indeed any body other than the High Court, can resolve. It is thus, wrong in law, as we hold, for the respondents to proceed on their own to purport to set aside a decision on record of the Attorney-General, and to prosecute a criminal case as if *nolle prosequi* had not been entered.

5. Does Private Prosecution Guarantee that the Prosecution is Conducted by Competent Authority?

The applicants case rests *inter alia* on the contention that their rights to a fair trial as required under Section 77 of the constitution, are endangered, as they are likely to be prosecuted by an incompetent authority. They assert that the respondents, as prosecutors, are incompetent authority as there is no basis under the Constitution, upon which they can proceed with the private prosecution. The logic of this argument is that the respondents, by purporting on their own to supplant the constitutional role of the Attorney-General, and by their conduct to set aside a lawfully –entered *nolle prosequi*, have not brought themselves within the category of authorized prosecutors under the Constitution; and thus they are incompetent. The applicants are arguing, and we believe, with justification, that they will not be able to achieve their rights to a fair trial at the hands of an incompetent prosecutor. We agree. It is readily inferred from the Court of Appeal case *in Roy Richard Elirema & Another v. Republic*, Criminal Appeal No 67 of 2002 that only legitimate prosecutor validly in "in office" can comply with the tenets of a fair prosecution process, in the terms of section 88 of the Constitution.

From this assessment of the facts, submissions and authorities, we now make the following orders:

1. We hereby issue a declaration as prayed, that the intended institution, prosecution and maintenance in the Nairobi Chief Magistrate's Court of Private Prosecution No 1 of 2001 against each and all of the applicants, after the Attorney – General had entered *nolle prosequi* in a previous prosecution in CMCCC No 240 of 2000, is unlawful and unconstitutional.

2. We hereby issue a declaration that the intended private prosecution of each and all of the applicants is a violation of their constitutional rights to a fair trial under Section 77 of the Constitution and to the equal protection of the law under section 70 of the Constitution.

3. We hereby issue a declaration that the intended private prosecution against each and all of the applicants, constitutes an abuse of the due process of the law and is oppressive to the applicants.

4. We hereby direct that the proceedings in the application for leave to institute the intended private prosecution against each and all of the applicants, in the Chief magistrate's Court, in Private Prosecution No 1 of 2001, shall be terminated forthwith.

5. We hereby issue an order prohibiting the Chief Magistrate, Nairobi from hearing or further hearing or proceeding with the application for leave to file the intended private prosecution against the applicants.

6. The costs of these proceedings shall be borne by the respondents. Lastly, we commend counsel for their excellent preparation, their disciplined mode of presentation, and their courtesy towards one another and towards the Court.

Dated and Delivered at Nairobi this 21st day of May 2004.

J.LESSIT **M.K.IBRAHIM** **J.B.OJWANG**

JUDGE **JUDGE** **JUDGE**