**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**MISCELLANEOUS CIVIL APPLICATION NOS 322 & 810 OF 1999 (CONSOLIDATED)**

**PATTNI & ANOTHER…… APPLICANTS**

**VERSUS**

**REPUBLIC……....……RESPONDENT**

**RULING**

Misc Application no 322 of 1999 was filed in the High Court Criminal Registry on 5.8.99. It is an originating motion brought pursuant to sections 65(2) and 84(1) of the Constitution of Kenya as read with sections 70, 71, 72, 74, 76, 77, 79, 80, 81, 82 of the Constitution; the Universal Declaration of Human Rights, African Charter of Human and Peoples Rights, the inherent jurisdiction and powers of the Court and all enabling provisions of law.

Applicant seeks 13 main reliefs namely:

1. .....

2. .....

3. A declaration that the fundamental rights and freedoms of the individual in section 70, 72, 74, 76 of the Constitution in relation to first applicant have been, are being or are likely to be contravened by Hon The Attorney General and the Commissioner of Police.

4. A declaration that the fundamental rights and freedoms of the applicants have been, are being or are likely to be contravened in Chief Magistrates Criminal Cases Nos 4053/94; 1474/97; 392/99 and 741/99.

5. A declaration that fundamental rights of second applicant in section 70, 76, 77(1), 77(2) and 79 have been, are being or are likely to be contravened in Chief Magistrates Criminal Cases Nos 1474/94, 741/ 99.

6. This Court do make such orders, issue such writs and give such directions as it considers appropriate to prohibit Chief Magistrates or any other magistrate from hearing, continuing or proceeding to hear Criminal Cases nos 4053/94, 1474/97; 392/99 and 741/99 and from admitting on the record of the Court proceedings count or counts alleging offences by one or more of the applicants in any way touch upon or are connected with any matter relating to applicants, Exchange Bank Limited (in voluntary liquidation) or World Duty Free Company Limited (T/A Kenya Duty Free Complex)

7. This Court do make such orders issue said writs and give such directions as it considers appropriate to acquit the applicants in the four criminal cases pending before the Chief Magistrate.

8. This Court do make such orders, issue such writs and give such directions as it deems appropriate to

Hon The Attorney General, and Commissioner of Police not to arrest, search the residence, search the offices or other business premises, charge or prosecute the first applicant in connection with matters relating to Goldenberg International Ltd, Exchange Bank Limited, World Duty Free Company Ltd or Central Bank of Kenya for any act of commission or omission in or about or before 1999.

9. That this Court do make such orders issue such writs and give such directions as it considers appropriate to prevent any or any further adverse, prejudiced, scandalizing or libelous publications, comment, discussion, debate or in any other manner by print or electronic media whatsoever, howsoever concerning or touching upon applicants in relation to any matter regarding Goldenberg International Ltd, Exchange Bank Limited and Central Bank Limited of Kenya for any act of commission or omission in or about or before 1999.

10. An order to stay further proceedings in Criminal Cases No 4053/94, 1474/97, 392/99 and 741/99 until the determination of this matter or upto further orders of the Court.

11. An order that there be no arrest of the first applicant, or search of business or residential premises of the applicants regarding any matters whatsoever without at first obtaining a warrant of arrest and search warrant respectively, issued for a specific purpose by High Court.

12. An order that the passport of the first applicant be returned to him forthwith and the said passport shall not be seized or recalled without a High Court order.

13. An order that personal recognizance be granted to first applicant in any further criminal proceedings.

14. An order that in case the Commissioner of Police, the Attorney General or Republic wish to charge applicant for any criminal offences they shall first obtain summons from Court endorsed with such a date for first applicant to appear in Court to take the plea(s) whereupon the first applicant shall be released forthwith on his own personal bond without providing any security, except for the non - bailable offence.

15. This Court do make such orders issue such writs and give such directions for the purpose of enforcing or securing the enforcement of and compliance with the Constitution of Kenya, the Universal Declaration of Human Rights and rules of natural justice as Court may deem fit to grant in all the circumstances in relation to the applicants. The application is supported by 56 grounds, first affidavit containing 279 paragraphs and three other affidavits. The application is also supported by 20 volumes of documents containing over 8000 pages.

Misc Civil Application No 810/99 was filed in the central registry of the High Court on 7/7/99. It is an originating motion pursuant to section 65(2), 70, 75, 76, 77 and 84 of the Constitution, Universal Declaration of Human Rights and inherent jurisdiction and powers of the High Court. The applicants seek declaration and orders including an order of prohibition to prohibit Chief Magistrate from hearing or continuing with hearing of Criminal Cases Nos 4053/94, 1474/97, 392/99 and 741/99 and an order for release of material taken by police in a search conducted on 24.3.99 which applicants allege was unlawful and deprived them of documents required for their defence in the four criminal cases. That application is supported by two affidavits and a mass of documents. Misc Application No 810/99 was on 8.10.2000 consolidated with Misc Application No 322/99, 322/99 being the main file.

The respondent has filed three affidavits in the two applications. The hearing of the applications has taken a lot of judicial time. The hearing of the preliminary objection raised by the Attorney General (respondent) took about 10 days which culminated in our ruling dated 28.8.2000. Thereafter, the hearing of the applications took about 11/2 months. The applicants' list of authorities contain about 50 cases and materials. The respondent's list contain 68 cases and materials and the list of interested party (Eliphaz Riungu) contain 13 cases and materials. We have read all of them though it is neither necessary nor expedient to refer to each of them for the purposes of this application.

The applications are brought in the context of four pending criminal cases. *Background*

In Criminal Case No 4053/94, Mr Pattni (first applicant) is charged with 12 counts of stealing money from Central Bank. Four other persons, Eliphaz Riungu, Lazarus Wanjohi Wairagu, Job Kilachi & Michael Wanjihia are charged in the same charge sheet with 12 counts of stealing as servants of the Central Bank.

Case no 4053/94 relates to the alleged loss by Central Bank of Kenya (CBK) of Kshs 13.5 billion in dealings with Exchange Bank Ltd. It is apparent from the proceedings of Public Accounts Committee (PAC) of 22.9.94 that the Controller and Auditor General had in his report raised a query about this loss and others by the CBK.

Mr Micah Cheserem, the Governor of CBK explained to the PAC how the loss of Kshs 13.5 billion occurred and the attempt to recover it. According to him there was shortage of foreign exchange and CBK used to buy dollars from Inter Banks and sell them to the Government to pay its foreign debts. The practice was that the Bank selling the dollars to CBK would have its account with CBK credited with the equivalent of dollars in Kenya Shillings and the Bank would deliver the dollars to CBK within 2 days.

But in this case, the Exchange Bank sold dollars to CBK which dollars it did not have or deliver to CBK. Mr Cheserem informed the PAC that those responsible for the transaction were charged before the Court and would explain to the Court how it happened. Mr Cheserem was certainly referring to Criminal Case No 4053/94. According to what he told the PAC it was a case of attempted fraud and the Government with CBK had in April 1994 taken possession of Grand Regency Hotel worth about 2.5 billion in an attempt to recover part of the Kshs 13.5 billion.

As stated by first applicant in para 213 of his first affidavit, Uhuru Highway Development Ltd, the registered owner of Grand Regency Hotel, instituted a civil suit HCCC No 29/95 in 1995. That suit was dismissed but was filed again as HCCC No 589/99. There are four plaintiffs in that suit, Uhuru Highway Development Ltd, Kamlesh Mansukhlal Pattni, Pansal Investments Ltd and Grand Hotels Management Ltd. There are three defendants - Central Bank of Kenya Deposit Protection Fund Board and Joseph Kittony. The suit is pending for hearing.

In Criminal Case No 1474/97, the two applicants are jointly charged in count 1, 2 and 3 with Wilfred Karuga Koinange, Eliphaz Riungu, Michael Wanjihia with theft of a total of Kshs 5.76 billion property of Government of Kenya. There are other charges, four of them alternative charges, making a total of 15 counts. That case is occasionally referred to as 5.8 billion Goldenberg case. It was triggered off by Controller and Auditor General's report of 1990/91 and repeated in the 1991/1992 report. He reports in para 38 of his 1992/93 report thus:

"In reports of 1990/1991 and 1991/1992 reference was made to the irregular manner in which a company was granted sole rights to export diamond, jewellery and gold out of the country and irregularly paid export compensation. Such payments amounted to K£ 61,338, 459 - 01 - 60 under the then normal legal rate of 20% and K£ 12,639,064, 14 - 60 - under an additional rate of 15% irregularly authorised by the Minister all totaling K£ 73,977,521 - 19 - 20 as at March 1993. Available information indicates that the Customs and Excise Department is holding unpaid claim amounting to K£ 105731 78 - 11 - 48 which were lodged by the company before export compensation on gold and precious metal, jewellery and articles were discontinued in April 1994"

He reported that the payment of additional compensation of 15% was illegal and that he found no evidence to confirm that all the diamonds and gold claimed had been exported; that they originated and were processed in Kenya and that the import content of such goods did not exceed 70% of the ex factory value as required under Export Compensation Act.

Apparently, as a result of the Report, the Law Society of Kenya filed a private prosecution Criminal Case No 1/94 in December 1994 charging six persons, Erick Arap Kotut (former Governor of CBK); C S Mbindyo; Dr W K Koinange; CYO Owayo; A K Cheruyiot and Kamlesh Pattni with obtaining over Kshs 18 billion as export compensation by false pretences, among other charges. We are informed that the charges were later terminated. PAC investigated the Report. There was no consensus in its Report of

1990/1991 and 1991/1992 Report and the issue of irregular payment of export compensation to Goldernberg International Ltd was left in abeyance. The PAC however dealt with the issue in its Report for year 1992/1993 and made findings and recommendations in paras 38 - 40. The PAC's findings and recommendations in paras 38 - 40 were deleted by amendment of its Report and excluded by Parliament, the result being that the Parliament did not adopt the PAC findings on the issue of irregular payment of export compensation to Goldenberg.

The hearing of Criminal Case No 1474/97 started before her Honour U P Kidulla, the then Chief Magistrate, on 3,3,98 Mr Chunga the then learned DPP made a long opening address giving a detailed outline of the case and the matters that the prosecution intended to prove against each accused.

He had a list of 81 witnesses. By 13.11.98, 25 witnesses had given evidence. As the 26th witness was giving evidence on 7.7.99, and after first applicants application for adjournment had previously been refused, the first applicant obtained an *ex parte* order in High Court Misc Application No 810/99 prohibiting the continued hearing of the four criminal cases. This order, though lifted later, stalled any further hearing of the criminal case.

Criminal Case No 741/99 was filed against the two applicants on 26.3.99 S P Sammy Musyoki Mikeku - one of the CID officers investigating Goldenberg criminal cases says in his replying affidavit sworn on 8.10.99 that the applicants were charged subsequent to a search on 24.3.99 in the premises of the applicants. In that case applicants are charged with stealing and obtaining by false pretences of about Kshs 320 million as export compensation. The charges are related to the charges in Criminal Case No 1474/97. The hearing of the case has not started.

The first applicant was charged in Criminal Case No 392/99 on 17.2.99 with seven counts. He is alleged to have stolen and obtained by false pretence US dollars equivalent to about Kshs 275,000/= from Michael Scamon the Receiver Manager of Kenya Duty Free Complex. First applicant discloses in his first affidavit that there has been previous proceedings relating to Kenya Duty Free Complex. First, he filed a civil suit - HCCC No 418 of 1998 against Nassir Ibrahim Ali, Dinky International S A and World Duty Free Companies Ltd t/a Kenya Duty Free Complex in February 1998 to recover " investment in the Kenya Duty Free Complex."

There has been intense litigation in that suit in respect of appointment of a receiver leading to protracted interlocutory proceedings both in the High Court and in the Court of Appeal relating to appointment of a receiver/ manager. The suit is pending for hearing in other Courts. On 9.11.98, Mr Pattni and his lawyer Mr Bernard Kalove were charged in Criminal Case No 9438/98 with two counts of forging the signature of Mr Nassir Ibrahim Ali to show sale of Kenya Duty Free Complex and one count of conspiracy to defraud Nassir Ibrahim Ali of World Duty Free Complex valued Kshs 3.3 billion. But on 11.2.99 the High Court in Misc Civil Application No 1296/98 granted an order of prohibition, prohibiting hearing or further hearing of, *inter alia*, Criminal Case No 9438/98.

Thus the trilogy of Goldenberg International, Exchange Bank and Kenya Duty Free Complex is the axis on which the four criminal cases revolve.

*Procedure and Jurisdiction*

Applicants allege infringement or likely infringement of various fundamental rights and freedoms. They *inter alia,* complain of denial of fair trial, freedom of assembly, fair hearing within a reasonable time by independent and impartial Court; presumption of innocence; that they have been subjected to torture and inhuman treatment and unlawful search.

They also complain that the Attorney General has abused his power and that the prosecutions are an abuse of process of the Court. In *Anarita Karimi Njeru versus the Republic* [1979] KLR 154 (hereinafter refer to as *Anaritas* case), the Court advised that:

"If a person is seeking redress from the High Court on a matter which involves a reference to the

Constitution it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed"

We will heed that advice when dealing with some of the general complaints of infringement of fundamental rights and freedoms.

It will be observed from the originating motion that in some cases the Court is merely asked "to make such orders, issue such writs and give such directions as it considers appropriate ..." Like in *Anarita's* case, we would stress that although the redress to be given ultimately rests with the Court, the applicant should specify the redress he seeks and proceed to justify it as an appropriate constitutional remedy. Applicants seek constitutional remedies in public law and invoke s 84(1) of the Constitution, s 65(2) of the Constitution, inherent jurisdiction and powers of the Court, Universal Declaration of Human Rights, African Charter of Human and Peoples' Rights.

The applicant's counsel did not refer the Court to the last two international instruments or their legal status in the Kenyan context or seek to rely on them. Mr Muthoga (who appears for Eliphaz Riungu - one of the accused in Criminal Cases Nos 4053/94 and 1474/97, and who basically appeared in the proceedings as an *amicus curiae*) did however, produce a copy of Universal Declaration of Human Rights 1948; International Covenant on Civil and Political Rights 1966; The African Charter on Human Rights 1981.

Although those international instruments testify to the globalisation of fundamental rights and freedoms of an individual, it is our Constitution as a law which is paramount - *Okunda v R* [1970] EA 453. That is not to say, however, that Court cannot in appropriate cases, take account of the emerging international consensus of values in this area. The two counsel will take consolation in the fact that Chapter V of the Constitution dealing with protection of fundamental rights and freedoms of the individual entrenches and sanctifies, subject to right to amend, the International Human Rights law.

Section 84(1) and (2) provides thus:

(1) Subject to subsection (6) if a person alleges that any of the provisions of sections 70 to 83 (inclusive) has been; is being or is likely to be contravened in relation to him (or in case of a person who is detained, if another person alleges a contravention in relation to the detained person), then without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction -

(a) to hear and determine an application made by a person in pursuance of subsection (1);

(b) to determine any question arising in the case of a person which referred to in pursuance of subsection (5) and make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing enforcement of any of the provisions of section 70 to 83 (inclussive).

In comparison, the Constitutions of Jamaica and Grenada contain a proviso giving power to High Court to decline to exercise such powers if satisfied that adequate means of redress are or have been available to the applicant under any other law - see *Herbert Bell v DPP* [1985] 3 WLR 18 and *Mitchell v DPP* (applicants authority no 29) respectively. There is no such proviso to S 84(2) in our Constitution. In *Anarita's* case (*supra*), the Court observed at page 160 letter B thus:

"Accordingly we read section 84 (1) as providing the individual with a means of obtaining redress only if he has never or has already utilised such other action as was lawfully available to him" (underlining ours).

That part of dictum which we have underlined is with respect not correct as it fails to emphasize the words "without prejudice to any other action with respect to the same matter which is lawfully

available .....” which in their context simply means that, the fact that an applicant seeks redress under s 84(1) does not preclude remedy under any other law, lawfully available to him. Indeed s 84(1) provides an applicant with a quick and summary procedure independent of any other remedy available to him for enforcement of contraventions of fundamental rights and freedoms. The Constitution confers original jurisdiction to the High Court for the enforcement of fundamental rights and freedoms. But applicants also invoke s 65(2) of the Constitution and inherent jurisdiction of the Court.

Section 65 of the Constitution falls under Chapter IV of the Constitution which deals with Judicature. Part 1 of Chapter IV establishes the High Court and the Court of Appeal. Section 65 is under Part 2 of the Constitution establishing other Courts. It reads:

(1) Parliament may establish Courts subordinate to the High Court and Court Martial, and a Court so established shall, subject to this Constitution have such jurisdiction and powers and as may be conferred on it by any law.

(2) The High Court shall have jurisdiction to supervise any civil or criminal proceedings before a subordinate court or Court Martial and may make such orders, issue such writs, give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by those Courts.

(3) The Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it by subsection (2).

This section confers on the High Court constitutional supervisory jurisdiction over subordinate courts and Court Martial akin to judicial review. Different rules of practice and procedures, not necessarily those contained in order LIII Civil Procedure Rules, are envisaged – though they have not been formulated. In the absence of such rules, an applicant can presumably approach the High Court by any procedure recognized by law including an originating motion.

The potential of this constitutional supervisory jurisdiction of the High Court in criminal and civil proceedings in subordinate courts, which seems wider than the judicial review jurisdiction under order LIII Civil Procedure Rules, largely remains untapped by legal practitioners. The point we want to make here is that original jurisdiction under s 84(1) is reserved for purposes of enforcement of fundamental rights and freedoms and is distinct from the supervisory jurisdiction under s 65(2) which is reserved for the purpose of ensuring that justice is duly administered by subordinate courts.

The applicants have invoked the two jurisdictions simultaneously in one application and this has obscured the real constitutional issues behind the applications and caused a confusion as to the remedies that the Court can give. It is this confusion of jurisdictions by applicants which made Mr Okumu to submit that, Court has no jurisdiction to issue an order of prohibition which is a coercive remedy like an injunction against the Government in view of the provisions of Government Proceedings Act.

It is still the same confusion which led to Mr Rebelo’s reply that the order of prohibition is not sought against the Government but against the magistrate, the republic having been sued on behalf of the magistrate. This confusion has been occasioned by blind application of English Constitutional Law. Unlike Kenya, UK does not have a written Constitution with the status of a superior law entrenching human rights and freedoms. In UK, the distinction between rights and remedies in public law and in private law is often blurred and human rights and freedoms are almost exclusively enforced by supervisory jurisdiction of superior courts of justice. Another relevant distinction between English unwritten Constitution and the Kenya written Constitution is that while in UK judges have no power to review a legislation in order to establish whether it complies with the terms of the Constitution, they have power only to review the manner in which public authorities exercise their powers conferred by the Legislature. Kenyan judges unlike their counterparts in UK, have power to review a legislation to establish whether it is inconsistent with the Constitution or any written law (see s 3 and s 123(8) of the Constitution). This constitutional structure in Kenya is the one which prompted the dictum in *Okunda v R* (*supra*) at page 457, thus:

"If a constitutional lawyer were to write about Kenya in the same strain as Dicey did about English, he would, to be accurate, have to emphasize the supremacy of the Constitution rather than any one organ of Government." And talking about the structure of the Constitution of Jamaica which is similar to Kenya Constitution, the Privy Council in *Hinds -v- Queen* (1977) 195 at page 213 letter E remarked:

"The more recent constitutions on the West Minster model unlike their earlier prototypes include a chapter dealing with fundamental rights and freedoms. The provisions of this chapter form part of the substantive law of the State and until amended by whatever special procedure is laid down in the Constitution for this purpose impose a letter upon the exercise by Legislature the Executive and the Judiciary of the plenitude of their powers."

As the High Court has original jurisdiction under s 84(1), specifically to enforce fundamental rights and freedoms including right to a fair hearing in criminal trials and taking into account the structure of our Constitution, the Court can make any order or declaration to stay or terminate criminal proceedings conducted or initiated in breach of the constitutional right to fair trial. Eg, if an applicant seeks a declaration under s 84(1) thus:

1. A declaration that the institution of criminal proceedings by the Attorney General against the applicant is unconstitutional and void as is in contravention of s 77 of the Constitution.

2. Court do issue an order quashing or terminating or staying the said criminal proceedings and discharge the accused or where it is the trial court breaching the right to fair trial thus:

1. A declaration that the trial of the accused is unconstitutional and void as is in contravention of s 77 of the Constitution.

2. Court do issue orders quashing or terminating or staying the said trial and discharge the accused.

If such orders declarations are sought and granted, they will have the effect of staying or terminating the prosecutions or trial without issuing an order of prohibition which savours of a remedy in supervisory jurisdiction of the High Court.

It follows that, in strictness, all matters that applicants allege as comprising an abuse of the process of the Court requiring intervention through inherent jurisdiction of the Court have to be categorized and considered under the constitutional supervisory jurisdiction of the High Court. Had the applicant heeded the advise in *Anarita's* case, the Court could have been spared of this arduous task of the categorization of rights and jurisdiction and hearing time would have been reduced considerably. Having said that we now proceed to deal with the applications before the Court.

*Applications*

We have already set out the specific remedies sought by the applicants, the primary one being an order of prohibition and acquittal of the applicant. As prayer No 4 and 5 show, applicants allege that sections 70,71, 72, 74, 75, 77, 79, 80, 81 and 82 have been or are likely to be contravened in relation to each of the four pending criminal charges. That is the justification for the order of prohibition and acquittal. But in the course of the proceedings, applicant's counsel prepared schedules of constitutional rights infringed showing the manner in which the rights have been infringed and the corresponding paragraphs of the first applicant's affidavit. In the schedules, applicant's counsel treats the right to personal liberty (s 72), protection from inhuman treatment (s 74), protection from deprivation of property (s 75): protection from arbitrary search (s 76): protection from freedom of expression (s 79): protection of right of assembly and association (s 80) and protection from discrimination (s 82) as separate topics. He has also treated the subject of protection of the law and right to fair trial (s 77) (11) as a separate subject. But a close scrutiny of those schedules and the paragraphs of the affidavit referring to each of those rights show that all the rights alleged to have been infringed have been infringed in the context of the four criminal cases and not independently of the four criminal cases. For instance, first applicant says that he has been denied right to personal liberty because of arrests and denial of bail on some occassions in connection with the four

criminal cases. He says that his right of association and assembly has been breached because he is unable to associate because of stigma arising from Goldenberg case.

He says that he has been subjected to inhuman treatment because of arrests, prosecutions and delay in the criminal cases. He says that he has been denied freedom of expression because he cannot express himself because of the *sub-judice* rule when the criminal cases are pending. He says that he has been subjected to discrimination because of racial statements made and because the Attorney General has not prosecuted some of the suspects.

The alleged illegal search is included in the topic on fair trial. The alleged deprivation of Grand Regency Hotel is also part and parcel of the criminal cases. Some of the sections of the Constitution eg s 72, s 74, s 79 s 80, s 82 has been read out of context and literally as they do not cover all circumstances complained of. Sections 71, 72, 74, 75, 77, 79, 80, 81, 82 do not warrant separate consideration and they have been wrongly invoked.

Applicant's counsel has filed three schedules in respect of s 77(1) numbered A, B, C. They deal with protection of the law and fair trial. The facts referred to in schedule A basically deal with evidence, the merits of the four criminal cases and events which have occurred in the course of the trial or when the trials are pending. Those facts tend to show that applicants are not guilty of the offences charged and that the prosecution have been instituted, maintained or conducted in a manner which amounts to abuse of the process of the Court. It appears that applicants equate a fair trial to, *inter alia*, a strong prosecution case on the merits. Although we will, in the interest of justice, be dealing with issue of abuse of process in detail later under supervisory jurisdiction of the Courts we observe that fair trial in the context of s 77 of the Constitution, does not refer to the merits or *bona fides* of the prosecution case. Rather it deals with trial process the decision making process sometimes referred to as "procedural due process". It recognizes that the Attorney General has constitutional mandate under s 26(1) (a) and s 126(8) of the Constitution to institute and undertake criminal proceedings against any person in respect of any offence alleged to have been committed by him without being subjected to the direction or control by any other person or authority.

In *Maharaj -v- A G of Trinidad and Tobago* [1978] 2 WLR 902, the Privy Council said at page 912, C, D,

"In the first place no human right or fundamental freedom recognised in Chapter 1 of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law even where the error has resulted in a person serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there were no higher courts to appeal to, then, none can say that there was an error. The fundamental human right is not a legal system that is infallible but one that is fair. It is only errors of procedure that are capable of constituting infringement to the rights protection by section 1 (a) and no mere irregularity in procedure is enough, even though it goes to jurisdiction, the error must amount to failure to observe one of the fundamental rules of natural justice".

Thus several orders denying first applicant bail on some occasions during trial or putting conditions of bail like depositing of passports in Court made by the trial magistrate which has been the subject of much criticism by the first applicant, cannot amount to breach of right to fair trial. First applicant has referred to matters of great diversity in his first 280 paragraph affidavit. But the matters relating to the history of first applicant's family, Goldenberg International, innocence of applicants, the role of Governor of Central Bank of Kenya and officers in Banking Fraud Investigations Department, the so called in-depth investigations by PAC and its findings, debates in Parliament, are totally irrelevant to the subject of contravention of constitutional right to a fair trial.

Fair trial in the context of section 77 refers to observance of and adherence to the constitutional safeguards as specified in sections 72 (2), 72 (3), 72 (4), 72 (5), & 2 (6), 72 (7), 72 (8), 72 (9) in the process of the trial.

Section 77 provides:

"(1) 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 an independent and impartial Court established by law.

(2) Every person who is charged with a criminal offence-

(a) shall be presumed to be innocent until proved or has pleaded guilty ....."

The concept of fair trial is not an abstraction. It is contextual and whether or not there has been a breach of right to fair trial will ultimately depend on the circumstances of each case. The article by David Harris – *The Right To a Fair Trial in Criminal Proceedings as A Human Right*, referred to by Mr Muthoga tells us that the primary meaning of "independent" is independent of other organs of Government in the sense of doctrine of separation of powers and its second meaning is independence of private pressure groups. He also says that the word "impartial" is reflected in the doctrine that no man may be a judge in his own cause.

That notwithstanding applicants have in the first affidavit and in the further affidavit as well as in the schedule B and C of s 77(1) identified four contraventions of right to fair trial. These are:

(a) Denial of presumption of innocence by wide and prejudicial media publicity.

(b) Denial of right to be heard by an independent and impartial Court.

(c) Denial of right to trial within a reasonable time.

(d) Denial of defence by seizure of documents necessary for the defence.

We deal with the first two together.

*Breach of Presumption of Innocence. Denial of Fair Hearing by and Independent and Impartial Court.*

Paragraph 219 - 225 of the first applicant's affidavit contain his general complaints. In particular he states in para 219 that from 1992, the local and international press and electronic media initiated, maintained and continue to maintain an incessant, scurrilous rumour based and racially motivated vitriolic attack centered mainly on himself. In para 22, he states that throughout the 5 years, the press, electronic media and politicians have heaped ridicule, racial hatred, and contempt upon the applicants by their constant and often repeated statements that the poverty and suffering of Kenyan people is as a direct result of the alleged criminal activities. In para 223, he deposes, *inter alia*, that, the entire country has been polarized into pro and anti Pattni camp with many individuals sympathizing with the unfair and unequitable treatment. And in para 229 he states:

"That in the light of the publicity aforesaid it is not now possible to find a magistrate who is unbiased and who would have the courage to acquit us in view of the serious adverse publicity which would ensue upon our acquittal with allegations of corruption in the Judiciary being inevitable"

In the further supporting affidavit, first applicant refers to subsequent appointment of Mrs Uniter Kidulla Esq, the trial magistrate in Criminal Case No 1474/97 to the position of DPP and the appointment of Mr Chunga, the then DPP and prosecutor in the criminal case to the high office of the Chief Justice of Kenya (CJ). He complains that the current DPP has now ceased to be an impartial arbitrator and that he is apprehensive that any magistrate trying any of the cases will to some degree be influenced by the previous determination by current CJ to prosecute the applicants.

In *Koigi Wa Mwere versus the Attorney General*, High Court Misc Application No 574/90 a Constitutional Court dealing with alleged breach of presumption of innocence in s 77(2)(a) of the Constitution said in part:

"We must however point out that the right is accorded a person who is charged with a criminal offence and not operative outside the criminal process. Quite clearly therefore the entity that is required to presume the accused innocent must be the Court trying him. It cannot be another entity and it certainly cannot be members of public or indeed public officials"

In the case of the *Directors of Public Prosecutions (Tanzania) versus Haji & others*, Court of Appeal - Dar es Salaam Criminal Appeal No 191 of 1994, while interpreting an equivalent article of the Constitution of Tanzania held, *inter alia*, that the requirement of fairness applies only to Courts of law but the presumption of innocence in favour of an accused charged with a criminal offence applies to every one and every agency involved in the criminal process including the general public who constitute the venue of every public trial.

We prefer the wider construction given to the presumption of innocence by the Tanzanian Court of Appeal with regard to s 77(2) (a) of our Constitution but emphasize that this presumption of innocence only applies when a person has been charged with a criminal offence. It does not apply before a person has been charged with a criminal offence.

The facts in the Tanzanian case and the practical approach adopted by the Court of Appeal are helpful in our case.

In that case Radio Tanzania a state radio - made a commentary in Kiswahili while a criminal case was pending. An application under the Constitution before trial judge to declare trial a mistrial occasioned by adverse commentary succeeded.

An appeal to the Court of Appeal was dismissed save that the order of acquittal was substituted with an order of discharge. In dismissing the appeal, the Court of Appeal took the following facts into account. That trial was before a judge with two lay members. That radio commentary was in a state radio - an agency of the Government. That commentary was in Kiswahili practically spoken by every Tanzanian. That the radio had a country wide coverage. That the radio commentary was made in the course of hearing of the defence case and that the two lay members seemed to have been aware of the radio commentary.

From those circumstances, the Court of Appeal concluded that:

(1) The commentary must have influenced the general public to believe, prior to conclusion of the trial, that respondents were guilty of the offence charged thereby violating respondents right to be presumed innocent until proved guilty.

(2) That the two lay members, like the general public, were bound to be adversely influenced by that commentary and were thus disabled from giving respondent a fair hearing unless given appropriate instructions by the trial judge. Elsewhere, the case of *Grant versus DPP* (Jamaica) [1982] AC 190 involved massive pre - trial publicity by three newspapers criticizing the perversity of coroners verdict in an inquest which failed to name the alleged murderers, named the applicants as the murderers sustained the complaint when applicants were eventually charged thereby exposing applicants to a hostile crowd which shouted and abused them during a Court appearance. Their complaint that their constitutional right to fair trial has been contravened due to massive pre-trial publicity and prejudice was rejected on the ground that it would not be impossible to empanel a jury unbiased by the adverse publicity.

In the *Grants* case, (*supra*), the Court of Appeal of Jamaica had held, *inter alia*:

"It is not sufficient for them to establish as they have done that there has been adverse publicity which is likely to have prejudicial effect on the mind of potential jurors. They must go further and establish that the prejudice is so widespread and so indecibly impressed on the minds of potential jurors that it is unlikely that the a jury unaffected by it can be obtained....."

It seems that the Privy Council did not disprove that test. That test was applied in the case of *Boodram*

*versus The Attorney General* (Trindad and Tobago, digested in the 1996, Commonwealth Human Rights Digest, (1996) 1CHRD 58, which was referred to us by Mr Muthoga.

The complaint in that case was that several articles in newspapers appearing after applicant had been charged with offence of murder were calculated and intended to create prejudice and hostility in the minds of potential jurors and would deny him the right to receive a fair trial by an independent and impartial tribunal. His appeal was dismissed. It appears from the Digest that the Court was of the strong view that, Criminal Court (trial court) was a more suitable forum by far than the Constitutional Court for the accused to pursue issue of pre-trial publicity and that if the trial court failed to employ available safeguards at common law, to ensure fair trial resulting in clear prejudice and miscarriage of justice, the judge would be corrected on appeal.

Both the *Grants* case and *Boodrams* case, show judicial reluctance to interfere with the process of the trial even when there has been prejudicial publicity after a person has been charged with a criminal offence and before trial.

The applicants have made speculative and very wide generalisation. We have to decide this aspect of the case on the basis of reality and the law. The newspapers are not on trial here for contempt of Court for prejudicing the trial and so it would be futile to find out whether what they have said is of great public interest. The presiding magistrate is not on trial either and the application is not for recusal of the presiding magistrate.

So again, it would be futile and improper to apply the tests in recusal cases. The applicants are not also seeking by this application, to vindicate their rights against the newspapers for the harm they have done. What applicants are complaining about is generalized bias by every magistrate in this country based on the wild assumption that every magistrate has read each and every article including foreign newspapers. It is not practically possible, either that, every magistrate in this country has over the years since 1992 read each and every newspaper referring either to Goldenberg, Exchange Bank or Kenya Duty Free Complex or that, any one of them has fresh memories of the content of the articles so as to conclude that the articles will cause prejudice.

As applicants disclose, there has been massive publicity and it is difficult to know what message each article conveyed. As applicants have stated, the articles have not prejudiced every Kenyan against each of them as he says that there are two camps - pro and anti Pattni. We do not know how the applicants guaged this and happily he has not said that every magistrate in Kenya belongs to anti Pattni camp.

The presumption of innocence only protects people who have been charged in Court. It does not assume that every Kenyan will at some stage in future become a potential suspect and thereby offer indetermins to protection. If the law was to do so, it would undermine criminal justice system.

Applicants, in paragraph 225, of the affidavit, assume that they will not be acquitted. They do not see any magistrate in Kenya who can acquit them. Fair trial by an independent and impartial Court does not mean acquittals or convictions. The applicants trial do not require a magistrate with judicial courage as the applicants do not say that the all powerful Executive will interfere with the magistrates impartiality.

Unlike the cases of *Grant, Haji* and *Boodram*, the applicants here will be tried by a professional magistrate who is bound by the judicial oath and who has the capacity and ability to adjudicate on any matter on the basis of evidence, procedure and counsels' submissions.

Applicants and the other suspects are represented by vigilant lawyers of distinction who as officers of the Court are required to help the trial court to do justice. Their vigilance is testified by the numerous applications made in the trial court and in the High Court arising from matters in the trial including constitutional applications eg Misc Criminal application No 481/95 filed previously by applicants after alleged prejudicial remarks pending trial made by an official of IMF.

The change of status of the former Chief Magistrate and former DPP do not warrant any comment

because their change of roles have no bearing either on the notion of fair trial or presumption of innocence within the meaning of s 77(1) and s 77(2) (a) of the Constitution and also because it has not been shown that there is anarchy, either, in the Judiciary, or in the administration of criminal justice system.

Referring to prayer no 9 of the application which is intended to "gag" the press and perpetually interfere with their freedom of expression we refer to the principles stated by Court of Appeal in the *Grant* case and in *Boodram* case, that the State does not guarantee in advance that a person charged will receive a fair trial but provides means by law whereby any infringement of that persons right at the trial would be infringed. None of the newspapers has been found guilty of contempt of Court or libel. We believe that it would be extremely perverse for this Court to issue such a gagging order in a free and democratic society especially when no wrong doing has been proved against any of them. If and when the press infringes the applicants rights , the law provides applicants with a remedy. We have already explained the technical meaning of the notion of fair trial by an independent and impartial Court and the limitation of presumption of innocence.

On the subject of adverse publicity applicant''s case does not fall within the confines of the law. It is thus inherently flawed.

*Denial of Right to Trial Within a Reasonable Time*

The factors to be considered in determining whether an accused has been deprived of constitutional right to hearing within a reasonable time were considered by Privy Council in *Bell v DPP* [1988] 3WLR 73. They include, length of delay, the reasons given by prosecution to justify delay, the responsibility of the accused for asserting his rights and prejudice to the accused.

The Privy Council however observed that the weight to be attached to each factor must vary from jurisdiction to jurisdiction and from case to case. The Privy Council also observed, with respect to Jamaica, that in giving effect to rights the Jamaican courts must balance fundamental rights of individual to a fair trial within a reasonable time against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions to be found in Jamaica.

In *Republic versus Taabere* (1983) LRC (Crim) 8 the High Court of Karibati was considering delay in context of the Constitution identical to s 77(1) of our Constitution. The Court held *inter alia*, that the delay to be considered is that following the date of the charge. From the language of s 77 (1) of the Constitution, we would give the same construction to s 77(1) that time runs from the date a person is charged in Court with a criminal offence.

The principle to be gathered from the authorities is that the words "within a reasonable time" have no universal application and whether or not constitutional right to hearing within a reasonable time has been infringed will depend on the local circumstances and the nature of the case.

Regarding Criminal Cases No 392/99 and 741/99, these are recent cases infact in 741/99, Mr Rebello on 5.7.99 asked the Court not to fix hearing dates as there are relevant matters he intends to follow in 1474/97 which were relevant to that case. We do not find, infact, that the right of applicants have been breached with respect to the two cases.

Applicants have given the history of the other cases in paragraphs 119 to 167 of the affidavit. Mr Horace Okumu for the respondent filed a long replying affidavit explaining the events in the 4053/94 and 1474/97. He explains that 1474/97 is a consolidation of Criminal Cases Nos 2208/95 and 2271/94. He has given the history of Criminal Cases Nos 4053/94, 2208/95 and 1474/97.

It is not necessary for purpose of this application to recount in detail the records of Criminal Case No 2208/95 later 1474/97 and 4053/97. The records of all the three cases speak for themselves. The criminal proceedings have been protracted. There have been many preliminary matters to be sorted out on several

occasions such as bail applications, variations of bail terms and preliminary objections. Hearing dates were taken on many occasions, but, for one reason or another the hearing could not start. The record of Criminal Case No 2208/94 speaks volumes. On 18.8.95, the trial magistrate lamented of the frustrations she had been getting in fixing hearing dates caused by both the prosecution and the defence. They used to make lengthy submissions before a hearing date could be agreed. It appeared that Criminal Cases No 4053/94 and 2208/ 95 were going on at the same time and defence counsels were involved in both. Several objections were made in 2208/95 which caused the postponement of 4053/94. Constitutional applications arising from 2208/ 95 were made in the High Court and both 4053/94 and 2208/95 had to be postponed to await the outcome of applications in the High Court, notably Misc Criminal Applications Nos 481/95 and 472/96. The High Court took time to determine them.

Criminal Application No 472/96 - *Eliphaz Riungu versus Republic* arising from Criminal Case No 2208/95 was concluded on 20.6.97. The Court in that case considered the issue of delay in 2208/95 and concluded.

"We considered the issue of delay in the prosecutions of this case but having considered the history of this matter we are unable to place blame on any side. This is a trial in which the accused persons are jointly charged in one indictment containing 93 counts. We have noted that there were numerous applications before the hearing proper could commence."

That is a judicial finding. The Court had been asked to take into account the delay in the criminal case and so it was properly seized of the matter. Mr Okumu says that there was a consent order that Criminal Case No 1474/97 take priority over 4053/94. Mr Rebelo does not deny that but says that accused cannot waive his constitutional rights and that the order was illegal. This is a case where applicants were in Court in two cases at the same time. It was a procedural order in effect staying one case pending the determination of the other. It was beneficial to the applicants as it avoided prejudice and allowed them time to concentrate on one case. There is complaint that 1474/97 was adjourned for a long time to allow the prosecuting counsel time to attend to Akiwumi Session Commission. The prosecution counsel applied for adjournment. Defence counsels objected. The trial magistrate gave a ruling allowing the adjournment. There was no appeal against her orders. As we have said before, no fundamental right is contravened by order of Court which is considered erroneous. The remedy for the errors is filing an appeal. As no appeal was filed, the delay of the case when prosecuting counsel was involved in the Akiwumi Commission has to be discounted. When the trial of 1474/97 resumed, the applicants obtained an order of prohibition in respect of continuation of all the criminal cases.

The record on 1474/97 also shows that, for a time the hearing of the case proceeded only for half days at the request of defence counsels to attend other matters.

In Misc Criminal Application No 481/95 filed by applicants herein, the Constitutional Court recognized that "these criminal cases are of highest possible level of public interest." That public interest has to be balanced with applicant's rights to trial within a reasonable time. There is another aspect of public interest which the Court has to consider. The criminal case is partly heard. It was heard over a long time and 25 witnesses gave evidence. Those witnesses spent their valuable time in Court. A lot of judicial time was involved. No doubt heavy expenses have been incurred both in the trial and in the investigations. The applicants did not bring this application in time as most of their complaints extend to the period before the trial started. They rely heavily on the proceedings of PAC which took place long before the trial in 1474/97 started. It is not in the public interest to stop the part heard criminal case at this stage. The public interest in the criminal cases far outweighs the applicants right to hearing within a reasonable time.

Having taken into account all the circumstances pertaining to Criminal Cases No 4053/94 and 1474/97 we are not satisfied that the applicants constitutional right to hearing within a reasonable time has been infringed.

*Denial of Defence by Seizure of Documents Necessary for Defence* It is the Misc Civil Application No 810/99 filed on 7.7.99 which deals comprehensively with the search by police on the applicant's premises on 24.3.99 and on 25.3.99. As a consequence of those searches, and other searches, the applicants allege

in 810/99, among other things, that the unlawful searches and detention of their files, documents, computers, counsels notes, statements required for their defences in Criminal Cases Nos 4053/99, 1474/97, 392/99 and 741/99, the applicants have been denied; are being and are likely to be denied justice and fair trial. They seek declarations that, the continued or further hearing of the four criminal cases contravene provisions of the Constitution that justice be duly administered by subordinate courts; that the hearing or further hearing of the four criminal cases are in all circumstances prejudicial to fair trial of the applicants. They also seek an order to prohibit the magistrate from hearing or continuing to hear the four criminal cases and an order that all boxes and cases containing files, documents, computer diskettes and other items seized by police and detained by them be returned forthwith to the first applicant in the condition in which they were taken.

The applicants say that the search on 24.3.99 and on 25.3.99 was unlawfuland illegal as there was no search warrant issued by Court and as there existed an order issued by High Court, on 16.2.99 in Misc Criminal

Application No 48/99, to the effect that State can in future search the office or residence of Mr Pattni only upon an application to the High Court for a search warrant. Mr Sammy Musyoki Mukeku, a Superintendent of Police - one of the officers investigating the criminal cases, says in paras 9, 11,27 of his affidavit sworn and filed on 8.10.99 that the search and seizure was not unlawful but was in exercise of public lawful and constitutional duties of investigating criminal offence. He annexed search certificates showing that the searches were done under s 20 of the Police Act (cap 84). Section 20 of the Police Act gives police power to search without a warrant in special circumstances. We have not been asked to find out whether or not the order of the High Court of 16.2.99 contravenes or suspends s 20 of the Police Act but we note that the order of 16.2.99, only relates to the premises and residence of Mr Pattni and not to the premises of Goldenberg. We have not also been asked to decide whether the searches of 24.3.99 extended to the premises of Mr Pattni or the premises of Goldenberg.

The contention of both parties show that there is a dispute as to the legality of the searches. Mr Mukeku explains in his long affidavit all the circumstances relating to the search on the two days. It states, *inter alia*, that first applicant agreed that search be done; that search was done in first applicant's presence and in the presence of his witnesses; that two cartons and a suitcase full of papers, letters, records relating to Goldenberg criminal cases were found including government papers, letters, internal memos, and records, that police took possession of those including two computer equipment for investigations; that it was not possible to list the very many documents and first applicant verbally agreed that search certificate in broad outline be prepared and signed which first applicant and his witnesses signed; that it was agreed that the said cartons and suitcase be sealed and that they be opened in the presence of first applicant and his witnesses; that applicants were charged in Criminal Case No 741/99 on 26.3.99; that documents seized will be used in Criminal Case No 741/99 and in further cases that will be filed after completion of investigations and that the two cartons and suitcase containing documents seized in the premises have not been opened and are still intact. He annexed two search certificates for the two respective dates which show, *inter alia*, that first applicant and his witnesses signed.

Although first applicant agrees that he signed the two search certificates, he denies most of the averments contained in Mr Mukeku's affidavit and gives his own version of the circumstances of the search. In particular,

first applicant in the affidavit sworn on 7.7.99 in support of Misc Application No 810/99, shows in para 11 and 15, that, the search on the morning of 24.3.99 until 2 pm, was done in his absence. He deposes in para 19 that it was impossible for his staff to ascertain what documents, files and confidential papers including papers belonging to his advocate were removed and in para 22, that although he signed the certificates of search he was never given the opportunity to examine the contents of sealed boxes or contents of the suitcase and that he merely signed to confirm the identity of the boxes, suitcase and computers. In para 21, he states that the documents relevant to his defence were removed in sealed boxes and suitcase. Although he states in para 21 and 22 that the boxes and suitcase were sealed, he however states in para 61 of his further supporting affidavit sworn on 14.7.2000, that, the suitcase and box were not sealed and in para 63, that the suitcase and boxes were merely closed with a tape. He avers that he

demanded that his lawyer be present during the search and that an inventory of the documents taken be taken but those requests were refused. He explains how he got Government documents (photocopies); that it was as a result of Court order in Criminal Case No 1474/97.

It is clear from the above brief analysis of the respective affidavits, that, the circumstances of the search are so contentious and that the nature of the documents placed in the two cartons and in the suitcase have not been ascertained.

First applicant states that he filed Misc Criminal Application No 121/99 to stop the opening of the boxes and suitcase but prayer 4 of that application which was granted on 7.4.99 as a temporary order, pending the hearing of the application *inter partes*, shows that, the relief sought by first applicant is stoppage of any future search in his residence and business premises.

That notwithstanding, the record of Criminal Application No 121/99 shows that, on 1.4.99 Mr Kalove for the first applicant applied for an order that the boxes removed be deposited in Court but the Court ordered that the boxes in question shall not be opened unless in the presence of applicant and his witnesses and further that the applicant, his witnesses and counsel do avail themselves on 6.4.99 for the opening of the boxes. The first applicant made an application for stay of those orders pending appeal and on 6.4.99, the orders of 1.4.99 were stayed pending appeal with, a further order that, pending appeal, the boxes and suitcase do remain in the custody of senior ACP Mr Joseph Kamau of Banking Fraud Investigators Department. Mr Joseph Kamau was further ordered not to tamper with the seals or the boxes or suitcases. There is no complaint that Mr Joseph Kamau has disobeyed the court order.

The first applicant filed Criminal Appeal No 25/99 in the Court of Appeal on or about 26.4.99 The first applicant seeks in the appeal *inter alia*, an order to set aside the order regarding the opening of boxes and a further order that the sealed boxes, suitcase, computers, seals, files and documents be returned to the first applicant forthwith. That appeal has not been prosecuted. Mr Bernard Chunga the then DPP states in para 21 of the affidavit sworn on 30.7.99 thus:

“That if the applicant co-operates the sealed boxes will be opened even today to enable inventory to be taken of all the contents and to enable the applicant to focus on what he needs for his defence”. Mr Chunga also explains in paras 4, 5, 6, 7, and 8 of that affidavit, that hearing date of Criminal Case No 1474/97 was taken on 13.4.99 and the case was mentioned on 7.5.99 and on 7.6.99 but first applicant did not on those three occasions notify the Court of his inability to continue with his trial.

Although s 20 of the Police Act gives police power to search without a warrant in special circumstances stated in that section, proviso (ii) of that section requires that anything seized should forthwith be taken before a magistrate to be dealt with according to law. By s 20(2), section 119, 120, and 121 of Criminal Procedure Code apply to a search without a warrant under s 20 of the Police Act. Section 121(1) of Criminal Procedure Code states:

“When anything is so seized and brought before a Court, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation”.

It would appear from s 121(1) of the Criminal Procedure Code that what police should have done after search and seizure of boxes, suitcase and computers is, either, to deposit them in the Court dealing with Goldenberg Case No 1474/97 already pending in Court or to deposit them with the Court dealing with Criminal Case No 741/99 after they had charged the applicant in Court on 26.3.99. We are of the view that if police fail to comply with s 20(2) of the Police Act, that would not make the search and seizure, if lawful, to be unlawful, the proper remedy being to seek an order from the magistrate to compel the police to deposit in court all the seized properties or documents. Thus, in the present case, it was open to the applicants to seek appropriate orders from the magistrate dealing with either criminal cases no 1474/97 and 741/99 regarding the seized properties. Further, the magistrate with whom the seized goods are required to be deposited or are deposited, would have jurisdiction to deal with issue of legality or otherwise of the search and to give any directions regarding the disposal of the seized goods.

We have shown that there is a dispute about the legality of the search and seizure of boxes and suitcase containing documents. We have also shown that the circumstances of the search are contentious. We have further shown that the nature of the documents seized have not been ascertained. All those issues require oral evidence for proper determination. The Constitutional Court is not the appropriate forum for resolving conflicts of facts and conflicts of evidence which would require investigation, especially when there is a more suitable forum. In *Boodram versus The Attorney General (Trinidad & Tobago)* (*supra*), the Court of Appeal stated (*obiter*), that Criminal Court was a more suitable forum by far than the Constitutional Court for the accused to pursue issue of pre-trial publicity.

In *Thornhill versus Attorney General (Trinidad and Tobago)* [1980] 2WLR 510, the applicants had sought three reliefs before the Constitutional Court *viz*:

(a) Declaration that the refusal by police to allow him to instruct and communicate with his legal adviser while he was under arrest and in police custody was a contravention of his constitutional right to do so

(b) Declaration that all statements taken from him during that period were unconstitutional, null and void.

(c) Orders designed to prevent the use of any of those statements in any prosecution of the applicant or other proceeding in which he might be concerned.

The Constitutional Court gave the first declaration but refused to grant the two other forms of relief on the ground that, they involve questions which cannot appropriately be decided by anyone, except the judge who will preside over the trial of the appellant for offences to which the statements relate and before whom full oral evidence as to the circumstances in which the statement came to be made can be called on the *voir dire*. The Privy Council agreed with that holding. The only constitutional dimension of the search and the seizure in relation to the four criminal cases is the allegation of seizure of documents necessary for applicant's defence in the four criminal cases. That deprivation, if *prima facie* proved, can amount to failure to give applicants or denial, of facilities for the preparation of their defence. That properly falls within the purview of s 77 (2)(c) and would be a contravention of that constitutional right of the applicants.

The respondent has cast aspersions to the *bona fides* of applicant's claimto deprivation of documents essential to their defence due to obstructive conduct of applicants in having the boxes and suitcases opened and also due to the belated claim of deprivation of documents. It is true that although the documents were taken on 24th and 25th March 1999, the applicants did not complain of deprivation of documents essential to the defence to the trial magistrate and only raised the issue when the hearing of the case resumed on 5.7.99. It is only when their application for adjournment was refused that they filed Misc Application No 810/99 on 7.7.99.

There is no claim that the documents in the two boxes and suitcase are lost or destroyed. They have been preserved by a Court order. Applicants have denied the trial court and this Court access to them. As the facts on which claim to deprivation of documents is based are seriously contested, and more importantly, as the documents taken have not been ascertained and classified as essential to the applicant's defence, applicants have not shown a *prima facie* case of deprivation of documents essential to their defence.

Moreover, the Criminal Court trying both Criminal Case Nos 1474/99 and 741/99 is the more appropriate forum for dealing with the alleged deprivation of documents essential to the defence in accordance with the Criminal Procedure Code and any other relevant law.

Indeed, it was not necessary for applicant to apply for adjournment of Criminal Case No 1474/99 on 5.7.99. All the applicants could have done is to apply to the trial magistrate for restoration of the documents and after the trial magistrate had given appropriate procedural directions, and after due inquiry, the trial could have proceeded. *Supervisory Jurisdiction Under S 65(2) and Abuse of Process* Applicants have said wide ranging things about abuse of process of Court in the grounds to support the application and in the affidavits. Grounds nos 20, 21, 29, 30, 31, 32, 34, 35, 36, 37, 38, and 52 refer to abuse of process. In para 37 to 54, among other paras of the first affidavit, applicants refer to

investigations by PAC. In paras 84 - 105 among other paragraphs, applicants make accusations against CBK, its Governor and officers of Fraud Investigations Department.

In paragraph 94, 97, 100, 103, 205 - 209, applicants refer to matters relating to Grand Regency Hotel. Applicants have also put in the affidavits exculpatory matters, evidence intended to show that neither of them committed any offence.

Applicants state that the bringing and maintenance of the criminal cases is an abuse of the process of Court as they are brought, *inter alia*, for extraneous and ulterior motives, to achieve collateral advantage, to victimize the applicants and to put unlawful pressure upon the applicants to forego their claims against CBK and Nasir Ibrahim Ali and his companies.

The origin of Criminal Case No 1474/97 and 4053/94 can be traced to reports of Controller and Auditor General. It is the constitutional duty of the Controller and Auditor General under s 105(2) (b) of the Constitution to satisfy himself that, all monies that have been appropriated by Parliament and disbursed have been applied to the purposes to which they were so appropriated and that the expenditure conforms to the authority that governs it. By s 105(4), the Controller and Auditor General is required to submit every report to Minister responsible for Finance, who in turn, is required to lay it before the Parliament. The report was laid before Parliament. Parliament through PAC investigated the reported irregular payments. The reports of PAC for 1990/91 and 1991/92 were not conclusive. The PAC report for 1992/93 was conclusive but Parliament did not adopt it. So the report came to nought. The investigations by PAC at least in 1990, 1991 and 1992, 1993 were done even before any of the applicants were charged with any criminal offence. The chairman of PAC, when presenting PAC's report to Parliament on 5.4.95, said, among other things, that Goldenberg remains the most emotive 'word' in Kenya public mind and that PAC does not have power of investigations and relies on the evidence of accounting officers. According to applicants Mr Micah Cheserem succeeded Mr Eric Kotut as Governor of CBK in July 1993.

He was not the Governor of CBK when CBK was allegedly defrauded of Shs 13.5 billion. He was not the Governor of CBK, either, when the Government was allegedly defrauded of money in the export compensation transaction. The Governor of CBK, is accountable to the Minister of Finance and to the Parliament. The money alleged to have been stolen is public money.

Although there was delay by Attorney General to investigate the alleged frauds, he did eventually order investigations and ultimately instituted the criminal proceedings. The applicant's counsel contended that the prosecutions are not brought by the Attorney General and that the charges are defective. We need not investigate this contention in detail because it is clear that applicants themselves admit that the criminal proceedings have been brought by the Attorney General albeit as they say,at the behest of CBK and other persons. Regarding the charges, first applicant in para 76 of the further supporting affidavit, deposes, in part:

"I have never made any claim that the charges against me and/or the second applicant are bad in law. I would not presume to instruct the prosecution on the legality of the charges they may wish to lay against me or any other person, but I do question the prosecution's motives and delays in laying the charges they have laid against me. It is a matter for trial court and not me to make any pronouncements on the legality or otherwise of the charges."

Under s 26(3) as read with s 26(8) of the Constitution, the Attorney Generalhas absolute discretion to institute and undertake criminal proceedings against any person. The Court has, however, power under s 123 (8) to deal with any question, relating to whether the Attorney General has exercised his discretion in accordance with the Constitution or any other law (underlining ours).

In raising the ground of abuse of process, the applicants do not claim that the Attorney General has breached any provision of the Constitution or any other law. What applicants are saying, in short, is that the prosecution is unfair and oppressive.

There are only four constitutional bars to trial of a person stipulated in s 77(4), 77(5), 77(6) and s 77(8)

namely,

(i) If he has been tried by a competent Court and either convicted or acquitted for the same offence or for any other criminal offence of which he would have been convicted at the trial of the offence

(ii) If he has been pardoned for that offence.

(iii) If the offence is not defined and the penalty therefore prescribed in a written law.

(iv) If the act or omission complained of did not at the time it took place - constitute an offence.

Despite powerful dissenting speeches in the two land mark cases of House of Lords viz *Connelly v DPP* [1964] 2 ALL ER 401, *DPP v Humphrys* [1976] 2 ALL ER 497 and in the Australian case *Williams v Spaitz* (1992) vol 66 CLR 383, it is now generally accepted that:

"every Court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the Court."

But there is no agreement as to the limits of the application of that judicial omnipotence particularly in criminal cases and it seems that whether it is applicable, and if so, to what extent, will ultimately depend on the peculiar facts of each case.

It is accepted, however, as those three cases show, that it is a discretion to be exercised, in criminal cases, very sparingly and only in the most exceptional circumstances and at least not when the judge thinks that the evidence will not support a conviction.

By s 65(2) of the Constitution, the High Court in its supervisory jurisdiction can issue such orders, writs and directions as it may consider appropriate for purpose of ensuring that justice is duly administered by the subordinate courts.

So in our jurisdiction, the supervisory jurisdiction in criminal cases is not inherent but is donated by the Constitution and the words "for purposes of ensuring that justice is duly administered by those Courts" are wide enough to include power to stay criminal proceedings on the grounds that the proceedings are oppressive and an abuse of the process of the Court.

In the present case, the charges are preferred by the Attorney General containing valid indictments. There is no complaint about the legality of the charges. The Chief Magistrate's Court has jurisdiction to deal with them. There is no plea of constitutional bar such as pardon, *autrefois acquit* or *convict* (ie double jeopardy). The applicants placed much reliance on the PAC report. But PAC was only investigating whether the relevant ministries had applied the money disbursed by Parliament for the purpose authorized by Parliament and whether the expenditure conformed to the authority that govern it. It was not investigating the commission of a crime. PAC is not a Court of law and its report cannot support a plea of *autrefois convict*. It was not in any case adopted by Parliament.

It is not the function of the Constitutional Court to call up all the evidence that prosecution intends to present to the trial court, review it microscopically and form an opinion as to whether or not there is *prima facie* evidence to support the charges. In any case, all such evidence has not been brought before this Court and further, it would be practically impossible in a prosecution of this enormity, to do so. This Court cannot usurp the function of the Criminal Court. The exculpatory evidence in the affidavits is a proper defence in the trial.

It is the first applicant's company which instituted the civil case in connection with Grand Regency Hotel and not the CBK. This was after some criminal cases had been instituted by the Attorney General. The civil suit is still pending for hearing.

It is apparent that that suit involves complicated issues and we cannot make any finding about the alleged

intimidation, lodging of caveat, execution of the legal charges etc without prejudicing the trial. So can we in the pending suits relating to Duty Free Complex. There is nothing personal between the first applicant and the Governor of the Central Bank of Kenya. The Governor is performing a public duty in pursuing matters relating to the alleged fraud on the CBK. He is not the Attorney General. There is no evidence that he has pressurized the Attorney General. The Governor has nothing to do with the alleged fraud in export compensation. It is apparent that the allegations against the Governor of CBK and officers in the Investigations Department are ill motivated as obviously the Governor of CBK and officers in Banking Fraud Investigating Department are not the appropriate targets.

There is nothing to show that the Attorney General was not solely motivated by public interest in instituting the criminal proceedings. As we have indicated before, the colossal amounts of money allegedly stolen belonged to the Government. It is in the public interest that applicants should face the trial and a verdict of the Court either way on the allegations made against them be known. From the foregoing it would certainly not be in the public interest to stop the prosecutions.

Mr Mukeku in para 30 of his affidavit sworn on 8.10.99 says that the application to stop the criminal proceedings is dishonest and an abuse of the process of the Court. The Constitution does not set the time limit with in which an application of this kind must be brought. Nevertheless, like other processes of the Court, it is in the public interest that, it must be brought promptly or within a reasonable time, otherwise, it would be considered as an abuse of the process of the Court. Further, an applicant should not bring multiple applications one after another, concerning same subject, matter as they will be considered as abuse of Court - *Mitchell v DPP (Grenada)* - applicants authority no 29/. Applicants have brought two constitutional applications before concerning breach of their fundamental rights one in connection with remarks made by Hino-Misc Application No 481/95 and the other in connection with Kibera Criminal Case Misc Application No 1296/98.

They did not include the contraventions now complained of in those applications though most of them were subsisting at that time. They did not bring the applications before the hearing of Criminal Case No 1474/ 97 commenced and only did so after that case had considerably progressed and after the prosecution had shown determination to proceed with the case. In the above circumstances, the present applications are an abuse of process of the Court.

As regards costs, there are no good reasons why the applicants should not get the costs of the preliminary objection.

There are no good reasons, either, why the respondent should not get the costs of this application.

For the foregoing reasons, we are satisfied that the applications have no merit and are dismissed with costs to the respondent. The applicants shall however get the costs of the preliminary objection.

Dated and delivered at Nairobi this 31st day of January, 2001

**E.M. GITHINJI**

**……**

**JUDGE**

**J.L. OSIEMO**

**……**

**JUDGE**

**J.W.O. OTIENO**

**……**

**JUDGE**