



**Choithram & another v Chief Magistrates’ Court at Milimani & 2 others (Petition E184 of 2021)  
[2023] KEHC 22359 (KLR) (Constitutional and Human Rights) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22359 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION E184 OF 2021  
HI ONG’UDI, J  
SEPTEMBER 22, 2023**

**BETWEEN**

**SHAHDADPURI GHANSHYAM CHOITHRAM ..... 1<sup>ST</sup> PETITIONER**

**PHILEMON MORARA APIEMI ..... 2<sup>ND</sup> PETITIONER**

**AND**

**CHIEF MAGISTRATES’ COURT AT MILIMANI ..... 1<sup>ST</sup> RESPONDENT**

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS .... 2<sup>ND</sup>  
RESPONDENT**

**HARISH SURESH LAKHIANI ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The petitioners filed a petition dated 24<sup>th</sup> May 2021 which was later amended and filed on 18<sup>th</sup> March 2022. The amended petition is filed under Articles 22, 23(3), 24, 47, 50 and 165(3)(a) & (6) of the Constitution. The amended petition seeks the following orders:-
  - i. A declaration be issued that the arraignment, charge and prosecution of the petitioners is tainted with ulterior motives, bad faith and against the public interest.
  - ii. A declaration be issued that the arraignment, charge and prosecution of the petitioners is an abuse of prosecutorial discretion and the court process being the criminal justice process.
  - iii. A declaration be issued that the prosecution of professionals, such as the 2<sup>nd</sup> petitioner, for carrying out their duties on instructions of their clients, is unlawful and an abuse of process.



- iv. A declaration be issued that the 2<sup>nd</sup> respondent, in making a decision to charge (and subsequently charging) the 2<sup>nd</sup> petitioner for executing lawful instructions given to him by his clients, in his capacity as an advocate, acted unreasonably and abused his discretion.
- v. A declaration be issued that the advocate-client privilege described in Section 134 of the [Evidence Act](#) survives death.
- vi. A declaration be issued that the 3<sup>rd</sup> respondent, in making a decision to charge (and subsequently charging) the 2<sup>nd</sup> petitioner, threatened with violation, the advocate-client privilege between the 2<sup>nd</sup> petitioner and his instructing clients.
- vii. A declaration be issued that the 3<sup>rd</sup> respondent's criminal complaint was made with ulterior motives and bad faith.
- viii. An order of Certiorari be issued calling into this Honourable Court, the entire proceedings in Milimani Chief Magistrates Court Criminal Case Number E357 of 2021- R Vs Shahdadpuri Ghanshyam Choitram & Philemon Morara Apiemi for purpose of being quashed; and by the same order the proceedings be subsequently quashed.
- ix. A declaration that a 'Decision to Charge/Prosecute or not to Charge/Prosecute' within the meaning of Sections 5 (4) (e) and 23 (1)(a) of the [Office of the Director of Public Prosecutions Act](#), 2013, amounts to an administrative action within the meaning of Section 2 of the [Fair Administrative Action Act](#).
- x. A declaration that the 2<sup>nd</sup> respondent's action of charging/prosecuting the petitioners without taking into account the matters raised by the petitioners, as expressly pleaded at paragraphs 32 - 45 of the petition, the 2<sup>nd</sup> respondent failed to take into account relevant considerations and thus subjected the petitioners to an unfair administrative action, and thus violated Article 47 of the Constitution and the [Fair Administrative Action Act](#).
- xi. A declaration be issued that if the prosecution mounted by the 2<sup>nd</sup> respondent is allowed to proceed, the petitioners' right to call/adduce evidence, as guaranteed by Article 50 (2)(k) of the Constitution, is threatened with violation as the petitioners' intended witnesses cannot be availed; on account of their death.
- xii. A declaration be issued that a trial where an accused person is impaired in the exercise of his rights to adduce and challenge evidence, is not a fair trial within the meaning of Articles 25 and 50 of the Constitution; and amounts to a deprivation of the right to access justice; as guaranteed by Article 48 of the Constitution.
- xiii. Damages be awarded to the petitioners, as against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, for subjecting the petitioners to an unfair administrative action.
- xiv. Costs of and incidental to, these proceedings be borne by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.
- xv. Any other relief that this Honourable Court may deem fit and just to grant in the interests of justice and/or that may become apparent and necessary in the course of these proceedings.

### **Background of this case**

2. This petition is about the plight of the 1<sup>st</sup> petitioner who is the director of Global Apparels Kenya Limited and the 2<sup>nd</sup> petitioner an Advocate of the High Court of Kenya. The 2<sup>nd</sup> petitioner acted as legal counsel for Suresh Rewachand Lakhiani and Narain Choithram and their company, Global



Apparels (EPZ) Kenya, where they were the directors. The two in 2016 were also shareholders in the 1<sup>st</sup> petitioner's company prior to their death.

3. The dispute herein revolves around the assertion that the respondents' preference of charges against the 1<sup>st</sup> and 2<sup>nd</sup> petitioners. The same is alleged to have been done with ulterior motives and in bad faith. The other limb is that of the 3<sup>rd</sup> respondent lodging a complaint against the 2<sup>nd</sup> petitioner whom the 2<sup>nd</sup> respondent charged for duties he lawfully executed in his capacity as an Advocate of the High Court. The 2<sup>nd</sup> petitioner found this to be malicious, vexatious, an abuse of his rights and an abuse of prosecutorial discretion and the court process.

### **The 1<sup>st</sup> Petitioner's case**

4. The 1<sup>st</sup> petitioner supported the petition with his affidavit of similar date. He informs that he is the director of Global Apparels Kenya Limited, a company based in Athi River and has been represented by the 2<sup>nd</sup> petitioner as its Advocate for a long time. Furthermore, he makes known that the directors of Global Apparels Kenya Limited were originally Suresh Rewachand Lakhiani and Narain Choithram who are now deceased. Additionally, he avers that the administrator of the estate of the late Suresh Rewachand Lakhiani is, Hitesh Suresh Lakhiani.
5. He deposed that on 14<sup>th</sup> October 2016, Suresh Rewachand Lakhiani transferred 50% of his shareholding to Narain Choithram which created a 50 – 50% shareholding for both. Thereafter, Narain Choithram transferred his 50% shareholding to him (1<sup>st</sup> petitioner).
6. It is deposed that prior to his death, Suresh Lakhiani, alongside Gem Trading LLC (where he was the sole beneficial owner) entered into a loan agreement with M.H Enterprises LLC, by whose terms Gem Trading LLC agreed to have been lent a consolidated amount of Twenty-One Million, Six Hundred and Ninety thousand, Two Hundred and Seventy United Arab Emirates Dirhams (AED 21,690,270). Subsequently Gem Trading LLC and Suresh Lakhiani defaulted in paying the owed amounts in the Loan Agreement. Being that repayment of the consolidated loan and advances was guaranteed by Suresh Lakhiani, it was secured by the collateral which included his 50% shareholding in Global Apparels Kenya Limited. Unfortunately, Suresh Lakhiani passed away in January 2018 before the repayment of the loan.
7. He averred that the lending company, M.H Enterprises LLC instituted civil proceedings at the Dubai First Instance Court vide Case No. 1367 of 2018 against Gem Trading LLC and the successors of Suresh Lakhiani seeking recovery of the owed amount. It is worthy to note that the 3<sup>rd</sup> respondent is one of his sons and as such was among the successors referred to. Judgement was entered in favour of M.H Enterprises LLC in the sum of AED 14,080,714 together with commercial interests at 9% per annum accruing from 30<sup>th</sup> May 2018 until payment in full.
8. Dissatisfied, the judgement debtors lodged an appeal at the Dubai Court of Appeal, vide Appeal No. 305/2019/2563 (Appeal No. 2563 of 2020) challenging the decision of the 1<sup>st</sup> Instance Court. The appeal was subsequently dismissed and the decision of the Court of 1<sup>st</sup> Instance affirmed.
9. He deposed that while the Judgement in the Dubai Appeal Court was pending, the 3<sup>rd</sup> respondent lodged a criminal complaint with the police, alleging, that his late father had not signed the Share Transfer documents and attendant instruments in 2016, meaning the instruments had been forged.
10. He deposed that in lodging the complaint the 3<sup>rd</sup> respondent failed to disclose a number of things. First that there was a loan agreement dated 1<sup>st</sup> November 2016 between M.H. Enterprises LLC and Gem Trading LLC and Suresh Lakhiani and the ongoing court proceedings in the Commercial Division



seeking to recognize the Dubai Courts judgment. Further that it was not disclosed that at the time of the agreement, the sole beneficial owner of Global Apparels Limited was Suresh Lakhaini. Moreover that, the 3<sup>rd</sup> respondent was neither a party to the Loan Agreement or the Share Transfer instruments; nor a witness thereto, and so had no material to support his claim.

11. He deposed that, the 1<sup>st</sup> and 2<sup>nd</sup> petitioners were as a result of the complaint arraigned in Court on diverse dates between 29<sup>th</sup> April 2021 and 20<sup>th</sup> May 2021, before the Milimani Chief Magistrates Court and charged vide CR. E537 of 2021, with several charges ranging from conspiracy to defraud, stealing, making documents without authority and uttering false documents. That the 3<sup>rd</sup> respondent's complaint was instituted to frustrate the execution by M.H Enterprises LLC of the Judgements of the Dubai Courts, pending their recognition in Kenya. That this makes the criminal proceedings malicious, vexatious and an abuse of the Court process. He as well stated that the criminal proceedings against himself and the 2<sup>nd</sup> petitioner were made in bad faith and an abuse of prosecutorial discretion. It is for this reason the petitioners seek to have the criminal proceedings quashed.

### **The 2<sup>nd</sup> Petitioner's case**

12. This petitioner in support of the amended petition filed a supporting affidavit of even date. In his affidavit he reiterated and emphasized the 1<sup>st</sup> petitioner's averments in support of the petition. He filed a supplementary affidavit dated 19<sup>th</sup> January 2023, and deposed to being an advocate of the High Court of Kenya, and acted for Suresh Rewachand Lakhiani and Narain Choithram who were the shareholders of Global Apparels Kenya Ltd in 2016. The two issued instructions to the effect that he should transfer 125,000 ordinary shares and 750,000 preferential shares from Suresh Lakhiani to Narain Choithram with the objective of having each director hold 50% shareholding. He accordingly prepared the Share Transfer Deed which was executed by both on 14<sup>th</sup> October 2016. Later on, on 6<sup>th</sup> September 2017, Narain Choithram transferred his 50% shareholding to the 1<sup>st</sup> petitioner and instructed him to effect this change by registration.
13. He deposed that the 3<sup>rd</sup> respondent subsequently lodged a criminal complaint, against him alleging that the legal Instruments he had prepared and attested were forged. As a result he was charged alongside the 1<sup>st</sup> petitioner vide Milimani Chief Magistrates Court CR. E537 of 2021 with charges including uttering false documents. With reference to the Judgements from the Dubai Courts, there are ongoing proceedings to recognize the Judgements in the High Court of Kenya under the Commercial Division in Case No. HCCOMMMISC/E365/2021.
14. He faulted the 2<sup>nd</sup> respondent's decision to charge him for carrying out his duties as an Advocate stemming from his client's instructions. He stated that the 3<sup>rd</sup> respondent's complaint is baseless and also malicious. In view of this, he brings this action against the respondents asserting that the Basic Principles on the Role of Lawyers (Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders) guarantees lawyers their security in discharge of their functions.

### **Respondents' case**

#### **The 1<sup>st</sup> Respondent's case**

15. The 1<sup>st</sup> respondent did not file any pleadings nor submissions in this matter.



## The 2<sup>nd</sup> Respondent's case

16. The 2<sup>nd</sup> respondent filed a replying affidavit (undated) sworn by Marindah Berryl, the 2<sup>nd</sup> respondent's Counsel. She deposed that the Directorate of Criminal Investigations (DCI) received a complaint from the 3<sup>rd</sup> respondent alleging that Suresh Pewachand Lakhiani, his late father together with Narain Choithram Shahdadpuri were the founders of Global Apparels Kenya Ltd with a shareholding in the Company of 75% and 25% respectively. In that regard, the 3<sup>rd</sup> respondent's father held a total of 375,000 ordinary shares and 1,500,000 preferential shares and Narain Choithram held a total of 125,000 ordinary shares and no preferential shares. The complaint was that the 1<sup>st</sup> petitioner had fraudulently transferred the company directorship and shareholding to himself on 14<sup>th</sup> October 2016 prior to the directors' death.
17. She averred that in the course of the DCI's investigations several statements were recorded and documents recovered. That the basis of the investigations, charge and prosecution of the petitioners was the resolution of transfer of shares dated 14<sup>th</sup> October 2016 and 6<sup>th</sup> September 2017 signed by the two late directors. The two signatures were subjected to forensic analysis and found to be a forgery.
18. Further it is deposed that the investigations conducted at the Director of Immigration Services revealed that Suresh Pewachand Lakhiani and Narain Choithram Shahdadpuri were out of the Country when the purported 14<sup>th</sup> October 2016 and 6<sup>th</sup> September 2017 resolutions were signed and attested to. She as well affirmed their knowledge of the existence of the Suresh Pewachand Lakhia's loan agreement and the court proceedings before the Commercial Division.
19. She outlined the results of the investigations into the matter to be as follows:
  - i. There was a loan agreement dated 1<sup>st</sup> November 2016 between M.H Enterprise LLC and Gem Trading LLC and Suresh Lakhiani, a consolidated sum of Kshs. 21,690,257 United Arab Emirates Dirhams (AED) (the 3<sup>rd</sup> respondent's father/ former director of Global Apparels Limited).
  - ii. That the shares in Global Apparels (K) Limited alongside other assets were used to guarantee the aforementioned loan and the necessary share transfer instruments executed.
  - iii. Gem Trading LLC and Suresh Lakhiani defaulted in repaying the loan.
  - iv. That M.H Enterprises LLC instituted legal proceedings in Dubai and had judgements entered in their favour.
  - v. The recognition enforcement proceedings are pending against the 50% shareholding in Global Apparels (K) Limited that was offered as collateral by the late Suresh Lakhiani.
  - vi. That the disputed transfer deed dated 14<sup>th</sup> October 2016 led to both deceased directors owning 50% shareholding each. Thereafter Narain Choitram allegedly transferred 100% of his shareholding to the 1<sup>st</sup> petitioner.
  - vii. Narain Choitram died on 30<sup>th</sup> October 2017 whereas Suresh Lakhiani died on 1<sup>st</sup> January 2018.
20. She deposed that after the close of the investigations, the DCI forwarded the file to the 2<sup>nd</sup> respondent. Satisfied that the evidence therein was sufficient, he made the decision to charge the petitioners. To this end Counsel submitted that the petitioners had failed to demonstrate how in carrying out its mandate the 2<sup>nd</sup> respondent had violated the petitioners' constitutional rights.



### The 3<sup>rd</sup> Respondent's case

21. The 3<sup>rd</sup> respondent filed his replying affidavit dated 27<sup>th</sup> July 2021 and a supplementary affidavit dated 25<sup>th</sup> April 2022 in response to the amended petition. He deposed to being an Indian who resides in Jumeira, Dubai United Arab Emirates though is residing in Kenya at the moment. He further informed that he is the eldest son of Suresh Rewachand Lakhiani who died intestate. His father was survived by his wife and their three children.
22. He deposed that succession proceedings in respect of the Estate of Suresh Rewachand Lakhiani were instituted in Dubai under the Sharia Law. Hon. Justice Suleiman Atiya Ibrahim - Judge on the 7<sup>th</sup> February, 2018 issued a grant which is pending resealing by the High Court in Kenya. Meanwhile, he and his brother, Hitesh Suresh Lakhiani were issued with a Limited Grant of Letters of Administration ad litem on 22<sup>nd</sup> June, 2021 by Hon. Lady Justice Maureen Odero) in Nairobi Succession Cause No. E1120 of 2021: In The Matter of the Estate of Suresh Rewachand Lakhiani.
23. He deposed that the known inventory of the assets of the estate of Suresh Rewachand Lakhiani includes a 75% shareholding in Global Apparels (EPZ) Limited. Further that Global Apparels (EPZ) Limited known sole directors were Suresh Rewachand Lakhiani and Narain Choithram Shahdadpuri both of whom maintained a bona fide shareholding in the Company of 75% and 25% respectively.
24. It's his disposition that following his father's death in 2018 he travelled to Kenya to pursue the transmission of his father's 75% shareholding in Global Apparels (EPZ) Ltd owing to the General Power of Attorney issued to him by the beneficiaries of the Estate of Suresh Rewachand Lakhiani. While in Kenya in 2020, he met the 1<sup>st</sup> petitioner who had taken over the control of Global Apparels (EPZ) Ltd including its operations, apparel production processes and sales. His attempts to gain access into the Company premises proved futile.
25. It is averred that in the effort to establish the true ownership of the Company, he went to the Registrar of Companies. The information released was that his father's name, Suresh Rewachand Lakhiani had been struck out from the directorship and shareholding structure of Global Apparels (EPZ) Limited and all his shares in the Company transferred to the 1<sup>st</sup> petitioner. This he says was done fraudulently. With that discovery, he reported the matter to the office of the DCI. The investigations into the matter proceeded soon after.
26. The 3<sup>rd</sup> respondent averred that the DCI's investigations concluded that some of the documents in the matter had been falsified and/or forged by the 1<sup>st</sup> and 2<sup>nd</sup> petitioners. The documents are:
  - i. Global Apparels (Epz) Limited's resolution dated 14<sup>th</sup> October 2016 purported to have been signed by Suresh Rewachand Lakhiani, Narain Choithram Shahdadpuri and the 1<sup>st</sup> petitioner.
  - ii. Global Appaprels (Epz) Limited's resolution dated 6<sup>th</sup> September, 2017 purported to have been signed by Suresh Rewachand Lakhiani and Narain Choithram Shahdadpuri effecting a share transfer in favour of the 1<sup>st</sup> petitioner.
  - iii. Transfer Deed dated 5<sup>th</sup> December, 2016 executed by Suresh Rewachand Lakhiani, Narain Choithram Shahdadpuri effecting a share transfer in favour of the 1<sup>st</sup> petitioner.
  - iv. Statutory Declaration dated 14<sup>th</sup> October, 2016 purportedly signed by Suresh Rewachand Lakhiani.
  - v. Transfer Deed dated 13<sup>th</sup> June, 2018 effecting a share transfer in favour of the 1<sup>st</sup> petitioner.



27. He further deposed that on the dates the transactions were said to have been done, the immigration records indicate that Suresh Rewachand Lakhiani was not in Kenya. The dates are on 6<sup>th</sup> September 2016, 14<sup>th</sup> October 2016, 5<sup>th</sup> December, 2016 and was already deceased on 13<sup>th</sup> June, 2018. He as well states that the 2<sup>nd</sup> petitioner by his letter dated 3<sup>rd</sup> March 2021 addressed to the Business Registration Service admitted to the attestation of documents purportedly executed by Suresh Rewachand Lakhiani but without witnessing the relevant execution, thereby confirming his complicity in the fraud.
28. It was further deposed that the Registrar of Companies, Ms. Joyce Koech, upon investigating the matter alleged that the 50% - 50% shareholding in the Company as between Suresh Rewachand Lakhiani and Narian Shahdarpuri was never captured in the system maintained by the Business Registration Service. In addition that there was an evident inadequacy in the commissioning of the Share Transfer Deeds relied upon by the petitioners.
29. It is his disposition that the 2<sup>nd</sup> respondent, upon considering the evidentiary and probative value of the DCI's investigations based on these illegalities and irregularities preferred charges against the petitioners in Milimani Criminal Case No. E537 of 2021.
30. He on the other hand averred that this Court does not have jurisdiction to entertain a petition seeking enforcement of orders and/or judgments issued by commercial Courts in Dubai as purported by the petitioners as the same is before the High Court's Commercial and Admiralty Division under Nairobi Commercial Cause No. E585 of 2021: Patrick Kiogora Mugambi Karani (Suing as the duly appointed Attorney of M.H. Enterprises Llc -Versus- Hitesh Suresh Lakhiani And Global Apparels (K) Limited) which is still pending hearing and determination.
31. In like manner it is asserted that M.H. Enterprises Llc, GEM Trading LLC and Global Apparels (Epz) Limited are not parties in the present petition and so the Court should not entertain any issues in respect to their commercial engagements. Nevertheless, he stated that the Dubai Court's decision has no bearing on the criminal proceedings commenced against the petitioners. Further that the petitioners' case is an attempt to usurp the 1<sup>st</sup> and 2<sup>nd</sup> respondent's mandate and defeat the cause of justice. As such should not be entertained by this Court but instead should be dismissed with costs.
32. In the supplementary affidavit, the 3<sup>rd</sup> respondent averred that the petitioners have misinterpreted Section 134 of the *Evidence Act* since the protection therein covers the client not the advocate. Moreover that the privileged communication indicated therein does not cover communication in furtherance of an illegal purpose.
33. Likewise, he states that contrary to the petitioners' argument Section 193A of the *Criminal Procedure Code* allows civil and criminal proceedings to run concurrently. In the same manner it is stressed that Article 157 of the Constitution bars the Court from interfering with the 2<sup>nd</sup> respondent's constitutional mandate. He deposed that the petitioners have not demonstrated that the 2<sup>nd</sup> respondent acted in bad faith or abused the legal process.

## **Parties' submissions**

### **The Petitioner's submissions**

34. The firm of Nchogu, Omwanza & Nyasimi Advocates filed written submissions and list of authorities dated 19<sup>th</sup> January 2023, on behalf of the petitioners. Counsel raised 7 issues for determination.
35. Counsel relying on the averments made in the petitioners' affidavits submitted that the Dubai cases are relevant to the instant proceedings as they confirm that the late Suresh Lakhiani had a Guarantee



- arrangement with MH Enterprises for a loan advanced to Gem Trading; by which arrangement his 50% shareholding in Global Apparels (EPZ) Kenya was committed as collateral. Therefore, in view of the Dubai Judgements, Suresh Lakhiani's 50% shareholding in Global Apparels being collateral for a loan advanced to him affirms that the transfer of shares had effectively been done as submitted by the petitioners.
36. It was likewise submitted that the appellants in the Dubai Court of Appeals No. 305/2019/2563 had challenged the Dubai 1<sup>st</sup> Instance Court judgment on numerous grounds including fraud, violation of the law and challenged the subject loan agreement. Moreover, the complaints included a claim by Suresh Rewachand Lakhiani's heirs that the signature appearing in the loan agreement, as the signature of Suresh, a forgery.
  37. Upon dismissal of the suit by the Dubai Appellate Court which was based on the 3<sup>rd</sup> respondent's (and his siblings') complaints on the loan agreement between MH Enterprises and Gem Trading, the 3<sup>rd</sup> respondent sought to instigate the impugned criminal proceedings seeking to impeach the Company Resolutions and Share Transfer documents none of which he was privy to.
  38. In view of this, it was argued that by filing the complaint, the 3<sup>rd</sup> respondent was intent on frustrating the criminal justice system (having been unsuccessful in the Dubai Court cases) with the assistance of the 2<sup>nd</sup> respondent who admitted in their affidavit that they were aware of the Dubai Court Cases yet proceeded to make the decision to charge the petitioners. According to Counsel, the 2<sup>nd</sup> respondent had ulterior motives, acted in bad faith and displayed abuse of prosecutorial discretion.
  39. On the second issue counsel argued that the institution of the criminal proceedings in the context of a company dispute instead of a civil proceeding was done wrongly and capriciously. It was contended that the Courts had made pronouncements against the use of the criminal justice system to pressure parties to settle a civil claim and simply vex them as a means of retribution. These sentiments were shared and echoed in a number of authorities relied on by Counsel. The cases are *Paul Stuart Imison Another vs. The Attorney General & 2 Others* Petition No. 57 of 2009, *Kuria & 3 Others vs. Attorney General* [2002] 2 KLR 69, *Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & another* [2002] 2 KLR 703, among others. Counsel argued that in such cases, the Courts quashed the criminal proceedings since they were found to be an abuse of the criminal justice process.
  40. Counsel submitted that the loan agreement between MH Enterprises, Suresh Lakhiani & Gem Trading was entered into, Suresh Lakhiani gave a number of properties as collateral including his shareholding in Global Apparels (EPZ) Kenya which he listed as amounting to 50%. Thus with this background in mind, Counsel questioned how then the 2<sup>nd</sup> and 3<sup>rd</sup> respondents proceeded to accuse the petitioners of conspiring to steal shares when the late Suresh Lakhiani affirmed that he only had 50% shareholding as of 1<sup>st</sup> December 2016. He also wondered why the late Suresh Lakhiani in light of the present claims had not brought a similar complaint while he was alive. It was further contended that the Dubai Courts having interrogated the subject Agreement including the collateral offered being 50% shares in Global Apparels) and affirmed it, and the matter was pending before the High Court of Kenya for recognition.
  41. Furthermore, it was asserted that matters pertaining to companies; their shareholding, governance, reporting obligations and more are civil matters governed by the *Companies Act*. As such, sections 863 and 864 of the *Companies Act*, 2015 direct that a party with a grievance as to the Register of a company's members has the right to apply to the Court for rectification of the same. In support reliance was placed on the case of *Monicah Wangui Njenga & another v David Kinyanjui Njenga & 3 others* [2021] eKLR where it was observed that the key issue in this matter is whether the 1<sup>st</sup> respondent forged the minutes of the meeting held on 25<sup>th</sup> May 2004 and the statement of Increase of Nominal Capital lodged by the 3<sup>rd</sup> respondent at the Companies Registry and signed by the deceased Chairman. The Court found



- this to be more of a civil matter. Counsel further referred to the cases of: *Commissioner of Police & The Director of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others* [2013] eKLR, *Cyrus Shakhhalanga Khwa Jirongo v Soy Developers Ltd & 9 others* [2021] eKLR among others.
42. Tying this issue with the third issue, on whether the 3<sup>rd</sup> respondent's complaint was mala fides counsel submitted that the prosecutorial discretion was not exercised in a manner that is in accordance with Article 157 (11) of the Constitution. This is because the decision to charge the petitioners was removed from public interest, the interest of the administration of justice and motivated by ulterior motives.
43. On whether the 2<sup>nd</sup> petitioner could be charged for professional services to clients counsel submitted that the basic Principles on the Role of Lawyers guarantee lawyers security in discharge of their functions and duties. The Principles also provide that lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority. Being that the 2<sup>nd</sup> petitioner was charged in the course of conducting his official duty as an Advocate of the High Court of Kenya, it was argued that Principles 26 - 29 of the Basic Principles on the Role of Lawyers provide that such complaints be addressed as per the existing Code of Conduct for the lawyers in their country.
44. In like manner it was asserted that the prosecution of the 2<sup>nd</sup> petitioner was a threat to the advocate-client privilege that subsisted between the 2<sup>nd</sup> petitioner and the late Suresh and Narain by dint of Section 134 of the *Evidence Act*, which enjoys protection even after the end of the relationship. To buttress this point reliance was placed on the case of *Richard Malebe v Director of Public Prosecutions & 2 others* [2020] eKLR where in similar circumstances the Court observed that there is a danger, however, that in circumstances such as were before it, a zealous prosecutor may cast his net too wide and catch even those, like the petitioner, who only performed the basic professional function of facilitating the local registration of one of the companies that allegedly was involved in the dams scandal. Had the petitioner indeed been disclosed in the statutory forms as a director and local representative of the said company or had there been other evidence such as account opening forms which demonstrated that he was indeed a director or local representative of the companies involved, this court would have had no hesitation in saying that the DPP has a factual foundation, has a prima facie case, that should be left to the trial court. Also see: *Republic v Makadara Chief Magistrate & 3 others Ex-Parte Wilberforce Nyamboga Mariaria* [2017] eKLR, *Esther Gathoni Mwangi v Director of Public Prosecutions & 2 others*, *William Charles Fryda & 3 others (Interested Parties)* [2022] eKLR among others.
45. Whether the 2<sup>nd</sup> respondent's decision amounted to an unfair administrative action counsel submitted that Article 47 of the Constitution entitles every person the right to fair administrative action and since a criminal prosecution affects the rights of an accused person, the decision to charge is an administrative action within the meaning of Sections 2 & 3 of the *Fair Administrative Actions Act*. Counsel asserted that in view of the Constitution, the *Office of the Director of Public Prosecutions Act*, 2013 and its guiding policies, the 2<sup>nd</sup> respondent disregarded and misapplied the same in making the decision to charge. That the 2<sup>nd</sup> respondent failed to consider the explanations given by the petitioners and that the persons alleged to have been defrauded never complained.
46. On violation of constitutional rights, Counsel submitted that the petitioners' rights under Articles 25, 28, 48 and 50 had been violated by the respondents, since the 2<sup>nd</sup> respondent had subjected them to an unwarranted and unfounded prosecution. It was further pointed out that the proceedings were a collateral attack to the civil proceedings. Equally it was submitted that the petitioners are prejudiced



as they can no longer rely on the testimony of the late Suresh and Narain and so handicapped in their defence, in violation of their right to access justice and a fair trial.

47. On what reliefs should be granted counsel submitted that having demonstrated that the prosecution of the petitioners was an abuse of prosecutorial discretion, against public interest and the interests of justice, the prosecution should be quashed and the petitioners be granted the reliefs sought. In support reliance was placed on the case of *Cyrus Shakhbalanga Khwa Jirongo v Soy Developers Limited & 9 others* (2021) eKLR where the Supreme Court affirmed the manner in which the 2<sup>nd</sup> respondent ought to carry out the office's mandate.

### **The 2<sup>nd</sup> Respondent's submissions**

48. The 2<sup>nd</sup> respondent filed written submissions dated 23<sup>rd</sup> January 2023 through its Counsel, Berryll Marindah. Counsel while relying on the contents of their replying affidavit submitted that Section 193A of the *Criminal Procedure Code* permits civil proceedings to be heard concurrently with any criminal matter and as such the existing commercial proceedings cannot be a bar to the criminal proceedings as argued by the petitioners.
49. In support reliance was placed on the case of *Kuria & 3 others Versus the Attorney General* (2002)2 KLR 69 where it was held that it is not enough to simply state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an abuse of process, is a manipulation, amounts to selective prosecution or such other processes, or even supposing that the applicants might not get a fair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts.
50. In view of this counsel submitted that the petitioners had failed to demonstrate how the 2<sup>nd</sup> respondent in carrying out its mandate in this case had acted contrary to public interest, the interests of the administration of justice or failed to prevent and avoid abuse of the legal process. Relying on the case of *Maina & 4 others v Director of Public Prosecutions & 4 others* (Constitutional Petition E106 & 160 of 2021 (Consolidated)) [2022] KEHC 15 (KLR) (Constitutional and Human Rights) (27 January 2022) (Judgment) Counsel noted that whereas the petitioners had the right not to be subjected to an illegal criminal process, the 2<sup>nd</sup> respondent was also under a public duty to ensure that the offences were prosecuted and those culpable attended to. The law requires that there be a balance created by the law and which this Court is called upon to take.

### **The 3<sup>rd</sup> Respondent's submissions**

51. The 3<sup>rd</sup> respondent filed written submissions and a list of authorities dated 6<sup>th</sup> March 2023 through the firm of Wachira and Mumbi Advocates which identified 3 issues for determination.
- Counsel while highlighting Articles 157(10), 160(1), and 245 of the Constitution; Section 6 of the *Office of the Director of Public Prosecutions Act*, 2013; Section 193A of the Criminal Procedure Code; Section 24 of the *National Police Service Act*; Section 134 of the *Evidence Act* and Principle 28 of the Basic Principles of the role of lawyers pointed out that the law was clear in the issue at hand.
52. Counsel proceeded to submit on the first issue that the case before the commercial Court Case No.E585 of 2021 which originated from the Dubai Court case, was not related to the criminal proceedings as alleged by the petitioners. It was submitted that the commercial suit is concerned



- with recognizing the Dubai Court judgment in Kenya while the criminal case is based on the alleged falsification and forgeries committed by the petitioners.
53. It was further noted that the 2<sup>nd</sup> respondent owing to the investigations carried out, was also aware of the Dubai Court cases and the High Court Commercial proceedings even as he made the decision to charge the petitioners. Nevertheless, it was stressed that according to Section 193A of the Criminal Procedure Code, civil and criminal proceedings can run concurrently. Additional reliance on this point was placed on the case of *Kuria & 3 others v AG* (supra).
54. Turning to the second issue, as to whether the charge against the 2<sup>nd</sup> petitioner amounts to breach of advocate/client, counsel submitted that Section 134 of the Evidence Act which prohibits an advocate's disclosure of communication made by a client, only protects the client and not the advocate which was also stressed in the case of *Anderson V Bank of British Columbia*, ELR (1876) 2 ChD 644. Comparable reliance was placed on the cases of *Conlon v Conlons Limited* (1952) 2ALL ER 462 and *Director of Public Prosecutions v Tom Ojienda t/a Prof. Tom Ojienda & Associates Advocates & 3 others* (2019) eKLR.
55. Counsel further submitted that this privilege as accorded to the client was not absolute. It was noted that this right had been violated and waived as the 2<sup>nd</sup> petitioner aided the 1<sup>st</sup> petitioner as his client in commission of a fraud and criminal activity which was revealed through the investigations. It was as well stated that Principle 28 of the UN Principles on the basic role of Lawyers was clear that disciplinary proceedings against lawyers are not only brought before a disciplinary committee but can also be brought before a court and be subjected to an independent judicial review. He submitted thus that the proceedings against the 2<sup>nd</sup> petitioner were legally proper before the criminal court for judicial review as the investigations revealed dubious elements that require determination by the Court.
56. On whether the petitioners constitutional rights are at the risk of being violated, Counsel submitted that the investigations and decision to prosecute the petitioners was within the legal confines. That in effect the petitioners failed to demonstrate and discharge their burden of proof with regards to the alleged violations of their constitutional rights under Section 22, 23(3), 24, 47 and 50 of the Constitution as discussed in *Anarita Karimi Njeru v The Republic* (1976 - 1980) KLR 1272 and *Leonard Otieno v Airtel Kenya Limited* (2018) eKLR.
57. Equally counsel relying on the case of *Michael Monari & another v Commissioner of Police & 3 others* (Misc. Application No.68 of 2011 submitted that Courts have been urged not to usurp the constitutional mandate of the 2<sup>nd</sup> respondent to initiate criminal proceedings provided the same was done in a justifiable manner and that the action is not done in contravention of the Constitution. Comparable reliance was placed on the cases of *Paul Ng'ang'a Nyaga V Attorney General & 3 others* (2013) eKLR, *Glinsk V McIver* (1962) AC 726 and Hon. *James Ondicho Gesami v the Attorney General & others* (Petition No.376 of 2011).
58. In the context of this case, Counsel submitted that the prosecution of the petitioners had been instituted with reasonable and probable cause as the 2<sup>nd</sup> respondent reviewed the evidence gathered and all factors considered and still made the decision to charge the petitioners. In doing so therefore the 2<sup>nd</sup> respondent cannot be said to have violated the petitioners' constitutional rights in carrying out its mandate.
59. In support of this point reliance was placed on the case of *Kipoki Oreu Tasur v Inspector General of Police and 5 others* (2014) eKLR where it was held that the criminal justice system is a critical pillar of our society. It is underpinned by the Constitution and its proper functioning is at the core of the rule of law and administration of justice. Therefore it is imperative in order to strengthen the rule of law and



good order in society that it be allowed to function as it should with no interference from any quarter and restraint from the superior courts except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated. Counsel referred to the case of *Henry Aming'a Nyabere v DPP & 2 others; Sarah Joslyn & another (Interested parties)* (2021) eKLR.

### **Analysis and Determination**

60. From the parties' pleadings and submissions which I have carefully considered I find the issues that stand out for determination to be as follows:
- i. Whether the 2<sup>nd</sup> respondent acted within its constitutional mandate in light of the circumstances of this case.
  - ii. Whether the petitioners fundamental rights and freedoms were threatened or violated specifically under Articles 25, 28, 48 and 50 of the Constitution; and
  - iii. Whether the petitioners are entitled to the reliefs sought.

### **Issue No. (i) Whether the 2<sup>nd</sup> Respondent acted within its constitutional mandate in the circumstances of this case**

61. The long and short of this case is that the petitioners seek to have the criminal proceedings instituted against them on account of the 3<sup>rd</sup> respondent's complaint quashed. It is their position that the 2<sup>nd</sup> respondent's prosecutorial discretion was not exercised in accordance with the dictates of Article 157 (11) of the Constitution. According to them the respondents' actions were done with ulterior motives, in bad faith and an abuse of prosecutorial discretion and the court process.
62. Since this issue will deal with the legality of the 2<sup>nd</sup> respondents actions. I will address it through the following sub-headings:
- a. Whether the civil and criminal proceedings can run concurrently.
  - b. Whether the 2<sup>nd</sup> respondent acted within the dictates of the law.
  - c. The relevance of the Dubai Court cases and the instant proceedings.
  - d. Whether the 2<sup>nd</sup> petitioner can be prosecuted for the services rendered to his clients.

#### **a. Whether the civil and criminal proceedings can run concurrently**

63. The petitioners in this matter opposed the instigation of the criminal proceedings whilst the civil suit in the commercial Court is ongoing. The respondents naturally challenged this notion stating that Section 193A of the *Criminal Procedure Code*, Cap. 75 allows concurrent civil and criminal proceedings in the same matter.
64. It is well established in law that criminal and civil proceedings can run concurrently. This is captured under Section 193 A of the *Criminal Procedure Code* which provides as follows:

‘Notwithstanding the provisions of written law, the fact that any matter in issue in any criminal proceedings is also directly in issue in any civil proceedings shall not be a ground for stay, prohibition or delay of the criminal proceedings.’



65. This is the position correspondingly in foreign jurisdictions as seen in the Supreme Court of India case in *P. Swaroopa Rani vs. M. Hari Narayana* (AIR 2008 SC 1884) where it was held that:

“ 13. It is, however, well-settled that in a given case, civil proceedings and criminal proceedings can proceed simultaneously. Whether civil proceedings or criminal proceedings shall be stayed depends upon the fact and circumstances of each case. [See *M.S. Sheriff v. State of Madras* AIR 1954 SC 397, *Iqbal Singh Marwah v. Meenakshi Marwah* (2005) 4 SCC 370 and *Institute of Chartered Accountants of India v. Assn. of Chartered Certified Accountants* (2005) 12 SCC 226].”

66. Be that as it may, although not automatic where there is a justifiable reason owing to the circumstances of a case, a Court may intervene to stay the criminal proceedings. The Court in the case of *Kuria & 3 Others Vs. AG* (supra) as cited with approval in the case of *Raymond Kipchirchir Cheruiyot & another v Republic* (2021) eKLR expounds on this scenario as follows:

“ 30...The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tolls for personal score-settlings or vilification of issues not pertaining to that which the system was even formed to perform..... The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta...”

67. Undoubtedly civil and criminal proceedings can run concurrently as it is the position in law. The obvious question to be determined is whether the circumstances of this case bar this court from intervening or whether they necessitate this court’s intervention.

**(b) Whether the 2<sup>nd</sup> Respondent acted within the dictates of the law**

68. Stemming from the first issue it is clear that the Constitution under Article 165(3)(d)(ii) of Constitution grants this Court the authority to question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution. As such this Court can prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation as held in the *Kuria* case (supra).

69. The power of the 2<sup>nd</sup> respondent to instigate criminal proceedings and make decisions to charge is derived from the Constitution under Article 157. Article 157(6) of the Constitution which is recapped in the *office of the Director of Public Prosecutions Act*, 2013(ODPP Act) under Section 5 provides as follows:

The Director of Public Prosecutions shall exercise State powers of prosecution and may--

- a. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
- b. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and



- c. subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

70. To exercise this power objectively and independently the 2<sup>nd</sup> respondent is under sub – Article 10 granted the following scope which is also echoed in the ODPP Act under Section 5:

- (10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

71. The 2<sup>nd</sup> respondent is however mandated to align his decisions to charge with the principles spelt out under Article 157(11) of the Constitution which state as follows:

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

72. In addition to this, the National Prosecution Policy, 2015 expounds on the 2<sup>nd</sup> respondent’s power to charge as follows:

The decision to prosecute as a concept envisages two basic components, namely, that the evidence available is admissible and sufficient and that public interest requires a prosecution be conducted. This is what is commonly referred to as the Two-Stage Test in making the decision to prosecute.

Each aspect of the test must be separately considered and satisfied before the decision to charge is made. The Evidential Test must be satisfied before the Public Interest Test is considered.

73. The National Prosecution Policy while listing the principles in each of the two tests informs as follows:

#### The Evidential Test

Public Prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction. In other words, Public Prosecutors should ask themselves; would an impartial tribunal convict on the basis of the evidence available?

#### The Public Interest Test

Public interest in relation to the decision to charge is the positive presumption that prosecution should ensue where the evidence discloses a contravention of criminal law... The assessment of the public interest test is not simply a sum of the factors tending towards or against a prosecution but rather the assessment of each case on its own merit.

74. The nature of the 2<sup>nd</sup> respondent’s mandate has been discussed severally by the Courts. The Court in the case of *Justus Mwenda Kathenge vs. Director of Public Prosecutions & 2 others* (2014) eKLR observed as follows:

“It is now trite that Courts cannot interfere with the exercise of the above mandate unless it can be shown that under Article 157(11):



- (i) he has acted without due regard to public interest,
- (ii) he has acted against the interests of the administration of justice,
- (iii) he has not taken account of the need to prevent and avoid abuse of Court process.”

75. In the case of *Peter D’Costa vs AG & Anor*, Petition No.83/2010 (U.R.) where the Court stated thus;

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

76. Further in the case of *Michael Monari & Anor vs Commissioner of Police & 3 others* Miscellaneous Application No.68 of 2011 where Warsame, J. (as he then was) stated as follows;

“It is not the duty of the court to go into the merits and demerits of any intended charge to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the Respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment.”

77. It is certain from the law and cited authorities that the 2<sup>nd</sup> respondent’s mandate is grounded in the Constitution. Supplementary to this is the 2<sup>nd</sup> respondent’s enjoyment of absolute independence as he carries out his function. This is a factor that has been appreciated by the courts. Undoubtedly the courts will not be quick to interfere with the mandate of the 2<sup>nd</sup> respondent as long as it was carried out within the confines of the law. Nonetheless, where the circumstances of a case justify an intervention, the Courts will not hesitate to do so in the interest of justice.

78. The Court in the case of *Agnes Ngenesi Kinyua aka Agnes Kinywa v Director of Public Prosecution & another* [2019] eKLR while discussing the delicate balance between instigation of criminal proceedings by the 2<sup>nd</sup> respondent and this court’s intervention opined as follows:

“42. It bears repeating that in these types of proceedings the Court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings. In a petition such as this the court ought not to transform itself into the trial court. In determining the issues raised herein the Court will therefore avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial Court.

43. The general rule in these kinds of proceedings is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion



conferred upon that office under Article 157 of the Constitution. Therefore, mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, is not, on its own and without more, a ground for halting such proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. An applicant who contends that he has a good defence in the criminal trial ought to be advised to raise the same in his defence before the criminal trial instead of invoking this Court's jurisdiction with a view to having this Court determine such an issue as long as the criminal process is being conducted bona fides and in a fair and lawful manner. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings."

79. The court went further to state that:

" 50. It is therefore clear that whereas the discretion given to the Respondents to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt. However, it must be emphasised that a constitutional petition challenging prosecution does not deal with the merits of the case but only with the process. The Court in such proceedings is mainly concerned with the question of fairness to the petitioner in the institution and continuation of the criminal proceedings and once the Court is satisfied that the same are bona fides and that the same are being conducted in a fair manner, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution's evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution."

80. Essentially a challenge to an instigated criminal prosecution by the 2<sup>nd</sup> respondent only involves an interrogation of the process adopted in making the decision by the prosecution. This Court is barred from making a determination or pronouncement that would prejudice the trial court where it is found that the 2<sup>nd</sup> respondent's decision to charge was in line with the law.

81. Having established the legal foundation of the two issues, I will now proceed to discuss the two major issues that have been argued by the petitioners to prove that the 2<sup>nd</sup> respondent in making the decision to charge based on the 3<sup>rd</sup> respondents complaint violated the Constitution and the law.

### **(c) The relevance of the Dubai Court cases and the instant proceedings**

82. One of the main assertions by the petitioners is that the 2<sup>nd</sup> respondent in making the decision to charge them failed to consider a relevant factor which is the judgment in the Dubai Courts case. The petitioners pointed out that the Dubai Court of Appeals had dismissed the 3<sup>rd</sup> respondent's and



successors case arguing that their father's signature had been forged. In the same way, it was noted that the Loan agreement between the 3<sup>rd</sup> respondent's father and Gem Trading LLC as advanced by M.H. Enterprises LLC included his 50% shareholding as deposed by the petitioners proving that the transfer of shares had indeed been effected.

83. The 3<sup>rd</sup> respondent however opposed this assertion while challenging the jurisdiction of this Court to entertain the issue of the Dubai Courts case and its implication on the criminal proceedings. The 3<sup>rd</sup> respondent emphasized that the judgment was yet to be enforced in Kenya and as such this Court ought not to make a pronouncement on the same. Likewise, it was argued that the relevant parties in the Dubai Court cases were not parties to these proceedings.

84. As has been discussed severally, a court's authority to determine a matter is everything and without it any pronouncements made are deemed to be void. The Supreme Court addressing its mind on the issue of jurisdiction in the case of *Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & others* (2012) eKLR emphasized as follows:

“A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”

85. In the circumstances of this case, the question is whether this Court can enter into a discourse over the Dubai Court cases which are deemed to be linked to the instigated criminal proceedings. The Court in the case of *ABSA Bank Uganda Limited (Formerly Known as Barclays Bank of Uganda Limited) v Uchumi Supermarkets PLC* (Civil Case E316 of 2020) [2021] KEHC 14 (KLR) (Commercial and Tax) (9 September 2021) (Ruling) analyzing the effect of a foreign judgement pending recognition observed as follows:

“28. A useful starting point is to mention that the “recognition” of a foreign judgment occurs when the court of one country accepts a judicial decision made by the courts of another “foreign” country, and issues a judgment in substantially identical terms without rehearing the substance of the original lawsuit. Recognition of judgment will be denied if the judgment is substantively incompatible with basic fundamental legal principles in the recognizing country.

29. Generally speaking, a foreign judgment will have no direct operation and cannot be enforced until it has been recognized. The party seeking to enforce a foreign judgment must therefore first apply to the court to have it recognized. Once the necessary procedural steps have been completed, the foreign judgment will be enforced as if it was a Kenyan judgment.

30. In Kenya, the primary statute governing enforcement of foreign judgements is the Foreign Judgement (Reciprocal Enforcement) Act Cap 43, Laws of Kenya which only applies to enforcement of udgements originating from countries outside Kenya which accord reciprocal treatment to judgements given in Kenya...”



86. It is discernible that this Court's jurisdiction to discuss the implication of the Dubai Court cases can only arise and be invoked once the Commercial proceedings are determined and the judgments recognized as having legal force. At this juncture the matter has not been conclusively determined and as such the Dubai Courts judgment has no legal effect in Kenya and so divests this Court's authority to make a pronouncement on its effect on the instigated criminal proceedings as against the petitioners' claims.

**(d) Whether the 2<sup>nd</sup> Petitioner can be prosecuted for the services rendered to his clients**

87. The other key contention in this matter is the 3<sup>rd</sup> respondent's complaint against the 2<sup>nd</sup> petitioner for executing the instructions given to him by the late Suresh Lakhiani and Narain Choithram as an Advocate. Additionally, the 2<sup>nd</sup> respondent's decision to charge him aware that his interaction with his clients was solely based on rendering his professional legal services. In defense the respondents' asserted that the decision to file the complaint and instigate the criminal charges was justified owing to the evidence and information that was discovered by the DCI while investigating the complaint.

88. The legal profession in Kenya is primarily regulated by the *Advocates Act* Cap.16 Laws of Kenya and the *Law Society of Kenya Act* among other laws. The qualified lawyers who are Advocates of the High Court of Kenya are subject to strict standards of professional responsibility to the Court, their client, their opposing Counsel and the general public at large. These standards are set forth in the Law Society's Code of Conduct. The Law and this Code stipulate the privileges, ethics and rules of professional conduct that the advocates should adopt.

89. Due to the nature of an advocate's work it is possible for one to be subjected to various risks that arise while rendering the professional service. This in essence was the reason why the Basic Principles on the role of lawyers (As adopted by the Eighth *United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Havana, Cuba, 27 August to 7 September 1990) was enacted. This Principles form part of the Kenyan law by virtue of Article 2(5) and (6) of the Constitution.

90. In relation to the instant case Principle 16 of the Basic Principles on the role of lawyers provides as follows:

Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

91. Additionally, Principle 18 provides as follows:

Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

92. It is safe to state that an advocate can only render legal services with the awareness that they will not be prosecuted for the service rendered and associated with their clients' wrongdoings. This privilege is deemed automatic so long as the advocate discharges his/her function within the confines of the law and the professional ethics principles set out by the Law Society of Kenya.

93. On the flipside it is also appreciated that this privilege does not shield an advocate where they are found to be guilty of engaging in an offense whilst carrying out their professional duties. This like



other crimes is supposed to be tried by the courts under the criminal justice system. As underscored by the petitioners in their submissions, the Court in the case of *Richard Malebe v Director of Public Prosecutions & 2 others* (supra) appreciated this element as follows:

“169. I agree with the DPP that Advocates, like all other professionals, do not have a special immunity if they commit, in the course of their professional duties, acts which are criminal in nature...”

94. Furthermore, the Court in the case of *Tom Odhiambo Ojienda SC v Director of Public Prosecutions & 3 others* (2020) eKLR opined as follows:

“42. However, it is important to clarify at the outset that where there exists a complaint, which raises criminal culpability, against an advocate arising from the relationship between the advocate and the client, the client is free to seek criminal redress and is not bound by the procedure in the *Advocates Act*. It is also possible that in the course of transactions between an advocate and a client, crimes may be committed. In such circumstances the procedure for dealing with criminal offences can be engaged by the 1st and 2nd respondents. In that regard I agree with the holding of Lenaola, J (as he then was) in *Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti-Corruption Commission & 5 others* [2016] eKLR that:

“132. The question that now arises is whether the issues in contest before me should first have been placed before the Advocates Complaint Commission and/or the Advocates Disciplinary Tribunal. To my mind the answer is simple; criminal offences including questions of corruption committed by advocates are not any different from those committed by laymen in law. The regime of the Commission and Tribunal aforesaid is limited to professional misconduct and not criminal conduct. To say otherwise would give advocates a special place in the criminal justice system and however attractive such a proposition may be to advocates, it is fallacious and against the public interest and the need to apprehend criminals, whatever their profession. In any event, an advocate may suffer both a professional sanction as can be seen above and simultaneously suffer a criminal sanction and in the circumstances, I see no value in the Petitioner’s arguments on that point. That is all there is to say on that matter.”

95. The 2<sup>nd</sup> petitioner asserts that the instructions issued to him by his clients, the late Suresh Lakhiani and the late Narain Choithram was to initiate a transfer of the shareholding of their Company to be 50% - 50% each and register the same once the Transfer was complete. It is averred that he was afterwards instructed to transfer Narain Choithram’s 50% shareholding to the 2<sup>nd</sup> petitioner.

96. According to the 2<sup>nd</sup> respondent, the evidence that links the 2<sup>nd</sup> petitioner to the alleged fraudulent transfer of the company directorship and shareholding is the resolution of transfer of shares dated 14<sup>th</sup> October 2016 and 6<sup>th</sup> September 2017 signed by the two late directors. The signatures were subjected to forensic analysis and found to be a forgery. Similarly on the dates the transactions were said to have done, the immigration records as per the Director of Immigration Services revealed that Suresh Lakhiani and Narain Choithram Shahdadpuri were out of the Country. This is when the purported



14<sup>th</sup> October 2016 and 6<sup>th</sup> September 2017 Resolutions were signed and attested to. Evidently these glaring discrepancies informed the decision to charge the 2<sup>nd</sup> petitioner.

97. As discussed before, this Court's mandate in making a determination in this matter is to interrogate whether the process adopted by the 2<sup>nd</sup> respondent aligned with the dictates of Article 157(11) of the Constitution and the guidelines in the National Prosecution Policy in making his decision to charge.
98. In my considered view the 2<sup>nd</sup> respondent in making its decision upheld the evidential test based on the findings of the DCI's investigation. I say so because the incongruities cited revolve around the notion that it is the 2<sup>nd</sup> petitioner who prepared the legal instruments being the transfer deeds, confirmed the signatures of the two late directors and in the end registered the changes as their advocate. It is reasonable to question how then this process was achieved legally in light of the details unearthed by the investigations. Judiciously in view of the public interest test, the 2<sup>nd</sup> respondent was under an obligation to make a decision to charge owing to the probable cause. Other questions on this will be answered on a different platform.
99. In the circumstances, it is my humble finding and conclusion that the 2<sup>nd</sup> respondent in making the decision to charge the 2<sup>nd</sup> petitioner exercised his discretion as donated by the Constitution prudently and followed the prescribed due process. As such the 2<sup>nd</sup> respondent's actions cannot therefore be condemned as they were both procedural and lawful. Considering this, intervention of this Court in the criminal proceedings is unwarranted. As to the veracity of the petitioners' claims as against the respondents' conclusion, the same consist of the merits of the case which ought to be tried and tested by the Trial Court during the hearing of the matter.
100. Taking into consideration the stated conclusion I find that the instigation of the criminal proceedings while the commercial proceedings are ongoing was in line with the law. Similarly, I find that the lawful exercise of the 2<sup>nd</sup> respondent's mandate cannot be deemed to have violated the petitioners constitutional rights under Articles 25, 28, 47, 48 and 50 of the Constitution. In the same breath, I find it prudent to point out that the petitioners' reliance on the Dubai Court cases although reckoned fundamental was premature because it was done before a definitive determination of the matter is made by the Commercial Division of the High Court, where the matter is pending.
101. The upshot of the foregoing and for the reasons set out above, I find that the petition dated 18<sup>th</sup> March 2022 has no merit and is hereby dismissed, with costs.

Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 22<sup>ND</sup> DAY OF SEPTEMBER 2023 IN OPEN COURT AT MILIMANI, NAIROBI.**

**H. I. ONG'UDI**

**JUDGE OF THE HIGH COURT**

