



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

PETITION NO. E007 OF 2020

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES

2(1), 3(1), 19, 22, 23, 25, 27, 28, 31, 47, 56, 73, 157(11), 159, 165 (3), 258, 259, 260 OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)
PRACTICE AND PROCEDURE RULES, 2013**

AND

**IN THE MATTER OF ALLEGED VIOLATION OF SECTION 4 OF THE OFFICE OF DIRECTOR OF PUBLIC
PROSECUTIONS ACT NO. 2 OF 2013**

AND

**IN THE MATTER OF ALLEGED VIOLATION OF SECTION 64 OF THE NATIONAL POLICE SERVICE ACT NO. 11A OF
2011**

AND

IN THE MATTER OF VIOLATION OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF PARAGRAPHS 4(B) (1), 4(B) (2) AND 45 OF THE NATIONAL PROSECUTION POLICY

BETWEEN

JOHANNES PETRUS VILJOEN.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS....1ST RESPONDENT

THE DIRECTOR, DIRECTORATE

OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

RULING

1. Before the Court is a Petition dated 12th November 2020 seeking the following orders: -

i) A declaration that the Petitioner's rights under the Articles above quoted were violated and therefore proceedings in both cases (Criminal Cases No. 1154 of 2019 and 68 of 2019) are null and void and must be struck out.

ii) A declaration that the 2nd Respondent, the Director of Criminal Investigations has no power and authority to institute criminal proceedings before a court of law without the prior consent of the Director of Public Prosecutions and any proceedings so commenced are unconstitutional, illegal, unlawful, null and void abinitio.

iii) A declaration that the intended prosecution of the Petitioner in the manner proposed by the 2nd Respondent is ultra vires the powers of the 2nd Respondent and is therefore unconstitutional and unsustainable.

iv) An order prohibiting the 2nd Respondent from instituting criminal proceedings against the Petitioner unless the same are instituted through the 1st Respondent, the Director of Public Prosecutions.

v) The costs of this Petition are awarded to the Petitioner against the 2nd Respondent.

2. The Petitioner has also sought certain prayers in his apparent interlocutory application, similarly dated 12th November 2020 seeking the following orders: -

i) The hearing of the criminal cases fixed for the hearing on 8th December 2020 be vacated until the determination of this application and/or further orders of this Honourable Court.

ii) That if so, the Petitioner's application be allowed and the order of deposit of cash bail of Ksh 500,000/= in Case No. 1154 of 2019 and cash bail of Ksh 300,000/= in Case No. 68 of 2019 be refunded to the Petitioner.

iii) That the posts which were ordered to be given to the Complainant on 15th October 2019 be returned to the Petitioner.

iv) That costs be provided for.

3. At this preliminary stage, this Court must point out that the Petition as drafted is wanting in nature. It appears that the Petition was combined with the interlocutory application. This should not be the case since the proper way to draft would have been to have two separate documents, one being the main Petition itself and the other being the interlocutory application. This would allow the Court to determine the application as a matter of urgency and determine whether or not to give the interim reliefs sought and thereafter determine the Petition. This Court is however mindful of the provisions of Article 48 of the Constitution of Kenya which provides that the state should ensure access to justice for all persons. Further, Article 22 (3) (b) of the Constitution provides that formalities relating to proceedings, including commencement of proceedings touching on violations of the Constitution shall be kept to the minimum and the Courts should, if necessary, entertain proceedings on the basis of informal documentation. For these reasons, this Court will entertain the Petition before it and determine it together with the application.

4. The Petition is supported by the affidavit of Harmesh Kumar Mahan. In his affidavit, he refers the Court to the affidavit of Mr. Edward K. Kiplagat filed in court on 19th August 2019 and the Petitioner's supporting affidavit sworn on 3rd December 2019 which he avers support the Petitioner's application. He has also attached both charge sheets in Criminal Cases No. 1154 of 2019 and 68 of 2019. He avers that Mr. Kiplagat was the investigating officer in the case against the Petitioner and was actively engaged in the prosecution against the Petitioner. He avers that to the best of his knowledge, the consent of the Director of Public Prosecutor was not given or obtained to institute the charges against the Petitioner and both cases must be struck out for being instituted illegally. He avers that the Petitioner's application is supported by the decision of Justice G. V. Odunga in **Geoffrey K. Sang v Director of Public Prosecutions & 4 Others in Petition No. 9 of 2020 (Machakos)**.

5. The Application was opposed. The 1st Respondent filed a replying affidavit sworn by Brenda Nandwa on 25th January 2021. She avers that the application before Court falls short of the legal requirements necessary for grant of such orders and is therefore bad in law. She avers that the matter is *res judicata* having already been dealt with by Hon Justice F. Gikonyo in **Criminal Revision No. 186 of 2019** in a Ruling dated 17th February 2020 where the Petitioner's application of the same nature was dismissed. She further avers that Article 157 of the Constitution of Kenya establishes the Office of the Director of Public Prosecutions and gives the same office power to initiate criminal proceedings on behalf of the state. She further avers that once investigations by the investigating officer were concluded, he forwarded the file to the Office of the Director of Public Prosecution for perusal and advice wherein the Office Director of Public Prosecution directed that there was indeed enough evidence to support the charges of stealing by Director contrary to Section 282 of the Penal Code and this is what enabled the investigating officer to arrest and charge the Petitioner. She further avers that the Petitioner has not given cogent reasons as to why Criminal Cases No. 1154 of 2019 and 68 of 2019 may have been initiated on facts which do not disclose an offence known in law, malicious or an abuse of process. She avers that all the shortcomings pointed out by the Petitioner are defences which the Hon Justice F. Gikonyo stated in his Ruling should be raised in the criminal trial. She avers that the application is an abuse of court process and should be dismissed since the same has already been dealt with and that if the application is allowed, the same will open up a pandoras box allowing various matters of such nature which have already been dealt with to be endlessly brought to Court and that litigation must come to an end.

6. The Petition was canvassed by way of written submissions. The Petitioner filed his submissions on 3rd February 2021. Therein, he submits that despite the Court having ordered the Respondents to file a replying affidavit to the Petitioner's application dated 12th November 2020, the same was not filed by the 1st Respondent until 25th January 2021 and that the same was only served upon the Petitioner on 27th January 2021 and that it is only the 1st Respondent who filed the replying affidavit through Prosecuting Counsel Brenda N. Nandwa and that there is no affidavit by the 2nd Respondent. He submits that the contents of paragraph 5 of the replying affidavit are hearsay. He further submits that his claim is not *res judicata* and that the matter before Court has nothing to do with the Ruling by Hon Justice Gikonyo as the issue before Justice Gikonyo was to determine whether the dispute between the Company 'SUNLAND' through the company's director for which the Petitioner co-owned was a civil matter and/or a criminal matter. He argues that the application of *res judicata* only applies to civil matters under the Civil Procedure Act and that the two cases, i.e 1154 of 2019 and 68 of 2019 have never been heard by any subordinate court at

Meru and have not been finally decided and by no means are they a suit. He contrasted the principle of *res judicata* under Section 7 of the Civil Procedure Act, from that of Section 138 of the Criminal Procedure Code which prohibits the prosecution of persons who have already been convicted or acquitted for the same offence. He submits that the Petitioner has never been acquitted or convicted for this same offence. He submits that the issue before this Court is totally different in law which is about the authority of the Directorate of Criminal Investigations to institute criminal proceedings before a court of law without the prior consent of the Director of Public Prosecution and that he is relying on the case of **Petition 19 of 2020 Sang v DPP & Others**. The Petitioner reproduced certain parts of the Judgement in the said Petition 19 of 2020 and therefore asks that his Petition be allowed with costs to himself.

7. The 1st and 2nd Respondents filed their submissions on 22nd February 2021. Therein, it is submitted that the instant Petition is very similar to an application which was made by the Petitioner in *Criminal Revision Number 186 of 2019* which application was dismissed by Hon Justice F. Gikonyo on 17th February 2020. The Respondents quote paragraph 17 of the Ruling where the Judge took note of the fact that the application then was to stay criminal proceedings in Criminal Case No. 68 of 2019. They submit that since the purpose of the Petitioner's application is to stay Criminal Case No. 1154 of 2009 and 68 of 2019, this indicates that the prayers sought in the instant Petition are similar to those in the said application, which application was nonetheless dismissed and the cases were ordered to proceed. They submit that under Article 157 (10) of the Constitution of Kenya 2010, as replicated in Section 6 of the Office of the Director of Public Prosecutions Act, 2013, the Director of Public Prosecutions does not require the consent of any person or authority for the commencement of criminal proceedings. Further, and in the exercise of his powers or functions, the Director of Public Prosecutions does not act under direction or control of any person or authority and that the decision to institute criminal proceedings by the Office of the Director of Public Prosecutions is therefore discretionary. They submit that for the instant case, as has been stated by the investigating officer in Criminal Revision Number 186 of 2019, that after he completed conducting investigations, he forwarded the inquiry file to the Office of the Director of Public Prosecutions for perusal and advice and it was after the perusal that the Office of the Director of Public Prosecutions then directed that the Petitioner be charged with the offence of Stealing by the Director of a Company contrary to Section 282 of the Penal Code and that this was followed by having the investigating officer arrest the Petitioner and having him arraigned in Court where he took plea. They therefore submit that the Petitioner has failed to bring to Court cogent reasons for the stay of the cases in Timau that is Criminal Cases No. 1154 of 2019 and 68 of 2019 and that these cases were not initiated on facts which do not disclose any offence known to law. They submit that the application is bad in law and is an abuse of Court process and ought to be dismissed. They further submit that the issue of stay of proceedings had been dealt with and for this reason, the instant matter is *res judicata* as espoused in the case of **Bernard Mugo Ndegwa v James Githae & 2 Others (2020) eKLR** and the case of **Jackson Juma Kenga v Republic (2019) eKLR** where the Court cited the other case of **South African Masara v Tsepong (2015) LSLC** and the case of **P. N. Eswara Iyer v The Registrar (Indian Supreme Court)**. They submit that the rule on *res judicata* ensures economic use of courts' limited resources and timely termination of cases and that litigation must come to an end. They submit that if the instant application is allowed, the same will open a pandoras box whereby litigants will be filing matters after they have already been concluded. They submit that once the Petitioner got wind that the initial Judge who had heard the matter was transferred, they made the same application before a different Court. They submit that the Petitioner ought to have gone before the Court of Appeal on this matter instead of making the same application as was in Criminal Revision No. 186 of 2019. They pray that the instant application should be dismissed.

Issues for Determination

8. From a reading and appreciation of the affidavits and submissions on record, the following issues present themselves for determination:-

i) Whether the matter herein is Res Judicata.

ii) Whether the 2nd Respondent instituted the criminal proceedings in Criminal Cases No. 1154 of 2019 and 68 of 2019 without the prior consent of the 1st Respondent and whether this makes the said proceedings null and void abinitio.

Whether the matter herein is Res Judicata.

9. The Respondents argues that the matter herein is *res judicata*. *Res judicata* is an issue that goes to the jurisdiction of the Court. As was held in the case of **Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd (1989) eKLR** :-

"Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

10. This Court does not agree with the submissions made by the Respondent that the doctrine only applies to suits. The provisions of statute must be construed purposively and the intention of the law maker must be achieved as nearly as possible. To give effect to the will and intention of the law maker is the primary objective of construction and interpretation of statutes. This Court finds that the application of the doctrine of *res judicata* extends to applications as well as it does to suits.

11. Before delving deeper into this issue, this Court is mindful of the fact that the matter before it is in the nature of a Constitutional Petition. As a matter of principle, challenges on jurisdiction of the Court over Constitutional Petitions in which matters concerning violations of rights more so those under the Bill of Rights should be taken with caution. The Court of Appeal has however dealt with the issue of the applicability of the doctrine of *res judicata* on Constitutional Petitions and **this Court has previously held that Constitutional Petitions are not exempted from the applicability of the doctrine of res judicata**. In **Hon. Benjamin Koeh v. Baringo County Government & 3 Ors**. KBT HC Petition No.3 of 2019 this court considered the question of res judicata in constitutional application and following **John Florence Maritime Services Limited & another v. Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR** held as follows:

"29. The Court of Appeal (Makhandia, JA; Ouko JA as he then was and M'Inoti, JA.) in Malindi Civil Appeal No. 42 of 2014, John Florence Maritime Services Limited & another v. Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR (an appeal from the decision of this Court sitting in Mombasa) put paid any question that the doctrine of res judicata applied

even to constitutional litigation as follows:

“From our expose of the doctrine above, we are now able to formally answer the issues isolated for determination in this appeal earlier as follows:-

i) The doctrine of res judicata is applicable to constitutional litigation just as in other civil litigation as it is a doctrine of general application with a rider, however, that it should be invoked in constitutional litigation in rarest and in the clearest of cases.

ii) There is no legal requirement or factual basis for the submission that the doctrine must only be invoked and or ventilated through a formal application. It can be raised through pleadings as well as by way of preliminary objection.

iii) The ingredients of res judicata must be given a wider interpretation: the issue in dispute in the two cases must be the same or substantially the same as in the previous case, parties to the two suits should be the same or parties under whom they or any of them is claiming or litigating under the same title and lastly, the earlier claim must have been determined by a competent Court.”

12. **Res judicata** does apply to constitutional applications, and the question is whether in this particular case, it is to be applied on the tests for its application set out in the authorities.

13. **This calls for this Court to interrogate whether the matter before court is indeed res judicata which if so, would warrant an order for dismissal. Section 7 of the Civil Procedure Act CAP 21 of the Laws of Kenya** prohibits courts from adjudicating upon matters which are *res judicata*. The said section provides as follows:-

‘No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.’

14. Essentially, the doctrine of *res judicata* applies by prohibiting Courts from listening to and/or adjudicating upon matters which have previously been determined by courts of competent jurisdiction. For the doctrine to apply, both matters i.e the one previously determined and the subsequent one must conjunctively bear all the three elements outlined in the provisions of Section 7 of the Civil Procedure Act. In this respect:-

i) Both matters must have been addressing similar issues directly and substantially.

ii) Both matters must have had similar parties whether such parties claim in their own rights or through others.

iii) The previous matter must have been determined by a Court of competent jurisdiction.

15. This Court has perused the Ruling by Justice F. Gikonyo in Criminal Revision No. 186 of 2019 and with respect to the above principles on *res judicata*, makes the following observations.

i) With respect to the parties, the Applicant in the criminal revision is one Johannes Petrus Viljoen, who is the Petitioner in the instant Petition. However the Respondent in the criminal revision is the Republic whilst the Respondents in the instant Petition are the Director of Public Prosecution and the Director, Directorate of Criminal Investigations. Though both the Director of Public Prosecution and the Directorate of Criminal Investigations are public offices whose liability would ultimately fall on the government, it appears that in the former case, there was no distinction between the two offices and neither were the grievances with respect to each office distinguished, unlike in the instant Petition where such distinction and roles of the two offices have been distinguished.

ii) Just as in the Petition herein, the Applicant in the criminal revision similarly sought to stay the proceedings of Criminal Cases No. 1154 of 2019 and 68 of 2019.

iii) The point of divergence however is on the reasons as to why he now seeks to stay them. In the criminal revision, the reasons were that he was not informed of the charges against him at the time of arrest; that no meaningful investigations were carried out on the matter; and that according to him, the charges are of a civil nature since he is a half owner and co-director of the complainant company. The reason for seeking the stay in the instant application is that the criminal cases were instituted without the approval of the Director of Public Prosecution as is required by law.

16. The application before the Court therefore doesn't squarely fit as *res judicata*. Although the Petitioner is the same in both cases, there was no delineation of the office of the Director of Public Prosecution and that of the Directorate of Criminal Investigations in the former and further, although the prayers sought in the two matters are the same, the basis for the seeking them are different.

17. Indeed, it being that the same Petitioner has previously brought a challenge to his prosecution in the very Criminal Cases No. 1154 of 2019 and 68 of 2019, seeking similar prayers as those sought herein, it is indeed questionable as to why the instant issue was not raised in that same application for criminal revision and why the Petitioner had to wait for over a year to raise it in a different forum. In the case of **Mburu**

Kinyua v Gachini Tuti Civil Appeal No. 25 of 1977 1978 KLR, Madan JA, sitting at the Court of Appeal gave a dissenting judgment wherein he elaborated on the doctrine of *res judicata* and cited the case of **Henderson v Henderson (1843) 67 ER 313**, 319 in which the Privy Council described as the *locus classicus* of this aspect of *res judicata*, in **Yat Tung Investment Co. Ltd v Dao heng Bank Ltd (1975) AC 581, 590** : -

“...where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time...”

18. The above finding is to the effect that parties ought to plead their cases in whole whenever such opportunity arises and that they should avoid opening new litigation which could have been the subject of previous litigation and the Court ought not to permit them such applications except in exceptional circumstances. The Petitioner herein has not explained why he could not raise the issue being raised in the instant Petition in the criminal revision. This Court however observes that the Petitioner relies on the finding of the Court in the case of **Geoffrey K. Sang v Director of Public Prosecutions & 4 Others in Petition No. 19 of 2020 (Machakos)**. This case was decided in **July 2020**, way after the criminal revision had been decided i.e in **February 2020**. The Petitioner, to the extent that he is relying in the case of Geoffrey Sang to bring the instant Petition may not entirely be faulted for failing to bring his claim earlier as it could be that he only became aware of it way after the criminal revision had been decided.

19. Owing to the above reasons, this Court finds that the matter is not *res judicata* and will go ahead and determine the same on merits.

Whether the 2nd Respondent instituted the criminal proceedings in Criminal Cases No. 1154 of 2019 and 68 of 2019 without the prior consent of the 1st Respondent and whether this makes the said proceedings null and void abinitio.

20. Before going into the merits of this issue, this Court observes that the Petitioner raised certain matters in his submissions which although were not raised in his Petition, call for the attention of this Court. The Petitioner argues that the fact that the 1st Respondent's replying affidavit was not sworn by the Director of Public Prosecutions himself rather by a Prosecution Counsel namely B. Nandwa is an indication that the real issue may not have been addressed. With respect to this submission, this Court finds that the functions of the Office of the Director of Public Prosecution may very well be delegated and it would surely not be feasible to expect the Director of Public Prosecution himself, Mr. Noordin Haji to sign all other affidavits and attend personally to all other matters where the Director of Public Prosecution is a party. This is the reason why the Office of the Director of Public Prosecution has many other employees and staff members to assist in performing the functions of the office. Article 157 9) accordingly provides as follows –

‘The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.’

21. The Petitioner also argues that there is no replying affidavit filed by the 2nd Respondent. For this issue, this Court observes that the right to defend oneself in proceedings is available to any person who so wishes and failure to do so despite proper service will not stop the Petitioner and/or any other litigant for that matter from prosecuting their case. This notwithstanding, it appears that the 1st and 2nd Respondents took a similar stand on the issues and the affidavit and submissions filed by the 1st Respondent were filed on behalf of the 2nd Respondent as well.

22. Turning to the merits of this issue, this Court observes that the application before the Court does not require this Court to look into the merits of the criminal process and/or the nature of the evidence adduced against the Petitioner in the criminal cases for which the Petition seeks to stop. That is the preserve of the trial court and for this Court to do so would be to overstep the boundaries and jurisdiction of the Court.

23. What this Petition seeks to answer is the question of whether the process by which the Petitioner came to be charged in Criminal Cases Number 1154 of 2019 and 68 of 2019 was lawful or otherwise thereby warranting a finding that the said cases are a nullity.

24. With respect to interference with the progression of Criminal Cases No. 1154 of 2019 and 68 of 2019, this Court finds that the burden is on the Petitioner to prove that there is reason good enough to so interfere. I respectfully agree with the case of **Attorney General vs Chief Magistrate, Milimani Law Courts & 3 Others Ex parte Mohan Galot, JR Miscellaneous Application No. 82 of 2018, (2018) eKLR**, Odunga, J. while citing with approval the case of **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** as hereunder: -

“The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial.”

25. Applying this principle in the present case, this Court finds that for an order staying and/or declaring the criminal proceedings instituted against him a nullity, it must be shown that there was manipulation, abuse or misuse of court process or that the Petitioner's right to a fair trial is likely to be infringed upon should the said proceedings go on.

26. The Petitioner argues that in charging him, the approval of the Director of Public Prosecution was not sought and the 2nd Respondent, the Directorate of Criminal Investigations went ahead and took charge of the process of charging him without involving the Director of Public Prosecution.

27. It is argued by the Petitioner that in charging him, the Directorate of Criminal Investigation acted *ultra vires* as they failed to involve the Director of Public Prosecution thereby making the proceedings null and void ab initio.

28. These averments by the Petitioner will call upon this Court to interrogate the procedures provided for by law as to how a person may come to be charged in a criminal law process. Key in any and all criminal processes is the office of the Director of Public Prosecutions. The office of the Director of Public Prosecutions is established under Article 157 (6) of the Constitution of Kenya 2010. The powers of the Director of Public Prosecution include to –

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.

c) Subject to clause 7 and 8 of the said article 157, discontinue at any stage before Judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions under paragraph b.

The said powers are replicated at Section 5 (1) (b) of the Office of the Director of Public Prosecutions Act.

29. Article 157 (10) of the Constitution provides as follows: -

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 exercise or control of any person or authority.

30. This implies that the office of the Director of Public Prosecutions is an independent one. Although independent and not subject to the direction or control of any other person, the office of the Director of Public Prosecution does not work in isolation but in collaboration and with the assistance of other offices. The office of the Director of Public Prosecution relies on criminal intelligence provided to it from the offices of the National Police Service and the Directorate of Criminal Investigations, the 2nd Respondent herein. This is where the role of the 2nd Respondent rightfully comes in.

31. The office of the Directorate of Criminal Investigation is established under Section 28 of the National Police Service Act. The functions of the Directorate are provided for under Section 35 of the National Police Service Act and they are as follows –

Functions of the Directorate

a) collect and provide criminal intelligence;

b) undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism

c) maintain law and order

d) detect and prevent crime

e) apprehend offenders

f) maintain criminal records

g) conduct forensic analysis

h) execute the directions given to the Inspector – General by the Director of Public Prosecutions pursuant to Article 157 (4) of the Constitution

i) co-ordinate county Interpol Affairs

j) investigate any matter that may be referred to it by the Independent Police Oversight Authority; and

k) perform any function conferred on it by any other written law.

32.

33. Going by the aforementioned provisions of law, it is indeed true that only the Director of Public Prosecution has powers to initiate criminal proceedings and any such criminal proceedings that are instituted ought to have been approved by the Director of Public Prosecution. Prosecutorial powers are the preserve of the Director of Public Prosecution. Indeed, this was the finding of the Court in the case of **Geoffrey K. Sang v Director of Public Prosecutions & 4 Others in Petition No. 19 of 2020 (Machakos)**. (See page 20 thereof)

34. The functions of the Directorate of Criminal Investigations are very clear and they are geared towards the collection and provision of criminal intelligence and the conduct of investigations. It is therefore well settled that the decision of whether to charge a suspect is the preserve of the Office of the Director of Public Prosecution.

35. Instructively however, the Director of Public Prosecution is not obliged to initiate criminal proceeding by the mere fact that the Directorate of Criminal Investigation or some other persons strongly feels that there should be a prosecution. The decision of whether or not to charge a suspect falls squarely on the Director of Public Prosecution and it starts and ends with the Director of Public Prosecution devoid of any external influence, even from the very body that conducts investigations.

36. It appears however that the real bone of contention between the parties' hereto does not concern the central role of the Director of Public Prosecution in deciding whether or not to institute criminal proceedings but rather, whether in the instant case, the Director of Public Prosecution's consent was actually obtained prior to the charging of the Petitioner in Criminal Cases No. 1154 of 2019 and 68 of 2019. To answer this question, this Court must interrogate how the Petitioner came to the conclusion that he was charged by the 2nd Respondent without there having been approval from the 1st Respondent.

37. From his affidavit and submissions, it is not clear *how and when* the Petitioner came to this realization. This being a Court of justice, the Court is minded that it ought not to rely on conjecture in making findings but rather cogent and substantiated facts and evidence. This Court observes that the Petitioner's apprehensions and/or convictions are linked to the actions of one Mr. Edward Kiplagat who was the investigating officer and who was purportedly actively involved in the charging of the Petitioner. At paragraph 4 of the supporting affidavit of Harmesh Kumar Mahan, it is averred that he will seek the indulgence of the Court to give due weight to his position and to illustrate the design and steps taken by the Investigating Officer who was actively engaged in the Petitioner's prosecution. The Petitioner failed to seek any such indulgence. He further states at paragraph 6 that prior to charging the Petitioner, to the best of his knowledge, the prior consent of the Director of Public Prosecution had not been sought. He however doesn't say what information he relied on to arrive at this conclusion.

38. The Petitioner's aforesaid averments have been challenged by the Respondents who at paragraph 5 of their replying affidavit aver that once the investigating officer had concluded the investigations, the file was forwarded to the Director of Public Prosecution who then concluded that on the strength of the evidence, the Petitioner ought to be charged with the offence of Stealing by Director of a Company Contrary to Section 282 of the Penal Code. Materially, the affidavit sworn by the said Edward Kiplagat on 19th August 2019 in Criminal Case No. 1154 of 2019 and 68 of 2019 by which the Petitioner's application for bail was being opposed was drawn and filed by the Director of Public Prosecutions.

39. In response to the averment by the Respondents on this issue, the Petitioner in his submissions stated that this averment by the Respondents, that consent was given and that based on the findings of the investigations that had been forwarded to them, the Director of Public Prosecution concluded that the Petitioner ought to be charged, is *hearsay*. This presupposes that perhaps the Petitioner expected to see a forwarding letter forwarding the findings of the investigations to the Office of the Director of Public Prosecution as well as to see a letter and/or some other form of communication from the Director of Public Prosecution indicating that the decision to charge him had been reached. Although this would have been the prudent thing for the Respondents to do so as to conclusively show that the process followed in charging the Petitioner was lawful, this Court finds that this may not be necessary at this stage because the Petitioner being the party alleging is yet to discharge his burden to the required standard so as to shift the burden to the Prosecution. This Court is mindful of the principle under the law of evidence on burden of proof to with Section 107 of the Evidence Act which provides as follows: -

107. Burden of Proof

1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Although the Director of Public Prosecution should always be ready to defend their decision to charge an accused person by showing that they acted on credible evidence, for Petitions such as the instant one, onus is on the Petitioner to prove its case. Any doubts raised as to the process followed in charging them must be reasonable and not whimsical such that any invitation upon the Prosecution to defend their stand to charge the Petitioner must be seen to be necessary. In any event, the very fact that the Prosecution Counsel is on record as owning the criminal proceedings should be enough to demonstrate the evidentiary burden that lies on the Petitioner.

40. To this end, I respectfully agree with the finding of Odunga, J. in the case of **Geoffrey K. Sang v Director of Public Prosecutions & 4 Others in Petition No. 19 of 2020 (Machakos)**, where the Court held as follows at paragraph 167: -

“However, it is upon the person who seeks to terminate or quash a criminal process to satisfy the Court that the discretion given to the 1st and 2nd Respondents to investigate and prosecute ought to be interfered with.”

On the same breadth, in the other case of **Diamond Hasham Lalji & Another v Attorney General & 4 others Civil Appeal No. 274 of 2014 [2018] eKLR** Mohammed J, H. M. Okwengu J and E. M. Githinji J sitting at the Court of Appeal held as follows: -

[42] The burden of proof rests with the person alleging unconstitutional exercise of prosecutorial power. However, if sufficient

evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision.

In Ramahngam Ravinthram v Attorney General (Supra) the Court of Appeal of Singapore said at p. 10. Para 28:

“however, once the offender shows on the evidence before the court, that there is a prima facie breach of fundamental liberty (that the prosecution has a case to answer), the prosecution will indeed be required to justify its prosecutorial decision to the court. If it fails to do so, it will be found to be in breach of the fundamental liberty concerned. At this stage the prosecution will not be able to rely on its discretion under Article 35(8) of the Constitution without more, as a justification for its prosecutorial decision.”

(Article 35(8) of the Constitution gives Attorney General of Singapore power exercisable at his discretion to institute, conduct or discontinue any proceedings for any offence).

41. The question that begs is whether the Petitioner in this case has laid sufficient basis to infer doubt as to the legality of the processes followed culminating in the decision to charge and prosecute him in Criminal Cases No. 1154 of 2019 and 68 of 2019 and therefore shift the burden to the Respondents.

42. Contrasting the case of ***Geoffrey K. Sang v Director of Public Prosecutions & 4 Others in Petition No. 19 of 2020 (Machakos)*** for which the Petitioner relies on with the present case, this Court observes that in the said case, the Petitioner therein had made an averment that at one point, when they were required to take plea, there was no official from the office of the Director of Public Prosecution and the investigating officer who is an officer of the Directorate of Criminal Investigations proceeded to extend their bail and the plea taking date was re-scheduled. (See paragraph 21 of the said decision). On the converse, the Petitioner herein has not made any such averment and/or allusion to support his case.

43. This Court therefore finds that the Petitioner, other than making unsubstantiated allegations, he has failed to discharge his burden to the required standard to show that there is reason enough to doubt that the consent by the Director of Public Prosecution was not sought prior to charging him. At the very least, it behooved the Petitioner to attach the proceedings of the lower Court for this Court to observe the extent of the involvement and participation of the Director of Public Prosecution and the Directorate of Criminal Investigations in the proceedings.

44. Furthermore, pursuant to the powers accorded to it in Article 165 (7) of the Constitution of Kenya, this Court called for the record of the proceedings in Criminal Cases No. 1154 of 2019 and 68 of 2019 and has observed that on 10th July 2019 and on 3rd July 2019 during the plea taking dates for the two matters respectively, the record indicates that on both dates the prosecution was by Prosecution Counsel in court. Clearly, the DPP authorized the prosecution and conducted the prosecution himself by his representative prosecution counsel, Mr. Kinyua and Mr. Musyoka, respectively.

45. This Court further draws to the attention of parties that pursuant to the provisions of Article 157 (6) (b) of the Constitution of Kenya, the Director of Public Prosecution has powers to take over and continue with 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). The lawmakers when drafting this provision envisaged that there would be times when proceedings would be instituted by persons other than the Director of Public Prosecution. This therefore means that even if it is true that it is the Directorate of Criminal Investigations, the 2nd Respondent, who initiated the criminal proceedings in issue in the trial Court, the Director of Public Prosecution, the 1st Respondent may still take over and continue with the same, and this would still be within the law. It appears that the Director of Public Prosecution, for all intents and purposes wishes to continue with the prosecution of Criminal Cases No. 1154 of 2018 and 68 of 2019. Once again, even if this was a case of taking over, the Petitioner has not shown that there was no valid taking over of the proceedings by the Director of Public Prosecution.

CONCLUSION

46. The court agrees with the petitioner that no criminal proceedings may be instituted without the consent of the Director of Public Prosecution. The court also finds that the matter raised in this petition is not barred by *res judicata* as asserted by the DPP because the previous determination by the court was on a different point of objection and for the reason of the judicial policy of sparing application of *res judicata* principle in constitutional applications only in the clearest cases. On the facts of the case, however, the Petitioner has not adduced evidence to prove that the prosecution was instituted without the consent of the DPP. Moreover, the court notes that Under Article 157 (6) (b) of the Constitution, the Director of Public Prosecutions has powers to take over and continue, or discontinue, any criminal proceedings in a court. The DPP's defence of its prosecutorial mandate in this court is evidence of intention to continue with the prosecution, and in any event, the applicant has not demonstrated otherwise. In fact, the DPP, has indicated by affidavit on oath by his prosecution counsel having conduct of the matter that consent to charge the Petitioner was indeed given. Indeed, upon exercise of its power under Article 165 (7) of the Constitution the court called for the records of the trial court proceedings and confirmed that the prosecution in the two cases subject of this petition were right from the first day of arraignment carried out by Prosecution Counsel lending credence to the position of the DPP that the prosecution was conducted with his approval and active participation. The Court, therefore, does not find merit in the Petition, and the same is declined.

ORDERS

47. Accordingly, for the reasons set out above, this Court makes the following orders: -

1. The Petition to this court by Notice of Motion dated 12th November 2020 is hereby dismissed.

2. The orders of stay granted in this Application pending hearing and determination of the application dated 12th November 2020 are hereby discharged and the trials before the Magistrate's court, respectively Meru CMC Criminal Cases No. 68 and 1154 of

2019, shall resume hearing.

3. In view of the constitutional and public interest element of the case, there shall be no order as to costs.

Order accordingly.

DATED AND DELIVERED THIS 11TH DAY OF MARCH 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Bali Sharma & Bali Sharma Advocates for the Petitioner

Ms Nandwa, Prosecution Counsel for the Respondents.