REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

JUDICIAL REVIEW APPLICATION NO. E002 OF 2021

WALTER MUSUNGU MUYODI.....1ST APPLICANT

MICHAL AWITI WANJERO.....2ND APPLICANT

PETER OTIENO OUMA.....3RD APPLICANT

HENRY SHISIA MATALANGA.....4TH APPLICANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

THE DIRECTORATE OF CRIMINAL INVESTIGATION (DCI) SIAYA.....3RD RESPONDENT

SIAYA PRINCIPAL MAGISTRATES COURT.....4TH RESPONDENT

UKWALA PRINCIPAL MAGISTRATES COURT.....5TH RESPONDENT

AND

LAWRENCE GODIA.....1ST INTERESTED PARTY

MATHILDA AWUOR MUHAWAN.....2ND INTERESTED PARTY

ANDREW ODHIAMBO ABIERO.....3RD INTERESTED PARTY

JUDGMENT

1. The four exparte applicants herein are Walter Musungu Muyodi, Michael Awiti Wanjero, Peter Otieno Ouma and Henry Shishia Mataanga. They all face criminal charges pending before both Ukwala and Siaya Principal Magistrate's Court. of either stock theft contrary to section 278 of the Penal Code and impersonation with intent to defraud contrary to section 382 of the Penal Code or being unlicensed auctioneer contrary to section 9 (1) (2) of the Auctioneers Act.

2. In their Notice of Motion application dated 31st March 2021 pursuant to leave of court granted on 24th March, 2021 to apply, the applicants seek the following orders:

> *a)* ***That this Honourable Court be pleased to issue an order for judicial review order of certiorari to quash the decision by the Directorate of Criminal Investigations (DCI) Siaya and the Director of Public Prosecution from charging Walter Musungu Muyodi, Michael Awiti Wanjero, Peter Otieno Ouma and Henry Shisia Matalanga and proceeding with criminal proceedings in Siaya Principal Magistrates Court Criminal Case No. 1109 of 2019 and Criminal Case No. 1127 of 2019 and Ukwala Principal Magistrates Court Criminal Case No. 332 of 2020.***
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> *b)* ***That this Honourable Court be pleased to issue an order for judicial review of prohibition to prohibit the Principal***

Magistrates Siaya Law Courts and Principal Magistrates Ukwala Law Courts from proceeding against Walter Musungu Muyodi, Michael Awiti Wanjero, Peter Otieno Ouma and Henry Shisia Matalanga and proceeding with criminal proceedings in Siaya Principal Magistrates Court Criminal Case No. 1109 of 2019 and Criminal Case No. 1127 of 2019 and Ukwala Principal Magistrates Court Criminal Case No. 332 of 2020.

c) ***Costs of this petition.***

3. The application is brought under the provisions or Order 53 Rule 3(1) of the Civil Procedure Rules, 2010, Section 3A and 63 € of the Civil Procedure Act, Section 8 of the Law Reform Act and pursuant to leave granted by this court on the 24/3/2021.

4. The respondents did not file any response to the application herein but opted to file their written submissions.

Applicants' Case

5. It is the applicants claim that they were charged before the Ukwala Magistrates Court and Siaya Principal Magistrates Court for alleged stock theft and being unlicensed auctioneers as well as impersonation with intent to defraud contrary to the law. They annexed copies of charge sheets to their verifying affidavit. They allege that they were executing for recovery of civil debts owed to their client **Sidindi Traders Sacco-Savings and Credit Cooperative Society Limited** and that they even obtained orders for security from the Magistrate's Court (see annexed orders of 10th September 2019 obtained from PM's Court at Siaya for security), before proceeding to attach properties belonging to the interested parties herein in accordance with the terms and conditions of borrowing funds from the said Society by the interested parties.(see annexed proclamations).

6. The applicants aver that the institution of criminal charges against them have been brought in bad faith and are in violation of their constitutional rights; are an abuse of the court process and an affront to their rights not to be subjected to discriminatory treatment, their rights to due process of the law and equal treatment and enjoyment of the rights envisaged under the law.

7. The applicants further state that the 1st and 4th applicants, who are auctioneers, carried out their duties and instructions in accordance with the Auctioneers Act and Rules having obtained orders in Siaya Principal Magistrates Court Civil Misc. Application No. 66 of 2019 and Civil Misc. Application No. 81 of 2019 to compel the Kenya Police to grant security to them while performing their duties of recovering debt owed by the interested parties.

8. It is the applicants case that their prosecution is unwarranted, malicious and misconceived as the dispute between the applicants and the interested parties is civil in nature and as such the respondents are in clear breach of their-applicants' rights to a fair trial as envisioned in Article 50(1) of the constitution.

Interested Parties Case

9. The 2nd interested party swore a replying affidavit on the 3rd of May 2021 and filed on the 12th May 2021 stating that she had never been a member of Sidindi Traders Cooperative Society Ltd and had never borrowed money from the Society and further that she was not in the list of defaulters annexed by the applicants and that neither was she listed in the names presented to court or in the proclamations done.

10. The 2nd interested party further deposed that on the 2/11/2019, the applicants went to her home and took away 3 heads of cattle after which she made a complaint to Ugunja Police Station.

11. It was her case that she had never been a member of the Sidindi Traders Cooperative Society Ltd and had never borrowed money from them and further that even the letter of instructions to the auctioneers to attach the property of the defaulters does not contain her name as one of the defaulters.

12. The 2nd interested party further states that neither the court orders in Siaya Misc. Application No. 66 0f 2019 nor proclamations produced by the applicants refer to her as one of the people whose property should be attached.

13. The interested parties further filed a Notice of Preliminary Objection dated 12th May 2021and filed on the same day raising the following points of law:

a) That the notice of motion dated 31st March 2021 filed on an unknown date in this court, be and is hereby struck out in limine.

b) That the cost of this objection and the entire proceedings be to the Objectors.

c) That there such or further relief as the court may deem fair and expedient to grant in the circumstance of Judicial Review.

14. The interested parties relied on the following grounds in support of their preliminary objection:

a) That the application dated 23rd March 2021 was fatally defective and ought to have been dismissed at the threshold.

b) That the court's orders made on 24th March 2021 were based on a fatally defective application for leave to apply for Judicial Review orders, must be vacated at the threshold.

c) That the so called Judicial Review application made on 31st March 2021 is fundamentally defective and must be struck out.

d) That the entire pleadings offend order 53 of the Civil Procedure Rules and the rules made thereunder and is thus not sustainable at all.

Exparte Applicants' Submissions

15. It was submitted that the charges against the exparte applicants in the subordinate court have not been brought in good faith and ought to be removed and quashed. The applicants relied on the cases of **Republic v Attorney General & Principal Magistrates Court at Makadara, Ex Parte Durani Hussein Mudobe (Nairobi HC Misc Appl No. 898 of 2003, Nairobi HC Misc. Appl. No. 406 of 2001 Republic v Attorney General & Chief Magistrate Court Nairobi Ex-parte Kipngeno Arap Ngeny** and that of **Republic v The Chief Magistrates Nairobi & 2 Others (Ex-parte Azim Jiwa Rajwani) Nairobi HC Misc. Application No. 1544 of 2004** where the courts held interalia that the action of the police in instituting criminal proceedings by one of the parties to a purely commercial transaction was in bad taste and he proceeded to issue orders of certiorari and prohibition to stop the said criminal proceedings.

16. The applicants further submitted that there was no shred of evidence to indicate actus reus and mens rea to warrant their prosecution and that the applicants rights and the due process had been flouted in their prosecution. They relied on the case of **Gitunguri v Republic [1989] KLR 1.** It was submitted that the applicants had met the threshold for grant of the orders sought and as such the notice of motion dated 31st March 2021 ought to be allowed as presented. No submission was made regarding the preliminary objection raised by the Interested parties.

The Respondents' Submissions

17. The respondents submitted that in November 2019, the police received complaints from among others, the interested parties, that people were pretending to be auctioneers and had taken their cattle for money allegedly owed to Sidindi Traders Cooperative Society and further that after investigations, it was discovered that the 1st applicant was not a licensed auctioneer. It was submitted that investigations further revealed that the 2nd interested party was not a member of Sidindi Traders Cooperative Society.

18. It was submitted that the decision to charge the applicants was made on 8/11/2019 and the applicants arraigned in court on 19/11/2019 whereas the application for leave to institute the proceedings herein was filed on 23/3/2021 and as such the instant application was fatally defective as it was brought more than six months after the decision sought to be quashed was made as provided under Order 53 Rule 2 of the Civil Procedure Rules. The respondents further relied on the case of **Republic v District Land Adjudication and Settlement Officer Tigania East and West, Deputy County Commissioner and Another Ex Parte Stephen Kathuthu; Stephen Michuki Kiunga (Interested Party) [2021] eKLR.**

19. The respondent submitted that the investigations and decision to charge was made outside the purview of judicial review and as such the court ought not to interfere with the exercise of power or discretion conferred on any other body as the court would be guilty of usurping that body's power. Reliance was placed on the cases of **Robert Makau & 279 Others v Municipal Council of Mombasa [2015] eKLR** and that of **Council for Civil Service Unions v The Minister for Civil Service [1985] A.C. 324.**

The Interested Parties' Submissions

20. It was submitted that the applicants' application dated 23rd March 2021 was fatally defective since it did not follow the correct procedure of the law specifically Order 53 Rule 3 (1) which provides that *where leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty one days by notice of motion to the High Court, and there shall , unless the Judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion*.

21. The interested parties further submitted that the applicants never filed nor served their notice of motion to the interested parties and further, that they never sought the extension of time to file the same. Reliance was placed on the case of **Republic v Speaker of Nairobi County Assembly Exparte Evans Kidero [2017] eKLR.**

Analysis & Determination

22. Having considered the exparte applicants' application, grounds, supporting and opposing affidavits and the Parties' submissions as above, there are several issues for determination.

23. The first issue regards the merits of the Preliminary Objection dated 12th May 2021. It is the interested parties' contention that the Notice of Motion dated 31st March 2021 ought to have been dismissed ab initio as it was defective and offends Order 53 of the Civil Procedure Rules. Further, that the Notice of motion was not filed and served within the time lines given by the Court in the order for leave. On the part of the Respondents, it was submitted on their behalf that the judicial review proceedings initiated on 23rd march 2021 are null and void because they were instituted after six months of the decision to charge the exparte applicants which was on 8th November 2019 hence the leave granted in March 2021 was beyond the statutory period of six months

24. In the much-celebrated case of **Mukisa Biscuits Manufacturing Company Limited v West End Distributors (1969) EA 696** the court stated as follows: -

"So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to

refer the matter to arbitration.....”

25. **Mwita, J.** in the case of **John Musakali v Speaker County of Bungoma & 4 others (2015) eKLR** put the foregone legal position in clearer terms when he stated that: -

> ***“The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law.”***

26. **Ojwang, J** *(as he then was)* in the case of **Oraro v Mbaja (2005) KLR 141** where after quoting the statement of **Law, JA.** in the **Mukisa Biscuits case (supra)** went on to stay that: -

> ***“A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point....***
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> ***Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.....”***

27. The interested parties submitted that the applicants never filed nor served their notice of motion to the interested parties and further never sought the extension of time to file the same.

28. The record reveals that on the 24/3/2021 the court granted the applicants' 10 days to file the substantive motion and serve the respondents and the interested parties. The matter then came up again on the 7/4/2021 when applicants' counsel Ms. Luyali for the applicants informed the court that they had not served the 1st respondent and the interested parties as they had been unable to trace the interested parties. Mr. Ngetich, the Prosecution Counsel further informed court that he was served on the 1/4/2021 but that he had not been served with all the requisite documents. By that time, the substantive Notice of motion had been filed on 31/3/2021 as directed by the Court on 24/3/2021 and within ten days of the order for leave to apply.

29. This court then directed the exparte applicants to serve all parties within five days of 7.4.2021. In other words, the court enlarged the time for service of the application and all supporting documents on the parties named in the judicial review proceedings. On 13/4/2021 when the matter came up for directions to confirm compliance and to give directions on the disposal of the Notice of motion filed on 31/3/2021 as per the court receiving stamp and paort payment voucher receipt in the court file, Mr. Kakoi Prosecution Counsel and representing the Respondents stated that they were served and desired to file a replying affidavit and the 1st Interested party Lawrence Godia who was present in court and in person said that he needed more time to get an advocate to assist him in the case. It can therefore not be said that the applicants filed their application and served out of time without leave of this court.

30. Section 9 of the Law Reform Act Cap 26 Laws of Kenya which is a substantive provision for institution of Judicial Review proceedings provides for a statutory 6 months within which the application for leave ought to be filed, and gives no room for enlargement thereof, the procedure for filing of the substantive motion is set out in Order 53 of the Civil Procedure Rules and that owing to the fact that the 21 days period is provided for by the Civil Procedure Rules, it goes without saying that a party can ably make an application for extension of the 21 days period under Order 50 rule 6 of the Civil Procedure Rules, for the filing of the motion.

31. In the case of **Wilson Osolo v John Ojiambo Ochola & the Attorney General CA No. 6 Nairobi of 1995** while considering whether the court has power or jurisdiction to enlarge time stipulated under Order 53 of the Civil Procedure Rules the Court of Appeal stated:

> ***“A can readily be seen that Order 53 Rule 2 (as it then stood) is derived verbatim from Section 9(3) of the Law Reform Act. Whilst the time limited for doing something under the Civil Procedure Rules can be extended by an application under Order 49 of the Civil Procedure Rules, the procedure cannot be availed of the extension of time limited by statute, in this case, the Law Reform Act.”***

32. In the same judgment, the Court of Appeal stated:

> ***“It was a mandatory requirement of Order 53 Rule 3 (1) of the Civil Procedure Rules then (and it is now again so) that the notice of motion must be filed within 21 days of grant of such leave. No such notice of motion having been apparently filed within 21 days on 15th February 1985 there was no proper application before the Superior court. This period of 21 days could have been extended by a reasonable period had there been an application under Order 49 of the Civil Procedure Rules.”***

33. The above judgment was delivered by the Court of Appeal on 6th August 1996 when the provisions of Order 49 of the Civil Procedure Rules were in force and after amendments in 2010, it is now Order 50 Rule 6 of the Civil Procedure Rules, which permit the enlargement of time stipulated by the rules or set by the order of the court.

34. This Court [Aburili J] has pronounced itself in several decisions including **JR 371 and 372 of 2015- Republic v Public Procurement Administrative Review Board Exparte Syner –chemie Limited [2016] eKLR** that although some courts have applied strict

interpretation regarding extension of time within which the substantive motion should be filed, this court, in the present constitutional framework should not let the former intricacies and obscurities hamper the provision of effective redress to facilitate access to justice for all, and therefore it should adopt a flexible approach, which is not necessarily crafting or innovating its jurisdiction, but an approach that takes cognizance of the fact that old case law in the reach of Judicial Review remedies may not be of such practical relevance today. See the case of **Republic v Speaker of Nairobi City County Assembly & another Exparte Evans Kidero [2017] eKLR**

35. Accordingly, it is my considered opinion that this court retains its inherent power to extend the time limited by Order 53 Rule (3), as a strict application of the rule would not be a legitimate restriction on the right of access to justice which is a constitutional right stipulated in Article 48 of the Constitution and in the circumstances herein I find and hold that there was no prejudice occasioned on the interested parties by the delayed service which delay was not inordinate and was explained to the satisfaction of this court leading to and order enlarging the shorter period earlier granted of 10 days within which to file and serve the substantive Notice of Motion.

36. Accordingly, those aspects of the preliminary objection are found to be devoid of merit and are rejected and dismissed.

37. On the second issue of whether there was inordinate and inexcusable delay in filing this application, the respondents contended that the applicant was guilty of delay as the decision to charge the applicants was made on 8/11/2019 and the applicants arraigned in court on 19/11/2019 whereas application for leave to institute the proceedings herein was filed on 23/3/2021. Further, that there is no good reason given for the delay and as such the substantive application ought to be dismissed, The Supreme Court of Appeal of South Africa observed in **Serious Economic Offences vs Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO and [2000]** stated that *"All statutes must be interpreted through the prism of the Bill of Rights."* Judicial Review in now entrenched in the Constitution. The concept of Judicial Review under the Constitution of Kenya is similar to that under the Constitution of South Africa where the South African Court held in ***Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others 2000 (2) SA 674 (CC) at 33*** that *"the common law principles that previously provided the grounds for Judicial Review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to Judicial Review, they gain their force from the Constitution. In the Judicial Review of public power, the two are intertwined and do not constitute separate concepts."*

38. The court went further to say that there are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. Rather, there was only one system of law shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

39. The entrenchment of the power of Judicial Review, as a constitutional principle should of necessity expand the scope of the remedy and the discretion and the power of the court to in such cases guided by the purposes, values and principles of the Constitution and the constitutional dictate to develop the law on that front. *First,* parties, who were once denied Judicial Review on the basis of the public-private power dichotomy, should now access Judicial Review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights. *Second,* the right to access the Court is now constitutionally guaranteed. It would require a compelling reason that would pass an Article 24 analysis test to deny a litigant the right to approach the court. Where a party applies for extension of time as in this case, the court should exercise its discretion and examine the period of the delay and the reasons offered for the delay.

40. *Third,* an order of Judicial Review is one of the reliefs for violation of fundamentals rights and freedoms under Article 23(3)(f). *Fourth,* section 7 of the Fair Administrative Action provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to a court in accordance with section 8; or a tribunal in exercise of its jurisdiction conferred in that regard under any written law. Section 7 (2) of the act provides for grounds for applying for Judicial Review. *Fifth,* Article 159 commands courts to administer justice without undue regard to procedural technicalities. See the case of **Republic v Kenya Revenue Authority Ex-Parte Stanley Mombo Amuti [2018] Eklr**

41. Taking into consideration the above, it is my opinion that despite the inordinate unexplained delay in initiating these proceedings which were brought by way of an application for leave, there would be no prejudice occasioned on the respondents if the instant application proceeds and is determined on its merit whereas the applicants stand to have the constitutional right to access to justice infringed if this court proceeds to dismiss the instant application. Furthermore, Judicial Review being a constitutional remedy overrides the statutory dictates or requirements for leave to apply for judicial review remedies. What this means is that it was not even necessary for the exparte applicants to apply for leave to institute these proceedings.

42. It is for the above detailed reasons that this court in the detailed ruling granting leave to apply on 24th March 2021 stated as follows:

> ***" 8. On the first prayer relating to certiorari, I note that being an intended application for certiorari, I observe that the application is not affected by the requirement to file with six months of the challenged decision as the decision in this case is not ejusdem generis a judicial decision in the nature of "judgment, order, decree, conviction or other proceeding" within the meaning of Order 53 Rules (2) of the Civil Procedure Rules, which provides that:***
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> > ***"2. Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."***
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> ***9. The applicants were charged before the Ukwala Magistrates Court and Siaya Principal Magistrate's Court for alleged stock theft and being unlicensed auctioneers. They alleged that they were executing for recovery of civil debts owed to their client and***

that they even obtained orders for security from court before proceeding to attach properties belonging to the interested parties. <u>The decision by the DCIO and the ODPP to charge is not a judicial decision but an administrative decision. Accordingly, the prayer for leave to apply for certiorari is to be considered on its merits. [emphasis added].</u>

43. Accordingly, the preliminary objections fail and are declined and dismissed.

44. On the third issue of the circumstances under which this court would grant the judicial review orders of prohibition or certiorari of the initiated criminal proceedings against the applicants. In achieving this objective, the court ought to in the first instance, question whether the respondents acted within their respective mandates in their investigation and subsequent institution of criminal charges against the applicants. Concomitant with this issue would be to answer whether the applicants' rights have been violated in the manner that they claim and finally, to ponder whether, on analysis of the preceding questions, if they are deserving of the reliefs sought.

45. Revisiting the circumstances under which the Court will grant an order prohibiting the commencement or continuation of a criminal trial process, when faced with a petition seeking to arrest a criminal prosecution, the factors which a court ought to account for are well settled. For a start, the court ought to be extremely cautious in making its determination so as to avoid prejudicing the intended or pending criminal proceedings. The court ought not to usurp the constitutional and statutory mandate of the Director of Public Prosecutions and neither should it curtail the investigatory mandate accorded to the National Police Service or Directorate of Criminal Investigations. However, the court may intervene were the said discretion is exercised unlawfully and in bad faith, for instance where it is being abused or being used for achievement of some collateral purpose which are not geared towards the vindication of the commission of a criminal offence.

46. **Chris Corns, Judicial Termination of Defective Criminal Prosecutions: Stay Applications, 76 University of Tasmania Law Review, Vol 16 No. 1, 1977, argues that** argues that the grounds upon which criminal proceedings will be stopped will depend on some of the following grounds:

i. When the continuation of the proceedings would constitute an 'abuse of process,'

ii. When any resultant trial would be 'unfair' to the accused, and

iii. When the continuation of the proceedings would tend to undermine the integrity of the criminal justice system.

47. In **<u>George Joshua Okungu & Another v The Chief Magistrates Court, Nairobi & Another [2014] eKLR</u>** it was held:

"The law is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions or the authority charged with the prosecution of criminal offences to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings. That a petitioner has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is always open to the petitioner in those proceedings. However, if the Petitioner demonstrates that the intended or ongoing criminal proceedings constitute an abuse of process and are being carried out in breach of or threatened breach of the petitioner's Constitutional rights, the Court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore, the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the Petitioner to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognized aim. In the exercise of the discretion on whether or not to grant an order of prohibition, the court takes into account the needs of good administration. See R vs. Monopolies and Mergers Commission Ex Parte Argyll Group Plc [1986] 1 WLR 763 and Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)."

48. In **<u>Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR</u>** held:

"The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene".

49. The prosecutorial powers of DPP are constitutionally and statutorily provided for under Article 157 (10) of the Constitution and Section 4 of the Office of the Director of Public Prosecutions Act No. 2 of 2013, which provides that the DPP does not require the consent of any person or authority to commence any criminal proceedings and in exercise of his/her powers and functions, shall not be under the direction or control of any person or authority. The exercise of that power is however subject to Subsection (11) of Article 157 and Section 4 of the DPP Act, which provides that in exercise of the said power, the DPP shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of legal process. Only in circumstances where it is manifest that the DPP acted unlawfully by failing to exercise their own independent discretion; acting under the control and direction of another person; failing to take into account public interest or interest of the administration of justice in all their manifestations; abusing the legal process; and by acting in breach of fundamental rights and freedoms of an individual will the High Court intervene.

50. With the litany of judicial pronouncements on the threshold for interfering with the discretion of the investigative and prosecutorial agencies in mind, I now turn to the applicants' gravamen. According to the applicants, the decision to charge and prosecute them amounts to an abuse of the legal process and a breach of the applicants right as the dispute between the applicants and the interested parties was purely

of civil nature.

51. On her part, the 2nd interested party deposed that she never belonged to the applicants' Cooperative Society and that the applicants stormed her home and led away her 3 heads of cattle after which she reported the matter to the area chief and subsequently to Ugunja Police Station. She further stated that none of the documents relied on by the applicants to prove their case, not even the applications lodged in court seeking for security ever listed her as a defaulter of the credit society's loans.

52. In my analysis, the applicants claim to be aggrieved by the alleged improper conduct of investigations against their actions. However, I find no scintilla of evidence provided to show how improper and or prejudicial to the applicants such investigations were. The DCI had the mandate to investigate the applicants as espoused in Section 35 of the National Police Service Act, No. 11 of 2011.

53. The 2nd respondent too cannot be faulted for exercising its discretion to initiate charges against the petitioner. Once it had examined the file forwarded to it by DCI and established that there was a basis to form a criminal charge, it went ahead and instituted the applicants' prosecution; which is well within the mandate of the office of the DPP. Despite the assertions by the applicants, little by way of evidence was availed to this court to demonstrate what sinister motive, if any, that the DPP had when it made the decision to prosecute. In **Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] eKLR** the Court held:

> ***"We agree that there is a real danger of courts overreaching if they were to routinely question the merit of the DPP's decisions. However, there are circumstances where the type of scrutiny set out in the majority decision of Njuguna S. Ndungu (supra) is called for. Should there be credible evidence that the prosecution is being used or may appear to a reasonable man to be deployed for an ulterior or collateral motive other than for advancing the ends of justice, then a scrutiny of the facts and circumstances of the case is not only necessary but desirable. This is because it would enhance the administration of justice if the challenged charges were to be properly tested so that any fears of ill motive are dispelled."***

54. It follows that for the intended prosecution to be deemed as being unfounded, it must be so manifestly weak so as not to disclose a prosecutable case or have no prospect for conviction. This is not the case in the instant matter. In the instant case, the applicants were charged with either stock theft contrary to section 278 of the Penal Code and impersonation with intent to defraud contrary to section 382 of the Penal Code or being unlicensed auctioneer contrary to section 9 (1) (2) of the Auctioneers Act. The applicants admit that they recovered animals from members of Sidindi Traders Cooperative Society, which members had defaulted in repaying their loans. In contrast, the 2nd interested party deposed and it was not controverted that she was not a member of any Cooperative nor had she borrowed any monies and defaulted to repay to warrant attachment of her animals. When her animals were carted away by the applicants, she was forced to report the same at Ugunja Police Station. Not even the proclamation filed in this court has her name on it.

55. In the case of **Republic v PC George Okello & another [2012] Eklr** the court held:

> ***"I can find no better words to capture this conclusion than those used by the South African Constitutional court in Sanderson as regards appropriate relief: Even if the evidence he has placed before the court had been more damning, the relief the appellant seeks is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins –and consequently without any opportunity to ascertain the real effect of delay on the outcome of the case –is far reaching. Indeed, it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will be seldom warranted in the absence of significant prejudice to the accused…Ordinarily and particularly where the prejudice alleged is not trial related, there is a range of "appropriate" remedies less radical than barring the prosecution. These would include a mandamus requiring the prosecution to commence the case, a refusal to grant the prosecution a remand, or damages after an acquittal arising out of the prejudice suffered by the accused. A bar is likely to be available only in a narrow range of circumstances, for example where it is established that the accused has probably suffered "irreparable prejudice as a result of delay."***

56. Therefore, on whether the Respondents' acted within their mandate, I find in the affirmative.

57. On whether the applicants' rights were violated as alleged, the court in the **Mumo Matemu v Trusted Society of Human Rights Alliance and others [2013] eKLR** held:

> ***"We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not conterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point...Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The Principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle."***

58. In **Philomena Mbete Mwilu (supra)** the Court held:

> ***"In our view, it would be within the mandate of an investigative body to receive complaints and to investigate them. Such bodies or entities cannot be faulted for acting on the complaints as in so doing, they would be acting within their constitutional and statutory duty. It was stated in Josephat Koli Nanok & another v Ethics and Anti-Corruption Commission (2018) eKLR, that by***

undertaking investigations an investigating entity does not violate any constitutional rights, and that violation of rights may only occur in the manner in which the investigative mandate is executed. In that event, the Petitioner would be under an obligation to demonstrate that his or her rights have been violated by the manner of investigation and attendant processes."

59. In the same vein, I agree with the Court in **Kenneth Kanyarati & 2 others v Inspector General of Police Director of Criminal Investigations Department & 2 others [2015] eKLR** where it stated:

"I am satisfied that it is not the business of the court to identify the points of investigation. Neither is it the business of this court to wander into the merits and demerits of any intended or prospective prosecution. As was stated in R Vs. Commissioner of Police and Another Ex parte Michael Monari & Another (2012) eKLR"The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges."

60. On the basis of the material placed before this court, Iam not persuaded that the investigations and intended prosecution of the applicants violated their constitutionally guaranteed rights and do hold as much.

61. On whether the applicants are entitled to the reliefs sought, in the exercise of the discretion on whether or not to grant an order of prohibition, the court takes into account the needs of good administration. **See R.Vs Monopolies and Mergers Commission Exparte Argyll PLC [1986] 1 WLR 763 and Re Bivac International SA (Bureau Veritas [2005]2 EA 43(HCK)**. In **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170** the Court of Appeal held:

"It is trite that an Order of Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings... Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court."

62. In the case of **Kuria and 3 others V Attorney General (2002) 2 KLR 69**, the court considered the requirement for proof of allegations of abuse of the process of the court and the necessity to balance the public and private interest considerations attending criminal proceedings, observing 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 or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution…The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose on 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 bipolar 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, on order of prohibition cannot also be given without evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused to have a fair trial ….." (emphasis added**)***

63. In **Meixner & Another vs. Attorney General [2005] 2 KLR 189,** the Court expressed itself as hereunder:

"The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion if acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution...Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power. Having regard to the law, the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision is correct."

64. However, in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69**, the High Court held:

"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 tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the

fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far that which the courts indeed the entire system is constitutionally mandated to administer...In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute. It is further alleged that the criminal prosecution is an abuse of the court process epitomised by what is termed as selective prosecution by the Attorney General. It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been be argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law...In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed...There is nothing which can stop them from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made...Under section 77(5) of the Constitution it is a constitutional right that no person who has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of the offence. What is clear from this constitutional right is that it prevents the re-prosecution of a criminal case, which has been determined in one way or another..."

65. I further associate myself with the decision in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** where it was held that:

"A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable."

66. Further in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] e KLR, it was held**:

"The police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene".

67. As was further held in **Kuria & 3 Others vs. Attorney General,** (supra):

"In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names."

68. Light of the preceding authorities to which I am fully agreeable with, it was incumbent upon the applicants to demonstrate to the satisfaction of the court that the respondents had somehow abused, overstepped or exercised their mandate unlawfully in carrying out the said investigations and making the decisions to prosecute the applicants in order for the reliefs sought to avail to them. The applicants also claim that their prosecution is intended to settle scores. However, they have not demonstrated what scores the ODPP and DCIO wanted to settle with them.

69. In addition, the applicants claim that the dispute is purely civil in nature and that therefore the Respondents have no business using the criminal process in such matters. However, there is no evidence of any pending suit or proceedings between the parties hereto, not even between the interested parties and Sidindi Traders Cooperative Society. **In Lameck Okeyo and Another v Inspector General of Police and 2 Others, [2016] e KLR the court stated:**

"In order for the Applicant to succeed it must show that not only are the investigations which were being undertaken are laced with ulterior motives but that the predominant purpose of conducting the investigations is to achieve some collateral result not

connected with the vindication of an alleged commission of a criminal offence. Although it was alleged that the criminal investigations have been commenced with a view to achieving collateral and extraneous purposes, that is to aid the interested party recover a civil debt, I am not satisfied based on the evidence on the record that this is so. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the predominant purpose is to further some other ulterior purpose and as long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene. Therefore whereas a matter may constitute both civil and criminal offence, the mere fact that the police intends to charge the persons against whom the complaint is made with a criminal offence notwithstanding the pendency of civil proceedings will not warrant a stay… This is the effect of section 193A of the Criminal Procedure Code". (emphasis added)

70. See also **Republic vs Chief Magistrate, Criminal Division & another Exparte Mildred Mbuya Joel [2014]e KLR**-a decision by Odunda J.

71. Furthermore, if there were any such civil proceedings between the interested parties and the Sidindi Traders Cooperative Society who instructed the exparte applicants, then the same would have been lodged before the Cooperatives Tribunal as established under section 77 of the Cooperative Societies Act. No such proceedings exist.

72. Section 76 of the Cooperative Societies Act on the other hand provides for settlement of disputes between Cooperative Societies and its members and between or among members of the Cooperative Society and the Cooperative Society. The section provides:

"76. Disputes

(1) If any dispute concerning the business of a co-operative society arises—

(a) among members, past members and persons claiming through members, past members and deceased members; or

(b) between members, past members or deceased members, and the society, its Committee or any officer of the society; or

(c) between the society and any other co-operative society, it shall be referred to the Tribunal.

(2) A dispute for the purpose of this section shall include—

(a) a claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or

(b) a claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not;

(c) a claim by a Sacco society against a refusal to grant or a revocation of licence or any other due, from the Authority."

73. In the absence of any civil proceedings having been initiated by the Sidindi Traders Cooperative Society against the interested parties before the Tribunal as stipulated in law above, the exparte applicants cannot claim that the investigations and prosecution against them is malicious or intended to achieve an ulterior motive. **See Umoja Innercore Tena Matatu Sacco Society Ltd & another vs Commissioner of Cooperatives Development &25 others [2017]e KLR.**

74. In addition, assuming the chattel that were being repossessed from the interested parties were signed off to clear the debts due to the society, the question is whether the said chattel were registered under the Chattels Transfer Act before execution. The exparte applicants have not made any disclosures in respect of section 4 of the Chattels Transfer Act.

75. In conclusion, I find and hold that the applicants did not demonstrate any unlawful actions, excess or want of authority, evidence of malice, evidence of intimidation or even of manipulation of court process so as to seriously impede the likelihood of them getting a fair trial as espoused under Article 50 of the Constitution. In the absence of such proof, I am unable to find and hold that the criminal proceedings against the applicants ought to be brought to a halt or that they be prohibited.

76. Consequently, I find and hold that the Notice of Motion dated 31st March 2021 lacks merit and the same is hereby dismissed. Each party to bear their own costs of these proceedings.

77. This file is closed. Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 22ND DAY OF SEPTEMBER, 2021

R.E. ABURILI

JUDGE