REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A.C. Mrima, J.)

CONSTITUTIONAL PETITION NO. E001 OF 2021

-BETWEEN-

JULIUS KIPLAGAT KORIR.....PETITIONER

-VERSUS-

1. THE DIRECTOR OF PUBLIC PROSECUTIONS

3. DIRECTORATE OF CRIMINAL INVESTIGATION.....RESPONDENTS

-AND-

EVERLYNE CHEPKORIR KOECH.....INTERESTED PARTY

JUDGMENT

Introduction:

1. This is one of the plethora of cases pitting *Julius Kiplagat Korir*, the Petitioner herein and *Everlyne Chepkorir Koech*, the Interested Party herein, who are a couple.

2. The matter subject of this judgment allegedly arose out of an assault of the Interested Party by the Petitioner sometimes in September, 2020. The incident was reported to and investigated by the Directorate of Criminal Investigations (hereinafter referred to as ***'the DCI'***) at Karen Police Station.

3. A decision to charge the Petitioner was made by the Director of Public Prosecution (hereinafter referred to as '***the DPP'***) hence these proceedings.

4. The proceedings are, therefore, an attempt by the Petitioner to forestall the institution of any criminal case against him arising out of the alleged assault.

5. The Petition is opposed.

The Petition:

6. The Petition is dated 5th January, 2021 and is supported by an affidavit evenly sworn by the Petitioner. Contemporaneously with the filing of the Petition was a Notice of Motion of even date under certificate of urgency seeking conservatory orders *inter alia* staying the arraignment and institution of criminal proceedings against the Petitioner.

7. The Petitioner filed written submissions dated 28th June, 2021.

8. In the main, the Petition sought the following orders: -

1. A declaration be and is hereby issued that investigations on the Petitioner by the DCI and the DPP's institution of criminal proceedings against the petitioner in relation to assault of Interested Party on 17th September, 2020 violates his constitutional rights, is an abuse of the process of the court and therefore, unlawful, null and void ab initio.

2. An order of certiorari be and is hereby issued to quash the entire charge sheet or proceedings against the petitioner in relation to an assault on 17th September, 2020.

3. An order of prohibition be and is hereby issued prohibiting the respondents from proceeding with the prosecution of the Petitioner in relation to assault of Everlyne Chepkorir on 17th September, 2020.

4. The costs of this petition be provided for.

The Responses:

9. The Respondents and the Interested Party, in opposition, responded to the Petition.

10. The Respondents filed a Replying Affidavit through one *No. 235389 CI Ann Wanjiru* who is attached at the DCI Karen and is one of the investing officers in the assault complaint. It was sworn on 30th March, 2021.

11. The Respondents also filed written submissions dated 30th March, 2021.

12. The Interested Party filed a Replying Affidavit she swore on 12th January, 2021. She also filed written submissions and List of Authorities both dated 27th June, 2021.

Issues for Determination:

13. The parties herein proposed, and the Court approved, that the Petition be heard together with the Notice of Motion application.

14. From the documents filed by the parties, the issues that arise for determination are: -

i. Whether there is a proper Petition before Court.

ii. If the answer to the first issue is in the affirmative, a general discussion on general prosecutorial powers, Section 193A of the Criminal Procedure Code and abuse of Court process.

iii. Whether the decision to institute criminal proceedings against the Petitioner contravenes Articles 27(1) and (2), 47, 50(1), (2) a, b, c, j and k and Article 157(11) of the Constitution and whether the said decision is irrational, unreasonable, illegal, malicious and in bad faith.

15. I will deal with the issues in *seriatim.*

Analysis and Determinations:

(i) Whether there is a proper Petition before Court.

16. This preliminary issue was raised by the Respondents through their written submissions. It is claimed that the Petition does not meet the precision threshold required of constitutional Petitions as established by the famous finding in Miscellaneous Criminal Application 4 of 1979, ***Anarita Karimi Njeru v Republic*** **[**1979] eKLR.

17. The issue was not responded to by the Petitioner. Nevertheless, I will consider it.

18. The above case is hailed for establishing the following precedent in respect of constitutional Petitions: -

… if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed…

19. The foregoing finding received endorsement from the Court of Appeal in Nairobi Civil Appeal No. 290 of 2012, ***Mumo Matemu v Trusted Society of Human Rights Alliance*** when the Learned Judges remarked on the importance of compliance with procedure under Article 159 of the Constitution, the overriding objective principle under section 1A and 1B of the Civil Procedure Act and need for precision in framing issues in constitutional Petitions. It was observed thus: -

(41) 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 coterminous 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.

20. The Learned Judges further bolstered the foregoing finding by making reference to the decision of *Jessel, M.R* in ***Thorp v Holdsworth*** (1876) 3 Ch. D. 637 at 639 where he made the following findings: -

> ***…*** *The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules…was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing….*

21. In making a finding that the High Court was right in its assessment that the Petition before it had not been drafted with the necessary precision, the Learned Appellate judges reaffirmed the *Anarita Karimi Njeru* principles and made the following findings: -

> *(43) The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.*
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> *(44) We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting," without requiring remedy by the 1st respondent.*

22. The Apex Court has, as well, discussed the issue. That was in ***Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others*** [2014] eKLR where the Court stated as follows: -

> *Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru vs. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.*

23. Having set out the principles required of constitutional Petitions, I will hence consider the craftsmanship of the instant Petition.

24. The Petition has four parts. They are the description of the parties, the facts and background to the Petition, the violations complained of and the remedies sought.

25. In a synopsis, the Petitioner sets out in a fairly detailed fashion the constitutional foundation of his complaint. He pegs the Petition on *Articles 10, 19, 20, 21, 22(1), 23(1) & (3), 25(c), 27(1), (2), 28, 29(a), (d), 157, 159(2)(a) and (e), 165(3)(b) and (d), 258* and *259* of the Constitution.

26. In Part C, the Petitioner describes the manner in which his rights under Articles 27, 47 and 50 of the Constitution were allegedly infringed upon by the Respondents. He also describes how the Respondents are in contravention of Article 157(11) of the Constitution.

27. Given the manner in which the Petition is drafted, this Court is satisfied that the Petition is in line with, and passes the threshold of reasonable precision, as discussed above. Further, the Petition is in consonance with Rule 10 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (commonly referred to as '***the Mutunga Rules'***).

28. In the end, the first issue is answered in the affirmative.

(ii) A general discussion on general prosecutorial powers, Section 193A of the Criminal Procedure Code and abuse of Court process:

29. I recently discussed this issue in Nairobi High Court Constitutional Petition No. E033 of 2021 ***Maura Muigana vs. Stellan Consult Limited & 2 Others*** (unreported) and also in Nairobi High Court Constitutional Petition No. E216 of 2020 ***Reuben Mwangi v Director of Public Prosecutions & 2 others; UAP Insurance & another (Interested Parties)*** [2021] eKLR.

30. As part of the introduction of the subject in ***Maura Muigana vs. Stellan Consult Limited & 2 Others*** case (supra), I acknowledged the many writings by legal scholars and decisions by Courts and appreciated that whereas it would have been desirable to come up with all the marvellous work on the issue in a '*one-stop shop'*, that was a tall order given the time constraints and the need for expeditious disposal of cases. I, however, rendered a concise discussion on the subject.

31. I traced the legal basis of the exercise of prosecutorial powers in Kenya to the Constitution and the law. **Article 157** of the Constitution establishes the Office of the Director of Public Prosecutions as under: -

1) There is established the office of Director of Public Prosecutions.

2) The Director of Public Prosecutions shall be nominated and, with the approval of the National Assembly, appointed by the President.

3) The qualifications for appointment as Director of Public Prosecutions are the same as for the appointment as a judge of the High Court.

4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

5) The Director of Public Prosecutions shall hold office for a term of eight years and shall not be eligible for re-appointment.

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

a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

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

7) If the discontinuance of any proceedings under clause (6) (c) takes place after the close of the prosecution's case, the defendant shall be acquitted.

8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.

9) 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.

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

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

12) Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions.

32. There is, as well, the **Office of Director of Public Prosecutions Act** No. 2 of 2013 (hereinafter referred to as '**the ODPP Act'**). It is an Act of Parliament aimed at giving effect to Articles 157 and 158 of the Constitution and other relevant Articles of the Constitution and for connected purposes. The ODPP Act provides in Section 4 the guiding principles in prosecution of cases as follows:

(4) In fulfilling its mandate, the Office shall be guided by the Constitution and the following fundamental principles—

(a) the diversity of the people of Kenya;

(b) impartiality and gender equity;

(c) the rules of natural justice;

(d) promotion of public confidence in the integrity of the Office;

(e) the need to discharge the functions of the Office on behalf of the people of Kenya;

(f) the need to serve the cause of justice, prevent abuse of the legal process and public interest;

(g) protection of the sovereignty of the people;

(h) secure the observance of democratic values and principles; and

(i) promotion of constitutionalism.

33. The ODPP Act, among other statutes, variously provide for the manner in which the DPP ought to discharge its mandate. Suffice to say, the exercise of prosecutorial powers by the DPP has been subjected to legal scrutiny and appropriate principles and guidelines developed.

34. Recently, the Supreme Court sufficiently rendered itself regarding termination of criminal proceedings on the basis of the dispute being civil in nature and also on account of inordinate delay in instituting an intended prosecution. That was in Petition No. 38 of 2019 ***Cyrus Shakhalanga Khwa Jirongo v Soy Developers Ltd & 9 others*** [2021] eKLR.

35. On whether the proceedings were more of a criminal or civil nature and on Section 193A of the Criminal Procedure Code, the Apex Court rendered the following discussion: -

> *[73] The above question is pertinent and must be addressed as a corollary to the issues we have determined above. In that context, the Appellant claims that he purchased lawfully all shares in the 1st Respondent's company and eventually became a director and shareholder. The 2nd and 3rd Respondents on the other hand maintain that there has never been any change of the directorship or shareholding of the 1st Respondent, claiming instead that they have always been its sole directors and shareholders. It is evident therefore that the main issue in contention involves the company registration forms of the 1st Respondent company as well as the alleged change of its ownership.*
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> *[74] The question whether a complainant can pursue both civil and criminal proceedings at the same time is not a new one in our realm. In the present case, it is admitted that the 2nd and 3rd Respondents have instituted* Civil Suit No.132 of 2015 *at the ELC and one of the claims made therein is that title documents for the suit property have been lost.*
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> *[75] The Appellant has however argued that the 2nd and 3rd Respondents then instituted his prosecution on alleged fraud charges and unlawful use of the title documents to obtain credit whilst also claiming that the same documents had been lost thus pointing to malice in his prosecution. What is the law in such a situation?*
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> *[76] The Court of Appeal persuasively stated in the case of* **Commissioner of Police & the Director of Criminal Investigation Department & another v Kenya Commercial Bank & 4 others** *[2013] eKLR that:*
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> *Clearly, the company and the guarantor through their directors were employing criminal process to assist them in resolving their civil dispute. While the law (Section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that that power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of the administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court. This is a case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations. We have no doubt in our minds that the belated involvement of the police in this purely civil dispute is an abuse of their power. The police should direct their energies and resources to prevention of crime which we all know is rampant in this country and is about to get out of control.*
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> *[77] We respectfully agree and adopt this position in this case but must add that where it is obvious to a Court, as it is to us and was to the learned Judge of the High Court, that a prosecution is being mounted to aid proof of matters before a civil Court or where the hand of a suspect is being forced by the sword of criminal proceedings to compromise pending civil proceedings, then Section 193A of the Criminal Procedure Code cannot be invoked to aid that unlawful course of action.* ***Criminal proceedings, whether accompanied by civil proceedings or not, cannot and should never be used in the manner that the 2nd and 3rd Respondents have done. It is indeed advisable for parties to pursue civil proceedings initially and with firm findings by the civil Court on any alleged fraud, proceed to institute criminal proceedings to bring any culprit to book. In addition, we shall, later in this Judgment, express ourselves on the criteria to be used by the High Court before terminating any criminal prosecution.***
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> *[78]* ***Having so said, we have already expressed ourselves on the right to fair trial and we must now make a finding that, in the unique circumstances of the present case, the institution of civil proceedings, simultaneously with criminal proceedings, claiming on one hand that title documents had been lost, while in another, claiming that they were in the possession of the Appellant and his banks or a third party, ASL Ltd, the 10th Respondent, is indeed an expression of mischief and dishonesty. This or another Court should never countenance such conduct for it brings the entire criminal justice into disrepute***.

36. On whether the High Court exceeded its jurisdiction in interfering with the prosecutorial mandate of the DPP contrary to the Constitution, the Supreme Court stated as follows: -

> *[79] The High Court in its finding, prohibited the Respondents from proceeding with any criminal proceedings against the Appellant in relation to the suit property or any subject matter and transaction connected to the suit property. The Court of Appeal reversed this judgment by holding that the High Court had interfered with the discretion given to the Director of Public Prosecutions (DPP) to initiate and conduct prosecution. Essentially, the Court of Appeal found that the High Court went against public interest in preventing investigation and prosecution of allegations relating to fraudulent transfer and acquisition of the suit property and that the learned Judge interfered with the prosecutorial mandate of the DPP to decide on whether to charge or not to charge an individual.*
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> *[80] The 5th, 6th and 7th Respondents on their part, maintain the position that the decision to commence investigations against the Appellant was consistent with the provisions of Article 157 of the Constitution and Section 6 of the Office of Director of Public*

Prosecutions Act. They also submitted that the decision to institute criminal proceedings by the DPP is discretionary and that such exercise of power is not subject to the direction or control by any authority as provided for under Article 157(10) of the Constitution.

[81] Under Article 157(6) of the Constitution, the DPP is mandated to institute and undertake criminal proceedings against any person before any Court. Article 157(6) provides as follows:

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

(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed."

Article 157(4) provides that:

(4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

However, Article 157(11) stipulates that:

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

[82] Although the DPP is thus not bound by any directions, control or recommendations made by any institution or body, being an independent public office, where it is shown that the expectations of Article 157(11) have not been met, then the High Court under Article 165(3)(d)(ii) can properly interrogate any question arising therefrom and make appropriate orders.

[83] In that regard, the Court of Appeal in the case of ***Commissioner of Police & Another v Kenya Commercial Bank Ltd & 4 Others*** *[2013] eKLR persuasively found that the High Court can stop a process that may lead to abuse of power and held that: -*

Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, it is too fairly well settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why courts in this country have consistently held that it would be an unfortunate result for courts to interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The courts must wait for the investigations to be complete and the suspect charged.

By the same token and in terms of Article 157 (11) of the Constitution, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution. See Githunguri v Republic [1985] LLR 3090.

It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See Ndarua v. R. [2002] 1EA 205. See also Kuria & 3 Others V. Attorney General [2002] 2KLR. (emphasis supplied)

[84] Furthermore, the Supreme Court of India in **R.P. Kapur v State of Punjab** *AIR 1960 SC 866 laid down guidelines to be considered by the Court on when the High Court may review prosecutorial powers. They are as follows:*

(I) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice; or

(II) Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction; or

(III) Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; or

(IV) Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.

[85] We are persuaded that this is a good guide in the interrogation of alleged abuse of prosecutorial powers and read alongside Article 157(11) of the Constitution, we have sufficiently expressed ourselves elsewhere in this Judgment to show that the unconstitutional continuance of the criminal proceedings against the Appellant amounts to abuse of Court process and that, balancing the scales of justice, the weight would favor the Appellant and not the Respondents.

37. On public interest, the Court expressed itself as follows: -

[86] On public interest, what is in issue is a dispute arising from a commercial transaction 24 years ago where the complainants have not denied receiving part payment of the purchase price. There is hardly any public interest element in such a transaction save the wide interest of the law to apprehend criminals.

[87] The learned Judge of the High Court, in our view, was well within his mandate under Article 165(3)(d)(ii) as read with Article 157(11) of the Constitution to curtail the Appellant's prosecution and the DPP'S powers have not in any way been interfered with, outside the constitutional mandate conferred on the High Court.

38. And, on whether inordinate delay in instituting an intended prosecution would infringe the rights and freedoms of the party sought to be prosecuted under Articles 19, 20, 27 and 50 of the Constitution, the Apex Court had the following to say: -

[56] The question of delay with respect to the lodging of criminal prosecutions has been addressed by our Courts in several matters. The leading persuasive decisions on the subject are the High Court cases of **Githunguri v Republic** *(1986) KLR 1 and* **Republic v Attorney General & Another ex Parte Ng'eny** *(2001) KLR 612 which both Superior Courts relied on.*

[57] In ***Githunguri v Republic*** *(supra), the Court stated as follows:*

In this instance the delay is said to have been nine years, six years and four years. The Court has not been told why these offences have been unearthed after they remained buried for so long. What caused turning up the soil! It is too long, too much of delay. The Attorney-General is not bound to tell the Court the reason but it would have made us knowledgeable if told.

We are of the opinion that to charge the applicant four years after it was decided by the Attorney-General of the day not to prosecute, and thereafter also by neither of the two successors in office, it not being claimed that any fresh evidence has become available thereafter, it can in no way be said that the hearing of the case by the Court will be within a reasonable time as required by section 77(1). The delay is so inordinate as to make the non-action for four years inexcusable in particular because this was not a case of no significance, and the file of the case must always have been available in the Chambers of the Attorney-General. It was a case which had received notable publicity, and the matter was considered important enough to be raised in the National Assembly.

We are of the opinion that two indefeasible reasons make it imperative that this application must succeed. First as a consequence of what has transpired and also being led to believe that there would be no prosecution the applicant may well have destroyed or lost the evidence in his favour. Secondly, in the absence of any fresh evidence, the right to change the decision to prosecute has been lost in this case, the applicant having been publicly informed that he will not be prosecuted and property restored to him. It is for these reasons that the applicant will not receive a square deal as explained and envisaged in section 77(1) of the Constitution. This prosecution will therefore be an abuse of the process of the Court, oppressive and vexatious.

[58] Similarly in the case of ***Republic v Attorney General & Another Ex Parte Ngeny*** (2001) KLR 612, the Court addressed this question and stated that:

In the case before us, the delay was nine years. No attempt has been made to explain it. The subject matter of the charges against the Applicant is a colossal sum involving an institution that was strategic to the Government when the losses were occasioned; so why did the State not mount a prosecution immediately? Nine years is too long a delay. We cannot think anything else but that the criminal prosecution against the Applicant was motivated by some ulterior motive. It is not a fair prosecution. It was mounted quite late: Nine years after the Applicant had vacated the relevant public office alleged to have been abused. We were told, and this was not challenged, that having been out of office for that long, he does not have in his possession material to prepare his defence. This we believe. We are of the view that to allow delayed prosecutions is akin to putting a noose around the necks of individuals and then saying to them: 'Go, you may go. We shall decide your fate as and when we wish.' This is to keep the individual in fear. This does not accord with constitutional guarantees of individual rights and freedoms and is nothing more than an abuse of the process of the Court.

[59] The argument put forth by the Appellant is that his right to be tried within a reasonable period of time has been infringed in view of the fact that it has taken 24 years for him to be prosecuted. The Appellant cites the various hurdles to the impending trial that will result in him not having a fair trial; the missing Land Registry file as well as the loss of vital documentary evidence.

[62] *In addressing this issue, we note that in the case of* **George Joshua Okungu & Another v The Chief Magistrate's Court Anti-Corruption Court at Nairobi & Another** *(*supra*), the High Court persuasively held that: -*

.....it is not mere delay in preferring the charges that would warrant the halting of the criminal proceedings. Rather, it is the effect of the delay that determines whether or not the proceedings are to be halted. In this case, there is no allegation made by the Petitioners to the effect that the delay has adversely affected their ability to defend themselves. In other words, the Petitioners have to show that the delay has contravened their legitimate expectations to fair trial.

[65] This Court in the case of **Hon. Christopher Odhiambo Karan v David Ouma Ocheing & 2 Others** *[2018] SC Petition No. 36 of 2019 had an opportunity to discuss the significance, distinctive meaning, scope and implication of the right to a fair trial and stated that* **"It is therefore settled law that all persons who come to any Court are entitled to a fair hearing whether the matter instituted is criminal or civil in nature. In this context, the drafters of the Constitution 2010 in Article 25(c) placed a bar on limitation of the right to a fair trial, in civil and criminal matters."**

[66] It is in the above regard trite that there is no limitation of time to institute and prosecute criminal offences but as stated in **Githunguri,** *where the delay has the effect of denying a suspect the legal tools to mount a credible defence, then the High Court is properly mandated by the Constitution to step in and stop the intended prosecution.*

[67] ***Similarly, where the delay was occasioned by deliberate inaction on the part of a complainant with the intent of getting at a suspect to force the suspect's hand in say, a different transaction between them at a later date or even use the complaint to force settlement in ongoing civil proceedings, then, again the High Court, as a Court of first instance, must step in because the intended prosecution is tainted with malice and not the otherwise unassailable intent to furnish criminal wrong doing, promptly.***

[68] Furthermore, both Articles 49(1)(a)(ii) and 50(1) and (2)(e) of the Constitution expect that in resolution of disputes, fairness must necessarily include the promptness of action and the inhibition against unreasonable delay. What is reasonable, it is now settled, includes both the reason for delay and the period of delay.

[69] *In the present case, all the evidence before us points to the fact that the documentation necessary to prove the alleged fraud may no longer be available and we agree with the learned Judge of the High Court that, where both parties have admitted that the same issues are also pending resolution in another Court, and that the issue of lost documentation remains unresolved, it would be most unfair to subject the Appellant to a criminal trial, 24 years after the impugned transaction.*

[70] *What of the fact that it is admitted that the 2nd and 3rd Respondents indeed received part purchase price for purchase of the suit property? Why would it take them 24 years to decide that they were now entitled to the balance thereof as well as return of the title documents? Our position is that such a delay and use of the criminal process to force the hand of the Appellant fatally taints the fairness of the resultant prosecution.*

[71] Lastly, in instituting the prosecution, the ODPP, without in any way taking away the constitutional mandate to prosecute crimes, ought always to act judiciously and not act in perpetuation of an unfair and malicious criminal complaint. In doing so, that office must always be guided by the principle that the right to a fair trial cannot be limited thus raising the bar in the determination of the question whether to prosecute or not.

[72] *It is therefore our finding, and in agreement with the learned Judge of the High Court that, the prosecution of the Appellant is in breach of his right to a fair trial as protected by Article 25(c) as read with Article 50 of the Constitution and we have stated why.*

39. This Court also discussed the various principles and guidelines in ***Reuben Mwangi v Director of Public Prosecutions & 2 others; UAP Insurance & another (Interested Parties)*** case (supra) as follows: -

91. Regarding the exercise of prosecutorial discretion by the Director of Public Prosecutions, the Court of Appeal in ***Diamond Hasham Lalji & another v Attorney General & 4 others [2018] eKLR*** *stated as follows: -*

[41] Thus, the exercise of prosecutorial discretion enjoys some measure of judicial deference and as numerous authorities establish, the Courts will interfere with the exercise of discretion sparingly and in the exceptional and clearest of cases. However, as the Privy Council said in Mohit v Director of Public Prosecutions of Mauritius [2006] 5LRC 234*:*

these factors necessarily mean that the threshold of a successful challenge is a high one. It is however one thing to conclude that the courts must be sparing in their grant of relief to seek to challenge the DPP's decision to prosecute or to discontinue a prosecution, and quite another to hold that such decisions are immune from any such review at all…

In ***Regina v. Director of Public Prosecutions ex-parte Manning and Another*** *[2001] QB 330, the English High Court said partly at para 23* ***page 344:***

At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the tests were too exacting, an effective remedy could be denied.

Although the standard of review is exceptionally high, the court's discretion should not be used to stultify the constitutional right of citizens to question the lawfulness of the decisions of DPP.

[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.

92. The High Court in ***Bernard Mwikya Mulinge v Director of Public Prosecutions & 3 others [2019] eKLR*** *had the following to say about the role of the Director of Public Prosecutions in prosecuting criminal offences: -*

25. It is therefore clear that the current prosecutorial regime does not grant to the DPP a carte blanche to run amok in the

exercise of his prosecutorial powers. Where it is alleged that the standards set out in the Constitution and in the aforesaid Act have not been adhered to, this Court cannot shirk its constitutional mandate to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, the Constitution itself. I associate myself with the sentiments expressed in Nakusa vs. Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565 to the effect that:

the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system…In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of ***Domnic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003*** *is that interpretation of the Constitution has to be progressive and in the words of Prof M V Plyee in his book,* ***Constitution of the World****: "The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time……. In our role as "sentinels" of fundamental rights and freedoms of the citizen which are founded on laisez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent "sentinels" of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right.*

93. Long before the advent of the Constitution of Kenya, 2010 the High Court in ***R vs. Attorney General exp Kipngeno arap Ngeny Civil Application No. 406 of 2001*** *expressed itself as follows: -*

…. *Although the state's interest and indeed the constitutional and statutory powers to prosecute is recognized, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognized lawful parameters...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious...A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds….*

94. It has also been well and rightly argued that, on the basis of public interest and upholding the rule of law, Courts ought to exercise restraint and accord state organs, state officers and public officers some latitude to discharge their constitutional mandates. The Court of Appeal in ***Diamond Hasham Lalji & another v Attorney General & 4 others*** *(supra) stated as follows: -*

The elements of public interest and the weight to be given to each element or aspect depends on the facts of each case and in some cases, State interest may outweigh societal interests. In the context of the interest of the administration of justice, it is in the public interest, inter alia, that persons reasonably 'suspected of committing a crime are prosecuted and convicted, punished in accordance with the law, that such a person is accorded a fair hearing and that court processes are used fairly by state and citizens.

95. The Court of Appeal in ***Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others [2018] eKLR*** *referred to the Supreme Court of India in State of Maharashtra & Others v. Arun Gulab & Others, Criminal Appeal No. 590 of 2007****,*** *where the Court stated:*

The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction to the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor can it soft-pedal the course of justice at a crucial stage of investigation/proceedings.

The provisions of Articles 226, 227 of the Constitution of India and Section 482 of the Code of Criminal Procedure, 1973 (hereinafter called as "Cr.P.C.") are a device to advance justice and not to frustrate it. The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of power of the Court, but the more the power, the more due care and caution is to be exercised in invoking these powers.

96. The High Court in ***Bernard Mwikya Mulinge case*** *(supra) expressed itself as follows: -*

14. As has been held time and time again the Court ought not to usurp the constitutional mandate of the Director of Public Prosecutions (DPP) to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under

Article 157 of the Constitution. The mere fact therefore that the intended or ongoing criminal proceedings are in all likelihood bound to fail, is not ipso facto a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. An applicant who alleges that he or she has a good defence in the criminal process ought to ventilate that defence before the trial court and ought not to invoke the same to seek the halting of criminal proceedings undertaken bona fides since judicial review court is not the correct forum where the defences available in a criminal case ought to be minutely examined and a determination made thereon.….

97. In ***Meixner & Another vs. Attorney General [2005] 2 KLR 189*** *the Court stated as follows: -*

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 is 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.…

98. ***Mumbi Ngugi, J*** *(as she then was), in* ***Kipoki Oreu Tasur vs. Inspector General of Police & 5 Others (2014) eKLR*** *stated that:*

The criminal justice system is a critical pillar of our society. It is underpinned by the Constitution, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior Courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated…

99. In ***Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR*** *the Court held that:*

… *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...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....*

100. Recently, the High Court in ***Henry Aming'a Nyabere v Director of Public Prosecutions & 2 others; Sarah Joslyn & another (Interested Parties) [2021] eKLR*** *dealt with several instances where a Court may intervene and stop a prosecution. They include where: -*

(i) There is no ostensible complainant in respect to the complaint;

(ii) The prosecution fails to avail witness statements and exhibits without any justification;

(iii) There is selective charging of suspects; or

(iv) An Advocate is unfairly targeted for rendering professional services in a matter.

40. And, in ***Maura Muigana vs. Stellan Consult Limited & 2 Others*** case (supra), I further discussed the subject as follows: -

58. I have also come across several other decisions on the subject. I will refer to only some few. In ***Anthony Murimi Waigwe v Attorney General & 4 others*** *[2020) eKLR, the Court held that the Prosecutor has a duty to analyze the case before prosecuting it and it should let free those whom there is no prosecutable case against them. It expressed itself thus: -*

48. It is no doubt dear that under Article 157 (1) of the Constitution the ODPP is enjoined in exercising the powers conferred by the aforesaid Article to have regard to public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process. Interest of the administration of justice dictates that only those whom the DPP believes have a prosecutable case against them be arraigned in Court and those who DPP believes have no prosecutable case against them be let free. This is why Article 159 (2) of the Constitution is crying loudly every day, every hour that "justice shall be done to all, irrespective of status". Justice demands that it should not be one way and for some of us but for all of us irrespective of who one is or one has.

49. The Petitioner in support of interest of administration of justice dictates referred to the National Prosecution policy, revised in 2015 at page 5 where it provides that: "Public Prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction, In other words Public Prosecutors should ask themselves• would an impartial tribunal convict on the basis of the evidence available?

50. In the case of Republic v. Director of Public Prosecution & Another ex parte Kamani, Nairobi Judicial Review Application No. 78 of 2015 while quoting the case of R vs. Attorney General ex Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001; the Court held;

A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper … there must be in existence material evidence on which the prosecution can say with certainty that it has 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 inactionable.

51. In a democratic society like ours, no one should be charged without the authorities conducting proper investigation. The prosecutor on the other hand is under duty to consider both incriminating and exculpating evidence, In the case of Republic v. Director of Public Prosecutions & Another ex parte Kaman/ Nairobi Judicial Review Application Nog 78 of2015 (supra), the court expressed itself as follows:

this court appreciates that the court should not simply fold its arms and stare at the squabbling litigants/disputants parade themselves before the criminal court in order to show-case dead cases. The seat of •justice is a hallowed lace and ought to be reserved for those mattes in which the protagonists have a conviction stand a chance of seeing the light of the day. In my view the prosecution ought not to institute criminal cases with a view of obtaining an acquittal. It is against the public interest as encapsulated in section 4 of the Office of the Director of Public Prosecutions Act to stage-manage criminal proceedings in a manner intended to obtain an acquittal. A criminal trial is neither a show-biz nor a catwalk.

59. In ***Meme -vs- Republic & Another*** *(2004) eKLR the Court of Appeal discussed abuse of the Court process thus: -*

An abuse of the court's process would, in general, arise where the court is being used for improper purpose, as a means of vexation and oppression, or for ulterior purposes, that is to say, court process is being misused.

60. In quashing a criminal prosecution on the basis of abuse of Court process, the Court in ***Peter George Anthony Costa v. Attorney General & Another*** *Nairobi Petition No. 83/2010 expressed itself thus:-*

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

61. Still on abuse of Court process in using Court to settle personal scores, the Court in ***Rosemary Wanja Mwagiru & 2 Others V Attorney General & 2 Others***, ***Mumbi J*** *(as she then was) stated that: -*

The process of the court must not be misused or otherwise used as an avenue to settle personal scores. The criminal process should not be used to harass or oppress any person through the institution of criminal proceedings against him or her. Should the court be satisfied that the criminal proceedings being challenged before it have been instituted for a purpose other than the genuine enforcement of law and order, then the court ought to step in and stop such maneuvers in their tracks and prevent the process of the court being used to unfairly wield state power over one party to a dispute.

62. On the need for a Prosecutor to act within the law, the Court in ***Thuita Mwangi & 2 Others vs. Ethics and Anti-Corruption Commission & 3 Others*** *stated that: -*

The discretionary power vested in the Director of Public Prosecution is not an open cheque and such discretion must be exercised within the four corners of the Constitution. It must be exercised reasonably within the law and to promote the policies and objects of the law which are set out in Section 4 of the Office of Director of Public Prosecution Act. These objects are as follows: the diversity of the people of Kenya; impartiality and gender equity; the rules of natural justice, promotion of public confidence in the integrity of the office; the need to discharge the functions of the office on behalf of the people of Kenya, the need to serve the cause of justice; prevent abuse of legal process and public interest, protection of the sovereignty of the people; secure the observance of democratic values and principles and promotion of constitutionalism. The court may intervene where it is shown that the impugned criminal proceedings are instituted for other means other than the honest enforcement of criminal law, or are otherwise an abuse of the court process.

63. In ***Republic v. Commissioner of Co-operatives ex parte Kirinyaga Tea Growers Cooperative Savings & Credit Society Ltd*** *CA 39/97 119991 EALR 245 the Court of Appeal warned against the improper use of power in the following words: -*

...it is axiomatic that statutory powers can only be exercised validly if they are exercised reasonably. No statute ever allowed anyone on whom it confers power to exercise such power arbitrarily, capriciously or in bad faith….

64. The above position was amplified in Nairobi High Court Miscellaneous Application No. 1769 of 2003 ***Republic vs. Ministry of Planning and Another ex-parte Professor Mwangi Kaimenyi****, where it was held:*

So, where a body uses its power in a manifestly unreasonable manner, acted in bad faith, refuse to take relevant factors into account in reaching its decision or based its decision on irrelevant factors the court would intervene that on the ground that the body has in each case abused its power, The reason why the court has to intervene is because there is a presumption that where parliament gave a body statutory power to act, it could be implied that Parliament intended it to act in a particular manner.

65. The need for Courts to act with deference and accord constitutional and legal entities to discharge their mandates was revisited in ***Paul Ng'ang'a Nyaga vs Attorney General & 3 Others*** *(2013) eKLR****,*** *where it was held that: -*

…. *this Court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they*

have acted in contravention of the Constitution.

66. I believe I have said enough on the general exercise of prosecutorial powers and for the purposes of this case. I will now look at what Legal Scholars and Courts have rendered on concurrent civil and criminal proceedings.

41. There was also a discussion on **Section 193A** of the Criminal Procedure Code, Cap. 75 of the Laws of Kenya. That was in ***Maura Muigana vs. Stellan Consult Limited & 2 Others*** case (supra) where I expressed myself thus: -

67. In Kenya, the aspect of concurrent civil and criminal proceedings is provided for in Section 193A of the CPC.

68. First, is a look at the said provision, which states as follows: -

Concurrent criminal and civil proceedings:

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

*69. In an Article titled '**Unjust Justice in Parallel Proceedings: Preventing Circumvention of Criminal Discovery Rules,** the author, Randy S. Eckers, defines concurrent proceedings as independent, simultaneous investigations and prosecutions involving substantially the same matter and parties.*

70. More often than not, the currency of the twin proceedings is challenged before Courts. In the above article, the author reiterates that a determination to either stay or allow the continuation of parallel proceedings depend on existence of certain requirements. He observes: -

The Courts only block parallel proceedings in special circumstances. A defendant may move for a stay to block parallel proceedings, which will be granted only if the defendant can prove either that the government is acting in bad faith and using malicious tactics to circumvent the strict criminal discovery rules, or that there is a due process violation….

Even if a defendant meets one of these requirements, a stay is not guaranteed. The Court takes many other factors into account in deciding whether a stay is appropriate in a specific situation. These factors include the commonality of the transaction or issues, the timing of the motion, judicial efficiency, the public interest, and whether or not the movant is intentionally creating an impediment." Absent special circumstances, both cases will probably proceed.

*71. It is, hence, deducible that the quest to stay concurrent proceedings must first be premised on the fact that there is in existence two or more active cases of civil and criminal nature in respect of the same entity or person. While discussing the general principles applicable in such scenarios, the Supreme Court of Appeal of South Africa in **Law Society of the Cape of Good Hope v MW Randell** (341/2012) [2013] ZASCA 36 (28 March 2013) stated as follows: -*

***…**it applies where there are both criminal and civil proceedings pending which are based on the same facts. The usual practice is to stay the civil proceedings until the criminal proceedings have been adjudicated upon, if the accused person can show that he or she might be prejudiced in the criminal proceedings should the civil proceedings be heard first….*

*72. The Learned Judges of the Supreme Court of Appeal further stated that it was not automatic for an Applicant to be awarded stay of the civil proceedings. It found support in numerous English decisions among them, **Jefferson Ltd v Bhetcha** [1979] 2 All ER 1108 (CA) and **R v BBC, x p Lavelle [**1983] 1 All ER 241 (QBD) and observed as follows;*

[24]. In dismissing the application, the Court emphasized that there was no established principle of law that if criminal proceedings were pending against a defendant in respect of the same subject matter, he or she should be excused from taking any further steps in the civil proceedings which might have the result of disclosing what his defence or is likely to be, in the criminal proceedings.

[25]. Jefferson was followed in R v BBC, x p Lavelle [1983] 1 All ER 241 (QBD) at 255 where Woolf J stressed that there should be no automatic intervention by the court. The learned judge pointed out that while the court must have jurisdiction to intervene to prevent serious injustice occurring, it will only do so in very clear cases in which the applicant can show that there is a real danger and not merely notional danger that there would be a miscarriage of justice in criminal proceedings if the court did not intervene.

*73. Closer home, our Courts have also had the occasion to address the issue of parallel proceedings. Before the Court of Appeal in Nairobi Civil Appeal No. 181 of 2013, **Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others** [2018] eKLR was the contention whether the High Court was right in granting orders restraining the Inspector General of Police, as well as the Director of Criminal Investigations from commencing, sustaining or proceeding with any investigations against Investments & Mortgages Bank Limited in connection with an alleged criminal conduct of its officers on account of a charge instrument whose execution was the subject of contention in a pending civil suit.*

*74. In determining the issue, the Learned Judges of Appeal acknowledged that the Office of the Director of Public Prosecutions is an independent constitutional office. However, that office is subject to the control of the Court in appropriate instances where illegality, irrationality and procedural impropriety is demonstrated. The Court made reference to the decision of the Supreme Court of India in Criminal Appeal No. 590 Of 2007, **State of Maharashtra & Others -vs- Arun Gulab & Others** where the power of the*

Court in checking excesses of the prosecutorial agency was discussed as follows: -

The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction to the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor can it soft-pedal the course of justice at a crucial stage of investigation/proceedings.

The provisions of Articles 226, 227 of the Constitution of India and Section 482 of the Code of Criminal Procedure, 1973 (hereinafter called as "Cr.P.C.") are a device to advance justice and not to frustrate it. The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of power of the Court, but the more the power, the more due care and caution is to be exercised in invoking these powers.

75. The Appellate Court further discussed limitations Courts ought to impose on ***Section 193A*** *of the* ***CPC,*** *the provision that allows parallel prosecution of civil and criminal cases and remarked as follows: -*

[47]. In terms of Section 193A of the Criminal Procedure Code, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings does not bar the commencement of criminal proceedings. ***However, where the criminal proceedings are oppressive, vexatious and an abuse of the court process or amounts to a breach of fundamental rights and freedoms, the High Court has the powers to intervene****. But this power has to be exercised very sparingly as it is in the public interest that crime is detected and suspects brought to justice.*

76. The Learned Judges cited with approval its earlier decision in ***Commissioner of Police & the Director of Criminal Investigation Department & another -vs- Kenya Commercial Bank Ltd & 4 others*** *[2013] eKLR, where the role of the Court in ensuring prosecutorial powers are exercised while having regard to public interest, the interests of administration of justice and to avoid abuse of legal process was discussed as under:*

. . .*in terms of Article 157(11) of the Constitution, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution.*

77. Further, the Court of Appeal in ***Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and*** *Others Nairobi Civil Appeal No. 56 of 2012 [2013] eKLR held that:*

While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. ***It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court.*** *This is a case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations.*

78.The High Court in ***Kuria & 3 Others vs. AG*** *(2002) 2 KLR appreciated the validity of existence of concurrent civil and criminal proceedings when it made the following findings: -*

.... The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution...A prerogative order should only be granted where there is an abuse of the process of the law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution... ***It is not enough to state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the Applicant are under serious threat of being undermined by the criminal prosecution.*** *In the absence of concrete grounds.... it is not mechanical enough that the existence of a civil suit precluded the institution of criminal proceedings based on the same set of facts. The effect of criminal prosecution on an accused person is adverse but so also are their purpose in the society, which are immense... an order of prohibition cannot also be given without any evidence that there is 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. (emphasis added).*

79. In the current Petition, the Petitioner has been charged in the criminal case, but there are no civil proceedings in place. On that basis, the Petitioner contends that the criminal case was instituted to settle a civil dispute hence it is an abuse of the Court process. That now takes me to the next sub-issue.

42. In the same case, ***Maura Muigana vs. Stellan Consult Limited & 2 Others*** case (supra), I also dealt with the issue of *abuse of Court*

process. This is what I stated: -

80. The subject of abuse of Court process was discussed by the Court of Appeal in ***Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others*** *Civil Appeal No. 25 of 2002 [2009] KLR 229, as follows: -*

The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it...The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice. Examples of the abuse of the judicial process are: -

i. Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.

ii. Instituting different actions between the same parties simultaneously in different courts even though on different grounds.

iii. Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.

iv. Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness.

81. The Court of Appeal went on and stated as follows: -

In our view, the often quoted principle that a party should have his day in court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine. Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice…We approve and adopt the principles so ably expressed by both Lord Roskil and Lord Templeman in the case of ASHMORE v CORP OF LLOYDS [1992] 2 All E.R 486 at page 488 where Lord Roskil states:

It is the trial judge who has control of the proceedings. It is part of his duty to identify crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judges' time as is necessary for the proper determination of the relevant issues.

Unless a trial is on discernable issues it would be farcical to waste judicial time on it.

82. In Nairobi ***Civil Appeal No. 70 of 2017 Prafulchandra Bharmal v Chief Magistrate Kibera & 3 others*** *[2020] eKLR, the Court of Appeal further rendered itself as follows: -*

20. In answering whether there was abuse of power, the Judge too discussed at length the safeguards that exist under criminal law in regard to an accused person to ensure a fair trial which is also a guaranteed right enshrined in the Constitution. He also appreciated that ***Section 193 A*** *of the* ***Criminal Procedure Code****, allows concurrent litigation of civil and criminal proceedings arising from the same issues but cautioned that the prerogative of the police to investigate crime must be exercised according to the laws of the land and in good faith. What we understand the Judge to be saying in this regard is that the mere fact that leave was granted to the appellant to institute private criminal prosecution, this ipso facto did not mean that the 2nd respondent would not get a fair trial because the principles of a fair trial are well ingrained in law and practice. Having said that, the Judge went further to infer the unique circumstances prevailing in this matter, and posited that, if the private prosecution were to proceed, it would amount to an abuse of process. He pointed out and rightly so in our view, that if both the civil and the private criminal prosecution cases which were all centred on the* ***Bakarania*** *agreement were to proceed for hearing in both courts, there was a likelihood of the two processes giving rise to two different outcomes as there were also two sets of evidence in form of document examiners' reports. To us this was not a merit determination but a commentary on the process. We do not also see any contradictions as the Judge was restating the well-established principles of a fair trial.*

21. Was there abuse of process to warrant an order prohibiting the criminal charge? In ***Jago v District Court (NSW)*** ***168 LLR 23, 87 ALR 57)*** *Brennan, J. said in part at p. 47-48: -*

An abuse of process occurs when the process of court is put in motion for purposes which in the eye of the law, it is not intended to serve. The purpose of criminal proceedings, generally speaking, is to hear and determine finally whether the accused has engaged in a conduct which amounts to an offence and on that account is deserving of punishment. When criminal process is used only for that purpose and is capable of serving that purpose, there is no abuse of process.

We are aware that the categories of abuse of process are not limited. Whether or not an abuse of power of criminal process has occurred ultimately depends on the circumstances of each case. One of the important factors at common law which underlie a prosecutorial decision is whether the available evidence discloses a realistic prospect of a conviction. In ***Walton v Gardener*** ***[1993] 177 CLR 378****, the High Court of Australia said at para 23 –*

The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all categories of cases in which the process and procedures of the court which exist to administer justice with fairness and impartibility may be converted into instruments of injustice and unfairness. Thus, it has long been established that regardless of the person responsible for their institution and maintenance, proceedings will constitute an abuse of process if they can be seen clearly to be foredoomed to fail…, if that court is in all circumstances of the particular case a clearly inappropriate forum to entertain them…, if, notwithstanding that circumstances do not give rise to an estoppel their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate a case which has already been disposed of by earlier proceedings.

21. It is not lost to us that both the appellant and 2nd respondents are siblings; they have been involved in a dispute over the suit property for a long time; the appellant is the one who filed a civil suit, a defence was filed and when the civil suit was still pending, he instituted a private criminal prosecution. At the backdrop of all this, even the appellant's complaint against the 2nd respondent was subjected to police investigations and the DPP directed the police file be closed. ***We are on our part persuaded that in the circumstances of this matter, an order of prohibition was justified to protect the court process from being used to settle a civil dispute which was pending and that allowing the criminal process was likely to embarrass the courts.*** *To us, this order was appropriate as the Judge had to navigate carefully so as not to make far reaching pronouncements that would embarrass the pending civil trial.*

83. The High Court in ***Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2*** *Others Nairobi (Milimani) HCCC No. 363 of 2009 stated as follows with respect to the Court's power to prevent abuse of its process: -*

This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. ***In the civilized legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing.*** *Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it. (emphasis added).*

84. From the foregoing, it is the case that the subject of abuse of Court process is wide and whether there is an abuse of the due process depends on the circumstances of a case.

85. As I come to the end of the second issue, I must state that I have deliberately endeavored the above somehow elaborate discussion covering the general exercise of prosecutorial powers, the concurrent civil and criminal proceedings under Section 193A of the CPC and the subject of abuse of Court process so as to lay a sound basis for consideration of the main issue in this matter which is whether the prosecution facing the Petitioner herein should be stopped since the dispute is civil in nature and the criminal case amounts to an abuse of Court process.

86. That consideration is the gist of the next issue.

43. From the foregoing, it comes to the fore that there are instances where a Court ought to exercise its discretion and stop a prosecution. Such instances, **include**, and where it is demonstrated that: -

(i) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court;

(ii) Where the quashing of the impugned proceedings would secure the ends of justice;

(iii) Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction;

(iv) Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged;

(v) Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.

(vi) The prosecution is not in public interest;

(vii) The prosecution is not in the interests of the administration of justice;

(viii) The prosecution is oppressive, vexatious and an abuse of the court process;

(ix) The prosecution amounts to a breach of rights and fundamental freedoms;

(x) The investigation and prosecution amounts to abuse of power and discretion and is aimed at achieving an ulterior or improper

motive;

(xi) The investigation and the prosecution are tainted with illegality, irrationality and procedural impropriety;

(xii) The investigation and prosecution is in gross contravention of the Constitution and the law;

44. Having said so, I will now consider the next issue.

(iii) Whether the decision to institute criminal proceedings against the Petitioner contravenes Articles 27(1) and (2), 47, 50(1), (2) a, b, c, j and k and Article 157(11) of the Constitution and whether the said decision is irrational, unreasonable, illegal, malicious and in bad faith:

45. I will begin this discussion with a brief look at the parties' cases.

The Petitioner's case:

46. The Petitioner pleaded that between May 2020 and September 2020 the Petitioner and the Interested Party had several altercations but none of which was physical. That on 30th November, 2020 the Petitioner was served with suit papers for *Milimani Miscellaneous E1295 of 2020 Everlyne Chepkorir Koech versus Julius Korir* where the said Everlyne Chepkorir Koech wanted the Petitioner to be removed from their matrimonial home pending filing of a Divorce Petition.

47. It is further pleaded that the said Milimani Miscellaneous E1295 of 2020 came up for hearing on 2nd December, 2020 and the Court agreed with the Petitioner that the Order of removing the Petitioner from the matrimonial home can only be granted after hearing of both parties. The Interested Party was dissatisfied with the directions granted by the Court and instead of appealing she informed her close confidants that she won't rest until the Petitioner is removed as a Principal Secretary or forced to step aside.

48. The Petitioner posited that on 14th December, 2020, he was summoned by the DCI Karen for interrogations on allegations that he had assaulted the said Everlyne Chepkorir Koech on 17th September, 2020. The Petitioner went to the said Karen Police Station and recorded a statement clearly stating that he never assaulted the said Everlyne Chepkorir Koech on the said date or at all.

49. It is averred that the said DCI officers informed the Petitioner that they have a CCTV footage of him assaulting Everlyne Chepkorir Koech and which the Petitioner felt that it was a fabrication and a creation of the said Everlyne Chepkorir Koech and DCI officers to embarrass him.

50. It is further averred that on 15th December, 2020 the Petitioner was informed that several bloggers had posted in various South Rift Forums suggesting that the Petitioner is a wife barterer and that the Petitioner had influenced the Police not to charge him, which information remains false.

51. He also averred that on or about the 18th December, 2020 he instructed his Advocates to contact the said Everlyne Chepkorir Koech with a view to understanding the genesis of the said allegations and a meeting was convened between the advocates of the Petitioner and those of Everlyne Chepkorir Koech. That, on 21st December, 2020 the Petitioner and Everlyne Chepkorir Koech together with their Advocates held a meeting with a view to settling all the pending matters since the trajectory the matter had taken was meant to embarrass the Petitioner.

52. The Petitioner further posited that he and the said Everlyne Chepkorir Koech have two issues and the said meeting was meant to address the following matter which would follow:

- Milimani Miscellaneous No. E295 of 2020
- Children matters
- Divorce and or reconciliation
- Division of matrimonial property

53. The Petitioner pleaded that the parties and their Advocates made several milestones culminating in a follow up meeting scheduled for 15th January 2021. However, immediately after the meeting the DCI officers called the Petitioner and informed him that they will prosecute him for assault on 5th January, 2021 if they will not have agreed on the four issues.

54. The Petitioner averred that it is clear that the DCI officers and the Respondents were out to embarrass the Petitioner and to force him to handover his assets to the said Everlyne Chepkorir Koech who had categorically stated that she will only drop the criminal charges if the Petitioner gave her half of the matrimonial assets.

55. It is pleaded that from the evidence submitted that the said Everlyne Chepkorir Koech is interested in 50% of the Petitioner's assets, then there is collusion to arm-twist the Petitioner into accepting the Interested Party's proposal.

56. The Petitioner is apprehensive that since the Respondents are fully aware that once the Petitioner takes plea it is expected that he steps

aside until the Criminal case is concluded, as such the Respondents would have assisted the said Everlyne Chepkorir Koech to achieve her dream of bringing down the Petitioner.

57. The Petitioner posited that the Petition sought the intervention of this Honorable Court to ensure that his plea taking and proposed prosecution is halted on the grounds that the prosecution is an abuse of court process and is premised on an improper exercise of the 1st Respondent's discretion as set out under Article 157 of the Constitution.

58. The Petitioner further averred that he, through his Advocates, engaged the 1st Respondent seeking review of the decision to charge him in vain. He contended that the letters to the Respondents have not elicited even an acknowledgement which is an outright infringement of the Petitioner's right to fair administrative action as provided under Article 47 of the Constitution as well as the Fair Administrative Action Act, 2015.

59. As a result of the foregoing, the Petitioner averred that his rights were severely infringed. In relation to the right to equality and freedom from discrimination pursuant to Article 27(1) and (2) of the Constitution, the Petitioner contended that the 1st Respondent is abusing its powers in criminalizing the professional work undertaken by the Petitioner for purposes extraneous to the criminal justice system.

60. In relation to the right to fair administrative action guaranteed under Article 47 of the Constitution, the Petitioner averred that he had, through his Advocates, written numerous letters to the 1st Respondent seeking an explanation for the proposed charge and requested for a review of the decision to charge him when there was no evidence linking him to the offences alleged to have been committed and in fact when there is exculpatory evidence but there has been no response or even an acknowledgement. The conduct of the 1st Respondent is, therefore, impugned as being in contravention of the right to fair administrative action.

61. On the right to right to fair hearing guaranteed under Article 50(1) and (2) (a, b, c, i, k) of the Constitution, the Petitioner contended that: -

i). The charges being brought against the Petitioner lack a proper factual basis or foundation as there is no iota of evidence linking the Petitioner to the activities giving rise to the offences;

ii). A basic requirement of a fair trial under Article 50(2)(b) of the Constitution is that precise information must be given to an accused person as to the nature of the complaint against him. The Courts have held that the framing of the charge or information particularized in the offence against the accused person "is very crucial in proving the elements beyond reasonable doubt". Thus, if the framing is ambiguous the accused stands prejudiced, and such charge cannot form the basis of a fair trial. A trial in contravention of constitutional provisions is unconstitutional and therefore oppressive.

iii). The Courts have further held that fundamental provisions enshrined in the Constitution are conditional precedent and the trial court must comply with them from the start. These include the rights to equality before the law guaranteed under Article 27 as read together with the provisions of Article 50 of the Constitution.

62. On the duty of the DPP to act within the Constitution, the Petitioner, drawing reference to Article 157(11) and Article 10(1) of the Constitution, the *Guidelines on the Role of Prosecutors (Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990*) in particular Guideline 14 which provides that Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded as well as the National Prosecution Policy on the "Decision to Prosecute", averred that in exercising the prosecution mandate the DPP is constitutionally bound to have due regard to the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. It was further pleaded that the provision applies equally to the DPP and officers acting on his behalf and that it is generally accepted as an international best practice whose origins are in common law.

63. The Petitioner further averred that the decision to prosecute as a concept envisages two basic components, namely, that the evidence available is admissible and sufficient and that public interest requires a prosecution be conducted. This is what is commonly referred to as the Two-Stage Test in making the decision to prosecute. Each aspect of the test must be separately considered and satisfied before the decision to charge is made. The Evidential Test must be satisfied before the Public Interest Test is considered. '

64. The Petitioner further pleaded that in any event, the public interest test would frown against the prosecution of a person with the view to making him to concede to division of matrimonial property on a 50:50 basis.

65. It was further pleaded that the predominant purpose of the actions by the 1st Respondent is an abuse of power and arbitrary exercise of authority to achieve a purpose unconnected with the rule of law or objective of the system of the administration of justice. As such, the proposed criminal case and the proceedings therein against the Petitioner are an abuse of the court process and oppressive. The proposed charges against the Petitioner are, therefore, an abuse of the legal process under Article 157(11) of the Constitution and ought to be quashed.

66. The Petitioner also pleaded that the decision to prosecute him ought to be quashed on grounds that it is irrational, unreasonable, illegal, malicious and in bad faith. According to the Petitioner, the decision to prosecute him is clearly for an extraneous purpose since the Petitioner and Interested Party were negotiating with a view to settling all the disputes between the parties now and all that may arise in the future. The Petitioner further asserted that the 1st Respondent's irrational and unreasonable conduct was evidence of illegality malice and bad faith in the matter.

67. In his submissions, the Petitioner mainly expounded on what he pleaded in the Petition and the Affidavit.

68. The Petitioner vehemently asserted that the Respondents were used by the Interested Party to blackmail him into making a division of

matrimonial property on a 50: 50% basis. He submitted that he was threatened with prosecution in the event that he failed to agree to such manner of division. He also submitted that the alleged CCTV footage of the Petitioner assaulting the Interested Party was a fabrication meant to embarrass the Petitioner. It is also submitted that the Respondents declined to supply the Petitioner with copies of the said CCTV footage to subject it for forensic examinations since the incident never took place. He urged the Court to find that the actions taken by the Respondents were made in bad faith and an abuse of the 1st Respondent's discretion with respect to proffering charges. He relied on *Republic v Director of Public Prosecution &another ex parte Patrick Ogola Onyango & 8 othets* [2016] eKLR on the discretion to prosecute.

69. On the alleged infringement of his rights, the Petitioner submitted that equality included the full and equal enjoyment of all rights and fundamental freedoms. The Constitution prohibits all forms of discrimination and the grounds of discrimination are not exhaustive. The Petitioner claimed that he was not accorded equal treatment before the law as charges had been preferred against him. The Petitioner contended that he was black mailed in an attempt to have him sign over 50% of his assets to the Interested Party and failure of which he be prosecuted.

70. He further submitted that Article 47 of the Constitution also provided for fair administrative action, which right was violated and infringed on by the Respondents' by failing to avail copies of the CCTV footage which they relied on in making a decision to proffer charges upon the Petitioner.

71. On abuse of prosecutorial powers, the Petitioner submitted that Article 157 of the Constitution established the Office of the DPP and granted it powers to initiate, sustain or discontinue prosecutions without direction or control from any person or authority. Article 157 (11) requires the 1st Respondent, in exercising the prosecutorial powers to have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process. Where the powers are exercised in a manner that abuses the legal process, and violates public interest or are contrary to the administration of justice, the Courts will step in and quash the DPP's actions.

72. It was submitted that the impugned investigation into the alleged indiscretions by the Petitioner was tainted by malice and abuse of process right from its inception. The prosecution that was initiated as a result of such the investigations herein and the process leading to the decision to prefer charges against the Petitioner herein cannot be said to be free from suspicion of malice and ulterior motive. It was submitted that the Respondents allowed their investigative and prosecutorial powers to be used by the Interested Party in bad faith. That was demonstrated by the fact that the Petitioner was to negotiate on the alleged assault together with other legal causes before Court, the Petitioner retorted.

73. The Petitioner vehemently submitted that the Interested Party engaged the Respondents to commence criminal proceedings against him with a view to forcing the Petitioner's hand in the division of matrimonial property, Milimani Misc. Application No. E1295 of 2020 and other matters, before the subordinate Court. According to the Petitioner, that amounts to abuse of prosecutorial powers. He relied on *George Joshua Okungu & another v Chief Magistrate's Anti-Corruption Court at Nairobi & another* [2014] eKLR in buttressing the submission.

74. The Petitioner further submitted that the Respondents intend to proffer charges on the basis of a CCTV footage whose authenticity is in question and the charges are meant to embarrass the Petitioner. The decisions in *Reuben Njuguna Gachukia & another v Inspector Genera/ of the National Police Service & 4 others* [2019] eKLR and *Joram Mwenda Guantai vs. The Chief Magistrate* [2007] 2 EA. 170 were referred to.

75. In the end, the Petitioner urged the Court to allow the Petition and the Notice of Motion as prayed.

The Respondents' case:

76. The Respondents deponed that vide 0B No. 02/18/09/20, a Kenyan female by the name Everlyne Chepkorir Koech reported that on 17th September, 2020 at around 1900hours her husband assaulted her after he had demanded for food which the reportee had replied was only available for the children.

77. It was further deponed that the reportee who is the Interested Party herein also informed the police that after the assault she proceeded to Nairobi Hospital where she was treated and discharged. She produced treatment notes to the police.

78. The police issued her with a Police Medical Examination Report (P3 Form) as she continued with medication and treatment. The P3 Form was filled on 18th September, 2020 which indicated injuries on the thorax and abdomen, upper limbs and lower limbs.

79. It is pleaded that the police then proceeded and obtained the CCTV footage that captured the assault and obtained a report from the Cybercrime Forensic Unit dated 4th November 2020. It was averred that a review of the CCTV footage clearly shows the Petitioner assaulting the Interested Party on the said date and time.

80. The Respondents contended that the offence of assault causing actual bodily harm is codified in Section 251 of the Penal Code and anyone found guilty is liable to imprisonment for five years.

81. It was further pleaded that the DPP reviewed the evidence and was also satisfied that the ingredients of assault were met and that the decision to charge the Respondent met the evidentiary threshold and the public interest test.

82. It is the Respondents position that there is no doubt that the Petitioner was well known to the Interested Party as her husband hence identified as such and further the CCTV footage clearly confirmed the Petitioner as the offender. The assault was medically confirmed.

83. According to the Respondents, the Petition is focused on extraneous private matters, which do not have any substance or relation to the Respondents and inherent merit bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority

levels attributable thereto to deserve the grant of the prayers sought. Further, it is deponed, the issues raised by the Petitioner can be raised before the trial Court as the accuracy and correctness of the facts or evidence gathered by the Respondents can only be assessed and tested by the trial Court which is best equipped to deal with the quality and sufficiency of evidence gathered in support of the charges. The Respondents reiterated the call that cases ought b to be determined on merit.

84. It was the Respondents position that Article 157 of the Constitution is to the effect that the 1st Respondent shall institute criminal proceedings only where a criminal offence has been committed and that Article 24 (1) of the Constitution provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors and that it is in the public interest that complaints made to the police are investigated and the perpetrators of crimes are charged and prosecuted.

85. To the Respondents, the Petition was misconceived, frivolous, and vexatious, as the Petitioners did not demonstrate how the Respondents acted illegally, unreasonable, *ultra-vires* and/or contrary to natural justice.

86. In their submissions, the Respondents mainly reiterated and expounded on their disposition. They submitted that the DPP is empowered by the Constitution under Article 157(6) to institute, undertake and takeover prosecutions of all criminal proceedings. Article 157(10) precludes the Director of Public Prosecutions from requiring consent of any person or authority to commence criminal proceedings and reiterates that the Director shall not be under the direction or control of any person or authority. In exercising such mandate, the DPP ought to keep off the demarcations in Article 157(11) of the Constitution. The decision in *Matalulu versus DPP* (2003) 4 LRC 712 was cited to propagate the submission.

87. It was also submitted that the Petitioner failed to demonstrate that the DPP lacked the requisite authority, acted in excess of jurisdiction or departed from the rules of natural justice in directing that the Petitioner to be charged with the offence disclosed by the evidence gathered. The argument was buttressed by the Court finding on abuse of process in High Court Petition No. 537 of 2017

> *Stephen Oyugi Okero –vs- Milimani Chief Magistrate's Court & DCI, cited Bennet v Horseferry Magistrate's Court & Anor.* Where such was described *"as something so unfair and wrong with the prosecution that the court should not allow a prosecutor to proceed with what is, in all other respects, a perfectly supportable case."*

88. It was further submitted that in this case there is no evidence of misuse of power or contravention of rules of natural justice as alleged by the Petitioner. The Petitioner has not demonstrated that in making the decision to prefer criminal charges against him, either the DPP or the Police acted without or in excess of the powers conferred upon them by the law or have infringed, violated, contravened or in any other manner failed to comply with or respect and observe the foregoing provisions of the Constitution or any other provision thereof or any other relevant provisions of the law.

89. The Respondents contended that the DPP independently reviewed and analysed the evidence contained in the investigations file compiled by the DCI including the witness statements, documentary exhibits and statements of the witnesses as required by law. It was on the basis of the said review and analysis that the DPP gave directions to prosecute the Petitioner. The decision to charge the Petitioner was, therefore, informed by the sufficiency of evidence on record and the public interest and not any other considerations or matrimonial issues between the parties, the Respondents averred.

90. It was submitted that the accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of evidence gathered and properly adduced in support of the charges.

91. The Respondents also submitted that the orders to quash the investigations and subsequent criminal proceedings must be in exceptional circumstances and that the current Petition is not one of it. The Petitioner has not shown nor adduced evidence to show that the Respondents decision to institute criminal proceedings against the Petitioner was done in bad faith and an abuse of process.

92. The Respondents prayed that the Petition be dismissed in its entirety with costs.

The Interested Party's case:

93. The Interested Party deponed on the manner in which she had been severally physically abused by the Petitioner. She exhibited police reports, medical records among other evidence.

94. The Interested Party averred that she had proved a case of assault against the Petitioner and that the issue of property as raised by the Petitioner and extraneous such that it cannot affect the soundness of the assault charges.

95. She denied any collusion with the Respondents with a view to coerce the Petitioner into any alleged settlement. She believed in the rule of law and was optimistic that the Courts will in the end do justice to the parties.

96. The Interested Party relied on the filed submissions in relation to the Notice of Motion on conservatory orders. Counsel, however, highlighted on the whole matter.

97. It was submitted that there is sufficient evidence to support the complaint against the Petitioner. The Interested Party was surprised that even after the Petitioner sought leave of the Court to file a Further Affidavit to counter the evidence she adduced, none was filed.

98. Further submissions were made that the private issues between the parties were before Courts and have no bearing with the matter at

hand. Counsel cited several decisions to the effect that the Petitioner is guaranteed a fair process before the trial Court and as such he should face his accuser.

99. The Interested Party urged the Court to dismiss the Petition and the application with costs.

100. I have, hereinabove, fully presented the parties' cases.

101. This Court has also carefully addressed itself to the facts and the law in this matter. As a brief rehash, a criminal complaint was made by the Interested Party on assault. The complaint was investigated. In the course of investigations, evidence was gathered which on *prima-facie* basis pointed to the Petitioner's culpability.

102. The Petitioner was categorical that the allegations of assault are untrue and only meant to force him to a settlement of the manner in which their matrimonial property be distributed.

103. In the ***Reuben Mwangi v Director of Public Prosecutions & 2 others; UAP Insurance & another (Interested Parties)*** case (supra), this Court summed up the burden on the Petitioner to succeed in stopping a criminal trial as follows: -

> ***101. Drawing from the foregoing, for the Petitioner to succeed in his claim in this case, he must demonstrate the stifling of or threats of infringement of his rights, fundamental freedoms, the Constitution and/or the law by the investigative and prosecutorial agencies. The Petitioner may also demonstrate that the prosecution of the criminal case is not in public interest or is not in the interests of the administration of justice or that the prosecution is in abuse of the legal process. Likewise, the Petition may succeed if the Petitioner proves that the investigations were undertaken contrary to Article 244 of the Constitution, the National Police Service Act and the law in general.***

104. In law, the burden of proof is provided under sections 107(1) (2) and 109 of the Evidence Act as follows: -

> *(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.*
>
> and
>
> *109. Proof of particular fact*
>
> *The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.*

105. The above was further rightly captured by the Court of Appeal in Civil Application Nai. 31 of 2016, ***Alfred N. Mutua v Ethics & Anti-Corruption Commission (EACC) & 4 others*** [2016] eKLR when the Court stated thus: -

> ***….*** *we find that the applicant is entitled in law to institute proceedings whenever there is threat of violation of his fundamental rights and freedoms or threat of violation of the constitution. Whether there is a threat of violation is a question of fact and evidence must be adduced to support the alleged threat.*

106. The Petitioner in this matter mainly holds to the belief that the criminal case is being used to settle the rest of the cases already in Court which are civil in nature.

107. The Supreme Court in ***Cyrus Shakhalanga Khwa Jirongo v Soy Developers Ltd & 9 others*** case (supra) was very clear that the coercive nature of police interventions and criminal prosecutions should not be used to force a party to settle a civil dispute.

108. In a case where a party alleges that criminal proceedings are used to attain an otherwise collateral purpose, such a party has the onus of proving as much. As held in ***Republic vs Chief Magistrate, Kilgoris; Ex Parte Johana Kipngeno Langat*** (2021) eKLR the party must prove '*…. that the criminal process is being used oppressively or on a charge of an offence not know to law, or for purposes of obtaining collateral or other advantages other than bringing the applicant to justice….*'

109. In this case, there is independent evidence on the complaint. This Court has, without success, tried to find the nexus between the assault complaint and the other cases in Court. The Petitioner has also not shown how his intended prosecution is not in public interest or is not in the interests of the administration of justice or that the prosecution is in abuse of the legal process.

110. The offence facing the Petitioner is assault causing actual bodily harm. It is codified in Section 251 of the Penal Code. The decision to charge and prosecute the Petitioner rests with the DPP as long as it is exercised within the Constitution and the law. The DPP has shown the basis of making the decision to charge and prosecute the Petitioner. As said, the Petitioner has not demonstrated how that decision was arrived at contrary to the Constitution and law. All what the Petitioner has done is to loosely claim that he is forced to surrender one-half of the matrimonial property to the Interested Party.

111. The Petitioner indicated that the parties held various meetings with their Advocates. That fact is admitted by the Interested Party. Surprisingly, there are neither minutes of the said meetings nor dispositions by any other party which was present at the meetings to, at least,

corroborate the Petitioner's position. As such, the Petitioner's contentions are hollow and remain unproved.

112. Whereas the Petitioner has a right not to be subjected to an illegal and/or unwarranted criminal process, the DPP is also under a public duty to ensure that offences are prosecuted and those culpable attended to as law requires. That is the balance created by the law and which this Court is called upon to serious undertake. In fact, that is the essence of the rule of law.

113. It is clear that the termination of the intended prosecution of the Petitioner in the circumstances of this case will frustrate, instead of advancing, the rule of law. The Petitioner still has constitutional safeguards in respect of his rights even when undergoing the trial. The Petitioner will, at the trial, also be accorded an opportunity to challenge the veracity of the evidence including whether the evidence was properly obtained.

114. Based on the foregoing, this Court is, therefore, not persuaded that the intended prosecution of the Petitioner infringes any of the various provisions of the Constitution either as alleged or otherwise. This Court further finds and hold that the Petitioner has failed to show how the intended criminal case is an abuse of the criminal justice system.

(d) Disposition:

115. In the end, the Petition and the Notice of Motion dated 5th January, 2021 are found to be wholly without merit and the following final orders hereby issue: -

(a) The Petition and the Notice of Motion dated 5th January, 2021 are hereby dismissed.

(b) The order of this Court issued on 7th January, 2021 and variously extended staying the arrest, the arraignment, the charging and the prosecution of the Petitioner is hereby set-aside and vacated.

(c) The Petitioner shall bear the costs of the Petition.

It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF NOVEMBER, 2021

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Vincent Kibet, Learned Counsel for the Petitioner.

Miss. Berryl Marindah, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondents.

Mr. Victor Arika, Learned Counsel for the Interested Party.

Elizabeth Wanjohi – Court Assistant.