REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

(Coram: Odunga, J)

PETITION NO. 19 OF 2020

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2(1), 3(1), 10, 19, 20, 21, 22, 23, 25, 27, 28, 29, 31, 40, 47, 50, 73, 157(11), 159, 165(3), 232, 258, 259 & 260 OF THE CONSTITUTION OF KENYA.

AND

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

AND

IN THE MATTER OF: SECTION 5, 45 AND 46 OF THE EMPLOYMENT ACT, 2007

AND

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

AND

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

AND

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

AND

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

BETWEEN

ENG. GEOFFREY K. SANG.....PETITIONER

-VERSUS-

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

THE DIRECTOR, DIRECTORATE

OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

THE BOARD CHAIRMAN, NATIONAL

WATER HARVESTING & STORAGE AUTHORITY.....4TH RESPONDENT

THE BOARD OF DIRECTORS, NATIONAL

WATER HARVESTING & STORAGE AUTHORITY.....5TH RESPONDENT

JUDGEMENT

Parties

1. The Petitioner herein is described as a Kenyan citizen of sound mind and disposition and that he brings this Petition in his capacity as a Kenyan citizen for the enforcement of the Constitution of the Republic of Kenya 2010 pursuant to Article 258 (1) of the Constitution.

2. The 1st Respondent the Director of Public Prosecutions (DPP) is established under Article 157 of the Constitution of Kenya, responsible for instituting and undertaking criminal proceedings against any person before any court (other than a court martial) in Kenya with respect of any offence alleged to have been committed.

3. The 2nd Respondent is the Head of the **Directorate of Criminal Investigations** (the DCI) which derives its mandate from Article 247 of the Constitution of Kenya and through the ***National Police Service Act 2011*** which establishes the Directorate as an organ of the National Police Service tasked to undertake specialized criminal Investigative services.

4. The 3rd Respondent, the **Attorney General** (the AG) is the Head of the Kenya State Law Office, the principal legal adviser to the Government of Kenya, and an ex officio Member of Parliament and Cabinet.

5. The 4th Respondent, the Chairman of the Board of Directors of National Water Harvesting and Storage Authority (the Authority) appointed as such vide Gazette Notice No. 2355 dated **20th March, 2020** and whose duty is to provide overall leadership to the Board.

6. The 5th Respondent, the Board of Directors of National Water Harvesting and Storage Authority (the Board), is an organ of National Water Harvesting and Storage Authority which among other functions, determines the Authority's mission, vision, purpose and core values. It sets and oversees the overall strategy and approves significant policies of the Authority. It also hires the CEO, on such terms and conditions of service as may be approved by the relevant government organ(s) and approves the appointment of senior management staff of the Authority.

The Petition

7. This Petition was grounded on Articles 2(1) and (2), 3(1), 10, 19, 20, 21, 25 27(1), 27(4) and (5), 28, 29, 31, 40, 47, 50 73, 157, 165, 232 258(1) and 259(1) of the Constitution.

8. According to the Petitioner, the National Water Harvesting & Storage Authority (the Authority) is a State Agency established under Section 30 of the ***Water Act 2016*** to undertake on behalf of the National Government the development of National Public Water Works for water resources storage and food control and is the premier authority in water infrastructure development and management in Kenya and beyond.

9. The Petitioner was the Acting Chief Executive Officer of the Authority having been appointed as such after a resolution of the Board made during the 6th Special Full Board Meeting held on the 18th November 2019 for a period of six (6) months or until a substantive Chief Executive Officer was appointed effective on 18th November 2019. It was pleaded that on the 24th day of April 2020 while in his office going about his official duties, individuals who identified themselves to be officers of the DCI visited his office and informed him that they were conducting investigations touching on his conduct at the Authority and that they required him to accompany them to the DCI's Headquarters along Kiambu Road for interrogation. According to the Petitioner, he was arrested alongside two other employees of the Authority and taken in for questioning at the DCI Headquarters, the other two being **Ms. Lydia Korir** (Ag. Procurement Manager) and **Mr. Joseph Ojiambo** (Chief Human Resources Officer). However, the said officers did not at any time avail and/or present to him any summons from the DCI or any documentation detailing the nature of the investigations and/or allegations levelled against him which they were investigating necessitating the interrogation.

10. Upon arrival at the DCI's Headquarters along Kiambu Road, he was questioned at length regarding his role in the appointment of one **Lydia Korir** to the position of Acting Procurement Manager and further regarding his role in the hiring of strangers at the Authority to wit **Noah Nondin Arap Too**, **Peter Mutai Bett** and **Nixon Kiprotich Bett**.

11. According to the Petitioner, the allegations against him are malicious and motivated by sheer witch-hunt which is evinced by the fact that one of the strangers alleged to have been hired by the Petitioner - **Noah Nondin Arap Too** is deceased having passed on the 6th day of May 2015. Further the payroll of all the employees of the Authority supplied to the officers of the DCI clearly indicated that the alleged strangers employed by the Petitioner were not on the payroll of the Authority.

12. However, the Petitioner was again required to avail himself at the Directorate of Criminal Investigations Headquarters on the 25th day of

April 2020 for further questioning which he obliged to. After the lengthy questioning on 25th April 2020, the 2nd Respondents officers read over to him a charge and cautionary rights and recorded his statement under charge and caution before transferring him to Pangani Police Station whereupon he was booked vide OB No. 54/25/04/2020 for the offence of abuse of office. He was however, later released upon payment of a cash bail of the sum of Kenya Shillings Fifty Thousands Only (Kshs 50,000/=) and required to attend Chief Magistrate's Court Milimani on 27th April 2020 at 8:00am to take plea. On the said date, even before the Petitioner and his co-accused were presented to the Court for plea taking, there was already a story running in the Star Newspaper of the 27th April 2020 titled ***"Kinoti in new supremacy war with Haji over criminal probes"*** where the DCI is quoted stating that they had arrested the CEO National Water Harvesting and Storage Authority (Petitioner herein) over claims of irregular tendering and that the DCI was planning to charge the Petitioner in Court the following day. This was after another story ran in the Daily Nation Newspaper of the 24th April 2020 titled ***"Water Authority boss Geoffrey Sang arrested in DCI swoop***", a story which was published even before the Petitioner was interviewed and charge and cautionary statements taken. The said story indicated that the Petitioner had been arrested by the DCI detectives over the 231 Million Naku'etum Peace Dam Project in Turkana County.

13. The Petitioner averred that at no time during his interrogation at the DCI Headquarters was he questioned regarding any money lost in a dam project and Specifically the Naku'etum Peace Dam in Turkana County and that these publications were erroneous, malicious and spitefully printed to portray the Petitioner as a corrupt individual. It was the Petitioner's averment that the actions of the 2nd Respondent and his officers of publishing the defamatory, malicious and scandalous stories in the print media denied him a right to a fair trial as envisaged at Article 50(1) of the Constitution since he had already been tried in the public without being accorded an opportunity to be heard and defend himself.

14. The Petitioner averred that in his questioning before the DCI's detectives denied ever employing strangers at the Authority and as regards the appointment of **Lydia Korir** to the position of Acting Procurement Manager, he explained that it was necessary to appoint someone to be in-charge of the procurement docket since the Head of Procurement docket **Mr. John Musyoka** was on leave and there was need for someone to act in the said position considering the sensitivity and relevance of the said docket. According to the Petitioner, the appointment of **Ms. Lydia K. Korir** to the position of Head of Procurement was above board and that due process was adhered to and the Petitioner was well within his mandate as per his Letter of Appointment to appoint her as such. It was averred that the Chief Procurement Officer, **Mr. John Musyoka** had vide an Internal Memo Ref No. NWHSA/PROC/FIL/13/VOL.VI/(83) dated 28th January 2020 and addressed to **Lydia Korir**, appointed **Lydia Korir** to take charge of the Procurement Division in his absence. Accordingly, the Petitioner in reliance of the said Internal Memo proceeded on the 28th February 2020 to appoint **Ms. Lydia Korir** as the Head of Procurement Operations vide a letter of appointment which clearly advised the said **Lydia Korir** to assume the duties which were being carried out by the Chief Procurement Officer and other duties that may be assigned to her by the Appointing Authority.

15. It was the Petitioner's contention that he is mandated by Mwongozo Code of Governance for State Corporations at Clause 1.19(a) to be responsible for the day to day operations of the Authority and is further mandated by Mwongozo Code of Governance for State Corporations at Clause 1.19(f) to ensure that the Authority has effective management structures including succession plans. By the Petitioner appointing **Lydia Korir** as the Head of Procurement Division following the recommendation of the Chief Procurement Officer, the Petitioner averred that he was performing his duties.

16. It was alleged that the officers of the DCI during the process of the arrest took away his two mobile phone handsets and laptop and some documents from his office without producing any search warrant allowing them to seize the said gadgets and take away documents. Accordingly, the said officers violated the Petitioner's right to privacy and property as envisaged at Article 31 and 40 of the Constitution of Kenya 2010 since they did not have a Search warrant allowing them search the petitioner and seize his phones and laptops and to date they still illegally hold possession of the Petitioner's phones and laptop against his will. As a result, it was contended that any evidence that the officers of the DCI may obtain and/or gather from the said phones and laptop is evidence illegally obtained and as such is not admissible in court. In this regard the Petitioner relied on Article 50(4) of the Constitution of Kenya 2010 which provides that evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights should be excluded if the admission of the evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

17. According to the Petitioner, his arrest by officers of the DCI, his interrogation and subsequent decision to charge him with the offence of abuse of office is maliciously instigated by individuals at the Authority who are colluding with officials of the DCI to have him take a plea as a public officer so that he steps aside and he be removed from office for their preferred candidate to be appointed.

18. It was claimed that the Authority does not have a substantive Chief Executive Officer and that the process of recruiting one has been marred by irregularities, lobbying, collusion and deceit perpetrated by some Board members of the Authority and the Court has had to intervene by granting orders staying the last Advertisement being Ref No. NWHSA/CEO/2019/2020/01 by the orders issued on 9th April 2020 in ELRC Nairobi Judicial Review No. 10 of 2020 by **Hon. Justice Onesmus Makau**. To demonstrate more malice on the part of the 4th Respondent, the Petitioner avers that while he was in court on the 27th April 2020 during the morning hours, the 4th Respondent broke in to his office without his knowledge and consent, an act which the Petitioner reports at Embakasi Police Station vide OB No.64/27/4/2020. Further malice in the arrest, investigation and intended prosecution of the Petitioner is evinced by the fact that the Chairman of the Board at the Authority after noting that the Petitioner had not taken plea on the 27th April 2020 illegally issued to all the Board Members to the exclusion of the Petitioner who is the Secretary a Notice of the 9th Special Full Board Meeting to be held on 28th April 2020.

19. The meeting, the Petitioner contended, was illegal since the Chairman of the Board discriminatively left out the Petitioner from the people in attendance yet the Petitioner is the Secretary to the Board and an ex officio and as such he should have been invited to attend the meeting and if any deliberations arose touching on him he could have been asked to step out. Accordingly, the decision by the 4th Respondent to notify the Board members of a meeting slated on the 28th April 2020 a day prior to violates the mandatory provisions of the Mwongozo-Code of Conduct for all State Corporation Chapter 1 Clause 1.8.4 which requires that Board papers should be made available to Board members not less than ten days before the date of the meeting. It was therefore his position that any resolution that was made by the 4th and 5th Respondents in the 9th Special Full Board meeting held on 28th April 2020 should as such be rendered null and void.

20. The Petitioner relied on Article 157(11) of the Constitution of Kenya 2010 which requires the DCI in the exercise of his powers to have regard to public interest, the interest of administration of justice and the need to prevent and avoid abuse of legal process. However, it was averred that the actions of the DCI and his officers have been biased, lacked public interest, have been a blatant abuse of office and the legal process and as such should not be entertained by this Honourable Court. In this regard the Petitioner relied on paragraph 4(B) (1) of The National Prosecution Policy of Kenya provides that the decision to prosecute envisages two basic components namely, that the evidence available is admissible and sufficient and that the public interest requires a prosecution to be conducted. Similarly, paragraph 4(B) (2) of the National Prosecution Policy of Kenya requires 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.

21. The Petitioner stated that on the 27th day of April 2020 when he and the co-accused were required to attend Court to take plea as directed on their Bail Form 18A, there was no official of the DPP and the Investigating Officer who is an officer of the DCI proceeded to extend their bail to the 4th day of May 2020 for plea taking.

22. The Petitioner averred that his rights and fundamental freedoms as enshrined in the Constitution of Kenya have been violated, infringed and denied by persons bound by the provisions of the said constitution and this court therefore has power to intervene and redress the same. The Petitioner further averred that the decision to arrest, investigate and charge him is unconstitutional, illegal, unreasonable, arbitrary, unlawful and without justification and in violation of 2(1), 3(1), 10, 19, 20, 21, 22, 23, 25, 27, 28, 29, 31, 40, 47, 50, 73, 157(11), 159, 165(3), 232, 258, 259 & 260 of the Constitution for the following reasons among others:-

(a) The allegations levelled against the Petitioner and for which he was interrogated related to employer-employee relationship and are not criminal in nature at all. The same ought to have been handled by the Board of Directors of the Authority if indeed that was any irregularities in the appointments done by the Petitioner. The Petitioner's right to a Fair Administrative Action as envisaged at Article 47 of the Constitution of Kenya 2010 was thus violated.

(b) The actions of the 2nd Respondent proceeding to arrest the Petitioner on the 24th April 2020 without any warrant of arrest and proceed to interrogate or question him without issuing him with any summons or formally informing him of the nature of allegations he is being investigated against contrary to the practice and or precedent adopted by the 2nd Respondent when conducting investigation of other suspects was discriminatory and violated his right to equality and freedom from discrimination as stipulated at Article 27 of the Constitution of Kenya 2010.

(c) The searching and confiscating of the Petitioner's mobile phones and laptop to date without a court order or search warrant violates the Petitioner's right to privacy and property as envisaged at Articles 31 and 40 of the Constitution of Kenya 2010.

(d) The evidence gathered based on the investigations conducted by the 2nd Respondents was illegally obtained since the officers of the 2nd Respondent did not have a search warrant nor did they produce one and show it to the Petitioner before searching him and taking away his phones and laptop. Relying on such evidence would amount to a violation of the Petitioner's rights as per Article 50(4) of the Constitution of Kenya 2010.

(e) The actions of the 2nd Respondent and his officers of publishing the defamatory, malicious and scandalous stories in the print media suggesting that investigations against the Petitioner had been concluded and he would be charged in court even before interviewing him denied him a right to a fair trial as envisaged at Article 50 (1) of the Constitution of Kenya 2010 since he had already been tried in the public gallery without being accorded an opportunity to be heard and defend himself.

(f) The actions of the 4th and 5th Respondents of convening a meeting in the absence of the Petitioner and resolving the remove the Petitioner from office without any justifiable was discriminatory to the Petitioner.

23. As a consequence of the blatant violation of the Constitutional provisions enumerated herein above, and specifically the violation of the fundamental rights of the Petitioner, the Petitioner prayed for the following orders:-

a) A Declaration that the Respondents violated Articles 2(1), 3(1), 10, 19, 20, 21, 22, 23, 25, 27, 28, 29, 31, 40, 47, 50, 73, 157(11), 159, 165(3), 232, 258, 259 & 260 as well as the provisions of Chapter Six of the Constitution of Kenya 2010.

b) A Declaration that the 2nd Respondents violated the Petitioner's right under Article 27 of the Constitution regarding the right to equality and freedom from discrimination by unlawfully, illegally, selectively and discriminately pursuing investigations against the Petitioner.

c) A declaration do issue that the intended prosecution of the Petitioner in the manner proposed is unfair, discriminatory, an abuse of the process of the Court, irrational, unreasonable, malicious, vexatious, oppressive and therefore unconstitutional and unsustainable.

d) An order be issued prohibiting the Respondents from sustaining, proceeding, hearing, conducting, or in any manner dealing with any intended charges a result of the botched and malicious investigations.

e) A declaration do issue that the intended charges, prosecution and proceedings against the Petitioner are unconstitutional and an abuse of the legal process.

f) A Declaration that 4th and 5th Respondents violated the Petitioner's rights under Article 27 of the Constitution of Kenya 2010 by discriminately excluding him from the 9th Special Full Board Meeting yet he is the Secretary of the Board and an

ex-officio.

g) A declaration that all the resolutions passed during the 9th Special Full Board meeting are null and void.

h) Any other relief that court may deem just and expedient in the circumstances.

i) That the costs of this petition be borne by the Respondents.

24. In support of the Petition, the Petitioner swore and filed an affidavit in which he averred that he was appointed the Acting Chief Executive Officer of the Authority by the Board of Directors of the Authority through a resolution of its 6th Special Full Board meeting held on 18th November, 2019, an appointment which was communicated to him vide the letter Ref No. NWCPC/BOD/CH/FIL/5/(67) dated the 18th November, 2019 and as per the said letter he was to hold the office for a period of six (6) months or until a substantive Chief Executive Officer was appointed whichever came first. As part of his roles and responsibilities as per the said Letter of Appointment was to be responsible for the day to day running of the Authority and ensuring succession management and employee growth and development.

25. It was deposed that the 4th Respondent was appointed the Board Chairman on the 20th of March 2020 and that since his appointment to the said position he has colluded with some members of the Authority to come up with a malicious scheme of instigating the Petitioner's unlawful and unfair suspension, termination and/or removal from office. Upon appointment as the Board Chairman of the Authority, the 4th and 5th Respondents caused to be advertised on the Authority's website and in the Daily Nation Newspaper of the 25th day of March 2020 the position of Chief Executive Officer of the Authority, barely a week after the 4th Respondent's Appointment as Board Chairman.

26. According to the Petitioner, to demonstrate that this was a malicious scheme hatched by the 4th and 5th Respondents to unlawfully remove, bar and/or prevent him from holding the office of and/or applying to be appointed to the office of the CEO National Water Harvesting Authority they deliberately added a requirement of 15 years professional experience for the applicants so as to lock out the Petitioner. However, the above stated advert Ref No. NWHSA/CEO/2019/2020/01 was ultimately stayed by the Employment and Labour Relations Court in Judicial Review Application No. 10 of 2020 Nairobi on the 9th day of April 2020. It was further added that the said actions of the 4th and 5th Respondents to illegally and maliciously include among the requirements for the position a requirement that the Applicant MUST have 15 years professional experience were well calculated to technically lock out the Petitioner and any other Applicants without the said qualification from applying for the said position.

27. After the 4th and 5th Respondent's mischievous actions of getting him out of the office were thwarted by the Court orders of the 9th April 2020, the 4th and 5th Respondents embarked on colluding with the 2nd Respondent to have him maliciously arrested and investigated relating to a myriad of baseless allegations. On the 24th day of April 2020 officers of the 2nd Respondent arrested him at his office and took him to the Directorate of Criminal Investigations Headquarters for questioning regarding irregularities in employment of staff at the National Water Harvesting and Storage Authority, an interrogation which started at around 10:00am until around 6:00pm when he was released after being questioned regarding his role and influence in the appointment of one **Lydia Korir** to the position of Acting Procurement Manager and further regarding his role in the hiring of strangers at the National Water Harvesting & Storage Authority to wit **Noah Nondin Arap Too**, **Peter Mutai Bett** and **Nixon Kiprotich Bett**.

28. The Petitioner then reiterated the rest of the averments in the petition set out hereinabove, and averred that as regards the other two strangers being **Peter Mutai Bett** and **Nixon Kiprotich Bett**, he denied hiring them and even supplied the 2nd Respondent a copy of the payroll of all the employees of the Authority supplied evincing that the said strangers were not on the pay roll but the 2nd Respondent officers ignored the same.

29. According to the Petitioner, upon his release from custody upon payment of a cash bail of Kshs 50,000/= on 25th day of April 2020, he was required to appear before the Chief Magistrates Court at Milimani on the 27th day of April 2020 to answer to the charge of Abuse of Office. On the said date since he was not feeling well after the long weekend and was issued a sick off by his Doctor at Mater Hospital, he instructed his counsel to appear on his behalf at the Chief Magistrates Court at Milimani and report to the court his reason for none attendance. Based on information supplied to him by his counsel, he averred that at the court his co-suspects being **Lydia Korir** and **Joseph Ojiambo** were present and after waiting at the Court precincts for more than four (4) hours, there was no attendance by officers of the DPP and the 2nd Respondent's officer - the Investigating officer **Mr. Okemwa** who was present informed parties and their counsel present that the plea taking would not proceed and extended the bond to the 4th May 2020 when the plea taking would proceed.

30. On the same day there was story run in the *Star Newspaper* of the 27th April 2020 titled *"Kinoti in new supremacy war with Haji over criminal probes"* where the 2nd Respondent is quoted stating that they had arrested the Acting CEO National Water Harvesting and Storage Authority (Petitioner herein) over claims of irregular tendering and that the 2nd Respondent was planning to charge the Petitioner in Court the following day. The said story clearly indicated that the 2nd Respondent had unilaterally decided to arrest, investigate and unilaterally charge him without the consent and authority of the Director of Public Prosecution-1st Respondent since the 1st Respondent had not approved of the charges intended to be preferred against him. It was the Petitioner's position that the stand-off between the 1st and 2nd Respondents regarding the manner in which they had been arrested, investigated and intended to be charged led to their failure to be charged hence the plea taking was deferred to the 4th May 2020. As this was going on in court, the 4th Respondent in the morning hours, broke in to his office without his consent and knowledge and he just came to learn of the same from an employee at the Authority. On learning of this he decided to go and confirm the position at his work place and indeed he found that the 4th Respondent had broken in to his office in his absence. The 4th Respondent had also issued strict instructions to the personnel that is should be allowed ingress in the said office hence he was left without an office.

31. It was further averred that on the same day he proceeded to industrial Area Police Station where he lodged a complaint of breakage in to

his office which Report was booked vide OB 64/27/4/2020.

32. It was the Petitioner's case that he was maliciously and un-procedurally arrested by the 2nd Respondent on allegations that are purely employment related which could well and fully be dealt with by the 4th Respondent administratively and which do not have any criminal element at all to justify the investigation by the 2nd Respondent. However, noting that plea taking had not occurred as planned and/or anticipated, the 4th Respondent on the same 27th April 2020 in the afternoon sent out a letter Ref No. NWHSA/CLS/BOD/FIL/01/VOL.1 (137) dated 27th April 2020 to all the Board members excluding the Petitioner titled *"Notice of the 9th Special Full Board Meeting to be held on Tuesday 28th April, 2020"* which letter indicated that the agenda of the meeting was to be tabled on the floor. He said letter was however not copied to him as the Ag. Chief Executive Officer of the Authority and the Secretary to the Board of the Authority yet all the other Board Members were copied and he just came to learn it from a member of the 5th Respondent.

33. On the 28th April 2020 the Board Chairman convened the said 9th Special Full Board Meeting whereupon the Board of Directors resolved to revoke his appointment and appointed **CS. Sharon Obonyo** with effective the 28th April 2020 as the Acting Chief Executive Officer.

34. The Petitioner lamented that the said letter by the 4th Respondent, Ref No. NWHSA/CLS/BOD/FIL/01/VOL.1 (137) dated 27th April 2020 to all the Board discriminated against him and was made in violation of the Chapter 1, Clause 1.8.4 of Mwongozo Code of Conduct for State Corporations which requires that Board papers should be made available to Board members not less than ten days before the date of the meeting.

35. The Petitioner maintained that his arrest, investigation and intended charging and prosecution was maliciously instigated by the 4th and 5th Respondents in collusion with officers of the 2nd Respondent seeking to have him take plea as a public officer so that he steps aside and the 4th and 5th Respondents proceed to appoint their crony to replace him since he was still holding an Acting position.

36. The Petitioner contended that allowing him to undergo criminal prosecution from the said transaction infringes on his constitutional rights to fair trial, which right under the Constitution is illimitable and non-derogable, and therefore he will be subjected to an irreparable harm, great prejudice and cause injustice for selective and malicious prosecution meant to frustrate the fair course of administration of justice hence it is in the interest of justice that the said Orders are issued to allow the Petitioner/Applicant herein enjoy the fundamental rights and freedoms enshrined in the Constitution of Kenya.

Petitioner's Submissions

37. In his submissions on the preliminary objection that this Court lacks the jurisdiction to entertain the matter, it was submitted that Article 165(3) of the constitution confers on this court with very wide jurisdiction to deal with any matter that falls within its jurisdiction. That jurisdiction is not exhaustive given that Article 165(3) (e) states that the court can have any other jurisdiction, original or appellate, conferred on it by legislation.

38. In terms of Article 165(3)(d)(ii), it was submitted that this court has jurisdiction to determine the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, the constitution. Article 23(1) also states that this court has jurisdiction to hear and determine applications for redress of denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights which jurisdiction is to be exercised in accordance with Article 165 of the Constitution. Article 23(3) of the constitution undoubtedly confirms the extent of the width of the jurisdiction of this court to grant appropriate relief.

39. It was submitted that there is no remedy the High Court is unable to grant under the Constitution, a fact which emerges clearly from Article 23(3) of the Constitution on the remedies the court can grant. The court is empowered to grant appropriate relief, including declaration of rights, injunctions and conservatory orders among others, leaving no doubt that the reliefs grantable by the court are inexhaustible and are at the discretion of the court depending on the facts and circumstances of each case.

40. In that regard, therefore, it was submitted that it is clear from both Articles 22 and 23 as read with Article 165(3) of the constitution that the court is to *redress denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights. That implies a petitioner would have to move the court for purposes of determining violation of rights and fundamental freedoms and thereafter, the court on being satisfied as to the violations, would prescribe appropriate redress on the basis of the facts and circumstances of the case.*

41. **It was therefore submitted that the preliminary objection should be stuck out for failing to meet the threshold of a preliminary objection as set out in the case of Mukisa Biscuits Manufacturing Ltd vs. West End Distributors Ltd (1969) E.A 696**. The Petitioner also relied on the cases of **Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd {1989} KLR 1** and **Melvin Kipkoech Kutol vs Independent and Boundaries Electoral Commission & 2 others [2017] eKLR** that a person raising a preliminary objection must be prepared to argue the same on the assumption that the facts as they are pleaded are correct. As long as that is done, it is not objectionable for the party raising the objection to refer to the facts on record.

42. It was noted that the 1st Respondent's stated that it has not made a decision on whether or not the Petitioner is going to be charged with any offence. This is a clear manifest that the activities undertaken by the 2nd Respondent of arresting and taking the Petitioner to court was a violation of his rights as the Directorate of criminal investigations do not have prosecutorial powers. Additionally, it was submitted that the issues before this court are matters of human rights violation and only the High Court and courts of similar status currently have jurisdiction to hear and determine matters of violation of fundamental rights and freedoms in the Bill of Rights as was declared in the case of **Royal Media Services Ltd vs. Attorney General & 6 others [2015] eKLR**.

43. In conclusion your lordship, it was submitted that this court has an unlimited jurisdiction to determine this matter, Jurisdiction that

emanates from the Constitution hence the preliminary objection dated 23 June 2020 should be struck off with costs.

44. In his submissions on the merits of the petition, the Petitioner contended that the above grounds adumbrated by the Petitioner clearly evince the fact that the intended charges and prosecution of the Petitioner was not arrived at in accordance with the provisions of the law. According to him, the manner in which the investigations were conducted is questionable since the petitioner was arrested and taken to Directorate of Criminal Investigations to be interrogated on issues of abuse of office pegged on allegations of irregularly employing strangers at the Authority. The above was objected to by the Petitioner in his affidavit and documentary evidence adduced. This has not been contradicted at all by the Respondents.

45. It was submitted that the conduct of investigations by the DCI was below board and denied the Petitioner the right to fair administrative action as envisaged at Article 47 of the Constitution since the 2nd Respondent flouted due procedure by failing to inform the petitioner at all of the allegations he was facing, proceeding to arrest him and decide to charge him without exhausting the investigations and prior to obtaining the requisite consent of the Director of Public Prosecution as is required by the law.

46. The 2nd Respondent has infringed the Petitioners' rights under Article 27 (1) and (2) of the constitution, particulars of the infringement including the 2nd Respondent acting with impunity, oppressively, unreasonably, high handedly and otherwise denying the petitioner the comfort or confidence that he was and being treated equally, fairly or that he has equal protection or benefit of the law and the 1st Respondent's action of unreasonably arresting the Petition based on the malicious and unfounded complaints by the 4th and 5th Respondents.

47. It was submitted that there is evidence of abuse of criminal justice system so that what the DCI is seeking to do is extraneous to the objectives of the criminal justice system, and is contrary to Article 157(11) of the Constitution of Kenya 2010.

48. It was further submitted that Article 239 (3) of the Constitution requires the officers of the DCI in their performance not to act in partisan manner nor be prejudiced by political interests. The Constitution also points out at Article 245 (4) (a) that the police shall not be under the direction of any person in the discharge of their duties.

49. It was submitted that the DPP noting the irregularities in the procedure followed by the DCI in arriving at the decision to charge the Petitioner on trampled up charges declined to approve the charges. This occasioned the deferment of the charges on the 27th April 2020 leading to the investigating Officer extending the Petitioner's bond to 4th May 2020. To date the DPP is yet to approve any charges against the Petitioner.

50. Moreover, the DPP's conduct and participation in the present petition tells much. Despite him being served with the Petition on the 4th of May 2020 and the Court's order of 13th May 2020 on the 14th May 2020, it has failed to enter appearance, file any responses to the Petition to oppose the same nor file any submissions to defeat it. The DPP has as well been absent from the proceedings herein. In this regard the Petitioner relied on the provisions of Article 157 of the Constitution which makes the holder of the Office of the Director of Public Prosecutions responsible for instituting and undertaking criminal proceedings against any person before any court (other than a court martial) in Kenya with respect of any offence alleged to have been committed. By the conduct of the DPP absenting himself from these proceedings it's a clear pointer that he is not interested in opposing the Petition herein at all.

51. It was submitted that Article 157 of Constitution does not merely mean that the Director of Public Prosecution is a conveyor belt for each and every investigations and findings placed before him. The office of the DPP is duty bound to interrogate the investigations presented to it and ensure that they comply and meet the Constitutional threshold. In view of the conduct of the DCI as stated herein any resulting process would amount to an abuse of process and therefore in breach of Article 157(11) of the Constitution.

52. According to the Petitioner, this Court is enjoined by the provisions of Article 159(2) (e) of the Constitution to protect and promote the purpose and principles of our constitution at all times. Therefore, it is within the province of this Court in exercising its power to prohibit the abuse of the intended criminal process as it is divorced from the goals of justice, and to find that the intended prosecution is not consistent with the constitutional values as enshrined under Article 10 and the tenets of good governance and the rule of law. In support of his case the Petitioner relied on the case of **Kuria & 3 Others versus Attorney General (2002) 2 KLR 69.**

53. It was submitted that the material availed before this Court shows clearly a well-coordinated deliberate effort by the 1st, 4th and 5th Respondents to harass intimidate and victimize the Applicant under the pretext of carrying out investigations. He referred to the case **Philomena Mbete Mwilu vs. Director of Public Prosecutions & 3 Others; Stanley Muluvi Kiima (interested party); International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] eKLR** and the case of **Hassan Ali Joho v Inspector General of Police & 3 other [2017] eKLR**

54. As regards the issue whether or not the 4th and 5th Respondents were justified to terminate the tenure of the Petitioner as the Ag. CEO before the lapse of his tenure, it was submitted that section 7 of the ***Fair Administration Action Act*** sets out circumstances under which a court or tribunal may review any administrative action to include bias, ulterior motive, where an action is not authorized by law, abuse of power or process among others. It was his submission that the actions of the 4th and 5th respondents in urgently calling for the 9th Special Full Board Meeting on the 27th April 2020 to be held on the 28th April 2020 was made with an ulterior motive aimed at illegally removing the Petitioner from his position as Ag. Chief Executive Officer of National Water Harvesting and Storage Authority in his absence. It was a scheme which the 4th and 5th Respondent had attempted previously on a number of occasions and failed. To demonstrate that this was a malicious scheme hatched by the 4th and 5th Respondents to unlawfully remove, bar and/or prevent the Petitioner from holding the office of and/ or applying to be appointed to the office of the substantive CEO National Water Harvesting and Storage Authority they deliberately added requirement of 15 years of professional experience for the applicants so as to lock out the Petitioner. The above stated advert Ref No. NWHSA/CEO/2019/2020/01 was ultimately stayed by the Employment and Labor Relations Courts in ***Judicial Review Application No. 10 0f 2020 Nairobi on the 9th day of April 2020.***

55. Thereafter the 4th and 5th Respondent embarked on colluding with the 2nd Respondent to have the Petitioner maliciously arrested and investigated relating to a myriad of baseless allegations culminating in the Petitioner being arrested by the DCI's officers on the 24th day of April 2020 and took the Petitioner to DCI Headquarters for question regarding irregularities in employment of staff at National Water Harvesting and Storage Authority. However, the Petitioner answered to all allegations of hiring strangers leveled against him and made it clear that the same was sheer witch-hunt. He produced evidence demonstrating that one of the strangers he was alleged to have hired- **Noah Arap Too** is deceased having passed on the 6th day of May 2015 way before he even appointed Ag. CEO in the year 2019.

56. As regards the other two strangers being **Peter Mutai Bett** and **Nixon Kiprotich Bett**, he denied hiring them and even supplied the DCI a copy of the payroll of all the employees of the Authority evincing that the said strangers were not on the payroll of the Authority.

57. As regards the Petitioner role in the appointment of **Ms. Lydia K. Korir** to the position of Head of Procurement, the same was proved to be above board and that due process was adhered to and the Petitioner was well within his mandate as per his Letter of Appointment to appoint her as such. He produced evidence showing that the Chief Procurement Officer, **Mr. John Musyoka** had vide an Internal Memo Ref No. NWHSA/PROC/FIL/13/VOL.VI/ (83) dated 28th January 2020 and addressed to **Lydia Korir** appointed **Lydia Korir** to take charge of the Procurement Division in his absence. The Petitioner in reliance to the internal Memo Ref. No. NWHSA/PROC/FIL/13/VOL.VI/ (83) dated 28th January 2020 procedurally proceeded on the 28th February 2020 to appoint Lydia as the Head of Procurement Operations.

58. It was submitted that the actions of the Petitioner were well within his mandate as detailed in ***Mwongozo Code of Governance for State Corporations at Clause 1.19(a)*** which give him the powers to oversee the day to day operations of the Authority since the same mandated the Petitioner at ***Clause 1.19(f)*** to ensure that the Authority has effective management structures including succession plans. By the Petitioner appointing **Lydia Korir** as the Head of Procurement Division following the recommendation of the Chief Procurement Officer, he was duly executing my rightful duties.

59. It was submitted that even before the calling of the 9th Special Full Board Meeting of the 28th May 2020, the 4th Respondent had already broken into the Petitioner's office without his consent and knowledge and he just came to learn of the same from an employee at the Authority on the same date the 4th Respondent issued strict instructions to the personnel at the Authority not to allow the Petitioner ingress in to his office hence leaving him without an office.

60. The said letter by the 4th Respondent, Ref No. NWHSA/CLS/BOD/FIL/01/VOL.1 (137) dated 27th April 2020 to all the Board Members discriminated against the petitioner and was made in violation of the ***Chapter1, Clause 1.8.4 of Mwongozo Code of Conduct for State Corporations*** which requires that Board papers should be made available to the Board Members not less ten (10) days before the date of the meeting. This was not the case with the above stated Board meeting as the requisite period was not allowed.

61. From the foregoing it was submitted that the 4th and 5th Respondent's actions of revoking the appointment of the Petitioner were based on ulterior motive and this Court is well suited to stop the injustice occasioned by the resolutions of the meeting held on 28th May 2020 which revoked the Petitioner's Appointment. As per Section 7 of the ***Fair Administrative Action Act***, this Honorable Court is invited to declare the resolutions of the said meeting to be null and void.

1st Respondent's Case

62. The 1st Respondent herein, the DPP, opposed the Petition. In so doing he filed both notice of preliminary objection and grounds of opposition.

63. In the preliminary objection, he raised the following issues:

> **1. That this court lacks jurisdiction to hear and determine this petition as the alleged violations took place in Nairobi which is outside its territorial jurisdiction.**
>
> **2. That the petition is misconceived, frivolous, vexatious and an abuse of the court process.**

64. As for the grounds of opposition, he averred that:

> **1. That it is not enough to merely state that the rights of the petitioners have been violated and infringed without specifically stating the nature of violations of such rights.**
>
> **2. That Article 157(6) (a) mandates the Director of Public Prosecutions to 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.**
>
> **3. That the Director of public prosecutions does not require the consent of any person or authority for the commencement of criminal proceedings and in exercise of his powers or functions, shall not be under the direct control of any person or authority.**
>
> **4. That the instant petition is pre-mature as the Director of Public Prosecution has not made a decision whether or not the petitioner is going to be charged with any offence.**
>
> **5. That the Petitioners have not demonstrated any issues for the court to determine.**

6. That the petitioner's rights as claimed are not absolute but are subject to some limitations.

7. That it is in the Public interest that all complaints made to the Police should be investigated and summons issued to the applicant is part of the investigations which is being carried out by the Police.

8. That the Police under section 24 the National Police Service Act, have the mandate of carrying out investigations and if there is any offence alleged to have been committed then the police will arrest and charge the perpetrators of the Crime.

9. That the Petitioner has not demonstrated how he will suffer any substantial injustice if charged in court as Criminal cases are determined on merits.

10. That this petition is frivolous and vexatious, and its only mend to prevent the Director of Public Prosecution and the Police from carrying out their core mandates and to circumvent the Criminal Justice in Kenya.

1st Respondent's Submissions

65. The 1st Respondents contested the jurisdiction of this Court to hear and determine the petition on the ground that the alleged violations took place outside the territorial jurisdiction of this court. Looking keenly at the petition, the petitioner is a resident of Nairobi and working for gain with the 5th Respondent who has a registered office in Nairobi. The petitioner alleges to have been summoned and arrested by the 2nd Responded at the DCI headquarters and later booked at Pangani Police Station. The 1st, 3rd and 4th Respondents have registered offices in Nairobi. Based on Section 12 to 15 of the ***Civil Procedure Act*** and the cases of **Mukhisa Biscuit Manufacturing co. ltd vs. West end Distributors Ltd (1969) EA 696** and **Owners of Motor Vessels "Lillian's" vs. Caltex oil Kenya ltd (1989) KLR 1,** it was submitted that the Court must in those circumstances down its tools. The 1st Respondent also relied on Article 165(3)(a) and (b) of the Constitution as well as rule 8 of the ***Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013.***

66. The 1st Respondent therefore prayed that the Petition be either struck out or transferred to Constitutional Petitions Division at Millimani Law Courts in Nairobi.

67. As regards the merits of the Petition, it was submitted, based on Halsbury's ***Law of England,*** 4th Edition, volume 1 at page 37, paragraph **and the** case of **Kenya national examination council vs. Republic ex parte Geofrey Gathenji Njoroge CA No.266/1996** that an Order for Prohibition is issued to an inferior tribunal by the High Court to forbid the tribunal from continuing proceeding in excess of its jurisdiction or in contravention of the laws of the land. It also lies not only for excess of jurisdiction or absence of it but also for the departure from the rules of natural justice. Therefore, an Order of Prohibition cannot issue against an action or decision which has not been made or taken by the 1st respondent in exercising their constitutional and legal mandate. From the foregoing, it is apparent that to issue or grant the Orders sought would be tantamount to ordering the Director of Public Prosecutions not to discharge his constitutional mandate and functions.

68. In support of this submission the 1st Respondent relied on Article 243 of the Constitution which establishes the National Police Service and it provides for the enactment of the ***National Police Service Act*** and Article 245 of the Constitution which establishes the Office of the Inspector General of Police of the National Police Service and Section 52. of the ***National Police Service Act.***

69. According to the 1st Respondent, the above quoted functions and duties of the Respondent are the constitutional mandate of the police. There is no dispute that the police have the power to investigate an alleged crime and if there is sufficient evidence then they make the decision to charge the suspect. The petitioner has not provided sufficient evidence that the 2nd Respondent exceeded their jurisdiction or breached the principles of natural justice when they summoned the applicant to record his statement.

70. In support of his case the 1st Respondent relied on the case of **Republic versus Commissioner of Police and Another ex Parte Michael Monari & Another (2012) eKLR.**

71. It was submitted that it is in the public interest that all complaints made to the police should be investigated. In this case, a complaint was made to the police, and the police carried out their constitutional and statutory functions of investigating the alleged incident. If the Orders sought are granted it would be tantamount to ordering the police not to discharge their mandate.

72. It was further submitted that pursuant to Article 157 of the Constitution, the Director of public prosecutions is vested with prosecutorial power and is mandated to 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(10**) of the constitution also provides that 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 powers or functions, shall not be under the direction or control of any person or authority, provisions which are replicated in sec 6 of the Office of the Director of Public Prosecutions Act No.2 of 2013. **Article 157(11)** provides that; in exercising the powers conferred by this article the director of public prosecutions shall 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.

73. It was however submitted that the petitioner has not demonstrated that the investigation done by the police and any criminal proceedings which may be preferred against him have been done in excess or without the jurisdiction by the Respondent and reliance was placed on the case of **Musyoki Kimanthi vs. Inspector General of Police and 2 Others [2014] eKLR**.

74. It was submitted that the instant Application is premature and purely speculative as the investigations are ongoing and no decision has been made as to whether or not to charge the petitioner with any criminal offence. In support of this position, the 1st Respondent relied on the case of **Cape Holding Limited vs. Attorney General, Director of Public Prosecution & Another, Misc Civil Applic 240 of 2011.**

75. As regards the alleged violation of the Petitioner's rights, it was submitted that there is no evidence of unlawful, selective or malice committed against the Petitioner by the Respondents. Furthermore, the Petitioner has not stated which rights have been violated and has not demonstrated the same. According to the 1st Respondent, the Petitioner has failed to frame the issues of the violations of his rights with precision as required in constitutional petitions and did not state the alleged rights violated in the bill of rights and the acts or omissions complained of and the public interest violated which he seeks to protect with reasonable precision. Apart from citing the provisions of the Constitution, the petitioner provided neither particulars of the alleged infringements of his rights or the manner of the alleged violations of public interest he seeks to protect. In this regard the Petitioner cited the case of **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR**.

76. It was contended that the petitioner has failed to demonstrate that the 1st respondent have not acted independently or have acted capriciously, in bad faith or have abused the legal precision in a manner to trigger the High court's intervention.

77. In conclusion, it was therefore submitted that this petition is premature and an abuse of the court process, merely meant to circumvent the criminal justice in Kenya and prevent the 1st Respondent from discharging his constitutional mandate and should therefore be dismissed.

4th and 5th Respondents' Case

78. In response to the Petition, the 4th and 5th Respondents filed a replying affidavit sworn by the 4th Respondent.

79. In the said affidavit, the 4th Respondent deposed that he was appointed by the President as the Chairperson of the Board of Directors of National Water Harvesting and Storage Authority on 20th March 2020 vide Kenya Gazette Notice Vol. CXX11 No. 50. In that capacity, he was **s**trictly mandated by the appointing authority to ensure that fundamental national values and principles of governance good governance such as --integrity, good governance, transparency and accountability – are inculcated into all affairs of the National Water Harvesting and Storage Authority. Specifically, he was asked to ensure that the Chief Executive Officer of the Authority follows the constitutional and statutory obligations of an accounting officer as outlined at Article 10 and 226 of the Constitution and the entire provisions of the ***Public Finance Management Act 2012*****-**in the day to day operations of the Authority.

80. He disclosed that when he assumed office on 20th March 2020 there were many corruption allegations flying around regarding a tender for the Construction of Turkana Peace Dam (Naku'etum site) in Turkana County-Tender No. NWSHA/ONP/007/2019-2020 for the sum of Kshs. 231 million and when he asked for a brief on the tender from the then Acting Chief Executive Officer**, Eng. George Sang**, the Petitioner herein, he was told that on 16th January 2020, the Authority put an advert in the Daily Nation Newspaper inviting bids for the Construction of the said Dam in Turkana County and that upon review of the submitted bids, the Tender Committee recommended that the tender be awarded to J.K Investment Kenya Limited which was issued with a notification of award. Upon his further inquiry, he found out that the then Acting Chief Executive Officer, Eng. George Sang, solely executed the contract with **J.K Investment Kenya Limited** without following internal/routine procedures of having the contract cleared by the Corporation Secretary/head of legal services of the Authority who is also required to witness the signature of the Chief Executive Officer.

81. According to the deponent, it is major breach of internal procedures, the *Mwongozo* guidelines on the governance of state corporations, the ***Water Act***, the ***State Corporations Act*** and the Constitutional provisions of leadership, integrity, and governance for the Petitioner to sign a major contract with a third party without getting the witnessing signature of Corporation Secretary/head of legal services of the Authority. Moreover, there were major tender irregularities raised by the General Manager responsible for the Procurement of the Authority which were all ignored by the Petitioner.

82. He further averred that he was also briefed that on 3rd April 2020, the Chief Procurement Officer wrote an internal memo addressed to the Petitioner herein advising him that the tender for the Construction of Turkana Peace Dam (naku'etum site) in Turkana County was not responsive and therefore should not be awarded to the recommended bidder since they did not meet the required evaluation criteria and the Internal Memo recommended that the procurement proceedings were subject to investigations by the *Ethics & Anti- Corruption Commission* and that the Notification of award should be terminated and all the bidders who participated be informed. Despite the above recommendations by the Chief Procurement Officer of the Authority, the Petitioner in blatant abuse of office failed, refused, and/or neglected to terminate the Notification of award and mitigate losses to the Authority.

83. It was the deponent's case that the fact that the said contract was also executed by a director of **J.K Investment Kenya Limited** clearly shows that the Petitioner herein was colluding for the said company to quickly commence construction works for the dam without conclusion of the underlying procurement and legal irregularities in the tender. In was deposed that in hurrying up to sign the said contract, the Petitioner was also avoiding the *statutory oversight* from the Board of Management chaired by the deponent.

84. The deponent termed the Petitioner's actions abuse of office, corruption, and extreme *'smash- and-grab-in-you-face'* kind of impunity by the Petitioner.

85. It was deposed that at the same time he was informed of investigations by the National Police Service through the Director of Criminal Investigations on the irregularities in the tender in question. Subsequently news of the arrest of the Petitioner by Director of Criminal Investigations was reported in the newspapers.

86. He deposed that as the Chairperson of the Board he was concerned about the arrest of the Petitioner and the negative news coverage around it as this was damaging to the institutional profile and image of the Authority in the eyes of public who they are supposed to serve. He further inquired and was informed on 28th April 2020 by the Director of Criminal Investigation that the Applicant was arrested alongside other officers on 24th April 2020, they were questioned at the DCI headquarters and later released on cash bail pending their arraignment in court on 27th April 2020.

87. According to the deponent, because of the grave corruption and abuse of office allegations against the Petitioner he convened online and chaired a special meeting of the Board on 28th April 2020 that resolved to revoke the Applicant's appointment as Acting Chief Executive Officer**.** Before tabling the issue for consideration by the Board he extensively consulted both in house and external lawyers who all advised him that it is proper and legal for the Board to revoke the appointment of the Petitioner as Acting Chief Executive Officer of the Authority because of the grave corruption and abuse of office allegations against him.

88. It was his view that since the Petitioner holds the substantive position of Chief Water Engineer in the Authority and not Chief Executive Officer, he cannot seek a conservatory order suspending his sacking as the **Ag.** Chief Executive Officer, a position he does not hold. The position of Ag. Chief Executive Officer is a privileged position, a trust bestowed to the Petitioner by the Board of Management pending the recruitment of a substantive Chief Executive Officer-which is ongoing. Therefore, it is impractical and legally untenable for the Petitioner to seek reinstatement to the position.

89. It was deposed that the decision of the Board to revoke the appointment of the Petitioner as Ag. Chief Executive Officer was made in good faith, it is line with good governance and accountability requirements and was meant to promote a legitimate public interest of safeguarding the funds of the Authority -which is more than Kshs. 230 million.

90. The deponent averred that given the ongoing COVID 19 pandemic and the need to ensure that the Petitioner does not authorise payment of funds to J.K Investment Kenya Limited, the Board meeting was convened online via Zoom application. All the directors attended the meeting and participated in the decision to revoke the appointment of Petitioner as Acting Chief Executive Officer of the Authority and to revoke bank mandates of the Petitioner and other officers who were accused alongside him.

91. He disclosed that he was aware that Ethics and Anti-Corruption Commission in a letter dated 30th April 2020 invited the Petitioner and other officers of the National Water Harvesting and Storage Authority to an interview which would facilitate investigations into the allegations of irregularities in the award of tender in the proposed Construction of Turkana Peace Dam (naku'etum site) in Turkana County. EACC has also requested for pertinent documents on the tender.

92. The deponent therefore was of the view that from the foregoing explanation especially concerning the circumstances that led to the 9th Special Full Board meeting of 28th April 2020 where the Petitioner's appointment as Acting Chief Executive Officer of the Authority was revoked and his bank mandate terminated alongside those of other officers; the Board verily believes the decision was taken in public interest and to safeguard public funds. In his view, the Boards' decision to was made in good faith. It does not control the decisions made by other agencies of government concerning the criminal aspects of the Petitioners' conduct.

93. He averred that on behalf of the board of the Authority, he believes there is a reasonable basis for the 1st and 2nd Respondent as well as the Ethics & Anticorruption Commission to investigate and possibly charge the Petitioner with abuse of office and corruption allegations hence the Petition filed herein lack merit and should be dismissed with costs.

94. On behalf of the 4th and 5th Respondents, it was submitted that It is now trite law that the office of the DCI and DPP should operate independently without any influence from internal or external factors. It was submitted that the court's interference should be exercised sparingly and in the clearest of cases and where it is proved that it has been unfairly and improperly exercised and reliance was placed on Article 157 of the Constitution and the case of **Douglas Maina Mwangi vs Kenya Revenue Authority and Another HC Constitutional Petition No. 528 of 2013.**

95. It was submitted that the powers of the police to investigate a crime cannot be challenged because the police service is principally exists to combat crime. It is therefore not possible to stop any criminal investigations unless the foundation of such investigations is malicious or is an abuse of power. Accordingly, it was argued that whereas the court may interrogate the process of conducting the investigations to establish whether they were informed by any malicious or ulterior motives,it need not go to the merits of the charges and the evidence collected as that is the jurisdiction of the trial court to evaluate whether the evidence produced is admissible.

96. With regards to the process or manner of the conduct of investigations, the Court was referred your Lordship to the case of **Josephat Koli Nanok & Another vs. Ethics And Anti-Corruption Commission (2018) eKLR** where the court went on to consider what an investigation process might entail. It stated that the person the subject of the investigation would be entitled to fair administrative action, so that before a decision is taken for the prosecution of the suspect, the investigative agency must observe that person's rights by granting him or her an opportunity to respond to the allegations. The court cautioned that it ought not to set standards for review of complaints or of matters warranting investigation and suggested that courts should guard against interfering with the investigative mandate of agencies by prescribing investigative procedures. It stated that what courts should look out for should be condemnation of a person before he or she has had an opportunity to be heard and to respond to the charges levelled against him or her.

97. In the matter at hand, it was submitted that the officers from the offices of DCI visited the National Water Harvesting & Storage Authority on 24th April 2020, identified themselves and informed the Petitioner that they were conducting investigations before arresting him alongside others and taking him for questioning in their offices. This clearly shows that the Petitioner was accorded the opportunity to explain his side of the story. He cannot therefore claim that his right to fair administrative action has been violated and that the investigations were marred with malicious intent.

98. According to the 4th and 5th Respondents, there is no prosecution yet, and the Petitioner has not even taken plea. Given that the 2nd Respondent conducted the investigations lawfully and procedurally, it serves no purpose to suspend the intended charges as at now because it is not known what is in the intended charge sheet, the evidence to be adduced and the probative value it has. This Court is bestowed with the duty to protect the Constitution hence the investigations and intended prosecution of the Petitioner should be allowed to proceed.

99. Regarding the prayer for an order of prohibition restraining the Respondents from sustaining, proceeding, hearing, conducting, or in any manner dealing with any intended charges, it was submitted that the same is discretionary and only tenable where a public body or official

acted in excess of their powers based on the decision of **Republic vs The Chief Magistrate, Milimani and 2 Others Ex. P Tusker Mattresses Ltd and 3 Others HC Misc. Civil Application No. 179 of 2012.**

100. It was submitted that from the foregoing, there has been no violation of the Petitioner's rights in the process of investigations. In the instant Petition, the Petitioner has not proven sufficiently that the process of investigations was tainted with irrationality, illegality and procedural impropriety. The Petitioner was not harassed in the process of investigations and his rights under the Constitution have not been violated. The Petition ought to be dismissed accordingly.

101. As regards the issue whether the respondents violated the petitioner's constitutional rights, it was submitted that though the Petitioner has a duty to demonstrate the alleged violations and contraventions of the Constitution, he has not presented any concrete evidence before this court to demonstrate how his Constitutional rights have been violated. This submission was based on the case of ***John Harun Mwau v Independent Electoral and Boundaries Commission & Another*** ***[2013] eKLR,*** **where** the Court stated as follows while referring to Article 27 of the Constitution. According to the said Respondents, they did not discriminate the Petitioner as alleged. The Petitioner having been the secretary of the board and the ex-officio member of the board is not guaranteed to attend all meetings of the board. The fact that he did not attend the 9th Full Special Board meeting which revoked his appointment does not amount to a violation of his rights. The first schedule of the **Water Act, 2016** provides that the quorum of a board meeting shall be a third of the members. This means that it is not mandatory for the Petitioner to attend a meeting.

102. It was submitted that the decision of the 5th Respondent to revoke the appointment of the Petitioner was made in good faith to safeguard public funds from any misappropriation and was not influenced by any ulterior motives hence should be upheld.

103. Based on section 18 of the ***Water Act***, it was submitted that the resolutions passed during the 9th Special Board Meeting were lawful and in accordance with law and that on 27th April 2020, the 4th and 5th Respondents sent out a letter to all Board Members notifying them that a special full board meeting was to be held on 28th April 2020 at 9.00 Am through zoom. This was in accordance with the circular from the Head of Public Service where the agreed mode of meeting was through virtual meetings due to the COVID-19 pandemic.

104. From the foregoing, it was submitted that the Petitioner's prayer to declare the Board meeting irregular and unconstitutional is baseless in law and misplaced since the Board Meeting was conducted in accordance with the law. The board's resolutions were made in good faith and in public interest to ensure smooth continuity of the Authority's operations. Therefore, we submit that the Petitioner has not provided sufficient proof to warrant the quashing of the Board's resolution to revoke his appointment and appoint the current acting CEO.

Determinations

105. I have considered the issues raised in this petition. The first issue for determination is whether this Court has jurisdiction to determine the issues raised in this petition. It is contended that this court has no territorial jurisdiction to entertain the matter. That contention is based on the fact that the alleged violations took place outside the territorial jurisdiction of this court and that the petitioner is a resident of Nairobi and working for gain with the 5th Respondent who has a registered office in Nairobi and he alleges to have been summoned and arrested by the 2nd Responded at the DCI headquarters and later booked at Pangani Police Station. It was further averred that the 1st, 3rd and 4th Respondents have registered offices in Nairobi. The objection was based on Section 12 to 15 of the ***Civil Procedure Act***, Article 165(3)(a) and (b) of the Constitution as well as rule 8 of the ***Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013.***

106. The cited provisions of the ***Civil Procedure Act*** provide for the territorial jurisdiction of the Court. The preamble to the ***Civil Procedure Act***, however provides that it is:

An Act of Parliament to make provision for procedure in civil courts.

107. The petition before me seek the application and interpretation of the Constitution. It cannot therefore be deemed to be *"civil proceedings"* as contemplated under the ***Civil Procedure Act*** so as to invoke Sections 12 to 15 thereof with a view to defeating the petition. In my view, the provisions of the said Act do not apply to petitions alleging violation of constitutional rights or contravention of the Constitution.

108. As regards rule 8 of the ***Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013,*** the same provides that:

Every case shall be instituted in the high court of Kenya within whose jurisdiction the alleged violations took place.

109. Article 165(3)(a),(b) of the Constitution provides that:

> ***(3) subject to clause (5), the High Court shall have-***
>
> ***"(a) unlimited jurisdiction in criminal and civil matters***
>
> ***(b) jurisdiction to determine the question whether a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened.***

110. As was appreciated **Nyamu, J** (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex**

Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728:

> **"The Courts guard their jurisdiction jealously, but recognize that it may be precluded or restricted by either legislative mandate or certain special contexts. Legislative provisions which suggest a curtailment of the Courts' power of review give rise to a tension between the principle of legislative mandate and the judicial fundamental of access to courts. Judges must search for critical balance and deploy various techniques in trying to find it. The Court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated. In our jurisdiction, the principle of proportionality is now part of our jurisprudence. Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the Court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal…It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly. It is a well established principle that a provision ousting the ordinary jurisdiction of the Court must be construed strictly meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the Court."**

111. Therefore, any provision purporting to limit the jurisdiction of the High Court must itself derive its validity from the Constitution itself and must do so expressly and not by implication unless the implication is necessary for the carrying into effect the provisions of the Act.

112. In matters of jurisdiction of superior courts, it is my view that one ought to take in consideration the well-known principle as enunciated in **East African Railways Corp. vs. Anthony Sefu [1973] EA 327,**where it was held that

> **"It is, a well established principle that no statute shall be so construed as to oust or restrict the jurisdiction of the Superior Courts, in the absence of clear and unambiguous language to that effect."**.

113. Although that rule applies the word "shall" it is my view, that the provision cannot be successfully invoked in order to dismiss a constitutional petition particularly in light of the clear constitutional provisions regarding the jurisdiction of the High Court. It is my view the mere fact that the said Rules applies the word "shall" rather than "may" does not necessarily connote that the requirement is mandatory. The intention of the rule making authority has to be examined before a determination is made as to whether the provision is mandatory or merely directory. In **Velji Shahmad vs. Shamji Bros. and Popatlal Karman & Co. [1957] EA 438** it was held:

> **"Such expressions as "may", "shall be empowered", "may be exercised", in certain circumstances are to be construed as having a compulsory or imperative force. The test is whether there is anything that makes it the duty on whom the power is conferred to exercise that power. Where a statute confers an authority to do a judicial act, in a certain sense there would be such a right in the public as to make it the duty of the justices to exercise that power: to put it another way where the exercise of an authority is duly applied for by a party interested and having a right to make the application, the exercise depends upon proof of the particular case out of which the power arises."**

114. In my view the said provision is merely directory and directs the parties on where to institute their proceedings and therefore in appropriate cases the court where the proceedings are instituted may direct that the same be heard and determined in a particular place. That, however, is a different thing from saying that the court has no jurisdiction in the matter. In the premises, I disallow the preliminary objection.

115. This petition brings to fore the thorny issue of the powers of the Director of Public Prosecutions vis-à-vis those of the Directorate of Criminal Investigations.

116. Section 28 of the ***National Police Service Act***, No. 11 of 2011 provides as hereunder:

> ***There is established the Directorate of Criminal Investigations which shall be under the direction, command and control of the Inspector-General.***

117. Section 29(8) and (9) of the same Act on the other hand provides as hereunder:

> ***(8) The Director of Criminal Investigations shall, in the performance of the functions and duties of office, be responsible to the Inspector-General.***
>
> ***(9) The Director of Criminal Investigations shall be—***
>
> ***(a) the chief executive officer of the Directorate;***
>
> ***(b) responsible for—***
>
> ***(i) implementing the decisions of the Inspector-General in respect of the Directorate;***
>
> ***(ii) efficient administration of the Directorate;***
>
> ***(iii) the day-to-day administration and management of the affairs of the Directorate; and***
>
> ***(iv) the performance of such other duties as may be assigned by the Inspector General, the Commission, or as may be prescribed***

by this Act, or any other written law

118. The functions of the Director of Criminal Investigations are provides for in section 34 of the Act as follows:

The Director of Criminal Investigations shall—

(a) be responsible for the effective and efficient administration and operations of the Directorate;

(b) provide strategic guidance and direction for the Directorate; (c) be responsible for the preparation of the budget and planning for the directorate;

(d) monitor and evaluate the Directorate;

(e) undertake supervision of the Directorate;

(f) co-ordinate training, research and development in the Directorate;

(g) provide internal oversight of the Directorate;

(h) improve transparency and accountability in the Directorate. (i) co-operate and engage in joint security operations with the Deputy Inspectors-General of both the Kenya Police Service and the Administration Police Service, other Government departments and security organs, where necessary, when relevant, to ensure the safety and security of the public; and

(j) perform any other functions that may be assigned by the Inspector General under this Act or any other law.

119. The functions of the Directorate of Criminal Investigations are provided for in section 35 of the said Act as hereunder:

The Directorate shall—

(a) collect and provide criminal intelligence;

(b) undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cyber crime among others;

(c) maintain law and order;

(d) detect and prevent crime;

(e) apprehend offenders;

(f) maintain criminal records;

(g) conduct forensic analysis;

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

(i) co-ordinate country Interpol Affairs;

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

(k) perform any other function conferred on it by any other written law. [Emphasis added].

120. It is therefore clear that the Directorate of Criminal Investigations is an office created under the ***National Police Service Act*** and its Director *inter alia* exercises his powers under the instructions of the Inspector General of Police.

121. The Director of Public Prosecutions is on the other hand a constitutional office created under Article 157 of the Constitution which provides as hereunder:

(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.

122. In this petition, one of the challenges taken by the Petitioner revolves around the prosecutorial powers. It is clear that neither the concerned the Directorate of Criminal Investigations nor the Inspector General of Police has any prosecutorial powers.

123. The law is very clear that powers must be expressly conferred; they cannot be a matter of implication. In testing whether a statute has conferred jurisdiction on a person or authority, wording must be strictly construed: it must in fact be an express conferment and not a matter of implication since a statutory Tribunal created statute has only such jurisdiction as has been specifically conferred upon it by the statute. Therefore, where the language of an Act is clear and explicit the court must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislature. Further, each statute has to be interpreted on the basis of its own language for words derive their colour and content from their context and secondly, the object of the legislation is a paramount consideration. See **Chogley vs. The East African Bakery [1953] 26 KLR 31 at 33 and 34; Re: Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195; Choitram vs. Mystery Model Hair Salon** (supra); **Warburton vs. Loveland [1831] 2 DOW & CL. (HL) at 489; Lall vs. Jeypee Investments Ltd [1972] EA 512 at 516; Attorney General vs. Prince Augustus of Hanover [1957] AC 436 AT 461**.

124. It is therefore clear that statutory power must be conferred by the Statute establishing an entity which statute must necessarily set out its powers expressly since such entities have no inherent powers. Unless its powers are expressly donated by the parent statute, the authority or person cannot purport to exercise any powers not conferred on it expressly. As has been held time without a number, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others.

125. Therefore, where the law exhaustively provides for the jurisdiction of an executive body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative or executive bodies. Whereas, if Parliament gives great powers to them, the courts must allow them to it, the Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The tribunals or boards must act in good faith; extraneous considerations ought not to influence their actions; and they must not misdirect themselves in fact or law. Most importantly they must operate within the law and exercise only those powers which are donated to them by the law or the legal instrument creating them. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.**

126. In this case in terms of prosecutorial powers, the Director of Public Prosecutions may pursuant to Article 157(4) of the Constitution, 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. Upon receipt of such directions, pursuant to Section 35(h) of the ***National Police Service Act***, the Inspector General of Police may direct the Directorate of Criminal Investigations to execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of the Constitution. Clearly therefore there is a clear chain of command set out hereinabove. When it comes to the exercise of prosecutorial powers, as between the three entities, the Director of the Public Prosecutions has the last word. In other words, no public prosecution may be undertaken by or under the authority of either the Inspector General of Police or the Director of Criminal Investigations without the consent of the Director of Public Prosecutions.

127. What the foregoing provides is that each of the three entities must of necessity stay on their respective lanes. Any attempt by any of them to trespass onto the other's lane can only end up disastrously. In simple terms an attempt by the Directorate of Criminal Investigations to charge a person with a criminal offence without the consent of the Director of Public Prosecutions is ultra vires the power and authority of the Director of Criminal Investigations and amounts to abuse of his powers. It is therefore null and void ab initio.

128. In this case it was contended which contention was not denied that there was a futile attempt by the 2nd Respondent herein to levy charges against the Petitioner without the consent of the 1st Respondent. That action was clearly unconstitutional, unlawful, illegal, null and void. This court is under a constitutional mandate to direct the 2nd Respondent back to his lane by directing him to refrain from running amok onto the 2nd Respondent's lane. The 2nd Respondent, the Director of Criminal Investigations, must keep to its lawful lane and must desist from the temptation to overlap even where he believes that those who are constitutionally empowered to take action are dragging their feet. Once he is done with its mandate he must hand over the button to the next "athlete" and must not continue with the race simply because he believes that the next athlete is "a slow footed runner".

129. Under Article 157(4) of the Constitution, the Director of Public Prosecution is empowered to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General is obliged to comply with any such direction. In other words, the DPP is not bound by the actions undertaken by the police in preventing crime or bringing criminals to book. He is, however, under Article 157(11) of the Constitution, enjoined to 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. In other words, the DPP ought not to exercise his/her constitutional mandate arbitrarily.

130. The independence of the DPP, is anchored both in the Constitution and in the legislation under Article 157(10) of the Constitution and section 6 of the ***Office of the Director of Public Prosecutions Act, 2013.*** Article 157(10) provide as follows:

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

131. Section 6 of the ***Office of the Director of Public Prosecutions Act, 2013*** provides that:

> ***Pursuant to Article 157(10) of the Constitution, the Director shall–***
>
> ***(a) Not require the consent of any person or authority for the commencement of criminal proceedings;***
>
> ***(b) Not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution, this Act or any other written law; and***
>
> **(c)** ***Be subject only to the Constitution and the law.***

132. In my view, the mere fact that those entrusted with the powers of investigation have conducted their own independent investigations, and based thereon, arrived at a decision does not necessarily preclude the DPP from undertaking its mandate under the foregoing provisions. Conversely, the DPP is not bound to prosecute simply because the investigating agencies have formed an opinion that a prosecution ought to be undertaken. The ultimate decision of what steps ought to be taken to enforce the criminal law is placed on the officer in charge of prosecution and it is not the rule, and hopefully it will never be, that suspected criminal offences must automatically be the subject of prosecution since public interest must, under our Constitution, be considered in deciding whether or not to institute prosecution. See ***The International and Comparative Law Quarterly*** Vol. 22 (1973).

133. A reading of Article 157(4) of the Constitution leads me to associate myself with the decision of the High Court of Uganda in the case of **Uganda vs. Jackline Uwera Nsenga Criminal Session Case No. 0312 of 2013,** to the effect that:

> **"...the DPP is mandated by the Constitution (See Art. 120(3)(a)) to direct the police to investigate any information of a criminal nature and report to him or her expeditiously…Only the DPP, and nobody else, enjoys the powers to decide what the charges in each file forwarded to him or her should be. Although the police may advise on the possible charges while forwarding the file to DPP…such opinion is merely advisory and not binding on the DPP (See Article 120(6) Constitution). Unless invited as witness or amicus curiae (friend of Court), the role of the police generally ends at the point the file is forwarded to the DPP."**

134. This position was similarly appreciated in **Charles Okello Mwanda vs. Ethics and Anti-Corruption Commission & 3 Others (2014) eKLR** in which **Mumbi Ngugi, J** held that:

> **"I would also agree with the 4th Respondent (DPP) that the Constitutional mandate under 2010 Constitution with respect to prosecution lies with the 4th Respondent, and that the 1st Respondent has no power to 'absolve' a party and thereby stop the**

> **4th Respondent from carrying out his constitutional mandate. Article 157(10) is clear…However, in my view, taking into account the clear constitutional provisions with regard to the exercise of prosecution powers by the 4th Respondent set out in Article 157(10) set out above, the 1st respondent (EACC) has no authority to 'absolve' a person from criminal liability…so long as there is sufficient evidence on the basis of which criminal prosecution can proceed against a person, the final word with regard to the prosecution lies with the 4th Respondent (DPP) …"**.

135. It was pursuant to the foregoing that **Majanja, J** expressed himself in **Thuita Mwangi & Anor vs. The Ethics and Anti-Corruption Commission & 3 Others Petition No. 153 & 369 of 2013** as hereunder:

> **"The decision to institute criminal proceedings by the DPP is discretionary. Such exercise of power is not subject to the direction or control by any authority as Article 157(10)…These provisions are also replicated under Section 6 of the Office of the Director Public Prosecutions Act, No. 2 of 2013…In the case of Githunguri –vs- Republic (Supra at p.100), the Court observed…The Attorney General of Kenya…is given unfettered discretion to institute and undertake criminal proceedings against any person "in any case in which he considers it desirable so to do… this discretion should be exercised in a quasi-judicial way. That is, it should not be exercised arbitrarily, oppressively or contrary to public policy …"**

136. In my view, the discretion to be exercised by the DPP is not to be based on recommendations made by the investigative bodies. Therefore, the mere fact that the DPP's decision differs from the opinion formed by the investigators is not a reason for interfering with the constitutional and statutory mandate of the DPP as long as he/she believes that he/she has in his/her possession evidence on the basis of which a prosecutable case may be mounted and as long as he takes into account the provisions of Article 157(11) of the Constitution as read with section 4 of the ***Office of Public Prosecutions Act***, No. 2 of 2013.

137. Conversely, the mere fact that the investigators believe that there is a prosecutable case does not necessarily bind the DPP. As is rightly recognised by **Sir Elwyn Jones** in ***Cambridge Law Journal*** – April 1969 at page 49:

> **"The decision when to prosecute, as you may imagine is not an easy one. It is by no means in every case where a law officer considers that a conviction might be obtained that it is desirable to prosecute. Sometimes there are reasons of public policy which make it undesirable to prosecute the case. Perhaps the wrongdoer has already suffered enough. Perhaps the prosecution would enable him present himself as a martyr. Or perhaps he is too ill to stand trial without great risk to his health or even to his life. All these factors enter into consideration."**

138. In **International Centre for Policy and Conflict vs. Attorney General & Others Nbi Misc. Civil Cause No. 226 of 2013**, this Court expressed itself as follows:

> **"Courts are the temples of justice and the last frontier of the rule of law and must therefore remain steadfast in defending the letter and the spirit of the Constitution no matter what other people may feel. To do otherwise would be to nurture the tumour of impunity and lawlessness. That tumour like an Octopus unless checked is likely to continue stretching its eight tentacles here and there grasping powers not constitutionally spared for it to the detriment of the people of this nation hence must be nipped in the bud."**

139. In **R. vs. Director of Criminal Investigation Department & Others (2016) eKLR** the Court held thus:

> **"I am however concerned that it would seem that the Applicants were taken to Court before the D.P.P. made a decision on whether they should be charged or not. That haste on the part of the police is clearly deplorable and cannot escape condemnation."**

140. Since our country is a constitutional democracy adherence to the rule of law is not an option. Every State Officer from the top to the bottom and every State Organ acquires his or its powers from the Constitution. He or it cannot therefore purport to exercise powers outside the Constitution. Any action he or it undertakes must therefore be constitutionally underpinned. That is why Article 2(2) of the Constitution provides that:

> ***No person may claim or exercise State authority except as authorised under this Constitution.***

141. **It was therefore held i**n **Republic vs Kombo & 3 Others Ex Parte Waweru Nairobi HCMCA No. 1648 of 2005 [2008] 3 KLR (EP) 478**:

> **"The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to the law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be wrong…or which infringes a man's liberty…must be able to justify its action as authorised by law – and nearly in every case this will mean authorised directly or indirectly by Act of Parliament. Every act of government power that is to say, every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the Courts of law, and if the legal pedigree is not found to be perfectly in order the Court will invalidate the act, which he can safely disregard."**

142. **Emukule, J** in **Muslims for Human Rights (MUHURI) & Another vs. Inspector-General of Police & 5 Others [2015] eKLR** expressing himself on the twin principles of constitutionalism and the rule of law opines at para 140 that:

"The principles of constitutionalism and the rule of law lie at the root of our system of government. It is a fundamental postulate of our constitutional architecture. The expression the rule of law conveys a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority. At its very basic level, the rule of law vouchsafes to the citizens and residents of Kenya, a stable, predictable and ordered society in which to conduct its affairs. Like our National Anthem says it is our shield and defender for individuals from arbitrary state action."

143. Orderliness requires that the holders of the offices of the Director of Public Prosecution, the Inspector General of Police and the Director of Criminal Investigations properly understand their powers and their limits. They must not through administrative or other craft or by innovation conjure imaginary powers which they in fact do not possess.

144. Accordingly, I must make it clear that the 2nd Respondent herein, the Director of Criminal Investigations has no powers at all under our current legal frame work to present any charges before a court of law particularly where the Director of Public Prosecutions, the 1st Respondent has not consented to the same.

145. By this petition, the Petitioner is in effect seeking to challenge the manner in which the 2nd Respondent purported to exercise his power.

146. Section 24 of the ***National Police Service Act*** **No 11 A of 2011** sets out functions of the Kenya Police Service as being the—

(a) Provision of assistance to the public when in need;

(b) Maintenance of law and order;

(c) Preservation of peace;

(d) Protection of life and property;

(e) Investigation of crimes;

(f) Collection of criminal intelligence;

(g) Prevention and detection of crime;

(h) Apprehension of offenders;

(i) Enforcement of all laws and regulations with which it is charged; and

(j) Performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.

147. The word **"investigate**" is defined in the ***Black's Law Dictionary*** **9th Edition as:** ***"To inquire into a matter systematically; to make an official inquiry*****."**

148. Apart from the foregoing section 51(1) of the ***National Police Service Act*** provides as follows:

(1) A police of officer shall—

(a) obey and execute all lawful orders in respect of the execution of the duties of office which he may from time to time receive from his superiors in the Service;

(b) obey and execute all orders and warrants lawfully issued;

(c) provide assistance to members of the public when they are in need;

(d) maintain law and order;

(e) protect life and property;

(f) preserve and maintain public peace and safety;

(g) collect and communicate intelligence affecting law and order;

(h) take all steps necessary to prevent the commission of offences and public nuisance;

(i) detect offenders and bring them to justice;

(j) investigate crime; and

(k) apprehend all persons whom he is legally authorized to apprehend and for whose apprehension sufficient ground exists.

149. Section 52 of the same Act, on the other hand, provides as hereunder:

(1)A police officer may, in writing, require any person whom the police officer has reason to believe has information which may assist in the investigation of an alleged offence to attend before him at a police station or police office in the county in which that person resides or for the time being is.

(2) A person who without reasonable excuse fails to comply with a requisition under subsection (1), or who, having complied, refuses or fails to give his correct name and address and to answer truthfully all questions that may be Lawfully put to him commits an offence.

(3) A person shall not be required to answer any question under this section if the question tends to expose the person to a criminal charge, penalty or forfeiture.

(4) A police officer shall record any statement made to him by any such person, whether the person is suspected of having committed an offence or not, but, before recording any statement from a person to whom a charge is to be preferred or who has been charged with committing an offence, the police officer shall warn the person that any statement which may be recorded may be used in evidence.

(5) A statement taken in accordance with this section shall be recorded and signed by the person making it after it has been read out to him in a language which the person understands and the person has been invited to make any correction he may wish.

(6) Notwithstanding the other provisions of this section, the powers conferred by this section shall be exercised in accordance with the Criminal Procedure Code (Cap. 75), the Witness Protection Act (Cap. 79) or any other written law.

(7) The failure by a police officer to comply with a requirement of this section in relation to the making of a statement shall render the statement inadmissible in any proceedings in which it is sought to have the statement admitted in evidence.

150. It is therefore clear that the 2nd Respondent when acting within his mandate is empowered to commence investigation into the allegations made against any person including the Petitioner.

151. In **Republic vs. Chief Magistrate Milimani & Another Ex-parte Tusker Mattresses Ltd & 3 others [2013] eKLR** this Court expressed itself as follows:

"The Court must in such circumstances take care not to trespass into the jurisdiction of the investigators or the Court which may eventually be called upon to determine the issues hence the Court ought not to make determinations which may affect the investigations or the yet to be conducted trial. That this Court has power to quash impugned warrants cannot be doubted. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the police to investigate allegations of commission of a criminal offence ought to be interfered with. It is not enough to simply inform the Court that the intended trial is bound to fail or that the complaints constitute both criminal offence as well civil liability. The High Court ought not to interfere with the investigative powers conferred upon the police or the Director of Public Prosecution unless cogent reasons are given for doing so...The warrants were issued to enable the allegations be investigated. Whether or not the investigations will unearth material which will be a basis upon which a decision will be made to commence prosecution of the ex parte applicants or any of them is a matter which is premature at this stage to dwell on."

152. It is trite that the Court ought not to usurp the constitutional and legal mandate of the 1st and 2nd Respondents to investigate any matter that, in the said Respondents' view raises suspicion of the occurrence or imminent occurrence of a crime. Just like in cases of prosecution, the mere fact that the allegations made are likely to be found worthless, is not a ground for halting investigations into the complaints made or brought to the attention of the Respondents since the purpose of criminal investigations conducted *bona fide* is to consider both incriminating and exculpatory material and not just to collect evidence on the basis of which a criminal charge may be laid.

153. It must always be noted that in these kinds of proceedings were are not concerned with the merits but with the decision making process. That a Petitioner applicant has a good defence to the complaint is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is open to the applicant to bring to the attention of the investigators in the course of the conduct of the investigations.

154. However, if the applicant demonstrates that the investigations that the investigators intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such investigations since investigations must be carried out independently and must be carried out in good faith without malice or for the purpose of achieving some collateral goal divorced from the purpose for which the investigatory powers are conferred.

155. In **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170,** the Court of Appeal held:

"It is trite that an order of prohibition is an order from the High Court directed to an inferior tribunal or body which

forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings..."

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

"The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion 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...Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power. Having regard to the law, the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision is correct. The other grounds, which the appellants claim were ignored ultimately, raise the question whether the evidence gathered by the prosecution is sufficient to support the charge. The criminal trial process is regulated by statutes, particularly the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court, which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence and that is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court."

157. The duty and mandate of the police was appreciated in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR** where it was held:

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

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

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

can still order that the continued implementation of that decision be stayed...There is nothing which can stop the from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made...Under section 77(5) of the Constitution it is a constitutional right that no person who has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of the offence. What is clear from this constitutional right is that it prevents the re-prosecution of a criminal case, which has been determined in one way or another...A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution.....In the instant case there is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even of manipulation of court process so as to seriously deprecate the likelihood that the applicants might not get a fair trial as provided under section 77 of the Constitution...There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an "abuse of process", is a "manipulation", "amounts to selective prosecution" or such other processes, or even supposing that the applicants might not get affair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts. The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial... In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names."

159. It is trite that based on **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001**:

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

160. It follows that the burden is on the prosecutor to show by way of admissible evidence that he is in possession of material that disclose the existence of a prosecutable case since as was held in **Stanley Munga Githunguri vs. R [1986] eKLR** at page 18 and 19 by a three bench High Court constituted of Ag. Chief **Justice Madan** and **Justices Aganyanya** and **Gicheru**:

> **"A prosecution is not to be made good by what it turns up. It is good or bad when it starts."**

161. Whereas Article 157(10) of the Constitution provides that 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, Article 157(11) provides:

> ***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.***

162. Apart from that, section 4 of the ***Office of Public Prosecutions Act***, No. 2 of 2013 provides:

> ***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.

163. It is therefore clear that the terrain under the current prosecutorial regime has changed and that the discretion given to the DPP is not absolute but must be exercised within certain laid down standards provided under the Constitution and the ***Office of the Director of Public Prosecutions Act***. Where it is alleged that these standards have not been adhered to, it behoves this Court 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."**

164. Where therefore it is clear that the discretion is being exercised with a view to achieving certain extraneous goals other than those legally recognised under the Constitution and the ***Office of the Director of Public Prosecutions Act***, that would, in my view, constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion. As was held by **Wendoh, J** in **Koinange vs. Attorney General and Others [2007] 2 EA 256**:

> **"Under section 26 of the Constitution the Attorney General has unfettered discretion to undertake investigations and prosecute. The Attorney Generals inherent powers to investigate and prosecute may be exercised through other offices in accordance with the Constitution or any other law. But, if the Attorney General exercises that power in breach of the constitutional provisions or any other law by acting maliciously, capriciously, abusing the court process or contrary to public policy the Court would intervene under section 123(8) of the Constitution and in considering what constitutes an abuse of the court process the following principles are relevant: (i) Whether the criminal prosecution is instituted for a purpose other than the purpose for which it is properly designed; (ii) Whether the person against whom the criminal proceedings are commenced has been deprived of his fundamental right of a fair trial envisaged in the provisions of the constitution; (iii) Whether the prosecution is against public policy."**

165. In **Kenya Commercial Bank Limited & 2 Others vs. Commissioner of Police and Another, Nairobi Petition No. 218 of 20122 (2013) eKLR,** where **Majanja J.** held that:

> **"the office of the Director of Public Prosecution and Inspector General of the National Police Service are independent and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within the limits provided by the law. But these offices are subject to the Constitution and the Bill of Rights contained therein and in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under the constitution."**

166. It is now clear that even in the exercise of what may appear to be prima facie absolute discretion conferred on the executive the Court may interfere. The Court can only intervene in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**

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

168. It is therefore clear that whereas the discretion given to the respondents to investigate criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence, the Court will not hesitate to bring such proceedings to a halt. However, in these types of proceedings, this court is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and once the Court is satisfied that the same are *bona fides* and that the same are being conducted in a fair manner, the High Court ought not to usurp the powers of the police by halting otherwise proper complaints made before them.

169. In this petition, Petitioner contended that the charges which were levied against the Petitioner were regarding that the employment and/or appointment of **Lydia Korir, Noah Nondin Arap Too**, **Peter Mutai Bett** and **Nixon Kiprotich Bett** to the 5th Respondent and that his action amounted to abuse of office. The Petitioner contended that the allegations levelled against him were untrue and that the same were

instigated maliciously by the 4th Respondent in order to get rid of him.

170. In **Jared Benson Kangwana vs. Attorney General Nairobi High Court Misc. Application No. 446 of 1995** (unreported) (hereinafter "Kangwana Case") **Khamoni, J** noted that:

> **"The essence of abuse as stated in the case of *Spautz v Williams*...is that:**
>
> **'the proceedings complained of were (instigated and) instituted and/or maintained for a purpose other than that for which they were properly designed or exist or to achieve for the person (instigating), instituting them some collateral advantage beyond that which the law offers, or to exert pressure to effect an object not within the scope of the process."**

171. The test as was noted in the *Kangwana Case* is;

> **"whether there are circumstances which will make the proceedings an abuse of the process of the court. Acts of such abuse are not restricted to what the prosecution or the State does but extend to acts of any party" and the prosecution or the Respondent should not be telling this court not to rely on anything done by the victim to decide whether there is an abuse...The court should ask whether its process is being fairly invoked…The functions of abuse of the process of the court are not limited to what the prosecution or the State or the court does. They extend to what any other interested party, like the person aggrieved, does and case authorities have shown that it is not the events at the trial that necessarily give rise to the granting of a prohibition on the ground of abuse of the process of the court. They can be events outside the court. They can be events not done by the State but done by the person aggrieved who succeeds in getting the unsuspecting State or Public Prosecutor to prosecute the Accused person."**

172. In the same case it was held that:

> **"to institute civil and criminal proceedings to exert pressure for the payment of a debt *bonafide* disputed, when those civil and criminal proceedings are not for the purpose of deciding the disputed debt or are not under the law which make provisions for deciding the disputed debt, constitutes an abuse of the process of the court."**

173. That was the position in **Williams vs. Spautz [1992] 66 NSWLR 585**, at 600, where the High Court of Australia consisting of seven judges observed that:

> **"If the proceedings obviously lack any proper foundation in the sense that there is no evidence capable of sustaining a committal, they will obviously be vexatious and oppressive. In such a case, the proceedings themselves are an abuse of the process of the Local Court and will inevitably result in the discharge of the defendant...And that the charges against the defendant lack any foundation, the Supreme Court would be justified in intervening to halt the proceedings in limine in order to prevent the defendant from being subjected to unfair vexation and oppression...For a man to be harassed and put to the expense of perhaps a long trial and then given an absolute discharge is hardly from any point of view an effective substitute for the exercise by the court [of its inherent power to prevent abuse of its process."**

174. In my view to permit the prosecutor to arbitrarily exercise his constitutional mandate based on ulterior criminal motives would amount to the Court abetting abuse of discretion and power and criminality. It was therefore held in **Regina vs. Ittoshat [1970] 10 CRNS 385** at**389** that:

> **"this Court not only has the right but a duty to protect citizens against harsh and unfair treatment. The duty of this Court is not only to see the law is applied but also, which is of equal importance, that the law is applied in a just and equitable manner."**

175. Similarly, in **Paul Imison vs. Attorney General & 3 Others Nbi HCMCA No. 1604 of 2003**:

> **"I do not think that our Constitution which is one of a democratic state would condone or contemplate abuse of power...The Attorney General in some of his constitutional functions does perform public duties and if he were to be found wanting in carrying them out or failing to perform them as empowered by the Constitution or any other law, I see no good reason for singling him out and failing to subject him to judicial review just like any other public official. I find nothing unconstitutional in requiring him to perform his constitutional duties. A monitoring power by the court by way of judicial review would have the effect of strengthening the principles and values encapsulated by the Constitution. To illustrate my point, Judicial Review tackles error of law and unlawfulness, procedural impropriety, irrationality, abuse of power and in not too distant future, human rights by virtue of the International Conventions which Kenya has ratified. In exercising the Judicial Review jurisdiction the court would not be sitting on appeal on the decisions of the Attorney General, he will still make the decisions himself but the lawfulness, etc. of his decisions should be within the purview of the courts..."**

176. This Court therefore has the powers and the constitutional duty to supervise the exercise of the Respondent's mandate whether constitutional or statutory as long as the discretion falls foul of section 4 of the ***Office of the Director of Public Prosecution Act*** and Article 157 of the Constitution.

177. I also defer to **R –vs- DPP & Others Ex parte Qian Guo Jun & Anor [2013] eKLR** where the Court held that:

"Although the Court appreciates that the discretion given to the police to investigate offences and that given to the Director of Public Prosecutions ought not to be lightly interfered with, where an applicant places before court material which prima facie show that the dispute between the applicant and the interested part is purely civil in nature and that the criminal proceedings are being undertaken with ulterior motives, it behoves the respondents to place some material before the court which though not conclusively proving the guilt of the applicant warrants their action to charge the applicants. In absence of such material and in light of the material placed before the court by the applicant, the Court would be left with no option but to believe the applicant's version that being the only factual version before it.."

178. As was held in **R. vs. The Judicial Commission into the Goldenberg Affair and 2 Others expSaitoti HC Misc Appl. 102 of 2006**:

"It is not good for the DPP to argue that the Applicant should be arrested and charged so that he can raise whatever defences he has in a trial court. The Court has a constitutional duty to ensure that a flawed threatened trial is stopped in its tracks if it is likely to violate any of the applicants' fundamental rights."

179. According to the Petitioner, the allegations against him are malicious and motivated by sheer witch-hunt which is evinced by the fact that one of the strangers alleged to have been hired by the Petitioner - **Noah Nondin Arap Too** is deceased having passed on, on the 6th day of May 2015. Further the payroll of all the employees of the Authority supplied to the officers of the DCI clearly indicated that the alleged strangers employed by the Petitioner were not on the payroll of the Authority.

180. It must however be emphasised that this Court, sitting as a constitutional court, is not concerned with the innocence or otherwise of the Petitioner. This is because it must be appreciated that our criminal process entails safeguards which are meant to ensure that an accused person is afforded a fair trial. Article 50 of our Constitution accordingly provides *inter alia* as follows:

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right—

(a) to be presumed innocent until the contrary is proved;

(b) to be informed of the charge, with sufficient detail to answer it;

(c) to have adequate time and facilities to prepare a defence;

(d) to a public trial before a court established under this Constitution;

(e) to have the trial begin and conclude without unreasonable delay;

(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

to remain silent, and not to testify during the proceedings;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

(k) to adduce and challenge evidence;

(l) to refuse to give self-incriminating evidence;

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;

(n) not to be convicted for an act or omission that at the time it was committed or omitted was not—

(i) an offence in Kenya; or

(ii) a crime under international law;

(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence

has been changed between the time that the offence was committed and the time of sentencing; and

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

(3) If this Article requires information to be given to a person, the information shall be given in language that the person understands.

(4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

(5) An accused person—

(a) charged with an offence, other than an offence that the court may try by summary procedures, is entitled during the trial to a copy of the record of the proceedings of the trial on request; and

(b) has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law.

181. I have reproduced the relevant provisions of Article 50 in order to show that our Constitution has provided extensive safeguards to accused persons when charged with criminal offences and therefore unless there is material upon which the Court can find that the applicant is unlikely to receive a fair trial before the trial Court, the Court ought not to interfere simply because the applicant may at the end be found to be innocent.

182. As was held in **Jago vs. District Court (NSW) 106**:

> **"An abuse of process occurs when the process of the court is put in motion for a purpose which, in the eye of the law, it is not intended to serve or when the process is incapable of serving the purpose it is intended to serve. The purpose of criminal proceedings, generally speaking is to hear and determine finally whether the accused has engaged in 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 not abuse of process...When process is abused, the unfairness against which a litigant is entitled to protection is his subjection to process which is not intended to serve or which is not capable of serving its true purpose. But it cannot be said that a trial is not capable of serving its true purpose when some unfairness has been occasioned by circumstances outside the court's control unless it be said that an accused person's liability to conviction is discharged by such unfairness. This is a lofty aspiration but it is not the law."**

183. In **National Director of Public Prosecutions vs. Zuma [2009] ZASCA 1**; **2009 (2) SA 277 (SCA)**, it was held that:

> **"A prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent, something not alleged by Mr Zuma and which in any event can only be determined once criminal proceedings have been concluded. The motive behind the prosecution is irrelevant because, as Schreiner JA said in connection with arrests, the best motive does not cure an otherwise illegal arrest and the worst motive does not render an otherwise legal arrest illegal. The same applies to prosecutions."**

184. In the book **Criminal Judicial Review:** ***A Practitioner's Guide to Judicial Review in the Criminal Justice System and Related Areas*** Bloomsbury (2013) by **Pierce .V. Berge,** the scope of Judicial Review in criminal prosecution was considered as follows;

> ***'The first issue in any judicial review involving the Crown Prosecution Service is that the scope for review is very narrow. The courts recognise that the DPP and other independent prosecuting bodies have an important constitutional position, as bodies have an important constitutional position, as bodies independent of the exclusive, solely entrusted with powers to make difficult judgments and assessments in the public interest. This will apply to decisions to prosecute and decisions not to prosecute. Therefore Judicial Review of their actions is highly exceptional. In R (Corner House Research) v Director of the Serious Fraud Offence, Lord Bingham said:***
>
> ***The reasons why the courts are very slow to interfere are well understood. They are, first that the powers in question are entrusted to the officers identified, and to no one else. No other authority may exercise power or make judgments on which such exercise must depend. Secondly, the courts have recognised (as it was described in the cited passage of (Matalulu v Director of Public Prosecution [2003] 4 LRC 712 at 735-736]) 'the polycentric character of official decision making in such matters including policy and public interest considerations which are not susceptible of judicial review because neither the constitutional function nor the practical competence of the courts to assess their merits,'***

185. In **Thuita Mwangi & Anor vs. The Ethics and Anti-Corruption Commission & 3 Others Petition No. 153 & 369 of 2013**, it was held:

> **"I am afraid that the High Court at this point is not the right forum to tender justifications concerning the subject transaction let alone test the nature and veracity of these allegations. In… the Court held that "It is the trial Court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. It would be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court". Similarly…Lenaola J., captured this balance as follows; "(22). The point being made above is that the DPP though not**

subject to control in exercise of his powers to prosecute criminal offences, must exercise that power on reasonable grounds. Reasonable grounds, it must be noted, cannot amount to the DPP being asked to prove the charge against an accused person at the commencement of the trial but merely show a prima facie case before mounting a prosecution. The proof of the charge is made at trial."

186. As was held by **Mumbi Ngugi, J** in **Kipoki Oreu Tasur vs. Inspector General of Police & 5 Ors (2014) eKLR:**

"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".

187. The trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of an appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words, unless the applicant demonstrates that the circumstances of the impugned process render it impossible for the applicant to have a fair trial, the High Court ought not to interfere with the trial simply on the basis that the applicant's chances of being acquittal are high. In other words, the High Court ought not to transform itself into a trial court and examine minutely whether or not the prosecution is merited.

188. It is also my view that in determining whether or not to halt criminal proceedings, the Court must consider the dominant motive for bringing the criminal proceedings. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the ***predominant*** purpose is to further some other ulterior purpose and as long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene. See **Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another** (supra) and **R vs. Attorney General exp Kipngeno Arap Ngeny** (supra).

189. Where it is not the predominant purpose the Court ought not to interfere. Where the ground relied upon to halt the same is some collateral motive which on its own does not warrant the halting of the said proceedings, the Court ought not to take such exceptional step of bringing to an end criminal proceedings where there possibly exist other genuine motives.

190. In this case, it is contended by the Petitioner that the 4th Respondent having failed to remove the Petitioner from his position as a result of the court's intervention, has colluded with the 2nd Respondent to maliciously levy criminal charges against him with a view to having him step aside. According to the Petitioner, his arrest by officers of the DCI, his interrogation and subsequent decision to charge him with the offence of abuse of office is maliciously instigated by individuals at the Authority who are colluding with officials of the DCI to have him take a plea as a public officer so that he steps aside and he be removed from office for their preferred candidate to be appointed.

191. I have already found that the 2nd Respondent had no powers to levy the said charges without the consent of the 1st Respondent and that the said action was illegal. It is however clear that the said attempt was stillborn. Accordingly, the said action by the 2nd Respondent can nolonger be a basis for the removal of the Petitioner from his position. Based on the material placed before me therefore there is no basis upon which I can find that the removal of the Petitioner or threat of his removal from his position with the 5th Respondent was informed by the subject criminal proceedings. There may well be some reasons malicious or otherwise but this Court sitting as a constitutional court as opposed to the Employment and Labour Relations Court cannot determine that issue. However, had it been proved before me that the Petitioner's removal from his position was as a result of criminal proceedings instituted by the 2nd Respondent I would not have hesitated to set aside the same since that action would have been based on a decision made without jurisdiction.

192. Proceedings of this nature, ordinarily, do not deal with the merits of the case but only with the process. In other words these proceedings determine, *inter alia*, whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made, whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters, whether the decision to commence the criminal charges go contrary to the applicant's legitimate expectation, whether the respondents' decision to charge the applicant is irrational. It follows that where an applicant brings such proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction to determine such a matter and will leave the parties to resort to the usual forums where such matters ought to be resolved. In other words, such proceedings are not the proper forum in which the innocence or otherwise of the applicants is to be determined and a party ought not to institute such proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in these kinds of proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and whether such proceedings amount to a violation of his rights and fundamental freedoms and once the Court is satisfied that that is not the case, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution's evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.

193. Whereas an applicant may well be correct that there are several factors which go to show his innocence, these are not the proper proceedings in which the correctness of the evidence or the truthfulness of the witnesses is to be gauged. That task is solely reserved for the trial Court which is constitutionally bound to determine the proceedings in accordance with the law. Accordingly, the mere fact that the applicants view the evidence to be presented against them as patently false, concocted and/or misleading does not warrant this Court in interfering with the criminal process since that is an allegation which goes to the sufficiency and veracity of the evidence and the innocence of the Applicants, matters which are not within the province of this Court.

194. I have considered the contents of the replying affidavit and I am unable to find that there is completely dearth of reasonable grounds to undertake investigations against the Petitioner.

195. The Petitioner has also taken issue with the fact that even before the Petitioner and his co-accused were presented to the Court for plea taking, there was already a story running in the Star Newspaper of the 27th April 2020 titled ***"Kinoti in new supremacy war with Haji over criminal probes"*** where the DCI is quoted stating that they had arrested the CEO National Water Harvesting and Storage Authority (Petitioner herein) over claims of irregular tendering and that the DCI was planning to charge the Petitioner in Court the following day. This was after another story ran in the Daily Nation Newspaper of the 24th April 2020 titled ***"Water Authority boss Geoffrey Sang arrested in DCI swoop***", a story which was published even before the Petitioner was interviewed and charge and cautionary statements taken. The said story indicated that the Petitioner had been arrested by the DCI detectives over the 231 Million Naku'etum Peace Dam Project in Turkana County. The Petitioner averred that at no time during his interrogation at the DCI Headquarters was he questioned regarding any money lost in a dam project and Specifically the Naku'etum Peace Dam in Turkana County and that these publications were erroneous, malicious and spitefully printed to portray the Petitioner as a corrupt individual. It was the Petitioner's averment that the actions of the 2nd Respondent and his officers of publishing the defamatory, malicious and scandalous stories in the print media denied him a right to a fair trial as envisaged at Article 50(1) of the Constitution since he had already been tried in the public without being accorded an opportunity to be heard and defend himself.

196. The issue of adverse publicity was dealt with in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** as hereunder:

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

197. I am also in agreement with the sentiments expressed in **Dream Camp Kenya Ltd vs. Mohammed Eltaff and 3 Others Civil Appeal No. 170 of 2012** that:

> **"Every litigation is inconvenient to every litigant in one-way or another. Also no one in his right senses enjoys being sued and ipso facto no one cherishes litigation of any nature unless it is absolutely necessary. With respect, we accept litigation is expensive and no litigant would enjoy the rigours of trial. The aftermath of vexatious and frivolous litigations is normally taken care of by way of costs. The discomfort of litigation would not certainly render the success of the intended appeal nugatory if we do not grant the application sought. If the learned Judge is eventually found wrong on appeal, and the applicant succeeds in its intended appeal, then the orders so made by the learned Judge would be quashed and the applicant would be compensated for in costs."**

198. As was held in **Jago vs. District Court (NSW) 106**:

> **"..it cannot be said that a trial is not capable of serving its true purpose when some unfairness has been occasioned by circumstances outside the court's control unless it be said that an accused person's liability to conviction is discharged by such unfairness. This is a lofty aspiration but it is not the law."**

199. It has not been alleged that there is a risk that as a result of the adverse publicity so far generated by the transaction in issue, the Petitioner's right to fair trial is threatened. In fact, no allegation has been made against the trial Court along those lines and in these proceedings no orders are expressly sought against the trial Court. The trial Court is in fact yet to commence the criminal proceedings involving the applicants.

200. It was alleged that the officers of the DCI during the process of the arrest took away his two mobile phone handsets and laptop and some documents from his office without producing any search warrant allowing them to seize the said gadgets and take away documents. Accordingly, the said officers violated the Petitioner's right to privacy and property as envisaged at Article 31 and 40 of the Constitution of Kenya 2010 since they did not have a Search warrant allowing them search the petitioner and seize his phones and laptops and to date they still illegally hold possession of the Petitioner's phones and laptop against his will. As a result, it was contended that any evidence that the officers of the DCI may obtain and/or gather from the said phones and laptop is evidence illegally obtained and as such is not admissible in court. In this regard the Petitioner relied on Article 50(4) of the Constitution of Kenya 2010 which provides that evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights should be excluded if the admission of the evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

201. Article 50(4) of the Constitution provides as follows:

> ***Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.***

202. Similarly, section 57(1) of the ***National Police Service Act***, provides as follows:

> ***Subject to the Constitution, if a police officer has reasonable cause to believe—***
>
> ***(a) that anything necessary to the investigation of an alleged offence is in any premises and that the delay caused by obtaining a***

warrant to enter and search those premises would be likely to imperil the success of the investigation; or

(b) that any person in respect of whom a warrant of arrest is in force, or who is reasonably suspected of having committed a cognizable offence, is in any premises, the police officer may demand that the person residing in or in charge of such premises allow him free entry thereto and afford him all reasonable facilities for a search of the premises, and if, after notification of his authority and purpose, entry cannot without unreasonable delay be so obtained, the officer may enter such premises without warrant and conduct the search, and may, if necessary in order to effect entry, break open any outer or inner door or window or other part of such premises.

203. Suffice it to say that evidence obtained in violation of the law is only to be excluded where its admission would render the trial unfair or otherwise detrimental to the administration of justice. In my view it is not the mere fact of the manner in which the evidence is obtained that determines its admissibility and the effect on the fairness of the trial process. That is a matter that can only be determined by the trial Court if and when a determination is made that criminal proceedings be preferred against the Petitioner. It is at that stage that the Respondents will be hard put to satisfy the trial Court that there existed special circumstances that warranted the search to be carried out even in the absence of the search warrants.

204. As regards the actions taken by the 4th Respondent, it is my view that those are matters which are better dealt with before the Employment and Labour Relations Court rather than this Court.

205. Having considered the issues raised in this petition the orders which commend themselves to me and which I hereby issue are as follows:

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

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

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

(d) The costs of this petition are awarded to the Petitioner against the 2nd Respondent.

206. Judgement accordingly.

Read, signed and delivered in open Court at Machakos this 16th day of July, 2020

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kiprono for Mr Mare for the Petitioner

Mr Ngetich for the 1st Respondent

Miss Kamau for Mr Wanyama for the 4th and 5th Respondents

CA Geoffrey