



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI LAW COURTS

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 49 OF 2016

In the matter of an application under Articles 165 (2),23 and 22 (1),35, 40 and 47 of the Constitution of Kenya 2010

and

In the matter of The Office of the Director of Public Prosecutions Act, 2013:

and

In the matter of an application Between

Shamsher Kenya Limited.....Petitioner

vs

Director of Public Prosecutions.....1stRespondent

Director of Criminal Investigations Department.....2ndRespondent

And

Faryd Abdulrazak Sheikh.....Interested Party

JUDGMENT

The Parties

1. The Petitioner, **Shamsher Kenya Limited**, is a limited Liability company duly incorporated in Kenya under the provisions of the Companies Act. Its Directors are Rahim Samji, Nizar Shamshudin Samji and Gulshan Lalani.
2. The first Respondent is the Director of Public Prosecutions established under Article 157 of the Constitution with constitutional mandate to *inter alia* 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.[\[1\]](#)
3. The second Respondent, is the Director of Criminal Investigations, whose mandate to undertaking Criminal Investigations stems from Article 243 of the Constitution and Section 4 of the National Police Service Act.[\[2\]](#)
4. The Interested Party is a Male adult Kenyan residing in Nairobi. He hails from Kilifi County.

Factual background

5. The Petitioner avers that it lawfully purchased **L.R.No. Kilifi/Jimba/332** and a Certificate of Lease was issued in its favour. It avers that in or about July 2011, its directors noticed that a development had commenced on the property, and upon enquiry, they were informed that the development belonged to the Interested Party herein. It further avers that it reported the matter to the CID Headquarters-Land Fraud Investigation Unit and two of the Petitioner's Directors and an employee of the Ministry of Lands recorded statements with the CID.
6. The Petitioner further avers that from the statement of the said employee of the Ministry of Lands, the Ministry had no record of the letter

of allotment issued to the Interested Party and that the serial number on his allotment letter belonged to a different person, hence, the Petitioner avers that his allotment letter is not authentic. It also avers that despite such evidence from the National Land Commission (NLC) and the Ministry of Lands, the CID and the DPP reluctantly failed to take positive steps to prosecute the Interested Party.

7. Further, the Petitioner avers that on 22nd June 2015, its Advocate wrote to the CID and DPP requesting them to undertake forensic investigations on the said documents. Also, it avers that on 8th August 2014, the NLC established that the letter of allotment held by the Interested Party was unauthentic; and on 29th October 2014, the Ministry of Lands confirmed that the Petitioner is the *bona fide* owner of the property.

8. The Petitioner also states that it submitted a private forensic report to the CID on 22nd June 2015 and requested them to carry out their own audit to confirm the findings. It also states that the DPP confirmed to its advocates that the Criminal Investigation Department had not submitted the investigation file for consideration. Further, it states that on 10th December 2015, the DPP requested for the investigation file from the CID for further review after a reminder from its Advocates; and that on 13th January 2016, through its advocates, it requested to be furnished with information by the DPP on whether the CID had forwarded the investigations file and the contents of the report, if any received, but the letter elicited no response. The Petitioner states that the State, through the DPP and the Police is unwilling to prosecute the Interested Party.

9. The Petitioner reiterates that it has consistently pursued the Police and the DPP to carry out investigations and prosecute the Interested Party, but they have "adamantly abdicated from their constitutional mandate and duty," and have exhibited bias, reluctance to prosecute and investigate the matter, and keep on passing the back from one office to another. Further, it avers that the alleged offences took place nearly four years ago, yet the DPP and CID have failed to avail information to the Petitioner.

10. The Petitioner claims that its rights under Articles 35 and 47 of the Constitution have been violated and seeks the following reliefs:-

a. **A DECLARATION** that the Petitioner's rights to access to information from state organs as contemplated in **Article 35** of the Constitution were violated and/ or infringed upon by the Respondents.

b. **A DECLARATION** that the Petitioner's rights to fair administrative action as enshrined and contemplated in **Article 47** of the Constitution were violated and/ or infringed upon by the Respondents.

c. **A DECLARATION** that the Petitioner's rights to own property enshrined and contemplated under **Article 40** of the Constitution were violated and/ or infringed upon by the Respondents.

d. **AN ORDER OF MANDAMUS** directing the Respondents to release all the findings and/or reports concerning the investigations in relation to the Petitioner's complaint over the ownership **L.R NO. KILIFI/JIMBA/332**.

e. **AN ORDER OF MANDAMUS** directing the Respondents to conclude their investigations within a reasonable time-frame concerning the investigations in relation to the Petitioner's complaint over the ownership of **L.R NO. KILIFI/JIMBA/332**.

f. **AN ORDER OF MANDAMUS** directing the CID to conduct or submit its forensic examination of the title documents held by **FARYD ABDULRAZAK SHIEKH** and the DPP do charge said person with offences as recommended by the CID in their investigation report.

g. **A DECLARATION** that as result of breach of the Petitioner's Rights he has suffered loss and damages.

h. Costs of the suit and interest thereof.

i. Any of other order as the Honorable Court shall deem fit.

Supplementary Affidavit.

11. The Petitioner filed a Supplementary Affidavit on 4th April 2016 sworn by its Director, Rahim Samji. He avers that due the frustrations by the DPP, they decided to institute Private Prosecution being Milimani Prosecution Number 8 of 2014, and in the said case, the DPP through one of its officers swore an affidavit to the effect that investigations into the matter were still ongoing, hence, the application was dismissed for being pre-mature. Further, he avers that the Petitioner was apprehensive that the unreasonableness of the DPP will deny it justice and it had taken 4 years to complete the investigations.

Respondents' Response to the Petition

12. The Respondents filed grounds of opposition stating *inter alia* that:- **(a)** an order of mandamus cannot command duty to be carried out in a specific way where a statute imposing a duty leaves discretion as to the mode of executing the legal mandate of the DPP; **(b)** that the decision of the DPP to prosecute is based on the sufficiency of evidence gathered against an accused person; **(c)** Under Article 157 (10) of the Constitution, the DPP does not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of its powers or functions, cannot be under the direction or control of any person or authority; **(d)** that the High Court has no jurisdiction to determine whether or not any criminal offence was committed based on the Petitioner's complaint and the pleadings filed herein.

13. Also, on behalf of the Respondents' is the Replying Affidavit of **PC Peter Mwita**, filed on **2nd** October 2017. He averred that the investigations began around **9th** August 2012 following the Petitioner's complaint that though he was the registered owner of **LR No. Kilifi/Jimba/332**, the same land was also being claimed by the Interested Party who had commenced a construction thereon. He also averred that the inquiry file together with the findings were forwarded to the office of the DPP for perusal and advise, and upon review, the DPP returned the inquiry file by a letter dated **4th** September 2014 and directed that certain outstanding areas be covered by investigators. He averred that the said areas are yet to be covered because of *inter alia*, (i) *the transfer of officers from the Director of Criminal Investigations, Land Fraud Unit*, (ii) *contingencies of work*, (iii) *failure by potential witnesses to co-cooperate*, (iv) *filing this Petition*, (v) *filing of the Private Prosecution*, and, (v) *filing of civil proceedings touching on the land*.

14. **PC Mwita** further averred that owing to the filing of the above matters, the inquiry file had to be forwarded to the relevant Government offices for purposes of filing suitable responses in Court. He averred that the Private Prosecution proceedings have since been concluded but the civil suit is pending. However, he averred that the inquiry file has been returned to the Directorate of Criminal Investigations to conclude the investigations as directed by the DPP.

15. Further, **PC Mwita** also averred that upon perusing the inquiry file, he observed that there are a number of material aspects that should be investigated, such as; (i) *the Kilifi Land Registry issued separate certificates of Lease on the subject land to both the Petitioner and the Interested Party*, (ii) *that the author of the allotment letter, Edward K. Kosgei does not deny he signed the same*, (iii) *that Kosgei did not provide the letter serial No. GL/10/1293*; and (iv) *lastly, the National Land Commission has not commended why a certificate of Lease was issued to the Petitioner for the same parcel of land*.

16. He deposed that the Interested Party's Certificate of Lease was brought to his attention upon filing of the affidavit, and that hitherto he was proceeding on the assumption that the Interested Party only had a letter of allotment, hence, the need to undertake investigations to cover numerous outstanding issues. He also averred that the statement of **Mr. Koskei** is not sufficient proof of commission of an offence. Regarding the private forensic report submitted by the Petitioner, he averred that the decision whether or not to prosecute is informed by the sufficiency of the evidence, and that the DPP is an independent office.

17. Responding to the alleged failure to supply information, **Mr. Mwita** averred that it is evident from the Petitioner's Affidavit that he is in possession of the information and that the ownership of the land is subject to pending Court proceedings.

Interested Party's Response

18. The Interested Party swore the Replying Affidavit filed on **27th** July 2017. He averred that he is the Registered proprietor of **LR No. Kilifi/Jimba/332** and exhibited a copy of his title. He averred that the property was allocated to him, that he was issued with an allotment letter dated on **26th** August 2010 in respect of the property and he was required to pay **Ksh.9,380/=** in respect of Land Rent, conveyancing and Registration fees, Stamp Duty and approval fees which he paid at the Lands Office and was issued with a Certificate of Lease on **29th** September 2010. He also states that the Plot was surveyed and he was shown all the boundaries as per the Surveyors Report which he annexed to his affidavit together with payment receipts. He also avers that the Lease is for **99** years from **1st** September 2010.

19. Also, he averred that the Petitioner has instituted several concurrent suits and complaints against him touching on the same land as follows:-

a. Civil Case No. 139 of 2011 filed on 6th September 2011 which is still pending determination.

b. Private Prosecution No. 8 of 2014 filed on 12th September 2014 which was dismissed on 4th June 2014.

c. Civil Appeal No. 93 of 205 which was dismissed on 14th June 2017.

d. National Land Commission Proceedings of 28th November 2014. The NLC directed that the matter be determined by the court.

20. Further, he averred that the Petitioner's conduct of filing one suit after another is aimed at frustrating him to give up his claim over the land, and that the Petitioner is on a fact finding mission and hopes to obtain information to advance its claim in Malindi High Court Civil Suit No. **139** of 2011, a fact that was noted in High Court Criminal Appeal No. **93** of 2015.

21. He also averred that the Petitioner has not disclosed the holding of the NLC and has only presented to the Court a letter dated **8th** August 2014, hence, he has not disclosed information that will assist the court to reach a just and conclusive decision. Further, he averred that the Petitioner is misleading the Court that the NLC made a finding that his letter of allotment is not authentic yet from the proceedings of **28th** November 2014, the NLC held that the matter be heard and determined by the Court. Also, he averred that, the claim for access to information lacks substance since the Petitioner knows that the investigations are not complete.

22. He also averred that under Section **6 (b)** of the Office of Director of Public Prosecutions Act, [3] the DPP is not subject to the direction or control of any person or authority in exercise of his functions under the Act and the Constitution, hence the order of mandamus cannot issue. He added that the DPP has discretion in deciding, based on evidence whether or not to prosecute and as such he cannot be compelled to carry out its mandate.

23. He also reiterated his rights to own property under Article **40** of the Constitution and that it is pre-mature for the Petitioner to claim ownership yet the matter is pending before the Malindi High Court, being ELC No. **139** of 2011 consolidated with Civil Suit No. **71** of 2008 (O.S.), and that this Petition is an abuse of Court process and the prayers sought are unsustainable.

Petitioner's further Affidavit.

24. The Petitioner filed a further affidavit dated 25th August 2017 sworn by one of its Directors, Mr. Rahim Samji reiterating that his Petition is premised on Article 47 of the Constitution and that the Petitioner raises matters of Public interest in that it touches on disinterest on the part of the DPP to prosecute crime, and that counsel from the DPP's office gave an undertaking that he will file a report in Court, but he never did so. He reiterated in detail his attack of the authenticity of the Interested Party's ownership documents.

Issues for determination

25. Upon careful consideration of the facts presented by the parties herein and the submissions by their respective counsels, I find that the following issues fall for determination, namely:-

- a. *Whether this Court can compel the Respondents to undertake investigations & charge the Interested Party.*
- b. *Whether the Petitioner's rights under Article 35, 40 and 47 of the Constitution or any of his rights under the Constitution have been violated*
- c. *Whether this Petition is an abuse of Court Process.*
- d. *Whether the Petitioner is entitled to the reliefs sought.*

Whether this Court can compel the Respondents to undertake investigations & charge the Interested Party.

26. The Petitioner's counsel submitted that the investigations have taken over 4 years to conclude, which he argued amounts to an inordinate delay.^[4] He also argued the Petitioner seeks orders directing the Respondents to conclude the investigations within a specified period, and to release the results of the investigations and charge the Interested Party.

27. Counsel for the Respondent submitted that the DPP has the discretion to prosecute once the investigations are complete and that the DPP has not failed to exercise his mandate. He also argued that Mandamus is a discretionary remedy and cited *Kenya National Examinations Council vs R ex parte Geoffrey Njoroge & Others*^[5] in support of his submissions on the scope of an order of Mandamus.

28. Counsel for the Interested Party submitted that the DPP is an independence office and cannot be compelled and or directed in the manner in which it executes its constitutional mandate.

29. A special feature of the Constitution of Kenya, 2010 is the establishment of an independent office of the DPP whose independence is provided under Article 157 (10) of the Constitution which declares that the DPP 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.

30. This position is replicated in Section 6 of the Office of the Director of Public Prosecutions Act^[6] which provides that pursuant to Article 157 (10) of the Constitution, the Director of Public Prosecutions 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 powers or functions under constitution, this Act or any other written law;* and (c) *be subject only to the Constitution and the law.*

31. The DPP is not only required to act independently in the exercise of his functions, but also ought not to be perceived to be acting under the direction or instructions or instigation of any other person. The decision to institute or not institute criminal proceedings is a high calling imposed upon the DPP by the law and must be exercised in a manner that leaves no doubt that the decision was made by the DPP independently. The prosecutor is required to act with diligence and promptness to investigate, litigate, and dispose of criminal charges, consistent with the interests of justice and with due regard for fairness, accuracy, and rights of the accused, victims, and witnesses. Where the decision is surrounded by doubt or even mere reasonable suspicion that an interested party has a hand in the prosecution, such a decision cannot be allowed to stand.

32. The complainant recorded a statement with the CID. He procured what he calls a forensic expert report and shared it with the DPP. He now wants the DPP to prosecute the Interested Party on what he considers to be credible evidence. A clear reading of the architecture of Article 157 of the Constitution leaves no doubt that the DPP is required to not only act independently, but to remain fiercely so. The Petitioner is a complainant and an interested party in the criminal proceedings that may be undertaken. He cannot be seen to be the one pushing the DPP to mount a prosecution. If that were to happen, the criminal proceedings would risk being quashed on grounds that the DPP did not act independently. All that the Petitioner is required to do is to present his evidence to the investigating officers, and leave it to the officers to compile their report and pass it to the DPP to act independently. A common thread in the Petitioner's case is that he has submitted ample evidence and the DPP has refused to act. It is not for the Petitioner or even this Court to decide the sufficiency or otherwise of the evidence. It is for the DPP to decide independently and act accordingly. It is also important to mention that under Article 245 (4) (a) of the Constitution, "no person may give a direction to the Inspector General with respect to the investigation of any offence or offences." Just like the constitutionally guaranteed independence of the DPP, this provision is aimed at ensuring that investigations are undertaken independently.

33. The prosecutor should remain fiercely independent, fair and courageous. The responsibilities entrusted to the DPP and police demand nothing less. D.A. Bellemare, M.S.M, Q.C put best the often difficult course for the prosecutor when he said:-

"It is not easy to be a prosecutor. It is often a lonely journey. It tests character. It requires inner strength and self-confidence. It

requires personal integrity and solid moral compass. It requires humility and willingness, where to appropriate, to recognize mistakes and take appropriate steps to correct them. Prosecutors must be passionate about issues, but compassionate in their approach, always guided by fairness and common sense.”^[7]

34. In order to advance the rule of law, and in particular to protect the principle that all are equally subject to the law, the DPP (and the Police) must be independent. The Constitutional provision in Article 157 (10) of the Constitution 2010 ensures that the DPP has complete independence in his decision making processes. This is vital to protect the integrity of the criminal justice system because it guarantees that any decision to prosecute a person is made free of any external influences. In the words of John Kelly TD, the prosecution system “*should not only be impartial but should be seen to be so and that it should not only be free from outside influence but should be manifestly so.*”^[8] The following observations are useful to bear in mind:-

“...the use of prosecutorial discretion should be exercised independently and free from ANY interference. Prosecutors are required to carry out their duties without fear, favour or prejudice—impartially, with objectivity, unaffected by individual or sectional interests and public or media pressures, fairly, having regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect and make all necessary and reasonable enquiries and disclose the results of those enquiries, regardless of whether they point to the guilt or innocence of the suspect ...That is a role which, I fear, is not well understood in the community. It may not be a popular position but it is a very valuable and important one.”^[9]

35. The role of the prosecutor excludes any notion of winning or losing; it is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.^[10] It is said that the prosecutor acts in the general public interest and so it must be. That is where the prosecutor’s ultimate loyalty and responsibility lie. It does not lie in acting at the behest of an overzealous complainant. Mere or reasonable suspicion that the DPP did not act independently, would be sufficient to taint the criminal proceedings.

36. Also, one key consideration to guide the DPP in instituting court proceedings is to advance or protect public interest as opposed to private interest. The decision to prosecute or not to prosecute is of great importance. It can have the most far-reaching consequences for an individual. Even where an accused person is acquitted, the consequences resulting from a prosecution can include loss of reputation, disruption of personal relations, loss of employment and financial expense, in addition to the anxiety and trauma caused by being charged with a criminal offence.

37. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system. For victims and

their families, a decision not to prosecute can be distressing. The victim, having made what is often a very difficult and occasionally traumatic decision to report a crime, may feel rejected and disbelieved. It is therefore essential that the prosecution decision receives careful consideration.

38. The discretion vested upon the DPP by the law must be properly exercised. But the *grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed*. Exercise of the discretion will be clearly unlawful *if the DPP knowingly invokes the power to arrest and prosecute for a purpose not contemplated by the law*. The decision to prosecute must be *based on the intention to bring the arrested person to justice*.

39. The constitutional approach to the nature of a discretion and how it should be exercised must of necessity take cognizance of the provisions of the fundamental right to the freedom and the dignity of the individual.^[11] It must be borne in mind that the Bill of Rights is a cornerstone of democracy in Kenya.^[12] It enshrines the rights of all people in our country and affirms the democratic values of *human dignity, equality and freedom*. The constitution directs the State and all persons to “... *respect, protect, promote and fulfill the rights in the Bill of Rights; “The Bill of Rights applies to all law, and binds all organs of state.”*^[13]

40. A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motives or improper purpose.^[14] 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.

41. It has never been the rule in this country that suspected criminal offences must automatically be the subject of prosecution. There must be sufficient evidence to mount a prosecution. The initial consideration in the exercise of this discretion is whether the evidence is sufficient to justify the institution or continuation of a prosecution. It is for the DPP to determine that the evidence presented is sufficient to justify a prosecution. In my view, a prosecution should not be instituted or continued unless there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the accused.

42. It is also true that the decision as to whether there is a reasonable prospect of conviction requires an evaluation of how strong the case is likely to be when presented in court. It must take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the arbiter of fact, and the admissibility of any alleged confession or other evidence.

43. The prosecutor should also have regard to any lines of defence which are plainly open to, or have been indicated by, the accused and any other factors which in the view of the prosecutor could affect the likelihood or otherwise of a conviction. This assessment may be a difficult one to make, and of course, there can never be an assurance that a prosecution will succeed. Indeed, it is inevitable that some will fail. However, application of this test dispassionately, after due deliberation by a person experienced in weighing the available evidence, is the best way of seeking to avoid the risk of prosecuting an innocent person and pursuing a futile prosecution resulting in the unnecessary expenditure of public funds.

44. When evaluating the evidence regard should be had to the following matters:- (a) *Are there grounds for believing the evidence may be*

excluded bearing in mind the principles of admissibility at common law and under statute? (b) If the case depends in part on admissions by the accused, are there any grounds for believing that they are of doubtful reliability having regard to the age, intelligence and apparent understanding of the accused? (c) Does it appear that a witness is exaggerating, or that his or her memory is faulty, or that the witness is either hostile or friendly to the accused, or may be otherwise unreliable? (d) Does a witness have a motive for telling less than the whole truth? (e) Whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute. (f) whether the alleged offence is of considerable public concern and (g) the necessity to maintain public confidence. As a matter of practical reality the proper decision in most cases will be to proceed with a prosecution if there is sufficient evidence available to justify a prosecution.

45. The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions. No evidence has been tendered to show that the DPP abused his discretion or powers under the Constitution. The duty of the prosecutor is to seek justice, not merely to convict or parade people in court without sufficient evidence.

46. No material was placed before me to enable me to make a conclusion that the DPP did not exercise his discretion in accordance with the law. No abuse of discretion has been established. The court is inclined to respect the decision by the DPP that he is still investigating for two reasons; namely:- (a) it is a constitutional imperative that the independence of the DPP must be respected, (b) for the court to intervene, there must be clear evidence of breach of the Constitutional duty to act on the part of the DPP or abuse of discretion.

47. The Affidavit of **PC Mwita** whose contents have not been rebutted shows that the DPP returned the inquiry file to the CID and directed that certain outstanding areas be covered by investigators. Further, he gave reasons for the delay. These are:- (i) the transfer of officers from the Director of Criminal Investigations, Land Fraud Unit, (ii) contingencies of work, (iii) failure by potential witnesses to co-cooperate, (iv) filing this Petition, (v) filing of the Private Prosecution, and, (vi) filing of civil proceedings touching on the land; (vii) the filing of several matters in Court, the inquiry file had to be forwarded to the relevant Government offices for purposes of filing suitable responses in Court.

48. Further, he averred that upon perusing the inquiry file, he observed that there are a number of material aspects that should be investigated, such as; (i) the Kilifi Land Registry issued separate certificates of Lease on the subject land to both the Petitioner and the Interested Party, (ii) that the author of the allotment letter, Edward K. Kosgei does not deny he signed the same, (iii) that Kosgei did not provide the letter serial No. GL/10/1293; and (iv) lastly, the National Land Commission has not commended why a certificate of Lease was issued to the Petitioner for the same parcel of land.

49. An official who has discretionary powers must, naturally exercise them within the limits of the Constitution and the authorizing statute, read in the light of the Bill of Rights. Rights here will include the rights of the Petitioner and the Interested Party. The DPP is required to balance the two and make the right decision. No material has been presented before me to show that the DPP has failed to exercise his functions. In fact, the explanation given by **PC Mwita** is in my view plausible. The enquiry is whether there has been an irregularity or an illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted. [15]

50. It is my finding that no material has been presented before me to demonstrate an irregularity or illegality on the part of the DPP or the CID that is a departure from the constitutional and statutory mandate of the DPP or the CID. I find and hold that the orders of Mandamus cannot issue in the circumstances of this case. First, such an order, if granted will offend Articles 157 (10) and 245 (4) (a) of the Constitution.

51. The Petitioner only grounded his argument on alleged violation of Articles 35, 40 and 47 of the Constitution but ignored the clear provisions of Articles 157 (10) and 245 (4) (a) of the Constitution. It is an elementary rule of constitutional construction that no one provision of the constitution is to be segregated from the others and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the instrument. [16]

52. It also clear that it is the duty of a court in construing the Constitution to seek an interpretation that promotes the objects of the principles and values of the Constitution and to avoid an interpretation that clashes therewith. The court must prefer the meaning that best promotes the spirit and purposes of the Constitution and the values stipulated in Article 259. As stated earlier, one core value of our constitution is to advance the rule of law, and in particular to protect the principle that all are equally subject to the law, hence the Constitution deliberately ensured the independence of DPP. The Constitutional provision in Article 157 (10) of the Constitution 2010 ensures that the DPP has complete independence in his decision making processes. This is vital to protect the integrity of the criminal justice system because it guarantees that any decision to prosecute a person is made free of any external influences. This court respects this Constitutional imperative and will hesitate to interfere with the functions of the DPP unless there is clear evidence of breach of the Constitution or abuse of discretion to prosecute.

53. In view of my analysis above, my answer to the issue under consideration is in the negative

Whether the Petitioner's rights under Article 35, 40 and 47 of the Constitution or any of his rights under the Constitution have been violated

54. The Petitioner's counsel submitted that he has unsuccessfully sought to be supplied with the findings and or reports concerning the investigations in regard to his complaint over the ownership of the subject land. [17] Further, he averred that the Petitioner's right to property under Article 40 has been violated. This assertion is based on what counsel described as "the existence of forged documents by the Interested Party which prejudices the Petitioner's enjoyment of property rights."

55. The Respondent's counsel on the other hand argued that there is no report to be shared since the investigations are yet to be completed and in any event, there is no requirement under the law for the DPP to share an investigation report with the Petitioner.

56. The right of access to information held by the state is guaranteed by Article 35 of the Constitution. The importance of this right has been

explained by the constitutional Court of South Africa[18] where the Court said:- "...access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights...."

57. It is important to mention that this Petition was filed before the enactment of the Access to Information Act [19] which was enacted to give effect to Article 35 of the Constitution. The Act provides a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles.

58. Section 4 provides that Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost. More important is the wording of subsection (4) which provides that the Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6.

59. Before the enactment of the Constitution of Kenya, 2010, there was no general right of access to information in Kenya. Considerable resources were directed instead towards maintaining secrecy in government. Many statutes contained provisions making it a criminal offence for officials to release information. The inclusion of a right of access to information in state hands was therefore "an innovation of great significance"[20] in the Constitution of Kenya 2010. Article 35 confers on every person "the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights."

60. Under our law, the disclosure of information is the rule and exemption from disclosure is the exception. Though the Act was enacted after the filing of this Petition, guidance can be obtained from section 6 of the act which provides for limitations. The Section will grant us a glimpse of what constitutes reasonable and justifiable limitations on the right of access to information. The purpose of section 6 is to protect from disclosure certain information that, if disclosed, could cause material harm to, amongst other things: the defence, security and international relations of the Republic; the economic interests and financial welfare of the Republic and commercial activities of public bodies; and the formulation of policy and taking of decisions by public bodies in the exercise of powers or performance of duties conferred or imposed by law.

61. The decision to prosecute or not prosecute is not only a constitutional and a statutory mandate but also a policy consideration which falls within the mandate of the DPP. It is admitted that there are live cases pending in court touching on the legality or otherwise of the contested titles. There is a danger the information may be used to the advantage of one party if it is released. There is also a danger that if the results of the investigations are released before the investigations are complete, it can prejudice the case.

62. It is common ground that there have been numerous cases in various forums relating to the same land. It is not contested that the existence of these cases delayed the investigations. It is not disputed there is a live dispute in court touching on the land. It is also true that the right of access to information is not absolute. In my view, the reasons offered by **PC Mwita** are not only reasonable, but do satisfy Article 24 analysis test.

63. I also find that the facts disclosed in this case do not disclose the alleged violation of property rights. The reason is simple. It is common ground that there is a live court case whose resolution will resolve the ownership dispute. That being the case, there is no basis at all for the Petitioner to claim that his rights have been violated. The Affidavit of **PC Mwita** cited above is very clear. There are two titles issued in respect of the same land. The Court will hear the evidence and determine the circumstances under which the titles were issued and make a finding on which of the two titles is genuine. The alleged claim for violation of property rights cannot be sustained in the circumstances of this case.

64. On the alleged breach of Article 47 rights, the respondents have not only a constitutional and statutory duty but also a moral duty to uphold the law. It would in general be wrong to whittle away the obligation of the Respondents as public bodies to uphold the law and enforce the criminal justice system in compliance with the constitution. A lenient approach could be an open invitation to the Respondents to act against their legal mandate.

65. Article 259 of the Constitution introduced a new approach to the interpretation of the Constitution. The Article obliges courts to promote 'the spirit, purport, values and principles of the Constitution, advance the rule of Law, Human Rights and fundamental freedoms in the Bill of Rights and contribute to good governance. This approach has been described as 'a mandatory constitutional canon of statutory and Constitutional interpretation'. The duty to adopt an interpretation that conforms to Article 259 mandatory.

66. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the Constitution or legislation. A reading of the Constitution reveals a deliberate intention vest the DPP with independence to perform his functions. Therefore, in construing Articles 47 and 157 of the Constitution, we are obliged not only to avoid an interpretation that clashes with the Constitutional values, purposes and principles but also to seek a meaning of the provisions that promotes constitutional purposes, values, principles, and which advances rule of law, human rights and fundamental freedoms in the Bill of Rights and also an interpretation that permits development of the law and contributes to good governance. We are also obliged to be guided by the provisions of Article 159 (e) which requires us to promote and protect the *purposes and principles of the Constitution*.

67. It is an elementary rule of constitutional construction that no one provision of the constitution is to be segregated from the others and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the instrument.[21] It follows that the Petitioner cannot invite this Court to look at Article 47 in isolation and ignore crucial provisions of Article 157 (10) and 245 of the Constitution.

68. It is thus clear that it is the duty of a court in construing statutes to seek an interpretation that promotes the objects of the principles and values of the Constitution and to avoid an interpretation that clashes therewith. If any statutory provision, read in its context, can reasonably be construed to have more than one meaning, the court must prefer the meaning that best promotes the spirit and purposes of the Constitution and the values stipulated in Article 259.

69. Guided by my herein above conclusions, I find and hold that the answer to the issue under consideration is in the negative.

Whether this Petition is an abuse of Court Process.

70. Counsel for the Interested Party submitted that the Petitioner failed to disclose to the court that there were proceedings at the NLC and that the NLC held that the matter be determined by the ELC court at Malindi. He argued that a person who approaches the Court has a duty to disclose all material facts,^[22] and that the Petition is an abuse of Court process.^[23]

71. He also argued that the land is the subject of a part heard case in Malindi, being High Court ELC No. **139** of 2011 (Consolidated with High Court Civil Suit No. 71 of 2008 (O.S) hence, the criminalization of a civil dispute is an attempt to bear pressure upon the Interested Party. Also, the predominant purpose of this Petition is to procure evidence to advance the civil dispute pending in court, hence this Petition is tainted with ulterior motives.

72. The Petitioners counsel did not address this issue nor was the existence of the previous suits denied.

73. In his affidavit, the Interested Party averred that the Petitioner has instituted several concurrent suits and complaints against him touching on the same land as follows:-*Civil Case No. 139 of 2011 filed on 6th September 2011 which is still pending determination; Private Prosecution No. 8 of 2014 filed on 12th September 2014 which was dismissed on 4th June 2014; Civil Appeal No. 93 of 205 which was dismissed on 14th June 2017 and National Land Commission Proceedings of 28th November 2014. The NLC directed that the matter be determined by the court.*

74. I have severally^[24] observed that "It is trite law that the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. Abuse as is defined as "Everything which is contrary to good order established by usage that is a complete departure from reasonable use. An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use."^[25]

75. The situations that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

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

(b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.

(c) Where two similar processes are used in respect of the exercise of the same right.

(d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.

(e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.^[26]

(f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.

(g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.

(h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. ^[27]

76. The Petitioner applied to institute private criminal proceedings. The application was dismissed. The matter was before the NLC. The Respondent states that the parties were advised to await the Courts determination in the civil suits. The DPP has stated that there are issues that require clarification and at the same time there are pending court cases which may have a bearing on their decision.

77. Whereas Section **193A** of the Criminal Procedure Code permits parallel civil and criminal proceedings, the peculiar circumstances of this case and the open push and desire exhibited by the Petitioner to achieve the prosecution, there is a danger that the criminal prosecution he is pursuing can be perceived as being aimed at bearing pressure upon the Interested Party to compromise the civil cases pending in court or the prosecution is aimed at giving him an undue advantage in the said cases. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interface with the administration of justice.^[28]

78. I note that the Petitioner omitted carefully in the Petition to disclose the existence of the previous proceedings. It is settled law that a person who approaches the Court or a Tribunal for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose at the earliest opportunity possible all the material/important facts/documents which have a bearing on the adjudication of the issues raised in the case. In other words, he/it owes a duty to the court or the Tribunal to bring out all the facts and refrain from concealing/suppressing any material facts within his knowledge or which he could have known by exercising diligence expected of a person of ordinary prudence. If he is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person.^[29]

79. A party is under a duty to disclose to the court or tribunal all relevant information even if it is not to his or her advantage. [30]The petitioner was under a solemn duty to bring to the attention of the court the existence of the previous cases at the earliest opportunity possible and leave it to the court to determine the matter.

80. The duty of a litigant is to make a full and fair disclosure of the material facts. The material facts are those which it is material for the court or Tribunal to know in dealing with the issues before the court or Tribunal. The duty of disclosure therefore applies not only to material facts known to the petitioner, but also to any additional facts which it would have known if it had made inquiries. The Petitioner carefully omitted to mention the previous cases in his Petition. It is my conclusion that there was non-disclosure of material facts in the Petition considering that the information in question was within his knowledge as at the time of filing the Petition in Court.

Whether the Petitioner is entitled to the reliefs sought.

81. Section 107 (1) of the Evidence Act[31]provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the constitution and inevitably result in ill considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.

82. In view of my analysis of the issues herein above, the conclusion becomes irresistible that there is nothing to show that the Respondents acted illegally or in any manner violated the Petitioners rights. The upshot is that this Petition is dismissed with no orders as to costs.

Orders accordingly

Signed, Delivered and Dated at Nairobi this 9th day of May, 2018.

John M. Mativo

Judge

[1]Article 157 (6) of the Constitution

[2] Act No 11A of 2011

[3] Act No. 2 of 2013

[4]Counsel cited R vs The DPP & 7 Others {2013}eKLR; Joseph Mbalu Mutava vs A.G & Another {2014}eKLR and Pastoli vs Kabale District Local Government Council & Others {2008}2 EA

[5] Civil Appeal No. 266 of 1996, {1997} eKLR

[6] Act No. 2 of 2013

[7] Infra

[8] <http://www.paclii.org/fj/other/prosecutors-handbook.pdf>

[9]Extract from a Speech by Anna Katzmann, SC at a dinner of the NSW Law Society's Government Lawyers CLE Conference on 30 October 2007. (Now the Hon. Anna Katzmann, Judge of the Federal Court of Australia).

[10] (see Boucher v the Queen (1954) 110 CCC 263, 270).

[11] Article 19 (2)

[12] Article 19 (1)

[13] Article 20(1)

[14]Republic vs Attorney General ex-parte Arap Ngeny HCC APP NO. 406 of 2001

[15]Interpreting similar provisions in the constitution of South Africa, the South African Constitutional court (Nicholas AJA), Shabalala & 5 others vs A.G of Transvaal & Another CCT/23/94

[16] *Smith Dakota vs. North Carolina*, 192 US 268(1940)

[17] Counsel cited *Nelson Kadison vs Advocates Complaints Commission & Another* {2013}eKLR & *Nairobi Law Monthly Ltd vs Kenya Electricity Generating Company & 2 Others* {2013}eKLR

[18] In *Brümmer vs Minister for Social Development and Others* {2009} ZACC 21; 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC).

[19] Act No. 31 of 2016

[20] *Ibid*

[21] *Smith Dakota vs. North Carolina*, 192 US 268(1940)

[22] Counsel cited *Arthur Wamiti Njoroge vs The Disciplinary Tribunal 7 Another* {2017}eKLR

[23] Counsel cited *Graham Rioba Sagwe & 2 Others vs Fina Bank Ltd & 5 Others* {2017}eKLR

[24] See e.g. *Agnes Muthoni Nyanjui & 2 Others vs Annah Nyambura Kioi & 3 Others Succ Cause no 920 of 2009 AND Graham Rioba Sagwe & Others vs Fina Bank Limited & Others*, Pet No. 82 of 2016

[25] *Black Law Dictionary, Sixth Edition* Black, Henry Campbell, *Black Law Dictionary Sixth Edition, Continental Edition 1891- 1991* P 990 P 10-11

[26] *Jadesimi V Okotie Eboh* (1986) 1NWLR (Pt 16) 264

[27] (2007) 16 NWLR (319) 335.

[28] *Ibid*

[29] This position was well captured in one of the earliest decisions on the subject rendered in 1917 in *R. v. Kensington Income Tax Commissioner* {1917} 1 KB 486, by Viscount Reading, Chief Justice of the Divisional Court.

[30] *Brinks-Mat Ltd vs Elcombe* {1988} 3 ALL ER 188

[31] Cap 80, Laws of Kenya