



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**CONSTITUTIONAL PETITION NO. 15 OF 2019**

**IN THE MATTER OF: ARTICLES 2, 3, 10, 12, 19, 20, 21, 22(1), 23(1) & (3), 27, 28, 29, 39, 40, 49, 50, 64, 157(4) (6) (10) & (11), 159(2) (a, e) 165(3) (b, d), (6) & (7) & 258 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF: THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS, ACT NO. 2 OF 2013**

**AND**

**IN THE MATTER OF: THE LAND TITLES ORDINANCE (1908), INDIAN TRANSFER PROPERTY ACT (ITPA) 1882 AS REPEALED**

**AND**

**IN THE MATTER OF: SUCCESSION CAUSE NO. 94 OF 2011, ESTATE OF LIWALI SHEIKH SALIM BIN KHALAFAN (DECEASED)**

**AND**

**IN THE MATTER OF: LAND OWNERSHIP DISPUTE OVER LAND PARCELS PLOT NO. 120 MGURULENI AND NO. 121 FURUNZI MALINDI BETWEEN SALIM ABDALLA BAKSHWEIN AND ALI ABDALLA BAKSHWEIN, BOTH SONS AND HEIRS OF THE LATE ABDALLA SALIM BAKSHUWEIN AND THE FAMILY AND BENEFICIARIES OF THE LATE SHEIKH SALIM BIN KHALIFAN LIWALI**

**AND**

**IN THE MATTER OF: MALINDI CHIEF MAGISTRATE CRIMINAL CASE NO. 911 OF 2018, REPUBLIC VERSUS RAMADHAN IDD RAMADHAN & 5 OTHERS**

**BETWEEN**

- 1. RAMADHAN IDD RAMADHAN.....1<sup>ST</sup> PETITIONER**
- 2. ABUBAKAR OMAR KOMBO ALIAS BAKARI.....2<sup>ND</sup> PETITIONER**
- 3. MUSA HASSAN JUMA.....3<sup>RD</sup> PETITIONER**
- 4. JUMA OMAR KORSHEN.....4<sup>TH</sup> PETITIONER**
- 5. JUMA HASSAN JUMA.....5<sup>TH</sup> PETITIONER**
- 6. SABURI SHEBANI SHEBANI.....6<sup>TH</sup> PETITIONER**

**AND**

- 1. THE DIRECTOR OF PUBLIC PROSECUTION.....1<sup>ST</sup> RESPONDENT**

2. THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....2<sup>ND</sup> RESPONDENT
3. THE CHIEF LAND REGISTRAR.....3<sup>RD</sup> RESPONDENT
4. THE CHIEF MAGISTRATE’S COURT AT MALINDI.....4<sup>TH</sup> RESPONDENT
5. THE ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT
6. SALIM ABDALLA BAKSHWEIN.....6<sup>TH</sup> RESPONDENT
7. ALI ABDALLA BAKSHWEIN.....7<sup>TH</sup> RESPONDENT

AND

NATIONAL LAND COMMISSION.....1<sup>ST</sup> INTERESTED PARTY

AND

SEIF SAID SEIF THELMA ANDREW LYALL the Administrators of the Estate of the

SULEIMAN MOHAMED SAID SALIM BIN KHALFAN, LIWALI OF TWAHIR SALIM

SOUD MOMBASA ABBAS SOUD ALI.....2<sup>ND</sup> INTERESTED PARTY

#### RULING

1. Before me for determination are two applications both brought by way of Notice of Motion. By the First Application dated 3<sup>rd</sup> May 2019 and filed herein on 6<sup>th</sup> May 2019, the six (6) Petitioners pray for orders that:-

**3. Pending the hearing and determination of this Petition, a Conservatory Order do issue staying the proceedings in Malindi Chief Magistrates Criminal Case No. 911 of 2018; Republic –vs- Ramadhan Idd Ramadhan & 5 Others.**

4.....

**5. Pending the hearing and determination of this Petition, a Prohibitory Order do issue restricting any dealings whatsoever over Land Parcels No. 120 Mguruleni and No. 121 Furunzi Malindi or any portion or part sub-divided or hived off from the said Land Parcels No. 120 Mguruleni and No. 121 Furunzi Malindi.**

6.....

**7. Pending the hearing and determination of this Petition, the Registrar of Titles Mombasa do lodge and register a Caveat over Land Parcels No. 120 Mguruleni and No. 121 Furunzi Malindi or any portion or part sub-divided or hived off from the said Land Parcels No. 120 Mguruleni and No. 121 Furunzi Malindi.**

**8. Costs of this application be provided for.**

2. The first Application is supported by an affidavit sworn by the 1<sup>st</sup> Petitioner Ramdhan Idd Ramadhan and is premised on the grounds:-

i) That Malindi CMCN No. 911 of 2018 against the Petitioners are founded on the two pieces of land-Plot No. 120 Mguruleni and No. 121 Furunzi in which the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners are administrators vide Mombasa Succession Cause No. 94 of 2011;

ii) That prosecution of Criminal Cases has no time limitation. It is therefore necessary and in the interest of justice that the controversy of ownership over the two parcels of land is determined by this Court first before criminal charges are preferred against any party, including the 6<sup>th</sup> and 7<sup>th</sup> Respondents.

iii) That the 2<sup>nd</sup> Respondent conducted shoddy and skewed investigations the basis of the criminal charges with the evil and unfortunate intention of assisting the 6<sup>th</sup> and 7<sup>th</sup> Respondents to illegally and fraudulently acquire and thereby disposes the Petitioners and the 1<sup>st</sup> Interested Party of their inheritance.

iv) That two judicial officers Honourable Lady Justice Maureen Odero and Honourable Joyce Gandani have recorded statements with the DCI LFIU denying allegations (of) forgery leveled against them by the 6<sup>th</sup> and 7<sup>th</sup> Respondents and that Succession Cause No. 94 of 2011 was conducted above board.

v) That the 6<sup>th</sup> and 7<sup>th</sup> Respondents filed Succession Cause No. 94 of 2011 primarily seeking revocation of the grant issued to the Petitioners on 7<sup>th</sup> August 2011. In a Ruling delivered by Lady Justice Mugure Thande on 23<sup>rd</sup> June 2017 she correctly found that she did not have jurisdiction to interrogate and determine the compelling interests between the parties and stayed the Grant provided the 6<sup>th</sup> and 7<sup>th</sup> Respondents filed an appropriate suit in the ELC within 90 days. The 6<sup>th</sup> and 7<sup>th</sup> Respondents have never filed the substantive suit.

vi) That in what appears to be a dramatic and unfortunate turn of events, the Petitioners are now in custody for allegedly conspiring to defraud the 6<sup>th</sup> and 7<sup>th</sup> Respondents of Parcel of Land No. 120 among other baseless charges;

vii) That the investigations carried out by the Land Fraud Investigations Unit of the DCI pursuant to a complaint by the 6<sup>th</sup> and 7<sup>th</sup> Respondents are to say the least underwhelming, shoddy and extremely inefficient to support the heavy charges preferred against the Petitioners;

viii) That the said charges have no basis at all (and) are a well calculated conspiracy and an evil scheme by state officers in cahoots with the 6<sup>th</sup> and 7<sup>th</sup> Respondents to corruptly, illegally and unlawfully dispossess the Petitioners of their inheritance; and

ix) That the criminal charges and the proceedings before the Chief Magistrate's Court are not only offensive, oppressive and an abuse of the Court process but also an affront to the law and the Constitution.

3. The Second Application dated 16<sup>th</sup> May 2019 has been filed by the 7<sup>th</sup> Respondent- Ali Abdalla Bakshwein as his response and that of the 6<sup>th</sup> Respondent to the Petition. By the said application, the 7<sup>th</sup> Respondent urges this Court to have the main Petition herein struck out and dismissed with costs. The application which is supported by an Affidavit sworn by the 7<sup>th</sup> Respondent is premised on the grounds that:-

i) The Petition is frivolous and otherwise an abuse of the Court process as there are no Constitutional issues raised;

ii) A dispute on ownership of land is not a Constitutional infringement to be determined through a Petition but rather a civil suit;

iii) The Petitioners have no locus standi to challenge the proprietary interest in Land Portion Nos. 120 and 121 Malindi;

iv) The Director of Public Prosecution's Constitutional powers to investigate and prosecute cannot be subject to direction and/or control from anybody;

v) There is no bar to concurrent processes of civil and criminal proceedings in respect of any matter; and

vi) The Petitioners are guilty of concealment/non disclosure of material facts.

4. In response to the First Application, the Director of Public Prosecutions (the 1<sup>st</sup> Respondent) has through its Prosecution Counsel Alice Mathangani sworn a Replying Affidavit filed herein on 17<sup>th</sup> May 2019. The 1<sup>st</sup> Respondent confirms that the Petitioners were indeed arrested on 25<sup>th</sup> September 2018 and were subsequently arraigned before the Malindi Chief Magistrates Court on 26<sup>th</sup> September 2018 charged with eight counts of offences relating to the subject properties.

5. The 1<sup>st</sup> Respondent avers that the said prosecution is lawful and accuses the Petitioners of trying to stop a lawful on-going criminal trial from proceeding to the detriment of the victims. The 1<sup>st</sup> Respondent further asserts that under Section 193A of the Criminal Procedure Code, there is no bar to the criminal case going on concurrently with civil proceedings and urges this Court to disallow the application and the Petition.

6. The Director of Criminal Investigations (DCI) named herein as the 2<sup>nd</sup> Respondent is equally opposed to the Petition and the First Application. In a detailed Replying Affidavit sworn on its behalf by the Investigating Officer Seargent Lawson Shuma and filed herein on 20<sup>th</sup> May 2019, the 2<sup>nd</sup> Respondent avers that it received a complaint in regard to the subject matter on 3<sup>rd</sup> July 2017.

7. The 2<sup>nd</sup> Respondent avers that they then commenced investigations and recorded statement from various personalities. The evidence gathered showed consistency of the commitment of a fraud. The 2<sup>nd</sup> Respondent avers that it then accordingly prepared and forwarded a duplicate file to the Office of the Director of Public Prosecutions (the 1<sup>st</sup> Respondent) for perusal and personal advise on 6<sup>th</sup> February 2018.

8. The 2<sup>nd</sup> Respondent asserts that upon perusal and analysis of the file, the 1<sup>st</sup> Respondent found sufficient evidence to warrant prosecution of the suspects and gave his consent for their prosecution vide a Letter dated 19<sup>th</sup> May 2018.

9. The 2<sup>nd</sup> Respondent therefore avers that contrary to the Petitioners' contention, they carried out comprehensive and conclusive investigations that revealed the commission of an offence by the Petitioners leading to their prosecution which is presently on-going.

10. The Chief Land Registrar, the Chief Magistrates Court Malindi and the Honourable the Attorney General (the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents respectively) are equally opposed to the First Application. In Grounds of Opposition dated 15<sup>th</sup> May 2019 as filed herein on 17<sup>th</sup> May 2019, they object to the Petition and the Motion on the grounds:-

1. That the Petitioner's allegations of harassment and intimidation by the aforesaid Respondents are too vague, ambiguous and unsubstantiated to constitute an arguable case against the Respondents.
2. That the Petition is unsubstantiated and without proper basis thus not meeting the threshold as was set out in **Anarita Karimi Njeru –vs- Attorney General**.
3. That no law and/or regulation has been demonstrated to have been breached.
4. That by the Petitioners' own admission the Courts have concurrent jurisdiction to sit in both criminal and civil matters when and if filed and there ought to be no interference of either jurisdiction of Court when such is properly invoked.
5. That the Petitioner has not filed or demonstrated the civil or land matter that has been filed despite their appreciation and belief of the jurisprudence raised in their Petition as emanating from decisions and rationale of several Judges or Courts that have handled matters between the Petitioners and the 6<sup>th</sup> and 7<sup>th</sup> Respondents herein(sic).
6. That the institution of the Petition is calculated to exert undue pressure upon the Court and the Respondents in carrying out their lawful duties and is therefore an abuse of the Court process.
7. That under Section 193A of the Criminal Procedure Code, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground of any stay, prohibition or delay of criminal proceedings.
8. That under Article 157(6) of the Constitution, the Director of Public Prosecutions exercises State powers of prosecution and in that capacity, may institute and undertaken criminal proceedings against any person before any Court in respect of any offence alleged to have been committed.
9. That the Applicant has not demonstrated that the DPP abused his powers neither has he demonstrated how he is being discriminated against nor that the charges against him are for ulterior motives.
10. That the 4<sup>th</sup> Respondent has the jurisdiction and competence to hear and determine the case before it whether civil or criminal in nature.
11. That there is no allegation of procedural or substantive impropriety on the part of the 4<sup>th</sup> Respondent and the proceedings before it has been fair and within the law.
12. That the Petition does not demonstrate that the Respondents have exceeded their lawful authority, contravened the Constitution or that by their act, the rights of the Petitioners and Interested Parties have been or are threatened with violation.
13. That the Criminal Proceedings have since commenced and the matter is pending further hearing and it is against the greater public interest to pre-empt and delay the ongoing prosecution of the Petitioners unless the said process has been demonstrated to be oppressive, frivolous and vexatious which is not the case herein.
14. That the Petitioners have not been discriminated against, however, by the Petition herein, the Petitioners seek to be elevated above the law by the issuance of orders to pre-empt and delay an on-going prosecution without laying a sound basis for the same. The immunity sought can only lead to impunity.
15. That the Petitioners have not shown that the subject matter of the civil matter will be rendered nugatory unless the orders sought are granted.
16. That provision regarding granting of bail is now settled law the determination (of which) lies squarely within the mandate and discretion of the trial Court and/or appeal where one is dissatisfied.

11. In addition to the Grounds of Opposition, the 3<sup>rd</sup> Respondent has thorough its Registrar of Titles Mombasa- John Gichuki Wanjohi sworn a Replying Affidavit filed herein on 14<sup>th</sup> June 2019 detailing the records of documents held in their Registry in respect to the subject parcels of land.

12. The First Application is equally opposed by the other Administrators of the Estate of the late Salim Bin Khalfan, Liwali of Mombasa enjoined herein as the 2<sup>nd</sup> Interested Party. In a Replying Affidavit sworn on their behalf by Seif Said Seif and filed herein on 12<sup>th</sup> June 2019, they aver that they recently came to learn that the Petitioners herein while posing as the grandsons of the late Salim Bin Khalfan, Liwali of Mombasa had obtained Letters of Administrations in respect of the Estate in **Mombasa Succession Cause No. 94 of 2011**.

13. The 2<sup>nd</sup> Interested Party asserts that the Petitioners are not related in any way with the deceased and were impostors out to steal the property belonging to the estate. They further assert that of all the properties listed in the Confirmed Grant, only Parcel No. 39 belonged to the late Salim Bin Khalfan, Liwali of Mombasa. It is further their case that the estate has never owned Parcel Nos. 120 Mguruleni and 121 Furunzi and that they do not have any fight over the same with the 6<sup>th</sup> and 7<sup>th</sup> Respondents.

14. I have perused and considered the two applications and the various responses thereto. I have equally perused and considered the detailed

written submissions and authorities placed before me by the Learned Advocates for the parties.

15. The six Petitioners, Ramadhan Idd Ramadhan, Abubakar Omar Kombo alias Bakari, Musa Hassan Juma, Juma Omar Korshen and Juma Hassan Juma describe themselves as the grandchildren of one Liwali Sheikh Salim Bin Khalfan, now deceased. The 1<sup>st</sup> and 2<sup>nd</sup> Petitioners are apparently some of the Administrators of the Estate of the said Liwali Sheikh Salim Bin Khalfan who is said to have died in Mombasa on or about 10<sup>th</sup> July 1920.

16. On or about 25<sup>th</sup> September 2018, the Petitioners were arraigned before the Malindi Chief Magistrates Court and charged with some eight counts of offences relating to conspiracy to defraud contrary to Section 317 of the Penal Code in respect of Land Portion No. 120 situated at Mguruleni Malindi and Land Portion No. 121 situated at Furunzi within Malindi.

17. It is the Petitioners case that the said charges were instigated by two individuals- Salim Abdalla Bakshwein and Ali Abdalla Bakshwein (the 6<sup>th</sup> and 7<sup>th</sup> Respondents respectively) with whom they have had a long running dispute over the said parcels of land.

18. The Petitioners assert that the documents of title in their hands are compelling and conclusive proof that the disputed parcels of land belonged to the late Liwali Sheikh Salim Bin Khalfan and hence the charges against them have no basis at all but are merely a well calculated conspiracy and evil scheme orchestrated against themselves by the Director of Public Prosecutions, the Director of Criminal Investigations, the Chief Land Registrar and the Chief Magistrates Court Malindi (the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents) in cahoots with the 6<sup>th</sup> and 7<sup>th</sup> Respondents to corruptly, illegally and unlawfully dispossess them of their inheritance from their great grandfather.

19. The Petitioners therefore aver that the charges preferred against themselves are based on skewed and unbalanced investigations carried out by the Director of Criminal Investigations who for unknown reasons has decided to believe the 6<sup>th</sup> and 7<sup>th</sup> Respondents' version of the story regarding the ownership of the subject parcels of land.

20. Accordingly, in their Petition filed herein on 6<sup>th</sup> May 2019, they urge this Court to grant them some eight(8) prayers listed in the Petition that:-

- i) A declaration be issued that the Petitioners have proved beyond reasonable doubt that Land Parcel Nos. 120 Mguruleni and No. 121 Furunzi Malindi still remain the properties of the late Sheikh Salim Bin Khalfan Liwali and were therefore properly included in the Confirmation of Grant of Letters of Administration in Succession Cause No. 94 of 2011;
- ii) A declaration be issued that the purported investigations and institution of criminal proceedings against the Petitioners and the 1<sup>st</sup> Interested Party in the (cited Malindi) case were inconclusive, biased and violate their Constitutional rights including equality before the law, equal protection and benefit of the law, the right to fair trial, protection of the right to property, is an abuse of the powers by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, abuse of the process of the Court and therefore unlawful, null and void ab initio;
- iii) An order of certiorari be issued to quash the entire charge sheet dated 8<sup>th</sup> October 2018 and proceedings against the Petitioners in the said Malindi Criminal Case;
- iv) An order of Prohibition be issued prohibiting the Respondents from proceeding with the prosecution of the Petitioners in the said case;
- v) An order be issued reversing, cancelling and or rectifying any entry, transaction or dealing with any of the two parcels of land or any sub-division thereof by the 6<sup>th</sup> and 7<sup>th</sup> Respondents or any other person as the case may be;
- vi) An order to compel the 3<sup>rd</sup> Respondent, to cancel and rectify any entry made on the two parcels of land or any of the subdivisions made thereto;
- vii) An order for compensation in form of damages for loss of user, trespass, mesne profits, loss of opportunity cost over the two parcels of land and further damages for malicious prosecution, incarceration(and) wrongful confinement; and
- viii) The costs of the Petition be provided for.

21. The law governing the grant of judicial review orders has traditionally been anchored under the Common Law principles in which Courts were concerned only with the decision making process as opposed to the merits of the decision. With the promulgation of the 2010 Constitution and the subsequent enactment of the Fair Administrative Actions Act, the scope or process of judicial review has now been elevated to a pedestal that transcends the technicalities that were prevalent under the Common Law.

22. As Odunga J. aptly stated in *Republic –vs National Transport and Safety Authority & 10 Others Ex Parte James Maina Mugo 2010:-*

“Judicial Review has I think developed to a stage today when....one can conveniently classify under three heads the grounds upon which administrative action are subject to control by Judicial Review. The first ground I would call “Illegality”, the Second “Irrationality”, and the third “Procedural impropriety”.....’By Illegality’ as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it... ..’By Irrationality’ I mean what can now be succinctly referred to as ‘Wednesbury unreasonableness’...it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standard that no sensible person who had applied his mind to the question to be decided could arrive at it...

I have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision”

23. In the matter before me, the Petitioner asserts both in the Petition and in their application for stay and conservatory orders that the basis of their prosecution by the 1<sup>st</sup> Respondent in the said **Malindi CMCR Case No. 911 of 2018** is the shoddy and skewed investigations conducted by the 2<sup>nd</sup> Respondent on the instigation of the 6<sup>th</sup> and 7<sup>th</sup> Respondents. The Petitioners contend that the reason for the criminal charges preferred against them is the evil and unfortunate intention of assisting the 6<sup>th</sup> and 7<sup>th</sup> Respondents to illegally and fraudulently acquire and thereby dispossess them of the suit properties.

24. But while they admit filing a criminal complaint with the 2<sup>nd</sup> Respondent against the Petitioners, the 6<sup>th</sup> and 7<sup>th</sup> Respondents accuse the Petitioners of deliberately and deceptively misleading the Court through material non-disclosure and concealment of important facts.

25. In their affidavit sworn in support of the Second Application urging for the dismissal of the Petition, the 6<sup>th</sup> and 7<sup>th</sup> Respondents aver that while the Petitioners have in their Petition produced and exhibited the Supplement Gazette No. 5 of 1916, they have clearly left out pages 9-17 of the Gazette where the subject parcels of land herein were mentioned. The Respondents aver that from page 181 of the said Gazette (Exhibit AAB-1) Land Portion No. 120 was at the time in the names of the children of one Said Mohamed Bin Suleiman while Portion No. 121 was in the name of Nasoor Walli Miralli and not Sheikh Salim Bin Khalfan Liwali of Mombasa.

26. The two Respondents therefore assert that there is no evidence of any record that the suit properties had at any one time ever been owned or registered, sold or transferred in the name of the said Sheikh Salim Bin Khalfan Liwali of Mombasa by way of any lawful grant, indenture or otherwise.

27. The two Respondents further aver that by reason of the dispute they have had with the Petitioners, they checked the land records in regard to Land Portion No. 39 which as per the mentioned Gazette Notice originally belonged to the said Sheikh Salim Bin Khalfan Liwali of Mombasa. The records reflected a Grant obtained by four of the Petitioners in **Malindi Succession Cause No. 14 of 2008** purportedly in the matter of the said Estate of Liwali Sheikh Salim Bin Khalfan, but when they perused the relevant Court records, they discovered that the matter relates to the Estate of one Magwisho Omar Chidanga instead.

28. The 6<sup>th</sup> and 7<sup>th</sup> Respondents further accuse the Petitioners of deceitfully misleading this Court by attaching extracts relating to the said Land Portion No. 39 at page 30 of their Bundle of Documents to appear as if they are part of and relate to Entries for Land Portion No. 120 Malindi.

29. In support of the 6<sup>th</sup> and 7<sup>th</sup> Respondents, the other Administrators of the Estate of the said Sheikh Salim Bin Khalfan Liwali of Mombasa jointly referred to herein as the 2<sup>nd</sup> Interested Party have equally disowned the Petitioners’ claim to the subject properties.

30. In a Replying Affidavit sworn on their behalf by Seif Said Seif and filed herein on 12<sup>th</sup> June 2019, they aver that they recently came to learn that the Petitioners were posing as the grandsons of the deceased Salim Bin Khalfan, Liwali of Mombasa and that they had obtained Letters of Administration in respect of the Estate in **Malindi Succession Cause No. 94 of 2011**.

31. The 2<sup>nd</sup> Interested Party deny that the Petitioners are related in any way with the deceased and accuse them of being mere impostors out to steal the property belonging to the deceased’s estate. It is further their case that they have no claim whatsoever as the rightful Administrators of the deceased’s estate over the two subject properties herein.

32. As it were the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have outlined the basis upon which they came to prefer the charges against the Petitioners. The 2<sup>nd</sup> Respondent has by an affidavit sworn by the Investigating Officer Sergeant Lawson Shuma given the details of the complaint that was received and how they went about recording statements from various individuals.

33. Their investigations pointed to the commission of a crime and accordingly, they prepared a duplicate file which was forwarded to the 1<sup>st</sup> Respondent for perusal and advise on 6<sup>th</sup> February 2018. Some three months later after perusal and analysis of the evidence in the file, the DPP concurred with their recommendations and directed that the Petitioners be charged with the offences they presently face in Court.

34. In this respect, this Court took note of the fact that the 2<sup>nd</sup> Respondent herein is a Department under the National Police Service charged with the duty of investigating crimes. Once they conclude their investigations, they are by law required to submit their findings as they did herein to the 1<sup>st</sup> Respondent for perusal and advise. The 2<sup>nd</sup> Respondent as it were has no control over what the 1<sup>st</sup> Respondent does. It is the 1<sup>st</sup> Respondent, a Constitutional Office created under Article 157 of the Constitution which has power to decide on who to be charged independently based, of course, on the evidence submitted.

35. As was stated in **Paul Ng’ang’a Nyaga –vs- Attorney General & Others (2013) eKLR:-**

“This Court can only interfere with and interrogate the acts of other Constitutional bodies if there is sufficient evidence they acted in contravention of the Constitution.”

36. There is therefore no doubt that this Court would interfere with the 1<sup>st</sup> Respondent’s decision where it was sufficiently demonstrated that he has exceeded his mandate or acted in contravention of the law. In **Diamond Hasham Lalji & Another –vs- Attorney General & 4 Others (2018) eKLR**, the Court of Appeal considered in detail the applicable law and the circumstances under which the Court could interfere with the 1<sup>st</sup> Respondent’s exercise of prosecutorial powers and observed as follows:-

**“The burden of proof rests with the person alleging unconstitutional (exercise of) power. However, if sufficient evidence is adduced to establish breach, the evidential burden shifts to the DPP to justify the prosecutorial decision.**

.....

**In considering the evidential test, the Court should only be satisfied that the evidence collected by the investigative agency upon which the DPP’s decision is made establishes a prima facie case necessitating prosecution. At this stage the Court should not hold a fully fledged inquiry to find if evidence would end in a conviction or acquittal. That is the function of the trial Court. However, a proper scrutiny of the facts and circumstances of the case are absolutely imperative.”**

37. Arising from the foregoing, it was incumbent upon the Petitioners to demonstrate that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had either exceeded their mandate or acted in contravention of the law. Other than the allegation that the two had acted in cahoots with the 6<sup>th</sup> and 7<sup>th</sup> Respondents however, the Petitioners did not place any evidence before me to demonstrate that the investigation against themselves by the 2<sup>nd</sup> Respondent and the directive by the 1<sup>st</sup> Respondent that they be charged had been actuated by any ulterior motive or done in contravention of the law.

38. Again to quote Odunga J as he observed in *Republic –vs- Chief Magistrates Court Nairobi & 4 Others (2013) eKLR:-*

“The Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a good ground that ought not to be relied upon by a Court in order to halt a criminal process undertaken bona fides since the defence is open to the applicant in those proceedings. However if the applicant demonstrates that the criminal proceedings that the Police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceedings may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the Court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. In the exercise of the discretion on whether or not to grant an order of prohibition, the Court takes into account the needs of good administration.”

39. In the matter before me, it is the criminal proceedings that were commenced first following a complaint lodged by the 6<sup>th</sup> and 7<sup>th</sup> Respondents in July 2017. The 2<sup>nd</sup> Respondent spent almost seven months conducting its investigations before forwarding a duplicate file thereon to the 1<sup>st</sup> Respondent for an independent analysis and advise. It took another three months for the 1<sup>st</sup> Respondent to consider the facts and evidence in the file and I am not persuaded that the criminal proceedings were the result of shoddy and skewed investigations and or that there is any basis to stay the same.

40. In light of the foregoing this Court was consequently not persuaded that the Petitioners Constitutional rights had been violated as alleged by the Petitioners or at all. The Petition before me was premised on the contention that there had been an unlawful interference with the Petitioners Constitutional rights and that as a result they had a right to claim redress and vindicate those rights. Having found there was no such violation, the Petition before me is left with no legs to stand on and must collapse.

41. Accordingly both the Petitioners application dated 3<sup>rd</sup> May 2019 and the Petition upon which it is based are hereby struck out.

42. The 6<sup>th</sup> and 7<sup>th</sup> Respondents as well as the 2<sup>nd</sup> Interested Party shall have the costs thereof.

**Dated, signed and delivered at Malindi this 27<sup>th</sup> day of May, 2020.**

**J.O. OLOLA**

**JUDGE**