



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW APPLICATION NO. 8 OF 2017**

**IN THE MATTER OF AN APPLICATION BY EDWIN HAROLD DYAN DANDE, ELIZABETH NALANTEI NKUKUU, PATRICIA NJERI WANJAMA AND SHIV ANOOP ARORA FOR JUDICIAL REVIEW AND ORDERS OF CERTIORARI, PROHIBITION & MANDAMUS AGAINST THE CHIEF MAGISTRATES COURT AT NAIROBI AND THE DIRECTOR OF PUBLIC PROSECUTIONS.**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015.**

**AND**

**IN THE MATTER OF NAIROBI CHIEF MAGISTRATE**

**CRIMINAL CASE NO. 1735 OF 2016.**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

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

**THE CHIEF MAGISTRATE'S COURT, NAIROBI.....2ND RESPONDENT**

**AND**

**BRITISH AMERICAN ASSET MANAGERS LIMITED...INTERESTED PARTY**

**EDWIN HAROLD DAYAN DANDE**

**ELIZABETH NAILANTEI NKUKUU.....EX PARTE APPLICANTS**

**PATRICIA NJERI WANJAMA**

**SHIV ANOOP ARORA**

## JUDGMENT

### **The ex parte applicant's case.**

1. Pursuant to this Courts leave granted on 1<sup>st</sup> February 2017, the *ex parte* applicant moved this Court by an application dated 3<sup>rd</sup> February 2017 filed on 7<sup>th</sup> February 2017 seeking orders of:- **(a) Certiorari** to quash the decision of the Director of Public Prosecutions made on or about 4<sup>th</sup> November 2016 to institute criminal proceedings against the applicants in criminal case number 1735 of 2016 before the Chief Magistrates Court at Nairobi; **(b)** An order of **Certiorari** to quash the proceedings in Criminal case number 1735 of 2016; **(c)** an order of **Prohibition** to prohibit the Chief Magistrates Court from hearing and determining Criminal Case No. 1735 of 2016; **(d)** Costs of the application be provided for.

2. The core grounds in support of the application as I distil them from the substantive application, the application seeking leave, the verifying affidavit and the annexures thereto and the statutory statement are that:-

a. **That** despite an order made by this Honourable Court (Odunga J) on 1<sup>st</sup> November 2016, staying any arrest and prosecution of the applicants pending the hearing and determination of the applicants application for stay, the first Respondent knowingly and wilfully violated and or disobeyed and or disregarded and or thwarted and undermined the effect and purpose of the said orders by instituting criminal proceedings on the 4<sup>th</sup> November 2016 before the Chief Magistrates Court at Nairobi against the applicants.

b. **That** the said criminal proceedings relate to two counts of theft by servant against the applicants for the sums of **Ksh. 1,161,465,388** and **Ksh. 10,132,368.50** being the property of the applicants' previous employer British American Asset Managers Ltd (BAAM), now known as Britam Asset Managers (Kenya) Limited, a subsidiary of British American Investments Company (K) Ltd. (BRITAM).

c. **That** the sums in respect to which the said charges relate were the subject matter of the claims in two of the civil suits in HCCC No. 352 and 353 of 2014, which suits have since been settled and or withdrawn.

d. **That** none of the applicants benefited from the payment and or transfer of the impugned sums and that no loss was suffered by Britam as it recovered from Acorn Group Limited, its affiliates, as well as the special purpose vehicles in which the money had been invested which formed the basis of five civil suits filed at the instigation of the company.

e. **That** the reasons for the prosecution is not for vindication of the Rule of Law but at the aegis of the company for the purposes of eliminating competition, a contravention of Article 157 (10) of the Constitution, hence, there was no reasonable factual basis upon which the first Respondent could conclude that charges of theft by servant should be made against the applicants and that no reasonable decision maker faced with the circumstances would arrive at the decision to prosecute the applicants.

f. As a result of the foregoing, the prosecution is an abuse of power and is unreasonable.

### **First Respondent's grounds of opposition.**

3. The DPP filed grounds of opposition on 24<sup>th</sup> January 2017 stating:- **(i)** that the application is an abuse of Court process, is *res judicata* as the same was conclusively determined in J.R. No. 435 of 2014; **(ii)** that there is a pending appeal in the Court of Appeal; **(iii)** that the first Respondent has the mandate to institute criminal cases; **(vi)** the existence of criminal proceedings is not a bar to criminal prosecution; **(v)** the applicants have not demonstrated that the DPP acted without or in excess of its powers.

### **First Respondent's Replying Affidavit.**

4. **Gitonga Muranga**, a Principal Prosecution Counsel in the office of the DPP swore the Replying Affidavit dated 14<sup>th</sup> February 2017. He averred that a complaint was made to the Directorate of Criminal Investigations on 16<sup>th</sup> October 2014 by the CEO of British American Company (K) Ltd. relating to misappropriation of funds. He also averred that the Director of Criminal Investigations completed investigations and forwarded the investigation file to the DPP with recommendations to charge the applicants. He averred that the National Police Service is mandated under the Constitution and the National Police Service Act to carry out investigations once a complaint is filed.

5. **Mr. Muranga** further averred that after JR. No. 435 of 2014 was dismissed, the DPP independently reviewed the files and was satisfied that the evidence on the file was sufficient to sustain a prosecution, hence, the DPP filed the charges in question. He also averred that the existence of any civil proceedings relating to the same matter is not a bar to the criminal prosecution, and in any event, since the parties state they settled the civil suits, it cannot be said that the criminal case is geared to settle the said cases. He also averred that the DPP does not require the consent of any person to commence criminal proceedings; and, that the DPP is not acting under the direction of any person; nor has it been demonstrated that DPP acted without or in excess of his jurisdiction.

### **The second Respondent's grounds of opposition.**

6. The second Respondent filed grounds of opposition stating that:- **(i)** *it has the jurisdiction and competence to hear and determine the case before it;* **(ii)** *there is no allegation of procedural or substantive impropriety on its part;* **(iii)** *that there is no allegation of perceived bias against it.*

### **Interested Party's Response.**

7. **Jude Brian Anyiko Oluoch**, the Interested Party's group Investment Officer swore the Replying Affidavit dated on 16<sup>th</sup> February 2017. He averred that the Interested Party is the complainant in the criminal case the subject of these proceedings. He also averred that the applicants were employees of the Interested Party; and, that they all resigned on diverse dates in August/September 2014. He further averred that prior to their resignations, the first applicant held various senior positions in the Interested Party and was its Managing Director, while the second Respondent was the Senior Portfolio Manager; and, the third applicant was the Head of Legal and Assistant Company Secretary; lastly, the fourth applicant was an Investment Analyst.

8. **Mr. Oluoch** averred that during the period of their employment, the applicants amongst themselves and with third parties engaged in conspiracy to carry out activities which had not been approved by the Interested Party. Further, he averred that in subsequent investigations undertaken by the Interested Party, it was found out that the applicants were engaged in:- **(i)** *fraudulent, irregular and unauthorized withdrawal of funds held or managed by the Interested Party;* and, **(ii)** *fraudulent, irregular, unauthorized and clandestine execution of contracts (notably joint venture agreements) that were adverse to interests of the Interested Party.*

9. He further averred that on diverse dates, the applicants fraudulently and without authority instructed a company known as Acorn Group Ltd to transfer funds owned, entrusted to and controlled by the Interested Party to various limited liability Partnerships owned and controlled by Acorn Properties limited, Acorn Investments Ltd and Acorn Group Ltd prompting the Interested Party and its related affiliates to file five civil suits in October 2014 against the applicants and Acorn Group together with Acorn's related entities seeking restitution of the said funds, properties and or other benefits by which each and all the parties named in the suits as defendants had been unjustly enriched at the expense of the Interested Party and the Interested Party's Affiliates. He averred that the funds which the Interested Party sought to recover in the said suits had been transferred to Acorn Properties Ltd, Acorn Investments Ltd and Acorn Group Ltd.

10. **Mr. Oluoch** further averred that Acorn companies engaged in an out of Court settlement whereupon

Acorn Limited agreed to re-transfer the funds and the suits were marked as settled. He also averred that the acts in question were criminal in nature, hence, a formal complaint was lodged by the Interested Party and upon investigations by the police it was ascertained that sufficient evidence existed to justify the applicants being charged in Court and the charges were preferred against them accordingly.

11. **Mr. Oluoch** also averred that the Interested Party did not exert pressure on the first Respondent to prosecute the applicants and that restitution of the funds is not a bar to the prosecution and as to whether or not there is a basis for the said prosecution, the trial Court is best suited to determine the said issue and lastly the DPP has a constitutional mandate to undertake criminal proceedings. Further, he averred that the applicants are essentially seeking from this Court immunity to criminal process and that since the applicants have lodged an appeal against the decision in JR. No. **435** of 2014, this suit is an abuse of Court process.

#### **Applicant's further affidavit.**

12. **Mr. Edwin Harold Dayan Dande**, the Chief Executive Officer of Cytonn Investments Management Limited swore the further affidavit dated **4<sup>th</sup>** April 2017 in response to the first Respondent's and the Interested Party's Replying Affidavits. In reply to the first Respondents Replying Affidavit, he *inter alia* averred that the DPP did not subject the investigations to an independent analysis and that it has not been demonstrated that the alleged transfer of funds led to any loss of funds nor was it demonstrated whether the applicants personally benefitted. He averred that the criminal proceedings are motivated by malice and/or ulterior motive.

13. In response to the Interested Party's Replying affidavit, he averred that there was no conspiracy to carry out unapproved activities, and, that the Interested Party did not show that the transactions were fraudulent, irregular and unauthorized.

#### **Issues for determination.**

14. Upon analysing the facts presented by the parties herein and the submissions filed, I find that the following issues fall for determination; namely; **(a) whether this case is an abuse of Court process; (b) whether applicants have demonstrated any grounds to qualify for the orders sought.**

#### **(a) Whether this case is an abuse of Court process.**

15. **Mr. Jude Brian Anyiko Oluoch**, the Interested Party's group Investment Officer in his Replying Affidavit dated on **16<sup>th</sup>** February 2017 averred that in a bid to obstruct the criminal justice system, the applicants filed J.R. Misc. Application No. **435** of 2014; *Edwin Harold Dayan Dande & 4 Others vs the Inspector General, National Police Service & 2 Others* seeking *inter alia* prohibition orders against the Inspector of Police and the Directorate of Criminal Investigations and obtained *ex parte* orders. He averred that after a protracted hearing, the Court declined to grant the orders sought but prohibited any criminal proceedings until the Director of Public Prosecutions makes a determination on the matter. He also averred that the applicants application for stay of the said order pending appeal was unsuccessful, hence, the DPP initiated criminal proceedings against the applicants being Nairobi Criminal Case No. **1735** of 2016.

16. He also averred that the allegations made by the applicants in this case are the same allegations as made in J.R. No. **435** of 2014. He also averred that the applicants appealed against the decision in JR. No. **435** of 2014 being Civil Appeal No. **246** of 2016, *Edwin Harold Dayan Dande & 4 Others vs The Inspector General, National Police Service & 2 Others* and also filed an application in the Court of Appeal seeking to stay the same criminal case in the lower Court, but withdrew it.

17. Notwithstanding the seriousness of the allegation that these proceedings are an abuse of Court process, the applicant's counsel as well as counsels for the Respondent's did not address this issue at all.

18. It is uncontroverted that the applicants filed JR. No. **435** of 2014 seeking to prohibit the same

prosecution and that the Court prohibited any criminal proceedings until the Director of Public Prosecutions makes a determination on the matter. It is common ground that the applicants appealed against the said decision and even applied for stay in the Court of Appeal.

19. The Memorandum of Appeal at **Mr. Oluoch's** Replying Affidavit is dated **8<sup>th</sup>** November 2016. It was lodged at the Court of Appeal Registry on **9<sup>th</sup>** November 2016. The application for stay in the Court of Appeal was lodged at the Court of Appeal Registry on **21<sup>st</sup>** December 2016. The orders sought in the said application are substantially similar to those sought in the present application. It is beyond argument that had the said orders been allowed by the Court of Appeal, they would have had the same effect as sought in the present application. The orders would have stayed the same criminal proceedings the subject of these proceedings. The present application was filed on **16<sup>th</sup>** January 2017. At the time it was filed, the application in the Court of Appeal was still pending.

20. The record shows that the application for leave was argued *inter partes* on **24<sup>th</sup>** January 2017. The applicant's counsel did not mention to the Court that there was a pending appeal in the Court of Appeal nor did he mention the pendency of the application for stay in the Court of Appeal. The Court rendered its ruling on **1<sup>st</sup>** February 2017 and granted the stay. On **8<sup>th</sup>** February 2017, the applicants withdrew the application in the Court of Appeal.

21. Two fundamental questions arise. *First*, whether the applicants were under a duty to disclose to this Court the pendency of the application in the Court of Appeal. *Second*, whether the existence of similar processes in this Court and the Court of Appeal constituted abuse of Court process.

22. 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 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. This position was well captured in one of the earliest decisions on the subject rendered in 1917 in *R. vs. Kensington Income Tax Commissioner*.<sup>[1]</sup>

23. 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.<sup>[2]</sup> The applicants were under a solemn duty to bring to the attention of the Court the existence of the application pending before the Court of Appeal at the earliest opportunity possible and leave it to the Court to determine the merits or otherwise of its application. This is even more crucial considering that the application in the Court of Appeal sought similar orders as in this application and either application if allowed had the effect of staying the same criminal proceedings. Conveniently, seven days upon obtaining stay orders in this case without disclosing to the Court the existence of the application in the Court of Appeal, the applicants conveniently withdrew the application pending in the Court of Appeal. Clearly, the determination of either of the two applications, if successful would confer the same benefit to applicants, and that is exactly what happened after the High Court granted leave in this case and allowed the leave to operate as stay.

24. 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 applied not only to material facts known to the applicants, but also to any additional facts which they would have known if they had made inquiries.

25. The question that inevitably follows is whether the non-disclosure in this case of the pendency of a similar application in the Court of Appeal was innocent, in the sense that the fact was not known to the applicants or that they did not perceive its relevance. In my view, the non disclosure in this case cannot be said to be innocent bearing in mind the fact that JR No. **435** of 2014 sought to stop the same criminal process. Had the said case been successful, this case would not have been filed. Further, had the

application in the Court of Appeal been allowed, the present suit would not have been necessary. Disclosure of the above information would have cleared the perception that the applicants were acting in bad faith or abusing Court processes. It would have given the Court the benefit of appreciating the propriety of the two processes and consider the implications if any of allowing the stay.

26. I have in numerous decisions of this court<sup>[3]</sup> 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. The black's law dictionary defines abuse 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."<sup>[4]</sup>

27. 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.<sup>[5]</sup>*

*(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. <sup>[6]</sup>*

28. Abuse of court process creates a factual scenario where a party is pursuing the same matter by two Court process. In other words, a party by the two Court process is involved in some gamble; a game of chance to get the best in the judicial process.<sup>[7]</sup>

29. It's settled law that a litigant has no right to pursue *paripasu* two processes which will have the same effect in two Courts at the same time with a view of obtaining victory in one of the process or in both. In several decisions of this court I have stated that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks. In my humble view, the two processes are in law not available simultaneously. The pursuit of the two processes at the same time constitutes and amounts to abuse of Court/legal process."<sup>[8]</sup>

30. Thus, the multiplicity of actions on the same matter between the same parties even where there exist a right to bring the action is regarded as an abuse.<sup>[9]</sup> The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right *per se*. 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.[\[10\]](#)

31. *First*, I find no difficulty in concluding that it was absolutely necessary for the applicants to disclose to the Court the existence of the similar application pending before the Court of Appeal and leave it to the Court to determine the matter. *Second*, I also find that pursuing two identical applications in two separate Courts seeking substantially identical reliefs constitute abuse of Court process. This is because the two applications arise from the same set of facts and circumstances and seek substantially similar reliefs. Even where a party brings a case to the Court and is aware of the existence of similar or previous litigation, the party has a duty to bring such information to the Court. This will help the Court to avoid rendering conflicting decisions on the same subject. This Court shudders to imagine what would have happened had the Court of Appeal declined the application and at the same time the High Court granted the same. Perhaps, I should add with regrets that the practice of parties filing multiple suits even in the various High Court divisions has become rampant. Time has come for the Judiciary to consider urgently computerizing Court records so that at the touch of a button, the registry receiving Court documents and judicial officers can detect the existence of any previous Court proceedings or pending Court proceedings involving the same parties and the same subject and the status of such cases.

**(b) Whether applicants have demonstrated any grounds to qualify for the orders sought.**

32. **Mr. Amoko**, counsel for the applicants submitted that the DPP abused its powers, hence, a ground for this Court to intervene.[\[11\]](#) He argued that the prosecution of the applicants is selective since the Directors of Acorn Group Ltd were not pursued. He also argued that the applicants have been subjected to unfair treatment and that the prosecution is actuated by ill-motive and a misuse of power.[\[12\]](#) He also submitted that the DPP must exercise its powers in a fair, judicial and impartial manner.[\[13\]](#)

33. **Mr. Amoko** also argued that although the civil suits were withdrawn, the ill motive still persists because the money the subject of the charges have since been recovered and that the prosecution is meant to taint the applicants reputations.[\[14\]](#) **Mr. Amoko** also argued that the decision to prosecute the applicants is unreasonable and irrational,[\[15\]](#) and, that DPP failed to refute the allegations that it was acting at the behest of the Interested Party. He also argued that criminal prosecution which is commenced in the absence of proper factual basis is always suspect for ulterior or improper motive.[\[16\]](#)

34. **Mr. Ashimosi**, counsel for **DPP** submitted that the **DPP** independently analysed the evidence with due regard to law and was satisfied that there was sufficient evidence, and independently made the decision to charge. Further, he argued that the applicants have not demonstrated that **DPP** abrogated any provision of the law or the Constitution or principles of Natural Justice. He also argued that the Court can only intervene where the **DPP** has violated the Constitution[\[17\]](#) and that the Court ought not to usurp the constitutional mandate of the DPP.[\[18\]](#) He submitted that the fact that the intended criminal proceedings is bound to fail is not a ground to halt criminal proceedings[\[19\]](#) and that the analysis of the evidence is a function of the trial and not the constitutional Court.[\[20\]](#)

**Second Respondent's Advocate's Submissions.**

35. **Joyce Ngelechei**, counsel for the second Respondent argued that the applicants case does not meet the tenets of Judicial Review and also invoked the immunity conferred upon the second Respondent by section 8 of the Judicature Act.[\[21\]](#)

**Interested Party's Advocate's Submissions.**

36. Counsel for the Interested Party argued that:-

*(i) by instituting the criminal proceedings, DPP did not abuse its powers;*

*(ii) restitution of the funds is not a bar to the criminal proceedings;*

*(iii) the existence of civil liability does not extinguish criminal liability;*[\[22\]](#)

*(iv) that the applicants have not proved that the criminal proceedings are not being used for advancement of the Rule of Law*[\[23\]](#) *or that the DPP acted irrationally;*

*(v) that it is not for this Court to stop the DPP simply because the Court believes that the DPP ought to have done better.*

37. A special feature of the Constitution of Kenya, 2010 is the establishment of an independent office of the **DPP**. Its independence is provided under Article **157 (10)** of the Constitution. Article **157 (10)** declares that the **DPP** shall not require the consent of any person or authority to commence criminal proceedings and that in the exercise of his powers or functions, the **DPP** shall not be under the direction or control of any person or authority. This position is replicated in Section **6** of the Office of the Director of Public Prosecutions Act[\[24\]](#) 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.*

38. 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 another person has a hand in the prosecution, such a decision cannot be allowed to stand.

39. A reading of Article **157** of the Constitution leaves no doubt that the **DPP** is required to not only act independently, but to remain fiercely so. It is also important to mention that Article **245 (4) (a)** of the Constitution provides that:-*"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.

40. The issues presented in these proceedings are a direct invitation to this Court to determine the circumstances under which the High Court in exercise of its vast jurisdiction conferred upon it by the Constitution can *halt, stop, prohibit or quash* a criminal prosecution mounted against a citizen. It is common ground that the Office of the Director of Public Prosecutions is a constitutional office which plays a vital role in the administration of justice in criminal matters. The Constitution vests the **DPP** with the sole Authority, power and responsibility to exercise control over the prosecution of all criminal matters except the institution of cases at the Court? Martial.[\[25\]](#)

41. It is also true that a fair and effective prosecution is essential to a properly functioning criminal justice system and to the maintenance of law and order. Individuals involved in a crime – the victim, the accused, and the witnesses – as well as society as a whole have an interest in the decision whether to prosecute and for what offence, and in the outcome of the prosecution. In short the proper and effective administration of the criminal justice system is a matter of great public interest.

42. There are general principles which should underlie the approach to prosecution. The **DPP** must at all times uphold the Rule of Law, the integrity of the criminal justice system and the right to a fair trial and

respect the fundamental rights of all human beings to be held equal before the law, and abstain from any wrongful discrimination.

43. Fundamentally, the primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to seek conviction. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion not to pursue criminal charges in appropriate circumstances. The **DPP** is required to protect the innocent and to seek conviction of the guilty, and also to consider the interests of victims and witnesses. The **DPP** has an obligation to respect the constitutional and legal rights of all persons, including suspects and accused persons and should avoid any appearance of impropriety in performing the prosecution function.

44. 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.

45. 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.

46. Courts have an overriding duty to promote justice and prevent injustice. From this duty there arises an inherent power to '*stay*' an *indictment* (or stop a prosecution) if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the Court or infringement of a citizens' fundamental rights. Whether a prosecution is an abuse of Court process, unfair, wrong or a breach of fundamental rights, it is for the Court to determine on the individual facts of each case.

47. It is admitted that the applicants were employees of the Interested Party. It is also admitted that all the applicants resigned. It is also common ground that some funds were transferred from the Interested Party's Accounts prompting it to lodge a complaint with the police. It is common ground that civil suits were instituted and the funds in question were re-transferred to the Interested Party. It is uncontented that after the funds were re-transferred as aforesaid, the civil suits were settled, but the complaints made to the Police remained. The applicants argue that since the civil suits were settled, pursuing the criminal prosecution is in bad faith, malicious and abuse of the prosecutorial powers of the **DPP**. The applicants also argue that the prosecution is selective in that not all involved were prosecuted.

48. It is a fundamental principle of law that it is not for this Court to determine the veracity or to weigh the strength of the evidence or accused persons defence. That is a function for the trial Court hearing the criminal trial. This court can only intervene if there are cogent allegations of violation of the Constitution or the law or violation of Constitutional Rights or threat to violation of the Rights or in clear circumstances where it is evident that an accused will not be afforded a fair trial or the right to a Fair Trial has been infringed or threatened or where the prosecution is commenced without a factual basis.

49. Whether a prosecution is an abuse of Court process, unfair, wrong or a breach of fundamental rights, it is for the court to determine on the individual facts of each case. The concept of a fair trial involves fairness to the prosecution and to the public as well as to the accused.[\[26\]](#)

50. The inherent jurisdiction of the court to stop a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances.[\[27\]](#) The essential focus of the doctrine is on preventing unfairness at the trial through which the accused is prejudiced in the presentation of his or her case or where there is clear breach of fundamental rights to a fair trial. Courts should first consider whether or not there is anything in the trial to prevent 'a fair trial' and if there is, then the court ought to stop the

prosecution.

51. The high court will only prohibit or quash prosecutions in cases where it would be **impossible to give the accused a fair trial; or where it would amount to a misuse/manipulation of process** because it offends the Court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.<sup>[28]</sup> It is in public interest that prosecutions be mounted to uphold law and order and justice for the victims of crime.

52. A criminal prosecution can also be stopped if it was commenced in the absence of proper factual foundation. 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. <sup>[29]</sup>

53. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to a fair trial be jeopardized.<sup>[30]</sup> A criminal trial premised on unfair and questionable partisan investigations or a decision to charge arrived at unfairly and without any reasonable basis would in my view open the door to an unfair trial.

54. The provisions of the Constitution conferring powers upon the High Court to grant such remedies as *Certiorari*, *Prohibition*, *Mandamus* or permanent stay of criminal proceedings are a device to advance justice and not to frustrate it. In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the Court or that the ends of justice require that the proceedings ought to be quashed.

55. The saving High Court's inherent powers, both in civil and criminal matters is designed to achieve a salutary public purpose which is that a Court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceedings in the interest of justice.

56. The High Court's inherent powers to quash, stay or prohibit criminal proceedings are wide as they imply the exoneration of the accused even before the proceedings have been culminated by way of trial. Noting the amplitude of these powers and the consequences which they carry, the Supreme Court of India<sup>[31]</sup> revisited the law on the issue and held that *'these powers should be exercised sparingly and should not carry an effect of frustrating the judicial process.'*

57. The Supreme Court of India in the above case delineated the law in the following terms:- *"The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and in the rarest of rare cases and the Court cannot be justified in embarking upon an inquiry as to the reliability or otherwise of allegations made in the complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at uncalled for stage nor can it 'soft-pedal the course of justice' at a crucial stage of proceedings...The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of the power of the court, but the more the power, the more due care and caution is to be exercised in invoking these powers."*<sup>[32]</sup>

58. The leading case on the application of abuse of process remains *Bennet vs Horseferry Magistrates Court & another*.<sup>[33]</sup> The court confirmed that an abuse of process justifying the stay of a prosecution could arise in the following circumstances:-

i. *Where it would be impossible to give the accused a fair trial; or;*

ii. *Where it would amount to a misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.*

59. The above categories are not mutually exclusive and the facts of a particular case may give rise to an application to stay involving more than one alleged form of abuse, and that staying a proceeding is a discretionary remedy and each case will depend on its set of facts and circumstances.

60. **Chris Corns**<sup>[34]</sup> argues that the grounds upon which a stay will be granted have been variously expressed in the cases. These grounds can be classified under three categories:-

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

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

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

61. Criminal proceedings commenced to advance other gains other than promotion of public good are vexatious and ought not to be allowed to stand. The word "vexatious" means "harassment by the process of law," "lacking justification" or with "intention to harass." It signifies an action not having sufficient grounds, and which therefore, only seeks to annoy the adversary. The hallmark of a vexatious proceeding is that it has no basis in law (or at least no discernible basis); and that whatever the intention of the proceeding may be, its only effect is to subject the other party to inconvenience, harassment and expense, which is so great, that it is disproportionate to any gain likely to accrue to the claimant; and that it involves an abuse of process of the court.

62. As stated earlier, the power to quash proceedings is immense since it amounts to exonerating a suspect before trial. Such power must be exercised with extreme care and caution. It is a power which the Court exercises only in exceptional cases where there is clear evidence of abuse of powers, abuse of discretion or absence of factual basis to mount the prosecution.

63. The initial consideration in the exercise of the discretion to prosecute is whether the evidence is sufficient to justify the institution or continuation of a prosecution. This is a decision constitutionally vested on the **DPP**. Where discretion is conferred on the decision-maker the Courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.<sup>[35]</sup> One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

64. The **DPP** is mandated to independently evaluate the evidence and make the decision to prosecute independently. 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.*

65. Upon analyzing the material presented in this case, I find nothing to suggest that the **DPP** did carefully analyze the evidence or acted carelessly or abused his powers. It has not been demonstrated that the decision to prosecute was influenced by irrelevant or extraneous considerations. Further, it has not

been established that the **DPP** did not act independently in arriving at the decision to prosecute. The applicants have not demonstrated that there was no sufficient evidence or factual basis to justify a prosecution. As stated earlier, it is not the function of this Court to weigh the veracity of the evidence. In my view, a prosecution should be instituted or continued if there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the accused. It has not been established that the facts presented in this case do not disclose an offence known to the law.

66. It is also my view that that in making his independent decision, the **DPP** should have regard to any lines of defence which is plainly open to, or has been indicated by, the accused and any other factors which in the view of the **DPP** 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.

67. The Constitutional provision in Article **157 (10)** of the Constitution 2010 ensures that the **DPP** has complete independence in his decision making processes, which 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. No evidence has been tendered to show that the **DPP** abused his discretion or powers under the Constitution. The court is inclined to respect the decision by the **DPP** to prosecute for two reasons, **(a)** it is a constitutional imperative that the Constitutional independence of 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.

68. Even though it is not for this Court to consider the defense of the accused persons, which is basically a function of the trial Court, the core issues raised by the applicants is that the money was recovered, and that the civil suits arising there from were settled. *First*, it is trite law that payment of the money or recovery of stolen goods is not a bar to criminal prosecution. *Second*, the withdrawal or settlement of the civil suits is not a bar to criminal prosecution. *Third*, the existence of a parallel civil case is not bar to criminal proceedings.[36] *Fourth*, the fact that some people implicated in crime were not charged is not a ground to stay criminal proceedings. It has never been the law in this country that every person implicated in crime must be prosecuted. The law confers the mandate upon the **DPP** to carefully and independently evaluate all the evidence and independently make a decision.

69. Applying the legal tests discussed herein above to the facts of this case, I find and hold that there is nothing to show that the prosecution is unfair or an abuse of Court process or abuse of police powers or judicial process. There is no material before me to demonstrate that the prosecution was undertaken without a proper factual foundation.[37] It has not been demonstrated that the prosecution was conducted or is being undertaken without due regard to traditional considerations of candour, fairness, and justice, nor has it been shown that the trial is being conducted in a manner different from what is prescribed under the law, or that the trial is bad in law.[38]

70. It is clear that the investigation were commenced after a complaint was lodged and the trial was commenced with a factual basis after the **DPP** independently evaluated the evidence. The allegations raised by the applicants are in my view, matters to be dealt with by the trial Court hearing the criminal trial. Further, the applicants have not demonstrated that their rights to a fair trial have been or will be infringed if the prosecution proceeds nor have they demonstrated that the prosecution will inherently violate their rights to a fair trial as enshrined in the Constitution. Further, it has not been demonstrated that the prosecution was not conducted in public interest.

71. Certiorari is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must

be exercised on the basis of evidence and sound legal principles.

72. The applicants also seek an order of *Prohibition*. The writ of *Prohibition* arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation. However, as stated above, the illegality of the impugned decision has not been established nor has it been established that the Respondents acted illegally or in excess of their powers nor has the decision to prosecute been shown to be illegal, irrational or a nullity

73. In view of my above reasoning, the conclusion becomes irresistible that the applicants Notice of Motion dated 3<sup>rd</sup> February 2017 does not satisfy the threshold to warrant the orders sought.

74. Accordingly, I hereby dismiss the applicants Notice of Motion dated 3<sup>rd</sup> February 2017 with no orders as to costs and direct that **Nairobi Chief Magistrates Criminal Case number 1735 of 2016** proceeds to hearing and determination.

Orders accordingly

Signed, Dated and Delivered at Nairobi this 11<sup>th</sup> day of **September** 2018

**John M. Mativo**

**Judge**

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[1] {1917} 1 KB 486, by Viscount Reading, Chief Justice of the Divisional Court.

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

[3] 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

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

[5] *Jadesimi vs. Okotie Eboh* (1986) 1NWLR (Pt 16) 264

[6] (2007) 16 NWLR (319) 335.

[7] Justice Niki Tobi JSC of Nigeria.

[8] Supra note 1.

[9] Ibid.

[10] Ibid.

[11] Counsel cited *Preston vs Inland Revenue Commissioner* {1985}2 ALL ER 327.

[12] Counsel cited Lord Denning in *HTV Ltd vs Price Commission* {1976} ICR 170 as quoted in *Preston vs Inland Revenue Commissioner* {1985}2 ALL ER 327.

[13] Counsel cited *Republic vs Commissioner for Co-operatives ex parte Kirinyaga Tea Growers Co-*

*operatives Savings and Credit Society Ltd* {1999}1 EA 245, *Ronald Leposo Musengi vs Director of Public Prosecutions & 3 Others* {2015} eKLR & *The Commissioner of Police & the Director of Criminal Investigations Department & Another vs Kenya Commercial Bank Ltd & 4 Others* {2013} eKLR.

[14] Counsel cited *Ndarua vs Republic* {2002} 1 E.A 205.

[15] Citing Lord Green in *Associated Provincial Picture Houses Ltd. vs. Wednesbury Corporation* {1947} 2 ALLER 680. He also cited *Pastoli vs Kabale District Local Government Council & Others* {2008} 2 EA 300.

[16] Citing *Republic vs A.G. ex parte Kipngeno Arap Ngeny*, High Court Civil Application No. 406 of 2001.

[17] Counsel cited *Paul Ng'ang'a vs A.g & 3 Others* {2013} eKLR.

[18] Citing *Kenya Commercial Bank Ltd & 2 Others vs Commissioner of Police and Another* {2013}eKLR.

[19] Counsel cited *George Joshua Okungu & Another vs Chief Magistrates Court Anti-Corruption Court Nairobi & Another* {2014} eKLR.

[20] Counsel cited *William Ruto & Another vs A.G.* HCC No. 1192 of 2004.

[21] Cap 8, Laws of Kenya.

[22] Counsel cited *Republic vs A.G & 4 Others ex parte Kenneth Kariuki Githii* {2014} eKLR.

[23] Counsel cited *Republic vs DPP & 2 Others ex parte Francis Njakwe Maina & Another* {2015}eKLR.

[24] Act No. 2 of 2013.

[25] Article 157 of the constitution.

[26]*DPP vs Meakin* {2006} EWHC 1067.

[27] See Attorney General's Reference (No 1 of 1990) [1992] Q.B. 630, CA; Attorney General's Reference (No 2 of 2001) [2004] 2 A.C. 72, HL.

[28]*See Bennett vs Horseferry Road Magistrates' Court and Another* [1993] 3 All E.R. 138, 151, HL; see also *R vs Methyr Tydfil Magistrates' Court and Day ex parte DPP* [1989] Crim. L. R. 148.

[29] 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.

[30] *Natasha Singh vs. CBI* {2013} 5 SCC 741.

[31] See *Maharashtra vs Arun Gulab Gawali*.

[32] See *State of West Bengal & Others vs Swapan Kumar Guha& Others*, AIR, 1982, SC 949, *Pepsi Foods Ltd & Another vs Special Judicial Magistrate & Others* AIR 1998, SC 128 & *G. Ugar Suri & Ano vs State of U.P & Others*, AIR 2000 Sc 754.

[33] {1993}All E.R 138, 151, House of Lords.

[34] Chris Corns, *Judicial Termination of Defective Criminal Prosecutions: Stay Applications*, 76 *University of Tasmania Law Review*, Vol 16 No. 1, 1977.

[35] Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, *Statute Law in New Zealand*, 3rd edn. (2003), pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

[36] Section 193A of the Criminal Procedure Code provides:- **193A** *"Notwithstanding the provisions of any other written law the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceeding."*

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

[38] Indian Case of *Pulukiri Kotayya vs Emperor* L.R. 74 Ind App 65.