REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 78 OF 2016

IN THE MATTER OF AN APPLICATION BY CYRUS SHAKHALAGA KHWA JIRONGO FOR JUDICIAL REVIEW AND ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF ARTICLES 22(1), 23(1,) & (3), 159(2)(a), 165(3)(b, d) & 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 10(1), 10(2), 27(1) & (2), 47(1) & (2), 50(1), 50(2)(a, l), 50(4), 157(11), 249(1) & (2) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF NAIROBI CHIEF MAGISTRATE'S COURT CRIMINAL CASE NO. 207 OF 2016 - REPUBLIC vs CYRUS SHAKHALAGA KHWA JIRONGO

BETWEEN

REPUBLIC.....APPLICANT

AND

THE ATTORNEY GENERAL……..……1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....3RD RESPONDENT

INSPECTOR GENERAL

OF THE NATIONAL POLICE SERVICE…….....4TH RESPONDENT

THE CHIEF MAGISTRATE'S COURT (NBI) .....5TH RESPONDENT

AND

SOY DEVELOPERS LIMITED.....1ST INTERESTED PARTY

DEPOSIT PROTECTION FUND BOARD

(As liquidators of Post Bank Credit Ltd).....2ND INTERESTED PARTY

SAMMY BOIT ARAP KOGO.....3RD INTERESTED PARTY

ANTOINETTE BOIT.....4TH INTERESTED PARTY

ASL LIMITED.....5TH INTERESTED PARTY

EX PARTE: CYRUS SHAKHALAGA KHWA JIRONGO

JUDGEMENT

Introduction

1. By a Notice of Motion dated 17th February, 2016, the *ex parte* applicant herein, **Cyrus Shakhalaga Khwa Jirongo**, seeks the following orders:

> **1) An order of certiorari to remove into the High Court and quash the decision of the 1st Respondent made on or about 09 February 2016 to charge and institute criminal proceedings in Criminal Case No. 207 of 2016 against the Applicant.**
>
> **2) An order of certiorari to remove into the High Court and quash the charges contained in the Charge Sheet dated 9/2/2016 Police Case No. 121/41/2016 charging the Applicant with the following offences and counts:**
>
> > **a. Count I – Obtaining execution of security by false pretences contrary to section 314 of the Penal Code.**
> >
> > **b. Count II – Making a document without authority contrary to section 357(a) of the Penal Code.**
> >
> > **c. Count III – Uttering a false document contrary to section 353 of the Penal Code; and**
> >
> > **d. Count IV – Giving false information to a person employed in the public service contrary to section 129 of the Penal Code.**
> >
> > **e. An order of prohibition directed to all the Respondents jointly and severally prohibiting any of them from carrying out and/or proceeding with Nairobi Chief Magistrate's Court Criminal Case No. 207 of 2016 – *Republic v Cyrus Shakhalaga Khwa Jirongo* and or any other criminal proceeding in connection with the same subject matter or property.**
> >
> > **f. An order of prohibition directed to all the Respondents jointly and severally prohibiting any of them from reopening or purporting to reopen, bringing, instigating, instituting, carrying out and/or proceeding with any criminal proceedings or charges in connection with the sale and/or purchase of L. R. No 209/11151 between the Applicant and the 1st, 3rd and 4th Interested Parties;**
> >
> > **g. An order that the costs of this application be paid for by the respondent.**

Applicant's Case

2. According to the applicant, on or about the year 1991, **Sammy Boit Arap Kogo** the 3rd Interested Party herein who is well known to him, approached him with an offer to sell to the applicant a parcel of land in Upperhill area in Nairobi. The land was situated at the corner of Elgon Road and Upperhill Road and this was L. R. Number 209/11151 (hereinafter "the suit property") registered in the name of Soy Developers Limited (the 1st Interested Party – hereinafter "SDL"). The applicant averred that at the time, the 3rd Interested Party and his wife **Antoinette Kogo Boit**, the 4th Interested Party herein, were the

shareholders and directors of Soy Developers Limited.

3. The applicant onfirmed that he was aware that the 3rd Interested Party was allotted the property through his connections and close relationship with retired **President Daniel arap Moi's** children and that the 3rd Interested Party was especially close to Jonathan Moi.

4. It was averred that after negotiations, the parties agreed on a purchase price of Kshs. 20million for the suit property. However as the property was the sole asset owned by SDL, it was agreed that the applicant would purchase the company and all its shares and to formalise the transaction, the 3rd Interested Party's advocates Messrs Oraro & Company, prepared a sale agreement a copy of which the applicant exhibited. Pursuant to the agreement the applicat subsequently made a payment of Kshs. 10 milllion being 50% of the purchase price by Banker's Cheque number NA/AE 219907 drawn from Barclays Bank Kenyatta Avenue to the 3rd Interested Party through his said advocates Messrs Oraro & Rachier Advocates which cheque was banked and the proceeds disbursed to the 3rd and 4th Interested Parties.

5. It was deposed that upon payment of the aforesaid sum, the original company registration documents of SDL and the Title Deed of L. R. No. 209/11151 were released to the applicant and pursuant to the agreement and understanding with the 3rd Interested Party, the applicant immediately proceeded to charge the property to City Finance Bank Limited to secure a loan sum of Kshs. 30million. The charge documents were signed by the applicant and his partner **Davy Koech** who pursuant to the sale agreement became the shareholders/directors of SDL and the charge was thereafter registered on 13th December 1991.

6. According to the applicant, soon after the loan to City Finance Bank was settled and the property discharged, he again charged the suit property to Post Bank Credit for the sum of Kshs. 50million. Once again, the relevant documents including the charge were signed by himself and his partner **Davy Koech** as the shareholders/directors of SDL Limited. The applicant asserted that the signatures on the Charge dated 25th September 1992 and registered on 21 October 1992 belong to **Davy Koech** and himself.

7. The applicant deposed that in the charges preferred against him, in the particulars under Count II, it is alleged that:

> ***"On the 25th day of September 1992 in Nairobi within Nairobi County, with intent to defraud, without lawful authority, made a certain false document namely Bank charge in respect of LR. No. 209/11151-IR 47029 registered in the name of Soy Developers Limited purporting it to be a genuine and valid bank charge signed by SAMMY BOIT KOGO."***

11.The applicant however contended that he was not aware of any such charge or document signed by **Sammy Boit Kogo** and none has ever been produced or shown to him. He reiterated that the charge exhibited is the true copy of the charge and one of the signatures therein is his own and the other belongs to **Davy Koech**.

12.In count III, he discled that it is alleged that:

> ***"On the 25th day of September 1992 in Nairobi within Nairobi County, knowingly and fraudulently uttered a certain false document namely Bank charge in respect of LR. No. 209/11151-IR 47029 registered in the name of Soy Developers Limited purporting it to be a genuine and valid bank charge signed by SAMMY BOIT KOGO and DAVY KOECH"***

13. Once again the applicant reiterated that he was not aware of any such charge or document signed by **Sammy Boit Kogo**.

14. The applicant disclosed that in the course of time, the Deposit Protection Fund (the 2nd Interested Party - hereinafter "DPF") who had taken over the operations of the collapsed Post Bank Credit, disposed

of the charged property to a third party, **ASL Limited** (5th Interested Party), in exercise of their statutory power of sale in or about the year 2006.

15. It was avered that according to the sale agreement between the applicant and the 3rd and 4th Interested Parties the completion date for the transaction was to be 31 May 1992 and as part of the purchase price, the applicant also paid to one **Jonathan Moi** a sum of Kshs. 7million which was acknowledged in writting by several witnesses including the 3rd Interested Party on 05th May 1992 with other witnesses being **Gerald Bomet**, **Samson Nyamweya** and **Solomon Cheruyiot**. In supprt of this contention the applicant exhibited a copy of a note acknowledging and witnessing the said payment of Kshs. 7million to **Jonathan Moi** and copies of the statements made by said three witnesses to the BFID. Prior to the aforesaid acknowledgement of payment, the 3rd Interested Party claimed that he and his wife were simply proxies of the said **Jonathan Moi**, who it was said was the true owner of the suit property. The 3rd Interested Party therefore alleged that part of the amount the applicant had already paid was given to **Jonathan Moi** sought to deny that the Kshs. 7million was part of the purchase price after an attempt to deny that the payment had been made at all.

16. The applicant averred that in order to conclude the transaction the 3rd Interested Party demanded that the applicant would have to pay a further sum of Kshs. 7million which the applicant did and in the end, he paid a total sum of Kshs. 27million for the purchase of the suit property instead of the originally agreed sum of Kshs. 20million. The applicant asserted that each of the witnesses mentioned above stated except the 3rd Interested Party, issued written statements to the CID confirming the payment of Kshs. 7million to **Jonathan Moi** through his personal assistant **Samuel Cheruyiot**. Following the aforesaid incident, the applicant insisted that the 3rd and 4th Interested Parties should in addition sign a deed of indemnity in hi favour against all claims, demands and liabilities that may arise or be levied against him as a director of SDL which deed of indemnity clearly recognised him as a director of SDL a copy of which the appicant exhibited.

17. It was averred that upon payment the 3rd Interested Party's advocates were to transmit the company transfer forms and documents to the Bank's advocates which the applicant believed was done since in his view, the Bank's Advocates would not have completed the charge if they did not have all the relevant documents required.

18. However, on 14th January 1993, the applicant was surprised to receive a notice addressed to him from the 3rd Interested Party's Advocates purporting that he had not completed the payments for the purchase of the suit property; and demanding that within seven days they should pay the sum of Kshs. 10million which in his view was strange because they had completed all payments in respect of the transaction as agreed by this time and the payment of Kshs. 10million had been made year earlier. They promptly replied to the above letter on 15th January 1993 through the applicant's assistant on the applicant's personal letter head on his behalf.

19. The applicant avered that since 15th January 1993 he never heard from either the 3rd Interested Party or his advocates in connection with this matter or at all and never received any further communication on the matter. As far as he was concerned the transaction was completed and all necessary documents transmitted which allowed for the registration of the charges against the company and the suit property and the eventual disposal of the property by the interested party.

20. However in early 2015 he received a surprising visit from two Criminal Investigations Department (CID) officers – **Gilbert Kitalia** and **Maxwell Otieno** who were investigating the alleged loss of Title Deed of the subject property and he was informed that the complainant in respect thereof was the 3rd Interested Party on behalf of SDL. Based on the he furnished the 2nd Respondent through its officers with all documents of ownership including correspondences relating to the acquisition of SDL and the suit property. Following the 2nd Respondent's visit and investigations, the applicant also followed up on the matter and learnt that the 3rd and 4th Interested Parties had alleged that they never sold or transferred their

shares in SDL and further that the transaction between them and Applicant was never completed.

21. Based on these allegations and suspecting a conpiracy, the applicant averred that on or about April 2015, he lodged a complaint to various entities who would be concerned with such a matter including the 2nd Respondent and the 3rd Respondent through the Banking Fraud Investigations Department (BFID) and also wrote to the 2nd interested party. Meanwhile in the year 2015 it came to his knowledge that the 3rd interested party in the name of SDL had commenced civil proceedings before in **Nairobi High Court ELC Suit No. 132 of 2015** which suit was originally against the 1st and 5th intrested party alongside the Chief Land Registrar in respect of the suit property. In the original suit and cause of action, the 3rd interested party alleged that the title document to the suit property got lost and/or was misplaced within the SDL offices. At no point or time did the plaintiff or the 3rd interested party state or mention or disclose in the original suit documents the agreement or any transaction with the applicant or **Kenagri Products Limited**. It ws the applicant's contention that clearly the 3rd Interested Party was seeking to hide these facts from the other parties since it is surprising yet inconceivable that the 3rd intereted party who is purpoting to act on behalf or in name of SDL would have forgotten or could not remember the sale agreement with the applicant.

22. The applicant disclosed that later on 31st March 2015, the suit documents were amended to delete the initial statement alleging that the Title Documents in respect of the suit property were lost or misplaced, to now reflect the transaction and agreement with the applicant t/a **Kenagri Products Limited** which amendment, the applicant avered was made soon after he received a visit from the CID officers and learnt of the complaint and investigations into this matter. To him it would appear that the documents that he furnished to the CID as evidence were the same ones availed to the 3rd Interested Party and which he used to seek an amendment of his suit/and or pleadings. It was therefore the applicant's contention that the belated amendments and/or change in story and/or wide departure from the original claim or suit was illogical and absurd and betrayed the mischief by the 3rd Interested Party in these proceedings, who it would appear had been prepared to pursue his civil claim based on deceit.

23. Meanwhile on 09 February 2016 the 2nd Respondent had already decided to instititute criminal proceedings against the aplicant and proceeded to do so as evidenced by the Charge Sheet dated 9th February, 2016 pursuant to which summons dated the same date were issued by the Chief Magistrate's Court Nairobi for him to attend court in order to take plea. The said charges as preferred by the 2nd Respondent were as follows:-

a. Count I – Obtaining execution of security by false pretences contrary to section 314 of the Penal Code;

b. Count II – Making a document without authority contrary to section 357(a) of the Penal Code;

c. Count III – Uttering a false document contrary to section 353 of the Penal Code; and

d. Count IV – Giving false information to a person employed in the public service contrary to section 129 of the Penal Code.

24. Based on the aforesaid summons, the applicant was required to attend court on 18 February 2016 to take plea thereon. According to the applicant, the decision to bring charges against him and to prosecute him came about as a result of his exposing the 3rd Interested Party's unawful scheme to defraud the the 2nd and 5th Interested Parties and the true position concerning the suit property. He reiterated that since he lodged his complaints in respect of these matters he did not from either the 2nd or 3rd Respondents on the status of their investigations into his complaint but only received the summons to appear in Court, on 10th February 2016 yet he had been informed by the BFID that the investigations into his complaint were still ongoing which was absurd. He therefore believed that the BFID and by implication the 3rd Respondent were abusing the criminal justice system through these proceedings to forestall, kill and/or avoid dealing

with and/or handling the complaint that he raised yet the 2nd Respondent has a constitutional duty to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. To him the 2nd Respondent abdicated its role and duty in this regard and allowed itself to be used as a pawn in the perversion of justice.

25. In a rejoinder to the respondents' replying affidavit, the applicant averred that with the collusion of the 2nd and 3rd Respondents, the 3rd and 4th Interested Parties are manipulating and misusing the criminal justice sytem and the court process to sustain and secure the execution of his prosecution. On the one hand, the 3rd Interested Party has at all material times in his correspondence with the applicant directly or through his advocates admitted that the title deed to the suit property had been delivered to t applicant lawfully and voluntarily. On the other hand, the same 3rd Interested Party has from the moment he decided to fraudently use the cloak of the court process and criminal investigations maintained that he lost the same title deed to the suit property including the allegations he made in the letter he wrote to the 3rd Respondent on 4th February 2015. Further, the 3rd Interested Party went as far as filing a civil suit in the name of the 1st Interested Party (ELC (Nairobi) No. 132 of 2015) in which it is specifically pleaded that the title deed got lost and/or misplaced within the 1st Interested Party's offices. The verifying affidavit confirming the correctness of the Plaint was sworn by the 3rd Interested Party. In suport of the suit the 3rd Interested Party also signed a witness statement averring that the title deed was lost.

26. The applicant averred that both the 3rd Respondent and the 3rd and 4th Interested Parties have selectively exhibited the names of directors and shareholders of Soy Developers Limited in accordance with the purported annual returns for the year 2014 which accordng to the applicant for the purposes of the law only relate to the specific period as stated in the letter by the Assistant Registrar of Companies written on 3rd March 2015. Apart from that the 3rd and 4th Interested Parties and the Respondents have not produced or exhibited any other annual returns for nearly twenty four (24) years other than the self-serving returns made in February 2015 and in particular, the 3rd Respondent has deliberately not exhibited the annual returns and other relevant and material documents for Soy Developers Limited relating to the years following the agreement signed on 9th November 1991 which would include the following calendar years:1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2009, 2010, 2011, 2012 and 2013.

27. The applicant further averred that no proof or statutory document has been placed before the Court to demonstrate that the 3rd and 4th Interested Parties were the directors and shareholders of Soy Developers Limited between 1992 and 2013 other than as conveneiently borne by the only annual return produced for the year 2014. Neither the Respondents nor the 3rd and 4th Interested Parties have provided or exhibited any evidence to demonstrate that the 3rd and 4th interested parties were paying land rent and rates as the purported directors and shareholders of Soy Developers Limited, the suit property being its only asset. Nor have the Repondents and the 3rd and 4th Interested Parties demonstrated that they were performing any other of their statutory obligations or other necessary obligations as would reasonably be expected of the directors and shareholders of Soy Developers Limited.

28. The applicant disclosed that on 14th January 1993 when M/s Oraro and Rachier Advocates wrote a demand letter to him, it did not include a demand of the title deed and/or grant; the demand was only for payment of the balance of purchase price with an additional and unspecified threat of legal steps to be taken as the clients may be advised and on 15th January 1993 in a letter signed on the applicant's behalf by his assistant he relayed an immediate response to the advocates stating there were no further or other sums due and owing to the former directors of Soy Developers Limited to be paid by him as full payment of the agreed purchase price had been made.

29. To the applicant, transactions involving the 2nd and 5th Interested Parties were only possible by availability of records in the Land Registry and the Registry of Companies after the exercise of due diligence on their part and none of them can gain from the dissapearance of the files and records kept by both Registries. The applicant however disclosed that the charge to City Finance Limited was registered

on 13th December 1991 and the charge to Postbank Credit Limited was registered on 21st October 1992. In his view, he would be subjected to an unfair and oppressive trial without the availability of the records of the Registry of Companies and the Land Registry after nearly twenty four (24) years; and when by the period of the delay itself, a number of documents are no longer available including the company forms required for effecting change at the Registry of Companies that M/s Oraro and Rachier Advocates constantly referred to.

30. According to the applicant, whereas the 3rd Interested Party claims to deny any relationship and/or involvment and/or connection with or between Soy Developers Limited and **Jonathan Moi**, it was **Jonathan Moi** who on 13th February 1989 applied on behalf of Soy Developers Limited to be allocated the suit property.

31. The applicant therefore averred that the 3rd and 4th Interested Party will have an unfair advantage in the criminal proceedings if there is no production of all relevant and material documents that were both in the custody of the Lands Registry and the Companies Registry yet a proper prosecution should be manifestly and demostrably fair to both the accused person and the prosecution.To him, owing to the delay in itself in investigating, instituting and commencing the criminal proceedings he has already suffered serious prejudice to the extent that no fair trial can be held with the effluxion of time, fading memories and unavailability of some of the persons who dealt with or handled the transactions involving the suit property especially in the Lands Registry and the Registry of Companies.

32. It was disclosed that there were prominent law firms and advocates engaged in the transactions and execution of the charges, discharges and transfers and in the circumstances without any credible evidence and on account of the affidavits, pleadings, statements sworn, filed or made in this and other proceedings there is an overwhelming presumption or inference that can be made or drawn that proper and due diligence was undertaken and carried out. To the applicant, although the Banking Fraud Investigation Unit (BFIU), which is a unit of the Directorate of Criminal Investigation, conducted investigations, compiled a report and sent it together with witness statements to the 3rd Respondent on 14th March 2016, it is perplexing and significant to note that no reference whatsoever is made to the work done by the BFIU. It is therefore apparent and the only reasonable inference or conclusion that can be drawn is that the 2nd and 3rd Respondents have unfairly, unreasonably and irrationally elected to consider inculpatory evidence against the aplicant while ignoring any exculpatory evidence yet it is a constitutional and prosecutorial principle and policy that the office of the Director of Public Prosecutions is required to have regard to the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. In the applicant's view, the said principles and policies have been disregarded and ignored in the following manner:-

a. On his account Davy Kiprotich Koech has exposed the abuse and malpractice applied to obtain a false statement from him and in a public bar.

b. Sgt Maxwell Otieono has clearly not taken into consideration the police statements made by Gerald Kipkemboi Bomett, Daniel Mutua Muoki and Samson Nyamweya.

c. Puportdely undertaking forensic handwriting examination using photocopies of documents without requesting or demanding the original documents from the Ex Applicant which included the deed of indemnity.

d. Failing to insist on production of all the records and documentation kept by the Land Registry and the Companies Registry or to inquire from the advocates involved in the transactions whether they held or had in their possession all the records and documents; and

e. The necessary information and documents have always been in the custody and possession of the State including the Land Registry, Registrar of Companies, the Central Bank of Kenya and other public institutions.

33. The applicant verred that whereas there are lawful and statutory procedures to be invoked and undertaken in the circumstances where a title deed has been lost or misplaced or the registered owner of land is in need of issuance of a provisional certificate of title, the 3rd and 4th Interested Parties have not shown that they took any legal, prudent, diligent and/or reasonable steps as provided in law to obtain a replacement title deed or a provisional certificate of title deed to safeguard or protect their purported interest or right over the suit property.

34. Theapplicant was of the view that if the offences contained in the charges sheet save for 4th count were committed as alleged, there is no explanation for the exercise of prosecutorial discretion in charging him alone to the exclusion of other persons hence a manifestation of discrimination, lack of fairness and irrational conduct or behaviour on the part of the 2nd and 3rd Respondents.

35. The Applicant in his submissions, which were highlighted by his learned counsel, **Hon. James Orengo, SC** reiterated that at the heart of this matter is LR No. 209/11151 (IR 47029) Nairobi (hereinafter "the Suit Property") a prime plot situated in Upperhill in Nairobi whose current value is estimated at Kshs 0.7 billion. On or about 1991, the 3rd and 4th Interested Parties sold to the Ex Parte Applicant all their interest in the 1st Interested Party - Soy Developers Limited (SDL), whose sole asset was the Suit Property, for a sum of Kshs. 20,000,000.00. More than 24 years after the sale and transfer of the suit property, the 3rd and 4th Interested Parties took various actions to reclaim the suit property, under the pretext that they lost their Title Deed plus original documents thereto.

36. In the applicant's view, the basis of the allegations by the 3rd and 4th Interested Parties is a fraudulent scheme hatched to reclaim title to the suit property, which the Ex Parte Applicant inconveniently interfered with.

37. It was averred that on 04 February 2015 the 3rd Interested Party herein, **Sammy Boit Arap Kogo**, lodged a complaint with the Serious Crime Department, claiming as a Director of SDL, what he alleged was the fraudulent transfer of Title Deed of the Suit Property. In the complaint, the 3rd Interested Party stated that (they) had "lost their title deed plus original documents that relate to the same". Accordingly, the 3rd Interested Party wanted the Serious Crime Department to open/commence investigations into the alleged fraudulent transfer of the Title Deed to the Suit Property. The applicant however noted that no date was given when the Title Deed is claimed to have been lost. The applicant however contended that this claim was intended to give basis or lay a foundation for a civil suit/claim filed by **Sammy Boit** in the name of SDL. Contemporaneously, in February 2015, the 3rd Interested Party in the name of SDL also instituted a civil suit over the alleged fraudulent transfer of the Suit Property in Nairobi High Court (ELC) Civil Suit No. 132 of 2015 - **Soy Developers Limited vs. Deposit Protection Fund Board, ASL Limited and Chief Land Registrar** (hereinafter "the Civil Suit") though the Ex Parte Applicant was not named or joined as a party thereto or any company associated with him.

38. According to the applicant, in the Civil Suit, the 3rd Interested Party categorically states/affirms that the Title Deed to the Suit Property got lost and/or was misplaced within the Plaintiff's Offices around 1991 and the veracity and correctness of the pleadings is verified by **Sammy Boit Kogo**, the 3rd Interested Party in the verifying affidavit sworn on 16 February 2015 filed together with the suit. The applicant stated that up to and until 31 March 2015, the claim by the 3rd Interested Party in all its formal representations, pleadings and documents has been that the Title Deed to the Suit Property had been lost.

39. However sometime in 2015, the Ex Parte Applicant learnt that the 2nd Respondent was investigating the alleged loss of Title Deed of the suit property and that the complainant in respect thereof was the 3rd Interested Party claiming in the name of/on behalf of SDL. Following the allegation, the Ex Parte Applicant supplied to the 2nd Respondent through its officers all documents of ownership including correspondences relating to his acquisition of SDL and the suit property and went further to follow up on the matter and learnt of the 3rd and 4th Interested Parties' claims that they had never sold or transferred their shares in SDL. Based on these allegations and suspecting a conspiracy, the Ex Parte Applicant

lodged a complaint to various entities who would be concerned with such a matter including the 2nd Respondent, the 3rd Respondent through the Banking Fraud Investigations Department (BFID), as well as the 2nd Interested Party. On 10th February 2016, the BFID informed the Applicant that the investigations into his complaint were still ongoing. Meanwhile on 09 February 2016 the 2nd Respondent decided to institute criminal proceedings against the Ex Parte Applicant as per the Charge Sheet dated 9th February, 2016 pursuant to which summons dated 9th February, 2016 were issued by the Chief Magistrate's Court Nairobi for the Ex Parte Applicant to attend court in order to take plea. It was averred that on or about 09 February 2016 the 2nd Respondent instituted criminal proceedings against the Ex Parte Applicant in Nairobi Chief Magistrate's Court Criminal Case No. 207 of 2016 (hereinafter "the Criminal Proceedings") in which the Ex Parte Applicant is charged with four counts in connection with the Suit Property to wit:

a. Count I – Obtaining execution of security by false pretences contrary to section 314 of the Penal Code;

b. Count II – Making a document without authority contrary to section 357(a) of the Penal Code;

c. Count III – Uttering a false document contrary to section 353 of the Penal Code; and

d. Count IV – Giving false information to a person employed in the public service contrary to section 129 of the Penal Code.

40. The particulars of these charges, it was revealed were that:

e. "On the 25th day of September,1992 in Nairobi within Nairobi County, by false pretense, and with intent to defraud, induced Post Bank Credit Limited to accept Bank charge in respect of LR No. 209/11151 – IR 47029 in the name of Soy Developers Limited to secure an overdraft facility of Kshs. 50,000,000/= to Cyber Projects international as valuable security."(sic)

f. "On the 25th day of September 1992 in Nairobi within Nairobi County, with intent to defraud, without lawful authority, made a certain false document namely Bank charge in respect of LR. No. 209/11151-IR 47029 registered in the name of Soy Developers Limited purporting it to be a genuine and valid bank charge signed by SAMMY BOIT KOGO."

g. "On the 25th day of September 1992 in Nairobi within Nairobi County, knowingly and fraudulently uttered a certain false document namely Bank charge in respect of LR. No. 209/11151-IR 47029 registered in the name of Soy Developers Limited to the credit manager Post Bank Credit Limited purporting it to be a genuine and valid bank charge signed by SAMMY BOIT KOGO and DAVY KOECH."

41. . These proceedings, according to the applicant, arise out of and/or are motivated by a dishonest and fraudulent claim driven by the greed of the 3rd Interested Party to recover the suit property which he had already disposed of/sold because of its now greatly appreciated value.

42. In support of the case, the applicant through, **Hon. James Orengo, SC**, relied on the decision of **Jared Benson Kangwana vs. Attorney General Nairobi High Court Misc. Application No. 446 of 1995** (unreported) (hereinafter "Kangwana Case") in which **Khamoni, J** noted that:

"The essence of abuse as stated in the case of *Spautz v Williams*...is that:

> **'the proceedings complained of were (instigated and) instituted and/or maintained for a purpose other than that for which they were properly designed or exist or to achieve for the person (instigating), instituting them some collateral advantage beyond that which**

the law offers, or to exert pressure to effect an object not within the scope of the process."

43. According to the applicant, the test as was noted in the *Kangwana Case* is;

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

44. It was the applicant's case that the criminal proceedings brought against him are:

a) An abuse of the process of the Court and are brought with an ulterior or extraneous motive;

b) Brought without a proper factual foundation or basis;

c) Selective, partial, discriminatory, unreasonable and constitute an illegal exercise of discretion;

d) Instituted in/through violation of the Applicant's fundamental rights and freedoms and legitimate expectations. In this regard, it is also contended that the criminal charges against the Applicant are being brought after an inordinately long period of time when pertinent evidence has already been destroyed or caused to disappear to the prejudice of the Applicant; and

e) Contrary to public policy.

45. In support of this position the applicant relied on **R vs. Attorney General ex p Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001,** cited with approval in the case of **George Joshua Okungu & Another vs. Chief Magistrate's Anti-Corruption Court at Nairobi and Another [2014] eKLR.**

46. In the applicant's view, all grounds or principles cited by the Court in the above passage, are relevant to these proceedings. Each of the principles has been violated in one aspect or another by the prosecution mounted against the Applicant herein and which is sought to be quashed and prohibited. In the overall, the criminal proceedings are contended to be an abuse of the court process.

47. It was submitted that in the criminal charges laid against the Ex Parte Applicant there are fundamental problems which betray the abuse of process and extraneous motive being pursued or sought to be achieved by the 3rd & 4th Interested Parties. To the applicant, there is no alleged Charge signed by or in the name of **Sammy Boit Kogo** as alleged and none has been produced to substantiate or justify the charge. Similarly, there is no alleged Charge signed by or in the name of **Sammy Boit Kogo** and **Davy Koech** as alleged and none has been produced to substantiate or justify the criminal charge. In addition, the alleged Charges are the primary documents essential to lay a *prima facie* charge against the Ex Parte Applicant yet they have not been shown or produced and do not exist as all documents intended to be relied upon by the prosecution have been revealed and the charge documents in question are not among them.

48. It was the applicant's submission that it is oppressive and unfair to institute criminal proceedings against somebody knowing the allegation cannot be sustained or substantiated.

49. The applicant further relied on the ***Kangwana Case*** in which it was held that:

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

50. The Ex Parte Applicant contended that it interfered with the fraudulent scheme by the 3rd and 4th Interested Parties to reclaim the suit property which they had sold and whose value has now considerably appreciated and that the criminal proceedings are a belated attempt to give credibility or legitimacy to the civil claim in High Court (ELC) Civil Suit No. 132 of 2015, once the claim by the 3rd Interested Party of a lost Title Deed was discredited. The Ex Parte Applicant interfered with the scheme because he contradicted the story and/or false claim by the 3rd and 4th Interested Parties that they had lost the Title thereby jeopardising the basis of their claim in High Court (ELC) Civil Suit No. 132 of 2015. That notwithstanding, the report made to the CID of loss of title by **Sammy Boit** simultaneously with the filing of the Civil Suit is highly questionable. The applicant posed the question of how long had the 3rd and 4th Interested Parties know their Title was missing and why did they not report the loss earlier? The applicant asserted that the criminal proceedings are an afterthought aimed at putting pressure on the Applicant, as can be seen from the fact the that when High Court (ELC) Civil Suit No. 132 of 2015 was filed, the Applicant or his company was not named as a party. At all material times, the 3rd & 4th Interested Parties have claimed that they lost the Title documents, yet it is reasonably impossible and/or unbelievable that any reasonable man would forget selling and/or giving their valuable title documents to somebody. The 3rd and 4th Interested Parties' changing versions of the story are irreconcilable and raise suspicion of an ulterior motive in their claims.

51. It was contended that the criminal case was only instituted after the Applicant through his company was joined as a party in High Court (ELC) Civil Suit No. 132 of 2015. Other relevant factors that show abuse of the court process and use of the criminal process for ulterior motives, according to the applicant, include:

a. The fact the 3rd & 4th Interested Parties did not take any action against the Ex Parte Applicant for 24 years. If they had genuinely believed the Applicant was unlawfully holding on to the Title documents without paying for the Suit Property, as a reasonable and diligent man would, they would have taken action against the Applicant in 1992/3.

b. The 3rd & 4th Interested Parties have never returned or offered to return the deposit of Kshs. 10million, whose receipt they admit/acknowledge. If they had not been paid in full for the Suit Property, they would have returned the deposit and demanded the Title Documents. There were remedies available to the 3rd and 4th Interested Parties to protect their interests if indeed the conveyance was not completed.eg under the LSK Conditions for Sale but they never made use of these remedies because the transaction was completed.

c. The 3rd Interested Party purportedly lodged a complaint to the CID in February 2015, yet the criminal prosecution was not instituted until February 2016 after the Applicant had provided evidence that would affect the 3rd and 4th Interested Parties' civil claim. In the applicant's view, these factors are akin to what the Court referred to in the case of **Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 708.**

52. It was submitted that the conduct of the 3rd and 4th Interested Parties is inconsistent with the conduct of an honest and reasonable man thus betraying the ulterior motive of the criminal proceedings instigated against the Ex Parte Applicant. The 3rd Respondent and the complainants are seeking to oppress the Applicant into acceding to their demands by brandishing the sword of punishment under the criminal law, rather than in any genuine desire to punish on behalf of the public a crime committed and must therefore be stopped. Furthermore, the complainants' inordinate delay in pursuing any alleged claim is evidence of

impropriety, malice and bad faith. Any claim concerning the subject property by the complainants could and should have been pursued by the complainants through civil action since 1991 when the sale/purchase of the subject property took place. It was submitted that the belated feigned interest and claim in connection with the property is a scandalous, gluttonous, corrupt, fraudulent and illegal scheme to unlawfully reclaim the property, and for unjust enrichment since the complainants have never taken any steps whatsoever or utilised any of the remedies available to them to enforce any alleged wrongdoing in connection with the transaction, yet under the civil law, they had numerous options to protect their interests or rights. To the applicant, when a remedy is provided elsewhere and available to a person to seek and enforce a civil remedy in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. In this respect the applicant relied on the Ugandan case of **Kigorogolo vs. Ruesherika [1969] EA 426** as well as in the ***Ganijee Case***.

53. It was further contended that the 3rd Respondent is acting and has acted partially in the conduct of investigations concerning this matter thereby contravening the Applicant's constitutional rights under Articles 47, 50(2)(a, j) of the Constitution. To the applicant, the prosecution is not impartial and the court must put a halt to the criminal proceedings since the 2nd Respondent is applying selective justice and acting discriminatively. The very information, which the Applicant provided to the 3rd Respondent and used to lodge a complaint on the same matters with which he is now charged; and to show the mischief by the 3rd & 4th Interested Parties, has been turned to be used against him. It was alleged that embarrassed by the new information, which exposed the gaps in the investigations that had already been conducted and which would exonerate the Applicant, the 3rd Respondent has decided to turn into accuser and judge by deciding selectively, arbitrarily, without any reasonable basis or justification, that the information provided by the Applicant is false. On this basis, the Investigating Officer **Sgt Maxwell Otieno** has purported to lay a charge against the Applicant in Count IV – Giving false information to a person employed in the public service contrary to section 129 of the ***Penal Code***. In the applicant's view, an investigation officer has no basis or jurisdiction to discredit or determine that information given to him in the course of investigations, by one party to a dispute, information which is the very subject of a dispute, is false. However in this case, the Investigation Officer **Sgt Maxwell Otieno**, pre-judged and/or pre-determined that the information given to him by the Applicant, the veracity of which can only be decided by a court of law, was false yet an investigation officer cannot purport to bring a charge against an accused person based on information he receives in the course of investigation. An investigation officer in a criminal case, it was submitted, can only present or avail evidence given to him but cannot be a judge in his own cause and mount a personal complaint within his own investigations in furtherance of the cause of one party against another. Only the trial court can determine whether the evidence or information given by the Applicant is false. This, to the applicant, is procedural impropriety.

54. The applicant further contended that it was unreasonable and absurd for the investigating officer to become an accuser in his own case hence demonstrating bias, lack of objectivity or partiality. The investigation officer's purported charge betrayed his partiality in the decision-making process and points to mischief and/or an ulterior motive in the criminal charges/proceedings brought against the Applicant. The duty of the investigation officer to act fairly and in good faith was contravened when the investigation officer decided he had a personal score to settle tainting his own work with mala fides and bias. In this regard, the applicant relied on **Prof Sir William Wade** in his book ***Administrative Law*** as cited in **R vs. Somerset County Council, ex parte Fewings and Others [1995] 1 All ER 513 at 524** on the nature of the duty of a public body which is applicable *mutatis mutandis* to a public officer for the proposition that any action to be taken by a public body must be justified by positive law since:

> "**The powers of public authorities are…essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land…regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that**

it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose…But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them…"

55. The motive behind laying the charge in Count IV against the Applicant, according to the applicant, is to intimidate and oppress him against pursuing his complaint to the same investigative body, which undermines the 3rd & 4th Interested Parties' claims or civil case in the High Court. To the applicant, the 3rd Respondent has allowed its officers to be used as a pawn and/or tool by the 3rd Interested Party and are no longer performing their duties impartially or fairly. Furthermore, the charge by the investigating officer has been brought to shield **Jonathan Moi** who would be a key witness in the proceedings, against any evidence by the Applicant against him. It was submitted that the investigating officer invoked the law to purportedly charge the Applicant with giving false information for the wrong ends and in this respect the applicant relied on **Kuria and 3 Others vs. Attorney General [2002] 2 KLR at 75.**

56. It was submitted that the charge of giving false information to a public officer employed in the public service was not intended to be used by investigation officers to badger or coerce witnesses or accused persons into cooperating with the investigator's theory or narrative or to punish persons who failed to meet that narrative and ***Kuria Case*** cited for the holding that:

"It is a duty of the court to ensure that utilization and/or invocation of its processes and the law is not actuated by other considerations so divorced from the goals of justice as to make it i.e. the court virtually a scapegoat in personal score settling and vendetta. It would be a travesty to justice, a sad day for justice should the procedures or processes of court be allowed to be manipulated, abused and/ or misused".

57. The applicant further relied on **George Okungu & Another vs. Chief Magistrate's Court Anti-Corruption Court a Nairobi & Another (supra)** in which the Court held that:

"where the intended or ongoing criminal proceedings constitute an abuse of process and are being carried out in breach of or threatened breach of the...constitutional rights, the Court will not hesitate in putting a halt to such proceedings…It is therefore clear that whereas the discretion to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt. Similarly where the commencement or continuation of the criminal prosecution will result in abrogation of the Petitioner's rights and freedoms enshrined in the Constitution, the Court is under a duty to bring such proceedings to a halt. In so doing, it must be emphasised that the Court is not concerned about the innocence or otherwise of the Petitioner. The Court's duty is only to ensure that the Petitioner's rights and freedoms as enshrined in the Constitution are protected and upheld…Where therefore it is clear that the discretion is being exercised with a view to achieving certain extraneous goals other than those legally recognised under the Constitution and the Office of the Director of Public Prosecutions Act, that would, in our view, constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion. As was held by in *Koinange vs. Attorney General and Others* (supra):

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

58. In the above case, the decision of **Kuloba, J** in the case of **Vincent Kibiego Saina vs. The Attorney General H.C Misc Appl. 839 and 1088/99** was cited with approval in holding that:

"So, it is not the purpose of a criminal investigation or a criminal charge or prosecution, to help individuals in the advancement of frustration of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other and ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice. No one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth."

59. In the applicant's view, the above dicta applies to both the conduct of the 3rd and 4th Interested Parties who are the true the complainants in Nairobi High Court (ELC) Civil Suit No. 132 of 2015, as well as to the conduct of the investigating officer (3rd Respondent) in bringing a charge personally against the Applicant. To him, the 1st and 2nd Respondents' decision(s) to prosecute the only the Applicant is manifestly illegal and unlawful. Furthermore, in choosing only to prosecute the Applicant, the Respondents' decisions constitute an illegal exercise of discretion since whereas the documents that are alleged to have been forged were signed by the Applicant and **Davey Koech**, yet the 2nd and 3rd Respondents have chosen to purse only the Applicant while trying to make **Davy Koech** a witness against the Applicant.

60. To the applicant, he had a legitimate expectation that any claim of impropriety in connection with the sale/purchase of the suit property between the Applicant and the 3rd and 4th Interested Parties would and/or should have been raised at the earliest possible opportunity as any reasonable man would. The failure by the 3rd and 4th Interested Parties to take any action in connection with the alleged non-completion of the sale and/or alleged loss of documents of Title defies logic and reason and the legitimate expectation of the Applicant to enjoy quite possession and finality of the transaction.

61. It was submitted that the legitimate expectation is that any reasonable person with a genuine grievance would have commenced civil proceedings and/or sought legal redress against the Applicant at the earliest opportunity/immediately if the sale had not been concluded as alleged. The applicant posed the issue of which honest, reasonable and diligent person would issue title to his/her property and then wait for 24 years without taking any action against the person they claim to have given it to if that person was unlawfully holding the title? The failure by the 3rd & 4th Interested Parties as directors of SDL to pursue the alleged loss of their title to the Applicant since 1991, according to him, is absurd in the least. It was therefore contended that to instigate criminal charges against the Applicant after 24 years violates the Applicant's constitutional rights enshrined under Article 47 and 50 of the Constitution. If the claim by the

3rd and 4th Interested Parties were genuine, then it behoved them to take action against the Applicant in 1991 at the time the transaction is alleged to have failed and/or was not completed.

62. This delay, it was submitted, has to take the record in prosecutions that have been impugned by the Court for being brought after an inordinate delay. With the passage of so many years, the Applicant was by the conduct of the Interested Parties, led to believe that there was nothing outstanding in respect of the transaction between him and the Interested Parties and that this was confirmed by the correspondence between the parties as exemplified by the letter dated 14th January 1993, from Messrs Oraro & Rachier Advocates, to the Applicant on behalf of the 3rd Interested Party demanding a balance of Kshs. 10,000,000.00. This letter was responded to on 15th January 1993 by the applicant the Applicant.

63. It was submitted that no further correspondence followed the Applicant's last correspondence until the year 2015 when the CID purportedly began investigating this matter. To the Applicant, his legitimate expectation was that any action that could or ought to have been taken by the 3rd Interested Party, if there was anything outstanding, would have been take in 1993 after his response. To lodge a criminal complaint 23 years after the transaction, in his view, is oppressive and unjustifiable as the effect of the delay has grave and prejudicial implications on the Applicant's ability to defend himself. The delay contravenes the Applicant's expectation to a fair and expeditious trial. Furthermore, there is already a loss and/or destruction of evidence. Crucial evidence such as annual returns are missing from the Companies' Registry. There is no evidence of the returns filed between the years 1992 and 2013, which would confirm the directors, and shareholders of SDL. The 3rd and 4th Interested Parties have conveniently produced only the returns for 2014 and attempts by the Applicant to obtain the documents/evidence from the Lands and Companies Registries have been rendered futile.

64. In addition, it was submitted that the Applicant had a legitimate expectation that the 2nd and 3rd Respondents would act impartially and professionally in the discharge of their duties and would make their decision in fairness to all parties since Article 27 of the Constitution guarantees all persons equality before the law and the right to equal protection and equal benefit of the law. Therefore the selective prosecution and application of the law against the Applicant contravenes his fundamental right under Article 27 of the Constitution. To the applicant, he had a legitimate expectation that the 2nd and 3rd Respondents would not abuse their office, power or authority in any unlawful manner, bad faith or to achieve an extraneous purpose by selectively victimising or punishing the Applicant.

65. Based on **R vs. Attorney General ex p Kipngeno Arap Ngeny** cited with approval and referred to extensively in the ***George Okungu Case***, it was submitted that:

> **"a prosecution that is contrary to public policy (or interest) will not be allowed...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds."**

66. Based on section 4 of the ***Office of the Director of Public Prosecutions Act, Act No. 2 of 2013*** ("ODPP Act"), it was submitted that the 2nd Respondent's decisions and exercise of its mandate in this case contravene public policy and public interest considerations and are an abuse of court process. Furthermore, the 2nd Respondent's decisions and conduct violates his duty and that of the institution of the Office of Director of Public Prosecutions to act independently and without fear or favour and his decisions contravene clear provisions under the Office of the Director of Public Prosecutions Act as was appreciated in ***George Joshua Okungu***, that where the 2nd Respondent is shown to have acted contrary to his mandate and in abuse of the Court process:

> **"…the Director of the Public Prosecution cannot be said to have been guided by the**

requirement to promote constitutionalism as mandated under the Constitution and the *Office of the Director of Public Prosecutions Act.* To the contrary the DPP would be breaching the Constitution which *inter alia* bars in Article 27 discrimination "directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth."[1]

67. It was reiterated that the 3rd Respondent's Investigation officers acted in excess and in abuse of their powers since before a criminal prosecution can be mounted, it is the responsibility of the 2nd Respondent to direct and review the work of the 3rd Respondent. That means that the DPP plays an active role before the institution of criminal process to ensure it passes constitutional and legal muster. The DPP is not a mere conveyor or conveyor belt for decisions made by the 3rd Respondent; the DPP is a gatekeeper and as such is clothed with wide powers to stop the abuse of process by the 3rd Respondent. In this case the DPP was accused of having failed in its role to ensure that legal process is not abused by the 3rd Respondent and based on **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi High Court Misc. Civil Application No. 743 of 2006 [2007] eKLR** which was cited with approval by this Court in **Republic vs. Cabinet Secretary for Ministry of Interior and Coordination of National Government & 2 Others Ex Parte Patricia Olga Howson Misc. Civil Application No. 324 of 2013 [2013] eKLR** the Court held while citing the case of **Reg vs. Secretary of State for the Environment Ex Parte Nottinghamshire County Council [1986] AC** that:

"A power which is abused should be treated as a power which has not been lawfully exercised."

Thus the courts role cannot be put in a straight jacket. The courts task is not to interfere or impede executive activity or interfere with policy concerns, but to reconcile and keep in balance, in the interest of fairness, the public authorities need to initiate or respond to change with the legitimate interests or expectation of citizens or strangers who have relied, and have been justified in relying on a current policy or an extant promise.

As held in Ex PARTE UNILEVER plc (supra) the Court is there to ensure that the power to make and alter policy is not abused by unfairly frustrating legitimate individual expectations. It is no defence for a public body to say that it is in this case rational to change the tariffs so as to enhance public revenue. The change of policy on such an issue must a pass a much higher test than that of rationality from the standpoint of the public body. The unfairness and arbitrariness in the case before me is so clear and patent as to amount to abuse of power which in turn calls upon the courts intervention in judicial review. A public authority must not be allowed by the court to get away with illogical, immoral or an act with conspicuous unfairness as has happened in this matter, and in so acting abuse its powers.

In this connection Lord Scarman put the need for the courts intervention beyond doubt in the ex-parte PRESTON where he stated the principle of intervention in these terms:

> **"I must make clear my view that the principle of fairness has an important place in the law of judicial review: and that in an appropriate case, it is a ground upon which the court can intervene to quash a decision made by a public officer or authority in purported exercise of a power conferred by law."**

The same principle was affirmed by the same Judge in the House of Lords in REG v INLAND REVENUE COMMISSIONERS, ex-parte NATIONAL FEDERATION OF SELF EMPLOYED AND SMALL BUSINESS LTD [1982] AC 617 that a claim for judicial review may arise where the Commissioners have failed to discharge their statutory duty to an individual or have abused their powers or acted outside them and also that unfairness in the purported exercise of a power can be such that it is an abuse or excess of power. In other words it is unimportant whether the unfairness is analytically within or beyond the power

conferred by law: on either view, judicial review must reach it. Lord Templeman reached the same decision in the same case in those helpful words:

> **"Judicial review is available where a decision making authority exceeds its powers, commits an error of law commits a breach of natural justice reaches a decision which no reasonable tribunal could have reached or abuses its powers."**

Abuse of power includes the use of power for a collateral purpose, as set out in Ex PRESTON, reneging without adequate justification on an otherwise lawful decision, on a lawful promise or practice adopted towards a limited number of individuals.

I further find as in the case of R (BIBI) v NEWHAM LONDON BOROUGH COUNCIL [2001] EWCA Cin 607, [2002] WLR 237, that failure to consider a legitimate expectation is a failure to consider a relevant consideration and this would in turn call for the courts intervention in assuming jurisdiction and giving the necessary relief.

Respondents' Case

68. The application was opposed by the Respondents.

69. According to them, the 3rd respondent received a complaint from **Sammy Boit Kogo**, Director of M/s Soy Developers Ltd that the Applciant while fraudulently holding himself out as a director of M/s Soy Developers Ltd had executed charge dated September 25th 1992 in favour of PostBank Credit Ltd over land parcel LR No. 209/11151 IR 47029 (the subject land) registered in the name of M/s Soy Developers Ltd to secure overdraft facilities to Applicant's Company, M/s Cyperr Projects International Ltd. It was further reported that following a default on the repayment of the facilitieS advanced by PostBank Credit Ltd, the subject land was in 2005 sold to M/s ASL Ltd under statutory power of sale by the Deposit Protection Fund Board, the statutory liquidator of PostBank Credit Ltd.

70. According to the respondents, investigations, that included summoning the applicant to record statements, were thereafter launched which investigtions revealed as follows:

a. M/s Soy Developers Ltd were allocated the subject land in 1989 and title subsequently issued.

b. The directors of M/s Soy Developers Ltd in 1989 and at present remain **Sammy Boit Kogo** and his spouse, **Antoinette Boit**.

c. In 1991, M/s Soy Developers Ltd entered into an agreement with the applicant, then trading as Kenagri Products Ltd for the sale of the subject land for a consideration of Kshs 20,000,000.00.

d. It was a term of the sale agreement that upon payment of a 10% deposit, title documents would be released to the applicant.

e. A cheque representing the deposit of KShs 2,000,000.00 was paid to the advocates of the complainant consequent to which title was released to applicant

f. The cheque for the Kshs 2,000,000 was however subsequently dishonored and after some back and forth between complainants advocate and applicant, a sum of Kshs 10,000,000 was paid by applicant.

g. As the balance of Kshs 10,000,000 was not paid by applicant, the complanant through his advocate demanded return of the document of title over subject land.

h. That despite repeated demands, the document of the title over subject land was never returned by the applicant.

i. That applicant while holding himself out as a dicrector of M/s Soy Developers Ltd executed charge over the subject land dated September 25th 1992 in favour of PostBank Credit Ltd to secure overdraft facilities in the amount of Kshs 50,000,000 to applicant's company, M/s Cyperr Projects International Ltd.

j.That applciant while recording his statement on **March 27th 2015 stated falsely to have paid one** Jonathan Moi a sum of Kshs 7,000,000 which allegations were been refuted by **Jonathan Moi** and **Solomon Cheruiyot** a purportted witness to the purported payment.

k. That following a default on the repayment of the facilities advanced by PostBank Credit Ltd, the subject land was in 2005 sold to ASL Ltd under statutory power of sale by the Deposit Protection Fund Board, the liquidator of PostBank Credit Ltd.

l. The forensic Analyst upon analysis has concluded that:

i. **Samy Boit Kogo** and **Antoinette Boit** did not author the signatures appearing on "Deed of Indemnity" purporting to indeminity applicant from claims and demands;

ii. **Sammy Boit Kogo** did not author the signature appearing on purported irrevocable authority authorizing applciant to pay one **Jonathan Moi** the sum of Kshs 7,000,000;

iii. **Davy Koech** did not author the signature appearing on charge dated September 25th 1992 in favour of PostBank Credit Ltd.

m. That the registrar of companies has confirmed that according to records they hold, **Sammy Boit Kogo** and **Antonitte Boit** are the directors of M/s Soy Developers Ltd

71. It was averred that the investigations file with recommendations was thereafter on April 16th 2015 sent to the Director of Public Prosecutions for directions as required by law who, upon review, directed the following charges be instituted;

a. Obtaining execution of security by false pretences contrary to section 314 ***Penal Code***;

b. Making a document without authority contrary to section 357 (a) ***Penal Code***;

c. Uttering a false document contrary to section 353 ***Penal Code***:

d. Giving of false information to a person employed in the public service contrary to section 129 ***Penal Code***;

72. It was submitted on behalf of the Respondents that the Director of Public Prosecutions received the investigation file together with the recommendation from the Directorate of Criminal Investigations and independently analysed the evidence for sufficiency to charge the Applicant with the alleged offence with due regard to the law and evidence. That based on the independent review of the evidence the Director of Public Prosecutions was satisfied that there was sufficient evidence and directed that the Applicant be charged with several offences stated in the charge sheet. That the decision to charge was made independently based on sufficiency of evidence and the public interest underlying prosecution of criminal offences.

73. According to the Respondents, the Applicant has not demonstrated that in making the decision to charge the Director of Public Prosecutions has abrogated any provision of the Constitution or any written law or any rules made there under or that the said decision was arrived at in breach of rules of natural justice and therefore the Application lacks merit and it ought to be dismissed with costs. In their view, the Respondents were acting within the law in that:-

a. That the 3rd & 4th Respondents are mandated to investigate all possible criminal offences and an attempt to stop such execution of mandate would result to an even greater injustice in the criminal justice system;

b. That the Applicants are seeking to pre-empt and curtail the mandate of the law enforcement agency (investigative department) as enshrined within the Constitution of Kenya;

c. That the Respondents are not acting under the direction or control of any person or authority;

d. That the Applicants have not demonstrated that in executing their mandate, the Respondents have acted without or in excess of the powers as conferred by the law or acted maliciously, infringed, violated, contravened or in any other manner failed to comply with or respect and observe the foregoing provisions of the Constitution or any other provision thereof.

74. The Respondents asserted that the Office of the Director of Public Prosecutions is an independent prosecution authority established under Article 157 of the Constitution and Article 157(6) thereof vests upon the DPP the power to: institute and undertake criminal proceedings; take over and continue any criminal proceedings; and to discontinue any criminal proceeding at any stage before judgment is delivered.

75. To the Respondents, the decision to institute criminal proceedings by the DPP being discretionary, such exercise of power is not subject to the direction or control by any authority and this is stipulated under Article 157(10) in the following terms:

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

76. The Respondents also relied on section 6 of the ***Office of the Director of Public Prosecutions Act*** which states that:

> ***6. Pursuant to Article 157(10) of the Constitution, the Director shall—***
>
> ***(a) Not require the consent of any person or authority for the commencement of criminal proceedings;***
>
> ***(b) Not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution, this Act or any other written law; and***
>
> ***(c) Be subject only to the Constitution and the law.***

77. It was submitted that the office of the Director of Public Prosecution being an independent institution established under the Constitution, the court can only interfere with or interrogate its actions where there is contravention of the Constitution. The Respondents relied on **Paul Ng'ang'a Nyaga vs. Attorney General & 3 Others [2013] eKLR,** where it was held that:

> **"this court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they acted in contravention of the Constitution".**

78. They also relied on **Francis Anyango Juma vs. Director of Public Prosecutions & Another (2012) eKLR**.

79. It was submitted that the law is that the Courts ought not to usurp the constitutional mandate of the director of Public Prosecution conferred pursuant to Article 157 of the Constitution and this was appreciated in the case of **Kenya Commercial Bank Limited & 2 others vs. Commissioner of Police and Another, Nairobi Petition No. 218 of 20122 (2013) eKLR,** where **Majanja J**. held that:

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

80. In revising the question under which circumstances the court will grant an order prohibiting the commencement or continuation of Criminal Proceedings the Respondent cited **George Joshua Okungu and Another vs. Chief Magistrate Court Anti Corruption Court at Nairobi and Another (2014) eKLR** in which the Court summarized some of the considerations that will not form the basis for the court to interfere with the DPP's Constitutional mandate thus.

"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 that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defense is always open to the Petitioner in those proceedings. The fact however that the facts constituting the basic of a criminal proceeding 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 petitioner 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 recognized aim".

81. They also relied on **Republic vs. Commissioner of Police and Another exparte Michael Monari & Another (2012) eKLR** where it was held that:

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

82. To the Respondents, the prayers in the Application for determination herein require the court to analyse and examine facts and evidence on the basis of which the guilt, innocence or otherwise of the Applicant shall be determined and the proper forum for consideration and resolution of the factual and evidentiary matter is the trial court yet in **William Ruto & Another vs. Attorney General HCC No. 1192 of 2004** it was held that analysis of evidence should be done at the trial and not in the constitutional Court. Similarly, in **Kuria and Others vs. AG [2002] 2 KLR 69** it was held that:

"There is public interest underlying every criminal prosecution which must be jealously guarded. At the same time there are private interests of the applicant to be protected and it is therefore imperative for the court to balance these Considerations".

83. With respect to the contention that the complainant should pursue a civil claim and that there is a pending civil case, the Respondents relied on section 193 A of the ***Criminal Procedure Code*** for the position that the pendency of a civil case is not a bar to institution of criminal charges if the same facts that constitute the civil claim disclose commission of a criminal offence.

84. It was therefore the Respondents' case that the Applicant failed to prove violation of his fundamental freedoms and rights and/or infringement of any law or regulation or abuse of discretion and breach of Rules of Natural Justice and the Application should therefore be dismissed with costs.

1st, 3rd and 4th interested parties' case

85. The 1st, 3rd and 4th interested parties opposed the application.

86. According to them, the facts unequivocally disclose that the applicant committed a crime.

87. According to the said interested parties, the 1st interested party was the registered owner of LR Number 209/11151 while at all the material time relevant to this suit, the 3rd and 4th interested parties were and are still the registered directors of the 1st interested party. It was averred that the genesis of the matter can be traced back to early 1990's. On or about the 13th April 1989, the 1st interested party applied to the government for the allotment of some plots within the Nairobi Hill Area which request was on 4th April 1989, approved with the Government allotting the 1st interested party the property known as L.R. NO 209/11151 and the 1st interested party paid for the allotment on the 5th April 1989. The government then issued title to the suit property to the 1st interested party which it was to hold as leasehold for a period of ninety nine (99) years.

88. It was revealed that sometime in 1991, the applicant approached the 2nd and 4th interested parties and intimated that he would purchase the 1st interested party (Soy Developers Limited) together with its assets and in or about the year 1991, the applicant entered into a Sale Agreement with the 2nd and 4th interested parties for the sale of the 1st interested party including its assets whose term of the Sale Agreement was *inter alia* that the 3rd and 4th interested parties would release the title to the suit property to the applicant upon payment of a deposit and further that the registration of change of directors and transfer of the suit property would only take place upon the completion of the purchase price. In pursuance of this agreement, the applicant paid a deposit and the 2nd and 4th interested parties released the title to the suit property. However, further performance of the contract was frustrated by the applicant and thus, the 2nd and 4th Respondents terminated the sale agreement. According to the said interested parties, all this time my lord, there was no change of directorship of the 1st interested party or registration of transfer of the suit property to any third party and no person therefore had the authority to act on behalf of the 1st interested party other than its directors, the 2nd and 4th interested parties. Upon the said termination of the sale agreement, the 1st interested party requested for the title to the suit property from the applicant which the applicant refused, failed and neglected to return to the 1st interested party. According to the said interested parties, in addition to the numerous oral demands that the 1st interested party made to the applicant, it wrote a letter on or about the 21st August 1997 demanding the return of the title to the suit property and informing the applicant about its attempt to trace the file at the lands registry to no avail. The 1st interested party categorically asked the applicant whether he was involved in the disappearance of the file at the registry which the applicant failed, refused and neglected to respond to**.** Again, on or about the 25th March 2005 and after more continued attempts to trace the file at the Lands Registry, the 1st interested party wrote again to the applicant demanding the return of the title to the suit property. Similarly, the applicant refused, failed and neglected to respond to the Applicant's demand.

89. In the meantime, the 1st interested party attempted on several occasions to protect its interests in and over the suit property by registering a caveat and or caution but the same was frustrated for the reason that the registry file could not be traced. In its efforts to trace the missing file, the 1st interested party proceeded to write a letter to the Lands Registry informing it of the loss of the title to the suit property and requesting the lands registry to restrict any dealings on the suit property. The 1st interested party also requested for a provisional Certificate of Title to the property**.** It was contended that it was not until early 2015 that the 1st interested party got information that the registry file had mysteriously resurfaced and that the title to the suit property had been transferred to the 5th Interested Party. The 1st Interested Party then proceeded and lodged a formal search with the Lands Registry on or about the 2nd February 2015which search revealed that the file was allegedly reconstructed by the authority of the Principal Lands Registrar of Titles on or about the 3rd April 2008 and that there had been several transactions over the suit property

which the 1st interested party was not aware of and had never at any time whatsoever consented to or approved. These transactions were outlined as follows:

a. On or about the 13th December 1991, the suit property was charged to City Finance Limited. This charge was fraudulent as it was not executed by the Directors of the registered proprietor.

b. On or about the 21st October 1992, the suit property was discharged from the charge to City Finance Limited:

c. On or about the 21st October 1992, the suit property was charged to Post Bank Credit Limited. Again, this charge was fraudulent as it was not executed by the directors of the registered proprietor.

d. On or about the 5th April 2006, the suit property was then discharged from all encumbrances and transferred to A.S.L.(the 5th Interested Party)

90. It was contended that at all the material time to these transactions, the 1st interested party was still the sole registered proprietor of the suit property and there had been no change of directorship and shareholding of the 1st interested party. As such, these charges had been fraudulently executed by the applicant while purporting to be a director of the 1st interested party.

91. Against the foregoing backdrop, the 1st interested party made a complaint to the Criminal Investigation Department requesting them to investigate the fraud and take further appropriate action**.** Upon completion of the investigations, the police forwarded their report to the Director of Public Prosecution, who upon the exercise of its prosecutorial discretion decided to charge the applicant herein. It is at this point that the applicant brought the current judicial review application.

92. It was submitted that judicial review jurisdiction is a special jurisdiction exercised by court to regulate the abuse of public power and that while granting reliefs in judicial review proceedings, the court is not to substitute its decision with that of the decision making entity. In support of this submission the interested parties relied on **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300, Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001, Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR, *Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60,* Chief Constable of the North Wales Police vs. Evans (1982) I WLR 1155** and **R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285** and added that it is trite that the Court will not be interested in replacing its own decision to that of the 2nd Respondent. It is only interested in establishing whether or not the applicant was given a fair chance to respond to any allegations made against him. Once that is determined, the Court then allows other organs and entities to exercise their legal mandates. According to the the 1st, 3rd and 4th interested parties, the applicant herein was given a fair chance by the investigating agencies and he shall also receive a fair trial before the criminal justice system.

93. The said interested parties explained that, first, a report was made to the police by the 1st, 3rd and 4th interested parties. Upon this report, the police commenced their investigations. They informed the applicant whose statement was not only recorded but also those of his witnesses. The police then undertook forensic investigations to establish whether offences had been committed. Their investigations turned out that certain documents had been forged thereby leading to the disposal of the properties which were the subject of the investigations. They then forwarded their file to the D.P.P. who considered the investigations and while exercising his prosecutorial discretion decided to charge the ex parte applicant. Such conduct, it was submitted, is commensurate with the law and was reasonable in the circumstances. The question of whether the applicant's defence is plausible is a question which can only be determined by the trial court.

94. It was further submitted that Article 157 provides for the powers of the Director of Public

Prosecutions while Article 157(6) gives the Director of Public Prosecution powers to institute criminal proceedings. According to the tenor of the provision, it is evident that it is the duty of the Director of Public Prosecution to institute and undertake criminal proceedings against persons who are suspected of having committed offences. This power is constitutionally donated and it is the intention of the constitution that each constitutional organ, commission and body should be allowed to exercise their respective mandates. This, it was submitted, is why in the case of **Diana Kethi Kilonzo vs. IEBC and 2 Others (Constitutional Petition Number 359 of 2013)**, the court thus observed:

> **"we note that the constitution allocated certain powers and functions to various bodies and tribunals. it is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and National Legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the constitution, found it fit that the powers of decision making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities.''**

95. The 1st 3rd and 4th interested parties therefore urged that the Director of Public Prosecution be accorded leeway to perform its functions. They further relied on the House of Lords opinion in **Director of Public Prosecutions vs. Humphreys [1976] 2 ALL ER 497 at 511.**

96. The said interested reiterated that the party being charged with the commission of various offences will be accorded a fair trial in the magistrate's court since the criminal justice system also has its inbuilt Constitutional safeguards which ensure that the criminal process is not subjected to any form of abuse. In this respect they relied on **Republic vs. The Director of Public Prosecution exparte Chamanlal Vrajlal Kamani & Ors [2015] eKLR,** in which this Court opined that:

> **"However, it must be taken into account that our criminal process entails safeguards which are meant to ensure that an accused person is afforded a fair trial and the trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the court may well proceed to acquit the accused. Our criminal process also provides for a process of an appeal where the accused is aggrieved by the decision in question. Apart from that, there is also an avenue for compensation by way of a claim for malicious prosecution. In other words, unless the applicants demonstrate that the circumstances of the impugned process render it impossible for the applicant to have a fair trial, the High Court ought not to interfere with the trial simply on the basis that the applicant's chances of being acquitted are high. In other words, a judicial review court ought not to transform itself into a trial court and examine minutely whether or not the prosecution failed.''**

97. The said interested parties reiterated that the facts as alluded to disclose commission of offences by the applicant. First, the applicant admits that there was an agreement between the 3rd and 4th interested parties for the sale and purchase of the 1st interested party. To this end, the parties executed a contract. The applicant then paid a deposit towards the purchase of the 1st interested party. Accordingly, the 3rd and 4th interested parties released the title to the applicant in anticipation of completion of the contract. However, completion which was scheduled to take place within 120 days did not materialize. This made the 3rd and 4th interested parties to rescind the contract and demand the immediate return of the title documents. Despite various unequivocal demands, the applicant did not refund the titles. On the contrary, the applicant who was neither a director nor a shareholder of the 1st interested party went ahead to forge signatures on the various documents and executed a charge in favour of Postbank Credit Limited to obtain a loan in his favour. Upon default on the credit facility, Postbank disposed of the land to the 5th interested party while purportedly exercising its statutory powers of sale.

98. The interested parties insisted that it was upon their complaint that the police carried out investigations and forwarded a report to the Director of Public Prosecution and they relied on **Republic**

vs. Commissioner of Police and Another exparte Michael Monari & Another [2012] eKLR, in which the court was of the opinion that:

> **"the police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court….as long as the prosecution and those charged with the responsibility of making the decisions to charge act in reasonable manner, the High Court would be reluctant to interfere''**

99. To the interested parties, once a complaint was made to the police, they were under a Constitutional duty to investigate. Indeed, they investigated and called forward all those persons who were found to have had a direct or indirect link to the offence and the applicant was invited to make a statement with the police. Subsequently, the police forwarded the investigation report to the Director of Public Prosecutions who after considering all the circumstances surrounding the matter decided to charge the accused. In those circumstances, it was submitted that the police and the D.P.P's conduct was reasonable hence the matter should then be better left to the trial court to consider and weigh the evidence and come to a conclusion. The Court was therefore urged to be reluctant to interfere.

100. In the interested parties' view, since the applicant has argued that it has a good defence to the accusations made and that there are high chances of being acquitted taking into account all the circumstances as well as the interested parties' version the foregoing facts can only be determined by the trial court and by way of taking viva voce evidence and reliance was sought in **Thuita Mwangi & 2 Others vs. The Ethics and Anti-corruption Commission H.C. Pet No 153 of 2013**, in which **Majanja, J** thus observed:

> **"while these arguments are forceful, attractive and cogent, I am afraid that the High Court at this point is not the right forum to tender the justifications concerning the subject transaction let alone test the nature and veracity of these allegations''**

101. It was therefore submitted that the trial court will be able to weigh the evidence and even take *viva voce* evidence if need be, circumstances which will enable it come to a just conclusion hence the magistrate's court be granted an opportunity to establish the nature and veracity of the charges preferred against the applicant against any defence that might be tendered thereto.

102. With respect to the allegation of an inordinate delay in charging the applicant, the 1st, 3rd and 4th interested parties refuted these allegations as baseless and cannot be allowed to stifle the Directorate of Public Prosecution from carrying out its mandate. First, there is no time limitation within which the Directorate of Public Prosecutions can prefer criminal charges. The courts of law while determining whether or not to prosecute has to weigh between the rights of an individual and the societal right to have the crime detected investigated and ultimately punished. Again, it was submitted that the delay is also directly attributable to the applicant. He had hatched a well-choreographed ploy to systematically and methodically defraud the 1st, 3rd and 4th interested parties of their property. First, he pretended and convinced the 1st, 3rd and 4th interested parties that he had capacity to purchase the 1st interested party and its property and at the agreed price of 20 million shillings. To this effect, he proceeded to execute a Sale Agreement. Secondly, he paid a deposit of Kshs 10,000,000/= so that it could acquire the title documents. Thirdly, having the possession of these documents, he fraudulently charged the property twice and to two financial institutions in exchange for loan amounts; Fourthly, he defaulted on the second loan to Post Bank Credit Limited. This made the interested parties' property to be sold to the 5th interested party and at a gross undervalue. All this time, the interested parties persisted in demanding for the original title documents from the applicant to no avail. Again, numerous searches at the registry in a bid to secure the property turned out negative as the file registry had mysteriously disappeared. As such, the 1st 3rd and 4th interested parties could not establish the status of the land as there were neither developments being carried on the land nor was it occupied. It was not until sometime in February 2015 that they discovered that the file involving LR Number 209/11151 had resurfaced at the registry. The 1st

interested party then promptly lodged a caveat prohibiting the further dealings with this Parcel of Land and simultaneously made complaints to the Directorate of Criminal Investigations. Such conduct cannot, it was submitted, by any means be termed as inordinate delay or dilatory conduct in preferring and instituting criminal proceedings. To the said interested parties, it would have been difficult for the 1st, 3rd and 4th interested parties to discover in good time. In any case, the applicant has not indicated that any fundamental rights and freedoms shall be violated if the investigations are to continue. Accordingly, it was submitted that the applicant's request that his prosecution should be stopped be dismissed with costs.

103. It trying to distinguish the instant case and the case of **Stanley Munga Githunguri vs. Republic [1986] eKLR**, it was submitted that in the latter, **Mr Githunguri**, had been investigated for having contravened certain provisions of the ***Exchange Control Act*** had received a public assurance from the Attorney General that he would not be prosecuted. The Attorney General had all the material evidence at hand while reaching at this conclusion. As such, the Court found that, it would have been unjust and oppressive for the Attorney General to bring charges especially in circumstances where there was no fresh evidence to warrant brining any new charges. According to court, as a consequence of what had transpired and also being led to believe that there would be no prosecution, the applicant may well have destroyed or lost the evidence in his favour. That again, in the absence of fresh evidence, the right to change the decision to prosecute has been lost in this case, the applicant having been publicly informed that he will not be prosecuted and property restored to him.

104. In the instant case, it was submitted that save for the complaint there had been inordinate delay in preferring the criminal charges, the applicant herein had not obtained any concessions from the Office of the Director of Public Prosecution that he would not be prosecuted. Again, it is due to the well-choreographed ploy that the crime took time before it could be detected and investigated. Indeed, not until 2015 that the offence was detected and investigations concluded timeously. In the circumstances, it would not be unjust to have the applicant charged and tried.

105. The said interested parties refuted the applicant's assertions that the criminal case has been instituted as leverage and as a way of strengthening the 1st interested party's case in the Environment and Land Court as being unfounded and expresses a serious misapprehension of the law. First, under section 175A (sic) of the ***Criminal Procedure Code*** Cap 75 criminal proceedings can simultaneously be commenced alongside civil actions. Accordingly, the applicant's claim fails to that extent. Again, ELC Suit Number 132 of 2015 was started way before the criminal proceedings were contemplated. As such, the applicants allegations lack merit and should be wholly disregarded.

106. It was therefore the case for the 1st, 3rd and 4th interested parties that the applicant's application is meant to stifle his prosecution even in circumstances which indicate that he was culpable for having committed certain offences.

107. In the foregoing premise the 1st, 3rd and 4th interested parties prayed that the applicant's Notice of Motion dated 17th February 2016 be dismissed with costs.

The 5th Interested Party's Case

108. According to the 5th interested parties, it is the registered proprietor of all that parcel of land known as LR No. 209/11151 (IR No. 47029) situated in the Upper Hill area of Nairobi (hereinafter referred to as "**the Property**") pursuant to a transfer registered in its favour on 5th April 2006. It disclosed that in a judgment delivered on 29th May 2015 ELC No. 24 of 2008 consolidated with ELC No. 567 of 2008, the Environment and Land Court held that the 5th Interested Party was the lawful proprietor of the Property and in the said judgment, the Court made the following pertinent findings:-

> *i. "There is also no doubt that ASL Limited was registered as the proprietor of the Suit Property on 5th April 2006 having purchased the Property from Post Bank Credit Limited, who had granted a financial facility to Soy Developers Limited, and the said Property was used as security for the*

charge entered (sic).

ii. Further there is no doubt that the Advocates for ASL lodged a complaint with the Chief Land Registrar who summoned the parties claiming interest over the Suit Property. After carrying out an inquiry, the Chief Land Registrar issued a Ruling on 15th November 2007 and held that the Suit Property belonged to ASL Limited.

iii. There was also evidence that Soy Developers charged the Suit Property to Post Bank Credit Limited on 21st October 1992 and the entry was entered in the Grant as entry No. 3.

iv. It is evident from document No. 71, being a letter to Soy Developers Limited that the law firm of Kimani & Michuki issued a statutory notice of intention to sell by public auction in exercise of its power of sale on behalf of Post Bank Credit Limited (In Liquidation).

109. According to the 5th interested party, it is clear from the aforesaid judgment that after hearing the matter on merits including the evidence of officials from the Land's office, the Environment and Land Court confirmed that the 5th Interested Party is the lawful proprietor of the property. In view of the above finding by the Court, it averred that this Court cannot sit on appeal against the said finding by a Judge of concurrent jurisdiction in the guise of judicial review proceedings.

110. The 5th interested party's asserted that since it was not privy to the transactions regarding the sale of the 1st Interested Party, it was unable to plead thereto. It however maintained that it was indisputably not party to the alleged fraud and in consequence those allegations cannot be used to impeach its title to and interest in the property moreso as prior to purchasing the property, it exercised reasonable precaution by moving the relevant public office charged with the responsibility of maintaining records relating to all land in Kenya namely the lands department in the then ministry of lands by applying for an official search to ascertain the owner of the property and confirmed that the 1st Interested Party had charged the Property to Post Bank Credit Limited which was selling the same in exercise of its statutory power of sale.

111. The 5th interested party therefore reiterated that it was an innocent purchaser for value, in good faith and without notice and was unaware of any alleged defect or other adverse matter in relation to the property and had at the point of purchase of the Property no reason to be on guard or harbour any suspicions that there existed or may have existed any other right to the property. It was therefore its view that the only remedy available to the 1st Interested Party lies in damages, if at all.

Determinations

112. I have considered the application, the affidavits sworn both in support of and in opposition to the application, the submissions made on behalf of the parties herein as well as the authorities cited.

113. From the submissions made, it is clear that the parties herein fully appreciate the principles that guide the grant of order prohibiting or quashing criminal proceedings in this jurisdiction. It is however important to restate the role of a judicial review Court as opposed to a trial or appellate Court. As has been stated by this Court before a judicial review Court is not concerned with the innocent or guilt of the applicant but rather with the fairness of the process which the applicant is being or has been subjected to. Where the Court finds that the process is unlawful or unfair, this Court has the duty to stop the same in its tracks. On other hand as long as the process is being carried out in a lawful and just manner, the mere fact that there is likelihood of an acquittal will not justify the Court in interfering. The demarcation between the two circumstances was clarified in **Meixner & Another vs. Attorney General [2005] 2 KLR 189,** where the Court of Appeal expressed itself as hereunder:

"The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section

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

114.This Court therefore held in **Republic vs. Director Of Public Prosecution & Another Ex Parte Chamanlal Vrajlal Kamani & 2 Others [2015] eKLR** in which the Court expressed itself as hereunder:

"In my view, criminal proceedings ought not to be instituted simply to appease the spirits of the public yearning for the blood of its perceived victims. This is a country governed by the rule of law and any action must be rooted in the rule of law rather than on some perceived public policy or dogmas. The former has been branded an unruly horse, and when you get astride it, you never know where it will carry you. See Richardson vs. Mellish (1824) 2 Bing 229."

115. As was held in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001**:

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

116. In the said case, the Court went on:

"The function of any judicial system in civilized nations is to uphold the rule of law. To be able to do that, the system must have power to try and decide cases brought before the Courts according to the established law. The process of trial is central to the adjudication of any dispute and it is now a universally accepted principle of law that every person must have his day in court. This means that the judicial system must be available to all...Although the Attorney General enjoys both constitutional and statutory discretion in the prosecution of criminal cases and in doing so he is not controlled by any other person or authority, this does not mean that he may exercise that discretion arbitrarily. He must exercise the discretion within lawful boundaries...Although the state's interest and indeed the constitutional and

statutory powers to prosecute is recognised, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious...In doing so the Court may be guided by the following principles: (i). Where the criminal prosecution amounts to nothing more than an abuse of the process of the court, the Court will employ its inherent power and common law to stop it. (ii). A prosecution that does not accord with an individual's freedoms and rights under the constitution will be halted: and (iii). A prosecution that is contrary to public policy (or interest) will not be allowed...A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing so."

117. That crimes must be punished and proved criminal must be dealt with expeditiously and decisively is not an option. A judicial system that is so porous that permits criminal to go scot-free is not worthy of its name. However, the process of arriving at the decision whether a person has committed a crime must in the words of Article 47 of the Constitution be expeditious, efficient, lawful, reasonable and procedurally fair. Anything less that that will not do.

118. Public outcry in my view ought not to be the determinant factor in determining the criminal process wave so that the tide of criminal prosecution is dictated by the direction the public wind blows. This was appreciated in **Dr. Christopher Ndarathi H Murungaru vs. Kenya Anti-Corruption Commission & Another Civil Application No. Nai. 43 of 2006 [2006] 1 KLR 77** in which the Court expressed itself in this fashion:

"Lastly, before we leave the matter, Professor Muigai told us that their strongest point on the motion before us is the public interest. We understood him to be saying that the Kenyan public is very impatient with the fact that cases involving corruption or economic crimes hardly go on in the Courts because of the applications like the one we are dealing with. Our short answer to Professor Muigai is this. We recognize and we are well aware of the fact that the public has a legitimate interest in seeing that crime, of whatever nature, is detected, prosecuted and adequately punished, the Constitution of the Republic is a reflection of the supreme public interest and its provisions must be upheld by the Courts, sometimes even to the annoyance of the public and the only institution charged with the duty to interpret the provisions is the High Court and where permissible, with an appeal to the Court of Appeal. Since the Kenyan nation has chosen the path of democracy rather than dictatorship, the Courts must stick to the rule of law even if the public may in any particular case want a contrary thing and even if those who are mighty and powerful might ignore the Court's decisions since occasionally those who have been mighty and powerful are the ones who would run and seek the protection of the Courts when circumstances have changed...The courts must continue to give justice to all and sundry irrespective of their status or former status."

119. As a Court of law, all those who appear before it must feel that their rights will be protected no matter their status, political, social or economic standing. This must necessarily be so because as was held in **Masalu and Others vs. Attorney General [2005] 2 EA 165:**

"A Judge has to pass between the Government and the man whom the Government is prosecuting; between the most powerful individual in the community and the poorest and the most unpopular. It is of the last importance, that in the exercise of these duties he should observe the utmost fairness. The judicial department comes home in its effects to every man's side; it passes on his property, his reputation, his life, his all. It is to the last degree important that he should be rendered perfectly and completely independent with nothing to influence or control him but God and his conscience. The greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a dependent Judiciary."

120. The Court must therefore live to its oath to dispense justice without fear or favour and as **Mpagi-Bahigeine**, J.A in the case of **Masalu and Others vs. Attorney-General (supra)** held:

> "…**while we are aware that justice must not only be done but must be seen to be done, the court prides itself in its impartiality under the judicial oath. Most importantly, it is a fundamental fact that no other institution, except the Judiciary, can better discharge the task of resolving disputes impartially and independently, regardless of their nature."**

121. It has therefore been said that the Courts must never shy away from doing justice because if they did not do so justice has the capacity to proclaim itself from the mountaintops and to open up the Heavens for it to rain down on us. Courts are the temples of justice and the last frontier of the rule of law. See **Republic vs. Judicial Commission of Inquiry into The Goldenberg Affair, Honourable Mr. Justice of Appeal Bosire and Another Ex Parte Honourable Professor Saitoti [2007] 2 EA 392; [2006] 2 KLR 400.**

122. Justice, it has been said is not a cloistered virtue and that where justice is done and public interest upheld, it is acknowledged by the public at large, the sons and daughters of the land dance and sing, and the angels of heaven sing and dance and heaven and earth embrace. See **Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443.**

123. Whereas the Court is alive to the fact that the DPP is constitutionally mandated to determine the cases which meet the threshold for criminal prosecution, and that it is a mandate which ought not to be interfered with lightly, as was held in **Paul Imison vs. Attorney General & 3 Others Nbi HCMCA No. 1604 of 2003**:

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

124. This Court therefore has the powers and the constitutional duty to supervise the exercise of the Respondent's mandate whether constitutional or statutory as long as the challenge properly falls within the parameters of judicial review. See **R vs. Attorney General exp Kipngeno Arap Ngeny** (supra).

125. In **George Joshua Okungu & another vs. Chief Magistrate's Court Anti-Corruption Court at Nairobi** (supra) this Court cited with approval the holding in **Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323** and held:

> **"Whereas we appreciate the fact that the decision whether or not to prosecute the petitioners is an exercise of discretion this Court is empowered to interfere with the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7)**

where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable…"

126. It is therefore important in my view for the Court to appreciate the principles guiding the judicial review relief in the field of criminal process and apply the same to the circumstances before it. Several decisions have been handed down which in my view correctly set out the law relating to circumstances in which the Court would be entitled to prohibit, bring to a halt or quash criminal proceedings. In arriving at its decision however, the Court must avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial Court. Similarly, the Court in determining judicial review proceedings ought not to usurp the Constitutional and statutory mandate of the DPP and the investigative agencies to investigate and undertake prosecution in the exercise of the discretion conferred upon them by the law and the Constitution. Therefore where there is no justification for interference the House of Lords in **Director of Public Prosecutions vs. Humphreys [1976] 2 All ER 497 at 511** cautioned that:

"A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval…If there is a power…to stop a prosecution on indictment in limine, it is in my view a power that should only be exercised in the most exceptional circumstances."

127. The DPP derives his prosecutorial power both from the Constitution and the ***Office of the Director of Public Prosecutions Act***. Whereas Article 157(10) of the Constitution provides that the Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority, Article 157(11) provides:

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

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

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

(a) the diversity of the people of Kenya;

(b) impartiality and gender equity;

(c) the rules of natural justice;

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

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

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

(g) protection of the sovereignty of the people;

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

(i) promotion of constitutionalism.

129. This Court has therefore held that since the promulgation of the Constitution of Kenya, 2010, the

terrain under the current prosecutorial regime has changed and that the discretion given to the DPP is not absolute but must be exercised within certain laid down standards provided under the Constitution and the ***Office of the Director of Public Prosecutions Act***. Where it is alleged that these standards have not been adhered to, it behoves this Court to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, the Constitution itself. It is on this basis that I understand the holding in **Nakusa vs. Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565** to the effect that :

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

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

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

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

> **"It is trite that an order of prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a**

wrong decision on the merits of the proceedings...Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court."

132. In **Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703**, it was held:

"It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement or frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth... When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court... In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in..."

133. According to ***Judicial Review Handbook***, 6th Edition by **Michael Fordham** at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority power.

134. In this case, from the version of the interested 1st, 3rd and 4th interested parties the complainants in the criminal process, the circumstances that provoked the transactions leading to these proceedings was the sale agreement entered into between the said complainants as vendors and the applicant herein then trading as Kenagri Products Ltd as the purchaser of the interests in the 1st interested party. It is not contested that the only asset of the 1st interested party was LR No. 209/11151 (IR 47029) Nairobi LR No. 1991. The purchase price was Kshs 20,000,000.00 out of which, according to the complainants, Kshs 10,000,000.00 was paid. It was however their view that the balance was not forthcoming despite demand for the same.

135. Thereafter the said property seemed to have undergone numerous transactions invoving financial institutions leading to the acquisition of interests therein by the 5th interested party. It would seem that the 5th interested party's interests therein has been been given a clean bill of health by the High Court.

136. From the complainant's own version, the balance of the purchase price was to be paid within 120 days and following the failure to pay the same they rescinded the contract. There is however no averment as to the whereabouts of the deposit. There is evidence that by the letter dated 14th January 1993, from Messrs Oraro & Rachier Advocates, to the Applicant on behalf of the 3rd Interested Party demanding a balance of Kshs. 10,000,000.00. If the complainant's version is to be believed, the rescission must have been nearly two years after the expiry of the 120 completion period since in 1993, they still treated the contract as being alive.

137. Nothing much seemed to have happened till 24 years after the sale agreement in 1995 when the complainants lodged a complaint with the police. According to the complainants, the delay is ***also*** directly attributable to the applicant who had hatched a well-choreographed ploy to systematically and methodically defraud the 1st, 3rd and 4th interested parties of their property. What the complainant call "a well-choreographed ploy to systematically and methodically defraud plot" is however constituted by the sale agreement, the payment of the deposit, the fraudulent charge of the property twice to two financial institutions in exchange for loan amounts and the default on the second loan to Post Bank Credit Limited. In the complainant's view, for 24 years, they persisted in demanding for the original title documents from the applicant to no avail. Again, numerous searches at the registry in a bid to secure the property turned out negative as the file registry had mysteriously disappeared. As such, the 1st 3rd and 4th interested parties could not establish the status of the land as there were neither developments being carried on the land nor was it occupied. It was not until sometime in February 2015 that they discovered that the file involving LR Number 209/11151 had resurfaced at the registry at which point they ***promptly*** lodged a caveat prohibiting the further dealings with this Parcel of Land and simultaneously made complaints to the Directorate of Criminal Investigations.

138. The inordinate delay in circumstances that render a fair criminal process impossible hence justifying being halted was appreciated in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** where the Court held that:

> **"Evidence of extraneous purposes may also be presumed where a prosecution is mounted after a lengthy delay without any explanation being given for that delay...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...A criminal prosecution that does not accord with an individual's freedoms and rights, such as where it does not afford an individual a fair hearing within a reasonable time by an independent and impartial court, will be the clearest case of an abuse of the process of the Court. Such a prosecution will be halted for contravening the constitutional protection of individual's rights...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds."**

139. The issue of the delay was also dealt with in ***Okungu Case*** (supra) where the Court expressed itself as hereunder:

> **"The Petitioners further contend that the said charges are being brought after a long period of time after the investigations thereon had been closed. Under Article 47(1) of the Constitution, "every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair." It is therefore imperative that criminal investigations be conducted expeditiously and a decision made either way as soon as possible. Where prosecution is undertaken long after investigations are concluded, the fairness of the process may be brought into question where the Petitioner proves as was the case in *Githunguri vs. Republic* Case, that as a result of the long delay of commencing the prosecution, the Petitioner may not be able to adequately defend himself. Whereas the decision whether or not the action was expeditiously taken must necessarily depend on the circumstances of a particular case, on our part we are not satisfied that the issues forming the**

subject of the criminal proceedings were so complex that preference of charges arising from the investigations therefrom should take a year after the completion of the investigations. From the charges leveled against the Petitioners, the issues seemed to stem from the failure to follow the laid down regulations and procedures in arriving at the decision to sell the company's idle/surplus non core assets. In our view ordinarily it does not require a year after completion of investigations in such a matter for a decision to prosecute to be made."

140. Where a person against whom wrongdoing has been allegedly committed takes an inordinately long period of time before lodging his complaint with the police and as a result of which crucial evidence is lost and or witnesses become unavailable, to subject the applicant to a process of prosecution will amount to nothing but persecution. This is not to say that the applicant is in such circumstances innocent. It is simply a recognition that the criminal process must be conducted in an atmosphere of fairness to both the accused person and the complainant and where the right to a fair hearing has been jeopardised by the long delay in the commencement of the criminal process thus placing the applicant's rights into jeopardy, such a process must not be permitted to continue.

141. However as was appreciated in the ***Okungu Case*** (supra):

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

142. The effect of the long delay in prosecuting the applicant was considered in **Githunguri vs. Republic KLR [1986] 1**, where the Court expressed itself as follows:

"*We are of the opinion that two indefeasible reasons make it imperative that this application must succeed. First as a consequence of what has transpired and also being led to believe that there would be no prosecution the applicant may well have destroyed or lost the evidence in his favour*. Secondly, in absence of any fresh evidence, the right to change the decision to prosecute has been lost in this case, the applicant having been publicly informed that he will not be prosecuted and property restored to him. It is for these reasons that the applicant will not receive a square deal as explained and envisaged in section 77(1) of the Constitution. This prosecution will therefore be an abuse of the process of the Court, oppressive and vexatious… If we thought, which we do not, that the applicant by being prosecuted s not being deprived of the protection of any of the fundamental rights given by section 77(1) of the Constitution, we are firmly of the opinion that in that event we ought to invoke our inherent powers to prevent this prosecution in the public interest because otherwise it would similarly be an abuse of the process of the Court, oppressive and vexatious. It follows that we are of the opinion that the application must succeed in either event…A prosecution is not to be made good by what it turns up. It is good or bad when it starts. The long and short of it is that in our opinion it is not right to prosecute the applicant as proposed. " [Emphasis added].

142. It is therefore incorrect to contend as the Respondents do, that the only reason why the trial in the **Stanley Munga Githunguri vs. Republic** (supra) was halted was due to the representations made by the Attorney General that no prosecution would be commenced.

144. In **Erick Kibiwott Tarus & 2 Others vs. Director of Public Prosecutions & 7 others [2014] eKLR** this Court expressed itself as hereunder:

"In this case it is the applicants' case that the criminal proceedings have been instituted after a very long period of time after the alleged offences were committed. Article 50 of the Constitution provides for the right to fair trial and under Article 50(1)(e) fair trial includes the right to have the trial begin and conclude without unreasonable delay. Therefore both the

commencement and the conclusion of the trial must be conducted without an unreasonable delay. This delay in my view not only encompasses the period between the arraignment and the commencement of the hearing but also includes the period between the discovery of the commission of an offence and the arraignment in court. However what is reasonable depends upon the circumstances of the case such as the nature of the offence, the collation and collection of the evidence as well as the complexity of the offence. Again of paramount importance is the effect of the delay on the viability of a fair trial… In this case, whereas the applicants contend that there has been a long time lapse between the time of the alleged commission of the offences in question and the preference of the charges, they do not contend that as a result of the said delay there has been a change in the circumstances which militate against a fair trial. Such change in circumstances may be shown for example by the fact of unavailability of the applicant's potential witnesses or evidence resulting from the said delay. I am therefore not satisfied that in the circumstances of this case the delay in bringing the charges against the applicants without more merits the termination or prohibition of the criminal trial. In this case the applicants have not contended that as a result of the long delay in bringing the criminal charges their defences have been compromised for example by making it impossible for them to efficiently present formidable defences which they could have done had the charges been preferred earlier on."

145. From the foregoing, it is clear that mere lapse of time between the alleged commission of the offence and the charge, does not *ipso facto* justify the halting of criminal process. The onus is upon the applicant to satisfy the Court that in the circumstances of the case, a fair trial would not be possible in the sense that he would be prejudiced as a result of the lapse of time. That more than two decades in bringing a criminal offender to book is a long period of time is not in question. However, where due to such circumstances as the position held by the applicant in the criminal justice system or the executive, it was not possible or that attempts to bringing him to book were thwarted by his actions, the Court will not readily accede to his contention that a fair trial is impracticable.

146. In this case, the applicant contends that as a result of the long lapse of time during which time the complainants took no action against the applicant, the applicant has lost crucial documents which would have aided him in his defence. The applicant's case is supported by an affidavit sworn by **Patrick Lubanga Mutuli**, an advocate of the High Court, who on instructions of City Finance Limited prepared a charge over the suit property to secure advances of Kshs 30,000,000.00 to Soy Developers Limited Upon carrying out personal search at the Companies Registry, Sheria House and at the land registry he confirmed that the property was free from encumbrances and that the Directors of Soy Developers Limited were **Cyrus Shakhalaga Kwa Jirongo** and one **Davy Koech** both of whom he personally dealt with. Pursuant to the foregoing the charge was executed by the said directors in the presence of their advocate, **Jayne Muthoni Murage**.

147. From the complainant's own version, it is clear that for a considerable period of time even the government records went missing and records had to be reconstructed. I did not hear the complainants expressly claim that he applicant had something to do with the missing records apart from alleging that the applicant did not respond when they raised the issue of the missing documents. In my view what the complainants claim constitute "a well-choreographed ploy to systematically and methodically defraud plot" do not constitute hindrance to a person keen in protecting his interests. That the Court has found that the 5th interested party lawfully acquired the suit property is a testimony to the fact that any diligent person would have noticed that his property was being sold since the Court has found that:

"It is evident from document No. 71, being a letter to Soy Developers Limited that the law firm of Kimani & Michuki issued a statutory notice of intention to sell by public auction in exercise of its power of sale on behalf of Post Bank Credit Limited (In Liquidation)."

148. I agree that to make a contrary finding would amount to sitting on appeal on the said decision. To make matters worse, the complainant knowing only too well to whom they had given their title documents set out to misrepresent that the said documents were lost.

149. Taking into account the manner in which the 1st, 3rd and 4th interested parties herein have conducted themselves one cannot help but agree that the applicant's case that the belated feigned interest and claim in connection with the property is a scandalous, gluttonous, corrupt, fraudulent and illegal scheme to unlawfully reclaim the property, and for unjust enrichment since the complainants have never taken any steps whatsoever or utilised any of the remedies available to them to enforce any alleged wrongdoing in connection with the transaction" may well be well founded. If that is the position, then it is clear that the commencement of the criminal proceedings is meant for the achievement of a collateral purpose other than its legally recognized aim.

150. Majanja, J in Petition No. 461 of 2012 – **Francis Kirima M'ikunyua & Others vs. Director of Public Prosecutions**, when dealing with situations where there exist criminal and civil proceedings arising from the same facts pronounced himself as follows:

> **"It is very clear that the criminal process and the resultant court proceedings are being used to settle what is otherwise civil dispute which has been the subject of several court cases and indeed decisions. It is clear to me that the contending parties wish to use the criminal process to score points against each side in order to assert the rights of ownership. The use of the criminal process in this manner is not uncommon within this jurisdiction to find that intractable land disputes mutate into criminal matters. It is not difficult to see why. In criminal cases the State's coercive power is brought to bear upon the individual and where we have an inefficient system to settle civil claims, a person who can tie his opponent in the criminal justice system and ultimately secure a conviction will no doubt have an advantage over his opponent."**

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

> **"The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious…The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, by whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far from that which the courts indeed the entire system is constitutionally mandated to administer... In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute".**

152. In **Mohammed Gulam Hussein Fazal Karmali & Another vs. Chief Magistrate's Court Nairobi & Another [2006] eKLR Nyamu, J** examined the policy considerations for halting criminal proceedings, noting that the court has two fundamental policy considerations to take into account which were enunciated in the case of **M. Devao vs. Department of Labour (190) in sur 464** at 481 as:

> **"The first is that the public interests in the administration of justice require that the court protects its ability to function as a court of law, by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court processes may lend themselves to oppression and injustice…the court grants a permanent stay in order to prevent the criminal process from being used for purposes alien to**

the administration of criminal justice under the law. It may intervene in this way if it concludes that the court processes are being employed for ulterior purposes or in such a way as to cause improper vexation and oppression."

153. The circumstances which the Court takes into consideration in deciding whether or not to halt a criminal process were set out by **Musinga, J** (as he then was) in **Paul Stuart Imison Another vs. The Attorney General & 2 Others Petition No. 57 of 2009**, in the following manner:

"The instances in which a court can declare a prosecution to be improper were well considered in *Macharia & Another –vs- Attorney General & Another (2001) KLR 448*. A prosecution is improper if:

a. It is for a purpose other than upholding the criminal law;

b. It is meant to bring pressure to bear upon the applicant/accused to settle a civil dispute;

c. It is an abuse of the criminal process of the court;

d. It amounts to harassment and is contrary to public policy;

e. It is in contravention of the applicant's constitutional right to freedom.

154. According to ***Bennett vs. Horseferry Magistrates' Court*** **(1993) 3 All E.R. 138, 151, HL**, an abuse of process justifying the stay of a prosecution could arise in the following circumstances:

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

b. 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.**

155. I therefore agree with **Mumbi Ngugi, J's** opinion in **Francis Anyango Juma vs. Director of Public Prosecutions & Another (2012) eKLR** that:

"Clearly, the intention under the Constitution was to enable the Director of Public Prosecutions to carry out his constitutional mandate without interference from any party. This court cannot direct or interfere with the exercise by the DPP of his power under the Constitution or direct him on the way he should conduct his constitutional mandate, unless there was clear evidence of violation of a party's rights under the Constitution, or violation of the Constitution itself."

156. In other words where the constitutional right to a fair hearing as decreed under Article 50 of the Constitution is violated or threatened with violation, this Court without necessarily pronouncing itself on the innocence or otherwise of the applicant is entitled to and has a duty to step in and it does not have to wait until the applicant's rights are actually violated before doing so. Any efficient legal system must put in place a machinery where equality of arms applies to both the complainant and the accused without placing one of the parties to an unwarranted disadvantage.

157. Therefore the people placed in charge of investigation and prosecution must in deciding whether to prefer criminal charges ask themselves whether in the circumstances, a fair trial is possible notwithstanding the material placed before them. In other words the police and the DPP ought not to conduct themselves as if they are an appendage of the complainants. In exercising their discretion to charge a person both the police and the DPP's office must take into account and must exercise the discretion on the evidence of sound legal principles. As was held by **Ojwang, J** (as he then was) in **Nairobi HCCC No. 1729 of 2001 – Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen &**

Another:

> **"...policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense...I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State's prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes".**

158. It is now clear that the mere fact that the applicant will be subject to a criminal process where he will get an opportunity to defend himself is not reason for allowing a clearly flawed, unlawful and unfair trial to run its course. As was appreciated in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001**:

> **"Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case."**

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

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

160. As appreciated in ***Githunguri Case***:

> **"What kind of a mad man who has an opportunity to apply for prohibition would opt for a trial, the risk of conviction and imprisonment."**

161. Having considered the material placed before me in this application, without making a finding as to the innocence of the applicant, it is my view and I so hold that in the circumstances of this case, it would be unjust and contrary to Article 50 of the Constitution to prosecute the applicant for an offence which was allegedly committed nearly two and a half decades ago particularly when both the complainants and the applicant contend that the relevant transactional documents may have been lost, misplaced or tampered with.

Order

162. In the premises, I find merit in the Notice of Motion dated 17th February, 2016 and I issue the following orders:

> **1) An order of certiorari removing into this Court and quashing the decision of the 1st Respondent made on or about 9th February 2016 to charge and institute criminal proceedings in Criminal Case No. 207 of 2016 against the Applicant.**
>
> **2) An order of certiorari removing into this Court and quashing the charges contained in the**

Charge Sheet dated 9th February, 2016 in Police Case No. 121/41/2016 charging the Applicant with the following offences and counts:

a. Count I – Obtaining execution of security by false pretences contrary to section 314 of the Penal Code.

b. Count II – Making a document without authority contrary to section 357(a) of the Penal Code.

c. Count III – Uttering a false document contrary to section 353 of the Penal Code; and

d. Count IV – Giving false information to a person employed in the public service contrary to section 129 of the Penal Code.

3) An order of prohibition directed to all the Respondents jointly and severally prohibiting any of them from carrying out and/or proceeding with Nairobi Chief Magistrate's Court Criminal Case No. 207 of 2016 – *Republic v Cyrus Shakhalaga Khwa Jirongo* and or any other criminal proceeding in connection with the same subject matter or property.

4) As I have not made a determination as to the merits of the criminal offence in question, each party will bear own costs.

Dated at Nairobi this 11th day of January, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ashimosi for the 2nd, 3rd and 4th Respondents

Mr Munyua for Mr Ligunya for the 1st, 3rd and 4th interested

parties

CA Mwangi