



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KNYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO 442 of 2016**

**SHIVJI JADVA PARBAT .....1<sup>ST</sup> PETITIONER**  
**PARESH SHIVI JADVA PARBAT.....2<sup>ND</sup> PETITIONER**  
**MISTRY JADVA PARBAT & CO. LTD .....3<sup>RD</sup> PETITIONER**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**  
**THE INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT**  
**THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....3<sup>RD</sup> RESPONDENT**

**RULING**

**INTRODUCTION**

1 The 1<sup>st</sup> and 2<sup>nd</sup> Petitioners describe themselves as “father and son and businessmen and Kenyan citizens who are directors and shareholders at the 3<sup>rd</sup> petitioner, a limited liability company, [which is] fully owned” by them. Their Petition dated 21<sup>st</sup> October 2016 and amended on 1<sup>st</sup> November 2016 seeks final orders substantively to bar investigations by the respondents into the banks accounts of the 3<sup>rd</sup> Petitioner company on the grounds that the respondents had no reasonable justification for such investigation because the complaint of fraudulent transfer on shares in the 3<sup>rd</sup> Petitioner pursuant to which the investigations were launched had been lodged by persons claiming under a deceased person who was not a shareholder of the company, and that the respondents had purported to go beyond the scope of the complaint lodged by the said complainants on 5<sup>th</sup> August 2015. One of the complainants, Vinodkumar Lalji Varsani was, upon an application by Notice of Motion dated 19<sup>th</sup> November 2016, joined as an Interested Party in the Petition by Consent of the Parties

2. The Petitioners’ cause of action and the relief sought are set out at paragraphs 3 – 5 of the Petition as follows:

**“FACTS**

**3.0 The petitioners are the only Directors and shareholders of the 3<sup>rd</sup> respondent herein and there are no other directors or shareholders of the 3<sup>rd</sup> petitioner.**

3.1 On or about 1972 the 3<sup>rd</sup> petitioner was incorporated. The shareholders and Directors then were Mistry Jadva Parbat and Shivji Jadva Parbat.

3.2 On 4<sup>th</sup> December.2005 Mistry Jadva Parbat died and his shares in the 3<sup>rd</sup> petitioner herein passed on to his grandson Paresh Shivji Jadva the 2<sup>nd</sup> petitioner herein in accordance with his will.

3.3 The 3<sup>rd</sup> petitioner herein has since 1988 or thereabouts held accounts in Middle East Bank namely A/C No. 200067002. A/C No. 011201126 and A/C No, 5200135018. The accounts are operated lawfully and for lawful purposes only.

3.4 On 23<sup>rd</sup> September a police officer Mr Isaac Ogutu on the instructions of the respondents sought from the Chief Magistrate Nairobi and was granted a warrant to take copies of all documents relating to the 3<sup>rd</sup> petitioners accounts including account opening documents bank signatories' statements and cheques.

**3.5 The said Mr Isaac Ogutu obtained the warrant or claims that he had received a complain[t] that a Mr Lalji Varsani who died in 2003 was a Director and shareholder of the 3<sup>rd</sup> petitioner.**

3.6 The warrant issued to Mr Ogutu required Middle East Bank to supply the respondents with all copies of account opening documents, Bank statements since 2002 and copies of cheques and any other documents in the bank's possession relating to the 3<sup>rd</sup> petitioners said accounts.

3.7 The petitioner over that obtained the warrant was obtained by on false claims and petitioners rights to freedom and privacy is in danger of being abused without any lawful justification.

**3.8 The Petitioners genuinely fear that the copies being sought by the respondents said officer is intended to be abused and/or passed on to third parties for use for unlawful purposes.**

**3.9 The petitioner avers that if the respondents genuinely wished to investigate the petitioners said bank accounts there would be no need to give false information to the chief Magistrate.**

**3.10 The petitioners further avers that there can be no reasonable basis or justification for the respondents need to obtain copies of account opening documents and cheques to investigate alleged transfer of non existence shares.**

**3.11 The petitioners further aver that the respondents' action is unconstitutional unreasonable, unjust, and unfair and does not amount to lawful exercise of police powers.**

**3.12 The petitioner further avers that it is in bad faith for the respondents to secretly apply for all the banking details of the petitioners by giving lies to the Hon. Chief Magistrate.**

#### **D. CONSTITUTIONAL RIGHTS AND FUNDAMENTAL FREEDOM INFRINGED AND THE INJURY**

##### **4.0 Right to equal protection of the law**

By their action, the Respondents have discriminated against the Petitioners in the eyes of the bank's employees by isolating them from other account holders of Middle East Bank and seeking to obtain documents of their accounts.

#### **4.1 Right to information**

*The respondents have failed to disclose to the petitioners the existence of any claims relating to the 3<sup>rd</sup> petitioner shares and the need of any investigation.*

#### **4.2 Right to a fair administrative action**

*The use of false excuses and the use of a name of a person who died more than 13 years ago to take a bank account documents cannot be said to be a fair administrative decision. Further, failure to notify the petitioners is unjust and unfair.*

#### **4.3 Right to property**

*The petitioners have held and operated the bank accounts lawfully and ownership of private property being sacrosanct, the Respondents cannot be allowed to invade petitioner's privacy and property without sufficient justification.*

#### **4.4 Right to privacy and possessions.**

*The petitioner's individual freedoms of privacy and possessions have been invaded and are threatened by the respondents' acts. While the petitioners acknowledge that the respondents have a lawful duty to find wrongdoers and repress crime, the petitioners are apprehensive that the respondents having obtained warrants by use of falsehoods the information sought by the respondents is not intended for lawful purposes.*

#### **4.5 Right to dignity**

*It is disrespectful for the Respondents to proceed to investigate the petitioner's Bank accounts as if an offence and/or crime has been committed by the petitioner a matter that is likely to lower the dignity of the petitioner's in the eyes of Middle East Bank Employees who are likely to start treating the petitioners with suspicion and contempt.*

### **E. RELIEFS SOUGHT**

#### **5.0 Your Petitioners, therefore pray for:-**

*(a) A declaration that the Petitioners rights under articles 27, 28, 31, 43, 47 and 50 of the Constitution have been violated by the Respondents.*

*(b) A declaration that the warrant to obtain documents issued to the respondent's Mr Isaac Ogutu was obtained in violation of the petitioner's constitutional rights.*

*(b1) A declaration that any investigation outside and/or beyond investigation relating to transfer of shares based on the interested party's report of 5<sup>th</sup> August, 2015 is unjustified and a violation of the [petitioners'] constitutional rights.*

*(c) An order for Respondents to surrender to the petitioners any copies of documents and information obtained from the 3<sup>rd</sup> petitioners accounts in Middle East Bank.*

*(d) AN order that the Respondents undertake and promise not to pass any details and any copies of documents of the petitioner's bank accounts to the interested party herein.*

*(e) An order of permanent injunction to restrain the respondents from accessing or interfering with the 3<sup>rd</sup> petitioner's bank accounts numbers 20067002, 011201126 and 5200135018 held in the Middle East Bank or in any other bank for any purposes other than evidence relating to the*

complaint received on 5<sup>th</sup> August, 2015.

(f) *A declaration that any documents and/or details obtained by the Respondents in their investigations shall not be available for use for any other purposes other than in Criminal Proceedings relating specifically to the complaint received on 5<sup>th</sup> August, 2015.*

(g) *Costs of the Petition.*”

3. The Petition is supported by a short verifying affidavit asserting the correctness of the averments in the petition and attaching relevant copies of documents. Counsel for the Petitioner Mr. Francis Mutua also filed on behalf of the Petitioners a further affidavit sworn on 3<sup>rd</sup> November 2016 enclosing the Notice of Motion and the supporting affidavit filed by the 3<sup>rd</sup> Respondent’s Investigation Officer in Nairobi Chief Magistrate’s Court Misc. Criminal Application No. 3080 of 2016 for warrants to access and take certified copies of documents to the named accounts of the 3<sup>rd</sup> petitioner.

### **THE APPLICATION**

4. By a Notice of Motion dated 21<sup>st</sup> October 2016 and amended on 1<sup>st</sup> November 2016 the Petitioner seeks two principal interlocutory reliefs as follows:

***a) That pending the hearing and determination of this petition a conservatory order do issue restraining the respondents and their agents and/or officers from obtaining any information and or taking possession of copies of any documents relating to the petitioner’s bank accounts no. 200067002/ 011201126 and 5200135018 in Middle East Bank or in any Bank.***

***b) That pending the hearing and determination of this Petition a conservatory order do issue to restrain the respondents their agents and or officers from obtaining any information and/or banking details of the Petitioners which do not relate to the matters whose complain was received on 5<sup>th</sup> August 2015. (sic)***

5. The Notice of Motion was expressed to be supported by the petition and the verifying affidavit and based on grounds set out in the application as follows:

*a. A Mr. Isaac Ogotu of National Police Service attached to DCI headquarters has already obtained a warrant to obtain all documents in applicant Bank accounts no. 200067002, 011201126 and 52001350 in Middle East Bank.*

*b. The alleged complainants are said to be Vinod Kumar Lalji Varsani, Kunverji Kurji Varsani and Shivji Premji Pindula who are neither directors nor shareholders or clients of the applicants/petitioners herein and there can be no reasonable justification for them to have access to applicant’s banking details.*

***c. The alleged basis for the said investigation is false in that shares belonging to a Mr. Lalji (deceased) in the 3<sup>rd</sup> Respondent [petitioner] have been transferred by the applicants through fraud a fact that any genuine police investigator would have easily verified in minutes to be false from the records held by the Registrar of companies.***

*d. The 3<sup>rd</sup> Petitioner is construction company that has been in business since 1972 and has never refused to provide any information required by any of the Respondent’s officers.*

*e. The 3<sup>rd</sup> Respondent genuinely fears that the respondent’s officers have no lawful purposes for seeking the Petitioners banking details.*

***f. Unless conservatory orders are issued the Respondents have obtained a court warrant to obtain***

**the 3<sup>rd</sup> Petitioners banks accounts and says all the petitioners banking details including account operating instructions, cheques and statement without justification.**

g. That Mr Isaac Ogutu has lied to the chief magistrate that a Mr. Lalji Kanji Varsani (deceased) was a director and/or a shareholder yet the said Mr. Lalji Kanji Varsani has never held any shares in 3<sup>rd</sup> Respondent a fact that the said Mr. Ogutu knew or ought to have known was false.

**h. The petitioners have legitimate expectation that any investigations by the Respondents ought to be within complains received by the Respondents and not without any specific complain.**

**i. The Respondents [Petitioners'] constitutional rights are at a great risk of being violated by the Respondents by the Respondent's acts being unpredictable, uncertain and unjustified.**

**j. The Respondents are acting outside their lawful mandate and in unfair and irresponsible manner.**

*(sic)*

**[emphasis added]**

## **RESPONSES**

6. The 1 and 2<sup>nd</sup> Respondents filed Grounds of Opposition dated 3<sup>rd</sup> November 2016 to both the Petition dated 21<sup>st</sup> October 2016 and the Notice of Motion filed thereunder on the following grounds:

### **“GROUNDS OF OPPOSITION**

1. *The Application for conservatory orders has not met the judiciary settled criteria and/or parameters for the grant of conservatory orders sought.*

2. *The Application and petition are fatally defective for want of compliance with the mandatory rules of the court, to wit, no authority has been filed in court authorizing the 1<sup>st</sup> Petitioner to swear an affidavit on behalf of his co-petitioners.*

3. *The Petitioner has not specifically outlined and/or demonstrated with a high degree of precision how their fundamental rights and freedoms under Articles 27, 28, 31, 43, 47 and 50 of the Constitution of Kenya have been violated.*

4. *The Application and the petition aim to defeat the cause of justice by seeking to halt and/or interfere with the constitutional and lawful discharge of the responsibilities and duties of the Respondents.*

5. *The discharge of the lawful duties of the respondents have been necessitated by a viable complaint against the Petitioners' which complaint has demonstrated a probable cause to warrant the commencement of the impugned investigations.*

6. *The impugned warrants obtained by the Respondents to investigate the bank accounts of the 3<sup>rd</sup> Petitioner were obtained through a lawful Judicial process.*

7. *The petitioners have neither demonstrated which third parties are likely to use the lawfully obtained documents nor the alleged fraudulent purpose for which the same may be used by those unknown parties.*

8. *This honourable court's power should not be used to hinder and/or curtail the lawful operations and functions of independent bodies and institutions. As such, the court exercises reasonable*

restraint in that regard.

9. This honourable court should apply the doctrine of constitutional avoidance and let the applicable law regarding the subject matter herein take its own course.

10. The Petitioner is fatally defective for being vague and is clearly an afterthought, hence an abuse of the due process of this honourable court.”

7. In response to the Petition and Motion, the 3<sup>rd</sup> Respondent filed a Replying Affidavit by the said Police Constable (PC) Isaac Ogotu on the 2<sup>nd</sup> November 2016 where the pith of the respondents' case is set out at paragraphs 7-15 as follows:

“7. THAT, upon perusing the file we established that the complaints emanated from among others **VINODKUMAR LALJI VARSANI through OB NO. 52/5/8/2015**. Where he complained of fraudulent transfer of shares and properties that were entitled to his late father **LALJI KANJI VARSANI** in the six companies that were owned or managed by the late father **LALJI KANJI VARSANI** amongst them 3<sup>rd</sup> Petitioner/Applicant **MISTRY JADVA PARBAT AND COMPANY LIMITED (Annexed herewith and marked “103” is a copy of the OB extract)**

8. THAT the said Lalji Kanji Varsani (deceased) was a director at the 3<sup>rd</sup> Petitioner's by a virtue of power of attorney from **JADVA PARBAT VARSANI** that gave him authority to control 89.5% of the shares held in 3<sup>rd</sup> Petitioner belonging to **JADVA PARBAT VARSANI (Annexed herewith and marked “104” is a copy of the said Power of Attorney)**.

9. THAT, apart from being a director through power of attorney in the 3<sup>rd</sup> Petitioner, the late **LALJI KANJI VARSANI** was also a director and a shareholder in the following companies

**(i) Ghanshyam Builders Limited**

**(ii) Mistry Jadva Parbat (Management) Limited**

**(iii) Kwale Investments Limited**

**(iv) Academy Properties Limited**

**(v) Windsor Investment Limited**

10. THAT, the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners forged documents to fraudulently acquire shares in the 3<sup>rd</sup> Petitioner and the other five companies named above **(Annexed herewith and marked as “105” is a copy of Forensic Document Examiners report confirming that the two forged documents used to fraudulently acquire the shares in the said companies)**.

11. THAT investigations have established that the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners forged documents that made 2<sup>nd</sup> Petitioner a Director in the above six companies amongst them the 3<sup>rd</sup> Respondent.

12. THAT the “modus operandi” of the fraudulent acts of forgery by 1<sup>st</sup> and 2<sup>nd</sup> Petitioners was replicated in all remaining five companies. The Forensic Document Examiners report marked **“IO5”** confirms this position.

13 THAT in a case of forgery and making documents without authority the government is the complainant as the said forged documents were uttered to government employees based at the Registrar of companies Sheria house.

14 THAT the Petitioners have intentionally failed to disclose to the Honourable that they forged the

documents to acquire part of the shares that originally did not belong to them, a fact that they are privy to.

15. *THAT after forgery of documents and fraudulently taking control of the 3<sup>rd</sup> respondent, the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners must have fraudulently laundered the funds held by the company. It was hence necessary to investigate the activities in the accounts of the 3<sup>rd</sup> Respondent in compliance with the Proceeds of Crime and Anti-money Laundering Act of 2009.”*

8. The said PC Ogutu filed a further affidavit for the 3<sup>rd</sup> respondent sworn on the 15<sup>th</sup> November 2016 and a supplementary affidavit sworn on 17<sup>th</sup> November 2016, both exhibiting relevant documents and steps taken in the investigations.

9. The Interested Parties filed a replying Affidavit sworn by Vinodkumar Lalji Varsani on 28<sup>th</sup> November 2016 setting out their case in paragraphs 1-8 thereof as follows:

1. *“I am one of the Complainants whose complaint No. OB 52 of 5 August, 2015 filed in Mombasa is the subject of the Criminal Investigation being objected to herein by the Petitioners.*

2. *The complaint amongst several others relates to the claims of the Estate of LALJI KANJI VARSANI against the Petitioners herein in respect of the shares, assets and accounts of the said company, Mistry Jadva Parbat & Co Ltd, and of their possible criminal conduct therein in defeasance of the said claims. The Estate claims a beneficial interest arising out of constructive trust over the shares held by one Mistry Jadva Parbat & Co Ltd and of their possible Criminal Conduct therein in defeasance of the said claims. The Estate claims a beneficial interest arising out of a constructive trust over the shares held by one Mistry Jadva Parbat (also known as Jadva Parbat) in the Third Petitioner Company. One of the Complaints is that the said shares of Mistry Jadva Parbat were fraudulently transferred to the second Petitioner in defeasance of the said trust.*

3. *I am the eldest son and legal representative of the said Lalji Kanji Varsani (hereinafter the Deceased) pursuant to letters of Administration issued at Mombasa in Probate and Administration Cause 70 of 2014. I annex a copy thereto marked **Exh VLV – 1**. I also annex a copy of the aforesaid complaint as **Exh. VLV – 2**.*

4. *By the foregoing, and by other claims and reasons, I have a legal interest and a statutory duty in these proceedings as Administrator of the said Estate, and have been joined as an interested party in these proceedings.*

5. *In discharge of my duty as Administrator to collect in the estate of the Deceased, I have gathered information which had disclosed:*

a. *Among other rights and claims, a constructive trust over a large part of the shares of the company*

b. c. *Prima facie evidence of fraud and other criminal actions relating to the shares, the entitlements of the Deceased, the management of the company, and the management and transacting of the company’s bank accounts. Three of those accounts are the bank accounts in issue in this petition, being Account Nos 200067002, 011201126, and 5200135018 in Middle East Bank of Mombasa.*

*Similar evidence in respect of related and other companies, also the subject of the aforesaid Complaint.*

6. *All the said information and its documents have been lodged with the police to investigate the full complaint including in respect of the Petitioners herein.*

7. *The accounts which are the subject of this Petition are relevant to the investigation and the estate's aforesaid serious claims, which bank documents and the bank accounts the Petitioners seek, by this Petition, to keep from investigation and disclosure. In addition to the bank accounts, the changes in the mandates of the said bank accounts require investigation.*

8. *All the bank accounts including the suit bank accounts, were operated by the Deceased Lalji Kanji Varsani as signatory (in Various banks for over 25 years from C. 1976 to 2003) from the outset when the accounts were first opened with middle East Bank as a director and or Director/Secretary pursuant to a long standing arrangement with other Director and the majority shareholder Mistry Jadva Parbat, including but not limited to Powers of Attorney.”*

10. The Petitioners filed a Further Affidavit sworn by the 1<sup>st</sup> Petitioner on 1<sup>st</sup> December 2016 in reply to the replying affidavits of the Respondents and the Interested Party. In this Affidavit, the Petitioner principally sets out his defence to the allegations of forgery and fraud, which are matter for determination by the trial court on the hearing of the criminal charges and or the Petition herein. However, significantly to the present interlocutory application for conservatory orders, the petitioner makes the following statements at paragraphs 3, 4, 5, 15, 16, 17, and 18 of the Affidavit:

*“3. **THAT** since 2014, the interested party's Advocates have been working together with the Respondents officers and questioning my family members, 3<sup>rd</sup> petitioners employees and potential witnesses and offering professional advice and guidance to Respondents officers on how the investigations should be conducted and what charges should be preferred against me. (Annexed herewith marked “SJP 1”).*

***4. THAT since 2015 I have been subjected to all manner of investigations, searches and seizure of documents from my officers, my residence and the residences of my children and I have been cooperating with the respondents officers. (annexed herewith marked “SJP 2”).***

***5. THAT late Lalji executed many documents for and on behalf of the 3<sup>rd</sup> petitioner herein as a Director by virtue of a Power of Attorney granted to him by my late father but that did not make him to have any rights of ownership of the company a fact that Mr Lalji himself was fully aware (annexed herewith marked “SJP 3”).***

.....

*15 THAI I am not aware of the existence of the alleged concept of beneficial interest allegedly based on constructive trust that has the capacity to confer ownership of company shares as claimed by the interested party.*

*16 THAT I am also not aware of the concept of entitlement to company shares by an employee by virtue of the period of service of the nature of duties performed by an employee.*

***17 THAT the respondents and the interested party have failed to inform this court how the petitioners banking details and Bank statements are relevant to an investigation relating to fraudulent transfer of shares when the existence of issue of the alleged shares cannot be demonstrated.***

*18 THAT it is evidently clear to me that the respondents, officers involved in this matter have abandoned their official obligations and have become agents of the interested party and have ceased to investigate transfer of shares and are now engaged a generalized search for any wrong doing on my part (Annexed herewith marked “SJP 6”).”*

11. By a further affidavit sworn on 4<sup>th</sup> December 2016, the 2<sup>nd</sup> petitioner confirmed the dates of death of the Interested Party's father Lalji Kanji Varsani as 19<sup>th</sup> April 2003 and his grandfather Jadva Parbat Varsani on 4<sup>th</sup> December 2005, and attached respective death certificates therefor.

## SUBMISSIONS

12. Counsel for the Parties - Mr. Mutua for the Petitioners, Mr. Ogosso for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, Mr. Okello with Ms. Ochieng for the 3<sup>rd</sup> Respondent and Mr. Nowrojee for the Interested Party – made oral submissions on the Notice of Motion and ruling was reserved.

13. The Petitioners' case is that there is no basis for the investigation and that the investigation would result in breach of their constitutional rights which cannot be remedied should the investigations reveal that they were innocent of the allegations levelled in the complaint by the Interested Party. In lamenting the growing extent of the investigations, from the initial searches at the petitioner's premises and residences, Counsel for the Petitioners, Mr. Mutua submitted that –

*“The Investigation is now going to 3<sup>rd</sup> Parties to seek information in respect of the petitioners.*

*If the petitioners are innocent, they may never be redressed, after the breach of their rights. If it happens, the 3<sup>rd</sup> parties change their view of the petitioners with impact on their accessing credit as they are entitled to. Such action should be done only when absolutely necessary and when there is a good basis to do so.*

*There is no basis for the investigation.”*

On the merits of the allegations of fraudulent transfer of shares in the 3<sup>rd</sup> Petitioner, the petitioners objected that the Interested Party's father Lalji Kanji Varsani was not a shareholder, and there could not therefore have been a transfer of his shares, and that share ownership was by subscription under section 28 of the Companies Act and there could be no claim in constructive trust for shares, on the basis of directorship or employment in a company no matter how long the service. On balance of convenience, the Petitioner argued that the public interest lies with protection of rights and liberties and that the Petition should be heard before the investigations could be carried out so that it is not rendered nugatory.

14. The Attorney General's counsel Mr. Ogosso asserted the role of the police to investigate and prevent crime, and submitted that the balance of convenience and public interest requires that compliant should be investigated, and the respondents have a duty to investigate compliant lodged by any person. It was argued that the petitioner could not demonstrate a prima facie case for the grant of the orders sought in the Petition because there was a basis for the investigation in the complaint lodge by the Interested Party and the Forensic Report by the police document examiner indicating fraud. On risk of prejudice, it was submitted that the danger must be real -imminent, true and actual so as to call for immediate redress. It further argued that the right to privacy is not absolute and there could lawful intrusion of privacy through a lawfully obtained warrant under judicial process, and that there was no evidence of violation or threat thereof with regard to any of the rights alleged. It was further objected that the Petitioners were improperly seeking by their Petition and Motion herein to direct the respondents on what to investigate. It was urged that where in the course of investigations there is revealed another offence calling for investigations the respondents should be able to deal with it.

15. For the DPP, Mr. Okello maintained that the complaint was that the 1<sup>st</sup> and 2<sup>nd</sup> petitioners had transferred shares in companies including the 3<sup>rd</sup> Petitioners fraudulently and that there was no issue of misrepresentation by the investigating officer as he had found upon investigation of the complaint that the Lalji Kanji Kumar was a director of the 3<sup>rd</sup> petitioner. It was submitted that it was the mandate of the police to carry out investigations and it had not been shown that there were any ulterior motives. On the merits of the petition, it was urged that it was not the duty of the court to determine the matter at this stage:

*“It is not for the court to sieve the evidence to see whether the petitioner should not be prosecuted. Public interest requires criminal complaints to be investigated to vindicate criminal justice. The investigations should be guided by the counsel for the Petitioner. It is only after investigations are completed that the police may take action [against a complainant] if there is a baseless complaint.*

*The DPP will sieve the evidence and decide whether charges will be preferred. The application is baseless. The applicant seeks to direct investigations.”*

16. On behalf of the Interested Party, Mr. Nowrojee urged that there was a basis for investigations based on reasonable suspicion pointing to among other things the alleged transmission of shares in the 3<sup>rd</sup> petitioner to the 1<sup>st</sup> respondent in accordance with an alleged Will for which no grant of Probate had been shown to have been made and the Transfer of Shares form (A-14) with respect to the 3<sup>rd</sup> Petitioner purportedly executed by Jadva Parbat in India on 14<sup>th</sup> April 2002 for which stamp duty is shown to have been paid in Kenya on 31<sup>st</sup> January 2006 and which among others document examiner has found to be forgeries. It was observed that the complaint to the police related to all the six companies for which there were falsification of Minutes of the Company authorising change of signatories to the 3<sup>rd</sup> Petitioner's accounts in various banks including the accounts subject of the petition. The Interested Party asserted that it was possible to have an equitable beneficial interest in shares in shares given to other persons or arising in law in favour of other persons and enforceable through a constructive trust. The reliability of the documents at the Companies registry was cast in doubt in view of the alleged evidence of fraud by forged transfer of shares and unproved Will. Relying on ***R. v. The General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington Ex Parte Princes Edmond De Polignac*** [1917] KB 486, it was further pointed out that the petitioners were guilty of material non-disclosure of the fact of the charge of forgery facing the petitioners with regard to one of the companies related to the 3<sup>rd</sup> Petitioner. Finally it was urged that although the Interested Party as an administrator to the Estate of the late Lalji Kanji Varsani was entitled to claim as a beneficial owner against any person who holds the property, for a person to report a crime no interest or relationship with the subject matter is required.

17. In reply, the learned counsel for the Petitioner urged, citing ***Isaac Tumunu Njunge v. DPP & 2 Ors., (2016)*** eKLR, that the question was how far the DPP could go in investigations into a complaint, and that investigations would be unlawful where discretion is abused to achieve collateral purposes. It was further contended that as Lalji Kanji Varsani had no shares in the 3<sup>rd</sup> Petitioner company, it was not true that there were transfer of shares and the court warrants were therefore obtained unlawfully on the basis of misrepresentation. On non-disclosure, it was contended that “*the criminal case before the Mombasa [Chief Magistrate Court criminal case no 1658 of 2016] related to a company known as Ghanshyam Builders Limited and it did not relate to the accounts being raised in the petition.*”

### **ISSUE FOR DETERMINATION**

18. The Issue for determination in the trial of Petition is whether the Respondent has a reasonable ground for carrying out the proposed investigation into the affairs of the Petitioner. At this stage, the question that the court has to consider is whether it should hold the ***status quo*** by a conservatory order staying the investigations as sought by the petitioners, pending the hearing and determination of the Petition.

19. Related to the issue of reasonable justification to warrant police investigations for trial in the Petition, which must be considered in the interlocutory stage on ***prima facie*** basis, is whether the police may investigate a matter which, though not the exact subject of a complaint, necessarily follows thereon or is revealed by investigations into the complaint lodged with the police and whether a person who lodges complaint with the police must have a legal interest in the subject matter of the complaint.

### **DETERMINATION**

#### ***The principles for the grant of conservatory orders***

20. The principles for the grant of conservatory are well known to include the demonstration by the applicant, firstly, that he has a *prima facie* case, an arguable case or a serious question for presentation to the Court at the hearing of the Petition; secondly that he will suffer irreparable loss if the order is decline and, thirdly, that the balance of convenience with regard to public interest favours the grant of the orders sought. See Supreme Court Petition No. 2 of 2013, ***Gatirau Peter Munya v. Dickson Mwendwa Githinji & 2 Ors.***; Nairobi Constitutional Petition No. 420 of 2015 ***Tom Onyango & 5 Ors. v. Independent Police***

**Oversight Authority & 4 Ors.** (2015) ECLR; Nairobi Constitutional Petition NO. 154 of 2016 **Wilson Kaberia Nkunja v. The Magistrates and Judges Vetting Board & Anor.**; **Pyramid Buildres Ltd. V. Koome Mwambia & 2 Ors.**; Mombasa Constitutional Petition No. 7 of 2001, **Muslim for Human Rights (MUHURI) & 2 Ors. v. Attorney General & 2 Ors.** (2011) eCLR; Petition No. 230 of 2015 **Michael Sistu Mwaura Kamau v. Ethics and Anti-Corruption Commission & 3 Ors.** (2015) eCLR; and **G.B.M. Kariuki v. DPP & 3 Ors.**, (2016) eCLR.

21. See also Nairobi Constitutional Petition no. 334 of 2016, **Kyalo Kamina v. The Senate & 3 Ors.**, where this Court considered the Principles for grant of conservatory orders as follows:

*“The Court takes guidance for the Supreme Court decision in Gatirau Peter Munya v. Dickson Mwenda Githinji & 2 Ors. SC K Petition No. 2 of 2013, (2014) eCLR, where Ojwang and Wanjala, SCJJ held:*

*“186. “Conservatory orders” bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospect of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the suppliant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant causes.”*

*The court has considered the three principles for the grant of conservatory orders, namely the inherent merit of the case, that is arguability or the existence of an arguable case; risk of prejudice of the applicant and whether the petition will be rendered nugatory if conservatory order is declined; and the consideration of public interest, or balance of public interest and private party causes, as necessary.”*

### **Arguability of the Petition**

22. It is clear that the police have general powers of investigation of crime under Article 245 (4) (a) of the Constitution and the DPP a general power to prosecute offenders subject only to the Constitution and the requirements of public interest under Article 157 (11) of the Constitution. The test appears therefore to be whether there is demonstrated a reasonable justification to commence investigation and prosecution for a crime. Where however, it can be shown that the prosecution is being carried out some purpose ulterior to the objects of the criminal process to enforce the law and to prosecute offenders, as to amount to what the constitution in Article 157 (11) calls abuse of the legal process, the court must intervene to halt such abuse.

23. In similar words, Odunga J. in **Isaac Tumunu Njunge v Director of Public Prosecutions & 2 others** [2016] eCLR, said with regard to the power of the police to investigate:

*“42. It is however my view that **the police are clearly mandated to investigate the commission of criminal offences and in so doing they have powers inter alia to take statements and conduct forensic investigations. In order for the applicant to succeed he must show that not only are the investigations which were being done by the police are being carried out with ulterior motives but that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence.** It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the **predominant** purpose is to further some other ulterior purpose and as long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.”*

I agree.

24. Therefore, once a complaint is lodged by a complainant, the police must investigate the matter and take action, as necessary. It is not for the investigators to make a determination as to commission or otherwise of the crime the subject of the complainant, and except where the complainant is clearly frivolous and unsubstantiated by evidence, the investigator must follow the trail of investigation where it leads.

25. Accordingly, while the police are not entitled to go on a fishing expedition without any reasonable basis, in my view, an investigator may not abandon investigation into an apparent a crime which appears to have been committed merely because the complaint as initially reported did not relate to the new angle revealed by the continuing investigation. In other words, a complaint for forgery of documents to facilitate fraud on shareholders of a company may lead to an investigation into the crime of forgery separately without the aspect of fraud on the shareholders and it would not matter that the persons who reported the matter had an interest as a shareholder matter or otherwise.

26. There is, therefore, no question of a universal complainant in the sense of universal blood donor, as alluded to by the counsel for the petitioner with respect to the Interested Parties whom it is alleged have no interest in the shareholding of the petitioner company. Once a *bona fide* reason to complaint is established, the police may launch investigations into a matter and follow the trail of criminality even as it leads to other matters not initially envisaged in the complaint. The attempt by the petitioners to straitjacket the investigations by an objection that the interested parties' father under whom they claim was not a shareholder of the 3<sup>rd</sup> respondent and that his authority under power of attorney terminated upon the death of the donor must fail in view of the forensic report allegedly disclosing forgery in relation to transfer of shares in the 3<sup>rd</sup> petitioner and other related companies and which necessarily become the subject of criminal investigation in line with the general and independent mandate of the Inspector General of Police (2<sup>nd</sup> Respondent) under Article 245 (4) (a) of the Constitution with respect to ***“the investigation of any particular offence or offences.”***

27. The constitutional provision for investigation of any particular offence indicates that the investigation is not mounted only for offences complaints for which a report is made in the Occurrence book. In my view, a complaint by letter or other communication will suffice for the police to commence investigations into the alleged crime. In the case of cognizable offence, or information on alleged offence comes to their knowledge, the police may on own motion investigate. It also does not matter who presents the information as to an offence, or his interest in the matter; an informer may not have any interest over and above that of the general public in the enforcement of law and order.

28. In ***Pauline Adhiambo Raget v. DPP & 5 Ors.***, (2016) eKLR, a case where breach of right to equality was alleged to have been violated by investigations of an offence, Onguto J. held, and I agree, that-

*“I have also been unable to see how in investigating an alleged criminal conduct or activity there could be discrimination or a practice of inequality before the law. The respondents are enjoined to investigate any allegations of criminal activity or conduct both by statute as well as by the Constitution. The investigations may take them to anyone including the petitioner. They could investigate on their own prompting or upon being prompted by any member of the public as did the interested party in this case. In so doing, it is a legal mandate they would be undertaking.”*

29. Accordingly, the objection by the Petitioner that the investigations herein should be restricted to the matters complained of in the complaint of 5<sup>th</sup> August 2015 is without merit. To be sure the OB 52 of 5<sup>th</sup> August 2015 (Exhibit IO3) raises the whole gamut of alleged fraud in the 3<sup>rd</sup> petitioner company among others. The Occurrence Book entry no. 52/5/8/2015 the subject of this petition is in terms as follows:

***“52. 13.50 hrs - REPORT MADE: To the station are the following: (i) VINOD KUMAR LALJI KANJI VARSANI, C/O Passport No. A1742200 Tel ++07958420747 (UK Line) a resident of Mombasa who reports that his late father Lalji Kanji Varsam who passed out on 17<sup>th</sup> April, 2003 was a partner to several companies namely Mistry Jadva Parbat and company limited (MJP) Ghanshyam Builders, MJP (Management Ltd) Academy properties Ltd, MJP (EPZ) MADRAP***

**and properties like Tononoka flats and others between the year 1971 – 2003.** The reportee was on the year 2003 threatened and thrown out of the father's home in Nyali and on making a follow up realized that **some known suspects had fraudulently transferred his fathers properties and shares to their own and also those held by one Jadva for the benefit of the reportee's father Lalji estimated to about 2 billion – 3 billion and Believe that the suspect have taken over Mistry Jadva Parbat and Company Ltd affairs illegally;** (ii) SHIVJI PREMJI PATEL C/O ID No. 10093158 Tel 0733614501 a resident of Tononoka that his late father Premji Sina Manji Pindolia who passed out on 1/8/1996 in India had one share in Ghanshyam builders Ltd which he co-owned with five other partners. He later realized that the shares were fraudulently transferred to some known suspects and the 14<sup>th</sup> April 2002 six years after his father's death without letters of administration the estimate of the share 16.6% in about Ksh. 20 million; (3) KUNULRJI KANJI PATEL C/O IS No . 3461640 as resident of West Lands Nairobi contact (0788-122 058 who reports that he joined Mistry Jadva Parbat and company limited in 1972 with his brother Lalji his father Kanji and others he has 10% percent in Tononoka flats, 1/3 share in Windsor Investment, 1/3 share in Ghanshyam builders and one share of his late father KANYI in Ghanshyam Builders Ltd., all estimated to about 300 million were fraudulently transferred to the suspects purportedly to have sold the shares. They all now seek police consistence.”

30. At OB 53/5/8/2015, at 14.13hours, the recording officer makes an entry that

“53. 14.13 hrs. - **ACTION TAKEN:** The matter is [being] investigated at County CID headquarters.”

This entry must in recognition of the complaint dated 21/10/2014 addressed to the County Criminal Investigation Department by the interested parties through their advocates, M/S Menezes, Oloo & Chatur (Exhibit 'VLV2' in the replying affidavit of the Interested Party).

31. Indeed, by the letter dated 5<sup>th</sup> July 2016, in ordering further investigations into the matter, the DPP notes the existence of the complaint by the advocates for the interested Parties and writes as follows:

“Office of the DPP

MSA/INQ/1/2015

5<sup>th</sup> July 2016

RE: Mombasa OB 52/ 5/2015 – Central Police Station

DCI Inquiry Register NO. 4/2015 – Mombasa

Complainants: (1) Vinodkumar Lalji Varsani

(2) Kunverji Kanji Varsani

(3) Shivji Premji Pindolia ”

The above matter refers.

We have perused Police Inquiry File No. 4/2015 Mombasa investigated and submitted to us for directions by the CCIO Office Mombasa.

**We are in receipt of a bundle of files from the firm of Oloo & Chatur and Co. Advocates, a firm acting on behalf of the complainants.**

**Upon perusal of the same and upon analysis of Inquiry NO. 4/2015 Mombasa we are of the view**

***that the scope, size, extent and complexity of the financial fraud and while collar crime disclosed demands further investigations by your office in cooperation with the officer of Agency Director, Assets Recovery***

*Enclosed are a bundle of files for your action a set of which has been dispatched to the Asset Recovery Agency for their action. Kindly cooperate with the Agency Director in your “follow the money” bit of these investigations.*

***Jami Yamina***

***Principal Prosecution Counsel***

***For: Director of Public Prosecutions.***

32. Clearly, the police had a reasonable basis to commence the investigations upon the complaints of 21<sup>st</sup> October 2014 and the OB report Entry No. 52/5/8/2015 and thereafter upon ;lawful direction by the DPP in accordance with Article 157 (4) of the Constitution, which provides as follows:

***“157 (4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector- General shall comply with any such direction.”***

***On the merits of the criminal complaint***

33. Upon commencement of investigations into the complaint the relevant documentation was forwarded to police forensic expert who in a report entitled Directorate of Criminal Investigations Forensic Document Examiner Report dated 14<sup>th</sup> October 2015 established that document submitted for examination and marked A1 –A14, (A14 being the transfer of shares in the 3<sup>rd</sup> Petitioner were not authentic. The same coincide with the findings of a private document examiner contracted by the Interested Parties whose report was attached to the complaint filed on 21<sup>st</sup> October 2014 with the County Department of Criminal Investigations, Mombasa.

34. Although this Court is not the finder of fact with respect to the allegations of forgery, making and uttering false documents with respect to the 3<sup>rd</sup> Petitioner and other companies, and without prejudice to the findings of the trial court in Mombasa Chief Magistrate’s Court Criminal Case 1658 of 2016 with respect of Ghanshyam Builders Limited, this Court finds that there is, on the basis of the two forensic reports by a private and police document examiners, a reasonable cause for the investigation and prosecution of the petitioners, if the offences are established by evidence obtained during the investigations.

***Procedure by ex parte application for warrant to search***

35. On the procedure for obtaining the orders for investigations into the bank books, the police cannot be faulted for obtaining ***ex parte*** a warrant to inspect the 3<sup>rd</sup> Petitioner’s bank accounts. The procedure for obtaining leave of court to conduct an investigation into bank accounts was considered in ***Erastus Kibiti Stephen v. Euro Bank Limited & another*** [2003] eKLR, where Waki, J. (as he then was) held:

*“It is common ground that the relevant applicable law in this matter is section 180 (1) of the Evidence Act (cap 80) Laws of Kenya. ....*

*In my view, as the Law now stands, an officer wishing to inspect Bankers Books must satisfy the Court on the reasons for such course. Although ***I accept the view that the Affidavit presented to the court should be accompanied by an application, I do not subscribe to the view that the order****

may not be obtained ex-parte at the first instance where the circumstances so dictate, for example where prior notice to the customer would lead to the closure of the Account, thus defeating the very purpose of the exercise. But the application ought to be served soon after on the customer and the Bank for their response. Where it is desired that the Accounts be frozen, a separate application ought to be filed and contested inter partes for the investigator to satisfy the Court that there is **sufficient basis for the order.**”

36. Section 118 and 121 of the Criminal Procedure Code (CPC) upon which the application was founded provide as follows:

**“118. Power to issue search warrant**

*Where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or a magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a court having jurisdiction to be dealt with according to law. [Act No. 22 of 1959, s. 12, Act No. 10 of 1983, Sch.]*

....

**121. Detention of property seized**

*(1) When anything is so seized and brought before a court, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation.*

*(2) If an appeal is made, or if a person is committed for trial, the court may order it to be further detained for the purpose of the appeal or the trial.*

*(3) If no appeal is made, or if no person is committed for trial, the court shall direct the thing to be restored to the person from whom it was taken, unless the court sees fit or is authorized or required by law to dispose of it otherwise.”*

37. Under section 118A of the CPC, the application for a search warrant is made **ex parte** as follows:

**“118A. Ex-parte application for search warrant**

*An application for a search warrant under section 118 shall be made ex-parte to a magistrate.”*

38. In addition section 180 of the Evidence Act provides for the relevant law with respect to banker’s books as follows:

**“180. Warrant to investigate**

*(1) Where it is proved on oath to a judge or magistrate that in fact, or according **to reasonable suspicion, the inspection of any banker’s book** is necessary or desirable for the purpose of any investigation into the commission of an offence, the judge or magistrate may by warrant authorize a police officer or other person named therein to investigate the account of any specified person in any banker’s book, and such warrant shall be sufficient authority for the production of any such banker’s book as may be required for scrutiny by the officer or person named in the warrant, and such officer or person may take copies of any relevant entry or matter in such banker’s book.*

*(2) Any person who fails to produce any such banker’s book to the police officer or other person executing a warrant issued under this section or to permit such officer or person to scrutinize the*

book or to take copies of any relevant entry or matter therein shall be guilty of an offence and liable to imprisonment for a term not exceeding one year or to a fine not exceeding two thousand shillings or to both such imprisonment and fine.”

39. The affidavit of PC Isaac Ogutu sworn on 22<sup>nd</sup> September 2016 and filed by the investigating officer in CM Criminal Application no. 3050 of 2016 in support of the application for warrants for access information and obtain certified documents relating to the 3<sup>rd</sup> petitioner’s accounts at Middle East Bank set out the grounds of the application as follows:

“2. *THAT I am investigating a case of conspiracy to defraud contrary section 317 of the Penal Code vide Directorate of Criminal Investigations Unit Inquiry No. 4/2015 Mombasa.*

3. **THAT the inquiry is as a result of complaint received from Vinodkumar Lalji Varsani, Kunverji Kanji Varsani and Shivji Premji Pindula.**

4. **THAT, the late Lalji Kanji Varsani was one of the directors of Mistry Jadva Parbat Limited and five other companies.**

5. **THAT, upon the death of Mr Lalji, the other director forged documents that he used to unlawfully transfer shares that were owned by the late to one of suspect’s sons.**

6. **THAT, the new directors while using the forged documents took over full management of the six companies without giving any considerations to the family of the deceased.**

7. ***THAT, the new directors are believed to have transferred funds from the companies’ accounts to others without lawful authority.***

8. ***THAT, the new directors, unlawfully sold and transferred the properties owned by the companies to third parties.***

9. *THAT I swear this affidavit in support of the application for bank information to enable me access the same for my investigations and provide me with certified copies of:*

(i) Account opening documents

(ii) Bank statements from 20<sup>th</sup> January, 2002 to date.

(iii) Inward and outward remittance documents/INSTRUCTIONS/SWIFT/RTGS/Withdrawal SLIP/CHEQUES from 20<sup>th</sup> January, 2002 to date relating to captioned accounts/respondents.

(iv) Record oral statements from bank manager or any other competent bank staff.

10. *THAT I am making this application in order to accomplish investigations of the said offence.”*

40. Although the affidavit in support of this application for inspection of books of accounts of the 3<sup>rd</sup> petitioner should have been crafted in a manner to retain the pre-trial unproven status of the evidence to be adduced by stating that the evidence so far collected appeared to support a case of fraud, rather than making incriminatory assertions of fact against the petitioners, the affidavit does in substance accurately set out the state of the investigations upon the complaint.

41. The affidavit asserts that the Interested Party’s father Lalji was a director of Mistry Jadva Parbat Limited; upon his death the other director forged documents to transfer shares of the deceased to one of his sons; and that it was believed that the new directors had transferred funds from the company accounts and its properties without lawful authority.

42. Despite objection by the Petitioners of any claim to ownership of the shares in the 3<sup>rd</sup> Petitioner, to which the Interested Party claims a beneficial interest on behalf of the estate of his deceased father, it has been conceded by the petitioners that the late Lalji was a director of the 3<sup>rd</sup> Petitioner, albeit under a power of attorney, and there was no contest that the new directors had transferred the shares, funds and properties of the 3<sup>rd</sup> Petitioner. Whether they had lawful authority is dependent upon the finding of the court on validity or otherwise of the transfer of shares in the 3<sup>rd</sup> property.

43. With respect to Counsel for the Petitioners, I do not agree that there is no basis for investigation into the 3<sup>rd</sup> petitioner's bank accounts and related information. The complaint of 21/10/14 included allegations of change of bank account mandate, transfer of funds and transfer of properties of the company. Moreover, if the transfers were fraudulent all dealings with the 3<sup>rd</sup> petitioner's property including funds in bank accounts would be without lawful authority and thereby making investigations into the bank transactions a necessary complement to the investigations as to the validity of share transfers of the 3<sup>rd</sup> petitioner company. In addition, the complaint report in OB52 of 5<sup>th</sup> August 2015 clearly indicated that the alleged transfer of shares also related to the shares of one Jadva Parbat Varsani as follows:

**“some known suspects had fraudulently transferred his fathers properties and shares to their own and also those held by one Jadva for the benefit of the reportee's father Lalji estimated to about 2 billion – 3 billion and Believe that the suspect have taken over Mistry Jadva Parbat and Company Ltd affairs illegally.”**

In these circumstances, it would not matter whether the report of transfer of the deceased Lalji's shares was accurate; the investigation would still be valid as against the transfer of the shares belonging to Jadva Parbat also deceased. It must always be borne in mind that at this stage of a complaint, the Court and, much less, the investigator is not called upon to decide the accuracy and merit of the complaint.

44. *Prima facie*, I find the affidavit in support of the application for search warrants to be on the whole in accordance with the complaint lodged by the Interested Parties and without any falsehood aimed at deceiving the Court to grant the orders sought in the *ex parte* motion. Quite clearly, the police demonstrated a **reasonable justification** for the order for inspection of the 3<sup>rd</sup> Petitioner bank books to aid in the investigation for the offence of forgery and fraud. See Petition No. 194 of 2014, **Timothy Isaac Bryant & 2 Ors. v. Inspector General of Police & 7 Ors.** (2014) eKLR.

45. As regards the petitioners allegations of breach of constitutional rights to equality, information, privacy, property, fair administrative action and dignity, I do not consider that a person's (individual and corporate) rights may be infringed by a lawful investigations conducted pursuant to the constitutional mandate of the investigative agencies in a lawful manner according to applicable statutory provisions. The petitioners have not demonstrated that the investigations are being conducted in an unlawful manner. The 3<sup>rd</sup> petitioner's right to privacy or secrecy with respect to its banking information may be fathomed with reference to the circumstances or exceptions where the contractual right to confidentiality owed by a banker to its customer as noted by Onyango Otieno, JA., in the **Standard Chartered Bank Kenya Limited v. Intercom Services Limited & 4 Others**, [2004] eKLR, that –

*“[I]n law, there are exceptions or qualifications to the implied contract that the Bank should not disclose customer's secrecy. Some of these exceptions are where the Bank has a duty to the public to disclose; **where disclosure is under compulsion of law**; when the interest of the Bank requires disclosure; where disclosure is made by the express or implied consent of the customer – (see *Tournier vs National Provincial And Union Bank of England, Ltd [1923] All ER 550 at page 554.* Under those circumstances, the duty put upon the Bank not to disclose customer's secrecy may be waived.”*

46. There cannot, therefore, be a breach of the right to privacy with respect to a banker –customer relationship in the matter of investigations where, as here, *prima facie*, the order was lawfully obtained.

47. I am, accordingly, unable to find a *prima facie* case in favour of the Petition.

### **Risk of Prejudice**

48. The petitioners' primary fear set out in paragraph 3.8 of the Petition that –

**“3.8. The Petitioners genuinely fear that the copies being sought by the respondents said officer is intended to be abused and/or passed on to third parties for use for unlawful purposes.”**

was not sufficiently addressed in affidavit or submissions to argument to justify a finding of prejudice.

49. However, the danger presented during submissions that the 3<sup>rd</sup> Respondent - and consequently its shareholder/directors the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners – stands to suffer loss of confidence in the banking sector which in turn denies it loans and other financial services by reason of the investigations into its accounts and bank operations indicating its involvement in crime and therefore unworthy of credit and other accommodation in the banking sector, is a real consequence of the investigations.

50. This risk of loss is counterbalanced by the benefit of proven integrity that the investigation, if exculpatory, would have on the future banking operations of the 3<sup>rd</sup> petitioner with renewed confidence and verified integrity.

51. The banking sector would also benefit in the comfort of the legality of the financial transactions involving the 3<sup>rd</sup> Petitioner and related companies in past and future dealings. It would appear that the personal risk of the petitioners is outweighed by the corporate benefit of the banking industry and due administration of justice in the processing and dealing with lawful criminal complaints in accordance with the law.

52. Indeed, as in *Standard Chartered Bank Kenya Limited v. Intercom Services Limited & 4 Others* [2004] eKLR, where circumstances warrant the bank may, to satisfy itself of the *bona fides* of a customer's transaction, be entitled to carry out its own in-depth investigations into the matter without breaching the principle of confidentiality between a banker and its customer.

### **Balance of Convenience in public Interest**

53. It follows from the foregoing discussion that the balance of convenience with regard to public interest favours the continuation of the criminal investigations in furtherance of the principles of the rule of law and due administration of justice. There must be public interest in the observance of the rule of law which provides for the police mandate to investigate crime and the DPP's to prosecute criminal offence in accordance with the constitution and the applicable law, unless it is shown that the constitutional power is being used oppressively in breach of the Bill of Rights and for the furtherance of unlawful ulterior purposes.

54. From the material before the court it is not possible to hold at this stage that the investigation into complaints filed by the interested Parties has been conducted without regard to the petitioners' constitutional rights or due process under the law.

55. In *Royal Reed Integrated & 4 Others v. Attorney General & 3 Others*, Nairobi HC Petition No. 438 of 2016, this court examined the investigatory mandate of the police and the DPP and observed as follows:

*“22. Article 157 of the Constitution bestows on the DPP a constitutional power and discretion to direct the police to investigate crime and thereafter to prosecute subject only to considerations of public interest, interest of administration of justice and need to prevent abuse of process of court as follows:*

**“157 (4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.**

(5)...

**(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may**

(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

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

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

23. In giving effect to the constitutional role of investigation of crime, under Article 243, 244 and 245, Part 4 Chapter 14 of the Constitution, the National Police Service Act requires by its section 24 provides for the functions of the Police to include investigation of crimes and apprehension of offenders as follows:-

**“24. Functions of the Kenya Police Service**

The functions of the Kenya Police Service shall be the—

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

**(b) maintenance of law and order;**

(c) preservation of peace;

(d) protection of life and property;

**(e) investigation of crimes;**

**(f) collection of criminal intelligence;**

**(g) prevention and detection of crime;**

**(h) apprehension of offenders;**

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

(j) performance of any other duties that may be prescribed by the Inspector-General under

*this Act or any other written law from time to time.”*

**24. Consistently with public interest, the judicial policy of the Courts applicable in cases of this nature is for non-interference with the performance of constitutional and statutory mandate of public organs and agencies unless it is demonstrated that the organ or agency is exercising its mandate, power or discretion in an abuse of power or discretion, driven by motives ulterior to the purposes and values of the Constitution and otherwise unreasonable and unjustifiable in terms of Article 24 limitation of rights and fundamental freedoms.”**

*[emphasis added]*

### **Non-disclosure of material facts**

56. On the question of non-disclosure of material facts by the Petitioners the law is set out in ***R v The General Commissioners for the Purposes of the Income Tax for the District of Kensington ex p. Princess Edmond De Polignac*** [1917] 1 KB 486, applied in Kenya in ***Uhuru Highway Development Limited v. Central Bank of Kenya & 2 Others***, C.A. Civil Application No. 140 of 1995, [1995] eKLR, that “*if on the argument showing cause against a rule nisi the court comes to the conclusion that the rule was granted upon an affidavit which was not candid and did not fairly state the facts, but stated them in such a way as to mislead and deceive the Court, there is power inherent in court, in order to protect itself and prevent an abuse of its process, to discharge the rule and refuse to proceed further with the examination of the merits.*” At page 509, Warrington L.J. explained that -

*“It is perfectly well settled that a person who makes an **ex parte** application to the Court, that is to say, in the absence of the person who will be affected by that which the Court is asked to do, is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and **if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained.** That is perfectly plain and requires no authority to justify it.”*

57. The 1<sup>st</sup> and 2<sup>nd</sup> Petitioner were charged on 19<sup>th</sup> August 2016 in Mombasa Chief Magistrate’s Court Criminal Case no. 1658 of 2016 with various counts of making a document without authority, forgery and uttering of a false document as well as intermeddling with deceased person’s property with respect to shares in Ghanshyam Builders Limited one the companies the subject of the Interested Parties’ complaint to the police. In not disclosing that the 1<sup>st</sup> and 2<sup>nd</sup> petitioners had been charged with forgery and related charges in the said case, the petitioners were guilty of non disclosure of material facts. The fact of the charges is a material fact to the present petition because it relates to one of the companies the subject of the interested parties complaint set out in the OB 52/5/82015 and in the previous letter of 21<sup>st</sup> October 2014.

58. In ordering the interim injunction the court stopped legitimate investigation into a matter that the police were seized of following the complaints made by the Interested Parties to the Police on the basis of misrepresentation and non-disclosure of material facts that the Interested Party and the person under whom he claimed had no interest in the 3<sup>rd</sup> petitioner and that the petitioners had already been charged for forgery and fraud offences with respect to Ghanshyam Builders Limited, a company related to the 3<sup>rd</sup> petitioner both which together with 4 other companies were the subject of a complaint to the police by the Interested Party together with others. Had the Court had this information, it would not have granted the interim order made on the 1<sup>st</sup> November 2016 before hearing the respondent and the Interested Party upon full hearing of Notice of Motion dated 21<sup>st</sup> October 2016. The petitioners only conceded the status of the Interested Party’s deceased father as a director in the 3<sup>rd</sup> Petitioner in the further affidavit of 1<sup>st</sup> December 2016, after the matter was raise by the Respondents and the Interested Party in their respective replying affidavits.

59. Had the Court also been aware of the admission by the 1<sup>st</sup> petitioner at paragraph 4 of his Further

**“4. THAT since 2015 I have been subjected to all manner of investigations, searches and seizure of documents from my officers, my residence and the residences of my children and I have been cooperating with the respondents officers. (annexed herewith marked “SJP 2””**

it would not have made the interim order without seeking to know the outcome of the investigations.

60. The Court was clearly deceived into making the interlocutory order, and the petitioners are guilty of breach of an *ex parte* applicant’s duty of disclosure of all material facts in accordance with *ex p. Princess Edmond De Polignac* decision, supra. For this reason, the Court will discharge the interlocutory order granted herein on 1<sup>st</sup> December 2016 and extended from time to time during the hearing of the Notice of Motion.

### **CONCLUSION**

61. The petitioner’s case was built around the contention that the Interested Party’s father Lalji Kanji Varsani was never a shareholder of the 3<sup>rd</sup> Petitioner company and that the application for warrants for accessing its bank accounts were unlawfully obtained on false deposition by the police investigator that the 1<sup>st</sup> Petitioner had fraudulently transferred the said deceased’s shares in the company with the result that the investigations into the 3<sup>rd</sup> petitioner’s bank accounts was without reasonable justification.

62. Upon evidence presented by affidavits by the parties, the underlying question became whether the interested parties seeking to enforce an interest of beneficial ownership by constructive trust in the shares and property of the 3<sup>rd</sup> petitioner company, which contend has been fraudulently acquired by the 1<sup>st</sup> and 2<sup>nd</sup> petitioners, could lawfully lodge a complaint thereon with the police and whether the latter may within its mandate commence investigations thereon including inspection of bank accounts information relating to the operation thereof by the 1<sup>st</sup> and 2<sup>nd</sup> petitioners must be answered in the affirmative.

63. When all the evidence in the petition was received it became clear that there was no contest that the late Lalji Kanji Varsani for whom the bulk of the complaint is brought by the Interested Parties was a director of the 3<sup>rd</sup> Petitioner and that in that capacity he executed charges and was a signatory of the company’s accounts the subject of the petition. Whether it was pursuant to a power of attorney which lapsed on his death or otherwise, his position as a director of the 3<sup>rd</sup> petitioner provides, in my view, a base for a possible claim for an interest legal or beneficial in the assets of the company based upon the terms of his engagement in the company. The Interested Party asserts a beneficial interest which is denied by the petitioners but that is a matter for another court.

64. In other words, the scenario, as I see it, is that where “A” claims an interest in a certain piece of property and “B” by fraudulent means of forgery transfers the ownership of the property to himself or to another person, “B” cannot resist investigation and prosecution for his *criminal* acts of fraudulent transfer of property by a defence that “A” has no right to complain and the police are not entitled to investigate his complaint, because his *civil* right to the property is not established.

65. The questions as to the beneficial ownership by Interested Parties, or persons under whom they claim, of the shares and property of the 3<sup>rd</sup> petitioner and the alleged criminal acts of forgery and fraudulent transfer of the shares and any disposal of the company property are wholly different inquiries, related though they may be. Indeed, the complaint of alleged criminal offences may be filed by any person, with or without an interest in the matter; what is required is a reasonable justification for investigations to be undertaken, and such justification does not depend on the complainant’s interest.

66. Moreover, a criminal complaint may, in my view, be made by any person who has information on the alleged act or omission that is alleged to constitute an offence. It is for the police to investigate and the DPP to prosecute if sufficient evidence to support the charge is established. It is immaterial that the

*personal* interests of the Interested Parties may be or will have to be adjudicated by a civil court. The State is the true complainant in criminal cases and its right to pursue a suspect of crime is unaffected by a third party's right in civil law to seek redress for any wrongful and unlawful act which is also the subject of the criminal act or omission.

67. The existence of reasonable grounds to show that the offences of forgery and fraud may have been committed is sufficient to justify an investigation and prosecution for those criminal offences, notwithstanding that the issues may be relevant in the civil process as well. This is the essence of the 2003 amendment [Act No. 5 of 2003, s. 79.] inserting section 193A of the Criminal Procedure Code that the existence of concurrent civil proceedings relating to the subject matter of a criminal case is no ground for stay or similar orders as follows:

***“193A. Concurrent criminal and civil proceedings***

*Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”*

See also *Pauline Adhiambo Raget v. DPP & 5 Ors.*, supra.

68. With respect to Learned Counsel for the Interested Party, the *res gestae* argument set out in the Replying Affidavit - that the evidence of the transaction of transfer of shares in the various companies may be adduced, justifying the investigations into the affairs of the 3<sup>rd</sup> Petitioner along with the investigations of the other companies in which shareholding by the person under whom the Interested Parties claim must have been offered *ex abundati cautela*, because the complaint lodged by the interested parties by a letter dated 21/10/2014 (exhibit VLV2) to the County Criminal Investigation Department, Mombasa included the 3<sup>rd</sup> petitioner company as one of the various companies in which shares were fraudulently transferred. Section 6 of the Evidence Act provides that –

***“6. Facts forming part of the same transaction***

*Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant whether they occurred at the same time and place or at different times and places.”*

69. However, without deciding at this stage, it would appear that the alleged fraudulent transfer of shares by making forgery and uttering false transfer of stock/shares form in one company are complete offences whose facts in issue are the facts of forgery and uttering of the forged transfer of stock or shares form for that particular company. The transfer of shares in other companies while probably done at the same time and place may be relevant as showing *system* under section 15 of the Evidence rather than as *res gestae* under section 6 of the Act. Section 15 of the Evidence Act is in terms as follows:

***“15. Facts showing system***

*When there is a question whether an act was accidental or intentional, or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.”*

Having found that the Interested Parties' complaint also related to the 3<sup>rd</sup> Petitioner company, nothing turns on this distinction.

70. Of course, the respondents and the complainants (Interested Party) do not need to prove in these proceedings that the petitioners are guilty of the offences under investigation, that is a matter for the trial court should the investigations lead to a prosecution. This Court shall not delve into the merits of the charges levelled against the petitioners investigations into which they seek to halt. See Petition NO. 310 of 2014 *Dr Alfred Mutua v. The Ethics and Anti-Corruption Commission & 3 Ors.* (2016) eKLR and

**Godfrey Mutahi Ngunyi v Director of Public Prosecutions & 4 others** [2015] eKLR. All that is required is a reasonable ground for suspecting the person subject of investigation to have committed an offence.

71. Without prejudice to the finding of the criminal court in the pending criminal trial and any subsequent charges preferred against the petitioners upon investigations, I consider that the respondents and the Interested Parties have demonstrated a reasonable ground for the suspicion of the petitioners as having committed the offence of forgery and fraud. The Court will, therefore, allow the impugned investigation to proceed unhindered.

72. Without prejudice to the petitioner's case in this petition and defence in existing or contemplated criminal cases, there is merit in the objection by the DPP that the petitioner's case is based on a forged transfer document. Article 40 (6) of the Bill of rights provides that the constitutional protection of the right to property does not extend to property that is fraudulently acquired thus:

*“(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”*

73. Although, there is no judicial finding yet that the transfer of shares in the 3<sup>rd</sup> Petitioner and consequent dealings with the company property was unlawful, the Court cannot, in view of the concurrent findings of a private and police document examiners, stand in the way of the respondents and the Interested Party in seeking to prove that the property the subject of the petition is fraudulently acquired. Indeed, a grant of conservatory order in such circumstances may well obstruct the right of access to justice for the Respondents and the Interested Parties in violation of Article 48 of the Constitution.

74. A harmonious application of the constitutional rights in the present situation is to permit access to justice through the investigation and prosecution of the petitioners, if evidence of culpability is established, and in the meantime to hold the **status quo** by allowing the petitioners to remain in legal title of the shares of 3<sup>rd</sup> petitioner and to operate its bank accounts in the ordinary course of business. However, in order to forestall probable disposal and waste of its property, the petitioners must be restrained from transferring or disposing of the 3<sup>rd</sup> petitioner's shares and property until further orders of the Court.

75. Moreover, a court of law cannot countenance a situation where a person benefits from his own wrongdoing or illegality. In **Mistry Amar Singh vs. Kulubya** [1963] EA 408, the Court of Appeal for Eastern Africa quoted with approval Lindley, L.J. in the case of *Scott vs Brown, Doering, McNab & Co.* (3), (1892) 2 Q.B. 724, 728:

*“Ex turpi causa non oritur actio. This old and well-known legal maxim is founded in good sense, and expresses a clear and well-recognized legal principle, which is not confined to indicable offences. No court ought to enforce illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the court ought not to assist him.”*

76. A forged transfer document cannot transfer any rights, and the Court of law must not stand in the way of an attempt on **reasonable grounds** to prove such forgery and fraud, as failure to do so may result in the Court being an instrument of illegality. See also **Standard Chartered Bank Kenya Limited v. Intercom Services Limited & 4 Others**, supra.

## **ORDERS**

77. For the reasons set out above, the Notice of Motion dated 21<sup>st</sup> October 2016 and amended on 1<sup>st</sup> November 2016 is declined.

78. To address the petitioners' concern over possible loss of their documents and use thereof for unauthorised purposes, the court directs that only certified copies of the documents may be taken with originals being retained by the relevant banks; that the Respondents shall not use the documents for any other purpose save the criminal investigations and prosecution, if warranted; and that the respondents will not share the said documents with any third party except in the due process of law during the investigations and prosecution, as necessary.

79. In the interest of justice, the *status quo* with regard to the shares and property of the 3<sup>rd</sup> petitioner as at the date of the filing of the Petition shall be maintained pending hearing and determination of the Petition, or until further orders of the Court.

80. The costs of the Notice of Motion dated 21<sup>st</sup> October 2016 and amended on the 1<sup>st</sup> November 2016 will be paid by the Petitioners to the Respondents and the Interested Party.

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 3<sup>RD</sup> DAY OF FEBRUARY 2017.**

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**JUDGE**

**Appearances:**

Mr. Mutua instructed by M/S Mutua Nzissi & Mboya, Advocates for the Petitioner

Mr. Ogosso for Attorney General for 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Mr. Okello for DPP for 3<sup>rd</sup> Respondent

Mr. Nowrojee instructed by M/S Oloo and Chatur Advocates for Interested Party.