REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

JUDICIAL REVIEW & HUMAN RIGHTS DIVISION

MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPLICATION NO. 574 OF 2016

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE LAW OF SUCCESSION ACT, CHAPTER 160 LAWS OF KENYA, NATIONAL POLICE SERVICE ACT, FAIR ADMINISTRATIVE ACTION ACT, No. 4 of 2015, THE LAW REFORM ACT, CAP 26, ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010, THE CONSTITUTION OF KENYA, 2010 AND ALL OTHER ENABLING PROVISIONS AND PROCEDURES OF THE LAW

BETWEEN

REPUBLIC...……..…..…APPLICANT

-VERSUS-

THE DIRECTOR OF PUBLIC PROSECUTIONS...1ST RESPONDENT

DIRECTOR OF CRIMINAL

INVESTIGATIONS DEPARTMENT…….....…..…2ND RESPONDENT

EX PARTE

GUY SPENCER ELMS

RAFFMAN DHANJI ELMS &

VIRDEE ADVOCATES.…….……EX PARTE APPLICANTS

JUDGEMENT

Introduction

1. By a Notice of Motion dated 1st December, 2016, the *ex parte* applicants herein, **Guy Spencer Elms**

and **Raffman Dhanji Elms & Virdee Advocates** seek the following orders:

i. <u>AN ORDER OF CERTIORARI</u> to call, remove, deliver up to this Honourable Court and quash the decision by the 1st Respondent in the Letter dated 2nd November 2016 to charge the 1st Ex Parte Applicant for forgery of a testamentary instrument authored by the law firm of Archer & Wilcock Advocates and for discharging his legal mandate and duties as the Personal Representative of the Estate of the Late Roger Bryan Robson appointed pursuant to the Grant of Probate of Written Will issued by this Honourable Court on 30th October 2013 in *Nairobi Succession Cause No. 955 of 2013, In the Matter of the Estate of Roger Bryan Robson, Deceased*.

ii. <u>AN ORDER OF PROHIBITION</u> to prohibit and or restrain the Respondents whether by themselves and or through their agents or officers from harassing, intimidating, threatening, arresting, detaining and or charging the 1st Ex Parte Applicant on charges related to the Written Will of the Estate of Roger Bryan Robson (deceased) and or execution of the statutory obligations flowing from the Grant of Probate issued by this Honourable Court on 30th October 2013 in *Nairobi Succession Cause No. 955 of 2013, In the Matter of the Estate of Roger Bryan Robson, Deceased*.

iii. Costs

<u>Applicants' Case</u>

2. According to the applicants, the 1st ex parte applicant is an Advocate of the High Court of Kenya and a Senior Partner practising as such under the firm of M/s Raffman Dhanji Elms & Virdee Advocates, the 2nd Applicant herein.

3. It was averred that vide a will dated 24th March 1997, one Roger Bryan Robson (hereinafter referred to as "the deceased") appointed the 1st applicant and one **Sean Battye** as his executors and it is clear on the face of it, that the said Will of **Roger Bryan Robson** dated 24th March 1997 was authored and or drawn by the law firm of Archer & Wilcock Advocates of then P.O Box 10201, Nairobi and witnessed by one **Milkah Wangui Nduati** of P.O Box 10201, Nairobi and one **Mary W. Kariuki** of P. O. Box 22395, Nairobi.

4. According to the 1st applicant, upon the demise of the deceased on 8th August 2012, he was appointed the Personal Representative of his Estate and Grant of Probate of Written Will was issued to him on 13th October 2013 in Nairobi Milimani High Court Succession Cause No. 955 of 2013 which vested all of his Estate unto him. However, in or around the year 2013, some fraudulent claimants surfaced and started laying claim onto the deceased's properties known as Land Reference Number 2327/10 and Land Reference Number 2327/117 all situated in Karen and they even went ahead and took physical possession of the said properties by demolishing the structures that the 1st applicant had caused to be erected on the said properties whereupon the 1st applicant reported the matter to the police but they persisted as nothing was being done by the police.

5. The 1st applicant averred that as such, and in discharge of the statutory mandate and duties conferred upon any personal representative of an Estate of a deceased person under the ***Law of Succession Act***, he instituted a suit in the Environment and Land Court at Nairobi, being **<u>ELC Case No. 80 of 2015, Guy Spencer Elms (Suing as Personal Representative of the Estate of Roger Bryan Robson) vs Agnes Kariuki Mugure</u>** seeking a permanent injunction against the Defendant whether by herself, servants, agents, relatives or anyone claiming under her from interfering in any way with the said properties. He disclosed that there are also other pending suits relating to the said properties.

6. It was averred that on the other hand, the basis upon which the Defendant in the above suit was laying claim over the deceased's properties was by way of a Sale Agreement, a Conveyance and some

acknowledgement receipts that purported to bear the signature of the Deceased. During the pendency of the said proceedings before the Environment and Land Court, on 2nd November 2016, the 1st Respondent made a decision to charge the 1st applicant for forging a testamentary instrument among other charges and in particular directed the 2nd Respondent to charge him for forging the signature of the deceased contained in the Will dated 24th March 1997 and the Power of Attorney dated 28th July 2010.

7. It was however averred that without prejudice to the foregoing, the 2nd Respondent has to date not fulfilled the conditions precedent to the 1st Respondent's recommendations in the impugned letter yet he is intimidating, harassing and threatening to arrest and charge the 1st Applicant based on incomplete investigations since none of the Respondents has contacted the persons named therein and or recorded statements with the said persons.

8. It was the applicant's case that the decision to charge the 1st Applicant in court is premature, malicious and influenced by extraneous considerations and factors as the investigations as recommended by the impugned letter herein are incomplete due to failure to satisfy the conditions precedent as stated hereinabove. It was the applicants' case that the said impugned decision to charge a Senior Partner of the 2nd Applicant herein is solely intended to embarrass, harass, prejudice and cause irreparable loss and injury to the reputation and the business of the 2nd Applicant, which is a reputable and prestigious legal practice within the city of Nairobi of over 16 years standing. Further, the said decision was based on unverified conclusions that the signatures contained in the Conveyance, Sale Agreement and Acknowledgment receipts as presented by the Defendant in Nairobi, ELC Case No. 80 of 2015, mentioned above were the authentic signatures whereas those of the deceased contained in the Will dated 24th March 1997 and the Power of Attorney dated 28th July 2010 were forgeries.

9. It was therefore the applicants' case that the decision to charge him was unreasonable, irrational and in bad faith as there is a forensic report by a reputable document examiner who has worked for various reputable agencies including the 2nd Respondent herein, to the effect that the signatures of the deceased contained in the Conveyance, Sale Agreement and acknowledgment receipts were all forgeries and that the ones contained in the Will dated 24th March 1997 and the Power of Attorney dated 28th July 2010 are genuine and authentic yet the Respondents have completely disregarded the findings of this forensic report.

10. It was the 1st applicant's case that it is vexatious, scandalous, spiteful, and malicious for the Respondents to charge him for forging the Will of the deceased when the said Will was authored by a third party being the law firm of Archer & Wilcock Advocates hence the said charges are baseless and frivolous as they do not give a valid reason and or explanation as to why he was being charged for forgery, yet he is not the author of the alleged testamentary instrument. The only connection between him and the said Will being that he was named as the executor of the deceased and that in itself does not make him the author of the said document.

11. It was averred that the Respondents had not obtained any statement from the firm of Archer & Wilcock Advocates rebutting the prima facie evidence that they are the authors of the said Will of the deceased dated 24th March 1997. In addition, the Respondents did not obtain the statements of the witnesses to the Will of the deceased rebutting the fact that they witnessed the deceased append his signature on the said Will and that their signatures therein are genuine. It was disclosed that the Respondents have not taken into account the fact that the Advocate who witnessed the Deceased append his signature on the Power of Attorney dated 28th January 2010 by the name **Adam Nafysa Abdalla**, has not given them her statement in spite of him being a well-known Advocate of the High Court of Kenya. To the contrary, the said Advocate of the High Court of Kenya, **Adam Nafysa Abdalla**, has previously given an unequivocal statement to the effect that the signature appearing on the Power of Attorney dated 28th January 2010 is indeed his and that being his signature, the Deceased must have appeared before him in appending his signature onto the power of attorney dated 28th January 2010.In addition, Habib Bank Limited has also confirmed that as of 2015, the deceased had still charged the abovementioned properties to it and that the same had not as at that time been discharged. The said bank had categorically refused to

sign a re-conveyance unless its interests were well safeguarded and guaranteed.

12. It was the applicant's case that it was also highly suspicious under what circumstances, the alleged conveyance and Sale Agreement between the deceased and one **Agnes Kariuki Mugure**, were entered into when the said properties had been charged to Habib Bank Limited and further that there was a Caveat registered against the properties by the Kenya Revenue Authority.

13. It was therefore the applicants' case that the allegations forming basis of the Respondents' letter of 2nd November 2016 are, although false, misconceived, purely of a civil claim and sub judice as they are the subject of proceedings in the abovementioned suit being Nairobi, ELC No. 80 of 2016 among other pending suits appertaining to the suit properties and as such the Respondents have exceeded their scope of authority which is an abuse of the criminal justice system.

14. The 1st applicant contended that in his capacity as the duly appointed personal representative of the Estate of the deceased, he has a statutory mandate under the ***Law of Succession Act***, Chapter 160, Laws of Kenya to discharge his duties of protecting the Estate of the deceased from wasting away and or any assets therein from being alienated, transferred, trespassed, disposed of and or in any way interfered with by any person, without the Orders of this Honourable Court and or without any lawful cause. Further, as a personal representative of the Estate of the deceased, he has a duty to protect the Estate from loss of assets therein failure of which he can be held liable for negligence or an offence under the succession laws and thus liable to a fine and or imprisonment.

15. It was averred by the 1st Applicant that it is against public policy and public interest that a mere executor and or personal representative of the Estate of a deceased person can be charged on the basis of a testamentary instrument that is clearly authored by a third person and which personal representative has as well been granted Grant of Probate of Written Will by this Court and or being charged for discharging his mandate as stipulated under the ***Law of Succession Act***, Chapter 160, Laws of Kenya. The 1st applicant emphasised that it is clear from the reading of the said Will of the deceased dated 24th March 1997 that he is not named as one of the beneficiaries but merely as an executor. As such, it beats logic as to what interests he would be pursuing by forging the signatures of the Deceased in the said Will when he has not been named as one of the beneficiaries. As such, there is no motive at all on his part to explain why he would allegedly forge the deceased's signature in the aforesaid Will dated 24th March 1997.

16. The 1st applicant believed that he was protected under the laws of succession for faithfully and dutifully discharging his obligations under a Grant of Probate that has been granted to him by the Court in respect of the Estate of the deceased. The 1st applicant therefore believed that the decision to charge him in complete disregard of the above facts is a tactic by the Respondents to intimidate, harass and threaten him into giving up on the suit that he has filed in the Environment and Land Court so that the fraudulent claimants can freely transfer the said properties into their own names.

17. The 1st applicant reiterated that being an Advocate of the High Court of Kenya, and a Senior Partner in one of the most prestigious law firms in the city of Nairobi, being charged with forgery of a testamentary document that he is not the author thereof and or his firm will occasion great prejudice and irreparable loss and injury to the reputation of his firm as his clients and potential clients will shy off and avoid his firm when baseless, malicious, incomplete and trumped up charges are brought against one of its partners thus loss of business and revenues to the firm.

18. It was contended that the actions of the respondents are an abuse of their statutory powers and are unlawful, illegal and above all contrary to the Laws of Succession and Regulations and the objectives and principles of the National Prosecution Policy and are an abuse of the criminal justice system as the 1st Respondent has disregarded all exonerating evidence against the 1st Applicant. To him, no prejudice will be occasioned to the Respondents should they be stopped from charging him on the basis of a testamentary document that was authored by the firm of Archer & Wilcock Advocates, or on the basis of him discharging the statutory duties of a personal representative as stipulated under the ***Law of Succession Act***, Chapter 160, Laws of Kenya.

19. In response to the replying affidavit, the 1st Applicant averred that Respondents have admitted on oath that they have not fulfilled, and do not intend to fulfil, the pre-requisite conditions set out in the impugned letter dated 2nd November 2016 by the 1st Respondent to the 2nd Respondent before the decision to charge and or arraign him in Court. The said letter, it was disclosed directed the 2nd Respondent to record and or consider statements from:

i) Advocate **Nafsya Adballa** who witnessed the Power of Attorney dated 28th July 2010 drawn by the 2nd Respondent' forming material basis of the charges against me.

ii) **A.N. Mululu**, a partner in the law firm of M/s Archer Wilcock Advocates or any authorized officer from the said firm to confirm or deny the alleged deceased Will dated 24th March 1997 was drawn by the said law firm.

iii) Habib Bank Limited to confirm the Mortgage on the titles and subsequent Re-Conveyance (discharge) of the same.

20. It was averred that the decision not to record the statements of the above named persons and or consider the said statements before charging and or arraigning the 1st applicant in Court is discriminative, biased, irrational, mala fides, a failure to consider relevant factors or evidence, unlawful, ultra vires the very instruction thereof deliberately and selectively taken with intention to shut out any exculpatory evidence and justify selective criminal charges in order to unjustifiably subject him to embarrassment, harassment, oppression through frivolous criminal charges and force him to give up his statutory duty as the executor of the deceased Will and allow the Complainant, **Agnes Kariuki**, to take up part of the estate that she claims fraudulently.

21. The 1st applicant clarified that he is not the witness of the testator's signature or beneficiary of the estate devolved in the deceased Will dated 24th March 1997 but only an executor of the said Will drawn by the firm of Archer & Wilcock Advocates as indicated thereon.

22. The 1st applicant contended that the decision to charge and or arraign him alone in Court on alleged forgery of the deceased's Will dated 24th March 1997 and the Power of Attorney by Deceased to him dated 28th January 2010 to the exclusion of the witnesses, the drawer of the said Power of Attorney or the latter's testimonies denying witnessing the deceased execution of the Will or Power of Attorney is clearly selective justice, bad faith, discriminative, unlawful, contrary to public interest and administration of justice.

23. It was contended that since the titles to LR. No. 2327/10 and 2327/117 (properties of the estate of Roger Bryan Robson) were mortgaged to Habib Bank Limited and no re-conveyance had been done as at 18th June 2015, it is trite law that a mortgaged property, as in the instant case, was not available for sale and or in the ownership of the mortgagor until a discharge by way of Re-conveyance to the mortgagor is done; accordingly the original instruments for the said mortgaged properties of the estate would not be available to the deceased to facilitate the alleged sale thereof in 2011 without the consent of the mortgagee. The statement of ***Habib Bank Limited***, the mortgagee, is therefore crucial in the case of fair, impartial and lawful investigations or prosecutions. In any event the said properties could not have been legally transferred to the said **Agnes Kagure Kariuki** at the time she alleges she purchased them as the said properties had been mortgaged to **Habib Bank Limited** at that time.

24. The 1st Applicant asserted that the said Advocate **Nafsya Adballa**, **A. N. Mululu** and an advocate for **Habib Bank Limited** who are the witness and or drawers of the Will, the Power of Attorney and the mortgage for the properties herein to the said bank have indeed confirmed various matters on oath in respect of the validity of the Will of the deceased and the mortgage on the properties in dispute herein which testimony on the matters in issue herein clearly exculpate the 1st Applicant from the allegations and or preferred charges against him.

25. It was therefore averred that the Respondents clearly violated and or acted *ultra vires* the law and intend to continue with such abuse of statutory power establishing them as well as the Constitution which requires the Respondents to uphold and act in accordance to the Constitution while in exercise of their investigative and prosecutorial powers. In addition, the hasty, partial, selective and discriminative manner the Respondents have threatened to act on allegations of forgery and or fanciful complaint thereof is not informed by public interest, the law or Constitution establishing them but improper motive particularly to shield the perpetrators of crime and or sanctify illegal and fraudulent dealings in the estate of the deceased whereof he is the executor.

26. The 1st applicant reiterated that in failing to consider all the relevant evidence, particularly exculpatory evidence in the prerequisites of the letter dated 2nd November 2016 by 1st to 2nd Respondent, is abuse of process/power, breach of the law and the constitution which safeguards every person guarantees, including himself, to equality before the law, the right to equal protection and benefit of the law to achieve improper motives particularly to brandish him with the penal consequences thereto and protect the real culprits of the fraud against the estate.

27. With reference to the anonymous complaint letter allegedly received on 1st February 2014 by the 2nd Respondent referred to in the Replying Affidavit, it was averred that the same does not state or complain that the 1st Applicant forged or changed the Will of the deceased so as to reflect him as the sole beneficiary as alleged or at all. The said letter produced clearly relates to a 3rd party- **Ann Njoki Wanjiku** on alleged drug trafficking and does not allege or implicate the 1st Applicant in manipulation of the deceased Will.

28. According to the 1st Applicant, the alleged complaints by advocates for and or by **Miss. Agnes Kagure Kariuki** to the 2nd Respondent relating to LR. No. 2327/10 and 2327/117 (properties of the estate of Rodger Bryan Robson) in the Replying Affidavit clearly illustrate a dispute over an alleged purchase of the said properties from the deceased in 2011, ownership thereof between the deceased estate and **Agnes Kagure Kariuki** or the legality of the said latter's alleged title documents thereto which are matters or issues pending in the said suit and cause in Nairobi, Environment & Land Court Case. No. 80/2015 and Nairobi, High Court Succession Cause No. 955/2013, Estate of **Roger Bryan Robson** respectively.

29. The 1st Applicant disclosed that it is also clear from the draft charge sheet exhibited in the Replying Affidavit that it does not mention dispute on or criminal culpability in respect of LR. No. 2327/10 and 2327/117. Further, neither the deceased Will nor Power of Attorney in issue herein and subject of the draft charge by the Respondents mentions the properties hereof, bequeaths the properties or any of the deceased estate to him hence the witnesses stated in the draft Charge Sheet produced as in the Replying Affidavit are irrelevant to the intended criminal charges in the draft charge sheet.

30. The 1st Applicant denied that the relevant Lands Registry confirmed the authenticity or ownership of LR. No. 2327/10 and 2327/117 to **Agnes Kagure Kariuki** at any time or at all and averred that at all material times of his executorship of the deceased estate, the respective file for the said properties had been missing at the said Land Registry whenever he sought confirmation of the status of the register to the properties and he had even made a request to the Chief Land Registrar to trace and keep the file under lock and key to prevent fraudulent transactions on the estate. Notwithstanding the foregoing, the purported land deals between the said **Agnes Kagure Kariuki** and the deceased are suspect, high chances of illegal or fraudulent transactions which are matters that the Respondents have deliberately frowned upon and or failed to impartially investigate and render an impartial decisions despite the 1st Applicant's numerous complaints set out in the Verifying and Respondents Replying Affidavit.

31. To the 1st Applicant, there is no finding or declaration of a competent Court in law, whether in *Nairobi, HC. No. 955/2013* or otherwise that the Will of the deceased is forged, invalid and or that the said deceased died intestate or recommendation by the said Court that the validity of the said Will be investigated. Further, there is no challenge and none has been raised whatsoever by any party, including

Agnes Kagure Kariuki at any-time on the validity of the deceased Will in *Nairobi, HC. Succession No. 955 of 2013*. It's worth noting that **Michael Fairfax Robson**, being the deceased's only brother and closest living relative, has made no objection to the said Will and in fact signed a consent before a Notary Public to the Confirmation to the same.

32. It was therefore contended that the purported conclusions or statements on oath by the Respondents that the Will or Power of Attorney is forged and or the Applicant is a criminal in relation to the deceased Will or Power of Attorney as expressly and authoritatively stated in the Replying Affidavit have no basis in law or fact, oppressive and ultra vires the law and the Constitution particularly on presumption of innocence. It is trite that such averments only confirm the improper motive by the Respondents in seeking the Court's rubber stamp to their vile motives and not fair, impartial and independent administration of justice whereof the Respondents have a constitutional mandate to deliver to the Court, the public and himself.

33. The 1st Applicant disclosed that on or about 24th March 2015, the partial confirmation of the letters of Grant of Probate in Nairobi, HC. No. 955/2013 was granted in the presence and consent of all parties particularly including **Agnes Kagure Kariuki's**, the Protestor's advocate and Objectors as there was no objection or challenge to the validity of the Will of the deceased whereof he is the executor but restricted by to the ownership of the properties of the estate.

34. The 1st Applicant clarified that the dispute in Nairobi, HC. Succession Cause No. 955/2013 and or Nrbi, ELC No. 80/2015 is strictly whether the properties listed therein including LR. No. 2327/10 and 2327/117 are part of the estate available for distribution by himself as the executor or not. There is no dispute or challenge by **Agnes Kagure Kairuki** or any person whatsoever that on his executorship of the estate of the deceased Roger Bryan Robson pursuant to the Will.

35. It was the 1st Applicant's case that the Respondents have clearly by their own pleadings failed to demonstrate existence of a complaint against by the 1st Applicant for forgery or manipulation of the deceased Will or Power of Attorney by the deceased to bequeath any estate or disputed properties of the estate to himself as alleged or at all and that the purported charges are actuated by ulterior and improper motives particularly to circumvent the cases in Nrbi, HC. Succession Cause No. 955/2013, Nrbi, ELC. No. 80/2015, unlawfully defeat executors statutory duty towards the wishes of the deceased and not public interest or administration of justice.

36. In the 1st Applicant's vie, it is also clear from the said draft charge sheet that the intended charges with fanciful complainant have no legal foundation but only an abuse of Court process and statutory power by the Respondents to abate or assist intermeddlers of the estate among others **Agnes Kagure Kariuki** to circumvent the legal process of proving her ownership of the disputed properties against the estate in Nrbi, HC. No. 955/2013, Nrbi, ELC. No. 80/2015. The Respondents motive is to maliciously intimidate the executor with vexatious and frivolous criminal charges, penal consequences thereof and public embarrassment thereby scaring him out of his statutory obligation to execute the wishes of the deceased.

37. The 1st Applicant lamented that despite having lodged complaints and statement on intermeddling of the deceased estate with the 2nd Respondent on several previous occasions as illustrated at exhibit EK-2 and 12 of the Replying Affidavit, the Respondents have to date failed to take action to stop the intermeddlers including **Agnes Kagure Kariuki** from wasting away the estate but continue to countenance the criminal actions and or assist the intermeddlers to further criminal actions on the estate.

38. The 1st applicant averred that it is clear from the charge sheet, witness statements and exhibits in the Replying Affidavit that neither the complainant therein- **Agnes Kagure Kariuki** nor the witness therein- **Agnes Kagure Kariuki**, **Michael Osundwa**, **Mark Muigai**, **Geoffrey Keverenge** or **Stephen Ongari** drew, witnessed and or attested the Will dated 24th March 1997 by the deceased or the Power of Attorney dated 28th January 2010 which are subject of the charges. Further, the statements of the prosecution witnesses produced in the Replying Affidavits are unsigned by the authors.

39. It was averred that the alleged forensic reports relied upon by the Respondent in the Replying Affidavit are not impartial and independent as they were done by 2nd Respondents officers which is *ultra vires* natural justice to further abuse of power. Further, the forensic report exhibited in the Replying Affidavit by a **Mr. John Muinde** purportedly clearly biased and erroneous opinion as it subjected the alleged signatures of the deceased on the conveyance and title documents of LR. No. 2327/10 and 2327/117 produced by **Agnes Kagure Kariuki** against the deceased signature on the Will and Power Attorney with the former as 'the alleged known signature of the deceased'. It is clearly erroneous and bias to use a disputed document/signature as a standard mark against another disputed document/signature. The 1st Applicant disclosed that he had requested that independent international neutral experts be brought in to review the disputed documents.

40. In the 1st Applicant's view, the forensic report exhibited in the Replying Affidavit by a **Mr. Thomas Mutaha** was also biased, partial and erroneous as it compared the signature of the deceased with signatures of a different person thereby arriving at an erroneous conclusion. He disclosed that he was aware that the 2nd Respondent conducted investigations into the claims of the said **Thomas Mutaha** and conducted their own forensic examinations which confirmed that he had forged the deceased's signature on share transfer documents and resignations as such one part of the 2nd Respondent is conflicting with another section of the 2nd Respondent over essentially the same dispute.

41.The 1st applicant insisted that the forensic reports were clearly products of partial and biased investigations structured in give particular results to further improper motives of the Respondents and the deceased estate intermeddler- **Agnes Kagure Kariuki**. To him the reports are not open or transparent as the standard unit or basis is biased, erroneous and secretive; the alleged known signature of the deceased is erroneous, secretive or signatures of a different person other than the deceased.

42. It was further his view that in any event, the forensic reports are opinions in law which requires corroborative evidence yet the Respondents have not illustrated any reasonable explanation, excuse for failing and or refusing to consider cogent primary and crucial evidence of the readily available drawer and witnesses of the deceased Will and or Power of Attorney in dispute and or exceptions for basing the decision to charge him for forgery based on secondary evidence particular forensic report/opinions hereof.

43. The 1st interested party averred that he had also instructed an independent document examiner-**Mr. Emmanuel Kenga** who compared the signatures of the deceased on the Power of Attorney and the Will in issue as well as the deceased alleged signatures on the title documents produced by **Agnes Kagure Kariuki** as against known signatures of the deceased on various disclosed documents signed by the deceased while he was alive. To him, the said forensic examiner opined that the signatures of the deceased on the Will and Power of Attorney indicate they were made by similar author but the Respondents have declined or have not illustrated consideration of the said report despite being furnished. In his view, the said report is transparent and illustrative by evidence of independent sources of the deceased Known signatures unlike the Respondent's reports.

44. While admitting that he did not submit the original Indenture dated 4th May 1978 with respect to LR. No. 2327/10 and 2327/117 and the Power of Attorney donated to him by the deceased and or all the original documents of title for forensic analysis as requested by the 2nd Respondent, he averred that this was due to the imminent hearing in Nrbi, ELC. No. 80/2015 that was forthcoming at the time of the request. He however averred that he did offer them for inspection at their offices and sent copies of the same to them.

45. The 1st Applicant therefore insisted that the intended criminal charges motivated with improper, ulterior motives, without legal foundation and ultra vires the law or Constitution based on biased forensic reports will not only cause him and the 2nd Ex-parte Applicant wherein he is a Senior Partner unnecessary, untold and irreparable embarrassment, oppression, loss of business good will locally and internationally but also eternal turmoil and loss of reputation and that of his firm and colleagues which cannot be redressed by damages for malicious prosecution or violation of fundamental rights and

freedoms which are otherwise available remedies in law for the Respondent's intended actions herein.

46. It was averred that in furtherance of the improper motive, the Respondents, including the deponent of the Replying Affidavit herein have during the pendency of the proceedings herein, have on diverse dates caused publications in widely circulating newspapers locally and internationally disparaged his reputation by stating that he is a criminal who forged a Will to allocate myself the deceased properties.

47. There were further affidavits in which the statements of the witnesses to the Will were exhibited though it was averred they were out of the country. The 1st Applicant further reinforced his averments made hereinabove.

48. It was submitted on behalf of the applicants that decision to charge the 1st Ex-parte Applicant is based on the letter dated 2nd November 2016 for alleged forgery of the deceased's Will and Power of Attorney.

49. However, 'before the charging or arraigning the 1st Ex-parte Applicant in Court, the 1st Respondent directed the 2nd Respondent to:

> i) Record the statement of 'Advocate **Nafsya Abdalla** who witnessed the Power of Attorney dated 28th July 2010.
>
> ii) Record the statement of '**A.N. Mululu** , a partner in the law firm of M/s Archer Wilcock Advocates or any authorized officer from the said firm to confirm or deny the alleged deceased Will dated 24th March 1997 was drawn by the said law firm'
>
> iii) Record a statement from Habib Bank Limited to confirm the Charge on the titles and subsequent discharge) of the same.

50. The 2nd Respondents however deliberately ignored and failed to comply with the said directive and even admit in their Replying Affidavit of their failure to comply with the preconditions of the said impugned decision. While reiterating the position adopted in the verifying affidavit the applicants relied on **Bitange Ndemo vs. Director of Public Prosecutions & 4 Others [2016] eKLR**, **R vs Commissioner of Cooperatives ex-parte Kirinyaga Tea Growers Cooperative Savings & Credit Society CA (1999) EALR 245,** ***De Smiths Judicial Review*** (6th Ed), **Council of Civil Service Unions and others vs Minister for the Civil Service [1984] 3 All ER**, and **Republic vs Director of Public Prosecutions & 2 Others Ex parte Praxidis Naomi Saisi (2016) eKLR,** and submit that the decision to charge is so outrageous in its defiance of logic or accepted moral standards that no sensible person who applied his mind to the question to decide could have arrived at it.

51. The Court was therefore urged to intervene to quash the decision and stop further abuse of power and relied on HC. Misc. App No. 1769/2003 - **R vs. Ministry of Planning Exparte Prof Kaimenyi** in which it was held that:

> **"…where a body uses its power in a manifestly unreasonable manner, acted in bad faith, refuse to take relevant factors into account in reaching its decision or based its decision on irrelevant factors the court would intervene that on the ground that the body has in each case abused its power. The reason why the court has to intervene is because there is a presumption that where parliament gave a body statutory power to act, it could be implied that Parliament intended it to act in a particular manner."**

52. It was submitted that the reason was given for failure to comply with the pre-requisites of the letter dated 2nd November 2016 and or exemption of compliance thereof the decision is actuated by malice and improper motive. To the applicants, the Respondents' deliberate disregard of exculpatory and or primary evidence in making a decision to charge is discriminative and actuated by bad faith, improper motive intended to misuse and or abuse the criminal justice system to harass, embarrass and oppress the Ex-parte Applicants in violation of the law and public interest.

53. It was averred that the Respondents have not given material evidence illustrating existence of a complaint against the 1st Ex-parte Applicant for forgery of a Will or Power of Attorney. There is no evidence of a Complaint that the 1st Ex-parte Applicant forged or uttered the deceased's Will or Power of Attorney. To the applicants, the purported complaint relied upon by the Respondents clearly relate to a different offence by a 3rd party and not the 1st Ex-parte Applicant. It was averred that there is no evidence that the purported complainant named in the draft Charge Sheet produced by the Respondents namely **Agnes Kagure Kariuki** has at any-time complained that the deceased's Power of Attorney or Will was uttered or forged. It was averred that whereas the said **Agnes Kagure Kariuki** is a defendant in a pending suit, **Nbi, ELC. No. 80/2015** wherein she has been sued for trespass in the disputed properties as well as a Protestor in **Nbi, HC. Succession Cause No. 955/2013** against confirmation of the Letters of Grant of Probate, in both cases, she has neither by pleading or affidavit challenged the validity of the Will or Power of Attorney nor alleged forgery thereof by the 1st Ex-parte Applicant. On 24th March 2015, this Court in Nbi, HC Succ. Cause No. 955/2013 granted partial confirmation of the Grant of Letters of Probate of the Will to the 1st Ex-parte Applicant by consent of **Agnes Kagure Kariuki** with respect to the estate except dispute properties. There has not been an objection to the validity of the Will. Further, there is no recommendation or finding by the Court in Nbi, HC. Succession Cause No. 955/2013 or any civil suit that the deceased's Will or Power of Attorney is suspect and should be investigated. The Respondents purported charges, it was submitted are orchestrated to assist the alleged Complainant defeat the pending Succession Cause and the civil suit.

54. In the foregoing, it was submitted that the Respondents' decision to arrest and charge the 1st Ex-parte Applicant disregarded the totality of the available evidence, is devoid of any basis or complaint and based on irrelevant evidence and considerations. It was submitted that the totality of the evidence placed before the Court by the Respondents to support the purported decision to charge do not advance fair administration of justice, equal application of the law and or protection of public interest but rather assisting **Agnes Kagure Kariuki** to advance personal interests and scores against the 1st Ex-parte Applicant. To the applicant, the arrest and charges have no legal or evidential foundation but to advance improper motive particularly to harass, oppress and intimidate the 1st Ex-parte Applicant by brandishing charges and punishment thereof to compel the 1st Ex-parte Applicant to accede to the settlement of the civil claims on ownership of the disputed properties against the estate in the pending *Nbi, ELC. No. 80/2015* and *Nbi. Succession Cause No. 955/2013*. To them, the charges are now being used by the Respondents to frustrate the 1st Ex-parte Applicant to forego or withdraw his executorship of the estate and assist **Agnes Kagure Kariuki** circumvent the proving of her claims in *Nbi, ELC. No. 80/2015* and *Nbi, HC. Succ. No. 955/2013*.

55. In the applicants' view, the selective and discriminative manner in which the Respondents are acting is motivated by vile, malice and improper purposes other than public interest and fair administration of justice. According to them, it is irrational to purport to selectively charge the 1st Ex-parte Applicant for forgery of a Will or Power of Attorney to the exclusion of the witnesses or drawers of the documents with intent to shield the alleged Complainant and the expert witnesses culpable of criminal and illegal actions.

56. Based on **Republic vs. Director of Public Prosecutions & 2 Others Ex-parte Praxidis Namoni Saisi** (supra), it was submitted that it has a duty to prevent charges used as tools for settling personal scores, improper or ulterior motives and mounted without factual foundation and that disregard of exculpatory evidence illustrate collateral motives. Based on the said case as well as **Nbi, HCCC. No. 1729/2001 - Thomas Mboya Oluoch & Another vs Lucy Muthoni Stephen & Anor**, it was contended that to deploy prosecutorial machinery and to engage the judicial process with litigation based on pettiness, chicanery or malice by the Respondents based on questionable evidence crafted to be self-serving is to annex public legal services for malicious prosecutions. In the applicants' view, criminal justice and or the power to investigate and charge bestowed upon the Respondents must be exercised within the confines of the law to achieve lawful purpose particularly administration of justice, the need to prevent crime, protect individual freedoms, public interest and avoid abuse of legal process. It is not an instrument of vexation, oppression and abuse of Court process.

57. To the applicants, the intended arrests and charges as illustrated herein above are based on frivolous, irrelevant considerations or evidence and devoid of any legal or evidential foundation. The intended charges are motivated by extraneous purposes particularly to assist the purported complainant to secure settlement of civil claims of ownership of disputed properties or to settle personal differences with the executor for stopping her from trespassing or intermeddling with the estate.

58. It was submitted that the Respondents' decision to arrest and charge is *ultra vires* the National Prosecution Policy, the Office of the Director of Public Prosecutions Act and the Constitution.

59. The Applicants asserted that in failing to consider the totality or sufficiency of evidence and exclusive use of irrelevant hearsay evidence to decide on arresting and charging the 1st Ex-parte Applicant, the Respondents' acted partially and discriminatively.

60. It was submitted that the Respondents' above actions demonstrate bias, partiality and discrimination in application of the law against the 1st Ex-parte Applicant. The actions are *ultra vires* the evidential test under the National Prosecution Policy which requires objective test of the totality of exculpatory and exculpatory evidence and relied on the ***The National Prosecution Policy***, revised in 2015 provides at page 5 that:-

> ***Public Prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction. In other words, Public Prosecutors should ask themselves; would an impartial tribunal convict on the basis of the evidence available"***
>
> ***Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be. The finding that there is a realistic prospect of conviction is based on the prosecutor's objective assessment of the evidence, including the impact of any defence and any other information that the suspect has put forward or on which he or she might rely. It means that an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged. This is a different test from the one that the criminal courts themselves must apply. A court may only convict if it is sure that the defendant is guilty.***

61. In the applicants' submissions failure to apply the evidential test objectively leads to the disregard of public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. Gathering of the evidence and the decision to charge by Respondents was made without any valid complaint on the alleged offence or complainant and subsequent to existing Civil Suit and Succession Cause in this Court vide Nbi, ELC No. 80/2015 and Nbi, HC. Succession Cause No. 955/2013. The evidence so gathered does not support the alleged offence but claims in the said civil suits between the 1st Ex-parte Applicant and the alleged Complainant.

62. It was contended that the impugned decision is in itself ultra vires Article 47 of the Constitution since the 1st Ex-parte Applicant was never informed and or given opportunity to defend the decision to charge him without the Respondents first considering available primary evidence of the makers and witnesses of the impugned documents. The decision was unlawful, unreasonable and procedurally unfair.

63. It was the Ex-parte Applicants case that they had demonstrated a case of abuse of power, the law and the Constitution by the Respondents. They were however quick to point out that they were not seeking the veracity of the facts or evidence proving or disapproving facts of or innocence or otherwise of the evidence against the 1st Ex-parte Applicant but the decision taken to charge him. Further, there is no challenge of the 1st Respondents powers under Article 157 of the Constitution but that the said powers are be abused and are ultra vires Article 157(11) of the Constitution.

64. The applicants therefore urged the Court to exercise its powers under Article 165 of the Constitution to stop the abuse of process and protect violation of the Constitution and the law by granting the orders sought herein with costs.

Respondents' Case

65. In opposition to the application, the Respondents averred that investigations into the matter the subject of the application herein and the intended criminal charges commenced subsequent to the following three complaints; namely:

a. On 1st February 2014, the Directorate of Criminal Investigations received an anonymous complaint letter to the effect that, **Guy Elms Spencer** (Mr. Elms), the first ex parte applicant herein, who was an advocate for one **Roger Bryan Robson** (deceased), had changed the deceased's Will so as to reflect him as the sole beneficiary. The letter further stated that, the said advocate had transferred the property in question to himself and intended to sell it at a purchase price of Kenya Shillings Seventy Million(Kshs 70,000,000.00).

b. The property in question was registered as Land Reference No. 2327/10 and 2327/117 (**the property**).

c. On 5th January 2015, **Mr. Elms** wrote to the Directorate of Criminal Investigations requesting investigations to be carried out in respect of the property which he alleged had been invaded by fraudsters without his permission as the sole executor of the deceased's Will.

d. On 22nd January 2015, the Directorate of Criminal Investigations received another complaint letter from the Law firm of Mokua and Company Advocates on behalf of one **Miss Agnes Kagure Kariuki** (complainant) to the effect that, the complainant was the registered owner of the property and further that, there were two publications as the ownership of the land in question. Attached to the letter were registration documents including a conveyance and a copy of indenture.

66. It was averred that following the above complaints, investigations commenced into the matters in question with a view to establish the authenticity of the complaints which investigations established that the property in question, that is to say, LR, No. 2327/10 and LR, No. 2327/117 belonged to the deceased who had purchased the same from one **Nancy Javens** in 1978; that **Mr. Elms** obtained a grant of probate for the estate of the deceased **Mr. Rogers Bryan Robson** from the High Court on 30th December 2013; that the grant of probate referred to above is in issue in High Court Succession Cause No. 955 of 2015 in which the High Court has issued preservation orders; that while applying for grant of probate, **Mr. Elms** based his application on a Will purportedly written and signed by the deceased, **Mr. Robson**, on 28th January 2010.

67. According to the Respondents, in her statements to the police investigators, the complainant, **Miss Agnes Kagure Kariuki** (complainant) stated that:

a. She purchased the property in question from the deceased at a cost of Kenya Shillings One Hundred Million (Kshs 100,000,000.00) which she paid in two instalments and which the deceased acknowledged.

b. The agreement was entered into on 1st September 2011 after full payment of the purchase price and the property was subsequently transferred to herself,

c. In the course of investigations, a police officer from Hardy Police station requested her to take the title documents to the police station but instead she went to the Lands office where they were scrutinised and later returned to her.

68. It was averred that according to the statements recorded from **Mr. Michael Osundwa Sakwa**,

advocate, on 18th November 2011, he drew a conveyance between **Roger Bryan Robson** and **Agnes Kagure Kariuki** in respect of the property LR. No. 2327/10 and LR. No. 2327/117 and witnessed the two append their respective signatures on the conveyance. Further, a statement was recorded from one **Geoffrey Keverenge Mtange**, a manager at the firm of Zablon Mokua & company advocates who stated that, on 3rd September 2011, the firm received instructions from the complainant to act for her in witnessing receipt of the purchase price. The firm requested the firm of S. Ogeto Ongari and Company Advocates to act for them as they were out of town and **Mr. Stephen Ogeto Ongori**, advocate confirmed that, he received instruction from the firm of Zablon Mokua and Company Advocates to witness receipt of the purchase price. He witnessed the payment of the purchase price by **Miss Kariuki** (complainant) to **Mr. Rogers Bryan Robson**.

69. The Respondent averred that according to **Mr. Mark Muigai Wanderi**, a Land Registrar, on 19th January 2015, he received a request from Hardy police station to ascertain the authenticity of two copies of documents for the property in question. As he could not locate the originals at the Lands Registry, he requested the parties to produce the alleged original but only the complainant presented documents which according to him were genuine. Accordingly, a statement was recorded from the Registrar of Titles, **Mr. Peter N. Mburu** who stated that, according to the records held at the Lands Office, the two parcels of land initially belonged to one Roger Bryan Robson who later transferred the same to the complainant. Similarly, it was disclosed that according to a statement recorded from a former employee of the deceased, one **Mr. James Munuve Mutisya**, **Mr Elms** enquired from him (**Mr. Mutisya**), the whereabouts of the title documents of the property in question and he believed that, **Mr. Elms** was asking for the same since he did not know where the documents were. The Respondents disclosed that in his statement to investigators, **Mr. Elms** admitted that, he opened a cabinet in which the deceased kept his personal documents and retrieved documents related to the land in question.

70. The Respondents further averred that as part of the investigations and enquiries made by the investigation team, the known signatures of the deceased were subjected to forensic examination by a Forensic Document Examiner, **Mr. John Muinde** to ascertain the authenticity of the Will and the Power of Attorney presented to investigators by **Mr. Elms** and according to the Forensic Document Examiner's Report:

> a. The signatures on the Sale Agreement, Conveyance as well as the acknowledgement receipts were the authentic signatures of the deceased, Roger Bryan Robson.
>
> b. The Forensic Document Examiner confirmed that, the purported signatures of the deceased on the Will and the Power of Attorney were forgeries.

71. In addition to the Forensic Document Examiner's Report referred to above, it was averred that in another case, another Forensic Document Examiner, **Susan Wambugu**, also examined the purported Will and Power of Attorney allegedly executed by **Mr. Roger Bryan Robson** and concluded, as did the **Mr. Muinde**, that they were forgeries.

72. It was averred that in the course of investigations, the first ex parte applicant was requested by the Directorate of Criminal Investigations to submit documents for forensic examination but failed to do so and at the conclusion of investigations, the Director of Criminal Investigations(DCI) recommended that, **Guy Spenser Elms** be charged with the following two offences:

> a. Forgery contrary to Section 347(d)(i) of the Penal Code as read together with Section 349 of the Penal Code; in respect of forgery of the signature of Roger Bryan Robson on the Will dated 24th March, 1997 purportedly appointing Guy Spencer Elms as the co-executor to the will of the said Roger Bryan Robson.
>
> b. Forgery contrary to Section 347(d)(i) of the Penal Code as read together with Section 349 of the Penal Code; in respect of forgery of the signature of Roger Bryan Robson on the Power of Attorney No. IP/A 53713/1 dated 28th January, 2010 purportedly donated to him by the said Roger Bryan

Robson.

73. According to the Respondent, in exercise of the powers conferred upon him under Article 157 sub Article 6(a) of the Constitution, the Director of Public Prosecutions independently analysed and reviewed the evidence gathered by the Directorate of Criminal Investigations and concluded that, the said evidence was sufficient and disclosed a criminal case and therefore made the decision to prefer criminal charges against Mr. Elms, the first ex parte applicant. Therefore the decision to prosecute the ex parte applicant was made on the basis of the fact that, there was sufficient evidence and further that, both the evidential test and the public interest test under Article 157(11) of the Constitution and the National Prosecution Policy had been satisfied. At the hearing hereof, the respondents shall crave leave of the court to refer to the National Prosecution Policy for its full meaning, purport and content.

74. In the Respondent's view, the decision to prefer criminal charges was based on the fact that, the evidence in the investigation file disclosed sufficient and a prima facie case with a realistic chance against **Guy Elms Spencer** for the following main reasons, inter alia;

a. The Forensic Document Examiners' Report confirmed that, the signatures on the Sale Agreement, Conveyance as well as the acknowledgement receipts were the authentic signatures of the deceased, Roger Bryan Robson. This supported the case by the complainant that she bought the property in question from the deceased.

b. On the other hand, the Forensic Document Examiner's Report did confirm that the purported signatures of the deceased on the Will and the Power of Attorney were forgeries. Mr. Elms relied on the forged documents to obtain grant of probate of the Will for the estate of Roger Bryan Robson.

75. With respect to the evidential test, the Respondents relied on Lord Denning's decision in ***Miller vs. Ministry of Pensions, [1947] 2 ALL ER 372*** where the Judge stated:

> ***"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."***

76. It was the Respondent's position that the Applicant has not demonstrated that in making the decision to charge the Director of Public Prosecutions has abrogated any provision of the Constitution, any written law or any rules made thereunder 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.

77. Dealing with the prayers sought, it was contended that an order of Certiorari issues to quash a decision made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons and that these grounds had not been proved.

78. It was the Respondents' case that the application herein is incompetent, bad in law, misconceived and an abuse of the court process in that, on 11th November 2016, the 1st ex parte applicant filed High Court Miscellaneous Application No. 414 of 2016, **Guy Spencer Elms versus The Inspector General of the National Police Service and 2 Others** which he subsequently withdrawn on 22nd November 2016 while these proceedings were pending before a competent court. It was therefore sought that the application and the statutory statement dated 18th November 2016 together with the substantive Notice of Motion application dated 1st December 2016 be dismissed and the criminal trial against the ex parte applicant be allowed to proceed to its logical, judicial conclusion.

79. It was submitted on behalf of the Respondent that the grounds in support of the applications together with the verifying affidavit and the statements of facts and the annextures thereto all amount to evidence. The said pleadings have failed in total to demonstrate how the decision by the DPP to prefer charges is without or in excess of the powers of the DPP under the Constitution and the Office of the ***Director of Public Prosecutions Act, 2013***. To the Respondents, the matters raised by the ex parte applicants in the pleadings filed herein form the basis of their defences which should be raised before the trial court and as such cannot be raised before the High Court in the manner proposed herein. It was the Respondents' position that the laws of Kenya provide essential safeguards for a fair trial which is also entrenched in the Constitution of Kenya 2010 and it has not been demonstrated that the ex parte applicants will not be accorded a fair trial before the subordinate court to warrant the granting of the orders sought. To the contrary, the ex parte applicants will have their day in court with the opportunity to challenge evidence, cross examine witnesses, tender their own evidence and generally invoke such provisions of the Constitution of Kenya 2010, ***Evidence Act***, Cap 80, ***The Criminal Procedure Code*** Cap 75, the ***Penal Code***, Cap 63, inter alia.

80. The Respondents submitted that the issues deposed to in the affidavits sworn herein are matters of fact and evidence whose authenticity, relevance and validity can only be ascertained through examination before a court of law, because the matters deposed to are meant to demonstrate the innocence of the ex parte applicant, yet the High Court cannot make a finding on the innocence of guilt of the ex parte applicant. It was therefore the Respondents' view that the fact that there are numerous contested matters is a proper ground to decline the application herein and let the ex parte applicant to raise the same before the trial court. In this respect the Respondents relied on the High Court Petition No. 446 of 2015, - **Pauline Adhiambo Raget vs. The Director of Public Prosecutions & 2 Others**, in which the court held at paragraphs 47 and 49 that:

> **"It is not for this court to sieve through the evidence and determine whether or not the petitioner ought to be prosecuted. It would only be speculative for the court to state that it is wrong to prosecute the petitioner when the decision is yet to be made but also a usurpation of a role which has been exclusively reserved both by statute as well as the Constitution for another office in the 3rd respondent…The court should not act as an appellate court to sieve through the evidence of a matter still before the Kenya Police Service or the Director of Public Prosecutions to determine whether or not prosecution should be instituted. Even then, I am satisfied that from the investigations and the results thereof as detailed in the affidavit filed by the respondents in reply , there appears to exist a factual foundation to enable one reasonably conclude that the petitioner was involved in criminal activity."**

81. With respect to the allegation of the failure to take into consideration the Forensic Examination Report of **Mr. Kenga**, it was submitted that to rely on this Report is tantamount to taking evidence in an application for Judicial Review to ascertain whether or not the ex parte applicant is innocent or guilty which is a preserve of the trial court more so as the respondents have furnished the High Court with a Forensic report to illustrate the basis of preferring charges and the involvement of the ex parte applicant.

82. On the issue of failure to record certain statements, the Respondents relied on section 143 of the ***Evidence Act***, Cap 80 Laws of Kenya which provides that:

> ***No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.***

83. In their view, the evidence available is sufficient to form a basis to prosecute and prefer charges and the ex parte applicant has not demonstrated that, there is intention to shut out any witnesses.

84. In support of their case the Respondents cited several decision both local and foreign

Interested Party's Case

85. On her part the interested party herein, **Agnes Kagure Kariuki** (hereinafter referred to as "the

Complainant"), averred that she is the material witness in the criminal complaint lodged with the Respondents in respect of the intended prosecution against the 1st *Ex-Parte* Applicant herein **Guy Spencer Elms**. According to the complainant the origin of this matter and the issues herein are in relation to her properties known as **LR. No. 2327/10 and 2327/117** situate in Karen Nairobi whose ownership is in dispute before the Environmental and Land Cases Court in **Case No. 80 of 2015** and **High Court Succession Case No. 955 of 2015** In the matter of the Estate of the Late **Roger Bryan Robson.**

86. According to her, sometime in July 2011 she entered into a Sale Agreement with the Deceased for the Sale and Purchase of the said 2 parcels of land in Karen that were registered under his name a the agreed purchase price of Kshs. 100,000,000.00. which sum she paid witnessed by **Stephen Ogeto** Advocate of Messrs **S. Ogeto Ongori & Co. Advocates** receipt of which the vendor acknowledged. Following the transfer thereof to her, through a Conveyance Deed dated 18th November 2011 duly executed by both parties to the transaction, the Complainant immediately took possession thereof.

87. According to the complainant, sometime in late 2013 she had instructed her agents to clear the properties for future development and to offer general security when the *ex-parte* 1st Applicant herein surfaced claiming ownership of the property under authority of an alleged Will claiming to have been appointed the Executor of the deceased and that the properties formed part of the residue of the Estate of the Deceased. Despite being informed of the Sale Agreement the ex parte applicant persisted in challenging the Complainant's rightful ownership to the properties and filed a complaint against her at Hardy Police Station seeking Police assistance to evict her claiming that she had forged the transfer documents. The Police at Hardy invited both parties to present documents and relevant details on the ownership of the property for scrutiny by the department of lands with a view to resolve the standoff. Though the Complainant duly presented the original Indenture transferring the property to the Late Mr. Robson that was in her custody having received it from the deceased during the sale process, it was averred that the 1st never availed the documents to the department of lands for scrutiny as instructed by the Police; including the original title documents over the properties that he claimed were in his possession. The Complainant however averred that the Department of Lands confirmed the validity of her documents and returned them to her since the documents confirms that she is the legitimate owner of the said properties.

88. As such the Complainant sought to challenge issuance of Grant of Probate to the 1st Applicant on grounds that the proceedings therein incorporated her properties that ought not to have formed part of the Estate of the Deceased and accordingly lodged an objection. It was averred that since her claim was restricted to the two material properties only in the Succession Cause, the presiding Judge in the Cause **Lady Justice L. Achode** on 24th March 2015 confirmed the Grant as sought by the 1st Applicant but excluded her properties from the Succession Cause and advised that she seeks resolution of the ownership of the suit properties before the Environmental and Lands Cases Court. Accordingly the 1st Applicant filed the above mentioned ELC suit No. 80 of 2015 against the Complainant to determine the ownership of the suit properties which suit is still pending for hearing before the ELC Court.

89. According to the Complainant, during the pendency of the said suits she learnt from the media that the Director of Criminal Investigations Department had received two complaints seeking activation of investigations over the suit properties; one of which was lodged by the 1st Applicant requesting the 2nd Respondent, the Director of Criminal Investigations to undertake investigations as to her proprietorship of the properties. The Complainant correspondingly lodged a complaint on 22nd January 2015 with the Director of Criminal Investigations through her lawyers Messrs Mokua & Company Advocates against the 1st Applicant claiming that he was interfering with her ownership and peaceful possession of the suit premises.

90. Pursuant to the said complaints, the Director of Criminal Investigations Department invited the applicant on several occasions to record statements and provide details to support her case which the Complaint did on various occasions and supplied the Director of Criminal Investigations Department with documents and the details of her ownership of the properties. Based thereon, the Director of Criminal Investigations Department through their laboratories and proficiency concluded that the Complainant's

documents including the sale agreement, the conveyance and title documents were genuine and further confirmed that her affirmations on the transfer of the properties to her were legitimate. The Director of Criminal Investigations Department however concluded that the documents and in particular the Will that the 1st Applicant is relying on as a basis to claim ownership on her properties are all forgeries and resolved to charge the *ex-parte* 1st Applicant herein with Forgery and related counts.

91. It was averred that the *Ex-parte* 1st Applicant lodged an application before the High Court Criminal Division in Misc. Application No. 414 of 2016 seeking anticipatory bail pending the intended charges against him which application was dismissed by the **Hon. Lady Justice Grace Macharia Ngenye**.

92. It was submitted on behalf of the Complainant that the decision to charge the applicant was based on rational suspicion and scientific proof that indeed the applicant was benefitting from a forged instrument with intent to defraud. Upon receiving the complaints the 2nd Respondent carried out investigations by inviting all the stakeholders to participate in the investigations. The Director of CID pursuant to his mandate to collect and provide intelligence requested the participants to provide all relevant documentation to assist in the investigations. All the participants, including the interested party and the Department of Lands officials participated and provided documentations to aid in the investigations. It is on record that the Applicant has declined to date to submit the original documents to the Respondents for purposes of investigations claiming that the respondents were biased and vile motived and that he was apprehensive that the Respondents will destroy or interfere with the evidence to the prejudice of the Estate. With respect, this statement by the *Ex-Parte* Applicant who is an Advocate of this Honourable Court, is at the least unfortunate and is suggestive of a lack of regard of the Law of this Country by the Applicant. The applicant was given an opportunity to assist in the investigations but he opted to carry out his own investigations. He therefore cannot claim that the Investigations were biased.

93. It was submitted that the Director of CID has been mandated under **section 35(g)** of the ***National Police Service Act No. 11A of 2011*** to undertake forensic analysis while undertaking investigations, the State has equipped the 2nd Respondent with scientific tools for the furtherance of this duty to achieve correct and accurate conclusions when conducting forensic investigations. The State has invested heavily on this tools and equipment and has trained and gazetted the forensic analysts who conduct these assignments. In that regard the Director of CID carried out forensic analysis of the documents in regard to the investigations herein. It was the finding of the Forensic Document examiner that the Interested Party's title documents were genuine and that the documents relied on by the applicant were confirmed to be forgeries. This conclusion was arrived through scientific precision.

94. According to the Complainant, the *Ex-parte* Applicant however opted to commence a parallel investigations and took his documents to an unlicensed individual alleged to possess the skills of a document examiner and who supposedly confirmed that his documents were genuine. The *Ex-Parte* applicant in that regard seeks the court's protection arguing that his investigations are superior to the investigations carried out by the State. It was however submitted that the Applicant has no right whatsoever to select how investigations against by the State ought to be carried out since the Director of Criminal Investigations Department is not required to take instructions from anyone else while performing his statutory obligations but shall only be responsible for the Inspector General pursuant to section 29 (8) of the ***National Police Service Act***; and shall perform his duties as assigned to him by the Inspector General under section 29(9) of the same Act.

95. It was therefore submitted that the applicant has failed to demonstrate that the Respondents in resolving to charge him a) failed to comply with statutory requirements, b) failed to comply with rules and principles of natural justice, c) Acted ultra vires and as such the Judicial Review reliefs are not open to him. The applicant ought to prepare a defence in trial for the proposed charges against him. To her, the decision to charge the *Ex-parte* Applicant was based on actual facts and on preponderance of evidence against the Applicant. The 1st Respondent is mandated under Article 157 (6) (a) of the Constitution to commence criminal charges against any person for any offence alleged to have been committed. 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.***

96. It was therefore contended that pursuant to the foregoing exclusive constitutional authority, the 1st Respondent has rightfully and lawfully exercised their mandate to consider charging the 1st Applicant with the material offence. To the Complainant, the 2nd Respondent is a State office duly established under the section 28 of the ***National Police Service Act No. 11A of 2011*** whose functions at **Section 35** include a) collection and provision of criminal intelligence to the State; b) Undertaking investigations; g) Conducting Forensic Analysis; h) Executing directions given to the Inspector General by the 1st Respondent under Article 157 (4) of the Constitution. In this respect the Complainant relied on **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR** and averred that pursuant to the foregoing mandate the 2nd Respondent undertook investigations as to the circumstances surrounding the complaints lodged with respect to the competing claims as to the ownership of the interested party's properties in Karen Nairobi County which investigations were triggered by complaints lodged by not only the Complainant but also a complaint lodged by the Applicant. To the Complaint, the only way the applicant can absolve himself is by the process of a criminal trial. In view of the foregoing the Complainant submitted that the investigations and the subsequent resolutions in these matters as reached by the respondents are lawful and within their mandates as provided under the Law.

97. While the Complainant appreciated that the High Court has discretion and jurisdiction to prohibit, bring to a halt or quash criminal proceedings, it was her case that it is always important to remember that in these types of proceedings the Court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings and relied on **Republic vs. Director of Public Prosecution & 4 others Ex-Parte Shamilla Kiptoo & 5 Others [2016] eKLR**, **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69, Godfrey Mutahi Ngunyi vs. Director of Public Prosecutions & 4 Others [2015], Director of Public Prosecutions vs. Humphreys [1976] 2 All E R 497**, **Republic vs. Director of Public Prosecution & Another Ex Parte Chamanlal Vrajlal Kamani & 2 Others [2015] eKLR** , and concluded that this Court ought to dismiss the application by the *Ex-Parte* Applicant with costs to the interested party.

Determinations

98. I have considered the application, the affidavits both in support of and in opposition to the application, the submissions made by the parties and the authorities relied on in support thereto.

99. The principles which guide the grant of the orders in the nature sought are now well settled. 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. It is however always important to remember that in these types of proceedings the Court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings. The Court ought not to usurp the mandate of the Respondents herein to investigate and undertake prosecution in the exercise of their discretion conferred upon that office under Article 157 of the Constitution and that the mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review. This is so because judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.

100. 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."**

101. In **Meixner & Another vs. Attorney General [2005] 2 KLR 189**, the same Court 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 if 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."**

102. In **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** it was held that:

> **"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, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far 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. It is further alleged that the criminal prosecution is an abuse**

of the court process epitomised by what is termed as selective prosecution by the Attorney General. It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been be argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law...In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed...There is nothing which can stop them from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made...Under section 77(5) of the Constitution it is a constitutional right that no person who has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of the offence. What is clear from this constitutional right is that it prevents the re-prosecution of a criminal case, which has been determined in one way or another...”

103. Finally, in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** it was held that:

“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. 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. 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."

104. 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.***

105. 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.

106. It is therefore clear that the prevailing statutory and constitutional regime decrees that in the exercise of their powers and discretion, the Respondents must do so 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. I associate myself with the sentiments expressed 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."**

107. 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."**

108. 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".

109. Therefore the police are expected to be professional in the conduct of their investigations and ought not to be driven by malice or other collateral considerations and the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. I say ordinarily because the mere fact that the version of one of the parties is not considered is not necessarily fatal to the prosecution. However, whereas it is alleged in this case exculpatory evidence is presented to the police in the course of investigation and for some reasons unknown to them they deliberately decide to ignore the same one can only conclude that the police are driven by collateral considerations other than genuine vindication of the criminal judicial process. Neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of malice and hence abuse of discretion and power.

110. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the DPP to investigate and prosecute ought to be interfered with.

111. In this case, what comes out is that the 1st applicant and the interested party herein lodged complaints against each other. Both of them were summoned to avail their supporting documents to the police. Whereas the interested party did so, the applicant failed to provide his documents. According to the 1st applicant, the reason why he did not submit the original Indenture with respect to LR. No. 2327/10 and 2327/117 and the Power of Attorney donated to him by the deceased and or all the original documents of title for forensic analysis as requested by the 2nd Respondent, was due to the imminent hearing in *Nrbi, ELC. No. 80/2015* that was forthcoming at the time of the request. He however averred that he did offer them for inspection at their offices and sent copies of the same to them.

112. Nevertheless the 2nd Respondent's investigations revealed that the documents furnished by the interested party were genuine while those that emanated from the 1st applicant were not. The 1st applicant however contended that the alleged forensic reports relied upon by the Respondent in the Replying Affidavit were erroneous and biased. The 1st Applicant disclosed that he had requested that independent international neutral experts be brought in to review the disputed documents. To him the reports are not open or transparent as the standard unit or basis is biased, erroneous and secretive; the alleged known signature of the deceased is erroneous, secretive or signatures of a different person other than the deceased.

113. It was further his view that in any event, the forensic reports are opinions in law which require corroborative evidence yet the Respondents have not illustrated any reasonable explanation or excuse for failing and or refusing to consider cogent primary and crucial evidence of the readily available drawer and witnesses of the deceased Will and or Power of Attorney in dispute and or exceptions for basing the decision to charge him for forgery based on secondary evidence particularly forensic report/opinions hereof.

114. The 1st applicant averred that he had also instructed an independent document examiner-**Mr. Emmanuel Kenga** who compared the signatures of the deceased on the Power of Attorney and the Will in issue as well as the deceased alleged signatures on the title documents produced by **Agnes Kagure Kariuki** as against known signatures of the deceased on various disclosed documents signed by the deceased while he was alive. To him, the said forensic examiner opined that the signatures of the deceased on the Will and Power of Attorney indicate they were made by similar author but the

Respondents have declined or have not illustrated consideration of the said report despite being furnished. In his view, the said report is transparent and illustrative by evidence of independent sources of the deceased known signatures unlike the Respondent's reports.

115. This Court cannot at this stage make a finding as to whose forensic report was proper. That being an opinion evidence, it is for the trial Court to assess the totality of the evidence before it including the opinion evidence which in law is not necessarily binding on the Court and arrive at its own conclusion. As those parties lodged complaints against each other, it is clear that there was an appreciation on the part of both that a crime may have been committed. It is not for this Court to dictate to the Respondents on how to conduct their investigations. As long as the same are being conducted fairly and lawfully, the fact that their decision on who to charge may be erroneous is not necessarily a ground to halt the intended criminal process. In my view, the intention to charge the 1st applicant cannot, based on the material placed before me, be said to have been farfetched.

116. The 1st applicant's case in effect is that the offences with which he is charged cannot, based on the evidence in his possession, be sustained. Further based on the evidence collected by the Respondents so far, such a charge cannot be sustained without recording statements from all potential witnesses. I however associate myself with the opinion in **Meixner & Another vs. Attorney General** (supra) that:

> **"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."**

117. The 1st applicant believed that he was protected under the laws of succession for faithfully and dutifully discharging his obligations under a Grant of Probate that has been granted to him by the Court in respect of the Estate of the deceased. The 1st applicant therefore believed that the decision to charge him in complete disregard of the above facts is a tactic by the Respondents to intimidate, harass and threaten him into giving up on the suit that he has filed in the Environment and Land Court so that the fraudulent claimants can freely transfer the said properties into their own names.

118. However in **East African Community vs. Railways African Union (Kenya) and Others (No. 2) Civil Appeal No. 41 of 1974 [1974] EA 425**, it was held by the East African Court of Appeal that the onus lies on a person seeking the grant of a prerogative order to establish that it is essential for it to issue since these are not orders that are lightly made. Judicial review or prerogative writs as they were known in the past, it has been held, are orders of serious nature and cannot and should not be granted lightly. They should only be granted where there are concrete grounds for their issuance. It is not enough to simply state that grounds for their issuance exist; there is a need to lay basis for alleging that there exist grounds which justify the grant of the said orders.

119. I associate myself with the holding in **Republic vs. Kenya Power & Lighting Company Limited & Another [2013] eKLR** to the effect that:

> **"It is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted."**

120. In this case the 1st applicant ought to have pinpointed at express actions on the part of the Respondents that show the Respondents' actions are driven by other motives other than a genuine desire to vindicate the commission of a crime. In other words it does not suffice to simply believe that the decision to charge him is a tactic by the Respondents to intimidate, harass and threaten him into giving up on the suit that he has filed. There ought to be a basis on which such a belief is founded in order for the Court to gauge whether that motive is the paramount one.

121. It was therefore held in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** that:

> **"A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution.....In the instant case there is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even of manipulation of court process so as to seriously deprecate the likelihood that the applicants might not get a fair trial as provided under section 77 of the Constitution...There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an "abuse of process", is a "manipulation", "amounts to selective prosecution" or such other processes, or even supposing that the applicants might not get affair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts."**

122. As was aptly put in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR**:

> **"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".** [Emphasis mine].

123. It was averred by the 1st Applicant that it is against public policy and public interest that a mere executor and or personal representative of the Estate of a deceased person can be charged on the basis of a testamentary instrument that is clearly authored by a third person and which personal representative has as well been granted Grant of Probate of Written Will by this Court and or being charged for discharging his mandate as stipulated under the ***Law of Succession Act***, Chapter 160, Laws of Kenya. It was therefore the applicants' case that the allegations forming basis of the Respondents' letter of 2nd November 2016 are, although false, misconceived, purely of a civil claim and *sub judice* as they are the subject of proceedings in the abovementioned suit being Nairobi, ELC No. 80 of 2016 among other pending suits appertaining to the suit properties and as such the Respondents have exceeded their scope of authority which is an abuse of the criminal justice system.

124. First and foremost, it is important to state that apart from the allegation of forgery relating to the Will the other offence is in respect of forgery of the signature of **Roger Bryan Robson** on the Power of Attorney No. IP/A 53713/1 dated 28th January, 2010 purportedly donated to the 1st applicant by the said **Roger Bryan Robson**. Accordingly, even if this Court as to find that the issue relating to the Will is the subject of the Succession Cause, that would not automatically terminate the allegations of the offence relating to the Power of Attorney.

125. The applicants have, going by their allegations, put forward what appears to be a formidable defence to the criminal charges facing the 1st applicant. However, in these kinds of proceedings, it is not sufficient to do so since this is not the Tribunal where the merits of the applicants' case is to be determined. It would be upon the prosecution to show at the trial that the defences which the applicants have alluded to are not available to them. In these proceedings however, the rules are reversed and it is upon the applicants to show that there possibly cannot be any prosecutable case against them, a burden which is no doubt heavy as it has the result if determined in favour of the applicants, of barring the Respondent from

executing its constitutional and statutory mandate. I associate myself with the decision of **Majanja, J** in HC. Pet. No. 153 of 2013; **Thuita Mwangi and 2 Others vs. the Ethics and Anti-Corruption Commission**, that:

> **"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."**

126. This Court appreciates that the court should not simply fold its arms and stare at the squabbling litigants/disputants parade themselves before the criminal court in order to show-case dead cases. The seat of justice is a hallowed place and ought to be preserved for those matters in which the protagonists have a conviction and stand a chance of seeing the light of the day. In my view the prosecution ought not to institute criminal cases with a view of obtaining an acquittal. It is against the public interest as encapsulated in section 4 of the ***Office of the Director of Public Prosecutions Act*** to stage-manage criminal proceedings in a manner intended to obtain an acquittal. A criminal trial is neither a show-biz nor a cat-walk.

127. However it must also 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 acquittal 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 is merited.

128. The 1st applicant contended that being an Advocate of the High Court of Kenya, and a Senior Partner in one of the most prestigious law firms in the city of Nairobi, being charged with forgery of a testamentary document that he is not the author thereof and or his firm will occasion great prejudice and irreparable loss and injury to the reputation of his firm as his clients and potential clients will shy off and avoid his firm thus lead to loss of business and revenues to the firm. It is not in doubt that there is a certain amount of embarrassment caused to those facing criminal trials. However as was held in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69:**

> **"The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial..."**

129. I am also in agreement with the sentiments expressed in **Dream Camp Kenya Ltd vs. Mohammed Eltaff and 3 Others Civil Appeal No. 170 of 2012** that:

> **"Every litigation is inconvenient to every litigant in one-way or another. Also no one in his right senses enjoys being sued and ipso facto no one cherishes litigation of any nature unless it is absolutely necessary. With respect, we accept litigation is expensive and no litigant would enjoy the rigours of trial. The aftermath of vexatious and frivolous litigations is normally taken care of by way of costs. The discomfort of litigation would not certainly render the success of the intended appeal nugatory if we do not grant the application sought.**

If the learned Judge is eventually found wrong on appeal, and the applicant succeeds in its intended appeal, then the orders so made by the learned Judge would be quashed and the applicant would be compensated for in costs."

130. As was held in **Jago vs. District Court (NSW) 106**:

"An abuse of process occurs when the process of the court is put in motion for a purpose which, in the eye of the law, it is not intended to serve or when the process is incapable of serving the purpose it is intended to serve. The purpose of criminal proceedings, generally speaking is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and, on that account, is deserving of punishment. When criminal process is used only for that purpose and is capable of serving that purpose, there is no abuse of process...When process is abused, the unfairness against which a litigant is entitled to protection is his subjection to process which is not intended to serve or which is not capable of serving its true purpose. *But it cannot be said that a trial is not capable of serving its true purpose when some unfairness has been occasioned by circumstances outside the court's control unless it be said that an accused person's liability to conviction is discharged by such unfairness. This is a lofty aspiration but it is not the law*." [Emphasis mine].

131. In **Erick Kibiwott & 2 Others vs. Director of Public Prosecution & 2 Others Judicial Review Civil Application No. 89 of 2014** this Court expressed itself as hereunder:

"…In determining the issues raised herein the Court will therefore avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial court. Dealing with the merits of the application, it is trite that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review proceedings are not concerned with the merits but with the decision making process."

132. In the instant case, the 1st Applicant has failed to discharge the burden and must be ready to face his accusers as was stated by **Lenaola, J** (as he then was) in **Daniel Ndungu vs. Director of Public Prosecutions & Another (2013) eKLR**:

"In conclusion, the Petitioner ought to face his accusers, prove his innocence or otherwise and submit to the consequences of the Law should he be found culpable".

133. In the premises I find no merit in this application. As was held in **Kuria & 3 Others vs. Attorney General,** (supra):

"In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names."

134. Consequently, the Notice of Motion dated 1st December, 2016 fails and is dismissed with costs to the Respondents and the Interested Party.

135. Orders accordingly.

Dated at Nairobi this 14th day of June, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Litooro and Mr Wageche for the applicant

Miss Khaemba for the Respondent

CA Mwangi