REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC CIVIL CASE NO. 435 OF 2014

IN THE MATTER OF ARTICLES 19, 20, 21, 23, 24, 25, 27, 28, 29, 36, 47, 49 & 50 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 19, 25, 27, 28, 29, 36 & 47 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF INTENDED ARREST AND/OR CRIMINAL PROSECUTION

BETWEEN

REPUBLIC……..…….....…….APPLICANT

VERSUS

THE DIRECTOR OF CRIMINAL INVESTIGATION DEPARTMENT..…1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.….....……...2ND RESPONDENT

THE DIRECTOROF PUBLIC PROSECUTIONS…….....…...…3RD RESPONDENT

AND

BRITISH AMERICAN INVESTMENTS COMPANY (K) LTD....…..…INTERESTED PARTY

EX PARTE:

EDWIN HAROLD DAYAN DANDE….....…1ST EX PARTE APPLICANT

ELIZABETH NKUKUU…….....……2ND EX PARTE APPLICANT

SHIV ANOOP ARORA……..…….....…...…3RD EX PARTE APPLICANT

PATRICIA NJERI WANJAMA..….....……4TH EX PARTE APPLICANT

CYTONN INVESTEMENT MANAGEMENT LIMITED…...……5TH EX PARTE APPLICANT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 17th November, 2014, filed in Court on 19th November, 2014, the *ex parte* applicants herein, **Edwin Harold Dayan Dande, Elizabeth Nkukuu, Shiv Anoop Arora**, **Patricia Njeri Wanjama** and **Cytonn Investment Management Limited** seek the following orders:

> **1. An order prohibition, prohibiting the Inspector General of the National Police Service and the Director of the Directorate of Criminal Investigation whether by themselves, their servants and/or agents rom arresting, harassing and/or in any other manner interfering with the liberty and/or property of the ex parte applicants.**
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> **2. An Order of mandamus compelling the Inspector General of the National Police Service and the Director of the Directorate of Criminal Investigation to return forthwith the cellphones impounded from Elizabeth Nailantei Nkukuu, Patricia Njeri Wanjama and Shiv Anoop Arora.**
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> **3. Costs of and occasioned by the Application.**

Applicants' Case

2. According to the applicants, the 1st to 4th ex parte applicants were until they resigned in August/September, 2014 and formed the 5th ex parte applicant (hereinafter referred to as "the Company") employed by the British American Asset Managers Limited (hereinafter referred to as "BAAM"), a subsidiary of the British American Investments Company (K) Limited. The applicants averred that BAAM is licensed as a fund manager by the Capital Markets Authority (hereinafter referred to as "CMA") and the Retirements Benefits Authority (hereinafter referred to as "RBA"). It was averred that BAAM is responsible for the Unit Trusts, Discretionary Portfolios, Cash Management Solutions and Alternative Investments.

3. According to the 1st to 4th ex parte applicants, they were part of the team running BAAM with the 1st Applicant (hereinafter referred to as **Dande)** as its CEO, while the 2nd Applicant (hereinafter referred to as **Ms. Nkukuu)** was the Senior Portfolio Manager and the 3rd Applicant (hereinafter referred to as **Arora**) an Investment Analyst. The 4th Applicant (hereinafter referred to as **Ms Wanjama)** on the other hand was the Assistant Company Secretary as well as the Head of Legal.

4. According to the affidavit sworn by **Dande** in related civil proceedings, a copy of which was exhibited hereto, the facts leading to this case were that he was formerly employed by **British-American Asset Managers Limited** as the Managing Director and Manager of the **BAAM Advisory LLP.** According to him he joined **British-American Asset Managers Limited** as the Chief Executive Officer on or about 18th July 2011 on the understanding and condition that the position:

> a) Involved investments in Africa;
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> b) Was entrepreneurial;
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> c) Had accountability for the profitability performance of the company;
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> d) Would allow him to build a strong team;
>
> e) Had the ability to build wealth for himself and his team;

5. He deposed that the began discussions with the Board on property strategy in August 2011, and on 6th December 2011, BAAM management led by himself did a presentation on property strategy and the

establishment of a Kshs. 10 billion Property Fund whose key issues were that BAAM needed a real estate development partner to work with, seed investment, a governance structure different and distinct from that of the Britam Group (hereinafter referred to as "the group"), and an aligned compensation structure and the recommendations of this presentation were approved by the board. In November 2013, the parties identified Acorn Group Limited (hereinafter referred to as **Acorn**) as their real estate development partner. With respect to seed investment, BAAM acquired Kshs. 1.3 billion as follows: Kshs. 250 million from Britam Insurance, Kshs. 300 million from the Britam Group, Kshs. 655 million from Unit Trust Funds, and Kshs 100 million from BAAM through BAAM Advisory while the balance was raised from private equity from key institutional investors and high net worth individuals.

6. According to the deponent, in November 2011, BAAM launched a new product called Cash Management Solutions (CMS) to take a diversified set of risks so as to provide investors with a high yield. The Cash Management Solutions partnership deed gave the fund manager broad discretionary and amendment powers. Between December 2011 and May 2012, the real estate team was not able to identify and develop any investment grade real estate deals and BAAM management therefore took out an advertisement looking for property deals. The Group Managing Director, **Dr. Wairegi**, was unhappy with this move, stating that it should have been sent out by the group. This notwithstanding, the project went on under BAAM without any objections from him. On 29th June 2012, a meeting was organized to agree on a property search criteria and the invitees included **Dr. Wairegi** and **Ms. Gladys Karuri** from the Group, and **Mr. Kirathe** of Acorn. It was averred that in December 2012, BAAM identified a property deal called Langata House, located at Wilson Airport and this became the first real estate deal to be securitized by a fund manager. BAAM took out another advertisement showcasing its success and that is in fact what attracted Acorn with regard to the partnership aforementioned.

7. It was deposed that in August 2013, the deponent held an initial meeting with the Chief Executive Officer of Acorn, **Mr. Edward Kirathe**, to explore possibilities of working together in various areas, in which meeting it emerged that the two sides had complementary strengths. In order to exploit this, they negotiated and agreed to form an end to end real estate platform spanning from site identification, site acquisition, concept development, statutory approvals, tendering, construction, marketing and sales, leasing and eventual exit. Acorn would be responsible for all development activities and BAAM would be responsible for all financing and exit activities. The deal was primarily in order to develop institutional grade real estate opportunities for BAAM investors. It was agreed in the course of negotiations that BAAM would acquire a 25% stake in Acorn so as to secure the interest of the investors in BAAM by having oversight over the quality of products to be invested in which 25% stake came with two Board seats and committee membership. Leading **British-American Asset Managers Limited's** team was **Mr. Jude Brian Anyiko Oluoch**, its CEO though he was the one now ironically claiming that the agreement was fraudulent and unauthorized.

8. According to the deponent, his team informed BAAM's Board, through a presentation dated 28th August 2013, that they were going to develop "structured real estate products for High Networth Investors, institutional investors and investment vehicles" and this was a deal strictly between BAAM and Acorn, with both roles specified. The Group however had no role in the transaction. When the matter went to Asset Management's investment committee for approval, the Board, without further explanation, "felt that a better strategic fit would be made if the investment was made by the Britam Group" which is majority owned by the members of the Britam Group Board. The Board approved the investment but referred it to the holding company as the investor, thereby denying BAAM investors the opportunity to share in the attractive Acorn investment opportunity as was the aim of this deal in the first place. This, according to the deponent, was the beginning of the conflicts between Acorn/ BAAM and the Group. In his view, the Group was only concerned with its own welfare rather than the welfare of the investors for whom the deal was brokered. This difference in intention laid the foundation for a protracted internal struggle for control and custody of the relationship with Acorn though Acorn was amenable to the change that the Group would be the investor on condition that the relationship was managed at BAAM level. BAAM Management then proposed a structure where the investing entity into AGL would be **Bramer Properties LLP** (Bramer), and the Group would be the investing entity into Bramer while BAAM would have sole management rights over Bramer.

9. It was deposed that on 30th September 2013, BAAM management went to the Investment Committee of BAAM to report the revised deal and it is at this meeting that the Board approved that management proceed and close the transaction. The management, including **Mr. Anyiko**, then informed the Board that they were going to vary the existing Joint Venture agreements as part of the follow up items. After the transaction closed, on 8th and 9th November 2013, Acorn hosted a stakeholder's two-day retreat which was attended by several members of the Group including **Dr. Wairegi**, **Mr. Peter Munga**, **Mr. Jimnah Mbaru**, **Mr. Anyiko**, **Ms. Karuri** and **Donde**, whose express purpose was to *understand the Real Estate Industry and Business Context and the opportunity to discuss and agree on the Strategy and Structure to unlock the opportunity; to review the expectations, roles and responsibilities of each party in this partnership.* Acorn and BAAM jointly presented the deal they had signed and the journey ahead and no one expressed any objections to the proposed structure under which the partnership was going to be conducted. It was in fact endorsed by all the attendees.

10. It was deposed that on 25th November 2013, the first real estate deal for Kshs. 83 million called project Severan, was closed. According to **Donde**, **British-American Asset Managers Limited** and **BAAM Advisory LLP** have never contested the propriety of this project in which the team was led by **Mr Anyiko**, and yet it also did not go through the Board but instead underwent the same processes and procedures now being challenged by them with respect to other projects. However a board meeting was held on 28th November 2013 where an updated pension strategy was presented and with the real estate strategy in place, BAAM was in a position to offer pension funds attractive returns backed by real estate and a product called Mezzanine Fund was proposed.

11. According to **Donde**, some members of the Board and management began to express their reservations about the structure of the transaction, and their thoughts that Acorn was a project manager and not a Developer, to which reservations **Donde** set out clarifying various aspects of the transaction and informed the Board that they were coming up with SPV templates and that they needed to acquire as many sites as possible, and to also establish a Mezzanine Fund. Accordingly, they requested and received approval for the Pension Business Strategy, of which the Mezzanine fund was a critical component and in early December 2013, BAAM and Acorn held an event at Kempinsky to launch the partnership, with the expenses for the event being borne equally by the two partners. On 17th January 2014, **Mr. Anyiko**, as portfolio manager covering real estate, issued a term sheet for Tiarra II Funding for Mezzanine, under substantially the same terms as the rest of the Mezzanine financing that were now under dispute though the authorisation process used in issuing the Term Sheet was precisely the same as the one he now claims to be irregular and unauthorized.

12. It was deposed that on 23rd January 2014, **Dr. Wairegi**, in the presence of **Mr. Kirathe**, confirmed that they should carry on with the execution of the strategy and during a meeting on 5th March 2014, they presented to BAAM Board a detailed list of the deals and Joint Venture agreements they were working on, and detailed that they had received approval requests from Acorn to look at the Joint Venture agreements. **Mr. Anyiko** was in fact the one who prepared the presentation informing the Board of the Joint Venture agreements which he now calls secret and clandestine. To the deponent, the Joint Venture agreements are entities for trade in real estate and being an ordinary course of business transaction, their presentation to the Board was merely for information purpose. It was averred that they subsequently sought board approval to establish BAAM Advisory LLP to be the advising partner on client deal SPVs, as real estate deals require speed. BAAM Advisory LLP would therefore be the contracting partner for SPVs to allow the investment team to move with speed which request was granted.

13. However, the previous discontent with the structure of the deal arose again in this meeting, whereby the Board challenged management to assist with the set up of the Group's own development capability. This again revealed that the Board's focus on their own welfare and benefit, as opposed to that of the investors. The Board was asking management to pursue a strategy in violation of the agreement signed with Acorn and this expectation continued to strain the relationship between the Board and management with regard to the Acorn transaction.

14. According to **Donde** by March 2014, they had spent enough time educating the stakeholders of the

strategy, and had put in place the vehicles needed for execution of the strategy such as Mezzanine Fund and BAAM Advisory LLP. Both the Real Estate Finance and Investment teams were ready to begin working on the products, which had been promised to investors since 2011 and the management came up with a deal process led by **Diana Gichaga**, given her role as head of fundraising. The first deal to be considered was Kileleshwa/Coral Development LLP (Coral K) and the Investment Committee of the Group met on 22nd April 2014, to the exclusion of BAAM management, and as part of their deliberations, recognised that Coral K was a deal being done by the Property Fund/BAAM Real Estate Fund (BREF). **Donde** informed **Mr. Wairegi** that funding would come from the Mezzanine fund. However the Investment Committee, contrary to the partnership deal, decided that they wanted to acquire 80% to 100% of Acorn as part of a strategy to be a leading property developer.

15. At a Board of Directors meeting held on 28th May 2014, the BAAM Board was informed that the establishment of both Mezzanine Fund and BAAM Advisory was complete. Once again, the Board brought up the issue that the Group was unhappy with the Acorn partnership, and asked the Group to conclude its discussions with Acorn by 20th June 2014. BAAM however continued to work with Acorn, identifying sites, and setting up and funding new or varied Joint Venture Agreements, relying on processes jointly developed by BAAM and Acorn, and put in place with the knowledge and approval of **Dr. Wairegi**, **Mr. Mbaru**, **Mr. Munga** and others. BAAM also exercised its authority with respect to the disbursements of the funds as and when required with **Donde**, as Managing Director of BAAM, originating and negotiating key terms of the deal, while the Port Folio Manager and the Investment Associates and analysts would analyse the deal from an analytical risk/return perspective, and if there was concurrence, proceed to document the transaction through Head of Legal after which the Chief Accountant would then send the funds.

16. Donde deposed that in an effort to address the tension over the Acorn partnership, he sought out and met the Group Chairman, **Ambassador Muthaura**, and informed him that the matter needed to be addressed urgently. The following day, he informed **Mr. Wairegi** of the discussion, and that the final payment for Coral K was due. He also asked him if the Group wanted to participate, to which he responded that they were reviewing whether and to what extent the Group would want to participate, if at all. On 15th June 2014, **Dr. Wairegi** requested to understand the use of the drawdown from Group and Insurance BREF totalling Kshs. 550 million and **Donde** responded that they could have a meeting for a briefing session, and expressed his concerns as to the need to rebuild the relationship with Acorn which had been soured by a perception of cold feet on the part of the Group. He also informed him of the BREF launch scheduled for 31st July 2014, and requested clarification on the Group strategy on property. A briefing session was subsequently held at the Capital Club on 24th June 2014, between **Dr. Wairegi**, **Mr. Benson Kamau**, **Ms Karuri**, **Mr. Anyiko** and the deponent, and the draw down for Kshs. 550 million sent to BREF thereafter. On 18th July 2014, **Mr. Kirathe** met **Dr. Wairegi** to discuss the issue that the Group was not satisfied with the returns it was getting through its investment in BAAM since it wanted a bigger stake in Acorn though the GMD was aware of the deal pipeline between Acorn and BAAM.

17. According to **Donde**, on 22nd July 2014, he tried to explain to **Dr. Wairegi** the nature of the risks they were carrying and how to mitigate them but on 24th July 2014, without notice to Acorn or to the deponent, **Dr. Wairegi** stopped further payments from CMS and Mezzanine Fund bank accounts to any LLP. **Donde** then notified **Mr. Kirathe** of the suspension on 28th July 2014, who subsequently met **Dr. Wairegi** and was told by the later that funding would only continue if Acorn sold a bigger stake to the Britam Group. On 31st July 2014, BAAM management wired from BREF, as equity disbursements, the sums that were due to the various SPVs with respect to the various real estate deals that were pending completion and BREF, in return, was allotted a 25% stake in the various SPVs as per the various Joint Venture Agreements. On 6th August 2014, management redistributed the funds in order to preserve the value of the deals and ensure closure when the time came. It was averred that the freeze on payments was in reference to further payments from the CMS and Mezzanine Fund, from which indeed no further payments were made.

18. According to the deponent, by this time, the 1st to 4th applicants in these proceedings had essentially

thrown in the towel and resigned or planned to resign, as the tensions around Acorn, especially the brazen commitment by the Group to take it over, made the work environment too difficult. They handed in their resignation letters according to the terms of their individual contracts and decided that the best way forward was to form an alternative investment shop, the 5th Applicant in this suit. The deponent explained that the move to Cytonn Investments Management Limited did not instigate media propaganda as all they did was to issue a press release informing the public of Cytonn's business activities. He deposed that by 5th September 2014, they had met with the Group Head of Legal and HR to discuss a draft report on Legal Documentation and Audit on British American Real Estate Property Interests of British American Investments Company (Kenya) Limited and Related Entities, prepared by Coulson Harney Advocates. The issues flagged in this report were commercial and governance in nature and there were no allegations of fraud or acting in excess of authority.

19. According to the deponent, on 5th September 2014 and 13th September 2014, he sent his handover notes to **Mr. Anyiko**.

20. According to the Applicants, as at 27th October, 2014, when the Plaintiffs in HCCC No. 354 of 2014 moved the Court accusing the Defendants/Applicants of fraud, BAAM and various entities had earned and accepted returns in the aggregate sum of Kshs 192,022,612/- by way of accrued interest and arrangement fees. According to the applicants, HCCC No. 354 of 2014 is one of the five proceedings which have been instituted by BAAM and other related affiliates of Britam with respect to sums invested on various real estate deals, as part of a partnership between Britam, BAAM and Acorn Group Limited ("AGL'). At the time of filing their respective suits, the Plaintiffs in HCCC Nos. 353, 354, 361 and 362 of 2014, sought and obtained extraordinary wide-ranging ex parte injunctive reliefs essentially halting those real estate deals. Upon being served with the said pleadings and orders, the applicants instructed **Mr. George Oraro** & **Mr. Walter Amoko**, to act for them in the said Civil Suit and commenced preparations for their response.

21. However, on the morning of Friday 7th November 2014, a team of five to six officers, attached to the Serious Crimes Unit of the Directorate of Criminal Investigations, led by **Inspector Koyuer**, went to the applicants'' offices at Liaison House, and demanded to record statements from the 1st, 2nd, 3rd and 4th Applicants though the **Donde** was not in the office at the time. On getting in touch with **Mr. Amoko**, he requested another, Advocate, **Mr. Julius Kemboy** to step in for him in the matter. He further advised that the applicants should not record any statements until **Mr. Kemboy** arrived. **Inspector Koyuer** and his team were quite impatient and declined to speak to **Mr. Amoko** but instead impounded and took away the applicants' phone and placed them under arrest for the crime(s) of theft by servant. The officers also proceeded to threaten to impound their laptops despite their protests.

22. Following the said arrests, the said applicants were taken to the CID Headquarters along Kiambu Road and spent the whole day there while their legal team, (**Mr. Amoko** and **Mr. Kemboy** later joined by **Mr. Madhav Bhalla**) sought to secure their release and prevent the laying of any charges against them until and when, they had recorded their statements and given an opportunity to provide any other relevant evidence. Initially the head of the Serious Crimes Unit and the other officers acceded to this and their phones were returned to them temporarily. The applicants contended that while their bond was being processed, **Mr. Kariuki** was countermanded by his seniors and directed that the applicants should be detained over the weekend and charged on Monday morning and that all attempts by the legal team failed to change this. Late in evening, **Mr. Amoko** left and took the laptops with him but the applicants' phones were subsequently impounded by Investigating Officer, one **Maureen** who demanded that the applicants surrender their PIN Numbers alongside their respective phones, despite the applicants questioning the legality of such a demand.

23. The applicants averred that at 7.00pm, they were taken to the Gigiri Police Station. **Mr. Amoko**, later informed the applicants that **Mr. Kariuki** called him at about 8.30 pm that evening and informed him that it had been agreed that the applicants would be released on cash bail of Kshs 200,000/- each. Eventually at about 10.30pm they were released once the said sums of money were deposited on their behalf but required to appear before the Chief Magistrate's Court at Milimani on Monday, 10th November, 2014 to

answer the charges of theft by servant.

24. According to the applicants, on Sunday, night while they were at **Mr. Amoko's** office having resumed the preparation of their response to cases HCCC Nos. 353, 354, 361 and 362 of 2014, **Mr. Amoko** received a call by which he was informed that the applicants should not go to Court on Monday 10th November, 2014 as required, but instead go to CID Headquarters the following day. To that request, the 1st to 4th Applicants complied and voluntarily presented themselves at the CID HQ as required and recorded their respective statements. At the conclusion of this exercise, which took the whole day, they were informed that they should appear before the Chief Magistrate's Court the following morning Tuesday 11th November 2014 to answer to various charges though it was hinted to them that there might by additional charges preferred against them. **Dande** was subsequently released on a cash bond of Kshs 100,000/- and though their phones were supposed to be returned they were informed that **Inspector Maureen**, who had impounded them had not reported to duty that day.

25. Based on information received from their counsel, the said applicants established that:

(a) There are two complaints. The first one is by **Mr. Anyiko** complaining that the applicants acted without authority essentially the same complaints as that raised in the civil suits HCCC nos. 353, 354, 361 and 362 of 2014.

(b)Another complaint was that they established Cytonn while they were still employees of BAAM which matter falls within the exclusive jurisdiction of the Industrial Court.

26. According to the Applicants, by his letter of 10th November, 2014 addressed to the Director of Public Prosecution, **Mr. Amoko**, on their behalf protested at the manner in which they had been treated and requested the intervention by his office to review the matter. However they duly appeared in Court No. 11 on the morning of Tuesday 11th November, 2014 to take their pleas as required at which appearance the Court was packed with various media reporters with cameras and videos and in attendance was one of Britam's public relations officers, **Francis Muriuki**.

27. It was averred that the applicants were however, not charged as the DPP had previously called the file for his review and direction on the way forward. It was directed that the bonds be cancelled and sums previously deposited with the police returned. The applicants also got their phones back. Though **Mr. Dande's** money was refunded that same morning, the same was not the position with the other applicants who contended that they were instead taken in circles over the same.

28. The applicants averred that rather than allow the review to take place and be informed decision taken, representatives from Britam went to see the DPP on 12th November, 2014 to pressurize him to have the applicants rearrested and charged though they could not confirm whether this attempt was successful. To the applicants, senior officers/officials were working hard to ensure that they were arrested once again and charged. In their view, their intention is that by hook or crook the applicants be charged and placed on the dock with maximum publicity and thus irreparably damage their respective reputations and kill their start-up business, in which trust is an essential, and indeed, a fundamental ingredient.

29. Based on the facts as deposed to by the applicants, it was their case that Britam's actions are an abuse of state resources and the Court system to achieve their own selfish and narrow commercial interests. In their view, the manner of arrest, intimidation, restraining use of the 2nd, 3rd and 4th Applicants' phones, taking of their ID cards, refusing them to communicate with their lawyers, lack of bail, lack of investigations into the matter, and other forms of harassment are a clear indication that the Criminal Investigations Department is not acting independently or objectively and that this malicious treatment, coupled with the fact that there were various Civil Suits over the same subject matter previously filed in the High Court, is more than enough reason to warrant intervention by this Honourable Court.

30. The Applicants disclosed that since these proceedings were instituted, the Interested Party and Acorn have entered into a settlement agreement whose details the applicants are not privy to. However, from the

consent which was recorded in Court withdrawing all the civil suits, Acorn has undertaken to refund all the money as well as transfer all the real property to the Complainant.

31. It was submitted on behalf of the applicants that the jurisdiction of judicial review courts has been principally based on the 3'I's namely illegality, irrationality and impropriety of procedure. An Applicant coming before the Judicial Review court has to prove that the procedure in question fails the test of the 3I's. In support of this position the applicants relied on **Republic vs. Minister in the Office of the President Provincial Administration & Internal Security & 2 Others ex parte Francis Kamau [2013] eKLR** where it was stated that:

> **"The grounds which administrative action is subject is threefold; the first ground is "illegality" meaning that the decision maker must understand currently the law that regulates his decision making power and must give effect to it. The second is "irrationality" namely Wednesbury unreasonableness. The 3rd is "procedural impropriety". Without any proof of illegality, irrationality or procedural impropriety on the part of the 2nd Respondent, the Applicant's allegations appear to me to be far from any of these well-established grounds for interrogation administrative action."**

32. It was however appreciated that these traditional three grounds have since expanded to included abuse of power, bad faith etc: Accordingly, the applicants relied on **R vs. Commissioner for Co-operatives ex parte Kirinyaga Tea Growers Co-operatives Savings and Credit Society Ltd [1999] 1 EA 245** at page 249 where the Court of Appeal held that:

"It is axiomatic that statutory power can only be exercised validly if they are exercised reasonably. No statute ever allows anyone on whom it confers a power to exercise such a power arbitrarily, capriciously or in bad faith."

33. As a matter of fact, it was submitted, based on ***Judicial Review Handbook***, 3rd edition, para. 51.1, pages 751-2 abuse of power as well as bad faith have fast become the "*root concept*" that informs judicial review. It was submitted that from the manner the process leading to their arraignment in court was carried out, it is manifestly clear that the Applicants were exposed to intimidation and harassment from the said officers all at the instigation of the Interested Party who is determined to use the criminal process as a means of teaching the *ex parte* Applicants a lesson and put them in their place for calling its [i.e. BAAM's] principals out for their perceived want of ethics. It is also self- evident that under the aegis of the Respondents, the Interested Party is determined to use the criminal process to wholly taint the reputations of the Applicants and damage their nascent business hence the presence of the Interested Party's PR as well as the whole panoply of the broadcast and print media at the first abortive arraignment of the Applicants. The applicants therefore contended that the criminal process is being used for ulterior purposes. And that this is an improper use of the criminal investigation and prosecution. Reliance was placed the decision of **Chemetei, J** in **R vs. Chief Magistrate Kisumu & others ex parte Mohanlal Arora & others** (unreported) Kisumu High Court JR Misc. Application No. 7 of 2011 where it was held that:

> **"I think this is one case where there was total abuse of the legal process. There was no proper investigation done. Mr. Oranga stated that he did obtain a consent from the Director of Public Prosecutions, but I have perused the file but I have not found any. The issues raised could as well be settled by the parties in their civil suit. Had the 4th Respondent directed its mind properly, it would have stumbled upon the details of the civil suit filed by the parties which clearly demonstrated the issues between them. The courts in any event are able to establish fraud and conspiracy in civil suits without the aid of any criminal proceedings. The criminal case to say the least was meant to "soften" the applicants into settling a purely civil matter via a criminal process. Before concluding its worth quoting extensively from the judgement of Justice Kuloba in the case of Saina –vs- Attorney General high Misc Application No. 839 and 1088 of 1999 where he said:-**
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> **"So it is not the purpose of a criminal investigation or a criminal charge or prosecution to**

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

This was an abuse of the criminal process. The 4th respondent did not exercise its constitutional mandate properly. It allowed the interested parties to drive it. It must be stopped."

34. It was submitted that the Complainant in the criminal proceedings, **Mr Anyiko**, is a person well known to the Applicants herein and an employee of BAAM who is also well aware of the proceedings in the civil suits before the High Court. All the Affidavits in those proceedings are sworn by him and he has essentially recycled in a more abbreviated (and misleading) form, the same allegations he made in the Civil suit.

35. The Applicants therefore prayed for an order for prohibition prohibiting the Inspector General of the National Police Service and the Director of the Directorate of Criminal Investigations whether by themselves, their servants and/or agents from arresting, harassing and/or in any other manner interfering with the liberty and/or property of the Applicants. In support of their submissions the applicants relied on **Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005.**

36. The Applicants contended that although **the phones were eventually returned, the Court should use this as an opportunity to provide guidance for it is definitely a matter which will recur.**

37. According to the Applicants, it is not disputed that there are pending civil disputes before the High Court, being *HCCC Nos. 353, 354, 361 and 362 of 2014*, between the Applicants herein and BAAM and its affiliates, in respect of the matter now the subject of the alleged investigations being conducted by the Police. The Ex-Parte Applicants are parties in the said pending civil proceedings. The Applicant cited the decision of the Court of Appeal in the **Commissioner of Police and the Director of Criminal Investigations Department & Another vs. Kenya Commercial Bank Limited & 4 others, Civil Appeal No. 56 of 2012 [2013]eKLR**, where the Court in upholding the reasoning and conclusion of the **Majanja, J** delivered itself thus;

"Clearly, the company and the guarantor through their directors were employing criminal process to assist them in resolving their civil dispute. While the law (Section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that that power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of the administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court. This is a case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations. We have no doubt in our minds that the belated involvement of the police in this purely civil dispute is an abuse of their power. The police should direct their energies and resources to prevention of crime which we all know is

rampant in this country and is about to get out of control."

38. To the Applicants the above decision captures the circumstances facing the ex-parte Applicants' herein case in all fours. The intention of the Complainant and the Respondents is all but clear that they are pursuing the criminal process to arm twist the Applicants into caving in to the civil claims which are pending before the High Court and the investigations are therefore clouded with bad faith. It was the Ex-parte Applicants' submissions that the decision to prefer charges against them can only be indicative of improper and ulterior purpose amounting to an abuse of power and the same is amenable to Judicial Review. In support of their case they relied on **R vs. Chief Magistrate's Court & others ex parte Qian Guo Jun & Others** where this Court held that:

> **"It is therefore clear that whereas the discretion given to the 3rd respondent to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt."**

39. According to the Applicants, while in this case the Respondents have indeed submitted some material, such material is not only partisan and shallow, but confirms that the Respondents' will be inviting the criminal court to adjudicate on a purely civil dispute. The rights and obligations of the 1st, 2nd , 3rd and 4th Applicants under their respective contracts of employments are classic civil law matters within the exclusive preserve of the Employment and Labour Relations Court while the terms of the joint venture partnership is a civil matter. According to them, in **Rahab Wanjiru Njuguna vs. Inspector General of Police & another, JR Application No. 187 of 2013**, the Applicant therein sought an order to restrain the Respondent from harassing or in any way detaining her motor vehicles alleging that the Respondents without any justifiable cause have been harassing and intimidating the applicant's said motor vehicles and this Court, in holding that the same amounted to irrationality since it was in defiance of logic stated thus;

> **"From the foregoing, it is clear that where the authority whose decision is challenged displays gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision such as where the decision is in defiance of logic and acceptable moral standards, the Court will interfere even if there is no illegality or procedural impropriety."**

40. Further support was sought from **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300*;*** **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479**.

41. It was therefore submitted that as a result of the foregoing, the decision by the Inspector General of the National Police Service and the Director of the Directorate of Criminal Investigations to prefer charges against the Applicants herein, well aware that the very charges were also being pursued by the Complainants in various civil proceedings before the High Court was grossly unreasonable, without logic and manifested the Respondents' inclination to act unfairly towards the Ex-parte Applicants. It further flows from the decisions above that the said decision was irrational and this Honourable Court ought to interfere with the same in order to protect the interests of a fair trial.

42. In the Applicants' view, however charitably one views the conduct of Respondent, this is a case that had any meaningful inquiry been done, it would have been obvious that to the Respondents that there was no reasonable basis to suspect that any crime had been committed. The complaint against the Applicants was bogus. The Interested Party (and behind it- the Britam Group), had civil claims (the validity of which was never forensically tested and determined by a Court of law) only for and in fact that civil claim had been settled to its satisfaction. It wrongly sought use the criminal process to beat the Applicants into submission. Now that the attempt has failed, it is using the criminal process out of spite punish. The criminal process at the instigation of Britam with the connivance of the Respondents is being abused. This Court has not only the power but the duty to intervene as the Court of Appeal held in **Joram Mwenda**

Guantai vs. The Chief Magistrate [2007] 2 EA 175, at pages 177, 178 and bring an end to it.

Respondents' Case

43. According to the Respondent, a complaint was made on 16th October 2014 by the acting CEO of British American Asset Managers Limited (BAAM) a subsidiary of British American Insurance Company (K) Kenya Limited (BRITAM) alleging that Kshs 10,132,368.50 and Kshs 1,161,465,388 was fraudulently misappropriated on 1st September 2014 and 31st July 2014 respectively out of BAAM Real Estate Fund (BREF) through instructions by **Mr. Edwin Dande**, **Ms. Elizabeth Nkukuu** and **Mr. Shiv Arora** who were then employees of BRITAM. Pursuant to the said report investigations into the said allegation commenced which revealed the following information

a) that BAAM is a subsidiary company of BRITAM whose main function is investment management;

b) that **Mr. Edwin Dande** was the Managing Director of BAAM since December 2011 and his duties include but are not limited to:-

i. advisory and preparatory work;

ii.planning and management;

iii. human resource and organizational development;

iv. financial planning and management;

v. public relations/advocacy;

vi. legal compliance;

vii. responsible investment management and active ownership.

c)That **Mr. Dande** handed in his letter of resignation on 29th August 2014 which was acknowledged on 1st September 2014 and later confirmed that his last day of work as 10th November 2014. However **Mr. Dande** intimated in a letter that his last day of work would be 5th September 2014;

d) That **Ms. Elizabeth Nkukuu** was hired in October 2012 as a Portfolio Manager in the Fund Management Department and her duties include but are not limited to:-

i. Delivering superior risk adjustment returns to client portfolios

ii. Analysing trends in global and local markets to manage the risk factors in client portfolio and produce meaningful long term returns through efficient positioning in various asset classes;

iii. Ensuring adherence to company's investment strategy and detailed processes;

iv Execute asset allocation decisions amongst client portfolio and general management of all publicly traded asset classes;

v Coordinating the dealing team to ensure efficient execution of investment decision to reduce market impact and cost to client.

e) That **Ms. Nkukuu** handed in her letter of resignation on 25th August 2014 which was

acknowledged on 1st September 2014 and later confirmed that her last day of work as 24th November 2014. However **Ms. Nkukuu** intimated in a letter that her last day of work would be 5th September 2014;

f) That **Ms. Patricia Wanjama** was hired in October 2008 but promoted in July 2012 as the Head of Legal and Assistant Company Secretary of BAAM and her duties include but are not limited to:-

i. Provide strategic legal advice on business and product development;

ii. Liaision officer with various regulatory agencies;

iii. Participate in company and group strategy purposes;

iv. Advise the asset management company on all matters touching on the law;

v. Ensuring the company is compliant with all statutory requirements.

g) That **Ms. Wanjama** handed in her letter of resignation on 14th August 2014 which was acknowledged on 1st September 2014 and later confirmed that her last day of work as 13th November 2014. However **Ms. Wanjama** intimated in a letter that her last day of work would be 30th September 2014;

h) That Mr. Shiva Arora was hired in November 2013 in the Fund Management Department and in February 2014 he became an Investment Analyst in the same department and his duties include but are not limited to:-

i Company research and analysis;

ii Financial modelling and data analysis;

iii Reviewing company information;

iv Conducting industry and capital markets research;

v Participating in the evaluation, formulation, and implementation of investment strategies.

i) That Mr. Arora handed in his letter of resignation on 1st September 2014 which was acknowledged and confirmed would take effect from 30th September 2014. However Mr. Arora intimated in a letter that his last day of work would be 5th September 2014;

j) That the above-named officers were senior officials at BAAM and as such BAAM through an Investment Advisory Agreement with BREF Mauritius Ltd (appointed investment manager) managed the finances;

44. According to the Respondents they established that BREF is one of the funds that BAAM uses for investment management and it is managed by BAAM Kenya through an Investment Advisory Agreement with BAAM Mauritius Ltd who is the appointed investment manager. BREF was seeded by three Britam entities, i.e. British Insurance Co., British Investment Co. and BAAM through various discussions with the then Portfolio Manager, **Elizabeth Nkukuu**. The three entities came into BREF as investors with approvals from BREF Investment Committee (BREF IC) and Britam Board and that there were no investments from third party investors. That BREF account is domiciled in Mauritius because the investment was meant to have both local and global investors. For any investments or divestments to be made BREF IC must approve a provision which is in the shareholders agreement of BREF. The management of BREF is solely the function of the Fund Management Department which is under BAAM and was being headed by **Edwin Dande** (BAAM CEO), **Elizabeth Nkukuu** (Portfolio Manager),

Patricia Njeri Wanjama (Head of Legal BAAM) and **Shiv Arora** (Investment Analyst).

45. The Respondents averred that they established that there were instructions for payment KES 1,161,465,3887- which were prepared by **Shiv Arora** reviewed by **Elizabeth Nkukuu** and approved by **Edwin Dande** former CEO BAAM which payments were made without approval by BREF IC as per the requirement to Even Dale Development (KES 9,869,139/=), Starling Park properties (KES 42,205,236/=), Crimson Court Development (KES 43,329,137), Sinopia Properties (KES 150,700?000/=) and Mikado Properties (KES 915,361,876/=) Limited Liability Partnerships (LLPs). The Limited Liability Partnerships (LLPs) are Special Purpose vehicles (SPV) formed for the development of various properties. Each property development is housed by a different LLP. The LLPs are formed and managed by Acorn Group which has a 25% stake on investment in Britam.

46. It was further averred that on 31st July 2014 a payment was made out of BREF bank account in Mauritius in the sum of Kshs 1,161,465,388 and that the said instructions were not forwarded to the BREF Investment Committee for approval as required under the Shareholders Agreement. In addition, the said instructions were sent notwithstanding the communication received from the Group Managing Director on 24th July 2014, directing that no more funds be transferred to property LLPs from Cash Management Solutions bank account. The said payment was made to the following LLPs:-

a) Evendale Development LLP for Kshs. 9,869,139;

b) Starling Park Properties for Kshs. 42,205,236;

c) Crimson Court Development for Kshs. 43,329,137;

d) Sinopia Properties for Kshs. 150,700,000; and,

e) Mikado Properties for Kshs. 915,361,876.

47. According to the Respondents, the signatories to the five accounts are **Edward Kirathe** and **Peter Njenga Ndungu** who are the shareholders of Acorn which entered into partnership agreement with BAAM.

48. It was further averred that the Respondents established that on the 1st September, 2014 one **Shiv Arora** former Investment Analyst at BAAM Fund Management Department, wrote an email to BREF Administrators in Mauritius (Tri-Pro) requesting- for payment of KES 10 Million meant for expenses for the launch of BREF. The email was copied to **Elizabeth Nkukuu** former Portfolio Manager at BAAM Fund Management Department and that the payment was to be made to Acorn Group Ltd Operating Account held at Chase bank. On 1st September 2014 a payment was made out of BREF bank account in Mauritius to Acorn Group Ltd in the sum of Kshs. 10,132,368.50 and that instructions for payment sent to BREF Administrators (Tri-Pro) in Mauritius were prepared by Mr. Arora and reviewed by **Ms. Nkukuu** and approved by **Mr. Dande**. This payment was in respect of BAAM share of expenses for the launch of BREF which was scheduled for 31st July 2014 however pursuant to a Board meeting held on 18th July 2014 where both parties were in attendance, the said launch was postponed indefinitely. Although the launch was held on 4th August 2014 without the participation of BRITAM/BAAM the said instructions were not forwarded to the BREF Investment Committee for approval as required under the Shareholders Agreement. These instructions, it was noted were effected subsequent to notification of their intention to resign from employment and were sent notwithstanding the communication received from the Group Managing Director on 24th July 2014, directing that no more funds be transferred to property LLPs from Cash Management Solutions bank account.

49. It was disclosed that the four named officers subsequent to resignation are now working at Cytonn Ltd Company.

50. It was revealed that according to a statement recorded from **Dr. Benson Wairegi** who is the Group

Managing Director, the launch had been postponed through a recommendation made by BREF IC in a meeting held on the 18th July, 2014 whereby **Edwin Dande**, **Elizabeth Nkukuu**, **Patricia Wanjama** and **Shiv Arora** were in attendance. **Dr. Wairegi** also confirmed that no further meeting was held by the investment committee to approve the said payment. According to **Sylvester Njuguna Mugwe** (Marketing and Corporate Department) the budget was too high for the BREF launch and that Marketing and Corporate Department and Britam Public Relations division were not involved in the initial planning of the BREF launch.

51. It was disclosed that once the money was credited into their accounts, Edenvale Development LLP paid out Kshs.9,869,139.00 to various payees. Starling Park Properties was credited with Kshs.42,205,236.00 and they made payments to various customers. The third account Crimson which was credited with Kshs,43,329,137.00 and paid to various companies by way of cheques. SINOPIA was credited with Kshs. 150,700,000/= and made payment to various companies and, finally Mikado was credited with Kshs.915,361,876/= out of Kshs.800,000,000/= was credited to Coral Account from other various payments to several companies. The signatories of the Coral Development LLP which received a credit of Kshs 100,000,000 are **Edward Muturi Kirathe**, **Peter Njenga Ndungu**, **Edwin Dande** and **Elizabeth Nkukuu** and they also made payments to various companies.

52. It was averred that Acorn Group Limited is the operating Account for Acorn Company and the signatories are **Peter Njenga Ndungu**, **Edward Kirathe** and **Kenneth Philip Luusa**. The other companies affiliated to this company are Acorn Properties Limited and Acorn Management Ltd and that the manager of these companies is **Robert Mwangi Ndungu**. Acorn Investments Limited and Acorn Properties Limited are partners in the five companies under investigations. Upon inquiry from the Registrar of Companies, it was revealed that the Directors are **Edward Kirathe**, **Peter Njenga**, **Kenneth Luusa** and **Antony Mwaniki** and that during their partnership relations, they had planned to do a brief launch which was also to showcase on what they could do and that this is confirmed by **Edwin Dande**, **Edward Kiraithe**, **Peter Njenga**, **Sylvester Mugwe Njuguna** and attended a meeting at Acorn House on the 19th June, 2014 together with **Patricia Wanjama** from Britam and **Duncan Mukabi**, **Steve Kivuva** and **Mukami Mungwe** from Acorn attended. It was averred that on the 18th July, 2014 the investment Strategy meeting was held at Britam which was attended by **Ambassador Francis Muthaura**, **Dr. Benson Wairegi** and **Jimna Mbaru**. Also present were **Edwin Dande**, **Benson Kamau**, **Elizabeth Nkukuu**, **Diana Gichaga**, **Patricia Wanjama** and **Shiv Arora**. While at the meeting it was decided that the launch be postponed until the board gave full Direction, the launch went on as earlier planned despite having been cancelled and that it took place at Hotel Villa Rosa Kempinski Westlands on 31st July, 2014 at the cost which was to be shared on 50, 50 basis between Britam and Acorn as earlier agreed.

53. The Respondents revealed that on the 22nd August, 2014 Acorn Disbursement request note for Kshs. 10,132,368.50 was sent to Britam and on the strength of the request **Shiva Arora** sent an email to **IHamal lyator** the Tri-Pro administrator of their account in Mauritius and their Standard Chartered Bank Account was debited and Acorn was credited with Kshs. 10,132,368 domiciled at Chase Bank Riverside Branch.

54. While conceding that Britam entered into partnership agreement with Acorn Group and they paid for the stake of 25% acquisition, it was contended that the role of the Acorn was to be a developer while Britam was to source for development funds. Acorn was to look for plots within Nairobi to purchase and develop and they identified (i) Gitanga Road LR No. 3734/917 Starling Park Properties, (ii) Jogoo road LR No. 209/12306 Edenvale Properties LLP (iii) Riara road LR No. 330/578 Crimson Court Development (iv) Kitengela a 200 acres Sinopia Proterties. (v) Mlolongo 23 acres Mikado Properties (vi) Kileleshwa Coral Development. This company received Kshs.800,000,000/= from Mikado for development. Both teams for Acorn and BREF had a meeting on 24th June, 2014 at Acorn House at which BREF was represented by **Edwin Dande**, **Anthony Mwaniki** and from Acorn were **Peter Njenga**, **Ken Luusa** and **Edwin Kiraithe** and that they had retreated at Lake elementeita in Naivasha where investment was discussed, and another one at Mount Kenya Safari Club in Mount Kenya Region on the same issue.

55. It was disclosed that initially, the two companies had no problem on their business and investment arrangements but later on the Britam Investment Committee which included **Dr. Wairegi**, **Peter Kihara Munga** the Chairman, **Jimnah Mbaru**, **Frank Ireri**, **Ambassador Dr. Francis Muthaura** denied having approved any funding for investment or for BREF launch. Further, the Britam Investment Committee which decides on which project to fund never approved the funding for Kshs.1.1 Billion and Kshs. 10 million respectively and the three who appended their signatures on the disbursements requests **Edwin Dande**, **Elizabeth Nkukuu**, **Shiv Arora** and were in attendance for the combined investments Strategy Committee held on 18th July, 2014 and **Patricia Wanjama** who was also present as the Legal advisor of the company, were aware that Investment and launch of BREF were postponed but still went ahead met ahead and authorized two transactions. To the Respondents, the beneficiary account holders of the five companies where the funds were credited are also equally to blame.

56. It was averred that the specimen signatures of the three signatories and known signatures on the disbursement note were confirmed by the Document Examiner as belonging to the first three Applicants and they actually authorized the transfer of the funds in question.

57. To the Respondents, it was interesting that **Elizabeth Nkukuu**, **Shiv Arora**, **Patricia Wanjama** & **Edwin Dande** resigned in a calculated move showing their intention to go and enjoy the loot acquired. The accounts where the money in question was credited or disbursed, Britam have no interest in them and logically the money would only be assumed to have been stolen. These have come out clearly from the top management of Britam that the money was not authorized. Under Section 20 of the ***Penal Code*** describes who are principle offenders and the investigations revealed all the above suspects belong to that category in that they aided and abetted in the commission of the crime.

58. To the Respondents, upon filing a complaint with the National Police Service, the service is mandated under the Constitution and the ***National Police Service Act*** to carry out investigations of any particular offence of offences complained off. Based on legal advice, they averred that:

> a) that the respondents are mandated to investigate all possible criminal offences and an attempt to stop such execution of mandate would result to an even greater injustice in the criminal justice system;
>
> b) that the applicants are seeking to pre-empt and curtail the mandate of the law enforcement agency (investigative department) as enshrined within the Constitution of Kenya;
>
> c) that if at all a crime has been committed, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay the criminal proceedings;
>
> d) that the applicant has not adduced sufficient evidence before this Court on merit to show that prejudice has been occasioned;
>
> e) that the respondents does not require the consent of any person or authority for the commencement of criminal proceedings;
>
> f) that the respondents are not acting under the direction or control of any person or authority;
>
> g) that the applicants have not demonstrated that in executing its mandate, it has acted without or in excess of the powers as conferred by the law or acted maliciously, infringed, violated, contravened or in any other manner failed to comply with or respect and observe the foregoing provisions of the Constitution or any other provision thereof.

59. In view of the foregoing, the court was urged to exercise extreme care and caution not to interfere with the Constitutional powers of the respondents and as such should only interfere if it is shown that the exercise of their powers is contrary to the Constitution, is in bad faith or amounts to an abuse of process. However, the Respondents held the view that the applicants failed to demonstrate that the respondents

acted independently or capriciously, in bad faith or abused the legal process in a manner to trigger the High Court's intervention.

60. It was submitted on behalf of the Respondents while reiterating the foregoing that that since the DPP is yet to make a decision on whether or not to charge the Applicants, the court should exercise extreme care and caution not to interfere with the Constitutional powers of the Respondents and as such should only interfere if it is shown that the exercise of their powers is contrary to the Constitution, is in bad faith or amounts to an abuse of process. According to the Respondents, the Applicants have failed to demonstrate that the Respondents have not acted independently or have acted capriciously, in bad faith or abused the legal process in a manner to trigger the High Court's intervention. Whereas the Applicants alleged that their rights under Articles 19, 20, 21, 23, 24, 25, 27, 28, 29, 36, 47, 49 & 50 of the constitution had been breached; infringed and/or violated, or been abrogated, the Respondents submitted that they had demonstrated the basis of the decision to investigate and recommend the prosecution of the Applicants. To them, upon conclusion of investigation by the 1st and 2nd Respondent, the 3rd Respondent will analyse the evidence presented and upon being satisfied on the sufficiency of evidence make a decision to prosecute, without any bias, influence and in an independent manner giving due regard to Article 157 of constitution and principles enunciated thereunder and the office of the ***Director of Public Prosecution Act*** (No. 2 of 2013). Based on **Kenya Commercial Bank Limited & 2 others vs. Commissioner of Police and Another, Nairobi Petition No. 218 of 20122 (2013) EKLR,** it was submitted that:

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

61. In their support the Respondent relied on **George Joshua Okungu and Another vs. Chief Magistrate Court Anti-Corruption Court at Nairobi and Another (2014) EKLR** where it was held 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 that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defense is always open to the Petitioner in those proceedings. The fact however that the facts constituting the basic of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, *ipso facto*, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the petitioner to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognized aim".**

62. Further reliance was sought from **Republic vs. Commissioner of Police and Another exparte Michael Monari & Another (2012) EKLR**: where it was held that:

> **"The police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be falling 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".**

63. To the Respondents, the Court's duty is only to ensure that the Petitioner's rights and freedoms as enshrined in the Constitution are protected and upheld and **Wendoh, J's** decision in **Koinange vs. Attorney General and Others (2007) 2 EA 256,** was relied on in this respect. To the Respondents, the prayers in the Application for determination thereof require the court to analyse and examine facts and evidence on the basis of which the guilt, innocence or otherwise of the Applicant shall be determined and the proper forum for consideration and resolution of the factual and evidentiary matter, according to **William Ruto & Another v Attorney General HCC No. 1192 of 2004,** is the trial court. The Respondents also relied on the holding in **Kuria and Others vs. AG (2002) 2KLR. 69** where it was held that:

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

64. The Respondents therefore submitted that the Applicants failed to prove violation of their fundamental freedoms and rights and/or infringement of any law or regulation or abuse of discretion and breach of Rules of Natural Justice and the Application should therefore be dismissed with costs.

Interested Party's Case

65. The Application was similarly opposed by the Interested Party.

66. According to the Interested Party, the 1st to 4th Applicants were employees of BAAM up to or around September 2014 when they simultaneously tendered their resignation therefrom. Till then, the said Applicants held various senior positions in BAAM. The 1st Applicant was BAAM's Managing Director, the 2nd Applicant was the Senior Portfolio Manager, the 3rd Applicant was the Head of Legal and Assistant Company Secretary while the 4th Applicant was an Investment Analyst.

67. It was averred that the police investigations complained of by the Applicants were necessitated by various undertakings and breaches by the Applicants which amount to criminal conduct and that better particulars of the undertakings and breaches came to fore upon the resignation of the 1st to 4th Applicants and upon investigations by BAAM which revealed on various dates during their tenure at BAAM, the 1st and 3rd Respondents exchanged email correspondence amongst themselves and with third parties embodying a conspiracy to do things that had "*not been approved*". It turned out from BAAM's investigations that the conspiracy embodied in this email entailed fraudulent, irregular and unauthorised withdrawal of funds held or managed by BAAM; and fraudulent, irregular, unauthorised and clandestine execution of contracts (notably joint venture agreements) that were adverse to interests of BAAM.

68. It was averred that one such fraudulent undertaking involved the illegal and fraudulent transfer at the instance of the 1st to 4th Applicants of a sum of **Kshs.1,161,465,388.00** being monies held in a Fund managed by BAAM in accounts in Mauritius (BREF Fund) ostensibly into projects which were not approved by BAAM and that this illegal transfer of monies had been concealed to BAAM all along and only came to the fore when documents that were handed over by the 1st Applicant at the time of his resignation were perused.

69. So as to ascertain and further investigate the apparent fraud, on or around 10th October, 2014, the Interested Party made inquiries with the BREF Fund administrator (Messrs Tri-Pro) and BREF's bankers from which it confirmed that indeed the sum of Kshs.1,161,465,388.00 had been transferred on 31st July 2014, on the instructions of the 1st, 2nd and 4th Applicants to various projects undertaken by third parties. Upon further inquiry and review of the relevant documentation, it was discovered that the 1st, 2nd and 4th Applicants had, in their instructions to the administrator, fraudulently passed off the payment of Kshs.1,161,465,388.00 as being on account of expenses, yet they had signed a schedule indicating that the payment was an approved investment by the BREF Investment Committee. To the interested party, contrary to the schedule signed by the 1st, 2nd and 4th Applicants, the BREF Fund Investment Committee

had not approved any investment or the payment of Kshs.1,161,465,388.00. These discoveries, it was contended led BAAM to undertake further audit of transactions and projects undertaken by the 1st to 4th Applicants which audit revealed that on or around 8th July 2014, the 1st to 4th Applicants fraudulently, clandestinely, conspiratorially and without due authority from BAAM signed joint venture agreements with third parties obliging an affiliate of BAAM to make a monetary contribution to real estate development projects undertaken and controlled by those third parties; obliging an affiliate of BAAM to mobilise third parties to make further monetary contributions to the aforesaid real estate development projects; providing for the ouster of BAAM's affiliate, at its own cost, for failure to meet any of the obligations.

70. It was averred the aforesaid joint venture agreements had not been authorised by BAAM; and were not disclosed to BAAM by the said Applicants. However, in perfection of the fraudulent scheme crafted around the illicit Joint Venture Agreements, on or around 12th August 2014, the said third parties – Acorn Properties Limited issued breach notices of the aforesaid joint venture agreements with a view to terminating the agreements.

71. It was therefore the interested party's position that the Applicants committed criminal offences *inter alia* under section 313 of the Penal Code (obtaining by false pretences); section 328 (fraudulent appropriation or accounting by directors or officers)***;*** and section 329 (false statements by official of companies)**.**

72. Further, the audit revealed that on or around 6th August 2014, the 1st, 2nd and 4th Applicants fraudulently and in conspiracy with third parties instigated the transfer and or laundering of a cumulative sum of Kshs.2,783,093,246.00 to a number of Limited Liability Partnerships ("**LLPs**") owned and controlled by third parties which transfers were in flagrant disregard of an express freeze on payments put in place by BAAM on or about 24th July 2014. To the interested parties, the instructions to transfer the monies as instigated by the 1st to 4th Applicants would amount to a money laundering offence under section 3 of the ***Proceeds of Crime and Anti-money Laundering Act*** No 1 of 2012.

73. It was averred that on or around 12th September 2014, only a few days after their well-choreographed resignations, the 1st to 3rd Applicants incorporated the 5th Applicant with themselves as directors, and the 4th Applicant as an associate. To the interested party, the formation of the 5th Applicant was part of the conspiracy and indeed the 4th Applicant was incorporated as a vehicle for execution of the fraud and the eventual beneficiary of the monies unlawfully channelled from BAAM. Since the 5th Applicant is borne and funded out of the monies illegally and fraudulently obtained from BAAM, the 5th Applicant would be guilty of an offence under Section 4 of the ***Proceeds of Crime & Anti-Money Laundering Act***.

74. While admitting the existence of the civil suits referred to in the verifying Affidavit i.e. HCCC Nos 353, 354, 361 and 362 of 2014, it was the interested party's contention that the said civil suits embody civil claims that are incidental to the criminal conduct by the Applicants herein. It however cited section 193A of the ***Criminal Procedure Code***, for the position that the fact that any matter in issue in any criminal proceedings is also directly in issue in any pending civil proceedings is not aground for any stay, prohibition or delay of the criminal proceedings. Besides citing BAAM as being the complainant in the alleged criminal investigations the Applicants herein have not shown that BAAM has had any role in the actual investigations which is within the powers of the police. The presence of a Britam employee in court on 11th November 2014 as alluded to in the Verifying Affidavit cannot be an inference that BAAM has in any unreasonable manner taken an active role in the investigations against the Applicants. It was therefore contended that the allegations set out in Paragraph 18 of the Verifying Affidavit are untrue, scandalous and without basis.

75. In the interested party's view, these proceedings herein are premature and only serve to delay the administration of justice both to the complainant and the persons against whom investigations are to be carried out and eventually charges proffered if necessary since it is within the context of criminal proceedings that the Applicants here will fully and effectively clear any allegations of criminal conduct

on their part.

76. It was contended that the Applicants having been arraigned in court on 11th November 2014 to take plea, the Police must have completed their investigations and correctly decided that there was a *prima facie* criminal charge to answer to. To it, in the criminal proceeding the Applicants will benefit from due process and presumption of innocence. There is therefore no sufficient reason to stop the criminal proceedings.

77. It was asserted that the Applicants having been arraigned in court to answer to the criminal charges against them, the case is ripe for hearing and the orders sought herein if granted will only serve to unduly delay the criminal proceedings and defeat the ends of justice for the Complainant and the accused persons.

78. It was asserted that the police have a constitutional mandate to independently investigate offences and the office of the Director of Public Prosecutions has a constitutional mandate to independently institute and undertake criminal proceedings. The Applicants have not placed before court any sufficient materials to form a basis for the Honourable Court to interfere with the said constitutional and discretionary mandates. Further, the Applicants have not shown that BAAM, or the Respondents herein have in any way acted outside the law or that there is any ulterior motive, bad faith or malice in the investigations and criminal proceedings.

79. The Interested Party therefore urged the Court dismiss the application with costs.

80. It was submitted on behalf of the interested party that the existence of civil liability alone does not extinguish criminal liability and relied on **Republic vs. Attorney General & 4 Others Ex-Parte Kenneth Kariuki Githii [2014] eKLR** where this Court reiterated this point as follows:

> **"In this case it is the applicant's case that the subject of the criminal proceedings is similarly subject of pending civil proceedings in which the ownership of the disputed parcel of land is pending determination. However, as stated hereinabove, the mere fact that the facts disclose both criminal offence as well as civil liability does not entitle the Court in judicial review proceedings to bring to a halt the criminal proceedings**
>
> **I have considered the positions taken by the parties to these proceedings and I am unable to find that there is absolutely no iota of evidence against the applicant in the said criminal proceedings. Whereas the criminal proceedings may well eventually fail that is not the same thing as saying that there is no evidence at all. I am also not convinced that the predominant purpose of mounting the said criminal offence is to achieve some collateral purposes rather than the vindication of a criminal offence. Whereas the facts may well constitute civil liability I am not convinced that under no circumstances would they constitute a criminal offence and that is as far as I am prepared to go."**

81. According to the interested party, the Court having directed investigations to proceed, the question is whether the Court can stop the police from exercising their constitutional mandate to arrest once the investigations are concluded. It submitted that to do so would amount to this Court interfering with the Constitutional mandates of other constitutional bodies without a proper basis in law and reliance was placed on **Paul Ng'ang'a Nyaga & 2 Others vs. Attorney General & 3 Others [2013] eKLR** where it was stated thus:

> **I maintain therefore that this Court can only interfere with and interrogate the acts of other Constitutional bodies if there is sufficient evidence that they have acted in contravention of the Constitution, *inter-alia* and one of the complaints made herein is that the Petitioners were unlawfully arrested. Arrest is a form of state constraint applied to a person, during which the person is placed under detention, is imprisoned and is deprived of his right to move freely. Paragraph 3 of Article 5 of the European Convention of Human Rights and Fundamental Freedoms (the Convention) of the Council of Europe stipulates the**

following criteria for arrest and detention;

a) A reasonable doubt that an offence has been committed by the person

b) There are grounds to presume that it is necessary to hamper a crime to be committed by him and prevent his escape after the crime has been committed.

Under the Constitution of Kenya, 2010 an arrested person has rights as provided for under Article 50 thereof and if accused, his rights are also protected by the same Article. In the event that a person is aggrieved by the due process in the dispensation of justice, he also has recourse to institute proceedings under Article 22 and seek appropriate reliefs as provided for by Article 23 of the Constitution.

The Petitioners in this case have expressed fear that the warrants of arrest so issued or to issue will curtail their freedom and they have also indicated that the Interested Party has used its financial might to compromise the 3rd Respondent. The Petitioners also believe that the 3rd Respondent is acting in cahoots with the Interested Party to defeat the criminal justice system. If I may pause at this point, it is obvious to me that all these allegations are based on beliefs, thoughts and apprehensions which are ambiguous. It is trite law that he who alleges must prove. The Petitioners in this case must also demonstrate with particularity how their rights have been infringed and the violation or threat they face and the damages suffered by this alleged infringement - See Anarita Karimi Njeru vs. The Attorney General (1979) KLR 154).

From the foregoing, there is a clear public interest in ensuring that crime is prosecuted and that a wrongdoer is convicted and punished. It also follows from this that it will generally be in the public interest to prosecute a crime where there is sufficient evidence to justify the contrary e.g. unless there is some countervailing reason not to prosecute. It is evident that the Petitioners are seeking protection after they have been arrested and charged but this Court cannot prevent the police and the DPP from carrying out their investigations if they have reasonable suspicion that an offence has been committed. The police ought to do their investigations and if they come to the conclusion that an offence has been committed, the suspect should be arrested and charged. The DPP and the Police working jointly have a constitutional duty and obligation to maintain law and order, initiate and conclude investigation and also apprehend and prosecute offenders."

82. It was submitted that if the Ex Parte Applicants' case is that their rights were violated on 7th November 2014 when they were arrested, they have a remedy under Article 22 and 23 of the Constitution and the same applies should their rights be violated when the impending arrest comes.

83. It was further submitted that the only prayer left for determination is prayer 1 which is as follows:

> ***THAT*** *an order of prohibition do issue prohibiting the Inspector-General of the National Police Service and the Director of the Directorate of Criminal Investigations whether by themselves, their servants and/or agents from arresting harassing and or in any other manner interfering with the liberty and /or property of the ex parte Applicants*

84. However, to the interested party, the prayer as couched is so general and wide that it cannot be granted without the court giving the ex parte Applicants blanket immunity from police action whatsoever. It is not stated what matters the prohibition would be in respect of. It is untenable that this should be left to conjecture. The Ex Parte Applicants have also sought orders prohibiting the police from 'harassing' them. Once again, it is not clear what the court should make of 'harassment'. It was submitted that the ambiguity in the prayers is deliberate so as to obtain orders stopping the police from making investigative inquiry into the criminal complaints lodged against the ex parte Applicants yet it is a principle of judicial review that prayers sought ought to be specific so as to ensure that the orders are not given in respect of the wrong subject matter and it cited **Republic vs. Land Disputes Tribunal, Koibatek District &**

Another Ex-Parte Florence Chepkurui Chepkwony [2011] eKLR.

85. The interested party contended that the Ex Parte Applicants in this case had not shown whether or not a decision had been made to arrest them and if such a decision had been made, they had not shown that there was any flaw in the procedure of arriving at the decision to arrest them. To the interested party, if a decision has been made to arrest the Ex Parte Applicant's then the prayer for prohibition is untenable. In the circumstances the Ex parte Applicants need to have first sought an order quashing that decision to arrest them before seeking an order prohibiting their arrest. This has not been done and reliance was sought **Republic vs. Truth Justice & Reconciliation Commission & Another Ex-Parte Augustine Njeru Kathangu & 9 Others [2011] eKLR**, **Republic vs. President & 7 others Ex parte Wilfrida Itolondo & 4 Others [2014] eKLR.**

86. It was submitted that while it is not mandatory for prohibition orders to be preceded by an order of certiorari, where it is apparent that a decision has been taken (for instance the decision to arrest the applicants herein) then an order quashing that decision must be of necessity otherwise the order of prohibition would be in vain if granted and the interested party was guided by the reasoning in the decision in **Republic vs. Karatina Senior Resident Magistrate's Court & Another [2009] eKLR.**

87. Based on **Republic vs. Director of Public Prosecution & 2 Others Ex-parte Francis Njakwe Maina & Another [2015] eKLR** it was averred that the ex parte Applicants had made sweeping and unfounded allegations that the criminal proceedings are being used to harass them and or intimidate them in respect of the existing civil suits against them.

88. The interested party therefore urged the Court to disallow the application with costs.

Determinations

89. 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.

90. In this case the Applicants have disclosed that when they appeared in Court No. 11 on the morning of Tuesday 11th November, 2014 to take their pleas they were however, not charged as the DPP had previously called the file for his review and direction on the way forward. It was directed that the bonds be cancelled and sums previously deposited with the police returned and the applicants also got their phones back.

91. It is therefore clear that by the time this matter was filed, the DPP was yet to make a determination on the way forward. Under Article 157(4) of the Constitution, the Director of Public Prosecution is empowered to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General is obliged to comply with any such direction. In making his decision the DPP is, under Article 157(11) of the Constitution, enjoined to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. In other words the DPP ought not to exercise his/her constitutional mandate arbitrarily.

92. The independence of the DPP, is anchored both in the Constitution and in the legislation under Article 157(10) of the Constitution and section 6 of the ***Office of the Director of Public Prosecutions Act, 2013.*** Article 157(10) provide as follows:

> ***"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."***

93. Section 6 of the ***Office of the Director of Public Prosecutions Act, 2013*** provides that:

> ***Pursuant to Article 157(10) of the Constitution, the Director shall–***

(a) Not require the consent of any person or authority for the commencement of criminal proceedings;

(b)Not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution, this Act or any other written law; and

(c) Be subject only to the Constitution and the law.

94. In my view, the mere fact that the Directorate of Criminal Investigations has conducted its own independent investigations, and based thereon, arrived at a decision does not necessarily preclude the Commission or the DPP from undertaking its mandate under the foregoing provisions. Conversely, the two bodies are not bound to prosecute simply because the DCI has formed an opinion that a prosecution ought to be undertaken. The ultimate decision of what steps ought to be taken to enforce the criminal law is placed on the officer in charge of prosecution and it is not the rule, and hopefully it will never be, that suspected criminal offences must automatically be the subject of prosecution since public interest must, under our Constitution, be considered in deciding whether or not to institute prosecution. See ***The International and Comparative Law Quarterly*** Vol. 22 (1973).

95. However, I must hasten to add that the fact that the DCI undertook investigations pursuant to which it arrived at a particular conclusion may be a factor to be considered by the DPP in deciding whether or not investigations or even prosecution ought to be carried out. However, the DPP is not necessarily bound by recommendations and conclusions arrived at by the Police.

96. A reading of article 157(4) of the Constitution, leaves me with little option but to associate myself with the decision of the High Court of Uganda in the case of **Uganda vs. Jackline Uwera Nsenga Criminal Session Case No. 0312 of 2013,** to the effect that:

"...the DPP is mandated by the Constitution (See Art. 120(3)(a)) to direct the police to investigate any information of a criminal nature and report to him or her expeditiously… Only the DPP, and nobody else, enjoys the powers to decide what the charges in each file forwarded to him or her should be. Although the police may advise on the possible charges while forwarding the file to DPP…such opinion is merely advisory and not binding on the DPP (See Article 120(6) Constitution). Unless invited as witness or amicus curiae (friend of Court), the role of the police generally ends at the point the file is forwarded to the DPP."

97. This position was similarly appreciated in **Charles Okello Mwanda vs. Ethics and Anti-Corruption Commission & 3 Others (2014) eKLR** in which **Mumbi Ngugi, J** held that:

"I would also agree with the 4th Respondent (DPP) that the Constitutional mandate under 2010 Constitution with respect to prosecution lies with the 4th Respondent, and that the 1st Respondent has no power to 'absolve' a party and thereby stop the 4th Respondent from carrying out his constitutional mandate. Article 157(10) is clear…However, in my view, taking into account the clear constitutional provisions with regard to the exercise of prosecution powers by the 4th Respondent set out in Article 157(10) set out above, the 1st respondent (EACC) has no authority to 'absolve' a person from criminal liability…so long as there is sufficient evidence on the basis of which criminal prosecution can proceed against a person, the final word with regard to the prosecution lies with the 4th Respondent (DPP) …".

98. It was pursuant to the foregoing that **Majanja, J** expressed himself in **Thuita Mwangi & Anor vs. The Ethics and Anti-Corruption Commission & 3 Others Petition No. 153 & 369 of 2013** as hereunder:

"The decision to institute criminal proceedings by the DPP is discretionary. Such exercise of power is not subject to the direction or control by any authority as Article 157(10)…These provisions are also replicated under Section 6 of the Office of the Director Public

Prosecutions Act, No. 2 of 2013…In the case of Githunguri –vs- Republic (Supra at p.100), the Court observed…The Attorney General of Kenya…is given unfettered discretion to institute and undertake criminal proceedings against any person "in any case in which he considers it desirable so to do… this discretion should be exercised in a quasi-judicial way. That is, it should not be exercised arbitrarily, oppressively or contrary to public policy …"

99. In this case, the criminal proceedings have not been given a green light by the office of the DPP. In fact from the material before the Court the matter is still under review by that office. This Court cannot state with certainty what decision the DPP will arrive at. Whereas there is an allegation that the interested party has attempted to exert pressure on the DPP to prosecute the applicants, based on the material before me I cannot state with certainty that that is in fact the case.

100. This matter therefore is still within the purview of investigations. In **Republic vs. Chief Magistrate Milimani & Another Ex-parte Tusker mattresses Ltd & 3 others [2013] eKLR** this Court expressed itself as follows:

"The Court must in such circumstances take care not to trespass into the jurisdiction of the investigators or the Court which may eventually be called upon to determine the issues hence the Court ought not to make determinations which may affect the investigations or the yet to be conducted trial. That this Court has power to quash impugned warrants cannot be doubted. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the police to investigate allegations of commission of a criminal offence ought to be interfered with. It is not enough to simply inform the Court that the intended trial is bound to fail or that the complaints constitute both criminal offence as well civil liability. The High Court ought not to interfere with the investigative powers conferred upon the police or the Director of Public Prosecution unless cogent reasons are given for doing so...The warrants were issued to enable the allegations be investigated. Whether or not the investigations will unearth material which will be a basis upon which a decision will be made to commence prosecution of the ex parte applicants or any of them is a matter which is premature at this stage to dwell on."

101. It is trite that the Court ought not to usurp the Constitutional mandate of the investigative authorities to investigate any matter that, in their view raises suspicion of the occurrence or imminent occurrence of a crime. Just like in cases of prosecution, the mere fact that the allegations made are likely to be found worthless, is not a ground for halting investigations into the complaints made or brought to the attention of the said authorities since the purpose of a criminal investigations conducted *bona fide* is to consider both incriminating and exculpatory material and not just to collect evidence on the basis of which a criminal charge may be laid.

102. To grant the orders sought in this application in my view would be both pre-emptive and presumptuous in light of the fact that the DPP's decision on review is still unknown. This Court ordinarily does not interfere with the exercise of constitutional and statutory power of executive authorities unless there exist grounds for doing so. I am afraid that there are no sufficient material on the basis of which I can find that upon the completion of the review by the DPP the applicants will certainly be arraigned in Court to face the various charges the subject of these proceedings.

103. I am however concerned that it would seem that the applicants were taken to Court before the DPP made a decision on whether they should be charged or not. That haste on the part of the police is clearly deplorable and cannot escape condemnation.

104. The police must always remember that the mere fact that they believe that there is a prosecutable case does not necessarily bind the DPP. As is rightly recognised by **Sir Elwyn Jones** in ***Cambridge Law Journal*** – April 1969 at page 49:

"The decision when to prosecute, as you may imagine is not an easy one. It is by no means in every case where a law officer considers that a conviction might be obtained that it is

desirable to prosecute. Sometimes there are reasons of public policy which make it undesirable to prosecute the case. Perhaps the wrongdoer has already suffered enough. Perhaps the prosecution would enable him present himself as a martyr. Or perhaps he is too ill to stand trial without great risk to his health or even to his life. All these factors enter into consideration."

105. In the circumstances of this case, it is my view that taking into account the fact that the DPP's decision upon review of the file is still pending it would be speculative to deal with some of the issues which were raised in these proceedings.

Order

106. In the premises whereas I decline to grant the orders in the manner sought by the applicants, I issue an order prohibiting the 1st and 2nd Respondents from taking any action in the nature of criminal proceedings until the DPP makes a determination on the matter.

107. Considering the fact that the police seems to have acted in unnecessary haste there will be no order as to costs.

108. It is so ordered.

Dated at Nairobi this 14th day of September, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Awele for Mr Amoko for the Applicants

Miss Nyagah for Mr Ngatia for the Interested Party

Cc Mwangi