



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

IN THE CONSTITUTIONAL LAW AND JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION No. JR 510 OF 2015.

(CONSOLIDATED WITH JR NOS. 420 OF 2015, 509 OF 2015 AND 510 OF 2015)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF THE CRIMINAL PROCEDURE ACT AND THE PENAL CODE.

AND

IN THE MATTER OF ARTICLES 20, 21, 22(1) (3) (a), 23(1), 28, 29, 40, 47, 50, 165, 238(2) AND 239(3) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE LAW REFORM ACT CAP. 26, LAWS OF KENYA

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF ORDER 53 (1) OF THE

CIVIL PROCEDURE ACT CAP. 21 OF THE LAWS OF KENYA

REPUBLIC..... APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

THE DIRECTORATE OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

THE CHIEF MAGISTRATE’S COURT – MILIMANI.....4TH RESPONDENT

THE HON. ATTORNEY GENERAL.....5TH RESPONDENT

EX-PARTE

1. SHAMILLA KIPTOO.....1ST EX PARTE APPLICANT

2. DAN MAURICE MWANDE OKOTH AND

JAMES MUTISYA MAWEU.....2ND EX PARTE APPLICANTS

3. MUSIC COPYRIGHT SOCIETY OF KENYA, PETER KISALA

AND LILIAN NJOKI.....3RD EX PARTE APPLICANTS

JUDGEMENT

Introduction

1. In these consolidated applications, the *ex parte* applicants herein, **Shamilla Kiptoo, Dan Maurice Mwande Okoth, James Mutisya Maweu, Music Copyright Society of Kenya, Peter Kisala and Lilian Njoki** substantially seek the following orders:

1. **An order of Certiorari to remove into the High Court and quash any such decision, declaration and directive of the respondents to prefer criminal charges against the Applicants based on the facts contained in the Charge Sheet dated 18th November 2015 in Criminal Case No. 1904 of 2015 – Republic versus Dan Maurice Mwande Okoth & 6 others.**
2. **An order of Prohibition directed to the Respondent prohibiting the prosecution of the Applicants based on the facts contained in the Charge Sheet dated 18th November 2015 in Criminal Case No. 1904 of 2015 – Republic versus Dan Maurice Mwande Okoth & 6 others.**
3. **Costs of this application be provided for.**

Applicants’ Case

2. According to the 1st applicant (hereinafter referred to as “**Shamilla**”), she is the Managing Director of Nasratech Limited a company duly registered in Kenya under the **Companies Act** which company is engaged in the business of acquiring various rights pertaining to musical works while also acts as agents for various musicians and producers. It was averred that in furtherance of its business as musical copyrights agents and owners and to be able to realize license and royalty fees due to, and on behalf of their clients, her said company applied to become members of the Music Copyright Society of Kenya (MCSK) which is a licensed Collective Management Organization (CMO) accredited by the Kenya Copyright Board, and were duly accepted and given a membership No. 123456.

3. According to **Shamilla**, like all other members of MCSK they are entitled to periodic royalties payments made by the MCSK as when they deem it fit to distribute money they have collected in respect of licence fees from third parties which payments made by MCSK are at their discretion and calculation and the applicants are unaware how it is calculated or compiled and have no hand in how they compute or distribute the royalty payments among the members many of whom are musicians or agents of musicians.

4. **Shamilla** was therefore surprised when she learnt that the company Nasratech Limited was being investigated by the CID allegedly because it had received some payments of money stolen from MCSK which sums it had received lawfully as royalties due to it. According to **Shamilla**, immediately he learnt

of the said investigations and inquired from the CEO **Maurice Okoth** the 2nd Applicant (and who is **Shamilla**'s husband) if there were any problems in the payments that had been remitted to the company or if they had lost money but was informed that MCSK had not lost any money or lodged any complaints with police, and that all payments made to members including Nasratech Limited were duly sanctioned by the board of MCSK as per the lawful mandate and powers of the directors and officers of the company contained in its memorandum and articles of association. **Shamilla** was further informed that even though MCSK had not lodged any complaint with police and had not lost any money at all it appears that some third parties members who were unhappy about the amount they were paid in royalties, had lodged a complaint with police claiming that MCSK had misappropriated their money.

5. It was therefore contended by **Shamilla** that she was thus shocked when on 17th November, 2015 a set of summons were dropped at their business premises from the CID requiring her to attend at the CID offices to give information relating to some criminal matters being investigated and since she was unwell she requested an advocate to attend on her behalf and explain that she was unable to attend and in any case knew nothing about the goings on in MCSK.

6. It was disclosed by **Shamilla** that her advocate, **Edward Rombo**, was able to attend at the CID Headquarters on her behalf and met the investigating officer one **Sgt Kitalia** who informed him that **Shamilla** was required to attend court the next day to be charged together with officials of MCSK with offences relating to conspiracy and theft of MCSK money.

7. **Shamilla** averred that she was very shocked as she is an innocent third party not involved in the dealings of MCSK should find herself being arraigned in court for something she had no part in. The following day, 18th November, 2015, several directors of MCSK were to be arraigned at the Chief Magistrates Court at Nairobi in Criminal Case 1904/15 where it was indicated that **Shamilla** was to be charged with the offence of conspiracy to commit a felony and another count of stealing.

8. According to **Shamilla**, from the statements recorded with the police by **Mwirigi Nicholas Gikunda, Sarah Oundo Nagaya, David Kasika Espoil, Daniel Madaga Mamboleo, David Luvumbaze Ominde, Cosmas Anyuka Masambaga** and the investigating officer **Sgt Gilbert Kitalia** none of those who recorded the same accused or proffered any claim against her or the company as having stolen or planned to steal their money or any money from MCSK. To **Shamilla**, the only person that mentioned the company was **Sarah Oundo Nagaya** and even then it was in passing that she had come to the knowledge that the company was licensed by MCSK to collect money on her behalf which is very mistaken because she is not the applicants' client and the company didn't collect any money on her behalf otherwise she would have made a complaint against the company and the same would have been noted by the investigating officer aforesaid **Sgt. Kitalia**. To **Shamilla**, her gripe against the company appears to be only because **Shamilla** is a wife to the CEO and nothing to do with any dealings between herself and the company.

9. **Shamilla** disclosed that she was set to be arraigned in court and be made to go through the traumatic process of a criminal trial when in fact there is no basis at all. In her view, no probable cause or offence has been disclosed on her part from the statements and the only reason she was being arraigned in court is because she happen to be married to the CEO of MCSK and nothing else. It was therefore her case that the said prosecution was based on ulterior motives, which is to embarrass her and force her husband out of office.

10. According to **Shamilla**, it was very telling that the particulars in the charges sheet appear to disclose that the money allegedly stolen or conspired to be stolen belongs to MCSK yet the statements of the witnesses do not show any of them as officials of MCSK. All they complain about is that they have not received royalty money they think they deserve to receive from MCSK.

11. **Shamilla** deposed that she had been informed by the Chairman of MCSK one **Bernard Mukaisi** that not only did MCSK not lodge any complaint about its money being stolen because none was, but that all payments made to all members including to the company Nasratech Limited were duly sanctioned and authorised by the board of MCSK and the whole charade of getting police to interfere with the operations

of MCSK allegedly on behalf some disgruntled members who are not even able to say how much money due to them was stolen, was malicious and aimed at the ulterior motive of destabilizing MCSK especially after the police also sought to freeze the accounts of MCSK at the same time and a public notice was put out in the media confirming that MCSK had not lodged any complaint.

12. It was **Shamilla's** case that the Respondents were acting unlawfully by arraigning her in court in such an arbitrary manner on trumped-up criminal charges when no evidence or facts were disclosed that she committed any offence.

13. Based on legal advice, it was contended that this Court has supervisory jurisdiction over the illegal actions of Respondents and to grant the prayers sought in the order to safeguard the proper exercise of statutory powers within the parameters of the law and to prevent abuse of power by all or any of the Respondents. Further the Court has inherent power and duty to secure fair treatment for all persons who are brought before it and also to protect her rights.

2nd Applicant's Case

14. According to the 2nd Applicants, **Dan Maurice Okoth** and **James Mutisya Maweu**, the Society Music Copyright Society of Kenya Limited a company duly registered in Kenya under the **Companies Act** whose core business is to deal with music copyright matters on behalf of its clients who include musicians, artistes, and publishers. It was averred that the Society is engaged in the business of acquiring and dealing with various rights pertaining to musical works while it also acts as agents for various musicians and producers and is licensed by the Kenya Copyright Board (KECOBO) as a Collective Management Organisation as provided under the Copyright Act Cap 130 of the Laws of Kenya and in furtherance of its business as Collective Management Organization (CMO) it makes agreements and arrangements with various organizations, establishments and broadcasters for payment of licence fees for various copyrights some assigned to the company and some on behalf of its clients/members. Further, it collect funds as licence fees and we periodically disburse funds to its members as royalty payments, which payments are made at its discretion and using a formula created by it to ensure fairness and that every member gets paid something. It was averred that the Society's CEO acts as instructed by the Board of Directors acting as the Governing Council and all funds that are collected on behalf of the company by the Society's various regional offices are kept at its several bank accounts whose mandatory signatories are several of the Directors and the CEO.

15. It was contended that on or about 8th October, 2015 the applicants learnt from the CID investigating officer **Sgt Kitalia** that the company was being investigated by the CID allegedly because a small group of musical artistes were apparently unhappy at the royalty payments they had been receiving and the CEO was asked to report at the CID Headquarters to record a statement regarding misappropriation of funds belonging to MCSK. He visited **Sgt Kitalia** at the CID offices at Kiambu Road Nairobi where he recorded a statement explaining the operations of the company and how all funds of the company were ordinarily dealt with and disbursed. He also inquired on who had lodged the complaint regarding loss of MCSK funds because he was certain none of the director of the Governing Council had done so, and was informed by **Sgt Kitalia** that several artistes had complained that they were not happy with the money they received as royalties and so that had decided to go and report the matter to police.

16. According to the Applicants this was surprising since there were adequate mechanisms for redress under the company memorandum and articles of association and if any member had any complaints there were channels where the said complaint or disaffection could be dealt with. It was disclosed that the relationship between the Society and the artistes/clients members is contractual as when they sign up or assign their copyrights to the Society it becomes their agents in terms of licensing and collecting copyright royalty or licence fees and that by them becoming members/clients the company becomes their agents but they acquire no proprietary rights in the company which is owned by its shareholders. To the Applicants it was further surprising that a complaint regarding alleged misappropriation of funds belonging to MCSK had been made not by the authorized officers of the company but by a group of our clients/members.

17. It was deposed that the CEO was later on 17th November, 2015 informed by a call from **Sgt Kitalia** that he would be charged in court with various offences and was required to avail himself at the Chief Magistrates Court at Nairobi Milimani Law Courts and on 24th November, 2015, himself and several other officials of MCSK were arraigned in court and charged with various offences including conspiracy to steal and theft of funds belonging to MCSK. **According to the Applicants from the statements taken** by the investigating officer of all the purported complainants being **Mwirigi Nicholas Gikunda, Sarah Oundo Nagaya, David Kasika Espoil, Daniel Madaga Mamboleo, David Luvumbaze Ominde and Cosmas Anyuka Masambaga**, none of them accused or proffered any claim against the Applicants or the company as having stolen or planned to steal their money any money from MCSK as their complaints as recorded were about dissatisfaction with royalty payments. Similarly the statement of the investigating officer **Sgt Kitalia** does not show or disclose any offences committed by the Applicants but makes several mistaken findings not based on law.

18. While reiterating the contentions by the other Applicants, the Applicants herein averred that the Respondents should not abuse or misuse their powers to arrest, detain and/or arraign them in court in such an arbitrary manner on trumped-up criminal charge when no evidence or facts have been disclosed that they committed any offence. It was contended that the Respondents' said actions were manifestly unreasonable, illegal, unconstitutional and in blatant violation of the applicants' rights. To them, the actions of the Respondents if not checked by this Honourable court will continue to cause them serious infringement of their constitutional rights and grave damage yet this Court has inherent power and duty to secure fair treatment for all persons who are brought before it and also to protect their rights.

3rd Applicants' Case

19. According to the 3rd Applicants, **Music Copyright Society of Kenya (also referred to as "the Society")**, **Peter Kisala** and **Lilian Njoki**, Music Copyright Society of Kenya is a duly registered Collective Management Organization with a valid license issued under Section 46 of the **Copyright Act** No. 12 of 2001 to collect on behalf of copyright holders royalties with respect to the use of works associated with the holders and Article 3 of its Memorandum of Association of MCSK stipulates the foremost objective of the society as:

To exercise and enforce on behalf of members of the Society, being the composers of musical works or the authors of many literary or dramatic works, or the owners or publishers of or being otherwise entitled to the benefit of or interested in the copyrights in such works (herein after called "the proprietors") all the rights, economic or moral, and remedies of the proprietors by virtue of the Copyright Act, or otherwise in respect of any exploitation of their works and in particular, to administer all the rights relating to the public performance, broadcasting, communication to the public by wire or wireless including transmissions to subscribers to a diffusion and/or any digital service, graphic or mechanical reproduction, translation, adaptation, photocopying or similar reproduction (such as digital copying) and any form of use of such works.

20. It was averred that consistent with the foregoing objective the Society has established and created several structures to collect and administer royalties on behalf of its members and is directly under the supervision of the Kenya Copyright Board (KECOBO) a State Corporation established under section 3 of the **Copyright Act** No. 12 of 2001, to administer and enforce Copyright and related rights protection in Kenya. The Kenya Copyright Board consists of members from various sectors within the copyright industry and representatives from pertinent government institutions particularly the Ministries of Finance, Information, Culture and also representatives of the 2nd Respondent and that the Board currently has 15 members made up of 4 copyright experts, 5 Government representatives and 5 members from the private sector with a staff of up to 33 members including 5 legal counsels and 9 police officers appointed by the 2nd Respondent and gazetted as copyright inspectors. The Mandate of the Kenya Copyright Board pursuant to Section 5 of the **Copyright Act** is to administer and enforce copyright and related rights throughout the Republic by carrying out 9 major functions:

- a) Registering of copyright,
- b) Administering the Anti-Piracy Security Device (APSD),
- c) Creating and maintaining a database on copyright works in Kenya,
- d) Inspection and enforcement actions,
- e) Prosecution of copyright cases,
- f) Training,
- g) Awareness-raising and advocacy on copyright matters,
- h) Offering free legal advice to the public on copyright law,
- i) Licensing and supervision of Collective Management
- j) Organizations and reviewing copyright legislation.

21. It was averred that the Society had endeavoured to comply with terms set forth by KECOBO pursuant to their supervisory mandate to ensure that the Society continues to operate as per its objectives. KECOBO time and again access the Society's documents and monitor its activities to guarantee and confirm that the Society administers royalties appropriately on behalf of its members the copyright holders hence the Board has always been involved in the Society's affairs in execution of their statutory mandate. The Society's license to operate as a Collective Management Organization is issued annually by the Kenya Copyright Board subject to compliance of dictates set forth by the Board and the Board continuously scrutinize the Society's books and upon being satisfied issues the license to allow the Society operate.

22. It was averred that on 2nd September 2015 the Society's chief executive officer received Summons to compel his attendance issued by officers of the 1st Respondent requiring that he appears on 5th October 2015 before the Officer in charge Investigations at the Directorate of Criminal Investigations Headquarters for an inquiry into an alleged offence of misappropriation of the Society's funds and stealing by Director Contrary to section 282 of the **Penal Code**. Other than the foregoing the 1st Respondent rushed to the Chief Magistrate's Court in Miscellaneous Criminal Application Number 1828 of 2015 and obtained warrants authorizing him to collect the Society's bank statements for purposes of their investigations. From the proceedings, the 1st Respondent contends that he is relying on a complaint filed by a **Cosmas Anyuka Mas Mbaga, David Luvumbaze, Daniel Madaga Mamboleo and Sarah Oundo Nagaya** who are all the Society's members who had indeed lodged a Petition with the Hon. Attorney General on the same allegations which Petition was never considered.

23. It was contended that the Complainants in the alleged charges being members of MCSK are bound by the terms of the Memorandum and Articles of Association of MCSK and since the claims herein pertain to administration of the complainants copyrights by MCSK the same ought to be exhaustively addressed through mechanisms provided for in the said Memorandum & Articles of Association particularly that such disputes should be referred to Arbitration under Article 78 of the Memorandum.

24. It was deposed that on 29th September 2015 the 1st Respondent through the Director of Criminal Investigations request the 2nd Applicants to furnish the Directorate with several items including, the list of registered members, lists used to declare royalty payments, list of royalty payment transactions between members and the society as from 2013, etc. to which the said Applicants complied. Thereafter the Society's CEO appeared on 5th October 2015 before the Officer in Charge of Investigations at the CID Headquarters together with its Advocate **Mr. Conrad Maloba** and were directed to the investigating officer a **Mr. Kitalia** but the Advocate was ordered by the said investigating officer to stay out of the

interrogation room lest he be held for obstruction of justice and/or interference to an ongoing investigation. It was averred that the said CEO was then interrogated for almost 4 hours and indeed no fault was detected since the Society's bank statements as provided to the 1st Respondent, which were endorsed by the Board, were identical to what the 1st Respondent collected from the Society's bankers under the authority of warrant issued by **Hon. Mr. Peter Mugure** Resident Magistrate in Misc. Application No. 1828 of 2015 indicating that Applicants were more than willing to cooperate to the fullest with the authorities in the investigations.

25. It was averred that on 8th October 2015 the CEO was arrested together with some of the Society's employees in its accounts department **Ms. Lilian Njoki Thuo** and **Mr. Peter Kisala Enyenze** for alleged offences of stealing by Servant contrary to section 281 of the **Penal Code** and were taken to the CID Headquarters and then to Muthaiga Police Station and were released on a Police Cash bond of Kshs. 20,000.00 with instructions to attend the Chief Magistrate's Court Milimani the next day for arraignment on which day they appeared at Milimani Courts as directed but the Charge Documents against the said employees were never filed. The police bond were consequently extended to 24th November 2015 when the CEO and his 2 colleagues and a former Director **Mr. James Mutisya** were arraigned on various charges in Criminal Case No. 1904 of 2015 listed below:

a) **Count 1.** All the accused persons were charged for Conspiracy to Commit a Felony Contrary to Section 317 of the Penal Code. That on diverse dates with intent to defraud the Music Copyright Society of Kenya the accused persons conspired to defraud MCSK a sum of Kshs. 27,000,000.00.

b) **Count 2.** Our CEO **Mr. Maurice Okoth** was charged with stealing by an officer of a company, contrary to section 282 of the Penal Code; that on 18th October 2014 at ABC Bank the CEO stole Kshs. 25,000,000.00 being the property of the Music Copyright Society of Kenya which came to his possession by virtue of his employment.

c) **Count III.** A former director **Mr. James Mutisya** was charged with stealing by a Director, contrary to section 282 of the Penal Code that he stole Kshs. 6,000,000.00 on 30th April 2015 being the property of the Society.

d) **Count IV.** The Directors of a Company known as Nasratech Limited were charged with stealing Kshs. 27,000,000.00 the property of the society.

26. It was the said applicants' case that the Music Copyright Society of Kenya has never pressed for charges or filed a complaint against any of the accused persons above for the alleged offences. As far as they are concerned the said offences and the facts attached thereto never took place and the Music Copyright Society of Kenya through its Governing Council/Board has never been involved in the investigations resulting to the said charges neither has any board member of the society been invited to participate in the investigations. This notwithstanding the applicants on 21st October 2015, were dismayed to learn from their bankers that all their bank accounts were frozen by an Order issued by **Hon Agade** Resident Magistrate in Miscellaneous Criminal Application Number 2138 of 2015 at the instigation of **Mr. Gilbert Kitalia** who swore an affidavit stating that he was conducting investigations into alleged commission of offences by the Directors of the applicant and he had suspicion to believe that the Directors and Management of the applicant were withdrawing huge sums of money from the applicant's accounts.

27. It was however contended that sum of Kshs. 6,000,000.00 were withdrawn by the management staff to pay members attendance fees for an AGM held at Embu on 1st May 2015 as per our Board's Resolution dated 16th April 2015 pursuant to the proposal of the Finance, Investments and Distribution Committee dated 13th April 2015. As per the Resolution each member who attended the meeting was paid Kshs. 3,000.00. With regard the facts set forth in Count II the said funds in the amount of Kshs. 25,000,000.00 were deposited in a fixed deposit account at African Banking Corporation with a view to generate interest based on the authorisation of the CEO by the Board. The applicants however denied any knowledge of the facts around Counts 1 and 4.

28. It was reiterated that the society, which is the perceived victim was never involved in the investigations neither were the applicants given an opportunity to comment on the charges. In their opinion, that if the 1st Respondent had given the Board of Directors of the Society a chance to participate in the said investigations the facts as stated herein above would have been shared with the CID and thereby the charges would not have been filed against the employees. They however contended that the said employees and all the accused persons as charged in the said criminal case No. 1904 of 2015 have never been involved in any criminal activity leading to the loss of the alleged funds. Accordingly, the grounds relied upon by the 1st Respondent in filing the charges against the employees were not only reckless but completely unsubstantiated yet criminal proceedings under section 89 of the **Criminal Procedure Code** can only be commenced by the making of a complaint from the principal complainant who is normally the victim. On the face of the charge sheet and the alleged offences it is clear that The Music Copyright Society of Kenya is the perceived victim and as such the said offences and the criminal proceedings ought to have been commenced by way of a complaint lodged by the society. As indicated the society is a company governed under the **Companies Act** with an operational governing council with the requisite capacity to commence legal proceedings of any nature. It was contended that **it is a cardinal principal in company law that it is for the company and not the individual shareholder/members to enforce rights of action vested in the company and sue for wrongs done to it. That in the absence of illegality, a shareholder cannot bring proceedings in respect of irregularities in the conduct of the company's internal affairs in circumstances where the majority are entitled to prevent the bringing of an action in relation to such matters.**

29. In the Applicants' view, the substance of the charge sheet sets out facts that are merely general allegations that do not point to any wrongdoing by the accused persons. The allegations accompanying the charges which require investigation is inadequate in the absence of facts linking the accused persons and their accounts to the allegations. The contents of the facts in the charge sheet merely point to an alleged suspicious activity. Since the Society was not involved in the investigations and no facts were placed before the 2nd Respondent for the 2nd Respondent to objectively conclude that indeed there is criminal offence against the Society.

1st and 2nd Respondents' Case

30. It was the Respondents' case that this case was reported to the Directorate of Criminal Investigations in the month of August 2015 by **Cosmas Anyuka Masambaga, David Lumbaze Ominde, Daniel Mamboleo, David Kasika** and **Sarah Nagaya**, who are members of the Music Copyright Society of Kenya, to the effect that royalties due to them were being misappropriated by the Management of the Society. Following Misc. Criminal Application No. 1828/2015, 1915/2015, 2138/2015 and 182/2016 orders to investigate and freeze accounts were issued by the Chief Magistrates Court at Milimani for the preservation of the following accounts:

- (i) Equity Bank Limited A/C No. 1400261153476, Westlands Branch.
- (ii) ABC Bank Limited A/C No. 001202001000001 and 001215001001492, Westlands Branch.
- (iii) Kenya Commercial Bank Limited A/C No. 1138499285 Sarit Centre Branch.
- (iv) Barclays Bank Limited A/C No. 2028186277 Westlands Branch; and
- (v) Standard Chartered Bank
 - a) A/C No. 0102011125500 Ukay Branch,
 - b) A/C No. 0102033738700 Westlands Branch,
 - c) A/C No. 0152511125500 Ukay Branch.

31. It was averred that in the course of the investigations, it was established that the Music Copyright Society of Kenya was functioning inappropriately since it had been deregistered on 1st April 2011 as a collecting society. According to the said Respondents, the Music Copyright Society of Kenya could only be registered afresh after deregistration pursuant to registration procedures as set out under section 46(2) of the **Copyright Act**, Cap 130 of the Laws of Kenya.

32. It was disclosed that upon deregistration, Music Copyright Society of Kenya filed Judicial Review No 133/2011 Republic vs. Kenya Copyright Board and was granted leave to commence the judicial review proceedings on 31st May 2011 by **Lady Justice Gacheche**. The Judge also issued stay orders to the Gazette Notice 5093/2011 until the 27th July 2011. However, there was no extension of stay orders thereafter thereby effectively discharging the orders. The Music Copyright Society of Kenya nevertheless continued to operate as collecting society, notwithstanding the lapse of the aforesaid orders. It was disclosed that the only time that the Music Copyright Society of Kenya was registered as a collecting society after deregistration was on 1st January 2014. According to the said Respondents, upon completion of investigations, the police duplicate file was forwarded to the Director of Public Prosecutions for advice and upon the advice and direction of the Director of Public Prosecutions, further charges were preferred against the accused persons.

33. It was the Respondents' case that:

i. that under Article 157(6) of the Constitution of Kenya 2010, the respondent exercises the state powers and functions of Prosecution which entails the institution, undertaking, taking over, continuance and or termination of criminal proceedings amongst other functions and duties;

ii. that under article 245 of the Constitution of Kenya 2010 and further by other known laws, the respondent is empowered to enforce the laws in terms of conducting investigations and seek for preservation orders for property suspected to be proceeds of a crime

iii. that in addition thereto, the respondent in the discharge of its duties and functions, is required to respect, observe and uphold the following Constitutional provisions, inter alia;

- To have regard to public interest, the interests of administration of justice and the need to prevent and avoid abuse of the legal process under Article 157 (11);
- Uphold and defend the Constitution;
- The national values and principles of governance enshrined in Article 10 in the application, interpretation of the Constitution as well in making and implementing the laws and public policy decisions;
- Respect, observe, protect, implement, promote and uphold the rights and freedoms in the Bill of Rights enshrined in Article 21(1);
- To be accountable to the public for decisions and actions taken and generally observance Article 73 (2) (d);
- To be accountable for administrative acts and observance of the values and principles of public service Article 232 (e).

iv. that the applicant has not demonstrated that in making the decision to investigate the complaint against him, and enforce the requisite laws, that the respondents have acted without or in excess of the powers conferred upon them by law or have 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;

v. that the applicant seeks to curtail the mandate of the criminal justice system actors as enshrined within the Constitution of Kenya;

vi. that the applicant has not adduced sufficient evidence before this Court on merit to show that prejudice has been occasioned and damage suffered in conducting the investigations and seeking for preservation orders against the said properties;

vii. that the 2nd respondent does not require the consent of any person or authority for the commencement of criminal proceedings;

viii. that the respondent does not act under the direction or control of any person or authority and as such Article 249 (2) of the Constitution, provides that an independent office is subject only to the Constitution and the law and is not subject to the direction or control by any person or authority; and,

ix. that the allegation by the applicant is without merit, legal reason or backing.

34. The Court was therefore urged to exercise extreme care and caution not to interfere with the Constitutional powers of the respondents to investigate and subsequently institute and undertake criminal proceedings and should only interfere with the independent judgment of the respondents if it is shown that the exercise of his powers is contrary to the Constitution, is in bad faith or amounts to an abuse of process. To the Respondents, the applicant's averments are intended to further delay due process and as such are misconceived, unfounded, unmeritorious and baseless.

35. It was asserted that the applicants failed to demonstrate that the respondents have not acted independently or has acted capriciously, in bad faith or has abused the legal process in a manner to trigger the High Court's intervention.

Interested Parties' Case

36. According to the Interested Parties, they are composers and performing artists of musical and audio-visual works and are members of the Music Copyright Society of Kenya (MCSK). According to them, the 1st Interested Party has 2 albums namely *Nitungulia Bwana* and *Alubu Asante* which he registered as copyright works by the Kenya Copyright Board. The 2nd interested party on her part has two albums namely "*Mkombozi*" and "*Nikitazama*" that have been registered as copyright works by the Kenya Copyright Board.

37. The Interested Parties contended that the MCSK has been over the years, collecting royalties from the public performance of the Interested Parties' copyrighted music but rarely remitting the same to them. They disclosed that since they joined the MCSK they have received a total of Kshs 42,941.00 and Kshs 1,300.00 respectively, as royalties for public performances of their copyrighted work. They added that despite massive airplay of their songs and despite demanding payment from the MCSK on numerous occasions, the MCSK has failed, neglected and/or refused to account for and remit the royalties earned through the public performances of their musical works from various media houses across the country. This refusal, according to them, raised their suspicion as to possible financial impropriety on their part, with respect to the collection and management of the royalties for the public performance of my musical works. Accordingly, on or about August 2015, they filed a complaint, with the Directorate of Criminal Investigations against the MCSK's management and directors for the misappropriation and theft of royalties collected on behalf of its members pursuant to which the Directorate of Criminal Investigations commenced investigations into the alleged misappropriation and theft of royalties collected on behalf of artists by MCSK's management and directors immediately after receipt of thereof leading to the issuance of search and freeze warrant obtained by **Sergeant Gilbert Kitalia** of the Serious Crimes Unit of the Directorate of Criminal Investigations, in Magistrates Miscellaneous Criminal Application No. 182 of 2016.

38. It was averred that because of suspected financial impropriety with respect to royalties collected by the MCSK for public performances, the applicants were charged in Chief Magistrate's Court Nairobi Criminal Case No. 1904 of 2015. According to the Interested Parties, they were categorical that **Dan Maurice Mwande Okoth** used artists' misappropriated royalties to establish his television station "Tripple P". To them, **Dan Mwande Okoth** is the MCSK's Chief Executive Officers and is as such, charged with the general administration of MCSK's affairs and he, together with other directors, is a signatory of several bank accounts in which all funds collected on behalf of the MCSK by its various regional officers are kept.

39. The Interested Parties reiterated the position because of its mismanagement, MCSK was deregistered as a Collective Management Organisation (CMO) on 1st April, 2011, by its regulators; the Kenya Copyright Board (KECOBO), for functioning inappropriately as a CMO, pursuant to section 46(9) of the **Copyright Act**, Cap 130 when the 2nd applicants were at its helm. According to the Interested Parties, the said Kenya Gazette Notice No. 5093 has neither been revoked by KECOBO through another gazette notice nor quashed by a court of competent jurisdiction. To them, registration of MCSK as a CMO, after the aforesaid deregistered, can only take place pursuant to the registration procedures set out at section 46(2) of the **Copyright Act**, Cap 130. They asserted that as there has been no revocation of the Kenya Gazette Notice number 5093 that deregistered MCSK as a CMO, the 2nd and 3rd Applicants have been operating and collecting royalties of its members' without any lawful authority, having been deregistered.

40. The Interested Parties averred that without registration by way of a gazette notice, KECOBO could not and did not have the legal capacity to issue MCSK with any form of license to trade and or practice as a CMO though MCSK still persists in its mismanagement of royalties collected for and in the name of artists and has indeed received a letter from KECOBO threatening it with denial of operating license. The Interested Parties contended that the MCSK's audited accounts show a clear case of deliberate mismanagement of royalties from public performances of its members' copyrighted work. They asserted that they had exhaustively addressed mechanisms provided for under MCSK's Memorandum and Articles of Association, to address their complaints, which MCK's officials have repeatedly rebutted. To them, in any event commission of criminal offences such as suspected in this case cannot be referred to arbitration as contemplated by the MCSK's Memorandum and Articles of Association.

Determination

41. I have considered the application.

42. It is, in my respectful view, important to understand the principles which guide the grant of the orders in the nature sought herein before applying the same to the circumstances of this case. Several decisions have been handed down which in my view correctly set out the law relating to circumstances in which the Court would be entitled to prohibit, bring to a halt or quash criminal proceedings. It is however always important to remember that in these types of proceedings the Court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings. The Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution and that the mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review. This is so because judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.

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

“It is trite that an order of prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the an inherent power and the duty to secure fair treatment for all

persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.”

44. In Meixner & Another vs. Attorney General [2005] 2 KLR 189, the same Court expressed itself as hereunder:

“The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion if acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution... Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power. Having regard to the law, the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision is correct.”

45. However, in Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69, the High Court held:

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society’s senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court’s) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far that which the courts indeed the entire system is constitutionally mandated to administer... In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute. It is further alleged that the criminal prosecution is an abuse of the court process epitomised by what is termed as selective prosecution by the Attorney General. It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been be argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law...In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that

justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed...There is nothing which can stop the from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made...Under section 77(5) of the Constitution it is a constitutional right that no person who has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of the offence. What is clear from this constitutional right is that it prevents the re-prosecution of a criminal case, which has been determined in one way or another...A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution....In the instant case there is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even of manipulation of court process so as to seriously deprecate the likelihood that the applicants might not get a fair trial as provided under section 77 of the Constitution...There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an “abuse of process”, is a “manipulation”, “amounts to selective prosecution” or such other processes, or even supposing that the applicants might not get fair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts. The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial... In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names.”

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

“the police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police

only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene”.

47. Whereas Article 157(10) of the Constitution provides that the Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority, Article 157(11) provides:

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

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

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

(a) the diversity of the people of Kenya;

(b) impartiality and gender equity;

(c) the rules of natural justice;

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

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

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

(g) protection of the sovereignty of the people;

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

(i) promotion of constitutionalism.

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

“the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system..... In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of *Domnic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003* is that interpretation of the Constitution has to be progressive and in the words of Prof M V Plyee in

his book, *Constitution of the World*: “The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time..... In our role as “sentinels” of fundamental rights and freedoms of the citizen which are founded on laissez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent “sentinels” of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right.”

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

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

51. It is now clear that even in the exercise of what may appear to be *prima facie* absolute discretion conferred on the executive the Court may interfere. The Court can only intervene in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323**.

52. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the DPP to investigate and prosecute ought to be interfered with. It is clear that in exercising their discretion to charge a person both the police and the DPP’s office must take into account and must exercise the discretion on the evidence of sound legal principles. As was held by **Ojwang, J** (as he then was) in **Nairobi HCCC No. 1729 of 2001 – Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another**:

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

purposes”.

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

54. In this case, it is not disputed that the Applicants were charged with the following offences:

Count 1. All the accused persons were charged for Conspiracy to Commit a Felony Contrary to Section 317 of the *Penal Code*. That on diverse dates with intent to defraud the Music Copyright Society of Kenya the accused persons conspired to defraud MCSK a sum of Kshs. 27,000,000.00.

Count 2. The CEO **Mr. Maurice Okoth** was charged with stealing by an officer of a company, contrary to section 282 of the *Penal Code*; that on 18th October 2014 at ABC Bank the CEO stole Kshs. 25,000,000.00 being the property of the Music Copyright Society of Kenya which came to his possession by virtue of his employment.

Count III. A former director **Mr. James Mutisya** was charged with stealing by a Director, contrary to section 282 of the *Penal Code* that he stole Kshs. 6,000,000.00 on 30th April 2015 being the property of the Society.

Count IV. The Directors of a Company known as Nasratech Limited were charged with stealing Kshs. 27,000,000.00 the property of the society.

55. It is clear that none of the counts allege that the applicants misappropriated the funds due to the interested parties which is the complaint that the interested parties allege against the applicants. Similarly, there is no offence preferred against the applicants relating to collecting money unlawfully as alleged by the Respondents. The entity which is alleged to have been defrauded, according to the charge sheet, has not only not complained but is also an applicant in these proceedings seeking or supporting the case seeking the termination of the criminal proceedings. It is therefore clear that the person or entity who the prosecution purports to protect through the criminal proceedings, does not support the prosecution's action. In my view it would seem that the decision to charge the applicants was arrived at without proper investigations and therefore contrary to Article 157(11) of the Constitution as read with section 4 of the *Office of the Director of Public Prosecution Act*. According to me the said decision defeats reason. According to **De Smith's Judicial Review**(sixth edition) at Page 559:

“Although the terms irrationality and unreasonableness are these days used interchangeably, irrationality is only one facet of unreasonableness. A decision is irrational in the strict sense of that term if it is unreasoned; if it is lacking ostensible logic or comprehensible justification. Instances of irrational decisions include those made in an arbitrary fashion perhaps by spinning a coin or consulting an astrologer or where the decision simply fails to add up-in which in other words there is an error of reasoning which robs the decision of logic...Less

extreme examples of the irrational decision include those in which there is an absence of logical connection between the evidence and the ostensible reasons for the decision, where the reasons display no adequate justification for the decisions or where there is absence of evidence in support of the decision.”

56. **Sedley, J’s in R vs. Parliamentary Commissioner for Administration, ex parte Balchin and Another [1998] 1 PLR 1**, stated at page 11 that:

“What the not very apposite term “irrationality” generally means in this branch of the law is a decision which does not add up-in which, in other words, there is an error of reasoning which robs the decision of logic.”

57. In my view the decision to charge the Applicants with offences allegedly committed against the Society in light of the material placed before me does not add up.

58. Apart from that it is clear that the interested parties’ bone of contention revolves around accounts. To transform a dispute which is purely a matter of accounting into a criminal one when the perceived victim has not lodged a complaint and when the complainants themselves are not even sure of what is due to them in my view amounts to embarking on a fishing expedition and amounts to employment of criminal process for the achievement of collateral purposes.

59. In my view, the correct prosecution policy is the one expounded in ***Code for Prosecutors of the Crown Prosecution Service of the United Kingdom*** (“the Code”) as reflected in our own prosecution policy, ***The National Prosecution Policy***, revised in 2015 which was relied upon by the Petitioners herein. The ***Code***, provides, *inter alia* that:

4.4 Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.

4.5 The finding that there is a realistic prospect of conviction is based on the prosecutor’s objective assessment of the evidence, including the impact of any defence and any other information that the suspect has put forward or on which he or she might rely. It means that an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged. This is a different test from the one that the criminal courts themselves must apply. A court may only convict if it is sure that the defendant is guilty.”

60. ***The National Prosecution Policy***, revised in 2015 on the other hand provides at page 5 that:-

2. Public Prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction. In other words, Public Prosecutors should ask themselves; would an impartial tribunal convict on the basis of the evidence available?”...

61. In **Githunguri vs. Republic [1986] KLR 1** at page 18 and 19 a three Judge bench High Court constituted of Ag. Chief Justice Madan and Justices Aganyanya and Gicheru expressed themselves as follows:

“But from early times... the Court had inherently its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing – the Court had the right to protect itself against such an abuse...The power seemed to be inherent in the jurisdiction of every Court of Justice to protect itself from the abuse of its own procedure...every Court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the

Court...Mr Chunga argued that to grant the application would be tantamount to curtailing or interfering with the powers of the Attorney-General under section 26 of the Constitution. This argument of his compels us to say that he kept freewheeling for a long time before us because perhaps he did not understand the real purport of the application. No one has made any challenge to the powers of the Attorney-General, nor would any one succeed if he were to say that the Attorney-General's powers under section 26 can be interfered with. What this application is questioning is the mode (emphasis ours) of exercising those powers...No one will succeed in convincing us that the Court does not have inherent powers to exercise supervisory jurisdiction over tribunals and individuals acting in administrative or quasi-judicial capacity...A prosecution is not to be made good by what it turns up. It is good or bad when it starts. The long and short of it is that in our opinion it is not right to prosecute the applicant as proposed.”

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

“The first is that the public interests in the administration of justice require that the court protects its ability to function as a court of law, by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court processes may lend themselves to oppression and injustice...the court grants a permanent stay in order to prevent the criminal process from being used for purposes alien to the administration of criminal justice under the law. It may intervene in this way if it concludes that the court processes are being employed for ulterior purposes or in such a way as to cause improper vexation and oppression.”

63. I also associate myself with the decision in R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001 that:

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

64. It is trite that to commence criminal proceedings in order to settle what is purely a civil dispute amounts to abuse of power and discretion. This was the position adopted by Majanja, J in Petition No. 461 of 2012 – Francis Kirima M'ikunyua & Others vs. Director of Public Prosecutions, when dealing with situations where there exist criminal and civil proceedings arising from the same facts pronounced himself as follows:

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

65. Whereas I appreciate that the mere fact that the Articles and Memorandum of Association provide for

a dispute settlement mechanism, does not bar criminal proceedings from being commenced, where the facts as can be discerned from the complainants do not support the charges preferred against the applicants, it would be a misuse or abuse of the judicial process to permit the criminal proceedings to proceed. As was held in **R. vs. The Judicial Commission into the Goldenberg Affair and 2 Others exp Saitoti HC Misc Appl. 102 of 2006:**

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

66. Having considered the material on record, it is clear that the Respondents have not laid any basis upon which it can be concluded by this Court that they have any prospects of successfully prosecuting the applicants.

67. In the premises, I find merit in these consolidated applications and grant the following orders:

1. An order of Certiorari to removing into this Court for the purposes of being quashed the decision, declaration and directive of the respondents to prefer criminal charges against the Applicants based on the facts contained in the Charge Sheet dated 18th November 2015 in Criminal Case No. 1904 of 2015 – Republic versus Dan Maurice Mwanje Okoth & 6 others which decision is hereby quashed.

2. An order of Prohibition directed to the Respondents prohibiting the prosecution of the Applicants based on the facts contained in the Charge Sheet dated 18th November 2015 in Criminal Case No. 1904 of 2015 – Republic versus Dan Maurice Mwanje Okoth & 6 others.

68. The costs of this application are awarded to the applicants to be borne by the 1st, 2nd and 3rd Respondents.

69. Orders accordingly.

Dated at Nairobi this 7th day of September, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Maloba for the 3rd Applicants and holding brief for Mr Rombo for the 1st and 2nd Applicants

Cc Mwangi