



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 192 OF 2016

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
BY WAY OF ORDERS OF PROHIBITION**

BITANGE NDEMOPETITIONER/APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

INSPECTOR GENERAL OF THE NATIONAL

POLICE SERVICE.....2ND RESPONDENT

THE DIRECTOR, CRIMINAL INVESTIGATIONS

DEPARTMENT.....3RD RESPONDENT

THE ETHICS AND ANTI-CORRUPTION COMMISSION.....4TH RESPONDENT

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

JUDGMENT

1. By a Notice of Motion dated 20th May 2016 and filed in court on 23rd May 2016, the Exparte applicant Bitange Ndemo seeks from this court orders for:

1. A **Declaration** that the initiation, maintenance and prosecution of the applicant in the Chief Magistrate's court (Anti-corruption court) vide Criminal Case No. 19 of 2014 is an abuse of the criminal justice system and a contravention of the petitioner/applicant's Constitutional Rights to freedom and security of the person and also the right to secure protection of the law;

2. A **Declaration** that the initiation and prosecution of the case against the petitioner/applicant in the Chief Magistrate's Court(Anti-corruption court) vide criminal case No. 19 of 2014 amounts to selective prosecution and a gross abuse of the process of court;

3. A **declaration** that the initiation, maintenance and continued prosecution of the

petitioner/applicant in the Milimani Chief Magistrate's court (Anti-corruption Court) vide criminal case No. 19 of 2014 is oppressive, malicious and an abuse of the process of the court;

4. Orders of prohibition do issue the continuance of the Chief Magistrate's Court (Anti- Corruption court) Criminal case No. 19 of 2014.

5. Costs of the application.

6. Any other order that the court may deem just and expedient to grant in the circumstances.

2. The application is brought under the provisions of Order 53 Rule 4(1) of the Civil Procedure Rules, 2010 and pursuant to leave granted on 9th May 2016 by Honourable Justice W. Korir vide chamber summons dated 26th April 2016.

3. The Notice of Motion is supported by verifying affidavit sworn by Bitange Ndemo, the ex parte applicant herein sworn on 26th April 2016, the statutory statement dated 26th April 2016 filed on 27th April 2016 and the exhibits filed together with the chamber summons for leave and with the notice of motion.

The ex parte applicant/petitioner's case

4. The gravamen of the ex parte applicant's case is that on 27th January 2014, officers from Directorate of Criminal Investigations Department after carrying out exhaustive investigations into alleged breach of procurement laws relating to the government procurement of land for the proposed ICT Park to wit LR No. 9918/3 Malili Ranch in Machakos District recommended various charges against one Eric Kyalo Mutua, Peter Mutua Kanyi, Julius Maweu Kilonzo, Directors of Gateway Logistic and Honourable Johnstone Muthama on the basis that there was adequate evidence on record to successfully prosecute them with the various criminal offences. The same officers recommended that on Ms Kagiri of the Ministry of Information and Communication together with Mr James Waweru formerly of Attorney General's office be charged with the offence of abuse of office.

5. That on 29th January 2013- the officers of Ethics and Anti - Corruption Commission recommended to the Director of Public Prosecutions that the ex parte applicant herein with one George Madanji, Henry Mungasia, Joseph Kimwele, Ernest Kerich, Edward Mburu and Joshua Magare be charged with various offences and indeed forwarded a draft charge sheet to the Director of Public Prosecutions.

6. Later, on 5th August 2013, the officers of the Ethic and Anti Corruption Commission wrote to the Director of Public Prosecutions confirming that after further investigations and review of the evidence available, the proposed charges in respect of counts two and three against Mr Bitange Ndemo and George Madanji were no longer sustainable, and recommended that the applicant, and Madanji be charged together with members of the ministerial tender committee.

7. That the Director of Public Prosecutions on 2nd September 2013 after taking into account exhaustive investigations conducted by the Ethics and Anti-Corruption Commission officers and the latter's recommendation, ordered the inquiry file to be closed since the applicant's prosecution was not warranted.

8. The applicant claims that on 5th September 2014, the Director of Public Prosecutions in a discriminatory and selective manner, unlawfully, maliciously and without any basis whatsoever recommended the applicant to be prosecuted in the same investigations file and as a result the applicant was summoned to Milimani Chief Magistrate's Court ACC 19/2014 where he was charged with the offences of:

Count 1: *Willful failure to comply with the law relating to Section 45(2) (b) as read with Section 48 of the Anti Corruption and Economic Crimes Act No. 3 of 2003;*

Count 2: *Willful failure to comply with the law relating to procurement contrary to Section 45(2) (b) as read with Section 42 of the Anti Corruption and Economic Crimes Act No. 3 of 2003;*

Count 3 : *Abuse of office contrary to Section 46 as read with Section 48 of the Anti Corruption and Economic Crimes Act No. 3 of 2003;*

Count 4: *Stealing contrary to Section 268 as read with Section 275 of the Penal Code; and*

Count 5: *Conspiracy to commit a felony contrary to Section 393 of the Penal Code.*

9. According to the ex parte applicant, although the criminal case was instituted against him in 2014, it has not been heard and determined and that during the course of the pending trial, the ex parte applicant accessed documents and correspondence which now confirm that his continued prosecution is malicious, was instituted for purposes other than the furtherance of the justice system, and is a clear abuse of court process.

10. Further, the ex parte applicant claims that the people recommended for prosecution have been shielded from prosecution in an attempt to embarrass, humiliate and coerce the applicant while others have been treated as prosecution witnesses in an attempt to deny the applicant a defence, and which is an abuse of the court process and an infringement of the applicant's Fundamental Rights and Freedoms as enshrined in the Constitution hence this court has the power to intervene under Articles 19,20,21, 22 of the Constitution and grant such appropriate remedies as are bestowed on it including those under Article 23(3) of the Constitution.

11. The applicant avers that his continued prosecution on no foundational evidence is ill founded and a violation of his Fundamental Rights and Freedoms as enshrined in the Constitution and that therefore he should not be subjected to illegal proceedings whose sole intention to embarrass and vex him, while trampling on his rights which are protected under the Constitution with impunity and that it is not clear as to what the intentions of the respondents are, when, after 4 years of waiting for the trial, they asked him to report to the investigating officer for preliminaries while the criminal case is pending before court.

12. It is the above brief facts that informed the filing of these Judicial Review proceedings.

13. In support of the Judicial Review Notice of Motion/Petition are a verifying affidavit reproducing the above facts on oath and annexing exhibits and asserting that the Government of Kenya through the Treasury and Auditor General's Office and the Public Investment Committee of Parliament and the Public Accounts Committee who are the watchdogs of public resources have never complained that public funds were lost in the Konza ICT project.

14. The applicant believes that his prosecution is a witch hunt and a cover up of the actual culprits.

The respondents' defence

15. In their defence to the allegations leveled against them in the Judicial Review Motion/Petition, the 1st, 2nd and 3rd respondents filed replying affidavit sworn by Gitonga Muranga a prosecution counsel with the Office of the Director of Public Prosecutions on 5th May 2016 deposing that the inquiry file leading to the charges that the applicant is facing was opened following allegations made between 2009 and 2014 to various Government Agencies including the 1,2 and 3 respondent, by several shareholders of Malili Ranch.

16. That the shareholders complained that they had not authorized the amalgamation and sale of their individual parcels of land to the Government of Kenya. That the applicant recorded his statements with the police on diverse dates which statements revealed that he was a conspirator to the illegal, irregular and fraudulent sale of the said land which at the material time did not belong to the Malili

Ranch Company but to individual owners comprising 7.8 acres each, and who should have been paid individually, and that this is a fact which the applicant and the directors of Malili Ranch knew.

17. The respondents further contend at the decision to charge the applicant was informed by sufficiency of evidence on record and the public interest, after the Director of Public Prosecutions had reviewed and analyzed the evidence contained in the investigations file including witness statements, documentary exhibits and the applicant's own statement as required by law.

18. According to the respondents, there is ample evidence to show that the transaction was not done above board and that it was shrouded in fraud and lack of due diligence.

19. Further, that the Directors of Malili Ranch offered the land for sale without consent of the shareholders and evidence shall be adduced at the trial to show that the Directors and the applicant herein were key beneficiaries of the proceeds of sale that arose from their fraudulent acts.

20. In addition, that whereas each shareholder was entitled to shs 1,560,000 for 7.8 acres, some shareholders received only shs 1,400,000, others 1,100,000 the difference being the money which was stolen amounting to shs 179,134,070 out of which the applicant herein also benefited and hence, the necessity to review the inquiry files by Mr Paul Kibugi Muite Senior Counsel and make recommendations which informed the charges facing the applicant and that recommended actions were considered and accepted by the Director of Public Prosecution.

21. According to the respondents, the Director of Public Prosecutions is exercising state powers and constitutional functions as conferred to him under Article 157(6) of the Constitution and Section 5(4) of the Office Director of Public Prosecution Act and in so doing, he is applying himself to the principles espoused in the Constitution i.e Article 157(1), Article 10, Article 21(1), Article 73(2) (d) and Article 232(a) of the Constitution.

22. And that the applicant has not demonstrated that the Director of Public Prosecutions has abused or exceeded his powers in prosecuting the applicant herein.

23. Further, the respondents deny all the allegations of harassment, malafides and contend that the sufficiency of the evidence shall be considered in the trial court and not by this court which is not exercising jurisdiction as an appellate court and that there are sufficient legal safeguards to ensure that the exparte applicant gets a fair trial hence there is no merit in this application for Judicial Review which, according to the Director of Public Prosecutions, seeks some illegal and unconstitutional immunity or insulation against lawful prosecution and that no prejudice will be suffered by the applicant going through the motions of the prosecution as scheduled.

24. respondents therefore prayed for dismissal of the notice of motion for Judicial Review Orders.

Submissions

25. The parties filed their submissions to canvas the notice of motion with oral highlights presented before me on 20th July 2016. I shall combine the written and oral submissions as presented in court. The exparte applicant filed his written submissions dated 20th May 2016 and further submissions dated 18th July 2016 each accompanied by a list authorities in support.

26. The respondent submissions are dated 10th June 2016 and are also supported by authorities.

The exparte applicant/petitioner's submissions.

27. Senior counsel Mr Fred Ojiambo representing the exparte applicant submitted that his client's application seeks for redress following a denial of and violation and infringement of his fundamental rights and freedoms under the Bill of Rights hence the prayers for Declarations that the continued

prosecution against the ex parte applicant for abuse of office and theft and conspiracy is an abuse of the criminal justice system, freedom of security and the right to the protection of the law.

28. Further, it was submitted on behalf of the ex parte applicant that his prosecution is a gross abuse of the process of the court, is oppressive and an abuse of the legal process and therefore the prayer for prohibition against the continued prosecution; and that this court has the jurisdiction to grant the remedies sought pursuant to Articles 23(3) and 165 of the Constitution.

29. The ex parte applicant's counsel, relying on his client's pleadings and affidavit and written submissions submitted that at all material times the applicant was the Permanent Secretary, Ministry of Information and Communication and was tasked with the setting up of Konza Techno city hence he set up a Ministerial Tender Committee as per the relevant law to source for suitable land. That he was not a member of that tender committee but that the process was completed upon which the purchase money was paid to Eric Kyalo Mutua advocate who was the company secretary and advocate for the Malili Ranch for onward transmission to his clients but that it turned out that the said Eric Mutua did not pay some of the members of Malili Ranch hence they raised a complaint which prompted investigations into the matter.

30. The ex parte applicant made it clear that he is not seeking for the veracity of the facts or evidence proving or disproving facts of or the innocence or otherwise or review or assessment of the evidence against him as gathered from the witnesses for the prosecution in the trial but that he is concerned about the decision taken to charge him.

31. Further, that he is not challenging or impugning the powers of the Director of Public Prosecutions who has duty to act independently in connection with the prosecution but that that of the DPP power was not being exercised within the constitutional confines.

32. That the Director of Public Prosecutions having reviewed the evidence in the investigations file, and having made certain recommendations on who should be charged with what offence, and having made a definitive decision in writing to the Ethics and Anti -Corruption Commission Chief Executive Officer Mr Halakhe Waqo that there was no basis upon which the ex parte applicant should be charged, for the Director of Public Prosecutions to reverse his decision to charge the applicant on the basis of Senior Counsel Muite's report on fresh evidence, it was critical that the applicant is given an opportunity to respond or comment on that new evidence touching the complaint that none of the shareholders of the Malili Ranch were paid the purchase price which was released to Mr Eric Mutua.

33. Further, that in fact, according to Senior Counsel Muite's letter communicating the fresh evidence, he made it clear that the CID were still investigating the matter and that the exact charges would be arrived at once the CID completes investigations.

34. Further that it was speculative for the Senior Counsel to state that Eric Mutua was seriously implicated in the scam yet conclude that he should be made a prosecution witness to secure conviction of the ex parte applicant, when the statement of Eric Mutua clearly was that he did not pay the ex parte applicant any of the proceeds of sale of the Malili Ranch.

35. According to the ex parte applicant, there was breach of fair administrative action in choosing and picking co-conspirators to a crime, so as to nail him.

36. That the ex parte applicant was never questioned on the new evidence before he was charged, which he considers was in violation of his right to fair administrative action as espoused in Article 47 of the Constitution and the Fair Administrative Action Act, No 4 of 2015 hence abuse of discretion of the Director of Public Prosecutions to manage and conduct public prosecutions. Reliance was placed on the case of **Githunguri V HCR Appl. 271/1995** where the Attorney General acted in similar fashion. The court found that action to be abuse of the legal process. Further reliance was placed on **Paul Imison V AG HC Miscellaneous Application 1604/2003** and **Njuguna Ndungu Vs EACC & 2 others [2014] e KLR**.

37. It was submitted on behalf of the applicant that if the Director of Public Prosecutions found new evidence against the ex parte applicant, he should have confronted the ex parte applicant with that new evidence to enable the applicant respond otherwise the Director of Public Prosecutions' actions are shrouded in mystery and secrecy as was held in **R Vs AG ex parte Diamond Lalji & Almed Hasham Lalji [2014] e KLR** where it was held that new evidence must be put to the suspects to respond and failure to do so is a violation of Article 157 of the Constitution.

38. Further, it was submitted that the respondents have not challenged the factual basis upon which this matter is founded hence the court must intervene where there is violation of rights.

39. In addition, it was submitted that the so called new evidence lacked foundation in that if the new evidence shows that the shareholders were not paid their money by Eric Mutua who received the money on their behalf and who has so admitted to receiving such monies, and who has also denied paying any part of that money to the ex parte applicant, then it is not clear why Eric Mutua was being shielded from prosecution and instead the ex parte applicant is being charged with stealing and Eric Mutua is being recommended to be treated as a prosecution witness even though it is said that his statement implicates him as being culpable.

40. It is therefore submitted that on the basis of the above facts, the prosecution of the applicant lacks any foundation and should not be allowed to proceed as was held by Odunga J in **Williams Vs Spantz[1992] 66 NSWLR 585** that where the evidence is incapable of sustaining a committal, they lack any proper foundation and will obviously be oppressive and vexatious and so the proceedings are an abuse of the process of the court hence the court would be justified in intervening. Further reliance was placed on the decision in **Praxides Namwoni & Others Vs Director of Public Prosecution & Ethics and Anti- Corruption Commission JR 502 of 2015**.

41. The ex parte applicant further complained that the singling out of the ex parte applicant and leaving out persons who were adversely mentioned and who even gave statements which were self incriminating and instead opting to use them as prosecution witnesses to "*secure a conviction against the ex parte applicant*" was discriminatory and abuse of power that is constitutionally given. Reliance was placed on **Joshua Okungu & Another V CMS court, Anti Corruption court & Another [2014] e KLR** where the court made it clear the arbitrary, discriminatory and selective manner in which the prosecution was commenced against the ex parte applicant could not be justified and that it would amount to abuse of legal process.

42. Further, it was submitted that in accordance with Section 4 of the Office Director of Public Prosecutions Act, where there is violation of statutory duties, the court cannot sit aside and say let the prosecution go on, and in the view of the fact that the Director of Public Prosecutions had evidence that Mr Eric Mutua, the advocate who had the money admitted that he never made any payments to any officials of the Ministry of Information, that the ex parte applicant's selective prosecution in the midst of all that, is denying him of equal protection of the law as espoused under Article 27 of the Constitution hence the Director of Public Prosecutions should be prohibited from prosecuting the ex parte applicant and that the court should make Declaratory orders terminating the prosecution that is intended to shield Mr Eric Mutua.

43. Further, that the Inter Ministerial Committee report was not made by the ex parte applicant.

The respondents' submissions

44. In response to the ex parte applicant's submissions, Mr Nderitu counsel for the respondents opposed the proceedings hereto, relying on the replying affidavit and written submissions and authorities as filed on record.

45. According to counsel for the respondents who entered an appearance in this matter, there are only two issues for determination namely:

1) *Whether the decision to charge the applicant is lawful and constitutional; and*

2) *Whether the intended trial of the applicants is an abuse of legal and or administrative process.*

46. On the first issue, the respondents' counsel contended that the Judicial Review application is an abuse of the court process. That the applicant as the former Permanent Secretary and Accounting Officer of the Ministry of Information Communication and Technology is charged with specific offences under the Public Procurement and Asset Disposal Act (repealed) and stealing and conspiracy to steal under the Penal Code hence it was misleading to allege that the applicant was charged with procurement related offences.

47. Further, that the fact that the applicant claims to be ready and willing to stand trial, he is on a trial and error fishing expedition. It was also submitted that this court cannot review evidence which the Director of Public Prosecutions will be presenting before the trial court and or review the defence of the exparte applicant and determine the outcome of the criminal trial through Judicial Review proceedings.

48. It was also submitted that there was no demonstration that the Director of Public Prosecutions had abused his powers as stipulated in Article 157 of the Constitution and Section 4,5 and 6 of Office Director of Public Prosecutions Act.

49. Consequently, the court was urged to refrain from interfering with the powers of the Director of Public Prosecutions.

50. Mr Nderitu further submitted that the applicant recorded not less than 2 statements with investigators hence he had an opportunity to be heard and that he denied any involvement in the commission of the offences.

51. the Director of Public Prosecutions has powers to review his decision by relooking into the matter even after he had proposed closure of the original investigations and that there is no prejudice in the reopening of investigations.

52. That the defence will have an opportunity to challenge the evidence during the trial since the Criminal Procedure Code provides various stages at which guilt or innocence of an accused person may be determined and that if there was any minor procedural defect which is denied then the remedy does not lie in the prohibition which is hereby sought by the applicant but in the applicant putting up a defence or seeking for damages for malicious prosecution.

53. Counsel for the respondents distinguished this case from the **Githunguri case** where the Attorney General had undertaken in writing not to prosecute the applicant but changed his mind which the court found to be an abuse of the court process, unlike this case where 6 months had not lapsed from the time that the Director of Public Prosecutions had advised that the file to be closed.

54. It was further submitted that there was criminal conduct and criminal trials are issues of public interest and the Director of Public Prosecutions acts in the public interest and so it is in the public interest that the criminal trial be concluded.

55. That the Director of Public Prosecutions has the discretion to call any witness and that the applicant is jointly charged with other persons not that he was singled out. That the applicant will have an opportunity to cross examine the witnesses who are lined up.

56. That what is before the court is an attack on the merits of the criminal trial pending in the lower court which court is the best forum for challenging evidence. Mr Nderitu relied in several authorities including the case of **Thuita Mwangi & Another Vs EACC & Others** where Majanja J held that the High Court was not the right place to tender justification concerning the subject transaction or test the nature and veracity of allegations and that proof of the charge is made at the trial hence the

Director of Public Prosecutions cannot be asked to prove the charge against an accused person at the commencement of the trial.

57. Further reliance was placed on **Republic Vs commissioner of Police & Another** ex parte **Michael Monari & Another** [2012] eKLR:cited in **Kibiwot & 2 Others Vs Director of Public Prosecution & 7 Others** [2014] eKLR where the court held inter alia that the police had a duty to investigate on any complaint once a complaint is made...and that as long as the Director of Public Prosecutions and those charged with the responsibility of making decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.

58. respondents also relied on **Republic Vs Attorney General & Others Ex parte Diamond Hashim Lalji & Ahmed Hashim Lalji** (supra) where Odunga J noted that the court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings -hence the applicant should appear before a competent court where he will be accorded a fair trial and a fair hearing and if dissatisfied he could appeal, as was held in the above **Diamond Hashim Lalji (supra)** case.

59. It was further submitted that having a good defence in the criminal process is a good 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 as was held in **Eric Kibiwott & 2 Others Vs Director of Public Prosecution & Others**(supra).

60. On instances in which a court can declare a prosecution improper, reliance was placed on **Paul Imisson & Another V Attorney General & 2 Others, Macharia & Another V Attorney General & Another & Bennet Vs Horseferry Magistrate's Court**, which circumstances, it was submitted, were absent in this case.

61. In a brief rejoinder, Mr Ojiambo Senior Counsel submitted that it is not true that the powers of the Director of Public Prosecutions under Article 157 of the Constitution are absolute and or that once he decides to prosecute then the court cannot intervene. Further, that those powers must be exercised reasonably, justly and not oppressively.

62. It was also submitted on behalf of the applicant that the applicant is not seeking to be declared innocent by these proceedings but is challenging the flawed process of charging him which is in violation of his constitutional rights and not a minor procedural error. That being a Permanent Secretary and Accounting Officer is not prima facie evidence that he is guilty but that there must be *mensrea and actus reus*.

63. In addition, Senior Counsel submitted that all statements made by the applicant were prior to closure of the investigations by the Director of Public Prosecutions and that since reviving those charges, the applicant has never been called upon to record any further statement after Senior Counsel Mr Muite's advisory.

64. Further, it was submitted that where there is a violation of rights, the issue of willingness to stand trial does not arise and that the issues being raised came to the knowledge of the applicant after the commencement of the trial in the subordinate court.

65. It was further submitted on behalf of the applicant that the Director of Public Prosecutions had overreached his mandate hence the court has the power to intervene especially in the glare of the evidence that those who made decisions in the inter ministerial committee and Eric Mutua who received the money and who denied paying any money to the applicant have not been charged.

66. And that public interest is only one of the considerations that the Director of Public Prosecutions takes into account in charging a person but that in this case there was gross abuse of duty.

Analysis and Determination.

67. From the pleadings, affidavit evidence, exhibits tendered and submissions of both parties ably represented in this judicial Review application, supported by a plethora of decided cases as well as statutory and constitutional provisions, this court acknowledges that the criminal justice system, and therefore, criminal trials, are a matter of public interest and are conducted in the public interest, to ensure that the Rule of law, one of the pillars of good governance is promoted and protected. It is for that reason that the makers of the Constitution of Kenya 2010 deemed it fit to enshrine therein several state institutions such as the office of the Inspector General of Police and the Director of Public Prosecutions, to be the custodians of the criminal justice system in ensuring that the Rule of Law is protected and promoted.

68. The above two state agencies/independent offices function in the broader society and not in isolation. The courts exist to administer justice in their exercise of judicial authority which is donated by the people of Kenya, to administer justice to all irrespective of status; to ensure expeditious justice; to administer justice without undue regard to procedural technicalities and to ensure that the purpose and principles of the Constitution shall be protected and promoted.

69. All stated organs, offices and persons are subject to the authority of the Constitution. The Director of Public Prosecutions exercises power donated by Article 157 of the Constitution and the Office of Director of Public Prosecution Act to among others:-

a) Institute and undertake criminal proceedings against any person before any court (other than a Court Martial) in respect of any offences alleged to have been committed;

b) Take over and continue any criminal proceedings against any person before any court that have been instituted or undertaken by another person or authority, with the permission of the person or authority;

c) With permission of the court, discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecution under paragraph b of Article 157(6) of the Constitution.

70. And in the exercise of the powers conferred by the Constitution, 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.

71. The Director of Public Prosecutions is also empowered to work without being under the direction of or control of any person or authority and to apply all principles and values of the Constitution and to be subject only to the Constitution.

72. Non discrimination is one of the values and principles of governance espoused in Article 10 of the Constitution. In addition, Article 27 of the Constitution commands that every person is equal before the law and has the right to equal protection and equal benefit of the law. Further, the latter Article bars discrimination of any person whether directly or indirectly by any other person. The Constitution under Articles 50 and 51 guarantee every person and an accused person a fair trial and a fair hearing.

73. In addition, Article 28 of the Constitution guarantees every person inherent dignity and the right to have that dignity respected and protected.

74. Freedom and security of the person and secure protection of the legal and Constitutional law are also guaranteed by the Constitution.

75. Against the above background, the applicant herein claims that his continued prosecution by the state through the Director of Public Prosecutions is discriminatory and therefore an abuse of power which is in violation of his constitutional rights.

76. From the proceedings conducted in the subordinate court, this court notes that the exparte

applicant did not resist his prosecution or at all and that on each of the occasions that the matter therein came up for trial, him and his counsel, Senior Counsel Mr Fred Ojiambo were eager to have the trial concluded expeditiously, but that the *ex parte* applicant's co-accused resisted the trial either because they had challenged their prosecution before the High Court, or were appealing against the decision of the High Court rejecting their stay of proceedings and it was not until much later that the *ex parte* applicant filed these Judicial Review proceedings challenging his continued prosecution, after learning that the Director of Public Prosecutions, after closing the investigations file relating to charges that had been preferred against the applicant, on advise of Ethics and Anti-Corruption Commission which is the key investigating agency in the matter, changed his mind and revived those charges.

77. It is alleged that the decision to revive those charges in Criminal ACC No 19/2014 is oppressive, malicious and an abuse of court process; is selective prosecution; and violates the applicant's rights to freedom and security of the person and the right to security and protection of the law hence the court should intervene to prevent abuse of the criminal justice system.

78. The *ex parte* applicant claims that the authority upon which the *ex parte* applicant's prosecution is grounded is an advisory by Senior Counsel Paul Muite, who, from the alleged selective manner in which he picked out the *ex parte* applicant and left out other suspects like Kamotho Waiganjo and Eric Mutua, it is apparent that the intention was *malafides* and intended to shield the key suspects and therefore sacrifice the *ex parte* applicant.

79. Further, that the applicant herein was never asked to respond to the new evidence forming the basis of the fresh charges that were preferred against him hence he was denied the right to a fair hearing since Mr Muite's advisory was clear that even the investigations were not completed by the CID who were on the ground, before he was summoned to appear in court and take a plea.

80. Mr Ndemo further complains that Mr Eric Mutua who is now being shielded from prosecution and being used as a prosecution witness admits that he is the one who was paid all the purchase price on behalf of his client Malili Ranch and that he admits in his statement to have disbursed the said money to his clients who are Directors of Malili Ranch as instructed by his client but that despite Mr Eric Mutua's express statement that he did not pay any money whether directly or indirectly to any official of the Ministry of Information and Communication, out of the proceeds of sale of the Malili Ranch land; and that despite Mr Muite Senior Counsel concluding that Mr Eric Mutua had incriminated himself in the case, nonetheless, Mr Mutua had co-operated and therefore he should be used as a prosecution witness to sustain a conviction against the applicant, which Mr Bitange Ndemo considers to be selective and discriminatory prosecution.

81. Mr Ndemo believes that his continued prosecution is intended to vex him and to embarrass and demean him rather than to achieve any criminal justice for the public hence the prosecution is malicious, false and misleading. He also laments that members of the inter ministerial committee who procured the land are not charged and that the Government of Kenya never lost any money as the sale has never been voided.

82. applicant is apprehensive that his constitutionally guaranteed rights and freedoms are being violated by the continued prosecution and therefore the court should issue declaratory orders and also prohibit the prosecution as commenced.

83. On the other hand, the respondents maintain that they are exercising constitutional functions and powers in preferring criminal charges against the applicant and that what the applicant is seeking is to have this court determine the veracity of the evidence before the trial court which this court must guard against.

84. Further, that the charges facing the applicant and evidence gathered show a *prima facie* case against him. In addition, that this court cannot stop the Director of Public Prosecutions from exercising his constitutional mandate in the absence of any bad faith.

85. According to the respondents, the applicant should face the trial and be vindicated after which he can if dissatisfied with the outcome appeal.

86. That criminal trials are in the public interest hence the courts should be slow to interfere with the powers of the Director of Public Prosecutions since the applicant is before a court of competent jurisdiction and is assured of fair trial, having recorded more than two statements denying the charges hence he has nothing to fear.

87. Further, that the applicant can also sue for malicious prosecution in the event that the trial court finds him innocent but that he should not interfere with the trial which is going.

88. The two main ancillary questions that this court must answer are

1) Whether the applicant is entitled to the declarations sought.

2) Whether the applicant is entitled to a prohibition sought in the application.

89. On whether the applicant is entitled to the declarations sought in the notice of motion, it is important to appreciate what a declaration seeks to do.

90. A declaration is a formal statement by the court pronouncing upon the existence or non existence of a legal constitutional state of affairs. It declares what the legal position is and what are the rights of the parties. It does not contain an order which can be enforced against the respondents, as it only declares what is the legal position. It is not a coercive remedy, and can be carefully couched or tailored so as not to interfere with the activities of public authorities more than is necessary to ensure that those public authorities comply with the law.

91. However, a declaration can also be used to pronounce upon the legality of a future situation and in that way the occurrence of illegal action is avoided. In **Bass V Permanent Trustee Company Ltd**[1999] 161 ALR 399 at paragraph 89, Kirby J held that:

“The Declarations’ development “is one of the most important and beneficial adventures in the administration of justice during this century.”

92. The tests to be satisfied to warrant grant of Declarations in Judicial Review proceedings were set out in the case of **Aussie Airlines Pty Ltd V Australian Airlines Ltd** [1996] 139 ALR 663 at 670-671 that:

“ For a party to have sufficient standing to seek and obtain the grant of declaratory relief it must satisfy a number of tests which have been formulated by the courts; some in the alternative and some cumulative. I shall formulate then in summary form as follows:-

a) The proceeding must involve the determination of a question that is not abstract or hypothetical. There must be a real question involved, and the declaratory relief must be directed to the determination of legal controversies. The answer to the question must produce some real consequences or the parties.

b) The applicant for declaratory relief will not have sufficient status if relief is “ claimed in relation to circumstances that (have) not occurred and might never happen or if the court’s declaration will produce no foreseeable consequences for the parties.

c) The party seeking declaratory relief must have a real interest to raise it.

d) Generally there must be a proper contradiction.

e) These other rules should in general be satisfied before the court's discretion is exercised in favour of granting declaratory relief."

93. The above decision is only a persuasive guide in this court's determination of the question of whether the applicant on evidence availed, is entitled to the Declarations sought in this Judicial Review application.

94. Applying the above guiding principles to this case, the applicant seeks Judicial Review Declaration orders that:

1. The institution, maintenance and prosecution of the applicant in the CMC ACC Criminal case No, 19/2014 is an abuse of the criminal justice system and a contravention of his constitutional Rights to Freedom and security of the person and the right to secure protection of the law.

95. Article 27 of the Constitution guarantees every person equality before the law and the right to equal protection and equal benefit of the law. The freedom and security of the person is guaranteed under Article 29 of the Constitution which includes right not to be

a) Deprived of freedom arbitrarily or without a just cause;

b) Subjected to torture in any manner, whether physical or psychological.

96. The real question involved is what the declaratory relief sought is directed to answer and the legal controversy in this case is whether the prosecution of the applicant is an abuse of the criminal justice system and a contravention of his constitutional rights as stipulated above.

97. It is now established law that a court ought not to usurp the constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecutions in the exercise of the discretion conferred upon that office. And the mere fact that the ongoing criminal prosecution is bound to collapse is no ground for halting those proceedings by way of Judicial Review proceedings, since Judicial Review proceedings are not concerned with determination of the merits but with the decision making process.

98. 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 the criminal process being undertaken *bona fides* since that defence is open to the applicant in those proceedings.

99. However, if the applicant demonstrates that the criminal proceedings that the Director of Public Prosecutions or the police have commenced or intend to commence against him constitute an abuse of the legal process, the court will not hesitate to put a halt to such proceeding(s) or declare the proceedings as being in breach of the law.

100. In **Republic Vs Attorney General Exparte Kipngeno Arap Ngeny HC Civil Application 406/2001** the court made it clear and I agree that:

"Criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose."

101. The above position of the court is informed by the fact that criminal proceedings are to be impartially conducted in the interest of the general public and when a prosecution is not impartial or when it is being used as a machinery to cause an injustice, or to shield the real perpetrators of crime, the court will not hesitate to find that that is an abuse of the court process, oppressive or vexatious. This is because, in criminal law a person is put in jeopardy and his personal liberty is involved. And if the object of the prosecution is to over awe the accused suspect by brandishing at him the sword of punishment there under, such an object is unworthy to stay the least and cannot be countenanced by any court.

102. The prosecution should never be seen to be actuated by the desire to punish the applicant or to oppress him into acceding to their demands by brandishing the sword of punishment under the criminal law, than a genuine desire to punish on behalf of the public a crime committed. And if it is demonstrated that the predominant purpose of the prosecution is to further that ulterior motive, then the High court will intervene (See **Republic Vs chief Magistrates court at Mombasa Exparte Ganijee & Another [2002] 2 KLR 703.**

103. The High Court in its exercise of Judicial Review jurisdiction is forever reminded that it must only exercise such power of reviewing decisions taken by the Director of Public Prosecutions to prosecute very sparingly and with circumspection. The rationale is that it was never the intention of the makers of the Constitution that the courts superintends every move that the Director of Public Prosecutions makes.

104. The supervision and superintending should only occur where there is evidence of patent abuse and where the criminal justice system is likely to be brought into disrepute because of the heavy misconduct of the parties or institutions involved in the criminal justice system. (see Onguto J in **Titus Barasa Makhanu V Police Constable Simon Gitau & 3 Others [2016] e KLR.**

105. In the instant case, I have no doubt in my mind that on the evidence available, the issues raised by the applicant raise real questions and the Declaratory relief sought is directed to the determination of legal controversies whose answer is capable of producing some real consequences for the parties.

106. Issues of abuse of the criminal justice system and contravention of the applicant's constitutional rights to freedom and security of the person and also the right to secure protection of the law and to be free from any discrimination whether directly or indirectly are real questions that are not abstracts or hypothetical.

107. Equally, issues of selective prosecution and gross abuse of court process and claims of oppression and malice are not hypothetical abstract questions.

108. The applicant in his application and his counsel's submissions has elaborately detailed the circumstances under which the applicant was charged in court with the various offences and how he came to learn that he was, in the first place, not meant to be charged but that he read malice, discrimination and abuse of the court process of the criminal justice system when Senior Counsel Mr Paul Muite purported to review the evidence and advise that the applicant should be charged with the relevant criminal offences following discovery of new evidence, while exonerating persons who are clearly said to have implicated themselves in the commission of the alleged crimes.

109. What is clear on record and what is not controverted by the respondents is that when the decision to review the earlier decision of the Director Public Prosecutions as advised by the investigators not to prefer charges against the applicant was made as advised by Senior Counsel Paul Muite, the applicant was never called upon to respond to the new evidence which had been unearthed, and that to date, he has not been formally notified of the new evidence to enable him respond thereto.

110. Article 50(2) (b) (c) of the Constitution guarantees every person the right to fair trial which includes the right-

i.

ii. *To be informed of the charge, with sufficient detail to answer it;*

iii. *To have adequate time and facilities to prepare a defence.*

iv. *To be informed in advance of the defence on the prosecution intends to rely on, and to have reasonable access to that evidence.*

111. From the applicant's depositions and his counsel's submissions, it is clear that on the charges for which Senior Counsel Muite prepared summons to be served upon the applicant to appear in court to answer, the new evidence was never brought to the knowledge of the applicant and that is the reason why the applicant humbly submitted to the jurisdiction of the Chief Magistrate's Court to answer to those charges believing that the said charges were based on the earlier allegations which the applicant had responded to and recorded statements denying his involvement in the alleged crimes.

112. In other words, the Director of Public Prosecutions kept as a secret the new evidence which counsel for the respondents maintained, was sufficient to nail the applicant to a conviction by the court.

113. To that extend, I find that the decision by the Director of Public Prosecutions violated the applicant's right to a fair hearing and that violation is amenable to a declaration.

114. The respondent's counsel submitted that the court should not interfere with the constitutional and statutory mandate of the Director of Public Prosecutions. I agree and add that Article 157 of the Constitution is clear that (a) the Director of Public Prosecution and may-

(a) Institute, and undertake criminal proceedings against any person before any court (other than a Court's Martial in respect of any offence alleged to have been committed.

115. Further, the decision to institute criminal proceedings by the Director of Public Prosecutions is *discretionary* and is not subject to the direction or control any authority because Article 157(10) of the Constitution stipulates that:

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

116. The above provisions are replicated in Article 6 of the Office of Director of Public Prosecutions Act No. 2 of 2013.

117. The Office of Director of Public Prosecution is an independent office and the court will therefore in an ideal situation be reluctant to prohibit that office from exercising its statutory and constitutional powers except in the clearest of cases. In **Rosemary Wanja Mwangi & 2 Others V Attorney General & 2 Others** Mumbi J stated that:

“ The process of the court must not be misused or otherwise used as an avenue to settle personal scores. The criminal process should not be used to harass or oppress any person through the institution of criminal proceedings against him or her. Should the court be satisfied that the criminal proceedings being challenged before it have been instituted for a purpose other than the genuine enforcement of law and order, then the court ought to step in and stop such maneuvers in their tracks and prevent the process of the court being used to unfairly wield state power over one party to a dispute.”

118. The ancillary question that must be answered is whether the Director of Public Prosecution acted independently in this matter, in deciding to charge the applicant. This court notes that the Director of Public Prosecutions vide his letter dated 2nd October 2013 BK 14 to the Chief Executive Officer Ethics and Anti-Corruption Commission, in response to the recommendations of the latter and upon review of the evidence, he directed that the inquiry file be closed and that appropriate administrative/disciplinary action should be taken against the suspects for dereliction of duty.

119. Later, after the National Police Service Director of Criminal Investigations opened an inquiry following persistent complaints by several shareholders of Malili Ranch and upon completion of their investigation, vide letter of 10th March 2014 the Director of Criminal Investigations recommended to the Director of Public Prosecutions that the applicant herein with others including Mr Eric Kyalo Mutua and Kamotho Waiganjo should be charged with several criminal offences, as per BN 12 and

BN 13 dated 10th March 2014 and 22nd April 2014 respectively.

120. And despite the Director of Criminal Investigations recommending that Mr Eric Kyalo Mutua be charged with the specific offences, PK Muite Senior Counsel (as a consultant) and on instructions by the DPP in his letters of 28th July 2014 and 26th August 2014 after reviewing the files and decisions earlier made by the DPP and the EACC, gave an opinion that the applicant herein and 4 others including Senator Johnstone Muthama, Mr Mabea – Commissioner of Lands, Mr Musengi Director of Gateway Logistics and Directors of Malili Ranch Limited be charged.

121. In that advisory, there is a rider that

“ Mr Eric Mutua whose evidence is critical in securing convictions is willing to be a prosecution witnesses, although clearly implicated himself” and that Kamotho Waiganjo, Peter Kalua and Peter Mutua Kanyi be prosecution witnesses because their evidence as per the statements which were voluntarily given is crucial to securing convictions of those being charged.

122. Senior Counsel Paul Muite then proceeded to draft charges and planned to register those charges on 29th August 2014 and to apply for summons, and that is what was actioned upon by the DPP.

123. What is strikingly strange about the exercise of these powers of the DPP by Senior Counsel Paul Muite in an ***“independent manner”*** is that the DPP enlisted the advice of Senior Counsel Paul Muite who even proceeded to draft charges on behalf of the DPP and he appeared in court on behalf of the DPP to prosecute the applicant and others right from the time of plea taking until when questions were raised as to whether Senior Counsel PK Muite was a gazetted prosecutor for purposes of that prosecution, is when Mr Muite, Senior Counsel, chickened out of those criminal proceedings, and yet nothing has been said about his role in the matter by the respondents.

124. In my humble view, the DPP did not act independently in that he accepted to be directed by Mr Paul Muite Senior Counsel who was not even an investigating officer in the matter, in deciding who to charge and who not to charge and with which offences, even when the investigations that would determine the actual charges were apparently still being undertaken by the Director of Criminal Investigations.

125. This court reads mischief in the advisory given by Mr Paul Muite Senior Counsel in that although he found that there was incriminating evidence against some suspects, like Mr Eric Mutua and others, his reasoning for excluding those other suspects from prosecution is not only irrational but without foundation and although this court shall not make any adverse orders against those individuals, no doubt the advisory by Senior Counsel Mr. Paul K. Muite was couched in a manner that suggests monkey business and guided by extraneous matters. I find that the decision by Paul Muite Senior Counsel, (which decision was adopted by the DPP without any question) to charge the applicant herein to the exclusion of self incriminated suspects like Mr Eric Mutua was arrived at in an arbitrary, skewed, discriminatory and selective manner. That is not acceptable. It amounts to abuse of legal process and abuse of power to prosecute.

126. In **George Joshua Okungu & Another Vs The Chief Magistrate’s Court ACC Nairobi & Another [2014] e KLR**, the court held and I agree that:

“where therefore the prosecution has been commenced or is being conducted in an arbitrary, discriminatory and selective manner which cannot be justified, that conduct would amount to an abuse of the legal process....”

127. Similarly, where, like in this case, it is crystal clear that the prosecution’s strategy adopted is meant to selectively secure a conviction against the exparte applicant by ensuring that certain individuals from whom the exparte applicant derived his decision making power are unjustifiably shielded from,

it is my considered view that such prosecution will not pass either the Constitution or statutory tests decreed herein above.

128. It is even worse where from the circumstances of the case, the same persons being shielded could have been potential witnesses for the ex parte applicant since Mr Eric Mutua clearly says that he never paid any money of the proceeds of sale of Malili Ranch Land to the ex parte applicant.

129. What I find the respondents doing in this case and what I consider to be highly decadent is trying to render Mr Eric Mutua an incompetent potential witness for the ex parte applicant by enticing him to be a prosecution witness. That strategy, I hold, constitutes an unfair trial under Article 50 of the Constitution see **(George Joshua Okungu & Another Vs The Chief Magistrate's Court ACC Nairobi & Another(supra))**.

130. In such an event the DPP cannot be said to have been guided by the requirement to promote constitutionalism as mandated under the Constitution and the Office of Director of Public Prosecutions Act. To the contrary, I find that the Director of Public Prosecutions would be breaching the Constitution which inter alia bars in Article 27 discrimination “ **directly or indirectly against any person on any ground**”

131. In George Joshua Okungu & Another Vs The Chief Magistrate's Court ACC Nairobi & Another(supra) the court went further and stated : “accordingly, it is my view that where such opinion is given by persons who are legally authorized to give the same and acted upon by persons under their authority, it would amount to selective application of the law to charge the persons to whom the opinion or advise was given while treating the persons who gave that opinion as a prosecution witness.”

132. In the instant case, whereas the court is alive to the fact of the DPP having the discretion on who to charge and who not to charge, that discretion and exercise of power must be judicious and in so doing, must take into consideration the law and circumstances of each case. In the present case, the DPP failed to act in accordance with the statutory requirements to act independently in reviewing the decision to charge the applicant after closing the inquiry file. He relied on the opinion of Paul Muite Senior Counsel without questioning the reason behind exclusion of other suspects who had given self incriminating statements and even exculpated the ex parte applicant from wrongdoing.

133. In **Republic V Attorney General & 4 Others Ex parte Diamond Lalji and Ahmed Hasham Lalji** (supra) the Learned Justice Odunga held :

“ where a decision had been made to close an inquiry file, it is my view that before reopening the investigations resulting from discovery of new evidence, the people sought to be charged ought to be given an opportunity to comment on the fresh evidence.

134. Furthermore, the advisory by Mr Muite Senior Counsel is riddled with uncertainties and ambiguities such as- **Dr. Bitange Ndemo purchased a plot or plots which were then on –sold to the Government of Kenya. Details of these are subject to the ongoing Criminal Investigation Department investigations on the ground.....**”

135. And noting that it is the advisory of Senior Counsel Paul Muite that was the basis of the charges against the applicant and not the **“ongoing Criminal Investigation Department investigations on the ground,”** the question that the court must pause is, was there any foundation for issuing summons to the applicant and rushing him to court to answer to charges when investigations into the said charges were still ongoing? I am in agreement with the decision in **Williams Vs Spautz [1992] 66 NSWLR 585 at (600)** where the Australian High Court held:

“.....if the proceedings obviously lack any proper foundation in the sense that there is no evidence capable of sustaining a committal, they will obviously be vexatious and oppressive. In such a case, the proceedings themselves are an abuse of the process of the local court and will

lack any such foundation, the Supreme Court would be justified in interfering to halt the proceedings in limine in order to prevent the defendant from being subjected to unfair vexation and oppression. For a man to be harassed and put to the expense of perhaps a long trial and then given an absolute discharge is hardly from any point of view an effective substitute for the exercise by the courts of its inherent power to prevent abuse of the process....”

136. In **Republic Vs Attorney General Exparte Kipngeno Arap Ngeny** (supra) the court was categorical that:

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

137. And in **Githunguri Vs Republic [1986] KLR 1 page 22** the court held that:

“A prosecution is not to be made good by what in turns up. It is good or bad when it starts.”

138. In this case, although the respondents urged the court to find that the veracity of the evidence and its sufficiency should be considered by the trial court, with clear admission by Mr Eric Mutua who is said to be a key prosecution witness and who allegedly ‘*incriminated*’ himself in the matter according to Senior Counsel Muite’s advisory, **and that he did not make any payment to any official of the Ministry of Information and Communication directly or indirectly out of the proceeds of sale,**” this court wonders how such evidence would found a charge and or sustain a conviction as contemplated by Senior Counsel.

139. I find, very humbly that this is one of those cases where the prosecution of the exparte applicant is nothing but a setback to the criminal justice system. It is a mockery, scorn and ridicule of justice for the public who have an interest in the outcome of criminal prosecutions which are initiated in the name of the Republic.

140. It is statements such as those contained in the advisory of Senior Counsel Paul Muite and which statements are bought by the DPP at a heavy price in the name of consultancies that invite this court to find that there is absolutely no foundation upon which the respondents are mounting a prosecution against the applicant since the applicant cannot be charged with theft or conspiracy to steal when the person who is said to be holding the key to the success of the prosecution and who is his co conspirator, and who received the whole purchase price which is alleged to have been stolen from poor landowners of MALILI RANCH Limited denies making any payments to the applicant/accused person.

141. In my humble view, Senior Counsel Paul Muite’s advisory falls short of any logic when he concludes that because Eric Mutua and 2 others who are said to be key prosecution witnesses gave voluntary statements then they are the key to securing convictions of those being charged. It should be noted that the advisory of Senior Counsel Paul Muite in itself is not evidence, for a prosecutor cannot be a witness in the case that he is mounting a prosecution. Therefore, this court in faulting the advisory given by Senior Counsel Paul Muite is not faulting the sufficiency or veracity of the available evidence to mount a prosecution, but the selective, biased, discriminatory, irrational, opinionated and oppressive manner in which Senior Counsel made the decision that the applicant be charged with offences for which the ‘*star*’ witness had clearly exonerated the applicant from blame yet that *star* witness who is also said to be a suspect who had incriminated himself was being used as a prosecution witness to secure a conviction against the applicant! And the DPP who is in charge of prosecution does not assess or question that opinion before dragging and arraigning the applicant to court.

142. It is not in doubt that one who shields a suspected criminal is himself culpable for aiding and

abetting crime. It therefore follows that the decision to charge the applicant with a criminal offence(s) when on the face of it the key (star) prosecution witness exonerates him from blame is in itself an abuse of discretion and an exercise of discretion for an improper purpose meant to achieve nothing but playing to the public gallery.

143. By such conduct, I find that the Director of Public Prosecutions is also in breach of the duty to act fairly; he has failed to exercise statutory discretion reasonably; has acted in a manner to frustrate the purpose of the Constitution and the Act donating the power; he has impeded his discretion; has failed to exercise discretion and has acted irrationally and unreasonably. (See **Republic Vs Minister for Home Affairs and Others Exparte Sitamze Nairobi HCC 1652/2004 [2008] 2 EA 323**.)

144. In **Ronald Leposo Musengi V Director of Public Prosecution & 3 Others [2015] e KLR**, Odunga J in a case arising from the same facts as this case, and while referring to the decision by the Director of Public Prosecutions not to charge the exparte applicant then making an about turn observed that:

“It does not require forensic evidence for one to see that the subject of that letter is the subject of the criminal proceedings being challenged in these proceedings. No attempt has been made by the respondents to explain what led to the change of view and the decision to charge the petitioner with the offence whose subject the prosecutor, albeit now wearing substantially the same hat albeit with a different color, found untenablewhere the petitioner had been given an assurance that he is not going to be prosecuted, to make an abrupt about turn without any convincing reasons, to decide to prosecute the petitioner based on the same facts cannot be countenanced in any judicial system that adheres to the rule of law. Where such a move is to be taken, the prosecutor must place evidence before the court that due to fresh evidence or a consideration of a different angle of the evidence, his change of decision is justified. To permit the prosecutor to exercise his constitutional powers arbitrarily would amount to the court abetting abuse of discretion and power. It was therefore held in Regina V Ihoshat [1970] 10 CRNS 385 at 389 that:

“ This court not only has the right but a duty to protect citizens against harsh and unfair treatment. The duty of this court is not only to see the law is applied but also, which is of equal importance, that the law is applied in a just and equitable manner.”

145. In the instant case, the exparte applicant, like in the Ronald Musengi (supra) case, complains that albeit he was the Accounting Officer in the Ministry of Information and Communication, the procurement process for the Malili Ranch land which has not been voided, was conducted by the Inter ministerial Tender Committee on whose advise he relied on and moreso, that none of those members of the said tender committee who participated in the tendering and procurement process have been charged which is further evidence of arbitrariness and bad faith and witch-hunt against the exparte applicant since the Government has not lost any money as a result of the said procurement and if it has, then it has not complained as he is not facing any charge related to loss of Government funds as the then Accounting officer. In response, the respondent simply said that they have enough evidence against the applicant to warrant a prosecution. As earlier stated, this court is not concerned about the sufficiency of evidence but whether the decision to charge the applicant and in a selective, discriminatory and arbitrary manner can be left to stand. I hold that such a prosecution cannot be allowed to continue for it is only intended to pull the wool over the public eyes that action is being taken against corrupt people when in essence there is nothing being done.

146. In **Paul Imison V Attorney General & 3 Others HCMCA 1604/2003** the court stated and I concur that.

“I do think that our Constitution which is one of a democratic state would condone or contemplate abuse of power. The Attorney General in some of his constitutional functions does perform public duties and if he were to be found to be wanting in carrying them out or failing to perform them as empowered by the Constitution or any other law, I see no

good reason for singling him out and failing to subject him to judicial review just like any other public official. I find nothing unconstitutional in requiring him to perform his constitutional duties. A monitoring power by the court by way of Judicial Review would have the effect strengthening the principles and values encapsulated by the Constitution.

To illustrate my point, Judicial Review tackles error of law and unlawfulness, procedural impropriety, irrationality, abuse of power and in not too distant future, human rights by virtue of the international conventions which Kenya has ratified. In exercising the Judicial Review jurisdiction, the court would not be sitting on appeal on the decisions of the Attorney General, as he will still make the decisions himself but the lawfulness etc. of his decisions should be within the purview of the courts....”

147. This court, on the evidence availed by the applicant is satisfied that the prosecution of the applicant is a manipulation and misuse of the court processes and is intended to deliberately deprive the applicant of protection of the law or to take unfair advantage of the applicant’s humble submission to the jurisdiction of the criminal court.

148. The failure to avail to the applicant new evidence that formed the subject of fresh charges in court is in my view not only prejudicial to him in the preparation and conduct of his defence but clearly violates his constitutionally guaranteed rights to fair hearing and fair trial as espoused in Articles 50(1) and 51 of the Constitution.

149. I am fortified by the observation by Kuloba J (as he then was) in **Vincent Kibiego Saina Vs Attorney General Miscellaneous Application 839/99** that:

“If a criminal prosecution is seen as amounting to an abuse of the process of the court, the court will interfere and stop it. This power to prevent such prosecutions is of great constitutional importance. It has never been doubted. It is jealously preserved. It is readily used, and if there are circumstances of abuse of the process of the court, the court will unhesitatingly step in to stop it.”

150. I accept and adopt the above holding. In this case, the Director of Public Prosecutions claims that in any case, the applicant has avenues for vindicating himself if he feels aggrieved by the outcome of the criminal trial once concluded including appeal. I agree but just to demonstrate how oppressive and arbitrary the decision to charge the applicant with criminal offences that have no foundation, it was, the respondents go further to dare the applicant to file suit for malicious prosecution if he thinks that the prosecution is acting with malice!

151. That challenge by the prosecution is in my humble view clearly an indication of high handedness and evidence of the applicant’s prosecution being a pasty wash and a public stunt that fortifies in the face of the public interest and public good. Kenyan tax payers have never been interested in malicious prosecutions which are orchestrated and planned by the prosecution which is also ready able and willing to pay damages for malicious prosecution.

152. The public good and public interest for which criminal prosecutions are initiated will be lost. It is an abuse of court process to knowingly, maliciously and oppressively prosecute an individual and with the intention of vilifying or disparaging him and parading him in the public gallery as the most wanted economic criminal in such an honestly dishonest manner. That is an abuse of the legal process which this court and any court of law which is ordained to be a temple of justice must intervene to stop in order to promote and protect the inherent integrity of the applicant and in this case, the exparte applicant.

153. In **Meme vs Republic & Another**, the Court of Appeal described the phrase abuse of court process as:

“An abuse of the court’s process would, in general, arise where the court is being used for improper purposes; that is to say, court process is being misused.”

154. Majanja J in **Peter George Anthony D’costa V Attorney General & Another Nairobi Petition No. 83/2010** in quashing a criminal prosecution mounted against the petitioner stated:

“The process of the court must be used properly, honestly and in good faith, and must not be abused. This means that the court will not allow its function as a court of law to be misused and will summarily prevent its machinery from being used as a means of vexation or oppression in the process of litigation. It follows that where there is an abuse of the court process, there is a breach of the petitioners fundamental rights as the petitioner will not receive a fair trial. It is the duty of the court to stop such abuse of the justice system.”

155. I concur with the above observations and hasten to add that under Article 157(1) of the Constitution, the Director of Public Prosecutions is under an obligation to prevent and avoid abuse of legal process while exercising his powers.

156. In **Thuita Mwangi & 2 Others Vs Ethics and Anti-corruption Commission & 3 Others** Majanja J had this to say concerning the powers of the Director of Public Prosecutions and I fully agree with the learned judge:

“ The discretionary power vested in the Director of Public Prosecution is not an open cheque and such discretion must be exercised within the four corners of the Constitution. It must be exercised reasonably, within the law and to promote the policies and objects of the law which are set out in Section 4 of the Office of Director of Public Prosecution Act. These objects are as follows: the diversity of the people of Kenya; impartiality and gender equity; the rules of natural justice, promotion of public confidence in the integrity of the office; the need to discharge the functions of the office on behalf of the people of Kenya; the need to serve the cause of justice; prevent abuse of legal process and public interest, protection of the sovereignty of the people; secure the observance of democratic values and principles and promotion of constitutionalism. The court may intervene where it is shown that the impugned criminal proceedings are instituted for other means other than the honest enforcement of criminal law, or are otherwise an abuse of the court process.”

157. On the material placed before this court, I am unable to find that the applicant has placed what he considers to be his terse defence in the pending trial but he has successfully persuaded the court that there is clear abuse of legal and court process, and not that the charges are incompetent, which latter position would be for the trial court to determine under Section 89(5) of the Criminal Procedure Code which empowers the trial magistrate to refuse to admit a complaint or formal charge that in his/her opinion does not disclose an offence.

158. I also find no challenge to the sufficiency of evidence but that in this case, it is trite that the criminal justice system is being manipulated with a view to denying the applicant the right to a fair trial and to be accorded equal protection of the law and to the liberty and security of the person.

159. For sure, where is the impartially and honesty of the Office of the Director of Public Prosecutions if that Office can subject suspects to the whims of Senior Counsel Paul Muite to determine the culpability of the applicant and to ensure that the applicant is convicted? Definitely I have a lot of respect for Senior Counsel Paul Muite and I do empathize with complainants, majority of whom are Malili Ranch Shareholders and who may have been unfairly and arbitrarily deprived of their proceeds of sale of their parcels of land. But it is clear to me that the applicant herein cannot be used as a sacrificial lamb to shield the real perpetrators of the crime.

160. Although the respondents claim that the applicant is seeking some form of illegal unconstitutional immunity from prosecution, I do not agree. The Constitution of Kenya 2010 lifts the persons’ rights over and above the powers that be on state agencies. The power vested in the Director of Public Prosecutions and other state machinery is the power and authority that emanates from the people and that power, as espoused in Article 73 of the Constitution is to serve the people and not to rule them.

161. The bearers of that power must exercise it in an accountable and transparent manner and in the manner that would bring dignity and integrity and build confidence in the offices that be.

162. Where it is clear like in the instant case that the decision to prosecute the applicant was unreasonable and irrational, this court is called upon to intervene. As was held in the **Republic Vs Attorney General exparte Arap Ngeny** case, that:

“ 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.”

163. In the view of this court, the decision to review the decision that closed the inquiry file cannot be justified. It was discriminatory, selective and therefore unconstitutional and unlawful. As was held in the Githunguri case (supra) ***“The people will lose faith in the Constitution if it fails to give effective protection to the fundamental rights. The people know and believe that to destroy the rule of law you destroy justice thereby also destroying the society.”***

164. In **Republic V Commissioner of Co-operatives exparte Kirinyaga Tea Growers Co-operative Savings & Credit Society Ltd CA 39/97 [1999] EALR 245** the Court of Appeal warned that:

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

165. In **HC Miscellaneous Application 1769/2003 Nairobi Republic Vs Ministry of Planning and Another Exparte Professor Mwangi Kimenyi**, the court held, concerning malafides:

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

166. In my view, the power conferred on the DPP is not absolute power. Absolute power is open to abuse and that is why the Constitution found it fit to provide checks.

167. I find that the impugned decision was also shrouded in mystery and secrecy. The applicant was never confronted with the new evidence to respond to it. As was held by Odunga J in **Njuguna S. Ndungu Vs EACC & 3 Others [2014] e KLR**:

“Transparency is one of the national values and principles of governance enshrined under Article 10 of the Constitution. Section 4 of the office of Director of Public Prosecution enjoins that office in fulfilling its mandate to be guided by the Constitution and inter alia, the principles of natural justice, promotion of public confidence in the integrity of the office, the need to serve the cause of justice, prevent abuse of the legal process and public interest and promotion of Constitution. The office cannot be promoting public confidence when its activities are shrouded in mystery and secrecy. Anything done in contravening of the Constitution must be prohibited, to securing fair treatment for all persons brought before the court and to prevent an abuse of the court process.

168. On the whole, it is from the foregoing that I find that the exparte applicant herein has established sufficiently that he is entitled to the Declarations and prohibition Orders sought in his Notice of Motion and I make the following orders:

1) It is hereby Declared that the initiation, maintenance and prosecution of the

petitioner/exparte applicant Dr Bitange Ndemo in the Chief Magistrate's court (Anti corruption) vide criminal case No. 19 of 2014 is an abuse of the criminal justice system and in contravention of the applicant's constitutional rights and freedoms and security of the person and the right to secure the protection of the law;

2) It is hereby Declared that the initiation and prosecution of the criminal case against the petitioner/applicant in the Chief Magistrate's Court(ACC) vide criminal case No. 19 of 2014 amounts to selective and therefore discriminatory prosecution and a gross abuse of the process of court.

3) It is hereby Declared that the initiation, maintenance and continued prosecution of the petitioner/applicant in the Milimani Chief Magistrates Court (ACC) vide criminal case No. 19/2014 is oppressive, malicious and an abuse of the process of court.

4) Orders of Prohibition be and are hereby issued prohibiting the continuance of the Chief Magistrate's Court (ACC) at Milimani vide criminal case No. 19 of 2015 in the manner intended against the petitioner/applicant Dr. Bitange Ndemo.

169. I order that each party shall bear their own costs of these judicial review proceedings.

Dated, signed and delivered in open court at Nairobi this 5th day of October, 2016.

R.E. ABURILI

JUDGE

In the presence of:

Senior Counsel Fred Ojiambo and Miss Githinji for the exparte applicant/petitioner

N/A for the Respondents

CA: Adline