REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 255 OF 2014

MIDLANDS LIMITED.....1ST APPLICANT

JUNGHAE WAINAINA…….....2ND APPLICANT

VERSUS

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

ETHICS & ANTI-CORRUPTION COMMISSION.....2ND RESPONDENT

MILIMANI CHIEF MAGISTRATES COURT.....3RD RESPONDENT

(CONSOLIDATED WITH)

JR CASE NO. 265 OF 2014

AMOS KIMUNYA.....APPLICANT

VERSUS

CHIEF MAGISTRATE'S

ANTI-CORRUPTION COURT.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

ETHICS & ANTI-CORRUPTION COMMISSION.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

AND

LILLIAN NJENGA.....INTERESTED PARTY

JUDGEMENT

GENERAL INTRODUCTION

1. Midlands Limited and Junghae Wainaina who are the 1st and 2nd applicants in **Nairobi High Court Misc. Application No. 255 of 2014, Midlands Limited & another v Director of Public Prosecution and 2 others** are, together with Amos Kimunya and Lillian Njenga, the accused persons in **Milimani Chief Magistrate's Court Anti-Corruption Case No. 4 of 2014.** Amos Kimunya is the Applicant whereas Lillian Njenga is the Interested Party in **Nairobi High Court JR Misc. Application No. 265 of 2014, Amos Kimunya v Chief Magistrate's Anti–Corruption Court & 3 others.** They are charged with offences allegedly committed in the course of the transfer of twenty five acres of land from Settlement Fund Trustees (SFT) to Midlands Limited. They have approached this Court seeking to overturn the decision to charge them and to quash the criminal proceedings.
2. On 17th July, 2014 the Court directed that the two cases be heard together. The two matters were indeed heard concurrently and submissions that were made in one matter were adopted in the other and vice versa. Considering the manner in which the two matters proceeded, I only find it just and fair that I write a consolidated judgment. As the matters were not formally consolidated at the hearing, I invoke the inherent jurisdiction of this Court and consolidate the two cases (**JR No. 255 of 2014** and **JR No. 265 of 2014**) with **JR No. 255 of 2015** becoming the lead file.

JR No. 255 of 2014

3. In **Nairobi High Court Misc. Application No. 255 of 2014**, Midlands Limited and Junghae Wainaina are the 1st and 2nd applicants. The Director of Public Prosecutions (DPP), the Ethics and Anti-Corruption Commission (EACC) and the Milimani Chief Magistrate's Court are the 1st to 3rd respondents respectively.
4. Through the notice of motion dated 14th July, 2014, the applicants pray for orders:

"1. THAT an order of certiorari do issue to bring to this court Milimani Chief Magistrates Court case No ACC No 4 of 2014 for purposes of being quashed and the said proceedings be quashed.

2. THAT an order of prohibition do issue directed to the Milimani Chief Magistrates Court prohibiting the Court and/or any other Court of concurrent jurisdiction from hearing, proceeding with and determining Milimani Chief Magistrates Court case No ACC No. 4 of 2014.

3. THAT costs of this motion and the proceedings be provided for."

5. The application is supported by the application for leave, the statutory statement, the verifying affidavit of the 2nd Applicant and the annextures thereto.
6. According to the papers filed in Court by the applicants, Midlands Ltd (Midlands) is a public company with over 3000 shareholders. It was conceived by the leaders and residents of Nyandarua County as an agro processing project with the objective of adding value to agricultural produce. The 2nd Applicant is a shareholder of Midlands.
7. Through a letter dated 15th August, 2003 Midlands applied to be allocated a portion of land belonging to the SFT in Njabini, Nyandarua. There was no response to the application. According to the applicants, the land in question was being used by the Ministry of Agriculture for agricultural training but the same was highly underutilized. On 20th February, 2004, Midlands made a formal request to the Ministry of Agriculture to be allocated a portion of the aforesaid land. The Permanent Secretary in the Ministry of Agriculture wrote back to the company on 23rd April, 2004 applauding the initiative to set up an agro processing plant but stated that the Ministry did not own the land and could therefore not engage in any negotiations concerning the allocation of the land.
8. Upon receiving the said letter, the company decided to pursue the application lodged earlier with the SFT. Meanwhile, the Ministry of Agriculture allowed Midlands to initiate seed production on a portion of the land. L.R. No. Nyandarua/Njabini/530 was subsequently subdivided into two

plots. L.R. No. Nyandarua/Njabini/5851 measuring fifty acres was allocated to the Ministry of Agriculture and L.R. No. Nyandarua/ 5852 comprising twenty five acres was given to Midlands to put up an agro processing facility. The land was formally transferred to Midlands in 2005 and a title deed issued under the provisions of the Registered Land Act, Cap 300.

9. It was the applicants' case that later, in order to properly plan and accommodate five processing units which Midlands intended to set up on the plot, the plot was sub-divided into six units with each unit having its own title. All six titles were subsequently charged and they are still charged to Equity Bank for a loan of Kshs.120 million to support procurement of plant and machinery.
10. It was the applicants' case that in 2011 the 1st Applicant received communication from the Nyahururu Land Registrar to the effect that the Kenya Anti-Corruption Commission (KACC), had placed a restriction on the original Midlands title on the ground that it was investigating the acquisition of twenty five acres of land belonging to Njabini Farmers Training Centre by Midlands. Around the same period the 2nd Applicant was asked to meet KACC officers and he met a Mr. Mutiga who informed him that KACC was investigating a complaint into an alleged irregular allocation of land to a company associated with Mr. Amos Kimunya who was the Minister of Lands and a Member of Parliament for Kipiriri in Nyandarua County.
11. The 2nd Applicant informed Mr. Mutiga that Midlands was a public company with over 3000 shareholders and that Mr. Kimunya owned 1000 shares which represented 0.016% of the issued shares in the company. Further that, other politicians from Nyandarua had also bought shares in the company in solidarity with the farmers.
12. In January, 2013, the 1st Applicant received a letter from the EACC in which the EACC demanded that Midlands surrender its land on the basis that it was illegally acquired. Through the same letter the EACC threatened to file a recovery suit. Midlands' counsel replied to the EACC that the land belonged to the company and requested the information on which the EACC had based its assertion that the land was illegally acquired. The EACC did not reply but instead filed **Nakuru High Court Civil Suit No. 195 of 2013.** The 1st Applicant asserts that it is ready to defend itself fully in the civil suit.
13. It was the applicants' case that in March, 2014 the 2nd Applicant received a call from an officer of the 2nd Respondent asking him to appear in court so that he could be charged in connection with the acquisition of the land at Njabini. When he appeared in Court, he was charged together with the 1st Applicant with the offence of fraudulently acquiring public property to wit Nyandarua/Njabini/5852.
14. The applicants asserted that the documents supplied to them by the prosecution reveals that the complainant in the case is Dr. Romano Kiome, the former Permanent Secretary in the Ministry of Agriculture. It is their case that the SFT which was the registered owner of the land had not raised any complaint. Further, that the charge sheet indicated that Midlands is a private company though it is a public company.
15. It was the applicants' case that none of the documents or witness statements alleged that the 1st Applicant was involved in any form of bribery, corruption or forgery in the process of acquiring the land. Further, that the witness statements to be relied on by the prosecution in the criminal case are the same witness statements filed in the civil case at Nakuru and that the DPP did not carry out any additional inquiries but solely relied on the evidence that had formed the basis for filing of the civil suit.
16. The applicants stated that the Ministry of Agriculture was also allocated land at Njabini using the same process that was used to allocate the land to Midlands. They argued that their criminal case has no basis as the Ministry of Agriculture has not been questioned about the land acquired using the same process that Midlands used to acquire its land.
17. The applicants disputed the authenticity of a letter dated 29th March, 2004 allegedly sent to the 1st Applicant by the Ministry of Agriculture stating that the letter did not reach them and that the letter they received from the Ministry on the same subject is dated 23rd April, 2004 but contained different information. They therefore asserted that the letter dated 29th March, 2004 was not authored by the Permanent Secretary of the Ministry of Agriculture. The applicants further contended that the Ministry of Agriculture was using its considerable weight and that of the KACC to cause Midlands to transfer its land to the Ministry of Agriculture.

18. The applicants therefore postulated that the institution of the criminal proceedings was aimed at achieving ulterior motives and unlawful collateral purpose as the EACC had already filed a civil suit for the recovery of the land at the time of the commencement of the criminal prosecution. It was their case that their continued harassment and intimidation by the respondents on account of issues pending in a civil case is a violation of the law and is intended to frustrate legislative purpose.
19. The applicants asserted that their arrest and prosecution is a violation of the cardinal rule of fairness and their legitimate expectation that the respondents will respect the rule of law and the statutory mechanisms established to ensure due process and consistency in the administration of justice. They also argued that the criminal proceedings will frustrate the applicants' legitimate expectation that the respondents will discharge their duties fairly and without hidden or ulterior motives.
20. The applicants contended that their prosecution is discriminatory and selective on the grounds that the legality of Midlands' title has not been subjected to enquiry by the National Land Commission as has been done in other similar cases. Further, that the EACC normally recovers illegally acquired land through the civil process but has inexplicably opted for the criminal process in the case of the applicants. They submitted that it is ironical for the national and county governments to offer both local and foreign investors free land to set up factories and other business enterprises while at the same time criminalising Midlands' public and community based project.
21. The applicants asserted that the actions of the respondents amount to abuse of power. The grounds in support of this assertion are:

a. That the DPP and the EACC are using the criminal proceedings to obtain advantage for the EACC and the Ministry of Agriculture in the civil suit at Nakuru;
b. That the institution of the criminal prosecution is not intended to serve any public interest considering that Midlands was started by the public with the support of the government so as to earn a better livelihood for the farmers;
c. That the criminal prosecution was commenced in the absence of any factual foundation and the distortion/suppression of material facts including the fact that Midlands is a public company;
d. That the predominant objective of the criminal case is to achieve the collateral purpose of depriving Midlands of its property and investment while simultaneously conferring an unlawful benefit upon the Ministry of Agriculture;
e. That the end result of the criminal prosecution is to nationalize Midlands a *de facto* community project thus harming the farmers of Nyandarua;
f. That given that fraud is the sole allegation made against the company in the civil and criminal cases, no valid reason or justification exists for the subsequent commencement of a criminal case when a civil case already existed;
g. That the threat of the possibility of incarceration is meant to coax Midlands to surrender the land, that was lawfully allocated to it, to the Ministry of Agriculture; and
h. That the selective prosecution of some state officers and one shareholder of the Midlands is unlawful and discriminatory.

22. The applicants also argued that their only crime was their persistence in their application to be allocated the land. It is their case that their vigour does not amount to fraud. On this point they cited the decision of the High Court in **Stripes Industries Limited v Attorney General, Nairobi HCCC No. 405 of 2005** in which it was stated that fraud or misrepresentation must not only be pleaded but must also be proved through cogent and logical evidence.
23. In support of their argument that the criminal process should not be used to aid a party in a civil cause, they cited the Court of Appeal decision in **Commissioner of Police & the Director of Criminal Investigation Department & another v Kenya Commercial Bank & 4 others [2013] eKLR** where it was stated that:

"Clearly, the company and the guarantor through their directors were employing criminal process to assist them in resolving their civil dispute. While the law (Section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime,

we reiterate that that power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of the administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court. This is a case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations. We have no doubt in our minds that the belated involvement of the police in this purely civil dispute is an abuse of their power. The police should direct their energies and resources to prevention of crime which we all know is rampant in this country and is about to get out of control."

24. In further support of this argument they also cited the decision of D.S. Majanja, J in **Lee Mwathi Kimani v Director of Public Prosecutions & 2 others [2014] eKLR** in which the learned Judge opined that:

"8. I am aware that this court should be slow to intervene in the prosecution of cases before the subordinate court as the discretion and authority to prosecute offenders is reserved for the Director of Public Prosecutions under Article 157 of the Constitution. I am also alive to the provisions of section 193A of *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)* that permit criminal cases and civil cases based on the same facts to proceed concurrently. However, even in such cases the court must have regard to the facts in each case and determine whether the petitioner's rights are violated or there is an abuse of the court process.

9. **As I have outlined above, the parallel proceedings may have conflicting outcomes which is not a salutary position for the High Court and subordinate court to find themselves in. The High Court has the jurisdiction and duty to protect the integrity of the court process. In my view such process would be achieved by staying the criminal case in these circumstances."**

25. On the principle that a criminal prosecution commenced in abuse of the court process ought to be quashed, they cited the decision of G.V. Odunga, J in **Republic v Chief Magistrate's Court Nairobi & 4 others [2013] eKLR.** In that case the learned Judge stated:

"In my view what the foregoing authorities determine is that the obligation placed on the police to investigate crime is not to be lightly interfered with. However, it is one thing to investigate crime and another to prosecute the suspects. The office of the Director of Public Prosecutions, is, in my view not a conveyor belt for transmitting persons against whom allegations are made to court for cleansing. The office of the Director of Public Prosecutions owes a duty to the public to ensure that the cases it takes to court have been properly investigated and they are cases which are prosecutable. If the court finds that a case is vexatious, the court will not sit back and rubberstamp a prosecution which is clearly malicious and an abuse of the process of the court. Once investigation is conducted and the DPP forms a *bona fide* opinion that criminal charges ought to be levied, the Court will not scrutinise the evidence in order to decide whether or not the offence is likely to succeed but will leave the matter in the able hands of the trial court to deal with the same appropriately. In other words it is not for the judicial review court to analyse the evidence in order to see whether a *prima facie* case exists."

26. The applicants used the decision in **Samuel Murimi Karanja & 2 others v Republic [2003] eKLR** to buttress their argument that the sanctity of a title should not be trifled with.
27. The applicants' contention that a selective and discriminatory prosecution should be halted was backed by the decision in **George Joshua Okungu & another v Chief Magistrate's Court Anti–Corruption Court at Nairobi & another [2014] eKLR** in which it was stated that:

"70. 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. Similarly, where the prosecution strategy adopted is meant to selectively secure a conviction against the petitioner by ensuring that certain individuals from whom the Petitioner derived his decision making power are unjustifiably shielded there from, it is our considered view that such prosecution will not pass either the Constitutional or Statutory tests decreed hereinabove. It is even worse where from the circumstances of the case, the same persons being shielded could have been potential witnesses for the Petitioner and who have, with a view to being rendered incompetent as the Petitioner's witnesses have been in a way enticed to be prosecution witnesses. That strategy, we hold, constitutes an unfair trial under Article 50 of the Constitution.

71. **Here for example, the Petitioners contend that they took all the necessary steps to obtain the requisite legal advice and approvals or authorisations. To turn round and institute criminal prosecution against the Petitioners while making the very persons who authorised the Petitioner's action into prosecution witnesses, in our view, amounts to selective and discriminatory exercise of discretion. In such an event the Director of the Public Prosecution cannot be said to have been guided by the requirement to promote constitutionalism as mandated under the Constitution and the *Office of the Director of Public Prosecutions Act.* To the contrary the DPP would be breaching the Constitution which *inter alia* bars in Article 27 discrimination "directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth."**

28. The DPP opposed the application through grounds of objection dated 2nd July, 2014. The grounds are as follows:

"1. The Application is misconceived,frivolous,vexatious, incompetent,improperly before court and an open abuse of the court process.

2. **Section 193A of the Criminal Procedure Code, Cap 75, and Laws of Kenya, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall <u>not be a ground for any stay, prohibition or delay of criminal proceedings</u>.**
3. **The 1st Respondent has mandate under article 157 of the Constitution to institute prosecutions. Further the applicant has not demonstrated that he has an arguable case. Leave and stay of ACC No. 4 of 2014 which is scheduled for hearing on 7th and 8th of July, 2014 should not be granted.**
4. **Under Article 157(10) of the constitution the Director of Public Prosecutions does not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of the powers or functions, shall not be under the direction or control of any person or authority.**
5. **The issues raised by the Applicant are issues of evidence that should be raised before the trial court that is seized with the matter. Indeed this matter is scheduled for hearing on 7th and 8th July, 2014.**
6. **It is in the public interest that perpetrators of crimes are prosecuted.**
7. **The Applicant has not demonstrated that he has a prima facie case and this Application is intended to delay the hearing of ACC No. 4 of 2014 which is scheduled for hearing on 7th and 8th July, 2014.**
8. **The application is without merit and should be dismissed with cost."**

29. The application was also opposed through a replying affidavit sworn on 2nd July, 2014 by David Ndege a Prosecution Counsel in the Office of the Director of Public Prosecutions (ODPP). The affidavit reinforced the grounds of opposition.
30. Mr. Ndege went ahead and averred that after concluding investigations into the matter, the EACC

forwarded the investigations file with a report to the DPP as required under Section 35 (1) of the Anti–Corruption and Economic Crimes Act No. 3 of 2003. Upon going through the entire evidence gathered by the 2nd Respondent, and having been satisfied about the sufficiency of the evidence incriminating the applicants herein jointly with others for fraudulently acquiring the land in question knowing that the land was not available for allocation, the DPP in exercise of his powers under Article 157 of the Constitution made the decision to charge and prosecute the applicants. Further, that the offences with which the applicants are charged are clearly spelt out in the respective statutes and the penalties thereof specified.

31. Mr. Ndege disposed that upon consideration of the evidence contained in the investigations file submitted by the EACC to the DPP, the DPP was satisfied that the applicants had jointly and severally conspired to defraud in the manner set out in the particulars of the offences for which they are charged. Mr. Ndege averred that the decision to charge and prosecute the applicants was based on the sufficiency of the evidence contained in the investigations file submitted by the EACC.

32. The DPP's case is that this Court should exercise extreme caution when arriving at a decision to halt a criminal prosecution. On this argument, the case of **Kuria & 3 others v Attorney General [2002] 2 KLR 69** was cited. In that case the Court stated that:

"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."

33. On the contention that the DPP is not subject to the control of any person in exercise of his prosecutorial powers, the DPP cited the decision of the Court of Appeal in **Meixner & another v Attorney General [2005] 2KLR 189** at page 193 where it was stated that:

"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 that discretion if the Attorney General, in exercising his discretion, is acting lawfully. The High Court can, however, interfere with the exercise of 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."

34. **Meixner** (supra) was also cited in support of the proposition that the analysis of evidence, in order to establish the guilt or otherwise of an accused person, does not fall in the province of the judicial review court. It was urged for the DPP that judicial review is concerned with the process leading to the making of a decision and not the merits of the decision. In **Meixner (supra**) the Court of Appeal opined:

"As the learned judge correctly stated, 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 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, we agree with 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. The other grounds which the appellants claim were ignored ultimately raise the question whether the evidence gathered by the prosecution is sufficient to support the charge.

The criminal trial process is regulated by statutes, particularly, the Criminal Procedure Code

and the Evidence Act. There are also constitutional safeguards stipulated in section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon an examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence. That is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court."

35. On the assertion that the existence of a civil action is not a bar to criminal proceedings arising out of the same set of facts, counsel for the DPP cited Section 193A of the Criminal Procedure Code and the decision of the Court in **Cape Holdings Limited v Attorney General, Misc. Civil Application No. 240 of 2011.**
36. The EACC opposed the application through the replying affidavit of its investigator Wilfred Mutiga. The contents of the affidavit are similar to those in the replying affidavit sworn by the same Wilfred Mutiga in opposition to the application in **JR No. 265 of 2014.** I therefore propose to expound the EACC's case later in this judgement.
37. Junghae Wainaina swore a further supplementary affidavit on 9th September, 2014 in which he vigorously disputed the contents of the affidavit of Wilfred Mutiga.

JR 265 OF 2014

38. The Applicant in **JR No. 265 of 2015** is Amos Kimunya. The Applicant was a Member of Parliament for Kipipiri Constituency for two terms spanning the years 2002 to 2013. During this time he served as a minister in various ministries namely Lands and Settlement; Finance; Trade; and Transport. In June, 2005, the time relevant to this matter, he was the Minister for Lands and Settlement. The Nairobi Chief Magistrate's Anti-Corruption Court, the Director of Public Prosecutions (DPP), the Ethics and Anti-Corruption Commission (EACC) and the Attorney General (A.G.) are the 1st to 4th respondents respectively.
39. Through the notice of motion application dated 10th July, 2014 the Applicant prays for orders:

"a) That an order of certiorari be and is hereby issued bringing into this court and quashing Milimani Chief Magistrate's Court Anti-Corruption Criminal case number 4 of 2014 Republic versus Amos Kimunya, Lillian Njenga, Junghae Wainanina and Midlands Limited and all proceedings therein.

b) That an order of prohibition be and is hereby issued requiring the Milimani Chief Magistrate's Court or any other Magistrate's Court not to hear or determine Milimani Anti-Corruption Criminal case number 4 of 2014 Republic versus Amos Kimunya, Lillian Njenga , Junghae Wainaina and Midlands Limited

c) Costs of this application be provided for."

40. The Applicant's case was clearly brought out by the statutory statement, the verifying affidavit of the Applicant and the annextures thereto. The Applicant indicated through his replying affidavit that he will also rely on the verifying affidavit sworn by Junghae Wainaina in **JR No. 255 of 2014.**
41. The Applicant believes that his rights under Articles 2(1), 3(1), 10, 19, 20, 22, 23, 25, 27, 28, 29, 43, 47, 48, 50(2), 157(11), 165(3), 258, 259 and 260 of the Constitution of Kenya have been infringed or are threatened with infringement. He argued that it is the Court's duty to ensure that his rights and freedoms as enshrined in the Constitution are protected and upheld. The Applicant submitted that subjecting him to a full trial on baseless grounds would constitute extreme injustice and contrary to Articles 47 and 50 of the Constitution. The trial will also subject him to undue torture both physically and mentally contrary to Articles 25 and 29 of the Constitution.
42. According to the Applicant, the prosecution herein has been actuated by malice and ulterior motive as the respondents are purporting to conduct an investigation targeted at the Applicant purely by virtue of his position in society. It was his case that the respondents are using the

criminal process as a tool for personal score-settling or vilification on issues not pertaining to that which the criminal justice system was established to perform.

43. Amos Kimunya averred that as a Member of Parliament representing Kipipiri Constituency he was aware that the farmers in the Nyandarua were experiencing a serious challenge of storage and marketing of their farm produce. As a consequence, Junghae Wainaina teamed up with the local leaders, professionals and businessmen and farmers and decided that there was need to set up a food storage/processing facility. It was agreed that the already registered but dormant company known as Midlands Ltd which was a public company be used to mobilize resources towards the achievement of this objective. The farmers were then encouraged to acquire shares in Midlands and over 3000 farmers took up shares in the company.
44. Since Midlands needed land for undertaking the project, 75 acres of land at Njabini being L.R. No. Nyandarua/Njabini/530 belonging to the SFT and which were lying idle at the time were identified as suitable for the project. An application was therefore made through the ministries of Agriculture and Lands and the provincial administration for allocation of the land. Following the applications, the Ministry of Agriculture allowed Midlands to use the land but informed it that it was not in a position to allocate the land as the same belonged to the SFT. Midlands then applied to the SFT for the land and after ground inspection, re-planning, and re-surveying of the land between 2004 and early 2005, it was duly sub-divided into two portions measuring fifty acres (Nyandarua/Njabini/5851) and twenty acres (Nyandarua/Njabini/5852) and allocated to the Ministry of Agriculture and Midlands respectively.
45. It was the Applicant's case that under Section 167 of the Agriculture Act it is only the SFT which could have disposed of the land and he had no capacity to allocate the land in question. He asserted that the SFT is made up of the ministers for the time being responsible for agriculture, lands and finance. Further, that by virtue of the said section 167 the SFT shall not be a body corporate having perpetual succession and a common seal, and may in its corporate name sue and be sued, and may purchase, hold manage and dispose of movable and immovable property, and may enter into such contracts as it may deem necessary or expedient. That subsection 3 of the section 167 provides that the seal of the SFT shall be authenticated by the signature of one of its members or of the officer administering the fund and subsection 4 thereof states that all documents, other than those required by law to be under seal, made by, and all decisions of, the SFT may be signified under the hand of one of the trustees or of the officer administering the fund. Accordingly, whether in his private capacity or official one, it was not legally possible for the Applicant to dispose the land as it was not placed at his sole disposal. The Applicant therefore concluded that decision to charge him is unreasonable and contrary to common sense.
46. It was the Applicant's case that after securing allocation of the land, Midlands approached him as one of the local leaders to lead the public shares drive and to officially launch the food storage/processing initiative. The launch on 30th April, 2014 was attended by himself, the Minister for Agriculture Hon. Kiptuto Kirwa who was also one of the trustees of the SFT. Also in attendance were other local leaders, the provincial administration and farmers.
47. The Applicant averred that contrary to what was in the public domain, Midlands was a public company with over 3000 shareholders and he only owned a mere 1000 shares which represented 0.016% of the total shares of the company.
48. The Applicant revealed that he was a member of the Board of Directors of the company for a short time and his membership was under the category of "government liaison" by virtue of his being the highest ranking government official in the District in 2005 but he resigned in February 2006 after the coming into force of government regulations which barred ministers from holding directorships in public companies. It was his case that he could not avoid giving political support and goodwill to Midlands as this was meant to aid the activities of the people he was leading.
49. The Applicant submitted that the decision to charge him is unreasonable as the land in question is owned by the SFT and it is the body that allocated the land to Midlands. He averred that the replying affidavit sworn on 29th August, 2014 by Interested Party clearly explained the procedure to be followed in disposal of the SFT land. The affidavit also confirmed that the procedure was followed in transferring the land to Midlands. Further, that the person who signed the transfer and affixed the seal of the SFT was the Permanent Secretary of the Ministry of Lands who is the officer charged with administering the fund. It was the Applicant's case that he did not in any way participate in the disposal or allocation of the land. According to him the unreasonableness of the

decision is confirmed by the fact that the ministers who were in charge of Agriculture and Finance are not in court.

50. The Applicant contended that although in the replying affidavit of Wilfred Mutiga it is deposed that the disposal of the land was his unilateral decision, there was no evidence adduced to show that he unilaterally disposed of the land. Further, that the officer in charge of administering the fund has not been charged and neither has he recorded a statement. According to the Applicant, the EACC's assertion that the seal of itself does not confirm that the decision was made by the Board of Trustees is selective and discriminatory. He asserted that there is evidence before the Court showing that the Minister of Agriculture was the guest of honour during the launch of Midlands' activities. He even planted a tree and issued share certificates to the shareholders of the company. It was the Applicant's case that the Minister of Agriculture was aware of what was going on but he has not been charged and the Minister of Finance has not even been mentioned. The Applicant asserts that this is discriminative prosecution. On the Applicant's assertion that his prosecution is selective and discriminatory, reliance is placed on the case of **George Joshua Okungu (supra)** where the Court quashed a criminal prosecution on the ground that the prosecution was selective and discriminatory.
51. The Applicant also relied on the case of **R v Attorney General ex parte Kipngeno Arap Ngeny, High Court Civil Application No. 406 of 2001** where it was held that a criminal prosecution commenced in the absence of basis is suspect of ulterior motives or improper purpose. In that case it was held that 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.
52. In reply to the respondents' argument that they are entitled to mount concurrent processes in the public interest, the Applicant submitted that a malicious prosecution cannot be commenced to obtain collateral advantage. According to the Applicant the issues in the criminal proceedings are the same with those in the civil case in the High Court at Nakuru. It is his case that the fact that the criminal prosecution was commenced more than fourteen months after the civil case was filed can only be interpreted to mean that the respondents' actions are driven by an unlawful motive, namely the use of the criminal process to coerce the Applicant and his co-accused to settle the civil claim.
53. In support of his position that the criminal process should not be used to assist a party in a civil claim, the Applicant cited the decision of the Court in **Nairobi High Court Petition No. 176 of 2013 Peter Gichuki Mwangi & 2 others v Copyright Board of Kenya & 3 others [2014] eKLR** in which Lenaola, J held that notwithstanding the provisions of Section 193A of the Criminal Procedure Code the Court must ensure that its processes are not abused. It is the Applicant's case that the two processes are aimed at attaining the same agenda namely the cancellation of the title of Midlands and allowing the processes to run concurrently amounts to an abuse of the Court process.
54. The Applicant also argued that Midlands is a public company and the land in question was allocated for the benefit of the farmers and no crime could therefore have been committed in the process. Further, that the process for allocating the land to Midlands was the same with that used for allocating fifty acres to the Ministry of Agriculture and the Applicant is therefore puzzled that the allocation to the Ministry of Agriculture has not been questioned at all.
55. Another ground on which the Applicant challenges his prosecution is that there was a delay in the commencement of the prosecution. Citing Article 47(1) of the Constitution, the Applicant submitted that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Accordingly, it is imperative that criminal investigations be conducted expeditiously. The Applicant contends that although the crime was alleged to have been committed in 2005 the prosecution commenced in 2014 and such a trial will prejudice him as he may not have access to the witnesses whose evidence he intends to rely on. According to the Applicant, the respondents' claim that he could not have been immediately charged as he was a powerful individual in the Government is not a good reason to be used to excuse the respondents' inaction for close to ten years. It is his case therefore that the criminal prosecution should not be allowed to proceed as the same would amount to an abuse of his constitutional right to a fair, just and expedient administrative action.
56. The Interested Party supported the Applicant's case through her replying affidavit sworn on 1st October, 2014. The Interested Party's counsel submitted that the issue was not about the merits or

the demerits of the criminal prosecution. According to him, the issue was whether the decision to charge the Applicant and his co-accused was fair, reasonable, and constitutional.

57. The first point taken up by the Interested Party is that the decision to charge them is irrational and an abuse of the court process. According to her, the prosecution is irrational as the statutory process for allocation of the SFT land was complied with in allocating the land to Milands. In support of her argument, the Interested Party relied on paragraph 15 of the decision of G.V. Odunga, J in **Republic v Chief Magistrate's Court at Kibera Law Courts Nairobi & 2 others Ex-parte Qian Guo Jun & 2 others [2013] eKLR** where the learned Judge opined:

> **"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. See Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300, Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2 and An Application by Bukoba Gymkhana Club [1963] EA 478 at 479."**

58. Secondly, the Interested Party contended that the acts for which they have been charged were performed in discharge of their statutory duties. She wondered whether the Applicant who was one of the trustees can be selectively charged for performance of the statutory duty of the SFT. It was her case that there cannot be estoppel against statute and in charging them the respondents intend to achieve this unlawful aim. The Interested Party told the Court that she has had a long standing career in the civil service which started in 1982 and at the time material to this case she was the Director of Land Adjudication and Settlement in the Ministry of Lands and Settlement. Her duties included purchase and disposal of the SFT assets. It was her case that before the land was disposed, due diligence was conducted and the matter was handled by various officers in the Ministry including the legal officer who drew the instrument of transfer. She asserted that she did not obtain any personal gain from the transaction and all along acted in good faith for the benefit of the public in Nyandarua County. Further, that Section 198 of the Agriculture Act gave her immunity from prosecution.

59. The third point taken up by the Interested Party was that their prosecution is selective and the respondents had a duty to offer an explanation on this selective prosecution. In support of this argument the case of **George Joshua Okungu (supra)** is cited. It was her case that the respondents' decision to pursue a discriminatory and selective prosecution offends the national values and principles of governance as enunciated in Article 10(2) of the Constitution and also violates the right to equal treatment as provided by Article 27 of the Constitution.

60. Fourthly, the Interested Party postulated that this matter was instituted with a view to supporting the civil case pending at the High Court in Nakuru in which the EACC is seeking a reversal of the allocation of the land in question to Midlands. It was the Interested Party's case that it is not enough for the respondents to assert that Section 193A of the Criminal Procedure Code provides for concurrent criminal and civil proceedings. The Interested Party contended that where the criminal process has been commenced with a view to aiding one party in a civil matter then the Court must firmly put down its foot and halt the criminal trial. Among the several cases cited in support of this contention are **Joram Guantai v Chief Magistrate Nairobi Civil Appeal No.228 of 2003** (Court of Appeal); **Floriculture International Limited and others v Trust Bank Ltd & others, Nairobi High Court Misc. civil Application No. 114 of 1997** (Kuloba, J); **R v A.G. & another ex-parte Mohammed Karmali & another, Nairobi High Court Misc. Civil**

Application No. 367 of 2005 (Nyamu, J (as he then was)); **Rosemary Wanja Wagiru & 2 Others v A.G. & 3 others [2013] eKLR** (Mumbi Ngugi, J) ; and **R v DPP & others exparte Qian Guo Jun & another Nairobi High Court Misc. application No. 453 of 2012** (G. V. Odunga, J).

61. I will reproduce what two of the judges stated in the cited cases with regard to Section 193A of the Criminal Procedure Code. In **ex-parte Mohammed Karmali (supra),** Nyamu, J (as he then was) opined:

"Notwithstanding the provisions of Section 193A of the Criminal procedure Code the Court is still bound to ensure that its process is not abused and also to protect itself against the abuse of its process by lititgants."

62. On his part G.V. Odunga, J at paragraph 25 of his judgement in **ex-parte Qiau Guo Jun** observed that:

"Although under Section 193A of the Criminal procedure Code the existence of civil proceedings do not act as a bar to the criminal process, where the criminal process has been instituted as a means of hastening the civil process by either forcing the applicants to concede the civil claim or abandon their claim altogether, the commencement of the criminal proceedings are an abuse of the process of the court....."

63. The Interested Party therefore contended that it is not enough for the respondents to assert that criminal proceedings and civil proceedings can go hand in hand but they ought to demonstrate that the parallel proceedings were not aimed at achieving ulterior motives. According to the Interested Party, the criminal prosecution was meant to intimidate Midlands into abandoning its claim over the land.

64. In furtherance of this argument, the Interested Party submitted that the respondents ought to have lodged a complaint with the National Land Commission so that it could launch enquires into the acquisition of the said land by Midlands.

65. In support of her argument that a prosecution commenced in abuse of prosecutorial powers can be terminated the Interested Party cited, among other decisions, the decisions of the courts in **Metropolitan Bank Ltd v Pooley (1885) 10 App cases**, **210; Williams v Spautz [1992] 66 NSWLR 585; R v DPP & others exparte Qian Guo Jun & another, Nairobi High Court Misc Application No. 453 of 2012**; **R v A.G. & another exparte Kipngeno Arap Ngeny, Misc. Civil Application No. 406 of 2001;** and **Floriculture International Limited & another v Trust Bank Ltd & others, Nairobi High Court Misc. Civil Application No. 114 of 1997.**

66. In order to show that the allocation of the parcel of land in question was above board, the Interested Party explained in detail the process for allocating the SFT land and how that process was followed in allocating the land to Midlands. I will let her speak for herself. In paragraph 7 of her replying affidavit sworn on 29th August, 2014 she averred that:

"7. I verily believe that the institution of both cases was out of actuated malice, is an abuse of process and a contravention of my and the ex-parte Applicant's rights and fundamental freedoms as enshrined in the Constitution of Kenya and specifically Articles 2(1), 3(1), 10, 19, 20, 22, 23, 25, 28, 29, 36, 40, 43, 47, 50(2), 157(11), 165(3), 258, 259 and 260 for the reasons to be stated herein below:

a) The charges refer to acts and steps undertaken by myself in my capacity then as staff, agent, officer and/or representative of the Ministry of Lands and Settlement, an entity which was not enjoined in Nakuru, H.C. ELC. No. 195 of 2013.

b) I was at the material time, an officer and/or staff of the Ministry of Lands and Settlement under the Department of Land Adjudication and Settlement and rose up the ranks and/or was promoted to the position of the Director of Adjudication and Settlement, wherein my duties among others included:

(i) Planning and co-ordinating activities of the Department of Adjudication and Settlement;

(ii) implementation of land adjudication and settlement programmes; and

(iii) Monitoring and supervising the activities of the Department of Adjudication and settlement.

c) As regards planning and implementing a settlement scheme, our duties as public servants, included identifying the land to be acquired. Thereafter, the identified parcel of land would then be planned, surveyed and the resultant survey plans would be used to guide allocation to the identified beneficiaries.

d) The identification of the beneficiaries was at all material times done by the District Plot Selection Committee comprising of the local leaders and Provincial Administration. The list of beneficiaries would then be forwarded to the Minister for Lands and Settlement for approval through the office of the Director of Adjudication and Settlement. After the said approval, the Director would then issues letters of offer.

e) The letters of offer would prescribe the amount to be paid and the period within which the cited amount should be paid but could never transfer title. Ten per cent of the amount ought to be paid within three (3) months and the balance thereof ought to be paid as a loan for a period of Thirty (30) of years. A beneficiary has the option of choosing to pay the whole amount set out in the letter of offer in what is known as outright purchase.

f) Once a beneficiary has cleared payments, the necessary clearance, discharge of charge and transfer documents are prepared. The Transfer documents are prepared by the legal section of the Department of Land Adjudication and Settlement within the Ministry, which has qualified Legal practitioners, and forward to the Officer Administering the Settlement Fund ("OASF") for execution and sealing.

g) The OASF is also the Permanent Secretary in the Ministry of Lands, and once the instruments of transfer are signed they are received by Legal Office and forwarded to the District Land Adjudication and Settlement Officer ("DLASO") in the respective area where the beneficiaries collect them for registration and issuance of Title Deed at the respective District Land Registry.

h) As regards Njabini settlement scheme, I am well aware that the scheme was initiated in the 1960's after independence. The need for the schemes was to reduce population pressure in the former Native reserves and squatters in the former White Highlands. These farms were developed and had improvements which included residences. During planning of the scheme, part of the land was identified for public utilities ("PU") which included schools, health centres, farmers training centre where necessary social amenities.

i) As regard the parcel of land known as Nyandarua/Njabini/530, I recall that this was identified for Njabini Farmers Training Center and it was initially numbered as 849 and consisted approximately 30.5 Heactares according to the Final Area list dated 4th February, 1978. The parcel was registered under Settlement Fund Trustee (SFT) as the owner of the parcel of land.

j) It is noteworthy that until payment and transfer of the title the land remains the property of the Settlement Fund Trustee.

k) Thereafter, I am aware that in the normal duties as a public servant and in line with my job description as a staff of the Ministry of Lands and Settlement I tasked an Officer within our Department, who was in charge of Nyandarua settlement office, one Mrs. Rachel W. Maina, to visit the subject parcel of land and prepare a detailed ground report as it was a

pending task for the department. This was the usual norm and procedure within the department in such instances or cases.

l) The said Mrs. Rachel Maina prepared and later brought the report which she personally handed to me as was the norm then. While handing me the report the said, Mrs. Maina, informed me, which information I verily believed to be true, of a public launch of the processing plant by Midlands Limited, wherein the then Minister of lands and Settlement, Hon Amos Kimunya, the ex-parte Applicant herein, and the then Minister for Agriculture, Hon. Kipruto Arap Kirwa, were present together with the local leaders for the area, including the District Commissioner and area Members of Parliament.

m) The report by Mrs. Rachel Maina was referenced DOS/NYA/5206/260/10/VOL VIII/24 dated 7th June 2005 indicated that among those found on the subject land was Midlands Limited, having approximately 9 acres, planted with potatoes for multiplication purpose. It stated that the said Company has also developed two disinfectant ponds and irrigation pipes all round their portion. The report further stated that Midlands Limited was maintaining indigenous tress which were planted during the above cited launching ceremony and I did not participate or influence the compilation of said report at all.

n) Consequently, officers and/or staff in our Department undertook subdivided the land into two portions of 25 acres and 50.4 respectively. Thereafter I received a Mutation Form Serial Number 1161184 dated 13th June 2005.

o) The mutation was then returned to District Surveyor through District Land Adjudication and Settlement Officer for amendment of the Registry Index Map ("RIM") to enable registration of the resultant parcels whose numbers were 5851 for 20.38 hectares and 5852 for 10.12 hectares. During the said process there was no objection by any party.

p) The allocation was then done by way of issuance of letters of offer to Midlands Limited vide a letter dated 30th June 2005 for Plot Number 5852 measuring approximately 10.12 Hectares.

q) A letter of offer was also issued to Njabini Farmers Training Centre for Plot Number 5851 of approximately 20.38 Hectares on 30th June 2005. The above letters were copied to permanent Secretary in the Ministry of Lands, the District Commissioner for Nyandarua District and the District Land Adjudication and Settlement Officer. This was to give notice to all concerned or interested Parties, which was the norm then, and I am aware that there were no objections to the allocations at the material time as aforestated.

r) After allocation and payment by Midlands Limited, the Transfers for its portion was prepared and signed by the Permanent Secretary of the Ministry of Lands and Settlement at the time, Mr. Kombo Mwero. This act and its subsequent registration passed the title of the subject portion of land to Midlands Limited. The Permanent Secretary in the Ministry was the Officer Administering the Settlement Fund. The said Transfer instrument was witnessed by another staff of the Ministry, Mrs. Rachel Maina , and certified by a Legal Officer in the Ministry, Mrs. Kungu-Karanja, as was the norm for all such transactions.

s) I am not a director or shareholder of Midlands Limited, which I verily believe to be a public Company and I have no interest in the said Company in any way whatsoever. Further, I did not get any personal benefit from the process of allocating part of the suit land to Midlands Limited and all my actions at the material time were undertaken in good faith, as a staff of the Ministry of Lands and Settlement, and for the good and benefit of the general public.

67. On the respondents' argument that whatever they have placed before this Court can serve as defences before the Magistrate's Court, the Interested Party submitted that this argument is

misplaced since their trial ought not to take off at all. The cases of **Githunguri v Republic [1986] KLR 1** and **Joram Guantai v Chief Magistrate Nairobi, Civil Appeal No. 228 of 2003** are cited to support the Interested Party's argument that where the remedy of prohibition is available, then an accused person should not subject himself to a criminal trial and risk conviction.

68. The Interested Party also contended that although they are confident that a fair trial of the criminal case by the 1st Respondent will lead to their acquittal, they had opted to halt and prohibit the criminal proceedings so as to protect the integrity of the Court process and keep the streams of justice pure. She asserts that they are not after self-preservation but are keen to protect the best interests of the Court and the wellbeing of the public at large. In support of this proposition, she cited **Williams v Spautz [1992] 66 NSWLR 585** where the High Court of Australia explained the reasons behind the remedy of prohibiting criminal trials as follows:

"As Lord Scarman said in R vs Sang [1980] AC 402 at 455, every court is "....duty bound to protect itself" against an abuse of its process. In this respect there are two fundamental policy considerations which must be taken into account in dealing with abuse of process in the context of criminal proceedings. Richardson J refered to them in Moevao vs. Department of Labour [1980] 1 NZRL 464 at 481 in a passage which Mason CJ quoted in Jago (1989) 168 CLR, at 30. The first is that the public interest in the administration of justice requires that the court protect 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 so to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court's processes may lend themselves to oppression and injustice."

69. The Interested Party also pointed out that the Court in **Githunguri (supra)** addressed the policy behind prohibition of criminal trials when it observed that:

"It is as much in the public interest that breaches of law should be punished, as it is to ensure that in the process of doing so the people are not bashed about so that they lose respect for the law. If the law falls into disrepute it will have a shattering effect upon the society's sense of security of their personal freedom and property. The Court is the final arbiter of how the public interest is to be preserved."

70. The Interested Party therefore urged this Court to conclude that is it in public interest to halt their trial.

71. The 1st and 4th respondents opposed the application through grounds of opposition dated 14th July, 2014. I can only do justice to their case by reproducing the grounds of opposition as follows:

"1. That whereas the Ex-parte Applicant is seeking several orders against the 1st Respondent he has not alleged any procedural or substantive irregularity occasioned by the 1st Respondent herein as to support the issuance of the same as against it.

2. That the 4th Respondent has by dint of Article 156(4)(b) of the Constitution no role in criminal proceedings and to that extent has been wrongly enjoined in the present proceedings which are challenging the propriety of criminal proceedings.

3. That no prima facie case is established from the pleadings of this case that would remotely suggest that the 1st Respondent has any likelihood of infringing the ex-parte applicant's constitutional rights.

4. That there is a presumption that the 1st Respondent shall act in a fair, just and impartial manner in accordance with the Constitution and all applicable law and that presumption has not been rebutted in any manner by the Ex-parte Applicant.

5. That the 1st Respondent has the jurisdiction to determine whether the prosecution has been actuated by malice, influenced by extraneous considerations, whether the prosecution

has established a prima facie case or not, whether the Ex-parte applicant should be put on his defence or not, whether there is adequate evidence to support the charges brought or not.

6. That from the evidence adduced before this Honourable Court there is no basis for any suspicion or fear that the 1st Respondent will infringe on the Ex-parte Applicant's rights as provided under Article 50 of the Constitution.

7. That no allegation of irregularity, ultra vires or irrationality has been made or can be construed from the pleadings and evidence adduced against the 4th Respondent."

72. Counsel for the 1st and 4th respondents also made oral arguments at the hearing of the application.

73. The 2nd Respondent opposed the application through grounds of objection dated 11th September, 2014. The grounds are as follows:

"1. The Application is misconceived, frivolous, vexatious, incompetent, improperly before court and an open abuse of the court process.

2. Under Section 193A of the Criminal Procedure Code, Cap 75, Laws of Kenya, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of criminal proceedings.

3. The 2nd Respondent has the mandate under article 157(6) of the Constitution to exercise State powers of prosecution and may institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed.

4. Under Article 157(10) of the Constitution the Director of Public Prosecutions does not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of the powers or functions, and is not be under the direction or control of any person or authority.

5. The issues raised by the Applicant are issues of evidence that should be raised before the subordinate court seized with the matter.

6. The application has not met the prerequisite requirements for the grant of the orders sought.

7. The matters raised by the applicants in the pleadings filed herein form the basis of his defences which should be raised before the trial court and as such cannot be raised before the High Court in the manner proposed herein.

8. No sufficient grounds have been advanced to warrant the grant of the orders sought.

9. The applicant is guilty of material non-disclosure.

10. The laws of Kenya provide essential safeguards for a fair trial which is also entrenched in the Constitution of Kenya 2010. It has not been demonstrated that the applicants will not be accorded a fair trial before the subordinate court to warrant the granting of the orders sought.

11. An order of certiorari cannot issue against an action or decision which has been taken or made in execution and discharge of a legal mandate.

12. The institution of criminal proceedings against the applicants or either of them cannot

be said to be an abuse of the process, discriminatory or actuated by malice or ulterior motives.

13. The High Court has no jurisdiction to determine whether or not the applicant is guilty or not.

14. The High Court has no jurisdiction to determine whether or not any criminal offence was committed by the petitioner in relation to the matters the subject of the pleadings herein.

15. It is in the public interest that perpetrators of crimes are prosecuted.

17. The Applicant has not demonstrated that he has a Prima facie case and this Application is intended to delay the hearing of ACC No. 4 of 2014.

18. The application is without merit and should be dismissed with costs."

74. On behalf of the EACC the application was opposed through a replying affidavit sworn on 7th August, 2014 by Wilfred Mutiga, an investigator with the organization. He averred that he investigated the allegation of irregular transfer of part of the land belonging to Njabini Farmers Trading Centre. Wilfred Mutiga deposed that sometimes in the year 2008 the defunct Kenya Anti-Corruption Commission (KACC) received a report alleging that part of the land belonging to Njabini Agricultural Training Centre had been grabbed by Hon. Amos Kimunya through a company associated with him. Investigations commenced and it was established that the land in question had been allocated to Midlands despite protestations by the Ministry of Agriculture. The investigations revealed that criminal offences had been committed in the course of the allocation of the land to Midlands.
75. Mr. Mutiga averred that prior to the sub-division of Nyandarua/Njabini/530 the land had been set aside for a public purpose as a Farmers Training Centre and reserved for use by the Ministry of Agriculture. He disposed that the Board of Governors of the Agricultural Training Centre at Njabini was not consulted in the allocation of part of the land to Midlands. Further, that the land having been set aside for use as an Agricultural Training Centre, the same was not available for allocation to Midlands or to anybody else.
76. Mr. Mutiga averred that any change of user, sub-division or disposition of the land in question could only be sanctioned by the Board of Trustees of the SFT which consisted of the Minister for the time being responsible for Land, the Minister for the time being responsible for Agriculture and the Minister for time being responsible for Finance. He disposed that there was no evidence to indicate that the decision to subdivide Nyandarua/Njabini/530 and allocate twenty five acres to Midlands was a decision of the Board of Trustees of the SFT. He asserted that the decision to subdivide the land was a unilateral decision of the Applicant. It is EACC's case that the attendance of the launch of Midlands activities by the Minister of Agriculture and the planting of a tree had no connection with the allocation of the land and neither did it endorse the acquisition of the land by Midlands. It was EACC's assertion that the authentication of the seal of the Board of Trustees of the SFT by one of the members or the officer administering the fund as required by Section 167(3) of the Agriculture Act does not of itself confirm that a decision of the members of the Board of Trustees has been made.
77. On the ownership of Midlands, Mr. Mutiga averred that the Applicant was a director of Midlands which was a limited liability company started by businessmen from Nyandarua as a commercial enterprise but was only registered as a public company because of the number of directors it had.
78. He further averred that the Applicant and the Interested Party knew that the land parcel in question was reserved for a public purpose as Agricultural Training Centre and further knew or ought to have known that the Ministry of Agriculture was objecting to any allocation of the land or part thereof.
79. The EACC's case was that upon conclusion of investigations, it prepared a report containing its recommendations and forwarded the same to the DPP who re-examined the evidence and recommended that the Applicant, the Interested Party and others be charged.

80. On the filing of **Nakuru High Court ELC No. 195 of 2013, Ethics and Anti-Corruption Commissioner v Midlands Limited and Lillian Wangiri Njenga,** Mr. Mutiga averred that under **Section 11(1)(j)** of the **Ethics and Anti-Corruption Act, 2011**, the EACC is mandated to institute and conduct proceedings in Court for purposes of the recovery or protection of public property. It was in exercise of that mandate that the civil case was filed with a view to recovering certain parcels of land from the defendants therein and the civil case cannot operate as a bar to the commencement of criminal proceedings. According to him, their actions are in consonance with Section 193A Criminal Procedure Code. He denied that the commencement of the criminal prosecution was meant to coerce the Applicant and Interested Party to submit to the recovery suit at Nakuru noting that recovery proceedings can be commenced even in cases where there is an acquittal. Further, that the investigation and recommendations by the EACC are not intended to punish the Applicant and his co-accused but are intended to vindicate public interest. He denied that the EACC was abusing its powers.
81. On the alleged delay in the commencement of the prosecution, Mr. Mutiga averred that the investigations commenced in 2009 and the Applicant was arraigned in Court within five years which cannot be said to be an unreasonably long period taking into cognizance the fact that the EACC is a successor of an institution that has been going through transition and that the Applicant occupied a powerful position in Government thereby impacting on the gathering of evidence. Further, that there is no limitation period for the prosecution of criminal offences except where limitation has been imposed by statute. It was also the EACC's case that there is no evidence that has been adduced to show that the Applicant has been prejudiced by the delayed prosecution.
82. Mr. Mutiga averred that the Applicant had not demonstrated how his being investigated and charged in Court had violated Articles 2(1), 3(1), 10, 19, 20, 22, 23, 25, 27, 28, 29, 43, 47, 48, 50(2), 157(1), 165 (3), 258, 259 and 260 of the Constitution.
83. It was the EACC's case that it would be a futile exercise to quash the criminal trial as no prayer has been sought to quash the decision of the DPP to charge the Applicant and fresh charges can still be introduced. Further, that the Magistrate's Court cannot be prohibited from hearing and determining the criminal case as a magistrate cannot, in the absence of any complain of impropriety on the part of the magistrate, be restrained by judicial review from conducting trials in accordance to the law, as that is what the law requires a magistrate to do.
84. The EACC contended that the Applicant lacks a cause of action against the Magistrate's Court as no evidence was tabled to demonstrate that the Applicant will not get a fair trial before the Magistrate's Court.
85. The EACC accused the Applicant of trying to present his defence before this Court despite the fact that this is not the trial Court. Further, that judicial review is concerned with the decision making process and not with the merits of the decision and that the sufficiency or otherwise of the charges goes into the merits of the decision of the DPP to prosecute the Applicant. The EACC asserted that the determination on the sufficiency or otherwise of the evidence belongs to the trial Court.
86. Mr. Mutiga averred that the rights of an accused person must be balanced with the equally fundamental societal interest in bringing those accused of committing crimes to stand trial and account for their actions.
87. The EACC contended that the DPP exercised his powers independently as anticipated in Article 157 of the Constitution and granting the orders sought will be tantamount to fettering the execution of the legal mandate of the DPP.

ANALYSIS AND DETERMINATION

88. Upon perusal of the evidence and submissions it emerges that the core issue in the cases before this Court is whether the DPP exercised the prosecutorial powers granted to him by Article 157 of the Constitution in compliance with Article 157(11) of the Constitution which requires him to have regard to the public interest, the interests of the administration of justice and to ensure that the legal process is not abused.
89. Before delving into the main issue there are a few procedural issues which I need to address first. The EACC argued that issuance of an order of certiorari in this case will not aid the applicants as they did not seek an order of prohibition against the decision of the DPP to prosecute them. This

submission is untenable. The Applicant seeks a prohibition against trial by any magistrate in Kenya and if the order is issued, then the DPP will not have any Court in which to institute the charges. His decision to prosecute will therefore die if the Court grants the orders sought by the applicants.

90. Another point raised by the EACC is that an order of prohibition cannot be issued to prohibit a magistrate from conducting a trial. The answer to this is that a trial is legit is indeed protected from interference but if a trial has been commenced in abuse of the court process or against the public interest then such a trial can be prohibited.

91. There was an argument by the Attorney General that his presence in this case is of no value as no order has been sought against his office. Further, that no order can issue against the Magistrate's Court. This Court take is that the trial Magistrate is in these proceedings by virtue of Order 53 Rule 3(2) of the Civil Procedure Rules, 2010 which requires that where an order would affect the proceedings before a magistrate, then the application should be served on the Court. The Attorney General is in this case in his capacity as the legal adviser and defender of the national government. The judiciary falls under the national government and it is the duty of the Attorney General to defend cases against the judiciary. The Attorney General cannot therefore be heard to say that he ought not to have been served unless he wants to abdicate his constitutional mandate.

92. I will now address the key question. I no longer expect any person at this age of our democratic development to assert that the independence of the DPP shields his decisions from the review of the High Court. A multiplicity of authorities have been cited by the parties in this case to demonstrate that a criminal prosecution can be halted if it is commenced in abuse of the court process or with a view to achieving ulterior motives-see **Floriculture (supra), Kipngeno Arap Ngeny (supra), Kuria (supra), The Commissioner of Police & The Director of Criminal Investigation Department (supra)** and **Meixner (supra).** The prosecutorial power of the DPP must therefore be exercised within the parameters of the Constitution and the law.

93. The principles guiding the exercise of the power of the High Court to quash a criminal prosecution are now well established. The decision whether or not to halt a criminal trial will be determined by the facts and circumstances of each case. The applicants have based their applications on several grounds. I will therefore cite a few authorities to demonstrate under what circumstances a criminal prosecution can be stopped.

94. In **Mohit v the Director of Public Prosecutions of Mauritius (Mauritius) [2006] UKPC 20** (25 April 2006) the Privy Council cited the decision of the Supreme Court of Fiji in **Matalulu v DPP [2003] 4LRC 712** in which the grounds for review of the exercise of prosecutorial powers were enumerated as follows:

"It is not necessary for present purposes to explore exhaustively the circumstances in which the occasions for judicial review of a prosecutorial decision may arise. It is sufficient, in our opinion, in cases involving the exercise of prosecutorial discretion to apply established principles of judicial review. These would have proper regard to the great width of the DPP's discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits. This approach subsumes concerns about separation of powers.

The decisions of the DPP challenged in this case were made under powers conferred by the 1990 Constitution. Springing directly from a written Constitution they are not to be treated as a modern formulation of ancient prerogative authority. They must be exercised within constitutional limits. It is not necessary for present purpose to explore those limits in full under either the 1990 or 1997 Constitutions. It may be accepted, however, that a purported exercise of power would be reviewable if it were made:

1. **In excess of the DPP's constitutional or statutory grants of power-such as an attempt to institute proceedings in a court established by disciplinary law (see s 96 (4) (a)).**
2. **When, contrary to the provisions of the Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion–if the DPP were to act upon a political instruction the**

decision could be amenable to review.

3. **In bad faith, for example, dishonesty. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe.**
4. **In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved.**
5. **Where the DPP has fettered his or her discretion by a rigid policy – e.g. one that precludes prosecution of a specific class of offences.**

There may be other considerations not precisely covered by the above in which judicial review of a prosecutorial discretion would be available. But contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the consideration, to which the DPP may properly have regard in instituting or discontinuing proceedings. Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice."

95. In **State of Maharastra & others v Arun Gulab Gawali & others Ciriminal Appeal No. 590 of 2007 (27 August, 2010),** the Supreme Court of India outlined the circumstances under which a criminal prosecution can be quashed. The Court stated at paragraph 13 of its judgement that:

"In R.P. Kapur Vs. State of Punjab AIR 1960 SC 866, this Court laid down the following principles:-

(I) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice;

(II) where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction;

(III) where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; and

(IV) where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge."

There may be other instances in which a criminal prosecution can be quashed. Each case has to be assessed on its own before a decision is reached.

96. One of the grounds in support of the application was that the prosecution of the applicants had been unduly delayed. Although the length of the delay between the alleged offence and the trial of the matter is relevant, it is in itself not decisive of the success or failure of the quashing application. Delay of itself is not sufficient. An applicant should proceed to demonstrate that actual prejudice will be suffered as a result of the delay. The question to be asked is whether the delay is so prolonged that it is unreasonable in the context of a particular case.
97. In **Jago v The District Court of New South Wales & others, 168 C.L.R.23, 12 October, 1989,** Deane, J observed that in considering whether or not the delay in institution of criminal proceedings should lead to the termination of a criminal prosecution, the Court should take into consideration the length of the delay; the reasons given by the prosecution to explain or justify the delay; the accused's responsibility for and past attitude to the delay; proven or likely prejudice to the accused; and the public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime.
98. The applicants before this Court contended that the delay in their prosecution had prejudiced them. They stated that the witnesses they intend to call may no longer be available to them. It must be noted that they have not given the names of the witnesses who could have testified for them but are no longer available because of the delay. They have not explained why the witnesses

are no longer available. It is only hard facts that could have assisted this Court to determine whether the delay in their prosecution has prejudiced them. From the evidence before the Court I can only conclude that the applicants have not been prejudiced by the delay.

99. Secondly, it is in the public interest that the truth be known about the acquisition of the SFT land in Njabini by Midlands. If crimes were committed in the transaction then it is in the public interest that those who committed the crimes be tried and if found culpable be convicted and punished. Whereas I do not agree with the EACC's revelation that it normally has challenges when investigating powerful persons in government, I find and hold that the institution of the criminal case against the applicants about four years after investigations commenced has not prejudiced them in any way. It is in the public interest that serious crimes, such as those alleged to have been committed by the applicants, must be investigated and charges brought where there is evidence.

100. The applicants and especially Amos Kimunya submitted that their prosecution was selective and discriminatory. They relied on the decision of this Court (W. Korir and G.V. Odunga JJ) in **George Joshua Okungu (supra).** In the cited case, this Court frowned upon the use of prosecutorial powers selectively and discriminatively. In that case, the applicants had been charged in connection with a decision of a parastatal to dispose houses belonging to the parastatal. The Court found that the decision had been made by the Board of the parastatal and among the intended prosecution witnesses in the criminal trial was the Permanent Secretary of the parent Ministry who had participated in the making of the decision to sell the houses. The Court found that charging the two petitioners and making the other members of the Board prosecution witnesses amounted to selective and discriminatory use of prosecutorial powers. The facts in the **George Joshua Okungu** case are different from the facts of this case.

101. In the case before this Court, Amos Kimunya wonders why he is not in the dock with Kipruto Kirwa, the then Minister of Agriculture, who even attended the launch of Midlands activities. He also does not understand why the then Minister of Finance has not been charged. According to Section 167 of the Agriculture Act the Board of Trustees of the SFT is made up of the Ministers in charge of agriculture, lands and finance. The EACC's case is that the decision to allocate the land to Midlands was not backed by the decision of the Board of Trustees. It argues that the decision to allocate the land was unilaterally made by Amos Kimunya who was the Minister of Lands and Settlement at the material time. In her statement to the EACC the Interested Party revealed that she acted upon the instructions of Amos Kimunya. From the EACC's standpoint, there was no reason for charging the other two ministers as they did not participate in the allocation of the land to Midlands. I therefore do not find anything untoward in the actions of the respondents. In the circumstances, the applicants' claim that the actions of the DPP and the EACC were discriminatory lacks basis and the assertion is rejected and dismissed.

102. There was also an argument by the applicants that their prosecution was selective as any parcel of land deemed to have been illegally acquired is normally recovered through the National Land Commission. The applicants did not, however, adduce any evidence to show that crimes were committed in the process of acquiring the parcels of land that have been subjected to recovery through the National Land Commission.

103. The applicants contended that their constitutional rights have been violated and will continue being violated if their trial is allowed to continue. The applicants' concerns cannot be lightly brushed off. Protection of individual rights is one of the key pillars of our constitutional framework. On the other there is the public policy that requires that crime must be punished. The approach and solution to this dilemma was provided in **Kuria (supra)** as follows:

> **"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."**

104. In an application like the one before this Court, the material placed before the Court by the parties will show the Court the direction to take. Where evidence has been adduced to show that

the mandate of the DPP to prosecute has been abused, the Court will not hesitate to grant an appropriate remedy. On the other hand, where there is no evidence of abuse of power, the application will be dismissed.

105. The applicants also submitted that the institution of the criminal prosecution while the civil suit was pending in Nakuru amounted to an abuse of the court process. In **Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others [2009] eKLR** the Court of Appeal defined what amounts to an abuse of the court process as follows:

"Finally, the *third point is,* whether in the circumstances the respondents had abused the process of the court. We must therefore determine if, in the circumstances the Originating Summon as framed, constituted an abuse of the court process. In this connection, we are greatly concerned that even after *Mr Church* had admitted that his occupation or possession was based on a tenancy he still did use the 1st respondent company to file an Originating Summons and claim a purchasers interest and also claim as an adverse possessor. In our view he, knowingly and dishonestly used the legal process to accomplish an ulterior purpose to that of the court process, which is to protect the interests of justice. We are of course aware that we cannot comprehensively list all possible forms of abuse of court process and that we cannot formulate any hard and fast rule to determine whether in any given facts, abuse is to be found or not, but in the circumstances of this case we do think that since the Originating Summons was instituted in the face of the admission of tenancy, this, in our view, does constitute an abuse of the court process. The 1st respondent and *Mr Church* did manifestly exploit the process whereas it was in our view clear to them that they lacked good faith in instituting the Originating Summons thereby causing prejudice and delay. The action was also wanting in bona fides and was oppressive to the appellant. All these in our view constitute abuse of process.

To re-inforce the point, abuse of process has been defined in *WIKIPEDIA*, the free encyclopedia:

"The person who abuses process is interested only in accomplishing some improper purpose that is collateral to the proper object of the process, and that offends justice."

In *BEINOSI v WIYLEY 1973 SA 721 [SCA]* at page 734F-G a South African case heard by the Appeal Court of South Africa, *Mohomad CJ,* set out the applicable legal principle as follows:-

"What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of "abuse of process." It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective."

Again the Court of Appeal in Abuja, Nigeria in the case of *ATTAHIRO v BAGUDO 1998 3 NWLL pt 545 page 656,* stated that the term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it.

In the Nigerian Case of *KARIBU-WHYTIE J Sc* in *SARAK v KOTOYE (1992) 9 NWLR 9pt 264) 156 at 188-189 (e)* the concept of abuse of judicial process was defined:-

"The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice …"

The same Court went on to give the understated circumstances, as examples or illustrations of the abuse of the judicial process:-

(a) "Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.

(b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.

(c) Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.

(d) (sic) meaning not clear))

(e) Where there is no loti of law supporting a Court process or where it is premised on frivolity or recklessness."

We are of the view that the circumstances of the case before us, falls squarely in illustration (e) above, in that there was no valid law supporting the process followed by the respondent."

106. It was upon the applicants to demonstrate that the actions of the respondents are an abuse of the court process. The applicants were expected to point out what in their view is an abuse of the court process. Have they done so? The answer will emerge shortly.
107. Section 193A of the Criminal Procedure Code provides that **"the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings."** However, as it has correctly been stated in some of the cited cases, the commencement of criminal prosecution while a civil action is subsisting can amount to abuse of the court process. For example, in **The Commissioner of Police & The Director of Criminal Investigation Department (supra)** the Court of Appeal held that the commencement of criminal proceedings in view of the fact that the parties had embroiled in a litany of civil cases amounted to an attempt by the complainant to use the criminal process to settle a civil dispute.
108. The onus is on an applicant to establish that the criminal prosecution has been instituted for ulterior motives. In **Kuria (supra)** it was held that:

"It is not enough to simply state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused. There is 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 the absence of concrete grounds.....it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same set of facts."

109. It is therefore not automatic that the commencement of criminal prosecution while a civil case has been filed or can be filed amounts to abuse of the court process. An applicant must go ahead to demonstrate that there is nothing criminal about the dispute or that justice will be better served by pursuing the civil process. In this case, the respondents have placed sufficient material before this Court to show that crimes may have been committed during the process of the transfer of the land in question to Midlands. Owing to the seriousness of the alleged crimes, the criminal process should be allowed to take its full course so as to vindicate the public policy which requires that crime should be tried and punished.
110. It is indeed true that criminal proceedings cannot be commenced with a view to propelling the civil process in favour of one of the parties. That would indeed be an abuse of prosecutorial powers. However, where the DPP has legally exercised his powers, his decision is not subject to

the second opinion of this Court. Once it is demonstrated, as it has been done in this case, that the DPP has sufficient material for forming an opinion that there is a prosecutable case, the matter should end there. The Court can only step in if the prosecution is not in the public interest, the interests of the administration of justice and is an abuse of the legal process. In this case, the civil process is aimed at recovering the land whereas the criminal trial is aimed at punishing crimes alleged to have been committed in the course of transfer of the land.

111. Some of the questions to be answered by the trial Court, which questions cannot be answered through judicial review, are:

a. Was the land available for alienation to Midlands?
b. Did Amos Kimunya fail to disclose his interest in Midlands when purporting to allocate the land to the company? Did he have an interest in Midlands in the first place?
c. Did Junghae Wanaina and Midlands fraudulently acquire public land?
d. Did Amos Kimunya and Lillian Wangiri Ndegwa abuse office in the process of handling the parcel of land that was allocated to Midlands?

It is only the trial Court which can reach a decision on all the questions relating to the matter.

112. The applicants pinpointed paragraphs in the witness statements and referred to documents to show that they are innocent of the charges facing them in the Anti-Corruption Court. In essence, the applicants are asking this Court to look at the evidence to be presented during the trial by the DPP and arrive at a conclusion that the same is not sufficient. They are asking for an acquittal without a trial and this is short-circuiting the clearly established constitutional and statutory mechanism for dealing with criminal cases. In the trial Court they will have the opportunity, by way of cross-examination, to test the evidence gathered by the EACC. As was pointed out by the Court of Appeal in **Meixner (supra),** the applicants will have the constitutional and statutory protection of their rights during the trial.

113. The applicants also contended that their legitimate expectation to be taken through a fair legal process was breached by the respondents. No evidence has been placed before the Court to show that the applicants were subjected to an unjust or unfair process or a process contrary to the law. The EACC and the DPP only did that which the law required them to do. There was therefore no breach of their legitimate expectation.

114. Finally, the applicants asserted that their prosecution is in breach of several cited constitutional provisions. The respondents' reply to this argument is that the applicants did not show how each of the cited constitutional provisions was breached and how that resulted in violation of their constitutional rights. I have already found that the prosecution of the applicants was commenced in compliance with the Constitution and the law. In light of that finding, it is clear that the applicants have failed to demonstrate a violation of their rights as enshrined in the Constitution.

115. The power to prohibit criminal prosecution ought to be wielded with great restraint. The Supreme Court of India warned in **State of Maharastra (supra)** that:

"12. The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor it can `soft-pedal the course of justice' at a crucial stage of investigation/ proceedings. The provisions of Articles 226, 227 of the Constitution of India and Section 482 of the Code of Criminal Procedure, 1973 (hereinafter called as `Cr.P.C.') are a device to advance justice and not to frustrate it. The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of power of the Court, but the more the power, the more due care and caution is to be exercised in invoking these powers. (Vide State of West

Bengal & Ors. Vs. Swapan Kumar Guha & Ors. AIR 1982 SC 949; M/s. Pepsi Foods Ltd. & Anr. Vs. Special Judicial Magistrate & Ors. AIR 1998 SC 128; G. Sagar Suri & Anr. Vs. State of U.P. & Ors. AIR 2000 SC 754; and Ajay Mitra Vs. State of M.P. & Ors. AIR 2003 SC 1069).”

116. I embrace the caution and add that only in cases where there is clear evidence that the prosecution was commenced with ulterior motives or in the absence of evidence or where on the face of it the charge does not disclose any offence should a criminal prosecution be quashed or prohibited. The criminal justice system is aimed at detecting crimes and punishing those found culpable and it should not be interfered with unless there is clear evidence that it is being used to attain other purposes. It is upon an applicant in a case such as this to prove that there are grounds, backed by sufficient evidence, warranting the intervention of the Court in a criminal prosecution.
117. An overall view of this case reveals that the applicants have not established any ground for quashing or prohibiting their trials. In short, there is no evidence that their prosecution amounts to an abuse of the legal process or is against public interest or is against the interests of the administration of justice.
118. In conclusion, I find that the applicants have not made out a case for the grant of the orders sought. Their applications are therefore dismissed with no orders as to costs.

Dated, signed and delivered at Nairobi this 4th day of March , 2015

W. KORIR,

JUDGE OF THE HIGH COURT