



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**JUDICIAL REVIEW NO. 311 OF 2014**  
**IN THE MATTER OF AN APPLICATION BY GEORGE KURIA MWAURA**  
**TO APPLY FOR THE JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION,**  
**MANDAMUS, INTERALIA**

**AND**

**IN THE MATTER OF THE DECISION OF THE DIRECTOR OF PUBLIC PROSECUTION  
DIRECTLY OR BY SUBORDINATE PERSONS ACTING IN ACCORDANCE WITH GENERAL  
OR SPECIAL INSTRUCTIONS TO CHARGE GEORGE KURIA MWAURA WITH THE  
CRIMINAL OFFENCES REGARDING THE L.R. NO. 209/9943 MEASURING 0.2131 HA VIDE  
CRIMINAL CASE NAIROBI CHIEF MAGISTRATE CR. CASE NO. 1444OF 2013, REPUBLIC -  
VS- GEORGE KURIA MWAURA**

**AND**

**IN THE MATTER OF THE PENAL CODE CHAPTER 63 LAWS OF KENYA, ARTICLE  
157(9) AND (11), 165(3) AND 165(6) OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT**

**CHIEF MAGISTRATE'S COURT, NAIROBI.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**AND**

**JOYCE GATHONI.....INTERESTED PARTY**

**EX-PARTE.....GEORGE KURIA MWAURA**

## JUDGEMENT

1. By a Notice of Motion dated 13<sup>th</sup> August, 2014, the *ex parte* applicant herein, **George Kuria Mwaura**, seeks:

1. **THAT** an order of certiorari do issue to remove in to this court for the purposes of being quashed, the decision of the Director of Public Prosecution either directly or by subordinate person acting in accordance with the general or specific instructions to charge the ex-applicant with criminal offences regarding the L.R NO. 209/9943 measuring 0.2131 Ha vide criminal case, **NAIROBI CHIEF MAGISTRATE CR. CASE NO. 1444 OF 2013 R -VS- GEORGE KURIA MWAURA.**

2. **THAT** an order of prohibition do issue prohibiting the Director of Public Prosecution either directly or by subordinate persons acting in accordance with general or special instructions from instituting, maintaining, prosecuting or in any other manner from dealing with the ex-parte applicant vide **NAIROBI CHIEF MAGISTRATE CR. CASE NO. 1443 OF 2013** or through any other Criminal Case and particular to prohibit the respondent from employing the criminal proceedings for some ulterior or improper purpose or in an improper way.

3. **THAT** an order of Prohibitory Order do issue against the Respondents from proceeding with the prosecution of the ex-parte Applicant vide Nairobi CHIEF MAGISTRATE'S CRIMINAL CASE NO. 1444 of 2013, REPUBLIC VS GEORGE KURIA MWAURA or instituting any other prosecutions touching on any other matter relating to L.R. No. 209/9943, the subject matter of the criminal proceedings herein.

4. **THAT** an order of prohibition do issue against the Chief Magistrate Court, Nairobi and/or any other Magistrate prohibiting him, her or them from hearing or further hearing with the trial of the ex-parte applicant on the charges brought against him in NAIROBI CHIEF MAGISTRATE CRIMINAL CASE NO. 1444 OF 2013, REPUBLIC –VS- GEORGE KURIA MWAURA.

5. **THAT** an order of mandamus do issue to compel the 1<sup>st</sup> respondent to exercise his powers general or special in accordance with the law and that henceforth the respondents decisions in respect of the ex-parte applicant touching on the L.R No. 209/9943 measuring 0.2131 Ha be exercised in accordance with the law and the Constitution of Kenya having regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

6. **THAT** an order do issue for the calling for the records in **NAIROBI CHIEF MAGISTRATE CR. CASE NO. 1443 OF 2013** for the purposes of the High court determining the legality of the said criminal proceedings or to give such directions as it considers appropriate to ensure the fair administration of justice.

7. A declaratory order that the Criminal proceedings in Nairobi Chief Magistrate Cr. Case No. 1444 of 2013, Republic –Vs- George Kuria Mwaura were null and void and an abuse of the legal process.

8. **THAT** a declaration that the grant I.R. No. 119537 for L.R. No. 209/9943, was issued as a result of a resolution made by the Ministry of Lands on diverse dates in June 2009, followed by the approval by the Honourable Minister of Lands, the Permanent Secretary and the Commissioner of Lands that the ex-parte Applicant's grant should be registered and hence the issue that the ex-parte Applicant obtained registration by false pretence contrary to Section 320 of the Penal Code could not constitute a criminal offence and the Respondents' continuity to proceed with the intended prosecution would amount to a violation of the ex-parte Applicant's fundamental rights and freedoms as envisaged under Section 77(8) of the

**Constitution of Kenya.**

**9. THAT a declaratory order do issue that proceeding with the Criminal Case No. 1444 of 2013, Republic Vs George Kuria Mwaura in the Nairobi Chief Magistrate will amount to the contravention of the ex-parte Applicant's fundamental rights as guaranteed by Section 77(8) of the Constitution of Kenya.**

**10. THAT a declaratory Order be issued to the effect that the Official Search carried out on the 21<sup>st</sup> day of October 2009, was valid and the same confirmed that the grant I.R. No. 119537 was officially registered by the Registrar of Titles and the issue that the ex-parte Applicant obtained registration by false pretence contrary to Section 320 of the Penal Code is not true and the continued prosecution of the ex-parte Applicant by the Respondents is in breach of Section 82(2) of the Constitution of Kenya and the prosecution is illegal, null and void *ab initio*.**

**11. THAT a declaratory Order be issued to the effect that the internal memo dated 1<sup>st</sup> April 2010 by the Hon. Minister of Lands, James Orengo confirming that there was a double allocation on grant L.R. No. 209/9943, was valid and the same confirmed that the suit property has two grants I.R. No. 119537 in the name of the ex-parte Applicant and I.R. No. 52820 in the name of the late Joseph Wanyoike Kiarie, the husband to the Interested Party and this vividly confirm that the ex-parte Applicant never committed any criminal offence and his continued prosecution by the Respondents is in breach of Section 82(2) of the Constitution of Kenya and the prosecution is illegal, null and void *ab initio*.**

**12. THAT a declaratory Order be issued to the effect that the investigation carried out by Mrs. Olando, a Senior Assistant Commissioner of Lands as per the instructions by the Commissioner of Lands on 12<sup>th</sup> May 2010, vividly confirmed the existence of double allocation in respect to grants I.R. No. 119537 and I.R. No. 52820, subscribing to L.R. No. 209/9943 and this confirms that the ex-parte Applicant did not obtain registration by false pretence and that he did not commit any criminal offence to warrant prosecution by the Respondents and his continued prosecution by the Respondents is in breach of Article 27, 47 and 50 of the Constitution of Kenya and the prosecution is illegal, null and void *ab initio*.**

**13. THAT a declaratory Order be issued to the effect that the letter of allotment to the ex-parte Applicant was surrendered to the Ministry of Land vide a Public Notice, issued in the Daily Nation on the 22<sup>nd</sup> day of October 2008 as per the directives of the Permanent Secretary, Ministry of Lands for verification and approval subject to a thorough investigation and hence the ex-parte Applicant fully consulted the Ministry of Lands and obtained a fresh letter of allotment and the continued prosecution of the ex-parte Applicant by the Respondents is in breach of Article 50 of the Constitution of Kenya.**

**14. THAT a declaratory Order be issued to the extent that the Deed Plan No. 152450 dated 10<sup>th</sup> day of September 2009, was issued by the Director of Survey as per the request of the Commissioner of Lands and the decision to register the ex-parte Applicant's grant was approved by the Permanent Secretary, Ministry of Lands and therefore the ex-parte Applicant never committed any criminal offence to warrant prosecution by the Respondents and the charge relating to the registration of the grant I.R. No. 119537 is a contravention of the ex-parte Applicant's fundamental rights as envisaged by article 50 of the Constitution of Kenya and therefore a mockery to the due process of the law.**

**15. THAT a declaratory Order do issue that the ex-parte Applicant's right to a fair trial as guaranteed by Article 50 of the Constitution of Kenya has been and is likely to be violated by the inclusion of the Commissioner of Lands, Mr. Zablon A. Mabea and the Senior Assistant Commissioner of Lands Mr. Edward K. Kosgei, as the Prosecution Witnesses.**

**16. THAT a declaratory Order do issue that the ex-parte Applicant's right against being treated in a discriminatory manner as guaranteed by Article 27, 47 and 50 of the Constitution of Kenya has been and is likely to be violated by selectively preferring criminal charges against the ex-parte Applicant in Criminal Case No. 1444 of 2013, Republic Vs George Kuria Mwaura, pending before the Chief Magistrate Court to the exclusion of the Permanent Secretary and the Honourable Minister of Lands, who by a resolution of the Ministry of Lands recommended and approved that the ex-parte Applicant should be issued with a new letter of allotment.**

**17. THAT a declaratory Order do issue that the Attorney General vide his letter dated 23<sup>rd</sup> day of June 2009 addressed to the Commissioner of Lands pursuant to the registration of grant I.R. No. 119537, the subject matter in the Nairobi Criminal Case No. 1444 of 2013, facilitated the registration of the ex-parte Applicant's grant. The Attorney General being the Advisor to the Government, the Respondents had no grounds or reasons whatsoever to charge the ex-parte Applicant as the would-be Complainant, the Permanent Secretary, Ministry of Lands and who approved the registration of the ex-parte Applicant's grant has not been equally charged or lined up as a prosecution witness, the ex-parte Applicant's fundamental rights against being treated in a discriminatory manner as guaranteed by Article 27, 47 and 50 of the Constitution of Kenya is likely to be violated by selectively preferring criminal charges against the ex-parte Applicant to the exclusion of the Permanent Secretary, the Commissioner of Lands and the Senior Assistant Commissioner of Lands.**

**18. THAT a declaratory Order do issue to the effect that the ex-parte Applicant's fundamental rights to a fair trial as guaranteed by article 50 of the Constitution of Kenya is likely to be violated by the intended inclusion of the Land Registrar of Titles, Mr. George Gachichi as a prosecution witness.**

**19. THAT a declaratory Order do issue to the effect that to select the ex-parte Applicant, out of a group of persons who participated in an honest and legal registration of the grant I.R. No. 119537 and then arraign him in court under the full glare of the press after hood winking them that the ex-parte Applicant was to be arraigned in court in connection with the forgery of a parcel of land belonging to the former Head of State, Hon. Daniel T. Arap Moi worth more than 1.6 billion and ending up charging the ex-parte Applicant with the criminal offence and then continue to subject the ex-parte Applicant to a full trial based on frivolous material in the Criminal Case No. 1444 of 2013 in the Nairobi Chief Magistrate Court, Republic Vs George Kuria Mwaura, would amount to inhuman treatment, undue and unnecessary mental torture contrary to article 27 and 50 of the Constitution of Kenya.**

**20. THAT an Order as to cost of this Petition be issued against the Respondents.**

**21. THAT any other Order that this Honourable Court may deem fit and just to grant.**

2. The application was supported by affidavits sworn by the applicant herein on 8<sup>th</sup> August, 2014 and 28<sup>th</sup> October, 2014.

3. According to the applicant, his grant I.R. No. 119537, was officially registered by the Registrar of Titles on 13<sup>th</sup> October 2009 and he became the indefeasible owner of L.R. No. 209/9943, situated at Parklands in the Nairobi Area. However on diverse dates in November 2009, when he went to the City Council of Nairobi, now the Nairobi County to be enrolled as a rate payer, he discovered that the complainant in the Criminal Case, now before the Chief Magistrate Court, **Mrs. Joyce Gathoni Kiarie** had already registered her deceased husband in 2006, Supplementary Valuation Roll (sic) yet her husband died on the 14<sup>th</sup> day of March 1989. This prompted the applicant to file **Nairobi High Court ELC No. 667 of 2009 George Kuria Mwaura –vs- The Estate of Joseph Wanyoike Kiarie, The Principal Registrar of Titles and The Commissioner of Lands** in December 1989.

4. It was deposed that though the said **Mrs. Joyce Gathoni Kiarie**, representing the **Estate of Joseph**

**Wanyoike Kiarie**, and the complainant in the **Criminal Case No. 1444/13** had filed a statement of defence in the **Nairobi High Court Civil Suit ELC No. 667 of 2009**, she only lodged her criminal complaint with the Criminal Investigation Department, after the case was partly heard by the **Lady Justice Pauline Nyamweya** on the 3<sup>rd</sup> and 4<sup>th</sup> July 2013, which criminal complaint raises a lot of questions as to where she had been for all these years, but more importantly that she rushed to lodge a criminal complain after sensing defeat.

5. The ex parte applicant therefore contended that his prosecution was illegal, null and void *ab-initio* and that the same was commenced in the absence of proper factual foundation. According to him, when he was arraigned in court on 19<sup>th</sup> September 2013, the 1<sup>st</sup> Respondent had no grounds or reasons to mount the criminal prosecution case and that he was prosecuted before investigation. The forensic investigations, which constitute the only charge, were conducted on 15<sup>th</sup> day of January 2014, while his prosecution commenced on 19<sup>th</sup> day of September 2013. He deposed that since the police have a constitutional duty to investigate on any complaint once a complaint is made, in this case they failed to do so.

6. It was the applicant's case that the 1<sup>st</sup> Respondent was actuated by malice and acted outside his jurisdiction and therefore the criminal charge is a contravention of his fundamental rights to a fair play and the said charge is unconstitutional, null and void *ab initio*. He further deposed that the only charge levelled against him of "obtaining registration by false pretence contrary to Section 320 of the Penal Code", is a fabrication by the 1<sup>st</sup> Respondent. To him, it defeats logic for the 1<sup>st</sup> Respondent to charge him with the criminal offence yet the investigation leading to the alleged charge were conducted on 15<sup>th</sup> January 2014, five (5) months after the commencement of his prosecution.

7. He reiterated that the Director of Public Prosecution never investigated him and no evidence was adduced to show that he indeed obtained registration by false pretence and that the action of the 1<sup>st</sup> Respondent was motivated by ulterior motive and the Director of Public Prosecution's purpose was not to conduct a fair process. According to the applicant, there was no evidence of the allegation that he actually made a forged document so as to justify an allegation of forgery as demonstrated by the 1<sup>st</sup> Respondent as he surrendered his letter of allotment dated 24<sup>th</sup> October 1989 to the Ministry of Lands for verification and approval after which he was issued with the new letter of allotment dated 21<sup>st</sup> August 2009 and therefore the allegation to justify the charge of obtaining registration by false pretence is missing.

8. The applicant added that the charge itself was defective as it was derived from a document that had been rendered obsolete or irrelevant and in any case the Director of Public Prosecution could not justify how he arrived at the charge and was in violation of Article 157(4) of the Constitution of Kenya and believed that he would not get a fair trial before the 2<sup>nd</sup> Respondent.

9. In the applicant's view, his rights to a fair trial and his fundamental rights were breached by the 1<sup>st</sup> Respondent due to the unreasonable delay in the commencement of the criminal charge which charge was derived from a forensic investigation based on a letter of allotment dated 24<sup>th</sup> October 1986 and the prosecution commenced on 19<sup>th</sup> September 2013, twenty seven (27) years down the line. This, in his view amounted to inordinate delay that could not be justified by the 1<sup>st</sup> Respondent and in any case.

10. The applicant disclosed that the internal memo dated 1<sup>st</sup> April 2010 by the Hon. Minister of Lands, **James Orengo** confirmed that there was a double allocation on grant L.R. No. 209/9943 and the same confirmed that the suit property contained two (2) grants I.R. No. 119537 in the applicant's name and I.R. No. 52820 in the name of the late **Joseph Wanyoike Kiarie**, the husband to the Interested Party which confirmed that he never committed any criminal offence hence his continued prosecution by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents is in breach of Section 82(2) of the Constitution of Kenya (sic) and the prosecution is illegal, null and void *ab initio*. Apart from that it was deposed that from the investigation carried out by **Mrs. Olando**, a Senior Assistant Commissioner of Lands as per the instructions of the Commissioner of Lands dated on 12<sup>th</sup> May 2010 it was confirmed that there existed double allocation in respect to grants I.R. No. 119537 and I.R. No. 52820, subscribing to L.R. No. 209/9943 thus confirming that the applicant

did not obtain registration by false pretence and that he did not commit any criminal offence to warrant prosecution by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

11. It was therefore the applicant's belief that the Investigating Officer, Mr. **Silvester Mango**, was actuated by malice as he purported to conduct an investigation whose singular aim was calculated to smear and dent his image with criminal offence when none existed as the issue of the ownership of the land was a civil matter and was well moot before the High Court for determination.

12. The applicant averred that the same the Investigating Officer conspired with the Interested Party and stage-managed the applicant's public condemnation by tipping the press of the latter's arrest by the Criminal Investigation Officers and misleading the public that he was to be arraigned in Court on charges of forging a title deed for a parcel of land belonging to the former Head of State, His Excellency **Daniel T. Arap Moi** worth 1.6 billion, an issue that generated a lot of public attention since the former Head of State was a national figure and thereby exposing the applicant to public odium and contempt. Further, the manner in which I was arrested and captured by the press amount to harassment and embarrassment and this justified that there was ulterior motive on the part of the 1<sup>st</sup> Respondent, which is an abuse of the process of the court. Furthermore there was selective prosecution, dramatic arrest while in a law court and the hastened prosecution to secure immediate conviction as well as shielding prosecution to certain individuals who participated and ensured that the applicant's grant was registered.

13. To the applicant, the said Investigating Officer caused the 1<sup>st</sup> Respondent to present a charge sheet falsely indicting him with the commission of a criminal offence when none existed while the evidence clearly shows that it is the Interested Party who ought to be charged with a criminal offence, a case of selective or oppressive justice. He was of the view that by not charging the Permanent Secretary, the Commissioner of Lands and the Senior Assistant Commissioner of Lands who participated fully in the registration of the grant, the 1<sup>st</sup> Respondent was condoning and endorsing illegality on the part of the Permanent Secretary, the Commissioner of Lands and the Senior Assistant Commissioner of Lands, discriminating against and selectively endorsing the applicant for indictment yet the approval, registration and the issuance of his grant was a collective responsibility of the very said persons who approved issuance of his grant. By lining up as a prosecution witness the Senior Assistant Commissioner of Lands, **Mr. Edward K. Kosgei** who issued the said letter of allotment amounts to selective and discriminatory exercise of the discretion by the 1<sup>st</sup> Respondent and this amount to an abuse of the process of the Court.

14. The applicant disclosed that prior to the resolution by the Ministry of Lands, he issued a demand notice to the 3<sup>rd</sup> Respondent, demanding to know why the Government of Kenya had invoked certain forfeiture clauses in the Constitution to repossess his grant and the 3<sup>rd</sup> Respondent demanded an explanation of the same from the Permanent Secretary. The Chief Government Advisor, the Attorney General vide his letter dated 23<sup>rd</sup> June 2009, directed the Permanent Secretary, Ministry of Lands to consider issuing a fresh letter of allotment to him as a result of which Ministry of Lands through a resolution as highlighted in the Minutes of the 86<sup>th</sup> Land Administration Technical Advisory Committee meeting held on 15<sup>th</sup> September 2009, the Permanent Secretary recommended that the grant should be taken out, and therefore the allegation that he made a forged grant cannot be justified.

### 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' Case

15. In response to the application, the Respondents filed what was termed a replying affidavit but was in effect a supporting affidavit sworn by **Geoffrey Swanya Birundu**, the Deputy Chief Land Registrar in the Ministry of Lands, Housing and Urban Development on 12<sup>th</sup> September, 2014.

16. According to him, L.R. NO. 209/9943 was officially allocated to the ex-parte Applicant, **Mr. George Kuria Mwaura** on 24<sup>th</sup> day of October 1986 by the then Commissioner of Lands under Letter of Allotment Reference Number 74520/3. However, the ex-parte Applicant never honoured the terms and conditions of the letter of Allotment and consequently the offer lapsed. When, on 22<sup>nd</sup> day of October 2008, the then Permanent Secretary Ministry of Lands issued a Public Notice in the Daily Nation

Newspaper requesting all the 'allottees' with expired letters of Allotment to surrender them to the Ministry of Lands for verification and the subsequent renewal, the Applicant on the 6<sup>th</sup> day of November 2008, complied with the terms and conditions as stipulated in the Daily Nation Newspaper and surrendered his original letter of allotment Reference Number 74520/3 to the Ministry of Lands for verification and approval. Among other things, the Verification Committee and the Ministry of Lands confirmed that the ex-parte Applicant was indeed allocated L.R. No.209/9943 and that he was officially allocated the said piece of land by the Ministry of Lands and he was therefore issued with an application form for the renewal of his letter of allotment, which was signed by **Tabitha Tsuma** on behalf of the Commissioner of Lands.

17. The deponent added that the Ministry of Lands through the offices of the Permanent Secretary, the Honourable Minister and the Commissioner of Lands commissioned a team of experts comprising of Land Officers, Land Registrars, Forensic Experts and a team of Lawyers to facilitate the verification and approval of the letters of Allotment surrendered by various allottees including the ex-parte Applicant at the completion of which the Ministry of Lands recommended that all the previously held Public Land reserves should revert back to Government. The ex-parte Applicant however felt that this was tantamount to illegal disposition of land and he issued a statutory notice to sue the Attorney General on behalf of the Ministry of Lands. Prior thereto, the ex-parte Applicant had written various complaint letters to the Ministry of Lands which prompted the Commissioner of Lands to author an internal memo to the Permanent Secretary, informing her that L.R. No.209/9943 was officially allocated to the ex-parte Applicant vide a letter of allotment Reference Number 74520/3 dated 24<sup>th</sup> October 1986. The Permanent Secretary was further informed that the Commissioner of Lands had finalized the Ground Inspection and status with recommendation that the ex-parte Applicant was already in occupation of the Land.

18. The deponent added further that the ex-parte Applicant wrote a letter to the Ministry of Lands on the 10<sup>th</sup> day of June 2009 and an Internal Memo to this complaint was addressed to the Permanent Secretary by **Mr. C.W. Ngatia**, the Legal Officer attached to the Office of The Permanent Secretary and who confirmed to the Permanent Secretary that the plot was allocated to the ex-parte Applicant and that the Commissioner of Lands had finalized verification of the records and ground status with a recommendation that the letter of allotment to the ex-parte Applicant may be renewed subject to the Minister's approval. During the verification exercise, **Mr. G.F. Onyango** and who signed the letter of allotment dated 24<sup>th</sup> October 1986 which was issued to the ex-parte Applicant was summoned to confirm the veracity of his signature and after confirming that the signature appended to the letter of allotment was indeed his, the Verification Committee approved that the letter of allotment to the ex-parte Applicant should be renewed and on the 17<sup>th</sup> day of August 2009, the ex-parte Applicant was requested to re-apply for the re-issue of his letter of allotment. Subsequently, on the 21<sup>st</sup> day of August 2009, the Commissioner of Lands responded to the ex-parte Applicant's application and confirmed that his letter of allotment would be renewed in due course and the said letter of allotment was signed by **Mr. Edward K. Kosgei**, the Senior Assistant Commissioner of Lands.

19. The deponent deposed that the ex-parte Applicant was issued with a new letter of allotment dated 21<sup>st</sup> August 2009 by the Commissioner of Lands and the ex-parte Applicant was required to accept the offer by paying to the Commissioner of Lands the sum of Kshs.23, 233.00 as stipulated in the letter of allotment which offer ex-parte Applicant accepted and paid the requisite charges for Stand Premium and other related charges vide a Banker's Cheque No. 059261 for Kshs.23,233.00 dated 24<sup>th</sup> August 2009 payable to the Commissioner of Lands which payment the Commissioner of Lands acknowledged issued the ex-parte Applicant with his official Receipt number 1389631 dated the 26<sup>th</sup> day of August 2009 in respect of parcel No.209/9943. Subsequently, the Commissioner of Lands issued the Director of Survey with a letter of indent for L.R. Number 209/9943 on the 28<sup>th</sup> day of August 2009 in favour of the ex-parte Applicant. On the 10<sup>th</sup> day of September 2009, the Director of Survey Vide Authentication Slip Number CT/29/VI/21 supplied the Commissioner of Lands with the Deed Plan Number 152450 for the Registration of L.R. No.209/9943 in favour of the ex-parte Applicant. On the 2<sup>nd</sup> day of October 2009, the Commissioner of Land executed the lease agreement in favour of the ex-parte Applicant and on the same day, the Chief Land Registrar executed a Memorandum of the Registration of transfer of Land from

the Government of Kenya in favour of the ex-parte Applicant and the transfer was booked under booking number 922 of 2<sup>nd</sup> October 2009. On the 8<sup>th</sup> day of October 2009, the ex-parte Applicant paid the Stamp Duty to the Government for L.R. No.209/9943 to facilitate the registration and the ex-parte Applicant was issued with a Certificate of Stamp Duty Seal Number 70170.

20. The deponent explained that thereafter on the 13<sup>th</sup> day October 2009, L.R. No. 209/9943 was officially registered as Grant I.R. No.119537/1 in the name of the ex-parte Applicant who immediately acquired the infeasible rights over the grant I.R. No.119537.

21. To the deponent, the Title in possession of the ex-parte Applicant followed the due process of the law and the Ministry of Lands wonders why the ex-parte Applicant has sued the Attorney General, in regards to a matter that the Attorney General has already filed the statement of defence in the ELC No. 667 of 2009, the **Ex-parte Applicant versus the Interested Party, The Commissioner of Lands, and The Principal Registrar of Titles**. He added that the Ministry of Lands' position was that the Grant I.R. No. 119537 for L.R.No.209/99/43 was registered on the 13<sup>th</sup> day of October 2009 in the name of ex-parte Applicant as the sole registered owner and therefore it is the contention of the Ministry that the Interested Party had no reason or grounds to initiate the Nairobi Chief Magistrate Criminal Case No. 1444 of 2013, **Republic -vs- George Kuria Mwaura** when the matter is not concluded in the environment and land court.

22. The deponent disclosed that he issued instructions to the Attorney General in the Civil Case No. ELC 667 of 2009, the **Ex-parte Applicant Versus the Interested Party, the Commissioner of Lands and the Principal Registrar of Title and the Ministry of Lands** declared that the documents purporting ownership by the Interested Party are all forgeries and it is crystal clear that there are questionable issues surrounding the ownership of the suit property by the Interested Party that requires the matter to be investigated and interrogated in that suit where the matter is partly heard and in which he is a witness.

23. He deposed that from the records available in the lands office, it is clear that no investigation has been undertaken by the police or officers conversant with the matter recorded statements in connection with a criminal case concerning LR. NO. 209/9943 and asserted that the Ministry was not party to the prosecution of the applicant as alleged in the notice of motion. In his view, investigation precede prosecutions and the allegation that the applicant is charged with registering an instrument on the 7<sup>th</sup> day of October 2009 whereas the registration of the instrument was done on 13<sup>th</sup> October 2009 after vetting and verification by the Ministry no basis.

### 1<sup>st</sup> Respondent's Case

24. In opposition to the application, the 1<sup>st</sup> Respondent filed a replying affidavit sworn by **Corporal Silvester Mango**, one of the investigating officers in the subject criminal case on 6<sup>th</sup> October, 2014.

25. According to him, in the month of June 2013 he was assigned a file to investigate the nature of which was based on a complaint by **Joyce Gathoni Kiarie** (the Interested Party in this case) that one **George Kuria Mwaura** had fraudulently registered a title deed without following due process. He obtained information and documents from the complainant showing that the Complainant was the administrator of the late **Joseph Wanyoike Kiarie** who had land registered as L. R. 209/9943 located in Parklands Nairobi which was the subject of the complainant of fraudulent acquisition of title.

26. The deponent then launched investigations which had to encompass the Chief Land Registrars and the Commissioner of Lands Office (whose functions have now been taken up by the National Land Commission) to authenticate who the real owner of L.R No. 209/9943. He deposed that the Directorate of Criminal Investigations wrote a letter dated 19/6/2013 to the Chief Land Registrar stating that they were investigation L.R. No. 209/9943 and that they required certified copies of the title deed, green card, documents launching any transfer and any other document or correspondence that may assist in the investigations. A further letter was written by the Directorate of Criminal Investigations dated 24/6/2013

to the Chairman National Land Commission with reference to L.R. 209/9943 with respect to grant L.R. 52820 and I.R 119537 requesting for documents in the correspondence file, receipts of payment for rent or stamp duty, documents launching any transfer and any other documents/correspondence that may assist the investigations. A reminder was written to the Chief Land Registrar with attention to **Madam R. N. Mule**, Assistant Commissioner of Lands, to avail the information as per the letter dated 19/6/2013.

27. The deponent averred that the Directorate of Criminal Investigations received a letter dated 4/7/2013 written by **R. N. Mule**, Assistant Commissioner of Lands making reference to the letter dated 19/6/2013 stating that from the records held at the Nairobi Registry L.R. No. 209/9943 was registered on 11/6/1991 in the name of **Joseph Wanyoike Kiarie** and attached a copy of the tile which was marked as grant No. I.R 52820. The Directorate of Criminal Investigations then followed up with the National Land Commission with a letter dated 14/8/2013 informing them that the office had received documents relating to L.R. No. 209/9943 in respect of Grant I.R. 52820 and that they were yet to received the documents of L.R 209/9943 Grant No. 119537. They informed the National Commission that they had information that the correspondence file was handled by **Mr. G.S. Birundu** and that they required his statements as well as that **Mr. E. K. Koskei**.

28. Vide letter dated 24/10/2013 the Directorate of Criminal Investigations wrote to the Director of Survey making request for certified copies of the documents in the correspondence file, area map, allotment letter and any other relevant document in reference to Deed Plan No. 152450 relating to the L.R. 209/9943. Vide letter dated 5/11/2013 to the Principal Secretary, Ministry of Lands, the Directorate of Criminal Investigations requesting to be furnished with details of **Mr. G.P. Onyango's** present work station, who allegedly signed the allotment letter used by the *ex parte* Applicant in L.R No. 209/9943 under Grant I.R 119537 in 1986 and in answer thereto, the Directorate of Criminal Investigations received a letter dated 22/11/2013 from the **A.A. Ombima** for the Land Secretary informing the Directorate that the Officer known as **G.F Onyango** was dismissed from the service vide letter date 31/10/2006. In a further letter to the Chairman of the National Land Commission dated 13/11/2013 the Directorate of Criminal Investigations requested to be furnished with the Known signatures of **Mr. G. F. Onyango** which he made during the time of his service as a lands officer based at Ardhi House Nairobi. On the said letter **Mr. Koskei** was requested to assist in obtaining the said signature which was also noted to the attention of the records office to assist and **Mr. Koskei** provided both the certified copies of the correspondence files for **Joseph Wanyoike Kiarie** and **George Mwaura Kuria** where it was decided to subject the two files to forensic examination where it was found that further analysis ought to be done on the allotment letter dated 24/10/1986. The examination of the said allotment letter specifically the signature was compared to the known signature of **G.F. Onyango** who allegedly signed it, that was obtained from an appeal letter signed by the said **G. F. Onyango** where he had appealed against his dismissal.

29. According to the deponent, statement (s) were taken from the proposed prosecution witnesses who included the complainant and two land officials who handled the matter among other witnesses to be produced at the trial and that the statement of the complainant **Joyce Gathoni Kiarie** showed that she had a previous fraud perpetuated against the same L.R. No, 209/9943 with the dispute arising thereof being decided in her favour in the 2008 by **R. N. Mule** who recorded a statement confirming that she handled a dispute regarding the said parcel of land L.R. No. 209/9943 arising from a fraudulent charge registered in the year 2002 in favour of Barclays Bank of Kenya which she investigated and upon calling all concerned parties found in favour of the estate of **Joseph Wanyoike Kiarie**. She further states that in response to the request for documents made by the Directorate of Criminal Investigation pertaining to L.R. No. 209/9943 she found the deed file and confirmed that the parcel of land L.R. 209/9943 and grant I.R 52820 was registered in the name of **Joseph Wanyoike Kiarie**. She confirmed in her statement that her investigations found that there was no deed file for the title L.R. 209/9943 under Grant No. I.R 119537 which would have been in favour of the *Ex parte* Applicant.

30. The deponent further took a statement of **Edward Kiptoo Koskei** who sheds light on how registration of Grant No. I.R 119537 took place. Specifically he stated that it was based on the presentation of the allotment letter dated 24/10/1986 presented by **George Mwaura Kuria** on 11/11/2008 that a temporary file No. 103463 TC was opened to begin the process of verification and thereafter issue title.

31. The deponent disclosed that the *ex parte* Applicant was arrested on 18/9/2013 and arraigned in court on 19/9/2013 and from the foregoing the same took place after preliminary evidence showed that there was sufficient suspicion and cause to hold **George Kuria Mwaura**, the *ex parte* Applicant herein for the offence of obtaining registration by false pretences contrary to Section 320 of the **Penal Code**. In his view, the *ex parte* Applicant knowingly presented a forged letter of allotment dated 24/10/1986, knowing the same to be a forgery or ought to have known it was, as a visit to the L.R. 209/9943 would have shown that the land was currently being occupied by a party who was in possession of the said land with permission from the Interested Party and was in fact paying rent for the possession/occupation.

32. In the deponent's view, the *ex parte* Applicant has conveniently left out information how he came into possession of the said letter of allotment dated 24/10/1986 to mislead the court and present a case as though he was an innocent buyer who may have suffered from double allocation or other illegality. Further, the *ex parte* Applicant is arguing on one hand that he is the registered owner of L. R. 209/9943 and on the other hand confirming that there may have been a double allocation of L.R. 209/9943. His assertion that no investigations were done, according to the deponent are false and are an effort to mislead the court as due inquiry was made within the Ministry of Lands and National Land Commission before any charges were preferred against him.

33. To the deponent, any assertion that the Interested Party has on her own committed any criminal activity is not the subject of the proceedings before the honourable court and no report or complaint has been made by any party including the *ex parte* Applicant to form the basis of an independent inquiry and investigations to warrant any assertion that the *ex parte* Applicant prosecution is discriminatory or biased. He averred that the issue before City Court Criminal Case No. 1444 of 2013 **Republic versus George Kuria Mwaura** is whether the letter of allotment dated 24/10/1986 which was used by the *ex parte* Applicant to obtain another letter of allotment dated 21/8/2009, which ultimately led to a registration of L.R 209/9943 as Grant No. I.R 119537, was obtained by fraud due to the fraudulent nature of the letter of allotment dated 24/10/1986, which evidence in our custody shows that it was indeed a forgery.

34. According to him, the prerogative on who to call as a witness or who to charge for an offence is discretion solely vested in the 1<sup>st</sup> Respondent as granted in the Constitution of Kenya 2010 based on the evidence available and other factors such as public interest and the fair administration of justice and in his view, the *ex parte* Applicant has demonstrated an intention to continue to delay his case before City Court Criminal Case NO. 1444 of 2013 **Republic versus George Kuria Mwaura** through filing this fresh application and Judicial Review Statement 13/8/2014 and 8/8/2014 respectively as he had previously filed **Miscellaneous Civil Application No. 25 of 2014** which sought the same orders as the current application and had proceeded all the way to submissions being filed only for the *ex parte* Applicant to withdraw the matter and file this fresh case. According to him, if the *ex parte* Applicant was interested in the wheels of justice moving faster he would have waited for the outcome of the **Miscellaneous Civil Application No. 25 of 2014**. This goes to show that the intention of this application is to wear out the parties in the case, so that the City Court Criminal Case No. 1444 of 2013 **Republic versus George Kuria Mwaura** and other cases relating to the same facts remain in at a standstill.

35. He asserted that the DPP independently reviewed and analyzed the evidence contained in the investigations file compiled by the Directorate of Criminal Investigations including the witness statements, documentary exhibits and statements of the Applicant as required by the Law on the basis of which instructions were given to prosecute **George Kuria Mwaura**. He therefore was of the view that the decision to charge the Applicant was informed by the sufficiency of evidence on record, the interests of the administration of justice, the public interest and consistent with the due process. To him, the accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed and tested by the trial court which is best equipped deal with the quality and sufficiency of evidence gathered and properly adduced in support of the charges and the contention by the Applicant that the case against him is oppressive and malicious and amounts to an abuse of court process in unfounded and bad in law.

36. According to the 1<sup>st</sup> Respondent, in the exercise of such powers, the Director of Public Prosecutions:

- i. Is subjected only to the constitution and the law

- ii. Does not require the consent of any person or authority
- iii. Is independent and not subject to the direction or control of any person or authority.

37. The 1<sup>st</sup> Respondent's case was that the application is in contravention of Section 193 A of the **Criminal Procedure Code** Chapter 75 Laws of Kenya which provides to the effect that notwithstanding the provisions of any other written laws, the fact that any matter in issue in any criminal proceedings is also directly and substantially in issue in any civil proceedings shall not be a ground for stay, prohibition or delay in criminal proceedings. However, since Judicial Review jurisdiction is concerned with the decision making process and not with the merits of the decision itself, the sufficiency or otherwise of the evidence to support the charge of obtaining registration by false pretences goes to the merits of the decision of the Director of Public Prosecution and not the legality of his decision. To him, it is the trial court in City Court Criminal Case No. 1444 of 2014 which is best suited and equipped to deal with the quality and sufficiency of the evidence gathered to support the said charge.

38. According to the said Respondent, this application is aimed at causing this honourable court to embark upon an examination and appraisal of the evidence in the City Court Criminal Case No. 1444 of 2013 including the evidence of the Interested Party and *ex parte* Applicant with a view to show their innocence which is not the function of the Judicial Review court and to do so would be subversion of the law regulating criminal trials of this honourable court which is that a Judicial Review Court was to usurp the function of the trial court. To him, the *ex parte* Applicant has failed to demonstrate that the DPP exercised his discretion to charge him unlawfully and in excess of jurisdiction and that any of the fundamental rights of the *ex parte* Applicant have been violated in a manner inconsistent with the Constitution of Kenya 2010 hence the application has been filed in bad faith and is an attempt to defeat and delay justice.

#### **Interested Party's Case**

39. On behalf of the interested party, the following grounds of opposition were filed:

- 1. That the orders sought cannot be granted as they are in contravention of provisions of Article 157(6) (a) and 157(10) of the Constitution which provide to the effect that:**
  - i. The Director of Public Prosecution may institute and undertake criminal proceedings against any person before any court (other than a court Martial) in respect of any offence alleged to have been committed:**
  - ii. The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority;**
- 2. That the application is in contravention Section 193A of the Criminal Procedure Code Chapter 75 Laws of Kenya which provides to the effect that notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any civil proceedings shall not be a ground for any stay, prohibition or delay in criminal proceedings.**
- 3. That Judicial Review jurisdiction is concerned with the decision making process and not with the merits of the decision itself.**
- 4. That the substratum of this application is that there is sufficient evidence to charge the Interested Party with the offence of obtaining registration by false pretences but no sufficient evidence to charge the *Ex parte* Applicant with the same offence.**
- 5. That the sufficiency or otherwise of the evidence to support the charge of obtaining registration by false pretences goes to the merits of the decision of the Director of Public**

**Prosecution and not the legality of his decision.**

**6. That it is the trial court in Chief Magistrate Criminal Case No. 1444/13 which is best suited and equipped to deal with the quality and sufficiency of the evidence gathered to support the said Charge.**

**7. That this application is aimed at causing this Honourable Court to embark upon an examination and appraisal of the evidence of witnesses in Chief Magistrate Criminal Case No. 1444/13, including my evidence and that of the *Ex parte* Applicant with a view to show their innocence which is hardly the function of the Judicial Review Court.**

**8. That it would be a subversion of the law regulating criminal trials if this Honourable Court, which is a Judicial Review Court was to usurp the function of the trial court.**

40. Apart from the grounds, the interested party filed a replying affidavit sworn on 17<sup>th</sup> September, 2014.

41. According to her, after due process, title to Land Reference Number 20/9943 for a term of 99 years commencing on 1<sup>st</sup> February 1981 was issued in the name of her late husband **Joseph Wanyoike Kiaire** on 6<sup>th</sup> June 1991. She disclosed that her said husband died on 14<sup>th</sup> March 1989 and she filed Succession Cause No. 92 of 1990 in her capacity as the widow of the deceased and obtained Letters of Administration to administer the estate of the deceased including L.R. Number 209/9943.

42. However, in late December 2009, the *ex parte* Applicants served her with Summons and Plaint in HCC NO. 667 of 2009 in which he claimed ownership of her late husband's parcel of land L.R No. 209/9943 by virtue of a letter of allotment allegedly issued on 24<sup>th</sup> October 1986. On 1<sup>st</sup> November 2002, Barclays Bank of Kenya caused a Charge to be registered in favour of an impostor, who represented himself to the said bank as the said **Joseph Wanyoike Kiarie** and obtained a loan from the said bank in the sum of Kshs 2,300,000.00 repayment whereof was secured on the said land. On discovery by her advocates on record that there was a Charge falsely registered as a foresaid, a complaint was made on her instructions to the Chief Land Registrar by a letter dated 1<sup>st</sup> February 2007 and after investigations, the said Charge was found to have been fraudulently registered and the said bank agreed to discharge the said charge.

43. She deposed that subsequently, on 25<sup>th</sup> June 2013, she recorded a statement with the police complaining that her late husband's property L.R No. 209/9943 had been fraudulently acquired by the *ex parte* Applicant using the said letter of allotment and investigations into my complaint were immediately commenced whereby **Rosina Ndika Mule**, now and Assistant Commissioner of Lands confirmed that the said land belonged to her late husband. Further investigation also revealed that a **Mr. Onyango G.F** the officer at the Department of Lands who purportedly issued the said Letter of Allotment dated 24<sup>th</sup> October 1986 to the *ex parte* Applicant had been sacked and subsequently died; and that the said letter of allotment dated 24<sup>th</sup> October 1986 was found to be a forgery.

44. Upon conclusion of investigations aforesaid, the interested party was informed by the police at the CID Headquarters in Nairobi that they had decided to charge the *ex-parte* Applicant with the offence of obtaining registration of her late husband's parcel of land by false pretences and that she was the complainant as well as a witness in the case.

45. In the interested party's view:

- i. the orders sought in the application cannot be granted as they are in contravention of provisions of Article 157(6) (a) and 157(10) of the Constitution which provide to the effect that the Director of Public Prosecution may institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed and that he shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his powers or

functions, shall not be under the direction or control of any person or authority;

ii. the application is in contravention of Section 193A of the ***Criminal Procedure Code*** Chapter 75 Laws of Kenya which provides to the effect that notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any civil proceedings shall not be a ground for any stay, prohibition or delay in criminal proceedings.

iii. the said application is misconceived, incompetent, bad in law and an abuse of the court process as it purports to invoke the Judicial Review jurisdiction to question the discretion of the Director of Public Prosecution.

iv. Judicial Review jurisdiction is concerned with the decision making process and not with the merits of the decision itself.

v. the substratum of this application is that there is sufficient evidence to charge the Interested Party with the offence of obtaining registration by false pretences but no sufficient evidence to charge the *Ex parte* Applicant with the same offence.

vi. the sufficiency or otherwise of the evidence to support the charge of obtaining registration by false pretences goes to the merits of the decision of the Director of Public Prosecution and not the legality of his decision.

vii. in the circumstances, it is the trial court in Chief Magistrate Criminal Case No. 1444/13 which is best suited and equipped to deal with the quality and sufficiency of the evidence gathered to support the said Charge.

16. The interested party contended that this application is aimed at causing this Honourable Court to embark upon an examination and appraisal of the evidence of witnesses in Chief Magistrate Criminal Case No. 1444/13, including her evidence and that of the *ex parte* Applicant with a view to showing their innocence which is hardly the function of the Judicial Review Court. Therefore, it would be a subversion of the law regulating criminal trials if this Honourable Court, which is a Judicial Review Court was to usurp the function of the trial court.

### **Determinations**

46. The parties herein filed written submission in support of their respective positions.

47. I have considered the application, the evidence on record as well as the submissions filed.

48. It is important to first deal with the circumstances under which the Court will grant order prohibiting the commencement or continuation of a criminal trial process.

49. The Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, *ipso facto*, constitute an abuse of the process of the court unless the

commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. In the exercise of the discretion on whether or not to grant an order of prohibition, the court takes into account the needs of good administration. See **R vs. Monopolies and Mergers Commission Ex Parte Argyll Group Plc [1986] 1 WLR 763** and **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)**.

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

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

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

**“The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion is acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution... Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it; it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power. Having regard to the law, the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision is correct. 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 examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence and that is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.”**

52. In this case, it is clear that the whole dispute between the parties herein rests on the ownership of the suit parcel of land. In matters of ownership of land, the records kept by the Land Registrar play a crucial

part and in resolving matters relating to title to land be it in criminal or civil proceedings the evidence possessed by the land registry play a very crucial role in determination the issues.

53. **Majanja, J** in Petition No. 461 of 2012 – **Francis Kirima M'ikunyua & Others vs. Director of Public Prosecutions**, when dealing with situations where there exist criminal and civil proceedings arising from the same facts pronounced himself as follows:

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

54. In **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69**, the High Court held:

**“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society’s senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court’s) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, by whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far from that which the courts indeed the entire system is constitutionally mandated to administer... In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute”.**

55. The Court went further to hold that:

**“It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been be argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...The fact that it has not been argued before however does not mean that the law stops dead at its tracks. An order of prohibition looks to the future and not to the past; it is concerned with the happenings of future events and little, if any, of past events...So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall**

continue extending so as to meet the changing conditions and demands affecting administrative decisions...In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed...There is nothing which can stop the Court from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made...However, it does not mean that a civil suit and a criminal case cannot co-exist at any one particular time. This is because the section envisages the re-prosecution of a criminal case substantially dealt with either in fact or law, a case in which issues have been laid to rest. There is no mention in the section that the simultaneous existence of a civil and criminal cases is constituting double jeopardy. The courts have, however stated that the power to issue an order of prohibition to stop a criminal prosecution does not endow a court to say that no criminal prosecution should be instituted or continued side by side with a civil suit based on the same or related facts, or to say that a person should never be prosecuted in criminal proceedings when he has a civil suit against him relating to matters in the criminal proceedings....”

56. It is therefore clear that this Court has the power and indeed the duty to bring to a halt, criminal proceedings where the same are being brought for ulterior motives or for achievement of some collateral purposes notwithstanding the constitutional and legal powers conferred upon the DPP and the police. In Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi (supra) it was held:

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

57. In Meixner & Another vs. Attorney General (supra) it was held:

“The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion if acting lawfully. The High

Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution... Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power.”

58. The mere fact that criminal proceedings have been commenced does not bar the court from halting them as long as the same have not been determined. In my view, it is only where the decision in question is complete that the Court cannot stay the same. However where what is sought to be stayed is a continuing process, the same may be stayed at any stage of the proceedings. In criminal proceedings the mere fact that the proceedings are ongoing does not bar the Court from staying the same at any stage of the proceedings before they come to an end. Accordingly this Court still has jurisdiction to stay the prosecution of the criminal proceedings.

59. Whereas the mere fact that the facts of the case constitute both criminal and civil liability does not warrant the halting of the criminal case, in **Republic vs. Chief Magistrate’s Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703**, it was held:

**“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth...When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to overawe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court... In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in...”**

60. It was similarly held by the Court of Appeal in **Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others Nairobi Civil Appeal No. 56 of 2012 [2013]eKLR** that:

**“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 the 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 administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be**

involved in the settlement of what is purely dispute litigated in court. This is 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”

61. The role of police in criminal process was recognised in Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR where it was held:

“the police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene”.

62. However, it was similarly appreciated in R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001 that:

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

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

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

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

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

*(a) the diversity of the people of Kenya;*

*(b) impartiality and gender equity;*

*(c) the rules of natural justice;*

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

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

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

*(g) protection of the sovereignty of the people;*

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

**(i) promotion of constitutionalism.**

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

**“the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system...In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of *Domnic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003* is that interpretation of the Constitution has to be progressive and in the words of Prof M V Plyee in his book, *Constitution of the World*: “The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time..... In our role as “sentinels” of fundamental rights and freedoms of the citizen which are founded on laissez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent “sentinels” of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right.”**

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

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

66. It is now clear that even in the exercise of what may appear to be *prima facie* absolute discretion conferred on the executive the Court may interfere. The Court can only intervene in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the

discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**

67. In this case the ex parte applicants' case is that there exists a civil suit in which the issues are being canvassed. However, the mere fact that criminal proceedings are being undertaken at the same time as the civil proceedings does not *ipso facto* amount to an abuse of the court process. The applicant ought to go further and show that the dominant motive for the institution of the criminal proceedings is to scuttle the civil process or force the applicant into abandoning his civil claim or force the applicant into submitting to the civil claim. If it is shown that the object of the prosecutor is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court. In other words the prosecutor must be actuated more by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose in such circumstances would be to further that ulterior motive and that is when the High Court steps in. In this case the criminal process had already commenced and it is not contended that in the course of the said proceedings an event took place which manifested an intention to secure some other purpose than the need to vindicate the committal of the offences charged. It must be remembered that justice must be done to both the complaint and the accused and where there is evidence upon which the prosecution can reasonably mount a prosecution, it is not for the High Court in a judicial review proceeding to inquire into the sufficiency or otherwise of such evidence since the High Court ought not to usurp the role of the trial court in determining the merits of the criminal case.

68. In this case it is the applicant's case that the subject of the criminal proceedings is similarly subject of pending civil proceedings in which the ownership of the disputed parcel of land is pending determination. However, as stated hereinabove, the mere fact that the facts disclose both criminal offence as well as civil liability does not entitle the Court in judicial review proceedings to bring to a halt the criminal proceedings. Similarly the mere fact that there are pending civil proceedings on the same subject matter does not *ipso facto* warrant the halting of otherwise *prima facie* proper criminal proceedings. It is however upon the person seeking that the criminal proceedings be halted to justify the grant of such orders.

69. In the instant case there are two sets of evidence on record which seem to paint conflicting versions. Whereas the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's position, a position which is supposedly held by the Land Registry, is that the suit land properly belong to the ex parte applicant, the 1<sup>st</sup> Respondent's position allegedly based on the very same evidence secured from the Land Registry is that the suit land is the property of the interested party as the administrator of the deceased.

70. In light of such conflicting versions, there is a real probability that the outcome of the criminal proceedings may be in conflict with the outcome of the civil proceedings. Such a probability ought to be avoided by all means in order to maintain the dignity of the legal process and in order not to portray legal proceedings as a circus.

71. In these proceedings however, I am not satisfied with the position taken by the ex parte applicant that he is unlikely to received a fair trial simply because some of the persons who have been lined up as witnesses are the ones who executed the documents leading to the issuance of his title. The mere fact that a person executes such documents does not necessarily render such a person an accomplice. It is only where the person was part and parcel of the decision and was aware of the circumstances leading to the same that the Court would be entitled to question the wisdom of treating such a person as a prosecution witness thus obstructing the accused from properly presenting his case. The Court however appreciates that in certain circumstances the prosecution may well be justified in treating an accomplice as a witness but each case must be considered on the circumstances of the case as there are not hard and fast rules in this area.

72. The criminal justice system in Kenya is structured such that every accused person has a right to a fair

trial and this is a guaranteed right enshrined in the Constitution. I therefore do not see any reason to apprehend that the trial court will not adhere to the provisions of Article 50 of the Constitution with respect to a fair trial. As was appreciated by this in **Republic vs. Attorney General & 4 others Ex-Parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR:**

**“Our criminal process entails safeguards which are meant to ensure that an accused person is afforded a fair trial and the trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of an appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words unless the applicants demonstrate that the circumstances of the impugned process render it impossible for the applicant to have a fair trial, the High Court ought not to interfere with the trial simply on the basis that the applicant’s chances of being acquitted are high. In other words a judicial review court ought not to transform itself into a trial court and examine minutely whether or not the prosecution is merited.”**

73. It was contended that the delay in bringing the criminal proceedings is likely to cause injustice to the ex parte applicant. However as was held by this Court in **George Joshua Okungu & Another vs. Chief Magistrate’s Court Anti-Corruption Court at Nairobi & Another [2014] eKLR:**

**“.....it is not mere delay in preferring the charges that would warrant the halting of the criminal proceedings. Rather, it is the effect of the delay that determines whether or not the proceedings are to be halted. In this case, there is no allegation made by the Petitioners to the effect that the delay has adversely affected their ability to defend themselves. In other words, the Petitioners have to show that the delay has contravened their legitimate expectations to fair trial.”**

74. In this case the applicant has not contended that as a result of the long delay in bringing the criminal charges his defence has been compromised for example by making it impossible for him to efficiently present a formidable defence which he could have done had the charges been preferred earlier on.

75. With respect to prayers 6-19 in the Motion it is clear that those prayers do not seek judicial review orders and are incapable of being granted in the instant proceedings. Under sections 8 and 9 of the ***Law Reform Act*** the High Court in the exercise of its judicial review jurisdiction can only grant orders of certiorari, prohibition and mandamus. As was held in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354,** judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the ***Civil Procedure Act*** does not apply. It is governed by sections 8 and 9 of the ***Law Reform Act*** being the substantive law and Order 53 of the Civil Procedure Rules being the procedural law. Section 8 of the ***Law Reform Act*** specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, *mandamus*, *certiorari* and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce* evidence to be adduced for the determination of the case on the merits. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application.

76. Taking into account the manifest conflict in evidence emanating from the very source of the problem – the land registry - it is my view that in the instant application the prosecutor has not demonstrated that he has a reasonable and probable cause for mounting a criminal prosecution at least before the issue of ownership of the subject land which is on course is determined. My decision herein is similarly informed by the need to avoid apparently conflicting decisions in light of such conflicting versions. As was held in **Githunguri vs. Republic (1985) KLR 91:**

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

**Order**

77. In the premises, without determining the merits of the criminal proceedings, it is my considered view that the criminal proceedings ought to be halted for the time being. Accordingly, I grant the following orders:

**1. An order of prohibition is hereby issued directed to the Respondents prohibiting them from proceeding with the prosecution of the Ex-parte Applicant vide Nairobi Chief Magistrate's Criminal Case No. 1444 of 2013, Republic vs George Kuria Mwaura or instituting any other prosecutions touching matters relating to L.R. No. 209/9943, the subject matter of the criminal proceedings herein which are also in issue in Nairobi High Court ELC No. 667 of 2009 - George Kuria Mwaura -vs- The Estate of Joseph Wanyoike Kiarie, the Principal Registrar of Titles and the Commissioner of Lands pending the hearing and determination of the said Nairobi High Court ELC No. 667 of 2009 - George Kuria Mwaura -vs- The Estate of Joseph Wanyoike Kiarie, the Principal Registrar of Titles and the Commissioner of Lands.**

**2. As the determination of the ownership of the land in question is yet to be resolved there will be no order as to costs.**

**Dated at Nairobi this day 7<sup>th</sup> day of April 2015**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Wawire for the Interested Party**

**Cc Richard**