REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR MISC. APPLICATION NO.363 OF 2013

(As consolidated with JR MISC. APPLICATION No.362 OF 2013, JR MISC. APPLICATION NO.375 OF 2013 and JR MISC. APPLICATION NO.405 OF 2013)

BETWEEN

REPUBLIC……APPLICANT

AND

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

THE CHIEF MAGISTRATE'S ANTI-CORRUPTION COURT……..……..2ND RESPONDENT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION….....1ST INTERESTED PARTY

RICHARD KERICH…….....….....2ND INTERESTED PARTY

AND

EX-PARTE

MERIDIAN MEDICAL CENTER LTD……..….....……...1ST APPLICANT

DR. PETER NGUNJIRI WAMBUGU……..….....…….2ND APPLICANT

DR. NDIBA WAIRIOKO…….….....….....…3RD APPLICANT

TODDY MADAHANA……..….....……..4TH APPLICANT

ANTONY KALATHIL CHACKO…….……..…….....….5TH APPLICANT

CLINIX HEALTHCARE LTD……..…….....….6TH APPLICANT

DAVID KIPRUTO CHINGI……...…….....7TH APPLICANT

MARWA FADHILI CHACHA…….....…..8TH APPLICANT

JUDGMENT

Introduction

1. The Ex-Parte Applicants have filed their respective judicial review Applications generally seeking orders to prohibit the Chief Magistrate, Anti-Corruption Court from proceeding with their trials in **Nairobi Anti-Corruption Cases Nos.12** and **18 of 2013** on grounds that the charges against them are a gross abuse of office on the part of the Director of Public Prosecutions (DPP) and are discriminatory against them. They have also alleged that the continuation of their prosecution would immensely violate their fundamental rights and freedoms, violate the objectives and purposes of the **Anti-Corruption and Economic Crimes Act (ACECA)** and would be a complete travesty of justice.

The Judicial Review Applications

2. In **J.R. Misc. Applic. No.363 of 2013,** the Applicants, Dr. Peter Ngunjiri Wambugu and Dr. Ndiba Wairioko, are medical doctors by profession while Meridian Medical Centre Ltd is a corporate entity that is the proprietor of a medical facility of the same name duly registered by the Medical Practitioners and Dentists Board, the regulatory body of the medical profession in Kenya. The two doctors are directors of Meridian Medical Centre Ltd.

3. In their Notice of Motion Application dated 23rd October 2013, they claim that on 21st July 2008, the Board of the National Hospital Insurance Fund (NHIF) placed an advertisement in local dailies inviting interested health care providers to express interest in the provision of care services to civil servants and members of the disciplined forces. Meridian Medical Centre, among other bidders, expressed an interest to participate in the said tender, being No. NHIF/014/2008-2009, and by a letter dated 29th September 2008, it was prequalified together with three other health care providers, being Clinix Healthcare Ltd, Nairobi West Hospital and Thika Road Health Services.

4. The pre-qualified bidders were thereafter requested to submit their technical and financial proposals and upon compliance, they were evaluated by the procuring entity, NHIF, and consequently, Meridian Medical Centre Ltd was awarded a contract for a six months' pilot phase under which it allegedly performed its obligations as stipulated in the contract. Thereafter, the parties executed a contract for the provision of health services for a period of six years under which the company undertook its obligations and that the NHIF later breached its terms by failing to settle the contractual sum and terminated the contract without notice. As a result, Meridian Medical Centre Ltd, being aggrieved by the breach of the terms of the contract by NHIF sued the latter in Nairobi **HCCC No.345 of 2013** seeking damages *inter alia* for breach of contract.

5. They stated that two days after filing of the Statement of Defence in the above suit, the doctors were arrested by officers of the Ethics and Anti-Corruption Commission (EACC) for alleged crimes relating to the contract between Meridian Medical Centre Ltd and the NHIF Board of Management. They were subsequently arraigned in Court and charged at the Chief Magistrate's Anti-Corruption Court in Nairobi on 2nd October 2013 in **ACC No.12 of 2013** together with Richard Langat Kerich, Marwa Fadhili Chacha and David Kipruto Chingi. They faced the following charges;

"Count I

Conspiracy to defraud contrary to Section 317 of the Penal Code Chapter 63 Laws of Keya

Richard Langat Kerich, Marwa Fadhili Chacha, David Kipruto Chingi, Peter Ngunjiri Wambugu, Ndiba Wairioko and Meridian Medical Centre Limited.

On diverse dates between 21st December 2011 and 28th day of February 2012 at NHIF Building in Nairobi Area within Nairobi County conspired to defraud the National Hospital Insurance Fund of Kshs.116,935,500.00 by entering into a contract under which Meridian Medical Centre Limited were to provide services under the Civil Service and Disciplined Services Medical Scheme while knowing that the said Meridian Medical Centre Limited had no capacity to provide such services in full."

"Count II

Obtaining money by false pretences contrary to Section 313 of the Penal Code, Chapter 63 Laws of Kenya

Peter Ngunjiri Wambugu, Ndiba Wairioko and Meridian Medical Centre Limited.

On or about the 13th day of March 2012 in Nairobi Area within Nairobi County being Directors of Meridian Medical Centre Limited and a limited liability company, respectively, with intent to defraud, jointly obtained Kshs.18,902,625.00 from the National Hospital Insurance Fund by falsely pretending that the said Meridian Medical Centre was capable of providing medical services to the Civil Servants Medical Scheme, a fact they knew to be false."

6. It is their averment that the above charges and their continuity jeopardizes and negatively impacts the planned growth of their business and that the decision of the DPP to charge them for having allegedly committed criminal offences arising out of purely commercial transactions which are before a Court of competent jurisdiction, is an abuse of the Court process. Further, that the decision to charge them is discriminatory and malicious as over 300 health facilities or healthcare providers which have offered the same service to NHIF members under the same scheme and during the same period and were paid in the same manner as Meridian Medical Centre using the same capitation method, had not been prosecuted.

7. They claim that the decision to charge only Meridian Medical Centre and its directors cannot therefore be justified and that the decision to charge them over a business transaction made through a tender which was evaluated competitively and not challenged at the Public Procurement Review Tribunal, is unjustifiable.

8. Lastly, that the decision to prefer charges against them and made despite the advice of the Attorney General to the contrary is actuated by ulterior motives.

9. In their Notice of Motion dated 23rd October 2013, they therefore seek the following orders;

"(1) An Order of Certiorari to remove into this Honourable Court and quash the decision of the Director of Public Prosecutions to charge the Applicants in ACC. No.12 of 2013, Republic vs Richard Langat Kerich, Marwa Fadhili Chacha, David Kipruto Chingi, Peter Ngunjiri Wambugu, Ndiba Wairioko and Meridian Medical Centre Limited with conspiracy to defraud contrary to Section 317 of the Penal Code, Chapter 63 of the Laws of Kenya.

(2) An Order of Certiorari to remove into this Honourable Court and quash the decision of the Director of Public Prosecutions to charge the Applicants in ACC. No.12 of 2013, Republic vs

Richard Langat Kerich, Marwa Fadhili Chacha, David Kipruto Chingi, Peter Ngunjiri Wambugu, Ndiba Wairioko and Meridian Medical Centre Limited with obtaining money by false pretences contrary to Section 313 of the Penal Code, Chapter 63 of the Laws of Kenya.

(3) An Order of Prohibition against the Director of Public Prosecutions prohibiting the said Director of Public Prosecutions from prosecuting the Applicants with the charges of conspiracy to defraud contrary to Section 317 of the Penal Code, Chapter 63 of the Laws of Kenya, and obtaining money by false pretences contrary to Section 313 of the Penal Code, Chapter 63 of the Laws of Kenya, in ACC. No.12 of 2013, Republic vs Richard Langat Kerich, Marwa Fadhili Chacha, David Kipruto Chingi, Peter Ngunjiri Wambugu, Ndiba Wairioko and Meridian Medical Centre Limited.

(4) An Order of Prohibition against the Chief Magistrates Anti-Corruption Court stopping the said Chief Magistrate's Anti-Corruption Court from proceeding with the hearing and all criminal proceedings against the Applicants on the charges of conspiracy to defraud contrary to Section 317 of the Penal Code, Chapter 63 of the Laws of Kenya, and obtaining money by false pretences contrary to Section 313 of the Penal Code, Chapter 63 of the Laws of Kenya, in ACC No.12 of 2013, Republic vs Richard Langat Kerich, Marwa Fadhili Chacha, David Kiptruto Chingi, Peter Ngunjiri Wambugu, Ndiba Wairioko and Meridian Medical Centre Limited.

(5) The costs of this Application be provided for."

10. In **JR. Misc. Applic. No. 405 of 2013**, the Applicants are Toddy Madahana, Antony Kalathil Chacko and Clinix Health Care Ltd. Toddy Madahana is the Chief Executive Officer of Clinix Health Care Ltd. They have alleged that Clinix Healthcare Ltd submitted its expression of interest to NHIF sometime in July 2008. In September 2008, it was notified of its prequalification on its expression of interest and also that its tender was successful. Thereafter it entered into a contract with NHIF in December 2009 and an official launch of the pilot project was conducted in Mumias by the Ministry of Health. It was thereafter accredited for the provision of outpatient services and some of its clinics were gazetted as hospitals within the meaning of the **NHIF Act**.

11. In 2011, Clinix Healthcare was made part of a consortium offering medical services to civil servants and members of the disciplined forces. The terms of the contract for the provision of primary healthcare services was allegedly determined jointly as between the NHIF Board of Management on the one hand and the Ministry of State for Public Services on the other hand. It was deponed that Clinix did not influence the contract in any way and when the medical scheme was rolled out, it was not restricted to Clinix but to all medical service providers accredited by NHIF at the time. In order to enhance the accessibility of services, Clinix allegedly established a vast network of clinics across the Country and also entered into third party service agreements with other providers in those places to complement its vast network.

12. It is their case that during the first phase of the medical scheme, all NHIF accredited healthcare providers were paid using the same formula and based on the number of civil servants and members of the disciplined forces who chose to use their services. Clinix Healthcare was allegedly chosen by 36,747 people and was accordingly paid Kshs.202,161, 187.50 for its services. That immediately the payments were made, it was, by unknown people, accused of corruption and it was alleged that Clinix Healthcare was made up of ghost clinics and all these allegations prompted Government agencies such as the Efficiency Monitoring Unit, the Inspectorate of State Corporations, the Parliamentary Committee on Health, the Kenya National Audit Office, the Attorney General and the EACC to move in and investigate the medical scheme. That while all the other Government agencies did not find any impropriety on the part of Clinix Healthcare, the EACC apparently did so but did not disseminate its findings to the Public or to Clinix itself.

13. Thereafter, on 2nd October 2013, the Directors of Meridian Medical Centre together with some employees of NHIF were charged in court on charges of obtaining public benefits. The Directors

of Clinix immediately became anxious given the similarity of their contracts to that of Meridian Medical Center and were apprehensive that EACC would charge them. Consequently they moved to Court through **Constitution Petition No.495 of 2013.** While the Petition was still pending hearing, on 7th November 2013, the Respondents proceeded to prefer charges against the ex-parte Applicants on 5th November 2013 in ***Nrb ACC No. 18 of 2013***; **Republic vs Richard Langat Kerich, Marwa Fadhili Chacha, David Kipruto Chingi, Toddy Madahana, Antony Kalathil Chacko and Clinix Healthcare Ltd**. They faced the following charges *inter-alia*;

"Count I

Conspiracy to defraud contrary to Section 317 of the Penal Code

Richard Langat Kerich, Marwa Fadhili Chacha, David Kipruto Chingi, Toddy Mahadana, Antony Kalathil Chacko and Clinix Healthcare Ltd.

On diverse dates between 1st day of January 2012 and 13th day of March 2012 at NHIF Building in Nairobi Area within Nairobi County conspired to defraud the National Hospital Insurance Fund of Kshs.96,565,125.00 by entering into a contract under which Clinix Healthcare Limited for the provision of primary health care and treatment services under the Civil Service and Disciplined Service Medical Scheme outside Nairobi County while knowing that the said Clinix Healthcare Limited had no capacity to provide such services." (sic)

"Count II

Willful failure to comply with the applicable law relating to the procurement of services contrary to Section 45(2)(b) as read with Section 48 of the Anti-Corruption & Economic Crimes Act, No.3 of 2003

Richard Langat Kerich and Marwa Fadhili Chacha

On diverse dates between 1st day of January 2012 and 13th day of March 2012 at NHIF Building in Nairobi Area within Nairobi County, being persons charged with the management of public revenue as the Chief Executive Officer and Manager, Strategy and Corporate Planning respectively, of a public body to wit the National Hospital Insurance Fund officers whose functions concerned the use of Public Revenue, jointly and willfully failed to comply with the law relating to procurement services to wit Section 29(1) of the Public Procurement and Disposal Act, 2005 in procuring Clinix Healthcare Limited as a service provider under the Civil Servants and Disciplined Services Medical Scheme without following the laid down laws and guidelines relating to procurement."

"Count III

Abuse of office contrary to Section 46 as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act, 2003

Richard Langat Kerich, Marwa Fadhili Chacha and David Kipruto Chingi

On diverse dates between 1st day of January 2012 and 13th day of March 2012 at NHIF Building in Nairobi Area within Nairobi County being the Chief Executive Officer and Manager, Strategy and Corporate Panning and Assistant Manager, Benefits and Quality Assurance, respectively, of a public body to wit the National Hospital Insurance Fund jointly used their said offices to confer a benefit on Clinix Healthcare Limited by irregularly awarding it a contract for provision of services under the Civil Service and Disciplined Service Medical Scheme without following laid down laws and guidelines

relating to procurement of the said services."

14. They now claim that the charges preferred against them are without merit, are a gross abuse of office on the part of the DPP and are discriminatory since all healthcare providers who participated in the Civil Servants and Disciplined Forces Medical Scheme were not charged as they were. That the charging of the 1st Applicant, who is an employee of NHIF, is without basis in law since it is impossible to justify a charge against one employee to the exclusion of other employees and more so without disclosing any unique facts as pertains to his conduct or action that singles him out for arraignment on criminal charges.

15. It is also the Applicant's contention that the DPP is acting in bad faith and his action is actuated by bias and that the DPP's understanding of the law governing the exercise of prosecutorial powers is mistaken. They state in addition that the DPP does not have unfettered discretion to prosecute anybody especially when it is obvious that no crime had been committed.

16. It is their further claim that the DPP had abdicated his role of determining whether a crime had been committed before commencing criminal proceedings against any person, to the EACC, in violation of the Constitution. It is their contention therefore that the decision of the DPP to prosecute them was a violation of their fundamental rights and freedoms especially given that they had not committed any crime.

17. In their Notice of Motion dated 27th November 2013, they have therefore sought the following orders;

"(1) An Order of Certiorari to remove into this Honourable Court and quash the decision of the Director of Public Prosecution, in collaboration with the Ethics and Anti-Corruption Commission and through Chief Magistrates Anti-Corruption Court, to charge the Applicants in ACC No.18 of 2013.

(2) An Order of Certiorari to remove into this Honourable Court and quash the decision of the Director of Public Prosecution to charge the Applicants in ACC. No.18 of 2013 Republic vs Richard Langat Kerich, Marwa Fadhili Chacha, David Kipruto Chingi, Toddy Madahana, Anthony Kalathil Chacko, and Clinix Health Care Limited with conspiracy to defraud contrary to Section 317 of the penal Code Cap 63 of the Laws of Kenya.

(3) An Order of Certiorari to remove into this Honourable Court and quash the decision of the Director of Public Prosecution to charge the Applicants in ACC. No.18 of 2013 Republic vs Richard Langat Kerich, Marwa Fadhili Chacha, David Kipruto Chingi, Toddy Madahana, Anthony Kalathil Chacko, and Clinix Health Care Limited with willful failure to comply with the applicable law relating to the procurement of services contrary to Section 45(2) (b) as read with Section 48 of the Anti-Corruption and Economic Crimes Act No.3 of 2003.

(4) An Order of Certiorari to remove into this Honourable Court and quash the decisions of the Director of Public Prosecution to charge the Applicants in ACC. No.18 of 2013 Republic vs Richard Langat, Kerich, Marwa Fadhili Chacha, David Kipruto Chingi, Toddy Madahana, Anthony Kalathil Chacko, and Clinix Health Care Limited with abuse of office contrary to Section 46 as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act, 2003.

(5) An Order of Certiorari to remove into this Honourable Court and quash the decision of the Director of Public Prosecution to charge the Applicants in ACC. No.18 of 2013 Republic vs Richard Langat Kerich, Marwa Fadhili Chacha, David Kipruto Chingi, Toddy Madahana, Anthony Kalathil Chacko, and Clinix Health Care Limited with obtaining money by false pretences contrary to Section 313 of the Penal Code Cap 63 of the Laws of Kenya.

(6) An Order of Prohibition directed against Director of Public Prosecution prohibiting him from prosecution or proceeding with the prosecution of the Applicants with the charges of

conspiracy to defraud contrary to Section 317 of the Penal Code Cap 63 of the Laws of Kenya in ACC. No.18 of 2013 Republic vs Richard Langat Kerich, Marwa Fadhili Chacha, David Kipruto Chingi, Toddy Madahana, Anthony Kalathil Chacko, and Clinix Health Care Limited.

(7) An Order of Prohibition directed against the Chief Magistrates Anti-Corruption Court stopping the said Court from proceeding with the hearing and all proceedings against the Applicants on the charges preferred in ACC. No.18 of 2013 Republic vs Richard Langat Kerich, Marwa Fadhili Chacha, David Kipruto Chingi, Toddy Madahana, Anthony Kalathil Chacko, and Clinix Health Care Limited.

(8) An Order that the costs of this Application be provided for."

18. In **JR. Misc. No.375 of 2013**, the Applicant, David Kipruto Chingi, was an officer working for NHIF. He has been charged in ***Nrb. ACC No.12 of 2013*** with the following charges;

"Count I

Offence of conspiracy to defraud contrary to Section 317 of the Penal Code Cap 63 Laws of Kenya

Richard Langat Kerich, Marwa Fadhili Chacha, David Kipruto Chingi, Peter Ngunjiri Wambugu, Ndiba Wairioko and Meridian Medical Centre Limited.

On diverse dates between 21st December 2011 and 28th day of February 2012 at NHIF Building in Nairobi Area within Nairobi County conspired to defraud the National Hospital Insurance Fund of Kshs.116,935,500.00 by entering into a contract under which Meridian Medical Centre Limited were to provide services under the Civil Service and Disciplined Services Medical Scheme while knowing that the said Meridian Medical Centre Limited had no capacity to provide such services in full."

"Count II

Abuse of office contrary to Section 46 as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act, 2003

Richard Langat Kerich, Marwa Fadhili Chacha and David Kipruto Chingi

On or about the 28th day of February 2012 at NHIF Building in Nairobi Area within Nairobi County, being the Chief Executive Officer, Manager Strategy and Corporate Planning and Assistant Manager, Benefits and Quality Assurance, respectively, of a public body to wit, the National Hospital Insurance Fund, jointly used their said offices to improperly confer a benefit, namely, awarding a contract worth Kshs.116,935,500.00 to Meridian Medical Centre Limited to provide services under the Civil Servants and Disciplined Services Medical Scheme without following laid down laws and guidelines relating to procurement."

19. In his Notice of Motion, he claims that the DPP approved his prosecution without reasonable or probable cause and without ensuring that all relevant and mandatory provisions of the law had been complied with. Further, that the DPP in approving his prosecution ignored the provisions of **Article 236** of the **Constitution** and **Section 104** of the **Public Procurement and Disposal Act 2005 (PPDA).**

20. He claims that the NHIF acts and conducts its affairs through its Board and the Applicant is not a member of the said Board and as such would not have been in a position to confer any benefit to anyone. He claims that he is not a procuring entity and as such he has been made a wrong party in the criminal proceedings.

21. He further claims that the charges filed against him are unconstitutional and against the policy guidelines on treatment of public servants. That they are a gross abuse of Court process as they have been brought by an illegal body that is not charged with compliance issues under the PPDA. He also contends that the Respondents' actions were motivated by irrelevant considerations as other Government Arms gave the medical scheme a clean bill of health. He also stated that the charges are ambiguous, malicious and have been filed for ulterior motive having been filed one and half year after the Applicant had been removed from office and so he does not have the documents he would have relied on in his defence and as such he is prejudiced.
22. He has therefore sought the following orders;

"(1) That the Applicant herein David Kipruto Chingi be and is hereby granted a Judicial Review order by way of Certiorari to bring before this Court and quash proceedings in Anti-Corruption Case No.12 of 2013.

(2) That the Applicant herein David Kipruto Chingi be and is hereby granted a Judicial Review order by way of Prohibition restraining and/or prohibiting the Court from continuing with the proceedings in Anti-Corruption Case No.12 of 2013 and from instituting similar proceedings based on the same or allied facts.

(3) That the cost of this application be awarded to the Applicant."

23. In ***JR Misc Applic No. 362 of 2013***, the Applicant, Marwa Fadhili Chacha, was charged in **Nrb ACC No. 12 of 2013** with the following offences;

Count I

Offence of conspiracy to defraud contrary to Section 317 of the Penal Code Cap 63 Laws of Kenya

Richard Langat Kerich, Marwa Fadhili Chacha, David Kipruto Chingi, Peter Ngunjiri Wambugu, Ndiba Wairioko and Meridian Medical Centre Limited.

On diverse dates between 21st December 2011 and 28th day of February 2012 at NHIF Building in Nairobi Area within Nairobi County conspired to defraud the National Hospital Insurance Fund of Kshs.116,935,500.00 by entering into a contract under which Meridian Medical Centre Limited were to provide services under the Civil Service and Disciplined Services Medical Scheme while knowing that the said Meridian Medical Centre Limited had no capacity to provide such services in full."

Count II

Willful failure to comply with the applicable law relating to the procurement of services contrary to Section 45(2)(b) as read with Section 48 of the Anti-Corruption & Economic Crimes Act, 2003

Richard Langat Kerich, Marwa Fadhili Chacha

On diverse dates between 21st December 2011 and 28th day of February 2012 at NHIF Building in Nairobi Area within Nairobi County, being Chief Executive Officer and Manager, Strategy and Corporate Planning, respectively, of a public body to wit, the National Hospital Insurance Fund officers whose functions concerned the use of Public Revenue, jointly and willfully failed to comply with the law relating to Public Procurement and Disposal Act by not using the open tendering method as stipulated in Section 29(1) of the Public Procurement and Disposal Act, 2005 and regulation 35 of the Public Procurement Disposal and Regulations 2006, in the procurement of Meridian Medical Centre Limited as a service provider under the Civil Servants and Disciplined Services

Medical Scheme."

Count III

Abuse of office contrary to Section 46 as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act, 2003

Richard Langat Kerich, Marwa Fadhili Chacha and David Kipruto Chingi

On or about the 28th day of February 2012 at NHIF Building in Nairobi Area within Nairobi County, being the Chief Executive Officer, Manager Strategy and Corporate Planning and Assistant Manager, Benefits and Quality Assurance, respectively, of a public body to wit, the National Hospital Insurance Fund jointly used their said offices to improperly confer a benefit, namely, awarding a contract worth Kshs.116,935,500.00 to Meridian Medical Centre Limited to provide services under the Civil Servants and Disciplined Services Medical Scheme without following laid down laws and guidelines relating to procurement."

24. In his Notice of Motion dated 29thOctober 2013, he claims that the charges against him do not disclose any offence and have been brought by an entity not recognized by law. That he was not a procuring entity and has been wrongfully made a party to proceedings ordinarily between a procuring entity and a service provider. He thus states that the charges are a gross abuse of Court process and the Respondents' action is motivated by irrelevant considerations as other Government arms have cleared the impugned medical scheme.

25. He has therefore sought the following orders;

"(1) That the Applicant herein Marwa Fadhili Chacha be and is hereby granted a Judicial Review order by way of Certiorari to bring before this Court and quash proceedings in Anti-corruption Case No.12 of 2013.

(2) That the Applicant herein Marwa Fadhili Chacha be and is hereby granted a Judicial Review order by way of Prohibition restraining and/or prohibiting the continuance of the proceedings in the Court in Anti-Corruption Case No.12 of 2013.

(3) That the cost of this Application be awarded to the Applicant."

The Applicants' Submissions

The 1st to 3rd Applicants' case

26. Mr. Kilukumi together with Mr. Munge presented the 1st to 3rd Applicants' case. Mr. Kilukumi submitted that the prosecution of the 1st to 3rd Applicants' was an abuse of the Court process and that the Constitution requires the DPP at **Article 157(11)** to prevent and avoid abuse of the legal process while exercising his prosecutorial powers and while doing so, under **Section 4(f)** of the **Office of the Director of Public Prosecutions Act,** he is obligated to take into account the need to serve the cause of justice, prevent abuse of the legal process and public interest. Further, that a decision to mount a prosecution in abuse of the legal process is an action in excess of jurisdiction and a violation of both constitutional and statutory provisions. He also claimed that a decision to prosecute is a quasi-judicial decision which must be taken after consideration of all the factors and should not be taken lightly given the penal consequences inherent in criminal proceedings. On that aspect he relied on the cases of ***Floriculture International Ltd & Others vs Trust Bank Ltd and Others Misc Civil Applic No.114 of 1997*** and ***Githunguri vs Republic (1986) KLR 1.***

27. It was Mr. Kilukumi's contention that the Respondents had failed to place any evidentiary

material before the Court to demonstrate in what way the Applicants lacked capacity to deliver on their contractual obligations and on that point, he claimed that the allegation of obtaining Kshs.18,902,625 by false pretence on 13th March 2012 contained in Count IV of the charge sheet in **Nrb. Acc. No.18 of 2013**is not supported by any evidence and submitted that no such amount was ever paid to the Applicants. As to the alleged sum of Kshs.116,935,500 in Counts I and III, he submitted that the amount was paid based on existing contractual obligations and it was unreasonable to prosecute the Applicants on account of contractual payment in advance of provision of medical services. It was therefore his case that the prosecution of the Applicants is an abuse of the legal process and on that issue, he relied on the authorities of ***Metropolitan Bank Ltd v Pooley (1885) 10 App Cases, 201, William vs Spautz (1992) 66 NSWLR 585, R vs Humphrys (1977) AC*** and ***R vs DPP & Others ex parte Qian Guo Jun &Anor Misc Applic No.453 of 2012*** where it was held that a prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution would be malicious and actionable.

28. It was Mr. Kilukumi's further submission that the dispute forming the subject of the prosecution is essentially a civil claim, relating to the termination of a contract, which is pending in ***Nairobi HCCC No.345 of 2013***. It was his contention in that regard that the Attorney General had rendered an opinion on the matter and found that there was a valid contractual relationship between the Applicants and NHIF. He thus submitted that the cause of action was civil in nature and there was nothing criminal about it and as to the importance of the Attorney General's opinion, he relied on the Ugandan case of ***Bank of Uganda vs Banco Arabe Espanol, Civil Appeal No.8 of 1998*** where it was held that the opinion of Attorney General on a matter should not be taken lightly.

29. He went on to submit that the prosecution of the Applicants was being mounted so as to prop up the defence for the NHIF against the civil claim lodged by the Applicants and on that issue, he relied on the case of ***Republic vs Chief Magistrate's Court ex parte Ganijee & Another (2002) 2 KLR 703*** and ***Joram Guantai vs Chief Magistrate Nairobi Civil Appeal No.228 of 2003*** where it was held that it was not the purpose of a criminal investigation or a criminal charge to help individuals in the advancement or frustration of their civil cases. It was his submission therefore that where the matter in controversy is essentially civil, the institution of criminal proceedings must lead to the conclusion and or inference that it is undertaken in downright abuse of the court process. He also claimed that there are other effective remedies for recovering any public monies not payable under the contract such as arbitral proceedings or the pursuing of a bank guarantee instead of criminal proceedings which are actuated by ulterior motives. He cited the cases of; ***R vs Attorney General ex parte Benson Kangwana Misc Applic No.446 of 1995, Kamlesh D. Pattini & 2 others vs Republic Misc Applic. No.1296 of 1998*** and ***Macharia & Another vs Attorney General Misc Applic. No.322 of 1999*** where the Courts prohibited prosecution in controversies that are essentially civil in nature dressed up in the garb of criminal proceedings.

30. Mr. Kilukumi further submitted that the contract in issue has an arbitral clause and therefore the method chosen by the parties for dispute resolution should be pursued and that the Court should not permit the prosecution of the Applicants in total disregard of the provisions of **Section 10** of the **Arbitration Act**. On that submission, he relied on the cases of **R *vs Attorney General ex parte Mohammed Karmali & Anor Misc Civil Appl. No.367 of 2005 and Rosemary Wanja Wagiru & 2 Others vs Attorney General & 3 Others (2013) e KLR*** where it was held that the criminal Court does not adjudicate commercial agreements where the dispute is arbitrable. It was his further contention that the DPP should not be allowed to use the provisions of **Section 193A** of the **Criminal Procedure Code (Cap 75 Laws of Kenya)** to abuse his office.

31. On the issue of the constitutional independence of the DPP in the discharge of his prosecutorial powers, Mr. Kilukumi submitted that the High Court has previously held that the said independence can only be enjoyed if the DPP operates within the Constitution and that the Court can interfere when satisfied that a decision to prosecute is taken without or in excess of jurisdiction. On that issue he relied on the decisions of ***Githunguri vs Republic (supra) and***

Pattni vs Republic (supra) where it was held that the Court has powers to interfere with the DPP's mode of exercising prosecutorial powers and to put it in check.

32. It was also Mr. Kilukumi's contention that the Applicants have been singled out for prosecution despite the fact that 300 other medical service providers are rendering the same services under the same standard contract the Applicants executed. He claimed in that regard that the prosecuting authorities have not offered any cogent explanation as to why the other standard contracts are valid, legal and binding and not the one executed by the Applicants. He thus submitted that the prosecution of the Applicants is selective and discriminatory and relied on the case of ***David Tirop vs Attorney General Misc Applic. No. 1201 of 2001*** where the High Court stated that it would have been prudent to charge all the persons involved in the purchases made by the Applicant. It was therefore his case that the decision of the DPP to prosecute the Applicants violates **Articles 10(2)(b)** and **27** of the **Constitution** as the DPP failed to prosecute other medical providers who had executed a contracts similar to those of the Applicants and were also using the same capitation payment method. That the targeting of the Applicants for prosecution must be suspect for ulterior motives and therefore unlawful.

33. On the issue whether the matters raised by the Applicants form the basis for their defences at the trial Court, Mr. Kilukumi submitted that the Applicants have approached the Court to halt the criminal proceedings instituted in abuse of the Court process despite their solid and good defences at the trial. That the Applicants are acting in these proceedings to protect the best interest of the Court and the wellbeing of the public at large. In that regard he relied on the cases of; ***Metropolitan Bank Ltd vs Pooley (1885) 10 APP Cases, 210, William vs Spautz (1992) 66 NSWLR 585*** and ***Githunguri vs Republic (supra)***where the Courts held that every court of justice ought to protect itself from the abuse of its own procedure.

34. Mr. Kilukumi therefore urged the Court to grant the orders sought in the Judicial Review Applications.

<u>The 4th to 6thApplicants' case</u>

35. Mr. Arwa, learned Counsel, presented the 4th to 6th Applicants' case. He associated himself with the submissions made by Mr. Kilukumi and added that the DPP is acting in bad faith as he is desperately attempting to distort and falsify clear and cogent facts with a view of maliciously building up a theory of criminality against the Applicants contrary to the weight of the evidence in his possession.

36. It was his other submission that the DPP is abusing his powers since prosecutorial powers were never intended to be used against any person unless a cognizable offence had been committed by such a person. That the Applicants had not committed any offence and therefore the DPP was in abuse of his powers by prosecuting them and further claimed that the DPP is acting *ultra vires* and does not have absolute and unfettered discretion to prosecute anybody for any alleged offence, especially where it is obvious that no crime had been committed. That the DPP has a duty to act judicially and there are laws that constrain and govern the exercise of his prosecutorial powers. It was therefore his case that the decision to prosecute the Applicants is unreasonable since no person properly directing himself would have made such a decision. He relied on The Wednesbury doctrine on unreasonableness as was stipulated in the case of ***Associated Provincial Pictures Houses Ltd vs Wednesbury Corporation (1948) 1 KB 223***.

37. It was also his position that the DPP is the only person who has the constitutional power of determining whether a crime had been committed before commencing any criminal proceedings and submitted that the DPP had effectively abdicated that role to the EACC thus violating the Constitution.

38. Mr. Arwa further contended that in deciding to prosecute the Applicants, the DPP had made that decision based on his personal subjective view rather than on the law. That he asked himself

wrong questions and considered matters that he ought not to have considered and consequently arrived at the wrong decision thus committing a jurisdictional error within the meaning of the House of Lords decision in ***Anisminic Ltd vs Foreign Compensation Commission (1969) 2 AC 147.***

39. It was his submission in addition that this Court has the duty to stop processes of the Subordinate Court from being abused through the continuation of criminal proceedings that are unmeritorious, oppressive and vexatious. On that point he relied on the cases of ***Githunguri vs Republic (supra), DPP vs Humprys (1976) 2 ALL ER 497, Mills vs Cooper (1967) 2 ALL ER 100***and***Metropolitan Bank Ltd vs Pooley (1885) A.C 210***. Further, that in the case of ***Ndarua vs Republic (2002) 1EA 205***, the High Court ruled that while exercising judicial review jurisdiction, it had the power and authority to intervene and prohibit a subordinate Court from proceeding with the hearing of a criminal case where it was satisfied that the DPP, by instituting the case, was not acting in good faith.

40. He therefore urged the Court to grant the orders sought.

<u>The 7th and 8th Applicants' case</u>

41. Mr. Makori acting for the 7th and 8th Applicantssubmitted that they are public servants who enjoy protection under the employment law especially when acting in good faith and that under **Article 236** of the **Constitution**, a public officer is protected from victimization for performing the functions of his office. Further, that the law at **Sections 105** and **138** of the **Public Procurement Act and Disposal Act, 2005** and **Section 13** of the **NHIF Act** also protect public servants against liability for acts done in good faith in performance of their duties under the law.

42. He also claimed that there is no evidence showing that the 7th and 8th Applicants did not act in accordance with what they were required to do in the course of their employment. In any event, that the performance of their duties, they do not have any obligation under the **Public Procurement and Disposal Act** as they do not sit in the Tender Committee of NHIF. He therefore submitted that their prosecution would be unlawful and amounts to victimization contrary to **Article 236** of the **Constitution.**

43. It was also his submission that the DPP is enjoined under **Section 4 of the Office of the DPP Act** to observe the rules of natural justice in performance of his duties and that he has oppressed the 7th and 8th Applicants and has failed to accord them natural justice by unfairly mounting the prosecution against them. On the same point, he claimed that the EACC is also required to observe the rules of natural justice in fulfilling its mandate.

44. Mr. Makori further claimed that the charges pending against the 7th and 8th Applicants are an abuse of the court process and they have been filed for ulterior motives and in bad faith by the EACC allegedly to gain publicity and not in pursuance of a genuine and ordinary criminal process. That the charges were therefore laid in disregard of the immunity accorded to the said Applicants under **Section 138** of the **PPDA**. In addition, that the EACC had failed to demonstrate how the two Applicants had dominated or were in a position to dominate and unduly influence NHIF and that it was other departments of NHIF that were involved in the contracts, subject of the proceedings.

45. It was also his contention that the EACC acted *ultra vires* and in excess of its mandate because the charges against the 7th and 8th Applicants have been preferred outside the express raft of offences cited in the **PPDA**. That the **Anti-Corruption** and **Economic Crimes Act** can only be used to charge people with procurement related offences if the alleged violations are themselves offences under the PPDA. According to Mr. Makori, the two counts the 7th and 8th Applicants have been charged with, are offences that do not fall under matters covered under **Section 11(d)** of the **Ethics and Anti-Corruption Commission Act (EACA)**. That the Commission's mandate under **Section 11** of the **EACA** is to investigate and recommend to the DPP the prosecution of any acts

of corruption or other matters prescribed under the **EACA** or any other law enacted pursuant to **Chapter Six** of the **Constitution**. It was therefore his submission that the EACC has acted ultra vires its functions under the law in investigating and recommending to the DPP the prosecution of the 7th and 8th Applicantsfor the alleged offences under the Penal Code which are not envisaged under **Section 11(d)** of the **EACC** or **Article 79** of the **Constitution**. On that point, he relied on the case of ***Joram Mwenda Guantai (supra***) in which the Court of Appeal held that the Appellant not being a member of the Tender Board which awarded the contract, could not be guilty of an offence.

46. Mr. Makori lastly submitted that it was not in the public interest that a prosecution be done without jurisdiction and without regard to due process. That the exercise of discretion by the EACC in recommending the prosecution of his clients was not exercised for the purpose for which it was intended under **Section 11** of the **EACA** and he urged the Court to intervene on behalf of the Applicants and issue the orders sought and terminate their prosecution.

<u>The 1st Respondent's case</u>

47. The DPP's case is contained in the Affidavits of his Prosecution Counsel, Ms. Stella Nyamweya, sworn on 19th November 2013 and Laura Spira, sworn on 4th November 2013. He also relied on Grounds of Objection dated 4th November 2013 and written submissions dated 7th November 2013 and 10th March 2014. In his grounds of objection, he raised the following grounds i.e. that;

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

(2) The Application has not met the prerequisite requirements for the grant of the orders sought.

(3) The matters raised by the Applicants in the pleadings filed herein form the basis of their defences which should be raised before the trial Court in the manner proposed herein.

(4) No sufficient grounds have been advanced to warrant the grant of the orders sought.

(5) The Applicants are guilty of material non-disclosure.

(6) 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.

(7) 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.

(8) 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.

(9) The High Court has no jurisdiction to determine whether or not the Applicants are guilty ...

(10) The High Court has no jurisdiction to determine whether or not any criminal offence was committed by any of the Petitioner/Applicants in relation to the matters the subject of the pleadings herein."

48. In addition to the above, in her Affidavit, Miss Nyamweya deponed that the Applicants had failed to demonstrate that in making the decision to prefer criminal charges against them, the DPP had acted without or in excess of his powers under **Article 157** of the **Constitution**. She also contended that the DPP received the investigations' file from the EACC and independently

reviewed and analysed the evidence contained in the said file as required by law and it was on that basis that he gave directions to prosecute the Applicants. She therefore stated that the decision to charge the Applicants was informed by the sufficiency of the evidence on record and the public interest and not any other considerations. She added that the accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed and tested by the trial Court and not any other Court, including this one.

49. She further stated that the DPP may institute and undertake criminal proceedings against any person before any Court in respect of any offence alleged to have been committed and that he does not require the consent of any person or authority before the commencement of any criminal charges. Further, that the DPP does not act under the direction or control of any person or authority and is only subject to the Constitution and the law. His decision to institute any criminal proceeding is therefore discretionary and she added that the Court should not interfere with the constitutional powers of the DPP to institute and undertake criminal proceedings unless it is shown that the exercise of those powers is contrary to the Constitution, is in bad faith or is an abuse of the Court process.

50. It was Ms. Nyamweya's further contention that under **Section 35** of the **Anti-Corruption and Economic Crimes Act,** the **EACC** is mandated to report to the DPP the results of its investigations after which the DPP is expected and mandated to make a decision whether to prosecute or not. That the Applicants had failed to demonstrate that the DPP had not acted independently in the present case and therefore their case is misguided.

51. She also averred that the charges as drawn against the Applicants are not ambiguous as they meet the mandatory provisions of **Sections 134 to 137** of the **Criminal Procedure Code (CPC)** and that there is no time limit for preferring criminal charges under the **Penal Code,** the **ACECA** or the **Limitations of Actions Act, Cap 22** Laws of Kenya.

52. It was Ms. Nyamweya's other contention that all the issues raised by the Applicants are evidential in nature and must be addressed before the trial court and fairly determined by the trial magistrate on merit.

53. On the allegation that the Applicants had been discriminated against, she deponed that every case is determined on its own merits since criminal responsibility is individual and not collective in nature. In her view, failure to charge a particular person does not amount to discrimination and the fact that other healthcare providers have not been charged does not amount to discrimination in any way.

54. According to Ms. Nyamweya therefore, the Applicants are presumed innocent until proved guilty by a competent Court and they have a right to have their day in Court where they will be accorded all the facilities to prove their innocence. In any event, she claimed that there are sufficient constitutional and legal safeguards to ensure their fair trial.

55. Ms. Spira on her part deponed that 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 to deal with the quality and sufficiency of evidence gathered and properly adduced in support of the charges. She stated that as to whether or not the Applicants followed the law in their involvement in the contract with NHIF is a matter that can only be determined by the trial court and not this court while exercising its judicial review jurisdiction.

56. It was also her position that there was no evidence of malice, harassment or intimidation of the Applicants or even manipulation of the Court process that had been tendered so as to demonstrate abuse of the Court process and which would reveal that the Applicants might not get a fair trial and so as to further warrant the High Court's interference with the criminal process before the subordinate Court.

57. Mr. Mule in addition to what his colleagues stated, submitted that all the matters raised by the Applicants form the basis of their defences before the trial Court and where they will have their day in Court to challenge the evidence tendered, cross-examine the witnesses and defend themselves as stipulated under the law. He argued further that only a trial Court could competently make a finding as to whether or not a criminal offence had been committed after hearing all the evidence tendered. He relied on the case of ***Thuita Mwangi & 2 Others vs The Ethics and Anti-Corruption Commission & 3 Others Petition No. 369 of 2013*** in that regard.

58. He also submitted that it has not been demonstrated that the Applicants were likely to be denied their rights during the trial and as to whether the Court should grant the orders sought, he submitted that the Applicants had not demonstrated that the DPP's decision was so manifestly wrong as to amount to an unreasonable, irregular or improper exercise of his powers On that point he relied on the following cases;

i. ***Associated Provincial Pictures Houses Ltd vs Wednesbury Corporation (1947) 1 KB 223.***
ii. ***Richard vs Republic (2006) 2 KLR 620.***
iii. ***Kingori and 4 others vs Mwangi & Another (1994) KLR 297.***
iv. ***Githunguri vs Republic (supra).***
v. ***Matalulu vs DPP (2003) 4 LRC 712.***

It was therefore his submission that the Applicants' cases do not demonstrate how the decision by the DPP to prefer charges is without jurisdiction or in excess of the powers of the DPP under the Constitution.

59. Lastly, he submitted that if the Court were to grant the orders sought, it would be tantamount to ordering the DPP not to discharge his statutory and constitutional mandate to prosecute crimes. He therefore urged the Court not to grant the orders sought by the Applicants.

<u>The 2nd Respondent's case</u>

60. The 2nd Respondent, the EACC, opposed the Applications through the Affidavits of its investigators, Ignatius Wekesa, sworn on 17th December, 2013 and Gideon Rukaria, sworn on 15th November 2013.

61. Mr. Rukaria deponed that the NHIF pilot scheme had nothing to do with the contract for the provision of primary healthcare and treatment services to civil servants and disciplined forces as the beneficiaries of the medical scheme were not allowed to select their medical provider of choice at the commencement of the scheme. That instead of allowing members to choose their preferred provider, the Applicants conspired with certain officials of NHIF who fraudulently created a list of 62,729 principal members purporting them to be members who had chosen the Applicants as their preferred service provider.

62. He deponed that the fraud perpetrated by the Applicants came to light after many genuine members of the medical scheme failed to receive any service from the Applicants who were purporting to be capable of providing such services Countrywide. When the members sought to be transferred to other service providers, they were allegedly stopped by Marwa Fadhili Chacha, the NHIF Manager, Strategy and Corporate Planning, from doing so. That in fact Clinix Healthcare had specifically and fraudulently claimed that it had 142 medical facilities while it only had four such facilities which had been duly accredited by NHIF and was therefore lacking in capacity to provide services to NHIF members.

63. According to Mr. Rukaria, full and comprehensive investigations involving the Applicants and other persons was undertaken as required by law once the above allegations were brought to the attention of EACC. That the investigations had commenced pursuant to a letter of complaint to EACC by the Ministry of Medical Services and not as a result of the filing of a claim in **HCCC No.345 of 2013** by Meridian Medical Centre as alleged by the 1st to 3rd Applicants.

64. He stated that EACC investigations revealed that Clinix Healthcare did not have any accredited facilities outside Nairobi County and the allocation of members to it was a conspiracy to defraud public funds. He added that during the said investigations, many statements were recorded from potential witnesses and the State has lined up more than 30 witnesses who will testify in the trial against the Applicants.

65. He claimed that the investigations further established that the NHIF Chief Executive Officer, acting with a few handpicked employees of the Fund, conspired with the Applicants to run the scheme contrary to laws governing the Fund and the PPDA as a result of which a substantial part of the money paid by the Government as premium for the scheme was fraudulently paid to the Applicants without any corresponding benefit to the members of the scheme and their dependants. He stated that the Applicants conspired to defraud NHIF in the following manner;

a. *A system of payment known as capitation was adopted the effect of which is that money would be paid before any service is rendered by the Service Provider which is contrary to* ***Section 22*** *of the* ***NHIF Act, Section 45(2)*** *of the* ***Anti-Corruption and Economic Crimes Act (ACECA)*** *and other Government Regulations.*

b. *No legally permissible procurement procedure was adopted and the reference to a procurement process by the Applicants is a reference to an initial project known as the pilot project and which was the subject of a separate contract and did not extend to cover the new medical scheme. The procurement Committee of NHIF was not involved in the selection of the service providers as by law required.*

c. *Contracts were entered into with the 3rd Applicant which is a company rather than a declared hospital under the* ***NHIF Act*** *with the result that payments would be made without reference to a corresponding service.*

d. *It was alleged that a certain number of members had chosen the companies whereas in fact the members of the scheme were not allowed to choose their preferred provider. The 3rd Applicant was fraudulently allocated/assigned beneficiaries for purposes of inflating the capitation whereas the beneficiaries were not involved in the selection.*

e. *The allocation was made to the companies in respect of non-existent institutions and even where they existed, they were not accredited by NHIF and were therefore not declared hospitals within the meaning of the Act.*

f. *The contracts with the Applicants were signed in the third and final month of the first quarter in respect of which the payments related meaning that services were allegedly rendered without a contract. As a result thereof money was paid for services not rendered or not adequately rendered contrary to the law.*

g. *That to ensure that the plan received little resistance, the Chief Executive Officer of NHIF operated the Scheme outside the structure of NHIF and thereby bypassed in-built checks and balances and appointed a team of four middle-level officers to run the scheme. That an internal memo to that effect exists.*

h. *That on 13th March, 2012, the 3rd Applicant was paid a total of Kshs.202,161,187.50 by NHIF being payment for the first quarter of the contract.*

i. *The 3rd Applicant knowingly received payments for members allocated to it yet it did not have any accredited medical facilities outside Nairobi. The total number of members outside Nairobi allocated to the 3rd Applicant was 27,106 and each member was allowed an additional 4 dependants making a total of 135,530 beneficiaries.*

j. *The amount payable for each beneficiary of the medical scheme was Kshs.2850 per year and thus the 3rd Applicant was fraudulently paid Kshs.96,565,125/- being Kshs.2,850/- multiplied by 135,530 alleged beneficiaries outside Nairobi divided by 4 for the quarter year.*

66. Mr. Wekesa in his Affidavit added that Meridian Medical Center is not a hospital or a private clinic within the meaning of the **Medical Practitioners and Dentists Act** and neither is it a declared facility within the meaning of the NHIF Act. He thus stated that it did not have the capacity to contract with NHIF and provide medical services under the scheme.

67. It was his further averment that no procurement procedure or any other lawful method was adopted in awarding the contract to Meridian Medical Centre and that Mr. Fadhili and Mr. Kipruto were responsible for the arbitrary assignments of members to Meridian Medical Center and Clinix Healthcare Ltd. In addition, that the contract executed as between the said medical facilities and NHIF has since been disowned by Ms. Rono, Head of Legal Department at the NHIF, the officer who would ordinarily have been involved in drafting such contracts.

68. He further deponed that the investigations he conducted concluded that the glaring illegalities, frauds, errors and omissions in the procurement, execution and implementation of the contracts with the Applicants were done to abuse the scheme for purposes of enriching them.

69. Mr. Murei who represented the 2nd Respondent further submitted that this Court should let the trial Court handle all the issues being raised by the Applicants and he relied on the English decision of ***Reg vs D.P.P ex p. Kebilene (2000) 2 AC 326*** where it was held that the decision of the DPP to prosecute should not be interrupted unless it could be shown that he was abusing his powers. In that regard, he therefore stated that the issues as to the validity of the purported contracts with the Applicants are some of the questions that should be determined by the trial magistrate. He however maintained that the contracts still formed the basis of the prosecutions because they were the tool used to perpetrate the illegalities. That the contracts were also allegedly poorly drawn, ambiguous, non-specific and they were left to a middle-level officer who had no capacity to execute it on behalf of the NHIF Board of Management to do so. It was therefore his position that both civil and criminal consequences flow from breach of law and therefore the disputed contracts cannot be relied upon to stop prosecution.

70. He submitted further that judicial review was concerned with the decision making process and not the merits of the decision. That the Applicants have not established in their favour any known grounds for judicial review and that abuse of process of Court which was heavily relied upon by the Applicants was not a known ground for judicial review. On the allegation that the Applicants have filed this case as part of their defence in their civil claim against NHIF in ***HCC Civil Suit No. 345 of 2013***, Mr. Murei submitted that investigations into the contracts the Applicants had with NHIF begun way before the civil suit was filed. In any event, it was his position that due to the contradictions made by the Applicants in their respective affidavits, it is most convenient in the circumstances to allow the said case to proceed to its logical conclusion on merits.

71. He further submitted that the NHIF Board is mandated under **Section 22** of the **NHIF Act** to only pay for services rendered and that payment under the "capitation method", in which the Board was required to pay for services not yet rendered, is illegal under the Act. He thus claimed that the contracts entered into by the parties contravened the law and should not be the basis for any lawful claim by the Applicants.

72. It was Mr. Murei's other submission that the Applicants did not go through any procurement process and were handpicked by the 2nd Interested Party in concert with Mr. Chingi and Mr. Marwa. That they thereby rendered the PPDA ineffective for failing to observe its express provisions.

73. On the issue of discrimination, Mr. Murei submitted that the Clinix and Meridian Cases are unique in several ways; firstly, the two are companies that entered into contracts with NHIF as

opposed to licensed institutions contrary to the **NHIF Act.** Secondly, they are not declared hospitals under the NHIF Act and thirdly, they are the only entities that were paid money in excess of Kshs.7,000,000.00 (Clinix Heathcare was paid Kshs.202,161,188 and Meridian Medical Centre was paid Kshs.116,035,500). Lastly, they are the only institutions that have been assigned members in each and every health station in the Country notwithstanding their lack of strength and geographical spread. He thus submitted that in those circumstances, it was not unreasonable for EACC to begin its investigations touching on the two companies; which it did and obtained evidence of conspiracy to defraud and obtaining by false pretences in respect of the two companies and those actions and facts do not amount to discrimination.

74. He further stated that whether investigations will be conducted on any other health provider and whether evidence of corruption will be found can only be a matter of speculation and that it would be unreasonable for EACC to simultaneously conduct investigations touching on all the providers. In any event, the fact that other institutions have not been investigated does not negate the culpability on the part of the Applicants.

75. As regards the case of the 2nd Interested Party, Mr. Murei submitted that he is an Interested Party in these proceedings and cannot therefore seek orders in his submissions without having filed a substantive application for judicial review as prescribed under **Order 53** of the **Civil Procedure Rules.**

76. According to Mr. Murei, it is in the public interest that major scandals be thoroughly investigated, the perpetrators prosecuted and punished and assets are recovered. As regards the present Applications, he claimed that the Applicants have attempted to pre-argue their respective defences which they can only make at the trial Court and not through the judicial review applications.

77. Mr. Murei concluded therefore that the charges against the Applicants and the 2nd Interested Party have not been brought with ulterior motives and that the decision to charge them was not outrageous at all. He thus urged the Court to let the criminal case proceed to its logical conclusion.

The 2nd Interested Party's case

78. The 2nd Interested Party, Richard Kerich was the Chief Executive Officer of NHIF during the roll out and subsequent implementation of the civil servants and disciplined forces medical scheme. In his Affidavits filed in Court on 15th November 2013 and on 25th November 2013, he gave the background to the contracts between NHIF and Clinix Heathcare Ltd as well as with Meridian Medical Centre Ltd. In that regard, he stated that the Government entered into a contract with NHIF on 5th January 2012 and by that contract, NHIF was to provide insurance services to the members of the scheme. The contract was to be implemented according to the terms and conditions contained therein and allegedly not in the same way that NHIF contributions are administered. He stated that the capitation method that was to be used was an idea introduced by the Government in its draft contract between it and a consortium of insurance companies.

79. He stated that it was also the Board of NHIF and not him that passed a resolution on the process of implementing the scheme and that there was no evidence that he had handpicked some employees to manage the implementation process as there was a Board resolution to that effect. He added that he involved the NHIF Board during the entire implementation of the scheme and due process was followed including invoking the provisions of PPDA.

80. He contended that his role was to ensure that the scheme was implemented, as he did, and he followed all the procedures necessary with the approval of the NHIF Board. Further, he deponed that the EACC ignored all the evidence in his favour and maliciously recommended prosecution against him. That in the event, his prosecution would violate his rights as it is illegal and amounts to an abuse of the Court process.

81. Mr. Bosek, learned Counsel for Mr. Kerich submitted that Count 1 of the charges against his client were malicious because the prosecution had not tendered evidence to show that he had met with the Applicants with the intent to defraud NHIF as alleged. In the absence of such evidence, he claimed that the DPP had brought the criminal case against the 2nd Interested Party in bad faith because the mode of payment made to Meridian and Clinix did not consider the number of gazetted health facilities but the number of people who utilized their health facilities.

82. It was also Mr. Bosek's position that the 2nd Interested Party was not a member of any of the tender committees within NHIF and notably none of the members of the NHIF Tender Committee had been marked for prosecution. That none of the members of the NHIF Board had also been prosecuted or investigated. He therefore claimed that the 2nd Interested Party had been discriminated against as he had been singled out for prosecution by the EACC's act ignoring relevant facts when recommending prosecution. That his right not to be discriminated against under **Article 27** of the **Constitution** had thereby been violated.

83. In addition, he claimed that the investigations leading up to the proceedings were not procedurally fair as they were not conducted in accordance with **Section 11** of the **ACECA**. In that regard, Mr. Bosek contended that the 2nd Interested Party's right to fair administrative action had similarly been violated.

84. Further, that the law is clear at **Section 13** of the **NHIF Act** that the 2nd Interested Party should not be held liable for acts and omissions done in his official capacity as an officer under the Act when he, at all times, acted in good faith. That Mr. Kerich is not a voting member of the Board of NHIF and as such he is protected from personal liability for any omissions by the Board and that the provisions of **Section 138** of **PPDA** bars prosecution against an officer who has acted in good faith, as he did, and he cannot be held personally liable in criminal proceedings for duties carried out under the Act. He therefore submitted that the charges in ***AccNo.12 of 2014*** are illegal and unconstitutional.

85. It was also Mr. Bosek's submission that the prosecution of Mr. Kerichis an abuse of the Court process and on that proposition, he relied on the case of ***Canadian Union of Public Employees vs City of Toronto & Attorney General Ontario (1992) 1 AC 34*** where the Supreme Court of Canada held that it was the duty of a judge to prevent an abuse of the Court's process. On the same issue of abuse of the Court process, he relied on the cases of ***Rosemary Wanja Mwagiru & 2 Others vs The Attorney General & 3 Others (2013) e KLR*** and ***Peter George Antony D'acosta vs Attorney General & Another (2013) e KLR*** where the High Court deprecated prosecutions that amounted to abuse of Court process.

86. Mr. Bosek urged the Court to grant the prayers sought in the Applications as the 2nd Interested Party stands to suffer irreparably if he is subjected to a criminal trial when in fact he had not committed any offence.

Determination

87. Parties in these proceedings have raised several issues regarding the origin and substance of the subject of the controversy forming the prosecution of the Applicants in **Anti-Corruption Criminal Cases Nos. 12 and 18 of 2013** i.e. the contracts for the provision of medical insurance for civil servants and members of the disciplined forces executed between Meridian Medical Centre Ltd, Clinix Healthcare Ltd and NHIF. In their pleadings and submissions, Parties made a lot out of the substance of the aforesaid contracts which is partly the basis for Applicants' prosecution as well as the civil suit in ***Nairobi HCCC No.345 of 2013.*** I have similarly heard a lot regarding the arguments on the merits or otherwise of the evidence forming the basis for the impugned criminal charges.

88. However, in my view, the larger issue for determination now before me is whether this Court

should intervene and quash the criminal proceedings in **Anti-Corruption Criminal Cases Nos. 12 and 18 of 2013**against the Applicants on the alleged charges of conspiracy to defraud contrary to **Section 317** of the **Penal Code**, abuse of office contrary to **Section 46** of the **Penal Code** and obtaining money by false pretence contrary to **Section 313** of the **Penal Code.** To determine that issue, I must deal with the issue of the DPP's power to prosecute so as to further determine whether the DPP has acted *ultra vires* or unreasonably in making the decision to prosecute the Applicants. As a corollary to that issue, I will answer the question whether their prosecution amounts to abuse of Court process.

The Powers to prosecute

89. The State's prosecutorial powers are vested in the DPP under **Article 157** of the **Constitution.** The relevant part provides as follows;

> ***157 (6) The Director of Public Prosecution shall exercise State powers of prosecution and may-***

a. ***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.***

The decision to institute criminal proceedings by the DPP is however discretionary and is not subject to the direction or control by any authority because **Article 157 (10)** stipulates that;

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

These provisions are also replicated in **Section 6** of the **Office of the Director of Public Prosecutions Act**. **No. 2 of 2013** in the following terms;

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

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

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

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

90. From the above provisions, the office of the DPP is an independent office and the Court will in an ideal situation be reluctant to restrain it in the exercise of its powers except in the clearest of cases. For instance in the following cases the Court expressed itself regarding the powers of the DPP in criminal prosecutions;

i. In ***Rosemary Wanja Mwagiru & 2 others vs The Attorney General & 2 others (supra)*** Mumbi J stated as follows;

> "***The process of the court must not be misused or otherwise used as an avenue to settle personal scores. The criminal process should not be used to harass or oppress any person through the institution of criminal proceedings against him or her. Should the Court be satisfied that the criminal proceedings being challenged before it have been instituted for a purpose other than the genuine enforcement of law and order, then the court ought to step in and stop such manoeuvres in their tracks and prevent the process of the court being used to***

unfairly wield State power over one party to a dispute."

ii. Similarly in ***Investments & Mortgages Bank Limited (I & M) vs Commissioner of Police and 3 others, Nairobi HC Petition No. 104 of 2012***Majanja J remarked as follows:

> ***"I agree with the respondents that it is within their mandate to investigate crimes where there is reasonable basis of commission of offence and that in performance of their duties, they are independent institutions. The Office of the Director of Public Prosecutions established under Article 157 is an independent office which is empowered to conduct its duties free from any influence or control by any authority. Its actions must be within the law and in accordance with what the Constitution dictates. One such dictate is that in the exercise of their powers, it is to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process."***

91. I wholly agree with the sentiments of the learned judges above and I also agree with the submission of Mr. Kilukumi that the decision to prosecute is a quasi-judicial decision which should not be taken lightly given the penal consequences inherent in any criminal proceeding - See ***Floriculture International Ltd & Others vs Trust Bank Ltd and Others (supra).*** There is also no doubt that the office of the DPP should exercise its mandate and discretionary power to prosecute within constitutional limits and the independence of his office. The allegation therefore made that the DPP has prosecuted the Applicants against the advise of the Attorney General is also misplaced as he (the DPP) does not and should not take advise from the Attorney General when making a decision as to whether he should prosecute or not.

92. Having said so, it is also true that the said power of the DPP should not be exercised arbitrarily, oppressively or contrary to public policy. As can be seen from the above cited authorities, the Court may intervene where it is shown that intended criminal prosecutions are instituted for other means other than the genuine enforcement of criminal law or otherwise an abuse of the court process - See ***Githunguri vs Republic (supra).*** Kuloba J in ***Vincent Kibiego Saina vs Attorney General Misc Applic*** **No.839 of 1999**in that regard observed as follows;

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

I agree with the learned judge and I adopt the same reasoning here as if it were mine.

<u>Abuse of powers</u>

93. In the instant case, the Applicants have challenged the charges against them on the ground that the DPP is abusing his powers. They claim that they had not committed any offence and therefore the DPP was acting ultra vires. It was therefore their case that the decision to prosecute them was unreasonable since no person properly directing himself would have made such a decision.

94. In that context, I have read all the affidavits and material place before me by the Applicants. Notably, Mr. Antony Kalathil in his affidavit has stated that the charges in **Anti-Corruption Case No.18 of 2013** are not *bona fide* and are driven by extraneous reasons other than genuine pursuance of criminal actions and are unattainable in law and are meant to purely embarrass the Applicants. On his part, Dr. Ngunjiri deponed that he believed that the decision to charge him together with his co-accused persons was actuated by the civil suit filed by the 3rd Applicant being ***Nairobi HCC No.345 of 2013***. He stated that the charges against him and his co-accused were also unreasonable and an abuse of the Court process for reasons that;

"(i) The Ethics and Anti-Corruption Commission and Director of Public Prosecution failed to consider that the healthcare provider had a commercial contract with NHIF and it undertook its obligation under the said contract in issue by treating patients, as envisaged in the contract;

(ii) The investigating body failed to consider that the healthcare providers were contracted after undergoing a competitive tender process which was not challenged as envisaged in Law;

(iii) The investigating body failed to consider the process prior to execution of the contract between NHIF and Meridian Medical Centre Limited as stated herein above.

(iv) Capacity was not a term of the contract for the provision of the requisite healthcare services and even if it was, the alleged want of capacity would only be a ground for breach of contract and not a criminal offence;

(v) None of the beneficiaries who chose Meridian Medical Centre Limited and who received treatment at [its] facilities had complained about the quality of services that they received during the pilot phase or thereafter;

(vi) The investigating body failed to consider that after press coverage of the scheme, the Regulatory body, being the Medical Practitioners and Dentists Board, visited the healthcare provider's facilities and affirmed its capacity to undertake the contract. Further, the contract had a provision for termination in case of breach by either party;

(vii) There are several healthcare providers who participated in the scheme and who received payments under their respective contracts whose capacitates are, in [his] estimation, as a medical practitioner in Kenya, much lower than that of Meridian Medical Centre and who have not been investigated or charged;

(viii) During the performance of the contract dated 1st January 2012 [they] rendered the same services to HNIF beneficiaries, together with over 300 other healthcare providers, and all of the said providers were paid by NHIF under the same terms and computation. However, it's regrettable that only [themselves] were charged for an alleged criminal offence."

95.Mr. Toddy Madahana on his part averred as follows;

> ***"(1) That I am aware of my own personal knowledge that EACC seeks to advance the theory that NHIF officers facing prosecution herein fraudulently devised a system known as capitation with a view to defrauding NHIF.***
>
> ***(2) That the above theory must fail and be dismissed for the reasons that;***

(a) I am informed by the 1st Interested Party which advice I verily believe to be true that it is MSPS that originated the capitation system. Furthermore, the NHIF Board approved the same.

(b) The capitation system originated from outside of NHIF and was conceived long before the scheme and long before Clinix joined the scheme;

(c) The way capitation system was originally conceived is the way it is still being implemented by NHIF up to now;

(d) The same system which was used is still being used to pay all healthcare providers in the CSADSMS.

> ***(3) That I am also aware of my own personal knowledge that EACCA seeks to advance the theory that the NHIF officers presently facing prosecution failed to follow procurement law when they offered a benefit to Clinix.***

(4) That the above theory must fail for the reasons that;-

(a) The decision to enter into contracts with the gazetted health care providers was not made by the officers facing prosecution but by the joint committee chaired by the Permanent Secretary MSPS and subsequently ratified by the full NHIF Board meeting held on 19th January 2012.

(b) The accused NHIF officers are being prosecuted for obeying and implementing instructions given to them by their employer, the NHIF Board, in conjunction with the MSPS.

(c) Three hundred and five (305) gazetted healthcare providers signed the same contract for CSADSMS and yet none of them was subjected to prosecution apart from Clinix and Meridian Hospital.

(d) There is no provision in the Public Procurement and Disposals Act that requires procuring entities to tender afresh when they are distributing work to those suppliers who are already in their list of prequalified suppliers. In any event, under the NHIF Act, once gazetted to offer services, one can validly officer services unless they are de-gazetted. Clinix had never been de-gazetted.

(e) Neither of the ex-parte applicants herein had any role to pay in the procurement process to justify their being prosecuted for the alleged failure to follow procurement law.

(f) CSADSMS is still being implemented precisely in the same manner. NHIF is still awarding contracts directly to gazzetted healthcare providers without subjecting them to tendering and both EACC and the Director of Public Prosecutions don't seem to find anything wrong with that.

6. ***That furthermore, I am aware of my own personal knowledge that EACC seeks to advance the theory that CDADSMS was implemented in violation of the provisions of the NHIF Act.***

7. ***That the aforesaid theory must fail for the reasons that;***

(a) The scheme involved services that could not be rendered under the NHIF Act.

(b) NHIF management was only implementing the directions and instructions given to them by the joint committee and ratified by the NHIF Board.

(c) Section 30 of the NHIF Act allowed the NHIF Board, by notice in the Gazette, to declare any hospital to be a hospital for the purposes of this act (which is exactly what they did in connection with the CSADSMS scheme) NHIF first declared various institutions to be hospitals under the act through gazettement and thereafter awarded them contracts which allowed them to participate in the CSADSMS scheme. Those contracts did not give the healthcare providers any specific benefit in monetary terms. They only gave the healthcare providers opportunities to compete under the schemes.

(d) Further, I am advised by my advocates on record which advice I verily believe to be true that Section 22 of the NHIF Act explicitly refers to the contributory scheme. CSADSMS does not fall under the preview of the mandatory contributory scheme. Suggesting that I or any other person violated this Section is a complete misapprehension of the law. The contributor mentioned is clearly defined in the Act.

(e) Furthermore, the contributions made to the contributory scheme are by law gazetted. The premiums paid in CSADSMS are not gazetted.

(f) The alleged failure, either by NHIF Board (as was the case here), or by any officer thereof, to comply with the provisions of NHIF cannot ipso facto constitute a crime.

7. ***That I am aware of my own personal knowledge that the EACC seeks to advance the theory that NHIF officers facing prosecution herein arbitrarily assigned beneficiaries to Clinix and other health care providers.***

8. ***That this above theory must fail for the reason that;***

a. ***The materials annexed to the Affidavit of Richard Kerich clearly confirm that the idea of civil servants choosing their preferred health care providers was actually raised by the very same officers who are currently facing prosecution.***

b. ***It was MSPS who later instructed the NHIF management to use some objective criteria to assign the beneficiaries to healthcare providers to speed up the exercise and also that the said beneficiaries were then instructed to migrate to their preferred healthcare providers and were given sufficient time to do that.***

c. ***If any of the beneficiaries of Clinix did not wish to have it as their preferred health care provider, then they would have migrated long before 15th February 2012 (when the contract between Clinix and NHIF was signed) since all beneficiaries were given 45 days to migrate to their preferred healthcare providers before the contracts were signed with those providers.***

d. ***EACC in its Affidavit and data it provided acknowledge that the selection process took place.***

9. ***That EACC seeks to advance the theory that Clinix did not have the capacity to deliver under the contract signed with NHIF because they did not have clinics all over the County, or because their clinics did not have sufficient facilities and equipments.***

10. ***That the above theory must fail for the reasons that;***

a. ***The contracts signed between Clinix and NHIF did not describe the number of facilities that each health care provider was required to maintain as a condition precedent to joining or participating in the scheme. There was no such eligibility requirements under the contracts signed between NHIF and healthcare providers.***

b. ***The contracts signed between NHIF and the health care providers merely described the quality of services to be rendered and did not insist that the said services had to be rendered in specific clinics or facilitates. Such contracts did not even require that such services be rendered in any specific geographical locations;***

c. ***The contracts between NHIF and the various service providers did not give detailed specifications as to the facilities and equipments which had to be kept at any of the healthcare facilities for a provider to continue to be eligible to participate in the scheme. Instead, there were detailed dispute resolution criteria which was designed to address such issues as capacity. Besides, any health care provider who did not have capacity would not be able to complete under the scheme because all its beneficiaries would migrate to other health care provider with the result that it would not be entitled to any payment under the contracts signed between NHIF and the various service providers under the scheme from using the facilities of any other hospital to render services to its beneficiaries under the scheme. On the contrary, that was expressly allowed. Clinix had many third party service providers who were available to offer services in CSADSMS. Contracts with the 3rd Party providers were given to EACC.***

d. ***The capacity of any hospital to render quality medical services can only be caused by the Kenya Medical Practitioners and Dentist Board. Neither EACC nor Chief Magistrates Court have the requisite competence to do that. The Kenya Medical Practitioners and Dentists Board had in fact licensed all Clinix facilities under the scheme, which is sufficient proof that they had the requisite capacity to render the desired services under the scheme.***

e. ***The contracts between NHIF and the various healthcare providers involved a capitation system which was itself based on the concept of insurance. It was not the intention of either NHIF or any of the healthcare providers under the scheme that each of the beneficiaries would have to receive services within the contract period. Accordingly, it is erroneous to attempt (as EACC has done herein) to evaluate the capacity of Clinix in terms of its ability to offer services to all its beneficiaries at the same time. It must be comprehended that if a situation arose where all beneficiaries are seeking services at the same time, then the situation would be a kin to an outbreak of disease. The Government would naturally have to move in and would not be the problem of service providers.***

f. ***It did not follow that a beneficiary of Clinix, who resided in Mumias or Mandera, or any of his/her dependent, could not receive services from a Clinix healthcare facility in Nairobi.***

11. ***That these charges are completely without merit since there is absolutely nothing that NHIF officers concerned not even the directors and/or employees of Clinix (or directors of any of the participating healthcare providers) did to determine the quantum of payment that was made to each of the healthcare providers that participated in CSADSMS, as that was determined solely by the civil servants and members of the disciplined services who chose their preferred healthcare providers in any event, Clinix should not be punished for choices made by beneficiaries.***

12. ***That further to the foregoing, the allegations in the charge sheet to the effect that Clinix lacked capacity to render the requisite services sought under CSADSMS are also without merit for the following reasons;***

a. ***The healthcare providers were contracted, as such, to render the services detailed in the scheme to the beneficiaries who chose them. Accordingly how they chose to render the said services and the facilitates they chose to use for the said purposes were solely left to their discretion of the member.***

b. ***Capacity was not a term of the contract for the provision of the requisite healthcare services and even if it was, the alleged want to capacity would only ground a breach of contract and not a criminal offence.***

c. ***The capacity of Clinix had been evaluated and proved to exist by other Government agencies. Refer to exhibit marked TM 12 in the Verifying Affidavit dated 7th November 2013.***

d. ***That if mere participation in the CSADSMS scheme was the crime that Clinix, committed then all the healthcare providers who participated in the scheme are equally guilty and should similarly be charged with corruption.***

13. ***That it is a matter of irrefutable fact contrary to various assertions in various quarters that Clinix was running "ghost clinics" the licensing authority, to wit, the Medical Practitioners and Dentists Board confirmed that the clinics of Clinix actually were in existence and operational.***

14. ***That the charges against the ex parte applicants lack the essential elements of criminality and are therefore malicious and illegal."***

96. As can be seen from the averments above, [and I deliberately reproduced them verbatim] while the Applicants have alleged that the DPP is in abuse of the Court process and basically his powers to prosecute, little was said about how exactly he failed in that duty. In the case of ***Meme vs Republic & Another (supra)***, the Court of Appeal described the phrase 'abuse of court process' in the following terms:

> ***"An abuse of the Court's process would, in general, arise where the Court is being used for improper purposes, as a means of vexation and oppression, or for ulterior purposes;***

that is to say, Court process is being misused."

97. In ***Peter George Antony D'costa vs Attorney General and Another, Nairobi Petition No.83 of 2010,*** Majanja J in quashing criminal proceedings against the Petitioner observed that;

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

I agree with the learned judges and indeed under **Article 157(11)** of the **Constitution**, the DPP is under an obligation to prevent and avoid abuse of the legal process while exercising his powers. In ***Thuita Mwangi & 2 Others vs Ethics & Anti-Corruption Commission and 3 Others (supra)*** Majanja J stated as follows in regard to the powers of the DPP;

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

98. Applying the above principles in the instant case, what the Applicants have addressed this Court on, in my view, is what I would consider as their defense against the charges facing them at the criminal trial. Sadly, the High Court at this point is not the right forum to entertain that defense or justification concerning whether they should have been charged or not.

99. As a corollary to that issue, while I have nothing but respect for Mr. Kilukumi, I cannot agree with his submission that this Court can determine at this stage whether or not the charges facing the Applicants in **Nairobi ACC No.12 and 18 of 2013** disclose an offence or not. To my mind a challenge to the competence of the charges can only be properly ventilated and resolved before the trial court which is sufficiently empowered under the provisions of **Section 89(5) of Criminal Procedure Code** to determine that issue. For avoidance of doubt **Section 89(5)** of the **Criminal Procedure Code** provides thus;

> "***Where the Magistrate is of the opinion that a complaint, or a formal charge made or presented under this Section does not disclose an offence, the Magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reason for the order".***

100. The Applicants' argument that they had not committed any offence because they had been cleared by other state agencies apart from the EACC cannot also be determined by this Court by virtue of the provisions of **Section 89(5)** of the **Criminal Procedure Code**. That the trial Court is the only Court which can determine whether the facts and evidence as presented discloses that an offence had been committed. Neither the Efficiency Monitoring Unit nor any other state organ has such mandate.

101. As regards the challenge made to the sufficiency of the evidence, I am of the view that such a challenge goes to the merits of the criminal case against the Applicants. If the Applicants are allowed in these proceedings to challenge the evidence in the possession of the DPP at this stage, I am afraid that it would amount to pre-empting the DPP's case by setting out the Applicants' defence and accepting it as true. Such arguments can only be made in the right forum being the trial Court. This Court is not to be concerned with the sufficiency of the evidence available to support the charges and it is sufficient for the Respondents to demonstrate that they have a reasonable or probable cause that an offence has been committed and therefore the Applicants should stand trial - See ***William S.K Ruto & Another vs Attorney General (supra).*** The principle that the Applicants are innocent until proven guilty is also one of the tenets of fair trial envisaged under **Article 50(2)** of the **Constitution** and in any event, I did not hear the Applicants to be contending that they will not have a fair trial at the Magistrate's Court and even if they did, they failed to plead with some reasonable degree of precision how their right to fair trial would be violated - See ***Annarita Karimi Njeru vs Republic (1976-1980) 1 KLR 14.***

102. In my view therefore, all the grounds raised by the Applicants and touching on the issue whether the DPP had exercised his powers within the four corners of the Constitution can only be determined in that context at the trial Court as that is the Court designed to test the veracity of the evidence tendered against them.

103. The Court of Appeal in ***Meixner & Another vs Attorney General (supra)*** held that;

> ***"It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. It would be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court".***

104. Further, in ***Joram Mwenda Guantai vs the Attorney General (supra)*** the Court of Appeal stated as follows as regards the powers of the High Court to issue judicial review orders;

> ***"…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 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."***

105. In that regard, judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review also deals with the legality of the decision and a decision can be upset by an order of certiorari and on a matter of law if, on *prima facie*, it is made without jurisdiction or in consequence of an error of law. Prohibition on the other hand restrains abuse excess of power - See ***Associated Provincial Pictures Houses Ltd vs Wednesbury Corporation (supra).*** What the Applicants are asking of this Court is to embark upon an analysis and appraisal of the evidence based on Affidavits with a view to show the innocence of the Applicants. That is hardly the function of the judicial review Court and I have said why.

106. I have avoided, and for good reason, an analysis of the facts as pleaded because that would lead me to make findings which would prejudice the trial of the Applicants. But *prima facie*, it does not appear to me that the decision by the DPP to charge the Applicant was malicious or unreasonable nor do I think it was informed by any extraneous considerations. This Court in any event has no basis at this stage for finding that the charges preferred against the Applicants were improper or an abuse of the process. The instances in which a Court can declare a prosecution to be improper were well considered in ***Macharia & Another vs Attorney General (supra)*** and a prosecution is said to be improper if;

> ***"(a) It is for a purpose other than upholding the criminal law;***

(b) It is meant to bring pressure to bear upon the Applicant/Accused to settle a civil dispute;

(c) It is an abuse of the criminal process of the Court;

(d) It amounts to harassment and is contrary to public policy;

(e) It is in contravention of the Applicant's constitutional right to freedom."

I agree with the above findings and it is clear to me for that for an application of the nature of the ones before me to succeed, there is need to show how and indicate clearly the basis upon which the Court process is being abused or misused. I have already said elsewhere above that if an applicant demonstrates that the Court process is being abused and the constitutional rights of the Applicants are being violated, the Court will not hesitate in putting an halt to such proceedings - See ***Rosemary Wanja Mwangiru vs Attorney General (supra), Githunguri vs Republic (supra)*** and ***Peter George Antony D' Costa vs Attorney General (supra).*** However that must be done in the clearest of cases and the Applicants' cases is not any of those cases.

Existence of civil suits

106. I also heard the Applicants to be saying that the subject matter in the criminal case was the same as that in civil suits HCC No. ***NairobiHCC No.345 of 2013*** and also **Petition No.435 of 2013,** which were still pending, as they are all based on the same transaction. That the DPP had instituted the criminal proceedings with ulterior motive; namely, to provide himself with a defence in the aforesaid civil suits. On that point, I do not know of any law that bars the DPP from instituting a criminal case while a civil case was pending based on the same facts or sets of transactions. Indeed, **Section 93A** of the **Criminal Procedure Code** is clear that the institution of civil proceedings does not preclude the State from proceeding with the criminal process. In that regard, in ***George Joshua Okungu& Another vs The Attorney General Petition NO. 227 and 230 of 2009***, Korir J stated as follows;

> ***"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 Petitioner to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognized aim."***

Likewise, in ***Kuria & 3 Others vs Attorney General (2002) 2 KLR 69*** the High Court stated as follows on that issue;

> ***"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 and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an "abuse of process", is a "manipulation", "amounts to selective prosecution" or such other processes, or even supposing that the applicants might not get a fair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts. The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there***

is a private interest on the rights of the accused person to be protected, by whichever means. Given these bipolar considerations, it is imperative for the Court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of Court process or that there is a danger to the right to the accused person to havea fair trial… In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the change to clear their names."

I am in agreement with the learned Judges and I will adopt their reasoning.

107. I am clear in my mind therefore that there should be concrete grounds for supposing that the continued prosecution of criminal cases manifests an abuse of the judicial process, or that the public interest would be best served by staying the prosecution. In the instant case, there is no evidence of malice, unlawful actions, of excess or want of authority and no evidence of want of authority and certainly no evidence of harassment or even manipulation of the Court process so as to seriously deprecate the likelihood of the Applicants getting a fair trial.

Liability of Public Officers

108.Having said so, the next issue I must determine is the allegation made by Mr. Kerich, Mr. Chingi and Mr. Fadhili that the decision to prosecute them is based on a procurement decision and that **Section 13** of the **NHIF Act** and **Section 138** of **PPDA** protects them of any acts and omissions done in their official capacity as officers under the Act and in good faith. I also heard them to say that the contracts were executed with the full knowledge and approval of the NHIF Board of Management and they therefore cannot be liable.

109.For avoidance of doubt, **Section 13** of **NHIF Act** states that;

"Subject to Section 14, no matter or thing done by a member of the Board or any officer, employee or agent of the Board shall, if the matter or thing is done bonafide for executing the functions, powers or duties of the Board under this Act, render the member, officer, employee or agent or any person acting on their directions personally liable to any action, claim or demand whatsoever"

Section 138 of **PPDA** provides that;

"No person shall, in his personal capacity be liable in civil or criminal proceedings in respect of any act or omission done in good faith in the performance of his duties under this Act".

Article 236 of the **Constitution** provides for the protection of public officers in the following terms;

"***A public officer shall not be—***

a. ***victimised or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or***

b. ***dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law."***

110.While interpreting the provisions of **Article 236** of the **Constitution** as regards the criminal culpability of public officers, in ***Charles Okello Mwanda vs Director of Public Prosecutions (supra***) Majanja J expressed himself as follows;

"The provisions of Article 236 provide additional protection to a public officer. In my view these protections are secured by the ordinary laws concerning the discipline, promotion and demotion of public officers. For example, the Public Service Commission Regulations, 2005 provides due process rights but settling out clearly the circumstances when a public officer may be interdicted … I do not read Article 236 to provide immunity to the Petitioner from investigations where an offence under ACECA has been alleged. As the facts in this case shows, the investigations are still in the primordial stage. The Commission is bound to act fairly, that is consider all matters including giving the Petitioner an opportunity to present his evidence before it comes to any conclusion. This is part of the due process contemplated under Article 236(2). I also do not read Article 236 as entitling this Court to restrain the performance by the ACECA of its statutory mandate and substituting itself as the decision maker to determine whether indeed a case has been made out for investigations. It is for this reason that I have exercised restraint in commenting on or making any definitive finding that would otherwise prejudice the outcome of the investigation."

111. I wholly agree with the learned judge. I would only add and state that the law as I understand it is that the above provisions of the law do not protect public officers against investigation or prosecution in any way if it is disclosed that they have committed any known offence in law.

The Place of Arbitration Clause

112. Connected to the above issue is the allegation made that there is an arbitration clause and that the Respondents should pursue the arbitral clause in the contracts in resolving the dispute between the Applicants and the NHIF.

113. I have already stated that the DPP exercises his powers to prosecute independently and such powers include institutions and undertaking of criminal proceedings against any person in respect of any offence alleged to have been committed by that person. If this Court were to direct that the arbitral clause be invoked in resolving the present dispute, it would in essence be directing the DPP in performance of his duties. It would also in essence be defeating the purposes of the criminal justice system. An arbitral clause cannot be a bar to prosecution as long as it is demonstrated that the prosecution is not malicious and has legal basis and that an offence was committed.

114. In any event, such orders cannot issue because the arbitration proceedings, as I understand them, would be invoked as between the parties to the contract to resolve any issues that may arise in performance of their contractual obligation but the arbitral clause is not in any way a bar to criminal prosecution.

Discrimination

115. The Applicants also claimed that they had been singled out for prosecution despite the fact that 300 other medical service providers were rendering the same services under the same standard contract the Applicants executed. They submitted that their prosecution was therefore selective and discriminatory.

116. In that regard, **Article 27** of the **Constitution** protects the right of equality and prohibits discrimination. It provides *inter alia* as follows;

"(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms".

The Court in ***Peter K. Waweru vs Republic [2006]eKLR*** defined discrimination as follows:

> *"…**Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by…sex whereby persons of one such description are subjected to…restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description…Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex…a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured**".*

117. I agree with the above definition and under **Section 35** of **ACECA** the EACC, after its investigations, forwards its report to the DPP who independently makes his decision on whether to prosecute or not. It is not in the place of the Applicants or any other person for that matter to decide who else should be charged alongside them. The DPP has the discretion to prefer charges against any person who has committed an offence if has sufficient evidence against that person. In that regard, in ***Hon James Ondicho Gesami vs The Hon. Attorney General & 2 Others (supra)*** Mumbi Ngugi J expressed herself as follows:

> ***"The Petitioner also argues that there has been failure of legal process and discrimination against him as he has been singled out for prosecution yet under Section 23(1) of the CDF Act, the member of Parliament is only one member and should not be singled out for criminal prosecution. He also argues that such failure of legal process is manifested by his prosecution for the same offence that he is a witness to in Nyamira Criminal Case No.190 of 2011 Republic v Gilbert Ateyi Onsomu. With respect, I do not find anything discriminatory in the preferment of criminal charges against any party in respect of whom he finds sufficient evidence to prefer charges. I do not know of anything in the law that would require that all members of the CDF Committee for West Mugirango Constituency be prosecuted for alleged misappropriation of funds unless there was evidence against them."***

I agree with the learned Judge - See also ***Joshua Kulei & 5 Others vs Attorney General and 4 Others Petition No. 66 of 2012.***

118. I am also unable to make any finding on the discrimination allegation made because no material has been placed before this Court to support that allegation. I do not for instance have the names of the other 300 medical providers who held the same contracts as the Applicants and have not been prosecuted. I also have no material evidence over any other employee of NHIF or Government agency for that matter who were involved and or facilitated the transactions that led to issuance of the contracts the subject of the prosecution.

119. Accordingly, I find the allegation for selective prosecution as unmeritorious.

<u>Conclusion</u>

120. The Applicants in this case have alleged that the institution of the criminal proceedings was done in bad faith, for ulterior motives and in abuse of the process. From the evidence before me, they have however failed to demonstrate that the criminal cases against them were instituted for other purposes other than the genuine enforcement of the law.

121. I have therefore already said enough to show why the Applications before me must fail. It must be remembered that the function of any judicial system is to uphold the rule of law, and the legitimate purposes of criminal proceedings is for the Court to hear and determine finally whether an accused has engaged in conduct which amounts to an offence and on that account, is deserving of punishment. It must not be forgotten, and on this one I agree with Mr. Kilukumi, that the effect of a criminal prosecution on an accused person is adverse but so is its purpose in the society.

There is a public interest underlying every criminal prosecution and I am in agreement with Mr. Murei that such prosecution must be zealously pursued when it involves financial impropriety and scandals of large sums of money. There is therefore the need to nail culprits and recover the assets or proceeds of illicit crimes - See ***Kuria and 3Others vs Attorney General (supra).***

122. In addition, the criminal justice system has many players and actors. For instance, the EACC and the Police have a duty to investigate economic crimes while the DPP has a duty to prosecute suspects of such crimes based on a reasonable basis and the rest is left to the trial Court. Of course, during trial, an accused person has his day in Court when he can cross-examine the witnesses and also defend himself. The trial Court would therefore be the best forum and judge of all the allegations which the Applicants have raised in the Applications before me. They are however innocent until proved guilty by that Court and I reiterate that old maxim of law which is now firmly entrenched in **Article 50(2)(a)**of our **Constitution.**

123. I should also add that I am aware of the Ruling delivered on 25th June 2015 by Kamau J. in **H.C. Civil Case No.345 of 2013** where the learned Judge declined to stay the hearing of **ACC Case No.12 of 2013** pending the hearing of the case before her. In doing so, she stated that ***"It is time that this matter (HCCC No.345 of 2013) proceeded to trial and be determined on its merits without fearing that its outcome herein would have any relevance or impact on the criminal proceedings and vice-versa".***

124. I agree with the learned Judge and I have similarly taken the view that the criminal trials should continue expeditiously and be determined on their merits.

125. Finally, I would wish to express my gratitude to all Counsel for the well-researched submissions which were helpful to the Court. If I have not expressly referred to any legal authority cited by them it is not out of respect or lack of appreciation for their industry.

Disposition

126. For the reasons given above, **J.R. Misc. Applications Nos.362, 375** and **405 of 2013**are hereby all dismissed.

127. There shall be no order as to costs as all the parties are still engaged in the proceedings before the Subordinate Court and an order for costs would only open new areas of unnecessary acrimony.

128. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JULY, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Miron – Court clerk

Miss Kirui holding brief for Mr. Arwa and Mr. Makori for Applicants

Mr. Kilukumi for Applicants

Mr. Bosek for 2nd Interested Parties

Mr. Ndege for 1st Respondent

Mr. Muru for 1st Interested Party

Mr. Ochwa holding brief for Mr. Munge for 1st Applicant

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE

10/7/2015