



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL PETITION NO.436 OF 2014**

**IN THE MATTER OF ARTICLES 22, 23, 157, 165, 258 AND 259 OF THE CONSTITUTION OF  
KENYA**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND  
FREEDOMS**

**AND**

**IN THE MATTER OF THE HIGH COURT VACATION RULES (CAP 8)**

**RONALD LEPOSO MUSENGI.....PETITIONER/APPLICANT**

**-VERSUS-**

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

**INSPECTOR GENERAL OF THE NATIONAL**

**POLICE SERVICE.....2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR, CRIMINAL**

**INVESTIGATIONS DEPARTMENT.....3<sup>RD</sup> RESPONDENT**

**THE CHIEF MAGISTRATE'S COURT (MI.....4<sup>TH</sup> RESPONDENT**

**JUDGEMENT**

**Petition**

1. In this Petition, the Petitioner, **Ronald Leposo Musengi**, commenced these proceedings against the Respondent claiming that the 1<sup>st</sup> Respondent unlawfully, maliciously and without any basis recommended the Petitioner for prosecution and indeed prepared a charge sheet, registered and caused the Summons to be issued by the 4<sup>th</sup> Respondent in Milimani Commercial **Criminal Case No. 19 of 2014** to face stealing contrary to Section 268 as read with Section 275 of the **Penal Code**; conspiracy to commit a felony Contrary to Section 393 of the **Penal Code**; and obtaining

- by false pretences Contrary to Section 313 of the *Penal Code*.
2. According to the Petitioner, the said charges are malicious as no proper investigations were carried out to establish the truth in it; neither was the Petitioner given an opportunity to be heard but were instituted for a malicious and/or ulterior purpose and are calculated to embarrass, humiliate, vex and coerce him. To him, the decision to charge him is a clear instance of abuse of court process, noting that all previous investigations done had not implicated the Petitioner in any wrongdoing and that his name has never appeared in any of the reports done and investigations relating to **Criminal Case No. 19 of 2014**. Indeed there have been constant mention of two other names which have now suddenly disappeared from the list and instead the Petitioner's name has been put in place of the two and he is being used as a red herring and diverting attention from the real culprits.
  3. It was the Petitioner's case that the 1<sup>st</sup> Respondent maliciously, and without merit selectively chose to prefer criminal charges against him when the 3<sup>rd</sup> Respondent had previously and more specifically on two instances based on their own investigation excluded the Petitioner from any criminal charge or culpability regarding the whole saga surrounding the sale of Malili Ranch to the Government.
  4. He reiterated that his Constitutional right of free movement is about to be curtailed by the actions of the 1<sup>st</sup> Respondent who has disregarded the previous investigations reports in possession by themselves and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
  5. According to the petitioner, the case pending before the subordinate's court is based on the patently false, concocted and/or misleading evidence and that he faces very real and imminent risk of having his personal liberty taken away on the basis of illegal proceedings hence the invocation of the jurisdiction of this Court conferred by **Article 23 & 165** of the Constitution.
  6. Based on several provisions of the Constitution, the Petitioner averred that he was in danger of being denied a fair hearing in breach of this fundamental right as enshrined in the Constitution hence his fundamental rights and freedom under **Article 27, 29 & 50** of the Constitution have been infringed upon and he faces greater risk of more serious violation of the same unless, at the very minimum, the said prosecution is permanently prohibited.
  7. In the premises the petitioner sought the following orders:
    - a. **A declaration that the initiation, maintenance and prosecution of Milimani Magistrate's Court Criminal Case No. 19 of 2014 against the Petitioner herein is an abuse of the Criminal Justice process and contravention of the Petitioner's Constitutional rights to freedom and security of the person, right to freedom of movement and right to secure protection of the law.**
    - b. **A declaration that the institution, maintenance and prosecution of the Milimani Magistrate's Court Criminal Case No. 19 of 2014 herein is oppressive, malicious and an abuse of the court process.**
    - c. **An order of prohibiting continuance of Criminal Case No. 19 of 2014 at Milimani Magistrates Court against the Petitioners herein.**
    - d. **A declaration that the Petitioners are entitled to damages as redress in respect of each of the above rights that were and continues to be breached by the Respondents.**
    - e. **An order consequential to the above declarations quantifying the amount of damages in respect of each and every declarations and order granted.**
    - f. **That the costs of this suit Petition be borne by the Respondents.**
    - g. **Any other/further relief that this Honourable Court may deem fit to grant.**
  8. In his supporting affidavit, the Petitioner averred that sometimes in September 2008, he together with his business partners **Isaac Kalua** and **Tony Njuguna** formed and incorporated a Company known as **Gateway Logistics Limited** (hereinafter referred to as "the Company") where he

nominated **Grace Kina Njururi** as a director. At that time he was an employee of Kenya Commercial Bank where he worked until 2011 and was therefore not in charge of or engaged in the day-to-day running of the affairs of the Company even though he was properly briefed by the Directors. He added that on 21<sup>st</sup> January 2009, he passed by the Company's offices at KICC, and was informed of a tender in one of the local dailies carried by the Ministry of Information and Communication asking for a tender of 3000 acres within a radius of 65km from Jomo Kenyatta International Airport to set up an **ICT (Information, Communication and Technology) Centre and** based on that information, the company sent emissaries in the names of **Isaac Kalua, Tony Njuguna** and **Dominic Mwamisi** to Kajiado and Machakos and all other places within the 65km radius to source for the land. **According to information** disclosed to the Petitioner by the said **Isaac Kalua**, there was a meeting between the Directors of Malili Ranch Limited and their **Advocate Eric Mutua** who was introduced to them by one **Mama Mumo** on behalf of Malili Ranch and the meeting was held at **Eric Mutua's** office at View Park Towers in Nairobi City Centre in which the following issues were agreed upon:-

- a. That the Directors of Malili Ranch unanimously nominated Gateway Logistics Limited as the agents at a commission fee of **Kenya Shillings Twenty one Thousand (Kshs. 21,000/-)** per acre purchased.
  - b. That **Eric Mutua** was nominated to act for both Malili Ranch and Gateway Logistics Limited as the lawyer in the transaction.
  - c. That Gateway Logistics Limited were instructed to collect the tendered documents from the Ministry of Information and Communication and **Eric Mutua** was to write an offer letter which was taken to the tendering committee by **Dominic Mwamisi** on behalf of Malili Ranch.
9. On 24<sup>th</sup> February, 2009 the Petitioner was informed by the said **Isaac Kalua** that they had been summoned to **Eric Mutua's** office to meet with the Directors and formalize an agency agreement dated 24<sup>th</sup> February, 2009 as agreed which agreement was by the said **Isaac Kalua** and **Tony Njuguna** on behalf of Gateway Logistics Limited. However, based on the Minutes of the Meeting held on 14<sup>th</sup> December, 2009 that the Directors reneged on the earlier agreement and only sanctioned Kenya Shillings Forty Million (Kshs. 40,000,000/-) to be paid as agency fee. However, in his view, the terms agreed upon were logical and legal since Gateway Logistics Limited legally executed a contract enforceable in law and nothing was done below the table as the terms were clear. He however disclosed that based on the information from **Tony Njuguna** on 2<sup>nd</sup> July, 2009, a cheque of Kenya Shillings One Hundred and Eleven Million (Kshs. 111, 000,000/-) was paid to Gateway Logistics Limited by **Eric Mutua Advocates** paying a commission fee as agreed upon which cheque was, however, stopped in total disregard to the agreement. The petitioner deposed that on 9<sup>th</sup> July, 2009 Malili Ranch through their Advocate **Eric Mutua** paid Kenya Shillings Forty Million (Kshs. 40,000,000/-) being full and final agency fee despite the earlier agreement. Being dissatisfied with the conduct of the Directors of Malili Ranch, Gateway Logistics Limited instructed their Lawyers, **Ochieng' Onyango Kibet and Ohaga** to demand for the balance which demand letter was sent and response received thereabout. However, to date there has never been a refund of the amount.
10. Nevertheless, sometime in early 2011 or thereabout the petitioner was summoned by the CID officers to present himself and record a statement over Malili Ranch sale pursuant to which he voluntarily appeared before CID officers where he was intensively investigated and interrogated by one **Gideon Kimilu** Deputy Director of Investigations as he then was among other officers and later made a statement and was told to go home after giving his true and correct version of how Gateway Logistics Limited came into being and his connection with the company. He however, explained to the officers that the mandate of Gateway Logistics Limited was purely to source for the buyers and nothing else.
11. It was deposed by the petitioner that he was neither contacted again by the CID officers neither did he know what transpired. However, he later learnt that upon completion of investigations, the file was placed before the Director of Public Prosecutions who directed the Police to close the inquiry and take no further action.
12. The Petitioner averred that it was a matter of public knowledge that **Konza City** was

- commissioned in May 2013 or thereabout where the Government high ranking officials had been invited to launch the occasion. However, there was hue and cry by the members of the public where the shareholders of Malili Ranch had raised a red flag against the Directors thereof Malili for having short-changed them in the sale of the Ranch. Surprisingly, **Isaac Kalua, Tony Njuguna** and the Petitioner were summoned by the Director of Criminal Investigations Department and appeared before two officers, a gentleman by the name **Mr. Kiragu** and a lady by the name **Fatuma** where he was again interrogated and instructed to make a further statement under their supervision. Once again he was thereafter not summoned again to the **CID** headquarters or to any other police station until sometimes towards the end of May 2014 or thereabout when he saw some names in one of the print media, namely *the Star*, recommending some people for prosecution and though his name was not mentioned. He could however recall the names of **Eric Mutua** and **Kamotho Waiganjo**. However, on 28<sup>th</sup> August, 2014, while going through the Newspapers, he was very surprised to learn that his name had been included in the list. He also noted that the same list had omitted **Eric Mutua** and **Kamotho Waiganjo** who were in the previous list of May, 2014. Similarly, his business partners were not mentioned yet they were running the activities of Gateway Logistics Limited and the executed documents.
13. According to the Petitioner, he realized that after Konza City was officially launched and complaints lodged against the Directors of Malili Ranch, the Director of Public Prosecutions nominated and gazette one Senior Counsel **Paul Kibugi Muite** as the special Prosecutor in the matter, to study the CID report and make recommendations on those who were possibly culpable. In his evidence, he was never summoned to appear before **Senior Counsel Paul Muite** to be interrogated or give a statement. However, a charge was registered in court on 29<sup>th</sup> August, 2014 where he was named as an accused person Number 6 appearing counts No. 4, 5, and 6 jointly with others.
  14. To the Petitioner, the intended charge is vexatious and without merit and simply calculated to embarrass and demean his character and based on information from his legal counsel he believed that:
    - a. The charges are malicious, vexatious and were established without any truth in it.
    - b. There is an abuse of court process calculated to injure his character and reputation.
    - c. That the charge and subsequent Criminal Proceedings is based on patently false, baseless and misleading evidence.
    - d. That the Petition raises very serious and weighty constitutional matters which touch on his Fundamental Rights and Freedoms.
    - e. That unless the orders sought are granted there is a possibility that the criminal trial shall proceed rendering the petition nugatory.
  15. It was contended by the Petitioner that he was not involved in the day to day management of Gateway Logistics Limited nor did he meet nor have met with the Directors of Malili Ranch, their agents or servants.
  16. He disclosed that the decision to prefer a criminal charge against him flies against the report made by the CID officers and even the final finding by the DPP where he was exonerated and even a report made that the inquiry file be closed. In his evidence, he has never stolen, conspired to steal or even made a false pretence to receive any money either from Malili Ranch Company Limited, **Eric Mutua** Advocate or any other person.
  17. In a further affidavit, the Petitioner while reiterating the foregoing added that whereas the decisions of the Company, Gateway Logistics, were collegiate decisions made by the Board, the prosecution had maliciously and in abuse of the powers granted to it by the Constitution singled him out for purposes of facing criminal charges to the exclusion of the Company and other directors of the Company; yet the funds in question were neither paid to him as an individual, nor were they deposited in his personal account, but were deposited in the account of the Gateway as per the decision of the Board of Malili Ranch Limited, thus there is no legal basis for a charge against him as an individual for obtaining the sum of Kshs. 40,000,000 as per the charge sheet.
  18. He denied that the statement he made with the police on 15<sup>th</sup> May, 2013 he knew that the sale of the Ranch by Malili Ranch Limited was unlawful, irregular and he was part to a conspiracy.
  19. Based on his Counsel's advice, the Petition averred that having made the representation and

- promise not to pursue the prosecution, the 1<sup>st</sup> Respondent had an obligation to notify the Petitioner and give reasons as to the change of the decision or any other concerned party in the event of any change in its decision with regard to the matter at hand. The decision to prosecute the Petitioner alone, having made an earlier decision to close the investigations file, was therefore in violation of the Petitioner's right to a fair administrative action. Further, having exonerated other Directors of the Company and the company from any criminal liability, it is improper to single out one director of a Company and charge him with offences yet exclude others who equally made the decision, which action is an abuse of the powers vested in the 1<sup>st</sup> Respondent.
20. In his view, the transaction between Malili Ranch Limited and Gateway Logistics Limited is a contractual one, whose validity cannot be voided through a criminal prosecution of a director of the Company, who is not even party to the contract.
  21. While conceding that Gateway Logistics Limited was set up in the year 2008 by **Tony Njuguna, Isaac Kalua** and himself for the purpose of undertaking general business, it was averred that due to the fact that they were all engaged in active employment, they each nominated a Director and Shareholder of their choice, for the purpose of running the affairs of the Company and that the persons nominated as Directors and Shareholders of the Company were; **Grace Kina Njururi**, nominated by himself, **Dominic Mwamisi** nominated by **Isaac Kalua** and **Joseph Mwangi** was nominated by **Tony Njuguna**. At all material times, it was averred that the company was run and managed by the Directors who had been duly and appointed under the law. He therefore deposed that the decision of the 1<sup>st</sup> Respondent to single him out for prosecution to the exclusion of all other persons, especially the active players in the transaction is not only in violation of the powers granted to the 1<sup>st</sup> Respondent, but also a violation of the rights and freedoms set out in the Constitution, which empowers the court to intervene.
  22. According to him, based on the documents availed to the prosecution the sale process was approved by the office of the Attorney General and payment authorised to be made hence the process cannot be illegal as alleged in the Replying Affidavit.
  23. It was submitted on behalf of the petitioner that there has never been any determination and declaration by a court of law, as regard the contract for the purchase of land by the Ministry, that the sale is unlawful and irregular as alleged. Furthermore, if there is an allegation that the sale is unlawful and irregular, the sale transaction cannot be annulled through the criminal process lodged by the Respondent against the Petitioner herein. It is therefore inconceivable for the Respondents' on one hand to assert that the transaction and sale of the land was unlawful and illegal yet the beneficiary to the transaction, the Government, has taken possession and enjoying the full rights granted to it by the law. Based on **Joram Mwenda Guantai vs The Chief Magistrate Nairobi**, Civil Appeal No. 228 of 2003, it was submitted that the transaction cannot be unlawful and/or illegal without a declaration of the by a court of law and the criminal process cannot be used for purposes of cancelling an otherwise valid transaction.
  24. On the issue of the place of agents in the transaction, it was submitted that the statement is a bare assertion and it is not supported by any provision of the law that prohibits agency relationship in Tenders and that if at all such a provision of law exists, nothing would have been easier than to charge the Gateway and Malili Ranch with the violation of the specific provision of the law related to tenders and appointment of agents. However, the charges, which have been brought against the Petitioner in the criminal case, are not in any way related to violation of any procurement law as alleged in the Replying Affidavit. In any event, the allegation has no solid foundation in law as the law does not specify contractual agreements that should and should not have agents and prohibit certain contractual obligations from agency relationships. An agency relationship is at the heart of the freedom of the party to contract upon such terms as parties to any contract may deem fit and just to do so, provided that the covenants thereof do not violate the law.
  25. It was submitted that since the land sold by Malili Ranch to the Government is owned by the Government and the project to be constructed on the site has been commenced and it is ongoing, it goes without saying that the allegation that the sale was unlawful and irregular has no foundation whatsoever based on the fact the Government has title to the property and it is executing the functions intended to carry out on the land. The Petitioner submitted that the transaction between the Malili Ranch and Gateway was undertaken pursuant to an agreement signed between the two parties and relied on section 23 of the **Penal Code**, Cap 63 of the Laws of Kenya.

26. In his view since the transaction between Malili Ranch and Gateway was through an agreement executed between the parties, if at all the agreement was unlawful or, executed to perpetuate a criminal activity then the offence was committed by the two companies Company hence the persons liable to be charged are the persons charged with, concerned or acting in, the control or management of the affairs or activities of the Company who according to the Petitioner were **Isaac Kalua, Tony Njuguna and Dominic Mwamisi**. Despite the above position, the Respondents' have only singled out the Petitioner for prosecution, even though he had a very limited role if any in the agency agreement taking into account the fact there were full time Directors of the Company, who not only engaged in the process of finding suitable land that could be meet the specification that were needed by the Ministry, but also locate an entity that had the land ready to sale. The Company even went further ahead to nominate the representative of Gateway, who was to deliver Tender Documents for and on behalf of Malili Ranch. In support of this position the Petitioner relied on **Joram Mwenda Guantai**, (*supra*) in which the Court of Appeal held:

**“Moreover, it has not been suggested that the contract or the tender award was procured or caused by the undue influence of the appellant or that he was in a position to dominate the will of the Hospital. It is correct that in awarding of the tender the Board and the Hospital are legal persons and since in every corporation there are certain persons who control and direct its activities, and those persons, when acting in the corporation’s business, are considered to be corporation for this purpose. Their acts and states of mind are the corporation’s acts and states of mind and it its held liable, not for acts of its servants, but what are deemed to be its own acts. See Gardner v Akeroyd [1952] 2 QB 743 and The Criminal Liability of Corporations [1946], 62 L.Q.R 345. In this regard, therefore, it there was any breach of the Regulations the blame should have been directed towards the Board and the Hospital and not the appellant, an obscure entity within these two bodies.”**

27. It was submitted that in the instant case, the actions which are alleged to have been unlawful are acts of a corporation registered under the **Companies Act** and therefore, the actions of its directors and/or persons who direct and control its activities are the actions of that corporation for which it can be held liable. However, the Respondents have only arbitrarily singled out the Petitioner for prosecution and excluded the persons, who at all material times, directed and controlled the affairs of the Company with regard to the transaction in question. If at all, the alleged contractual activities between were illegal and criminal in nature, the Company as well the individual directors, who exercised control and directed the activities of the Company, would all be liable for any such alleged criminal activities under Section 23 of the **Penal Code** thus liable to be charged jointly.

28. To the Petitioner, the exclusion of the all other persons to be charged including the Company, Gateway, without any reasonable explanation for the action cannot be deemed to be in the public interest, in the interests of administration of justice and avoiding abuse of legal process as stipulated under Article 157 of the Constitution.

29. Contrary to Article 27 of the Constitution, it was contended that the action of the Respondents singling him out for prosecution and excluding other persons, who were actively involved in the transaction for the sale of land to the Government as agents, and excluding the Company all together from any liability is discriminatory and the selective application of the law with regard to the Petitioner, to the exclusion of others is an express violation of the powers of the 1<sup>st</sup> Respondent. The Petitioner relied on **Njuguna S. Ndung’u vs. Ethics & Anti-Corruption Commission (EACC) & 3 others** [2014] eKLR, in which this Court expressed itself as follows:

**“The starting point is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions or the authority charged with the prosecution of criminal offences to investigate and undertake prosecution in the exercise of the discretion conferred upon that office and the mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it is agreed, is not without more a ground for halting those proceedings. That a petitioner has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is always open to the Petitioner in those proceedings. However, if the**

**Petitioner demonstrates that the intended or ongoing criminal proceedings constitute an abuse of process and are being carried out in breach of or threatened breach of the Petitioner's Constitutional rights, the Court will not hesitate in putting a halt to such proceedings."**

30. To the Petitioner, equality of all people before the law as provided by the Constitution in Article 27 presupposes that all persons will be treated equally in the eyes of the law and the protection that each person is afforded by the law shall be equal and the benefits of the law shall equally be enjoyed by all without any distinction whatsoever. Any limitation to such a right must be within the parameters contemplated by Article 24; that is by law and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In his view therefore the criminal liability of a corporation as prescribed by section 23 of the *Penal Code*, must equally apply to all Directors of a Corporation and the Corporation as envisaged by the law and vice versa and any differential treatment not sanctioned by the law that is not reasonable and justifiable cannot be allowed to stand as it is a violation of the fundamental rights. To the extent that the Petitioner has been arbitrarily and discriminatorily selected for prosecution without any justification is an abuse of legal process and a violation of the powers granted to the 1<sup>st</sup> Respondent. Furthermore; the interest of administration of justice, particularly criminal justice, is to ensure that society is protected and those culpable of violations of the law are punished in accordance with the law to safeguard societal interests. To this extent, where the persons suspected of an offence are available and within the reach of the court, then they ought to be arraigned before a court of law by the responsible authority for criminal sanction except to such exemption and agreements as may be permissible by the law. It was submitted that the public interest in the execution of the duties of the 1<sup>st</sup> Respondent office require that all suspects in any criminal enterprise face the full brunt of the law after investigations have been conducted and there exists evidence of commission of an offence. The action of selecting one person out of many likely accused person, without any reasonable explanations as to why as envisaged by the law is a violation of the public interest element.
31. The Petitioner in support of his submissions relied **Joram Mwenda Guantai vs. The Chief Magistrate Court, [2007] 2 EA 170, Meixner & Another vs. Attorney General [2005] 2 KLR 189, Kuria & 3 others vs. Attorney General [2002] 2 KLR 69**, and added that the interest of justice and invocation of court process would demand that all persons suspected of having been involved in the commission of the offence should be arraigned before a court of law to face criminal trial. However, the exclusion of the very persons that the law states and demands that they are culpable is not in the public interest and the court is bound to intervene to stop the process.
32. Further reliance was placed on **Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & another [2002] 2 KLR 703**, and **R vs. Attorney General Ex Parte Kipngeno arap Ngeny High Court Civil Application No. 406 of 2001** and **George Joshua Okungu & Another vs. The Chief Magistrate's Court Anti-Corruption Court at Nairobi & Another [2014] eKLR**.
33. To the Petitioner there is no reason given by the 1<sup>st</sup> Respondent as to why the decision made on 24<sup>th</sup> January, 2011 was reversed having made the representation to Gateway and its Directors that there existed an agency agreement and there is no proof that the payment from Malili Ranch was obtained fraudulently. The Petitioner therefore had a legitimate expectation that like other directors of Gateway, he would not be charged with any offence arising from the agreement with Malili Ranch. It was submitted that in proceedings for [judicial review](#), legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise. An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is *within its power to fulfil*. It was contended that whereas the 1<sup>st</sup> Respondent may review the decision he has made, as alleged, having made a decision in writing with reasons thereof, he ought to have notified the Petitioner and the Directors of Gateway of the fact that he was reviewing his decision and the reasons thereof. It was therefore contended that the action of the Respondent violated his right to legitimate expectation and the abrupt and

arbitrary review of the decision dated 24<sup>th</sup> January, 2011 without any reason is in violation of his fundamental rights empowering the court to intervene and the Petitioner's prosecution would be an abuse of the process court, oppressive and malicious and it is not in the public interest hence ought to be stopped. Further reliance was placed by the Petition on **Musyoki Kimanathi vs. Inspector General of Police & 2 others** [2014] eKLR, where it was held by Justice Majanja thus:

**“In light of the mandate conferred upon the DPP in Article 147 of the Constitution, the High Court therefore ought not interfere with the above mandate unless cogent reasons are given thus; that the DPP has acted without due regard to public interest, against the interest of the administration of justice and has not taken account of the need to prevent and avoid abuse of court process. Although the DPP has the discretion to determine which complaint should lead to a criminal prosecution, the High Court may intervene where that discretion has been abused or where the effect of the proceedings results in the abuse of the court process.”**

34. In the Petitioner's view, just like in in **Githunguri vs. Republic [1986] 1** where the Court emphasized that the High Court has inherent power to stop a prosecution that amounts to an abuse of the court process, is oppressive and vexatious, this Court ought to allow the prayers in the Petition and make such orders as it may under Article 23 of the Constitution of Kenya.

### **Respondents' Case**

35. On the part of the Respondents, it was disclosed that Inquiry File leading to the present charges facing the Petitioner was opened following allegations by several shareholders of Malili Ranch which were made between 2009 and 2014 to various Government Agencies including the Respondents to the effect that the amalgamation, sale of their individual parcels of land to the Government of Kenya by the Directors of Malili Ranch was done without their authority and or consent. These complaints, it was deposed were lodged vide statements made between the year 2013 and August 2014 giving a detailed background and history of Malili Ranch Ltd and stating clearly the circumstances under which they all came to know about the sale of their land. On his part, it was averred that the Petitioner recorded a statement with the Police on the 15<sup>th</sup> day of May 2013 on the role he played in the transaction, from which it was clear that the Petitioner knew the sale was unlawful, irregular and was party to the conspiracy. According to the Respondents, they intend during the trial to adduce evidence to show that the Petitioner unlawfully received Kshs. 40,000,000/= (Forty Million Shillings) by falsely pretending that his Company namely Gateway Logistic acted as a sales agent between Malili Ranch Ltd and Government of Kenya, a fact which the Petitioner knew to be false as the purchase and sale of the property was by way of a tender advertised by the Government and in a Tender there is no place for agents.

36. It was contended that the evidence on record clearly shows from the complaints raised by the Complainants who owned plots within the 5,000 acres that was sold to the Government of Kenya that the sale was unlawful, irregular and fraudulently done since at the time of the sale the land in question did not belong to the Company but to the individual owners of the 7.8 acres parcels each of who should have been paid, a fact which the Petitioner and the Directors knew. It was added that the evidence on the Police File clearly proves that resolutions provided and made by the Directors of Malili Ranch and the fact of Petitioner being paid Ksh. 40,000,000/=, a sum which the Petitioner in paragraph 16 of his affidavit in support agrees that he did receive as a purported 'agency' fee and which the Prosecution shall prove that he was not entitled to, were all flawed and illegal and therefore of no legal consequence.

37. It was deposed that upon analysis of the evidence on record the 1<sup>st</sup> Respondent recommended that the Petitioner be charged with offences that are known to law as reflected in the charge sheet and that this decision was informed by the sufficiency of evidence on record and the public interest. To the respondents, the 1<sup>st</sup> Respondent has independently reviewed and analysed the evidence contained in the investigations file including the witness statements, documentary exhibits and statements of the petitioner as required by law and it is on the basis of the said review and analysis that the DPP has given directions to prosecute the petitioner.

38. According to the respondents, upon opening of inquiry file *vide* CCIO Nairobi Area Inquiry File

No. 20/2013 pursuant to complaints by various shareholders of Malili Ranch Ltd seeking for investigations to be carried out in respect to the sale of the 5,000 (Five Thousand) acres it was revealed that:

- a. The transaction was not above board as it was shrouded by fraud and due diligence was not exercised when the entire process was undertaken;
- b. The Directors of Malili Ranch offered the land for sale without consent of the shareholders and evidence shall be adduced at trial to show that they were and the Petitioner were key beneficiaries of the proceeds of sale that arose from their fraudulent acts;
- c. Each shareholder's portion measured 7.8 acres and each was therefore entitled to Kshs. 1,560,000/= (one million five hundred and sixty thousand shillings) however some of the shareholders received 1,400,000 (one million four hundred thousand shillings) and others received 1,100,000 (one million one hundred thousand shillings), the difference being the money stolen amounting to Kshs. 179,134,070/= (one hundred and seventy nine million one hundred and thirty four thousands and seventy shillings).

39. According to the Respondents, the evidence to be adduced at trial, shall prove that the Petitioners fraudulently benefited financially from the transaction. It was added that the file in respect to the INQ File No. 20/2013 was then forwarded by the Nairobi County Criminal Investigations Officer to the Directorate of Criminal Investigations on the 13<sup>th</sup> day of March 2014 which forwarded the same to the Director of Public Prosecutions on the 22<sup>nd</sup> day of April 2014 for purposes of perusal and directions. Further investigations were carried out by the 3<sup>rd</sup> Respondent and that **Paul Kibugi Muite**, S.C was then required to review the above files and make the necessary recommendations and on the 26<sup>th</sup> day of August 2014 **Paul Kibugi Muite**, S.C wrote a letter to the 1<sup>st</sup> Respondent with recommendations in respect to the above file. To the Respondents, the 1<sup>st</sup> Respondent in carrying out review of the Investigations file, considered all the evidence on record before coming to the conclusion it made in regard to charging the petitioner and the other accused persons and pursuant to Section 85(2) of the *Criminal Procedure Code*, the 1<sup>st</sup> Respondent appointed **Paul Kibugi Muite**, S.C to be Public Prosecutor for the purposes of criminal cases and all related legal proceedings arising from or connected to the above subject matter.

40. According to the Respondents, section 5(4)(e) of the *Office of the Director of Public Prosecution Act* provides that the Director of Public Prosecution shall review a decision to prosecute, or not to prosecute, any criminal offence while under Article 157(6) of the Constitution of Kenya 2010, the Director of Public Prosecutions exercises the state powers and functions of Prosecution including the institution, undertaking, taking over, continuance and or termination of criminal proceedings amongst other functions and duties. It was added that in the discharge of its duties and functions, the Respondent is required to respect, observe and uphold the following Constitutional provisions, inter alia:

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

41. In the Respondents' view:

- a. Under **Article 157(6)** of the Constitution of Kenya 2010, the Director of Public Prosecutions

- exercises State powers of prosecution and in that capacity, may institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed;
- b. The petitioner has not demonstrated that in making the decision to prefer criminal charges against him, the Respondents have acted without or in excess of the powers conferred upon them by the law or have infringed, violated, contravened or in any other manner failed to comply with or respect and observe the foregoing provisions of the Constitution of Kenya 2010 or any other provision thereof.
  - c. The allegation by the petitioner that the intended charges are intended to serve ulterior motives is without merit, evidentiary or legal reason or backing.
  - d. The petitioner's averment that the Respondents are bent on harassing and embarrassing him for no apparent reason is misconceived, unfounded, unmeritorious and baseless;
42. Their view was that the correctness of the facts or evidence gathered by the Respondents can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of evidence gathered in support of the charges. However, the Petitioner has failed to demonstrate that the 1<sup>st</sup> Respondent has not acted independently or has acted capriciously, in bad faith or has abused the legal process in a manner to trigger the High Court's intervention and has not demonstrated that the 1<sup>st</sup> Respondent has exercised his powers contrary to the Constitution as provided under **Article 157(11)** and has not shown whether the 2<sup>nd</sup>, 3<sup>rd</sup> Respondents have violated any provisions of the law and the Constitution. To them, the Constitution, the **Criminal Procedure Code** and the **Evidence Act** provide sufficient safeguards to ensure that the petitioner gets a fair trial.

### **Determination**

43. I have considered the petition, the affidavits both in support of and in opposition to the petition, the submissions for and against the grant of the orders sought and the authorities cited on behalf of the parties thereto.
44. It is, in my respectful view, important to understand the principles which guide the grant of the orders in the nature sought herein before applying the same to the circumstances of this case. Several decisions have been handed down which in my view correctly set out the law relating to circumstances in which the Court would be entitled to prohibit, bring to a halt or quash criminal proceedings. It is however always important to remember that in these types of proceedings the Court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings. In these matters the High Court does not transform itself into a trial court and is not permitted to delve into the merits or otherwise of the criminal process as that would amount to unnecessarily straying into the arena exclusively reserved for the criminal or trial Court. This Court in determining the constitutional issues raised therefore ought not to usurp the Constitutional and statutory mandate of the Respondents to investigate and undertake prosecution in the exercise of the discretion conferred upon them.
45. As was held by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**:

**“The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision...”**

46. It was well put by **Professor Wade** in a passage in his treatise on **Administrative Law**, 5th Edition at page 362 and approved by in the case of the **Boundary Commission [1983] 2 WLR 458, 475**:

**“The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the**

**bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended.”**

47. However, according to *Judicial Review Handbook*, 6<sup>th</sup> Edition by **Michael Fordham** at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority or power.
48. Under the current Constitution, this Court is empowered to invoke its judicial review jurisdiction in the proceedings of this nature in order to grant appropriate orders including the orders sought herein. In other words judicial review jurisdiction has now been fused with the remedies under the Constitution and this is clearly discernible from the remedies crafted under section 11 of the *Fair Administrative Action, Act, 2015*. As was held by the South African Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa & Another vs. Minister of Health Case CCT 31/99* that:

**“The common law supplements the provisions of the written Constitution but derives its force from it. It must be developed to fulfil the purposes of the Constitution and the legal order that it proclaims — thus, the command that law be developed and interpreted by the courts to promote the “spirit, purport and objects of the Bill of Rights.” This ensures that the common law will evolve within the framework of the Constitution consistently with the basic norms of the legal order that it establishes. There is, however, only one system of law and within that system the Constitution is the supreme law with which all other law must comply. What would have been ultra vires under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality. In this respect, at least, constitutional law and common law are intertwined and there can be no difference between them. The same is true of constitutional law and common law in respect of the validity of administrative decisions within the purview of section 24 of the interim Constitution. What is “lawful administrative action,” “procedurally fair administrative action” and administrative action “justifiable in relation to the reasons given for it,” cannot mean one thing under the Constitution, and another thing under the common law...Although the common law remains relevant to this process, judicial review of the exercise of public power is a constitutional matter that takes place under the Constitution and in accordance with its provisions. Section 167(3)(c) of the Constitution provides that the Constitutional Court “makes the final decision whether a matter is a constitutional matter”. This Court therefore has the power to protect its own jurisdiction, and is under a constitutional duty to do so. One of its duties is to determine finally whether public power has been exercised lawfully. It would be failing in its duty if it were to hold that an issue concerning the validity of the exercise of public power is beyond its jurisdiction.”**

49. In my view since the Constitution is incremental in its language, what the current constitutional dispensation requires is that the grounds in judicial review applications be developed and the grounds for granting relief under the Constitution and the common law be fused, intertwined and developed so as to meet the changing needs of our society so as to achieve fairness and secure human dignity.
50. Therefore, the mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings. That a petitioner has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is open to the petitioner in those proceedings. However, if the petitioner demonstrates that the criminal proceedings that the police or the Director of Public Prosecutions intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.

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

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

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

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

53. In Republic vs. Chief Magistrate’s Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703, it was held:

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

**applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in...”**

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

**“the police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court...As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.”**

55. Proceedings of this nature, ordinarily, do not deal with the merits of the case but only with the process. In other words these proceedings determine, *inter alia*, whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where a petitioner brings such proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. In other words, such proceedings are not the proper forum in which the innocence or otherwise of the petitioner is to be determined and a party ought not to institute such proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in such proceedings is mainly concerned with the question of fairness to the petitioner in the institution and continuation of the criminal proceedings and whether such proceedings amount to a violation of his rights and fundamental freedoms and once the Court is satisfied that that is not the case, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the petitioner. Where, however, it is clear that there is no evidence at all or that the prosecution’s evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.

56. Therefore the determination of this case must be seen in light of the foregoing decisions. However, it is upon the petitioner to satisfy the Court that the discretion given to the Respondents to investigate and prosecute ought to be interfered with.

57. In this case the petitioner contends that the case pending before the subordinate’s court is based on the patently false, concocted and/or misleading evidence and that he faces very real and imminent risk of having his personal liberty taken away on the basis of illegal proceedings hence the invocation of the jurisdiction of this Court conferred by **Article 23 & 165** of the Constitution. In his evidence, he has never stolen, conspired to steal or even made a false pretence to receive any money either from Malili Ranch Company Limited, **Eric Mutua** Advocate or any other person.

58. On the part of the Respondents, it was disclosed that Inquiry File leading to the present charges facing the Petitioner was opened following allegations by several shareholders of Malili Ranch which were made between 2009 and 2014 to various Government Agencies including the Respondents to the effect that the amalgamation, sale of their individual parcels of land to the Government of Kenya by the Directors of Malili Ranch was done without their authority and or consent. These complaints, it was deposed were lodged vide statements made between the year 2013 and August 2014 giving a detailed background and history of Malili Ranch Ltd and stating clearly the circumstances under which they all came to know about the sale of their land. On his part, it was averred that the Petitioner recorded a statement with the Police on the 15<sup>th</sup> day of May 2013 on the role he played in the transaction, from which it was clear that the Petitioner knew the sale was unlawful, irregular and was party to the conspiracy. According to the Respondents, they

intend during the trial to adduce evidence to show that the Petitioner unlawfully received Kshs. 40,000,000/= (forty million shillings) by falsely pretending that his Company namely Gateway Logistic acted as a sales agent between Malili Ranch Ltd and Government of Kenya, a fact which the Petitioner knew to be false as the purchase and sale of the property was by way of a tender advertised by the Government and in a Tender there is no place for agents.

59. As already stated hereinabove these are not the proper proceedings in which the correctness of the evidence or the truthfulness of the witnesses is to be gauged. That task is solely reserved for the trial Court which is constitutionally bound to determine the proceedings in accordance with the law. Accordingly, the mere fact that the petitioner views the evidence to be presented against him as patently false, concocted and/or misleading does not warrant this Court in interfering with the criminal process. Similarly his allegation that he has never stolen, conspired to steal or even made a false pretence to receive any money either from any person is a matter for determination by the trial Court since that is an allegation which goes to the sufficiency of evidence and the innocence of the Petitioner, matters which are not within the province of this Court.

60. This Court appreciates that a distinction must be made between a situation where what is alleged is insufficiency of evidence as opposed to where the evidence to be adduced does not disclose an offence. In the former, the right forum to deal with the matter is the trial Court. In the latter, it would amount to an abuse of the criminal process to subject the petitioner to such a process. Criminal process ought to be invoked only where the prosecutor has a conviction that he has a prosecutable case. Whereas he does not have to have a full proof case, he ought to have in his possession such evidence which if believable might reasonably lead to a conviction. He does not have to have evidence which disclose a *prima facie* case under section 210 of the **Criminal Procedure Code** since a decision as to whether a *prima facie* case is disclosed is a jurisdiction reserved for the trial Court. He however must have evidence which satisfy him that his is a case which ought to be presented before a trial Court. He must therefore consider both incriminating and exculpatory evidence in arriving at a discretion to charge the accused. Unless this standard is met, the Court may well be entitled to interfere with the discretion of the prosecutor since that discretion, as stated elsewhere in this judgement, is not absolute.

61. It must, however, be appreciated that our criminal process entails safeguards which are meant to ensure that an accused person is afforded a fair trial. Article 50 of our Constitution accordingly provides *inter alia* as follows:

***(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.***

***(2) Every accused person has the right to a fair trial, which includes the right—***

***(a) to be presumed innocent until the contrary is proved;***

***(b) to be informed of the charge, with sufficient detail to answer it;***

***(c) to have adequate time and facilities to prepare a defence;***

***(d) to a public trial before a court established under this Constitution;***

***(e) to have the trial begin and conclude without unreasonable delay;***

***(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;***

***(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;***

***(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly; to remain silent, and not to testify during the proceedings;***

*(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;*

*(k) to adduce and challenge evidence;*

*(l) to refuse to give self-incriminating evidence;*

*(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;*

*(n) not to be convicted for an act or omission that at the time it was committed or omitted was not —*

*(i) an offence in Kenya; or*

*(ii) a crime under international law;*

*(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;*

*(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and*

*(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.*

*(3) If this Article requires information to be given to a person, the information shall be given in language that the person understands.*

*(4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.*

*(5) An accused person—*

*(a) charged with an offence, other than an offence that the court may try by summary procedures, is entitled during the trial to a copy of the record of the proceedings of the trial on request; and*

*(b) has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law.*

62. I have reproduced the relevant provisions of Article 50 in order to show that our Constitution has provided extensive safeguards to accused persons when charged with criminal offences and therefore unless there is material upon which the Court can find that the Petitioner is unlikely to receive a fair trial before the trial Court, the Court ought not to interfere simply because the petitioner may at the end be found to be innocent.

63. As was held in **Jago vs. District Court (NSW) 106**:

**“An abuse of process occurs when the process of the court is put in motion for a purpose which, in the eye of the law, it is not intended to serve or when the process is incapable of serving the purpose it is intended to serve. The purpose of criminal proceedings, generally speaking is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and, on that account, is deserving of punishment. When criminal process is used only for that purpose and is capable of serving that purpose, there is not abuse of process...When process is abused, the unfairness against which a litigant is entitled**

**to protection is his subjection to process which is not intended to serve or which is not capable of serving its true purpose. But it cannot be said that a trial is not capable of serving its true purpose when some unfairness has been occasioned by circumstances outside the court's control unless it be said that an accused person's liability to conviction is discharged by such unfairness. This is a lofty aspiration but it is not the law."**

64. The trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of an appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words unless the petitioner demonstrates that the circumstances of the impugned process render it impossible for the petitioner to have a fair trial, the High Court ought not to interfere with the trial simply on the basis that the petitioner's chances of being acquitted are high. In other words the High Court ought not to transform itself into a trial court and examine minutely whether or not the prosecution is merited.
65. It was contended by the petitioner that the transaction between Malili Ranch Limited and Gateway Logistics Limited is a contractual one, whose validity cannot be voided through a criminal prosecution of a director of the Company, who is not even party to the contract. It was submitted on behalf of the petitioner that there has never been any determination and declaration by a court of law, as regards the contract for the purchase of land by the Ministry, that the sale is unlawful and irregular as alleged. Furthermore, if there is an allegation that the sale is unlawful and irregular, the sale transaction cannot be annulled through the criminal process lodged by the Respondents against the Petitioner herein. It is therefore inconceivable for the Respondents on one hand to assert that the transaction and sale of the land was unlawful and illegal yet the beneficiary to the transaction, the Government, has taken possession and enjoying the full rights granted to it by the law.
66. In my judgement to commence criminal proceedings *in lieu* of civil proceedings or in order to coerce a person to either concede to a civil claim or to abandon his civil claim would clearly amount to an abuse of the legal process. However, there ought to be cogent evidence that the said criminal proceedings are being commenced *in lieu* of civil proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying or halting 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 recognised aim. Similarly the mere fact that the State commences criminal proceedings rather than civil proceedings for recovery of a sum alleged to have been lost does not *ipso facto* make the criminal proceedings bad since a crime ought not to go unpunished simply because the sum lost as a result thereof is capable of being recovered by a civil action. As long as there is evidence on basis of which the criminal proceedings may be justified, the High Court ought not to halt the criminal process simply because the civil recourse is also available to the State. Section 193A of the ***Criminal Procedure Code*** on this issue provides:

***Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.***

67. However caution ought to be exercised and as was held by the Court of Appeal in **Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others Nairobi Civil Appeal No. 56 of 2012 [2013]eKLR:**

**"While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised**

**responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court.”**

68. Therefore in determining whether or not to halt criminal proceedings, the Court must consider the dominant motive for bringing the criminal proceedings. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the *predominant* purpose is to further some other ulterior purpose and as long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene. See **Republic vs. Chief Magistrate’s Court at Mombasa Ex Parte Ganijee & Another** (supra) and **R vs. Attorney General exp Kipngeno Arap Ngeny** (supra).
69. Where it is not the predominant purpose the Court ought not to interfere. Where the ground relied upon to halt the same is some collateral motive which on its own does not warrant the halting of the said proceedings, the Court ought not to take such exceptional step of bringing to an end criminal proceedings where there possibly exist other genuine motives.
70. Based on several provisions of the Constitution, the Petitioner averred that he is in danger of being denied a fair hearing in breach of this fundamental right as enshrined in the Constitution hence his fundamental rights and freedom under **Article 27, 29 & 50** of the Constitution have been infringed upon and he faces greater risk of more serious violation of the same unless, at the very minimum, the said prosecution is permanently prohibited. As I have held there is no evidence placed before me that the Petitioner will not be able to receive a fair trial before the Magistrate’s Court. However if the petitioner’s case is that subjecting him to a trial which is unlikely to lead to conviction is unfair, then I can only refer to **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** where it was held as hereunder:

**“The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence.”**

71. I am also in agreement with the sentiments expressed in **Dream Camp Kenya Ltd vs. Mohammed Eltaff and 3 Others Civil Appeal No. 170 of 2012** that:

**“Every litigation is inconvenient to every litigant in one-way or another. Also no one in his right senses enjoys being sued and ipso facto no one cherishes litigation of any nature unless it is absolutely necessary. With respect, we accept litigation is expensive and no litigant would enjoy the rigours of trial. The aftermath of vexatious and frivolous litigations is normally taken care of by way of costs. The discomfort of litigation would not certainly render the success of the intended appeal nugatory if we do not grant the application sought. If the learned Judge is eventually found wrong on appeal, and the applicant succeeds in its intended appeal, then the orders so made by the learned Judge would be quashed and the applicant would be compensated for in costs.”**

72. As was held in **Jago vs. District Court (NSW) 106**:

**“..it cannot be said that a trial is not capable of serving its true purpose when some unfairness has been occasioned by circumstances outside the court’s control unless it be said that an accused person’s liability to conviction is discharged by such unfairness. This is a lofty aspiration but it is not the law.”**

73. As I have held hereinabove the mere fact that the petitioner goes through the motion of a trial does

not amount to a waiver of his rights to institute appropriate proceedings for damages if it turns out that the criminal proceedings ought not to have been instituted in the first place. However to base this Court's decision on that ground would require very cogent grounds and solid material to do so. It was in recognition of this fact that the House of Lords in **Director of Public Prosecutions vs. Humphreys [1976] 2 All ER 497 at 511** cautioned that:

**“A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval...If there is a power...to stop a prosecution on indictment in limine, it is in my view a power that should only be exercised in the most exceptional circumstances.”**

74.It was also along those lines that, in my view, **Ojwang', J** (as he then was) in **Republic v Attorney General & another Ex parte Vaya & another** (supra), expressed himself that:

**“One critical custodian of this public policy is the Attorney General in his prosecutorial role; and in a matter such as the one in hand, this Court ought not hold that no prosecutions may be brought against persons suspected of committing offences touching on national resource use. Accordingly I hold that there is no public policy to limit the competence of the Attorney General to prosecute persons in the position of the applicants.”**

75.As was appreciated in **Kuria & 3 Others vs. Attorney General** (supra):

**“...just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial...”**

76.According to the Petitioner, whereas the decisions of the Company, Gateway Logistics, were collegiate decisions made by the Board, the prosecution had maliciously and in abuse of the powers granted to it by the Constitution singled him out for purposes of facing criminal charges to the exclusion of the Company and other directors of the Company; yet the funds in question were neither paid to him as an individual, nor were they deposited in his personal account, but were deposited in the account of the Gateway as per the decision of the Board of Malili Ranch Limited, thus there is no legal basis for a charge against him as an individual for obtaining the sum of Kshs. 40,000,000 as per the charge sheet. To the Petitioner, the exclusion of the all other persons to be charged including the Company, Gateway, without any reasonable explanation for the action cannot be deemed to be in the public interest, in the interests of administration of justice and avoiding abuse of legal process as stipulated under Article 157 of the Constitution. It was contended that contrary to Article 27 of the Constitution, the action of the Respondents singling him out for prosecution and excluding other persons, who were actively involved in the transaction for the sale of land to the Government as agents, and excluding the Company all together from any liability is discriminatory and amounts to selective application of the law with regard to the Petitioner, to the exclusion of others and is an express violation of the powers of the 1<sup>st</sup> Respondent.

77.Section 23 of the **Penal Code** provides that:

***Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission.***

78. This Court in George Joshua Okungu & Another vs. The Chief Magistrate's Court Anti-Corruption Court at Nairobi & Another [2014] eKLR, held that:

“Where therefore the prosecution has been commenced or is being conducted in an arbitrary, discriminatory and selective manner which cannot be justified, that conduct would amount to an abuse of the legal process. Similarly, where the prosecution strategy adopted is meant to selectively secure a conviction against the petitioner by ensuring that certain individuals from whom the petitioner derived his decision making power are unjustifiably shielded therefrom, it is our considered view that such prosecution will not pass either the constitution or statutory tests decreed hereinabove. It is even worse where from the circumstance of the case, the same persons being shielded could have been potential witnesses for the petitioner and who have, with a view to being rendered incompetent as the petitioner's witnesses have been in a way enticed to be prosecution witnesses. That strategy we hold constitutes an unfair trial under Article 50 of the constitution. Here for example, the petitioners contend that they took all the necessary steps to obtain the requisite legal advice and approvals or authorizations. To turn round and institute criminal proceedings against the petitioners while making the very persons who authorized the petitioner's actions into prosecution witnesses, in our view, amounts to selective and discriminatory exercise of discretion. In such an event the director of the public prosecution cannot be said to have been guided by the requirement to promote constitutionalism as mandated under the constitution and the Office of the Director of Public Prosecutions Act. To the contrary the DPP would be breaching the constitution which inter alia bars in Article 27 discrimination “directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status...Accordingly it is our view that where such opinion is given by persons who are legally authorized to give the same and acted upon by persons under their authority, it would amount to selective application of the law to charge the persons to whom the opinion or advice was given while treating the persons who gave that opinion as a prosecution witness”.

79. Whereas the Respondent have a discretion on whom to charge, that discretion must be exercised judicially and judiciously and in so doing they ought to take into account the statutory provisions relevant to the circumstances in question. In this case, section 23 of the *Penal Code* provides that in case of offence committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons are culpable for the same unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission.

80. To this, the Respondents simply stated that the evidence on the Police File proves that the Petitioner was paid Kshs. 40,000,000/=, as agency fees but which sum he was not entitled to and the processes were all flawed and illegal and therefore of no legal consequence. This in my view cannot do. The Respondents were under a duty to show that the decision to selectively charge the petitioner was justified under the exception expressly provided in section 23 of the *Penal Code*. In absence of any such justification the exercise of the Respondents' discretion must be faulted. In George Joshua Okungu & another vs. Chief Magistrate's Court Anti-Corruption Court at Nairobi (supra) this Court cited with approval the holding in Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323 and held:

“Whereas we appreciate the fact that the decision whether or not to prosecute the petitioners is an exercise of discretion this Court is empowered to interfere with the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7)

**where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable...”**

81. It was averred by the petitioner that after his first statement, he was neither contacted again by the CID officers neither does he know what transpired. However, he later learnt that upon completion of investigations, the file was placed before the Director of Public Prosecutions who directed the Police to close the inquiry and take no further action. He was therefore of the view that the decision to prefer a criminal charge against him flies against the report made by the CID officers and even the final finding by the DPP where he was exonerated and even a report made that the inquiry file be closed. Based on his Counsel's advice, the petitioner averred that having made the representation and promise not to pursue the prosecution, the 1<sup>st</sup> Respondent had an obligation to notify the Petitioner and give reasons as to the change of the decision or any other concerned party in the event of any change in its decision with regard to the matter at hand. The decision to prosecute the Petitioner alone, having made an earlier decision to close the investigations file, was therefore in violation of the Petitioner's right to a fair administrative action. Further, having exonerated other Directors of the Company and the company from any criminal liability, it is improper to single out one director of a Company and charge him with offences yet exclude others who equally made the decision, which action is an abuse of the powers vested in the 1<sup>st</sup> Respondent. To the Petitioner there is no reason given by the 1<sup>st</sup> Respondent as to why the decision made on 24<sup>th</sup> January, 2011 was reversed having made the representation to Gateway and its Directors that there existed an agency agreement and there is no proof that the payment from Malili Ranch was obtained fraudulently. The Petitioner therefore had a legitimate expectation that like other directors of Gateway, he would not be charged with any offence arising from the agreement with Malili Ranch.
82. In his letter dated 24<sup>th</sup> January, 2011, addressed to The Director of Criminal Investigations in respect of an ***“Inquiry Into Allegations That Gateway Logistics Obtained Kshs 40 Million From Malili Ranching Company By False Pretences”***, the then Chief Public Prosecutor, **Keriako Tobiko**, the current Director of Public Prosecutions, expressed himself as follows:

***I have carefully perused the entire file and considered the evidence contained therein and noted that there was an Agency Agreement in which Gateway Logistics Ltd had been appointed by Malili Ranching Company Ltd to be its agent for purposes of identifying and facilitating the purchase of 5000 acres of the latter's land and was to be paid Kshs 21,000/= per acre.***

***The board of Directors of Malili Ranching Company Ltd sanctioned the payment of Kshs 40 million to Gateway Logistics Ltd pursuant to the Agency Agreement and there is therefore no evidence that the latter obtained the said cash fraudulently.***

***I therefore direct that this inquiry file be closed. No Further Police Action. Proceed accordingly.***

**KERIAKO TOBIKO**

**CHIEF PUBLIC PROSECUTOR**

83. It does not require forensic evidence for one to see that the subject of that letter is the subject of the criminal proceedings being challenged in these proceedings. No attempt has been made by the Respondents to explain what led to the change of view and the decision to charge the petitioner with the offence whose subject the Prosecutor, albeit now wearing substantially the same hat albeit with a different colour, found untenable.
84. In my view whereas mere delay in commencing criminal proceedings, unless the delay is not favourable to a fair trial may not justify the halting of criminal proceedings, where the Petitioner has been given an assurance that he is not going to be prosecuted to make an abrupt about turn without any convincing reasons to decide to prosecute the petitioner based on the same facts cannot

be countenanced in any judicial system that adheres to the rule of law. Where such a move is to be taken the prosecutor must place evidence before the Court that due to fresh evidence or a consideration of a different angle of the evidence his change of decision is justified. To permit the prosecutor to exercise his constitutional powers arbitrarily would amount to the Court abetting abuse of discretion and power. It was therefore held in **Regina vs. Ittoshat [1970] 10 CRNS 385 at 389** that:

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

85. Similarly in **Paul Imison vs. Attorney General & 3 Others Nbi HCMCA No. 1604 of 2003:**

**“I do not think that our Constitution which is one of a democratic state would condone or contemplate abuse of power...The Attorney General in some of his constitutional functions does perform public duties and if he were to be found wanting in carrying them out or failing to perform them as empowered by the Constitution or any other law, I see no good reason for singling him out and failing to subject him to judicial review just like any other public official. I find nothing unconstitutional in requiring him to perform his constitutional duties. A monitoring power by the court by way of judicial review would have the effect of strengthening the principles and values encapsulated by the Constitution. To illustrate my point, Judicial Review tackles error of law and unlawfulness, procedural impropriety, irrationality, abuse of power and in not too distant future, human rights by virtue of the International Conventions which Kenya has ratified. In exercising the Judicial Review jurisdiction the court would not be sitting on appeal on the decisions of the Attorney general, he will still make the decisions himself but the lawfulness, etc. of his decisions should be within the purview of the courts...”**

86. This Court therefore has the powers and the constitutional duty to supervise the exercise of the Respondents’ mandate whether constitutional or statutory as long as the discretion falls foul of section 4 of the *Office of the Director of Public Prosecution Act* and Article 157 of the Constitution.

87. In **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** it was held that:

**“Although the Attorney General enjoys both constitutional and statutory discretion in the prosecution of criminal cases and in doing so he is not controlled by any other person or authority, this does not mean that he may exercise that discretion arbitrarily. He must exercise the discretion within lawful boundaries...Although the state’s interest and indeed the constitutional and statutory powers to prosecute is recognised, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious...In doing so the Court may be guided by the following principles: (i). Where the criminal prosecution amounts to nothing more than an abuse of the process of the court, the Court will employ its inherent power and common law to stop it. (ii). A prosecution that does not accord with an individual’s freedoms and rights under the constitution will be halted: and (iii). A prosecution that is contrary to public policy (or interest) will not be allowed...A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of**

the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case. Evidence of extraneous purposes may also be presumed where a prosecution is mounted after a lengthy delay without any explanation being given for that delay...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...A criminal prosecution that does not accord with an individual's freedoms and rights, such as where it does not afford an individual a fair hearing within a reasonable time by an independent and impartial court, will be the clearest case of an abuse of the process of the Court. Such a prosecution will be halted for contravening the constitutional protection of individual's rights...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds."

88. A similar view was held in George Joshua Okungu & Another vs. Chief Magistrate's Court Anti-Corruption Court at Nairobi & Another (supra) in which this Court cited with approval the holding in Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323 and held:

"Under Article 47(1) of the Constitution, "every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair." It is therefore imperative that criminal investigations be conducted expeditiously and a decision made either way as soon as possible. Where prosecution is undertaken long after investigations are concluded, the fairness of the process may be brought into question where the Petitioner proves as was the case in *Githunguri vs. Republic*, that as a result of the long delay of commencing the prosecution, the Petitioner may not be able to adequately defend himself. "

89. It is therefore clear that whereas the discretion given to the respondents to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt. Similarly where the Respondent is shown not to be acting independently but just reading a script prepared by someone else or that he has been pressurised to go through the motions of a trial, the Court will not hesitate to terminate the proceedings as in such circumstances, the powers being exercised by the Respondent would not be pursuant to his discretion but at the discretion of another person not empowered by law to exercise such discretion.

90. In my view where the prosecutor has given an assurance that based on the evidence presented before him, no prosecutable case is disclosed, the High Court would be entitled to presume existence of extraneous purposes, if such a decision was arbitrarily overturned particularly by the same person without any explanation for change of heart. This was the position in Githunguri vs. Republic KLR [1986] 1 in which the Court expressed itself as follows:

"We are of the opinion that two infeasible reasons make it imperative that this application must succeed. First as a consequence of what has transpired and also being led to believe that there would be no prosecution the applicant may well have destroyed or lost the evidence in his favour. Secondly, in absence of any fresh evidence, the right to change the decision to prosecute has been lost in this case, the applicant having been publicly informed that he will not be prosecuted and property restored to him. It is for these reasons that the applicant will not receive a square deal as explained and envisaged in section 77(1) of the Constitution. This prosecution will therefore be an abuse of the process of the Court, oppressive and vexatious...If we thought, which we do not, that the applicant by being

prosecuted is not being deprived of the protection of any of the fundamental rights given by section 77(1) of the Constitution, we are firmly of the opinion that in that event we ought to invoke our inherent powers to prevent this prosecution in the public interest because otherwise it would similarly be an abuse of the process of the Court, oppressive and vexatious. It follows that we are of the opinion that the application must succeed in either event...A prosecution is not to be made good by what it turns up. It is good or bad when it starts. The long and short of it is that in our opinion it is not right to prosecute the applicant as proposed. ”

91. I also associate myself with R vs. Crown Court at Derby, ex parte Brooks [1984] 80 Cr. App. R 164 to the effect that:

“The power to stop a prosecution arises only where it is an abuse of the process of the court. It may be an abuse of the process if either (a) the prosecution have manipulated or misused the process of the courts so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality; or (b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable.”

92. This Court has had an occasion to deal with the discovery of fresh evidence after the closure of an inquiry file in Republic v Attorney General & 4 others Ex-Parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR and held that:

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

93. With due respect, in the absence of any reasonable explanation coming from the Respondents why they have suddenly woken from the slumber, as it were, three years down the line and have decided to prosecute the Petitioner after giving an assurance that such prosecution was not forthcoming, the decision to prosecute the Petitioner cannot be justified. I associate myself with the decision in R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001 that:

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

94. In exercising its mandate, section 4 of the *Office of the Director of Public Prosecutions Act* enjoins the DPP to take into account the provisions of the said section of the said Act which provides:

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

- a. *the diversity of the people of Kenya;*
- b. *impartiality and gender equity;*
- c. *the rules of natural justice;*
- d. *promotion of public confidence in the integrity of the Office;*
- e. *The need to discharge the functions of the Office on behalf of the*

*people of Kenya;*

- f. *the need to serve the cause of justice, prevent abuse of the legal process and public interest;*
- g. *protection of the sovereignty of the people;*
- h. *secure the observance of democratic values and principles; and*
- i. *promotion of constitutionalism.*

95. In promoting constitutionalism it is my view that the DPP ought to adhere to the national values and principles of governance in Article 10 of the Constitution under which he is bound by *inter alia* the principles of transparency and accountability. Where he has directed a file to be closed, he cannot arbitrarily reopen the same without any reason for doing so without violating the aforesaid values and principles and hence failing in his duty to promote constitutionalism.

96. I, however, find no merit in the contention that the Petitioner ought to have been summoned by the Special Prosecutor, **Senior Counsel Paul Muite**, before the commencement of the criminal proceedings. A prosecutor is not bound to conduct further investigations on being retained to carry out a prosecution, though I have no quarrel with the prosecutor giving his view on the prospects of the prosecution to the person retaining him.

97. Nevertheless in this case there is no factual foundation upon which the facts which three years ago were deemed insufficient to sustain a criminal charge have had life breathed into them so as to be the basis of the subject criminal proceedings.

98. In my view the decision to charge the Petitioner cannot be justified in the circumstances of this case. First the decision is discriminative and selective and cannot be justified under the Constitution or the relevant statutory provisions. Secondly, the decision flies in the face of the provisions of section 4 of the **Office of the Director of Public Prosecution Act** and Article 157 of the Constitution in light of the earlier decision not to prosecute based on the same facts.

99. I am alive to the pronouncement in **Githunguri vs. Republic** (supra) to the effect that:

**“We speak in the knowledge that rights cannot be absolute. They must be balanced against other rights and freedoms and the general welfare of the community. We believe we are speaking correctly and not for the sake of being self laudatory when we say the Republic of Kenya is praised and admired by other people and other systems for the independent manner in which justice is dispensed by the courts of this country. We also speak knowing that it is our duty to ask ourselves what is the use of having a Constitution if it is not honoured and respected by the people. The people will lose faith in the constitution if it fails to give effective protection to the fundamental rights. The people know and believe that to destroy the rule of law you destroy justice thereby also destroying the society.”**

100. To paraphrase **Githunguri vs. Republic**, the inescapable conclusion I come to, both under the Constitution and the inherent powers of this Court is that **“it is not right to prosecute the Petitioner as proposed.”**

101. The Petitioner sought damages. However no material was placed before me on the basis of which I would be able to assess the same even if I was to find that the same were deserved which I do not.

## **Order**

102. In the premises, the orders which commend themselves to me and which I grant are as follows:

- a. **A declaration that the initiation, maintenance and prosecution of Milimani Magistrate’s Court Criminal Case No. 19 of 2014 against the Petitioner herein, in the manner intended, is an abuse of the Criminal Justice process and contravention of the Petitioner’s Constitutional rights is oppressive, malicious and an abuse of the court process.**
- b. **An order of prohibiting continuance of Criminal Case No. 19 of 2014 at Milimani Magistrates Court against the Petitioner herein, in the manner intended.**
- c. **That the costs of this Petition are awarded to the Petitioner be borne by the Respondents.**

103.It is so ordered.

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

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Wetangula for the Petitioner**

**Cc Patricia**