REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. JR. 424 OF 2014

IN THE MATTER OF AN APPLICATION BY SENATOR JOHNSON NDUYA MUTHAMA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW AND ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF ARTICLES 10, 47, 50, 73 AND 157 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF SECTIONS 6(A) & (B), 16(1), (2) & (3), 29(1), (2) 3, 301 2 AND 34(1)(A), (B) & (C) OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ACT, 2013

AND

IN THE MATTER OF THE SPECIAL ISSUE OF THE KENYA GAZETTE VOL. CXVI-NO, 102 OF 27TH AUGUST 2014

AND

IN THE MATTER OF NAIROBI CHIEF MAGISTRATE'S COURT ANTI-CORRUPTION CASE NO. 19 OF 2014

BETWEEN

REPUBLIC……..…….....……..APPLICANT

AND

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

HON. PAUL KIBUGI MUITE SC…….....…..2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....3RD RESPONDENT

INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE…….4TH RESPONDENT

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

EX PARTE - SENATOR JOHNSON NDUYA MUTHAMA

JUDGEMENT

Introduction

1. By a Motion on Notice dated 17th November, 2014, the ex parte applicant herein, **Senator Johnson Nduya Muthama,** seek the following orders:

> **1. An order of certiorari to remove into the High Court and quash the decision of the 1st Respondent contained in the Special Issue of the Kenya Gazette Vol. CXVI-No. 102 of 27th August 2014 Gazette Notice No. 5959 appointing Paul Kibugi Muite S.C to be a public prosecutor for purposes of criminal cases and all legal proceedings arising or connected with the following inquiry files:**
>
> **1. CCIO Nairobi Area Inquiry File No. 20/2013;**
>
> **2. Police Case File No. Cr. 121/761/2009;**
>
> **3. CID HQs Inquiry File No. 96/2008; and**
>
> **4. KACC/FI.INQ/96/2010**
>
> **2. An order of certiorari to remove into the High Court and quash the decision of the 1st Respondent made on or about 26th April 2014 or on any date between March 2014 and 27th August 2014 identifying, instructing and appointing Paul Kibugi Muite S.C to review, advice and/or in any manner handle the file(s) relating to or connected with investigations into matters touching on Malili Ranch Limited or any investigations into allegations of offences connected with the sale and/or purchase of land between Malili Ranch Limited and the Government of Kenya;**
>
> **3. An order of Certiorari to remove into the High Court and quash the decision of the 2nd Respondent made on or between 27th August 2014 and 29th August 2014 to commence proceedings, prosecute, summon and/or cause the Applicant to be summoned and charged for the purpose of prosecution in Nairobi Chief Magistrate's Court Anti-Corruption Case No. 19 of 2014 – *Republic v Julius Maweu Kilonzo & 8 Others.***
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> **4. An order of certiorari to remove into the High Court and quash the decision(s) of the 3rd Respondent contained in the charge sheet dated 27th August 2014 Police Case No. 121/272/2014 charging the Applicant alongside others with offences and counts contained in the said Charge Sheet.**
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> **5. An order of prohibition directed to the 1st Respondent prohibiting him from carrying out and/or proceeding with Nairobi Chief Magistrate's Court Anti-corruption Case No. 19 of 2014 – *Republic v Julius Maweu Kilonzo & 8 Other* whether by himself or through any other public or private prosecutor.**
>
> **6. An order of Prohibition directed to the 5th Respondent prohibiting the 5th Respondent from carrying out and/or proceeding with Nairobi Chief Magistrate's Court Anti-Corruption Case No. 19 of 2014 – *Republic v Julius Maweu Kilonzo & 8 Others* and/or any further proceedings arising from or connected with the following inquiry files:**
>
> **1. CCIO Nairobi Area Inquiry File No. 20/2013:**

2. **Police Case File No. Cr. 121/761/2009;**

3. **CID HQs Inquiry File No. 96/2009; and**

4. **KACC/FI/INQ/96/2010**

Applicants' Case

2. The application is based on the following grounds:

1. **The 1st Respondent's decisions are manifestly illegal, unlawful, unreasonable, irrational, illogical and unjustifiable.**
2. **The 1st Respondent's conduct is irrational, irresponsible and an illegal abdication of the duties, role and mandate of the 1st Respondent and that of his office.**
3. **The 1st Respondent's decision to divest himself and his office of the duty of handling the investigations file is in violation of the 1st Respondent's constitutional mandate.**
4. **The 1st Respondent's decisions and conduct violate his duty and that of the institution of the Office of Director of Public Prosecutions to act independently and without fear or favour.**
5. **The 1st Respondent's conduct and decisions are unprocedural, inconsistent and ultra vires the provisions and procedures under the Constitution of Kenya, 2010, the Office of the Director of Public Prosecutions Act, No. 2 of 2013 and the Public Officer Ethics Act, Chapter 183.**
6. **The 1st Respondent's decisions contravene clear provisions under the Office of the Director of Public Prosecutions Act.**
7. **The 1st Respondent's decisions are unjustifiable under the spirit of the Constitution of Kenya, 2010 and the current laws made thereunder.**
8. **The 1st Respondent's decision to appoint a political office holder as a public prosecutor is illegal, unlawful and *ultra vires* the spirit and objects of the Constitution of Kenya and the Public Officer Ethics Act.**
9. **The 1st Respondent acted without jurisdiction when he purported to appoint the 2nd Respondent under section 85(2) of the Civil Procedure Code.**
10. **The 1st Respondent failed to follow public procurement law and procedure.**
11. **The 1st Respondent flagrantly flouted the Office of the Director of Public Prosecutions Act which sets out the procedure and requirements for appointing a private legal practitioner as a public prosecutor.**
12. **Such flagrant breach demonstrates the existence of bad faith, improper motive and/or extraneous purposes unconnected with the purpose and conduct of the 1st Respondent's office and/or mandate.**

Illegal exercise of discretion and abuse of power

13. **The 1st Respondent's decisions constitute an illegal exercise of discretion.**
14. **The 1st Respondent failed to distinguish between his personal and individual persona and his official persona as the Director of Public Prosecutions and the institution of the Office of Director of Public Prosecutions.**
15. **The 1st Respondent irrationally and unreasonably equated and substituted his personal and individual persona to that of the entire Office of the Director Public Prosecutions.**
16. **The Respondents' decisions are not the exercise of their own discretion but the result of unlawful collusion and/or pressure from third parties and other persons directly implicated in the investigations. Such decisions are illegal and contrary to statute, public policy and the law.**
17. **The 2nd Respondent lacks the requisite professional objectivity to act in this matter as a prosecutor.**

Wednesbury unreasonableness, irrationality, impropriety, bad faith and improper motive

18. **The decisions are unreasonable in law under the *Associated Provincial Picture Houses Limited v Wednesbury Corporation* principles.**
19. **The 1st Respondent's decisions are in conflict with the powers and requirements of his office to act independently, impartially and without fear or favour.**
20. **The 1st Respondent's decision to appoint the 2nd Respondent as a public prosecutor in spite of the fact that the 2nd Respondent holds office in a political party is unreasonable, irrational and for an extraneous purpose.**
21. **The 1st Respondent's decision to flagrantly appoint a political officer holder as a public prosecutor is contra bonos mores and contravenes Chapter Six of the Constitution on Leadership and Integrity.**
22. **The 2nd Respondent is an unfit and improper person to be appointed as a public prosecutor;**
23. **The 2nd Respondent has a criminal case and charges pending against him in Nairobi Chief Magistrate's Court Criminal Case No. 1800 of 1999 in which the 1st Respondent is the Prosecutor.**
24. **The 1st Respondent's decision to appoint the 2nd Respondent in light of the above fact is unreasonable and absurd.**
25. **The professional and personal relationship between the 2nd Respondent and Eric Kyalo Mutua, one of the persons directly implicated in the Malili Ranch matter and because of whom the 1st Respondent abdicated his role thereof renders the 2nd Respondent an unfit and improper person to advice and/or render judgement in a matter touching the 1st Interested Party.**
26. **The 1st Respondent's decision to appoint the 2nd Respondent as a prosecutor subsequent to seeking the latter's advice on the same matter is irrational and absurd and contrary to the law and public policy. The 2nd Respondent has a vested interest to justify and vindicate his own advice/recommendations to the 1st Respondent and therefore cannot have professional objectivity in the matter.**
27. **The 1st Respondent's decisions are consequently illegal and void ab initio.**

Unfairness, discrimination, partiality, inconsistency and selective application of the law

28. **The Respondents have exercised their discretion without conforming to the principles of independence, impartiality, equality of all citizens before the law and the judicious exercise of power and authority without fear or favour.**
29. **The 2nd Respondent exercised his delegated authority and mandate selectively, partially, discriminatingly and capriciously.**
30. **The 2nd Respondents' decision to selectively prosecute some persons alleged to be implicated in the Malili Ranch scandal while leaving out other persons is unreasonable, unjustifiable, made in bad faith and for an improper motive and/or extraneous purpose.**
31. **The 2nd Respondent's decision to partially prosecute only some of the persons recommended for prosecution while leaving out those considered culpable and recommended for prosecution by the 3rd Respondent and the Auditor General among others is irrational and points to extraneous factors, illegal considerations, selective application of the law and abuse of power.**
32. **The Respondents' decisions are manifestly unfair, unjust, arbitrary, inconsistent, capricious, oppressive and punitive.**
33. **The Respondent's decisions are clearly and plainly made in bad faith.**
34. **The Respondents' decisions are unlawful on account of unfairness and amount to an abuse of power. The decisions are in any event illogical, irresponsible and contrary to the law.**

Violation of legitimate expectation

35. **The Respondents' decisions and conduct violate the principle of legitimate expectation.**
36. **The 1st, 3rd and 4th Respondents had previously carried out investigations into this matter, based on the same facts, which led to the indictment and prosecution of two directors of Malili Ranch in Nairobi Chief Magistrate's Court Criminal Case No. 2141 of 2009.**
37. **The Applicant was the whistle blower that led to the aforesaid criminal prosecution, which went through a trial at the end of which the accused persons were acquitted.**
38. **The 1st and 3rd Respondents had addressed their minds to the Applicant's role before the criminal proceedings of 2009 were instituted.**
39. **Based on among others, the principles enunciated in the case of *Stanley Munga Githunguri v Republic*, the Applicant had the following legitimate expectations:**

i. **The matter had been put to rest;**
ii. **That this matter having been prosecuted many years ago and in view of the sentiments of the Trial Court that heard the matter, it seemed there was no case;**
iii. **The Respondents' would not turn around and victimise the Applicant who not only was the first to expose the matter, but has consistently and willingly volunteered information to the Respondents including the 2nd Respondent to aid them in their investigations;**
iv. **The Respondents would make their decision in fairness to all parties;**
v. **The Respondents' and in particular the 2nd Respondent would not abuse their office, power or authority in any unlawful manner, bad faith or to achieve an extraneous purpose;**
vi. **The Respondents would not abuse their powers to selectively victimise or punish the Applicant.**

40. **The Respondents decisions contravene public policy and public interest considerations and are an abuse of court process.**
41. **The Applicant will also rely upon as grounds all the matters set out in the Verifying Affidavit and the exhibits annexed thereto.**

3. The application was supported by the applicant's affidavit sworn on 31st October, 2014.
4. According to the applicant, on or about April 2014, the Directorate of Criminal Investigations (the 3rd Respondent) purported to conduct an inquiry into allegations by various shareholders of Malili Ranch Limited (hereinafter referred to as "the Company"), and misappropriation of the sum of Kshs. 1 Billion that was paid by the Government of Kenya, by three of the seven directors of the Company and the "company secretary" **Erick Kyalo Mutua**.
5. It was deposed that according to the 3rd Respondent, an inquiry file was opened following a series complaints from one government public office to the other by various shareholders of Malili Ranch seeking to have three out of the seven directors investigated over conspiracy to defraud them that arose out of the sale transaction of the 5,000 acres of land to the Ministry of Information and Communication for a sum of Kshs 1 Billion at a cost of Kshs 200,000/= per acre without their authority.
6. The applicant disclosed that he is accused of "purportedly holding a Special General Meeting on 29th November 2009 where shareholders promptly resolved to withdraw instructions to **Erick Mutua**" (the Company's Lawyer) and in his place have **Kamotho Waiganjo** appointed so as to act as an alleged cover up. He is also accused of having initiated a change of office bearers at Malili Ranch so he could have officials that could heed his instructions.
7. Based on the alleged inquiry on 22nd April, 2014, the 3rd Respondent recommended to the Director of Public Prosecutions (the 1st Respondent) that the applicant together with **Eric Kyalo Mutua**, **Peter Mutua Kanyi**, **Julius Maweu Kilonzo**, **Kamotho Waiganjo** and **Alphonse Munene Mutinda** should be charged with the following offences:

    a. Conspiracy to defraud contrary to Section 317 of the ***Penal Code***;

    b. Obtaining money by false pretences contrary to Section 313 of the ***Penal Code***.

    c. Making a document without authority contrary to Section 357 of the ***Penal Code***;

d. Stealing contrary to Section 275 of the ***Penal Code***.

8. The applicant averred that soon after receiving the aforesaid recommendation it was widely reported in the media that the 1st Respondent had divested himself and his office of the duty handling the file and/or matter and instead passed on the file to **Paul Kibugi Muite** (2nd Respondent) an advocate in private practice, to process the file, and to review and advise the Director of Public Prosecutions on the matter/investigations file. According to the media reports, which the applicant had sight of, the 1st Respondent is said to have based his decision on the facts that **Eric Kyalo Mutua**, who was one of the persons the CID recommended should be charged, is the current chairperson of the Law Society of Kenya and is also an active member of the Advisory Board of the Office of the Director of Public Prosecutions.
9. According to the applicant, following the 2nd respondent's appointment, he wrote to the 2nd Respondent seeking to shed light on the matter particularly in view of the CID's recommendations in the letter of 22nd April 2014. He disclosed that based on the 2nd Respondent's advice to the 1st Respondent on the investigations file, the 1st Respondent, by a notice contained in the Special Issue of the Kenya Gazette of 27 August 2014 Gazette Notice No. 5959, appointed the 2nd Respondent to be a public prosecutor for purposes of criminal cases and all legal proceedings arising or connected with the following inquiry files:

a. CCIO Nairobi Area Inquiry File No. 20/2013;
b. Police Case File No. Cr. 121/761/2009;
c. CID HQs Inquiry File No. 96/2009; and
d. KACC/FI/INQ/96/2010

10. It was averred by the applicant that the 2nd Respondent has instituted and commenced criminal proceedings against him and seven others in Nairobi Chief Magistrate's Court Anti – Corruption Case No. 19 of 2014 – *Republic v Julius Maweu Kilonzo & 8 Others* (hereinafter referred to as "the criminal case") and on 5th September 2014, he formally took plea in the matter to the following charges:

> a. That contrary to section 268 as read with section 275 of the Penal Code, together with others, "on diverse dates between the 17th day of June, 2009 and 11th day of January 2010 at Machakos/Nairobi Counties within the Republic of Kenya, jointly with others not before the Court, stole a sum of Kshs. 179,134,070/= being the sale proceeds of 5,000 acres of land LR No. 9918/3 that was sold to the Government of Kenya (Ministry of Information and Communication) the property of individual shareholders of Malili Ranch Ltd."
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> b. Conspiracy to commit a felony contrary to section 393 of the Penal Code. Together with eight others "on diverse dates between the 17th day of June, 2009 and 11th January 2010 at Machakos/Nairobi Counties within the Republic of Kenya, jointly with others not before the Court conspired to commit a felony namely stealing a sum of Kshs. 179,134,070/= being the sale proceeds of 5,000 acres of land LR No. 9918/3 that was sold to the Government of Kenya (Ministry of Information and Communication) the property of individual shareholders of Malili Ranch Ltd."

11. It was the applicant's case that he was aggrieved by the Respondents' various decisions including:

i. The 1st Respondent's decision to unreasonably, unlawfully and irrationally divest himself of his constitutional mandate and duty in connection with this matter;
ii. The 1st Respondent's irrational and illegal decision to appoint the 2nd Respondent, an unfit, unqualified and improper person as a Special Prosecutor over this matter;
iii. The 2nd Respondent's decision to unlawfully, irrationally, unreasonably, inexplicably, selectively and discriminatorily charge some of the persons recommended by the CID to be charged while leaving out others.

iv. Charging him with offences in a matter that he was the whistle blower;
v. Charging him long after the matter had seemingly been put to rest.

12. In the applicant's view, the decisions complained of are oppressive and punitive, contrary to public policy and interest and have been taken for extraneous purposes and ulterior motives unconnected with the pursuit of criminal justice. Further, the 1st Respondent's decision to appoint the 2nd Respondent as a Special Prosecutor is manifestly irregular, illegal, absurd, irrational and unreasonable and contrary to well known facts and established constitutional and legal principles based on the following facts:

i. The 2nd Respondent is an unqualified, unfit and improper person to be appointed to the position and his appointment violates constitutional principles, moral etiquette and other legal principles.
ii. The 2nd Respondent is to date the Party Leader of Safina Party a registered political party.
iii. The 2nd Respondent has a pending criminal case in which he is the accused person, this being Nairobi Chief Magistrate's Court Criminal Case No. 1800 of 1999 – *Republic v Paul Kibugi Muite*. This matter falls within the 1st Respondent's docket to prosecute; and considering the 1st Respondent's abdication of his role in this matter, the 1st Respondent's ability to prosecute the 2nd Respondent is undoubtedly questionable.
iv. The 2nd Respondent has acted for the Law Society of Kenya in several matters and has received instructions on those matters directly and/or through **Eric Kyalo Mutua** who is a key and central figure in the Malili Ranch matter.
v. It is irrational, absurd and contrary to the law that the 1st Respondent has appointed the 2nd Respondent, the same person chosen to advise on the files, as the prosecutor. The 2nd Respondent has a vested interest to justify and vindicate his own advice/recommendations to the 1st Respondent and therefore cannot have professional objectivity in the matter.

13. Based on legal advice, the applicant deposed that the 1st Respondent's decision to: 1) abdicate his constitutional role and mandate in this matter; and 2) based on his abdication, to appoint a Special Prosecutor is, among other grounds, unconstitutional, illegal, irrational, unreasonable, illogical and unjustifiable and the decision violates among others, the Constitution of Kenya, 2010 and ***The Office of the Director of Public Prosecutions Act, 2013***.
14. It was further deposed that the 1st Respondent did not follow the proper or laid down procedure to legally and lawfully appoint a prosecutor from private practice to handle this matter.
15. According to the applicant, he is a registered member and shareholder of the Company in which he became a member on or about the year 1980 being member number 2412. His son **Moses Muthama** is also a registered member and shareholder of the Company. He however disclosed that he has never been a director, nor has he ever been involved in the management and/or day-to-day operations of the Company. However, as a shareholder, alongside all other shareholders of the Company he is aware that they each have a beneficial interest to 7.8 acres per shareholder of the land owned by the Company and the decision to subdivide the land amongst the shareholders was made in or about the year 2004. On 13th March 2006, he received a letter signed by the then chairperson of the Company, **Josiah Munuka**, inviting him to attend and ballot for his plot though he neither attended nor received any document of the plot allocated to him or registered in his name. The same position, according to him applies to his said son. He was however aware that once the land was subdivided and the plots allocated to the individual members/shareholders, the land ceased to belong to the Company as an entity as each member was subsequently issued with letters of allotment for their individual plots.
16. According to the applicant, on or about September 2009 following the demise of the chairperson **Josiah Munuka**, he received complaints from other members/shareholders of the Company, concerning the late chairman and that the complainants were threatening to disrupt and stop the burial of **Josiah Munuka** on the main ground that the deceased chairman had sold off their land in the Company without compensating and/or paying them. This complaint was addressed to the applicant in his capacity as a leader of the community, which he was serving then as a member of parliament which complainants were hitherto unknown to him. According to him, he pleaded with

and succeeded in dissuading the complainants against disrupting the burial but promised that he would look into the matter.

17. To the applicant, he was among if not the first to lodge a complaint with the Criminal Investigations Department (CID) calling for scrutiny and/or investigations into the sale of part of the land owned by the Company to the Government of Kenya; and the defrauding of shareholders by the directors of the Company together with other persons. Although he lodged the complaint, he did not record a statement on the advice of the then Director of CID **Karanja Katiba** who said that the statements of the complainants would be more relevant and therefore the applicant was tasked with availing them to the CID.
18. The applicant disclosed that following the complaints and the statements that were recorded in or about November 2009, two directors of the Company were charged in Court in connection with the matter in Nairobi Chief Magistrate's Court Criminal Case No. 2141 of 2009 which case went through trial after which the two directors who had been charged in the matter were acquitted of the charges made against them.
19. In his view, in light of the decision above and with the effluxion of time, during which period no further action was taken either by the CID or by the Police, he believed that the matter had been laid to rest. Notwithstanding, he has always readily, openly and willingly shared any information he has with the Respondents including the 2nd Respondent to aid in investigations when they decided to revisit this matter. However, all this time, at no stage or time was he warned or cautioned that he could be a suspect in this matter. Moreover, he contended that the Respondents' decisions violate his legitimate expectations, are an abuse of process and contrary to public policy and interest and having been the whistle blower in this matter, and the 1st and 3rd Respondents having conducted their own investigations into the matter, he had the following legitimate expectations:

    a. The matter had been put to rest;

    b. That this matter having been prosecuted many years ago and in view of the sentiments of the Trial Court that heard the matter, it seemed there was no case;

    c. The Respondents' would not turn around and victimise him when he was among the first to expose the matter;

    d. The Respondents would exercise their powers impartially and make their decisions in fairness to all parties;

    e. The Respondents' and in particular the 2nd Respondent would not abuse their office, power or authority in any unlawful manner, bad faith or to achieve an extraneous purpose;
    f. The Respondents would not abuse their powers to selectively victimise, punish or prosecute him as is being done.

20. In support of his case the applicant exhibited a copy of the letter dated 23rd February, 2015 from the Director of Criminal Investigations to the Director of Public Prosecutions which in his view contains the advice and opinion of the Director of Criminal Investigations which centres on the entire criminal persecution. In his view the said letter points to the wrong exercise of discretion by the Director of Public Prosecutions which exercise of discretion was informed by the legal advice of the Special Prosecutor, **Paul Kibugi Muite**. He asserted that in view of the said letter dated the Special Prosecutor, **Paul Kibugi Muite**, should be disqualified from the proceedings as it is his legal opinion that informed the exercise of the discretion by the Director of Public Prosecutions that is now being impugned.
21. To the applicant, though the director of Public Prosecutions has the discretion to determine whether or not to prosecute a person, and who to prosecute, that discretion must be exercised judiciously and must be informed by the facts and the law since a prosecution is not to be good by way it turns up but is good or bad when it starts.
22. It was submitted on behalf of the applicant by **Dr Khaminwa**, Mr **Harun Ndubi**, **Ms Kethi Kilonzo** and **Mr Antony Oluoch** that judicial review orders are not merely administrative

remedies but are also constitutional remedies guaranteed to the Applicant by virtue of Articles 23(f), 47 and 50(1) of the Constitution of Kenya and their purpose as expounded in **Commissioner of Lands vs. Kunste Hotel Ltd**. **KLR [1997] eKLR** is:

"…to ensure that the individuals receive fair treatment and not to ensure that the authority after according their treatment reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court."

23. According to the *ex parte* applicant, based on **R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285**, the purpose of judicial review proceedings is to ensure that an individual is given fair treatment by the authority to which he has been subjected. With respect to the grounds for judicial review the applicant relied on **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300, Seventh Day Adventist Church (East Africa) Limited vs. Permanent Secretary, Ministry of Nairobi Metropolitan Development & another [2014] eKLR** and **Council For Civil Service Unions v. Minister For Civil Service [1985] A.C. 374, at 401D**.
24. To the applicant, when a decision is challenged by way of judicial review, the court will thus check if the decision is legal, rational and procedurally fair but does not look at the merits of the decision for that mandate lies with the decision-making body and any party aggrieved with the merits of the decision should file an appeal as confirmed by the Court of Appeal in the celebrated case of **Meixner & Another v. Attorney General [2005] 2 KLR 189** as cited in **Republic vs Attorney General & 4 others Ex Parte Kenneth Kariuki Githii [2014] eKLR**.
25. It was the ex parte applicant's case that the 1st Respondent's decisions are illegal, irrational and procedurally unfair. Further, the 1st Respondent's decision to appoint the 2nd Respondent as a public prosecutor is unconstitutional, unlawful, and ultra vires as 2nd Respondent is an unfit, unqualified and improper person to be appointed as public prosecutor or Special Prosecutor. To him, the holder of the office of Public Prosecution is required to possess more than academic qualifications to give legitimacy to the office and since the personal integrity of the 2nd Respondent is questionable this end cannot possibly be achieved hence his appointment fell short of the requirements of Articles 73 and 75 of the Constitution and therefore did not meet the legibility criteria.
26. The ex Parte Applicant further submitted that where the prosecutor is biased or unqualified, the prosecution process is inherently flawed, hence the Court must intervene to remedy the situation and relied on **R vs. Chief Magistrate at Mombasa ex parte Ganijee and Another (2002) 2 KLR 703** where the Court underscored its duty to stop a prosecution which is not impartial by declaring that an order of prohibition and/or certiorari must issue where a criminal prosecution is an abuse of the process of court, is oppressive or vexatious.
27. The ex parte Applicant submitted that 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 as was enunciated by the Court of Appeal in **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 (2007) 2 EA 170** and adopted in **Erick Kibiwott Tarus & 2 others vs. DPP & 7 others (2014) eKLR, J.R Civil Application No. 89 of 2014.**
28. It was submitted that the 2nd Respondent's appointment is inconsistent with the Constitution and the ***Public Officers Ethics Act*** as it failed to take into account the qualities of integrity, honesty and suitability for Public Office, with regards to the 2nd Respondent. To the applicant, it was expected of the 1st Respondent to act within the powers he was seized of hence he ought to have been guided by the provisions laid down by statute including the requirement to comply with the relevant public procurement laws and regulations as well as the principles set out in section 4 of the ODPP Act. Further, the 1st Respondent's had a duty and obligation to ensure that the decision he adopted was lawful. Having deviated from the legally laid down principles, the applicant called upon the Court to issue an order of certiorari and prohibition to control any kind of irregularity that ensued.
29. It was the applicant's position that the Constitution of Kenya 2010 under Article 157 created the office of the Director of Public Prosecutions, which hitherto existed in the office of the Attorney

General under a different name but that the current office of Director of Public Prosecutions is an independent one, not requiring the consent of any person or authority for the commencement of criminal proceedings. In the exercise of the functions of the Office the holder is not be under the direction or control of any person or authority. Further, the holder of such office is expected to act with utmost good faith, reasonably and within the law. He, however accused the 1st Respondent of misusing his discretion by making a decision based on external influences and not on law or principle and relied on **Sharpe vs. Wakefield (1891) AC 73** where it was stated:

"Discretion means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion…according to law and not humour. It is to be done, not arbitrary, vague or fanciful but legal and regular. And it must be exercised within the limit to which an honest man competent to discharge his office ought to confine himself."

30. To the applicant, the 1st Respondent was dishonest in failing to confine himself to the constitutional and statutory limits when appointing the 2nd Respondent to act as a public prosecutor hence the 1st Respondent's decisions are unfair, discriminatory, capricious and manifestly illegal. Further the said decisions amount to an outright abuse of office, thus cannot stand and are amenable to being quashed.
31. The applicant based his case on **Article 157(11)** of the Constitution which provides that in exercising the powers conferred by the Constitution, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. To him, if this is not adhered to the Court has the power to intervene and based on **Commissioner of Police and Others vs. Kenya Commercial Bank and Others Nairobi Civil Appeal No. 56 of 2012 [2013] eKLR, it was contended that it is not in the public interest to use the criminal justice system as a pawn for unfounded claims and witch-hunting. In his view,** the 1st Respondent's decision to appoint the 2nd Respondent as a Public Prosecutor was without any regard to the interests of the administration of justice.
32. It was submitted that section 9 of the ***Public Officers Ethics Act 2003*** imposes a duty on public officers to uphold professionalism and in particular, section 9(a) requires a public officer to carry out his duties in a way that maintains public confidence in the integrity of his office. Further, section 9(g) calls on all public officers to discharge any professional responsibilities in a professional manner. However, the 1st Respondent in making the decision to appoint the 2nd Respondent as a public prosecutor acted in flagrant violation of the provisions of section 9(a) and (g) of the ***Public Officers Ethics Act 2003*** and that the 1st Respondent's decisions were not the exercise of his own discretion but the result of unlawful collusion and pressure from third parties and other persons directly implicated in the investigations, and as such, the decisions are contrary to both the law and public policy. To him, the 1st Respondent's decision to divest himself and his office of the duty of handling the investigations file was in violation of his constitutional mandate.
33. The applicant conceded that the Director of Public Prosecutions has the power to appoint public prosecutors and stated that section 29 (1) of the ***Office of the Director of Public Prosecutions Act 2013*** provides that the Director of Public Prosecution may appoint any qualified person to prosecute on his or her behalf and a person so appointed shall be known as a public prosecutor. He however contended that section 16(1) of the ***Public Officers Ethics Act***, requires public officers to be politically neutral as the provisions provides that a public officer shall not, in or in connection with the performance of his duties—

a. ***"act as an agent for, or so as to further the interest of, a political party; or***
b. ***indicate support for or opposition to any political party or candidate in an election."***

34. Since section 16(2), requires a public officer not to engage in political activity that may compromise or be seen to compromise the political neutrality of his office, it was his view that the 1st Respondent's decision to appoint a holder of political officer as a public prosecutor is unlawful and amounts to an abuse of his office and illegal exercise of discretion.
35. Relying on **Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1**

KB 223 and **Council of Civil Service Unions vs. Minister for the Civil Service [1984] 3 All ER 935,** it was contended that the 1st Respondent's decision to appoint the 2nd Respondent as a public prosecutor despite knowing that the 2nd Respondent is unqualified to hold such office is unreasonable and irrational, going by the Wednesbury test making them liable to be quashed on judicial review.

36. To the applicant, **the 2nd Respondent acted partially and irrationally in targeting some persons and leaving out others who were considered culpable and recommended for prosecution by the 3rd Respondent and the Auditor General which decision is outrageous and defies logic.**

37. **It was further contended that** the 1st Respondent's decisions and conduct violate the principle of legitimate expectation. It was elaborated that the 1st, 3rd and 4th Respondents had previously carried out investigations into the Malili Ranch matter, based on the same facts, which led to the indictment and prosecution of two directors of Malili Ranch in Nairobi Chief Magistrate's Court Criminal Case No. 2141 of 2009. However, the ex parte Applicant was the whistle blower that led to the aforesaid criminal prosecution, which went through trial at the end of which the accused persons were acquitted. The 1st and 3rd Respondents had addressed their minds to the ex parte Applicant's role before the said criminal proceedings were instituted. The ex parte Applicant thus had the following legitimate expectations;

a. That the matter had been put to rest;
b. That the matter having been prosecuted many years ago and in view of the sentiments of the trial court that heard the matter, it seemed there was no case;
c. The Respondents would not turn around and victimize the Ex Parte Applicant who was not only the first to expose the matter, but has consistently and willingly volunteered information to the Respondents to aid them in their investigations;
d. The Respondents would make their decision in fairness to all parties;
e. The Respondents and in particular the 2nd Respondent would not abuse their office, power or authority in any unlawful manner, bad faith or to achieve an extraneous purpose; and finally
f. The Respondents would not abuse their powers to selectively victimize or punish the Ex Parte Applicant.

38. This position was based on the decision in the case of **Abdul Waheed Sheikh & Another vs. Commissioner of Lands & 3 Others [2012] eKLR** where **Hon. Lenaola, J** quoted, with approval, the definition of the doctrine of legitimate expectation by the Supreme Court of India in **J.P. Bansal vs. State of Rajastan & Anor, Appeal (Civil) 5982 of 2001.**

39. The *ex parte* Applicant further submitted that categories of unfairness are not closed and precedent should act as a guide not a cage thus the principle behind the said principle is that once a public body makes a promise, it effectively amounts to a contract and to go back on it is a breach and unfair for a public authority to do so. To the Ex Parte applicant, he relied on the representations made by the Respondent. Based on **Republic vs. The Commissioner of Lands *Ex parte* Lake Flowers Limited Nairobi HC Misc. Application No. 1235 of 1998** and **Seventh Day Adventist Church (East Africa) Limited vs. Permanent Secretary, Ministry of Nairobi Metropolitan Development & another [2014] eKLR**, he contended that the grounds upon which courts exercise judicial review jurisdiction are incapable of exhaustive listing**.**

40. With respect to legitimate expectation, the applicant cited **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA NO. 743 of 2006 [2007] 2 KLR 240,** and **Republic vs. Kenya National Examinations Council Ex parte Ian Mwamuli [2013] eKLR** to the effect that legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way.

The 1st, 3rd and 4th Respondents' Case

41. The 1st, 3rd and 4th respondents filed replying affidavits sworn by **Gitonga Murang'a** a prosecution counsel at the Office of the Director of Public Prosecutions (DPP).

42. According to him, an inquiry file was opened following persistent complaints by several shareholders of the Company which was made between the year 2009 to 2013 and continued to be made to various Government agents such as CID,OOP,DPP, Hon. AG, Former Prime Minister's Office, Registrar General alleging that three of the seven directors of the company by names of **Joshua Munuka** (Chairman and now deceased) **Peter Mutua Kanyi** (vice chair) and **Julius Maweu Kilonzo** (Secretary) conspired with to fraudulently amalgamate over 5000 acres of their individual shareholders parcels of land and sold it to the Ministry of Information and Communication for a sum of Kshs. 1 billion at a cost of Kshs. 200,000 per acre without their authority. They alleged that each shareholders portion measured 7.8 acres and each was therefore entitled to Kshs. 1,560,000.00 yet some of the complainants have to date not been paid while other shareholders were paid a paltry Kshs.1.1 Million thereby allegedly losing Kshs. 460,000/= each while a few shareholders were paid Kshs.1.4 Million and allegedly lost Kshs. 160,000/= each. It was further averred that the complainants further stated that operations of their company, being a public company was conducted at all times by way of resolutions approved by the shareholders, in either annual general meetings or extra ordinary general meetings and that no resolution to sell their parcels of land or any asset of the Company was made in the years 2009. The deponent added that the complaining shareholders also alleged that their company did not have any land to sell in the year 2009 because, pursuant to the special general meeting held on 4th September 2004 the shareholders had resolved to sub-divide the entire Malili Ranch land amongst all the shareholders and in the month of June, 2005 all the shareholders were invited for balloting and each of the 2347 shareholders were allocated an equal share of 78 acres of agricultural land and 80x100 commercial plot as per ballot papers and allotment letters issued to some shareholders. They further stated that the approved subdivision plan was later submitted to the Ministry of Lands for preliminary approval and issuance of Title Deeds to individual shareholder in the year 2008. The shareholders nevertheless were given possession of their portion, where some moved in and started developing.
43. He deposed that all the complainants recorded their statements between the month of February, 2013 and June, 2013 and took the police through the background and history of Malili Ranch Ltd and stated clearly the circumstances under which they all came to know about the alleged sale of their parcels of land, and it clearly emerged that shareholders resolved on their first special General meeting held on 3rd April,2004 and 4th September 2004 by the new board of the directors to subdivide the entire Malili Ranch Land amongst all the shareholders and appointed a firm of surveyors by the name of **Mr. Gichuki** of Geodevsurveyors to undertake the subdivision of the entire Malili Ranch Ltd lands and allocate equal portions to individual shareholders immediately which survey was completed in the year 2006 and all shareholders were invited on 27th July 2006 to ballot and each member was allocated 7.8 acres of agricultural plot and 80x100 commercial plot equally. Since Malili ranch only going concern was the land, its subdivision and allocation in the year 2006, to individual shareholders meant that Malili ceased to be a going concern and what remained was its dissolution after the members' title deeds were processed and issued. Everything including the plot where Malili Ranch offices were situated was subdivided and allocated. Its directors therefore did not have any legal capacity to sell. The complainants alleged that each took possession of the individual land as *bonafide* owners while awaiting the titles. This fraudulent sale was possible because inspite of the directors having assured shareholders of processing their title deeds within two years from the year of 2006, the three directors deliberately delayed processing the titles to shareholders so that the land remained registered and vested at registrar of lands in the names of Malili Ranch Limited as an entity.
44. According to the deponent, investigations revealed that they also forged minutes and resolution of board of directors dated 22nd January 2009 by alleging that all the seven directors of Malili Ranch Limited attended the board meeting and resolved to sell over 5000 acres of land to the Ministry of Information and Communication belonging to Malili Ranch because in reality Malili Ranch did not have any land as all the land had been subdivided and allocated to shareholders.
45. It was disclosed that on 30th November 2009, the applicant sent a known political activist in Ukambani, **Muteti**, who is currently secretary General of URP Party to go to Machakos and bring the other four directors of Malili Ranch Limited, **David Ngilai**, **Leonard Kitua**, **Julius Mbau Nzuki** and **James Kituku Munguti** and on arrival the applicant instructed **Eric Mutua** to conduct an election of a chairman and secretary from among the four to replace the two that had been charged. On the same day **Mr. Eric Mutua** conducted an election in his office and **Mr. David**

Ngilai and **Leonard Kitua** were elected by the four as chairman and secretary respectively.

46. He added that the Applicant did record Police Statements in the role he played in the transaction, from which it was clear that he knew the sale was unlawful, irregular but never raised any objection and on the month of November 2009, the Applicant and others agreed to proceed with the irregular and unlawful transaction after the death of the Company Chairman, **Josiah Munuka**.
47. According to the deponent, during the trial the Prosecution shall adduce evidence to show that the Applicant signed a number of documentation including Minutes of various meetings in relation to the unlawful sale of the land and that the evidence on record clearly shows 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. To him, the evidence on the Police File clearly proves that resolutions provided and made by the Applicants and other Directors of Malili Ranch were all flawed and illegal and therefore of no legal consequence and that upon analysis of the evidence on record the 1st Respondent recommended that the Applicant be charged with offences that are known to law as reflected in the charge sheet. In his view, the decision to charge the Applicant was informed by the sufficiency of evidence on record and the public interest and that the 2nd Respondent has independently reviewed and analysed the evidence contained in the investigations file including the witness statements, documentary exhibits and statements of the applicant 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 Applicant.
48. It was averred that 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 and that in the discharge of its duties and functions, the Respondent is required to respect, observe and uphold the following Constitutional provisions, inter alia 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); to uphold and defend the Constitution; to uphold 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; to respect, observe, protect, implement, promote and uphold the rights and freedoms in the Bill of Rights enshrined in Article 21(1) of the Constitution; to be accountable to the public for decisions and actions taken and generally observance of Article 73 (2) (d) of the Constitution; and to be accountable for administrative acts and observance of the values and principles of public service under Article 232 (e) of the Constitution.
49. It was further contended by the said respondents that:

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 Applicant has not demonstrated that in making the decision to prefer criminal charges against him, the Respondent has 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 applicant that the intended charges are intended to serve ulterior motives is without merit, evidentiary or legal reason or backing.
d. The Applicant's averment that the Respondents are bent on harassing and embarrassing him for no apparent reason is misconceived, unfounded, unmeritorious and baseless;

50. In their contention, 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 and the Applicants have failed to demonstrate that the 1st 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. Further, the Applicants have not demonstrated that the 2nd Respondent has exercised his powers contrary to the Constitution as provided under **Article 157(11).** To the said respondents, the Constitution,

the ***Criminal Procedure Code*** and the ***Evidence Act*** provide sufficient safeguards to ensure that the applicants get a fair trial. It was their view that the Applicants have merely stated their rights and have failed to demonstrate with particularity how their rights will be infringed and violated or the damages that they are is likely to suffer as a result of the alleged infringement.

51. It was deposed that on 26th April, 2014, the 1st Respondent received from the 3rd Respondent an investigations file in which he recommended a number of individuals be charged with fraud related offences in relation to the Government purchase of Malili Ranch. The 1st Respondent then made a decision that the file be independently reviewed and advised by a Senior Counsel from private practice and the decision to have the files reviewed by a Senior Counsel was informed by the fact that one of the individuals recommended to be charged, **Erick Mutua**, sits on the 1st Respondent Advisory Board; and secondly, that there had been previous investigations undertaken by the EACC and the 3rd Respondent in relation to the subject matter and the 1st Respondent had already rendered decisions on the same and as such decision on the present file would necessarily entail review and/or reconsideration of the 1st Respondent earlier decisions.
52. It was contended that 1st Respondent advertised tender No. ODPP/QNO.069/2013-2014 for the provision of legal services of a senior Counsel and the 2nd Respondent was one of the persons who applied for the tender after which the 1st Respondent Tender Committee on its sitting on the 9th day of May 2014 awarded **Paul Kibugi Muite S.C** to provide legal services tender and S.C signed an agreement 15th day of May 2014 in which he was required to review all the files related to the transactions of land belonging to Malili Ranch. The said decision was communicated to the Director of Public Procurement Oversight Authority (PPOA) based on Regulation 61(3) of the ***Public Procurement and Disposal Regulations 2006***. According to him, the appointment of the 2nd Respondent as a Public Prosecutor was gazette vide Gazette Notice No. 5959 published on the 27th day of August 2014 and the same has never been challenged in any court hence was proper and legal and was within the mandate of the 1st Respondent. However, on the 3rd day of June 2014, the Applicant wrote a letter to the Commission on Administrative Justice (Office of the Ombudsman) complaining about the conduct of the investigations and the commission replied vide letter dated 11th day of June 2014.
53. Further investigations, it was contended, were carried out by the 1st Respondent and that **Paul Kibugi Muite**, **S.C** was then required to review the above files and make the necessary recommendations as per the tender that had been awarded. Pursuant thereto, on the 26th day of August 2014 **Paul Kibugi Muite**, **S.C** wrote a letter to the 1st Respondent with recommendations in respect to the above files.
54. To the respondents, the 1st 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 Applicants and the other accused persons. Further, on the 28th day of August 2014 the 1st Respondent acknowledge receipt of the letter dated 26th day of August 2014 by **Paul Kibugi Muite**, **S.C** wherein the 2nd Respondent considered the recommendations made in light of powers conferred upon DPP by the Constitution and pursuant to Section 85(2) of the ***Criminal Procedure Code***, the 2nd 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.
55. It was averred that the appointment of **Paul Kibugi Muite, S.C** to act in the matter raised herein above was and is lawful and that the issue raised herein is the same issues raised in JR 333 of 2014 where the current *ex parte* Applicant is an interested party and the ex parte Applicant is clearly in abuse of process.
56. The respondents therefore prayed that the application be dismissed in its entirety with costs and further that the *ex Parte* applicant should not be granted the orders sought.
57. It was submitted that on behalf of the 1st, 3rd & 4th Respondents by Mr **Ashimosi** and **Mr Okello** that upon conclusion of investigation by the 3rd & 4th Respondent, the 1st Respondent on recommendation of the 2nd Respondent analyzed the evidence presented and upon being satisfied on the sufficiency of evidence made a decision to prosecute, without any bias, influence and in an

independent manner giving due regard to Article 157 of constitution and principles enunciated thereunder and the office of the Director of Public Prosecution Act (No. 2 of 2013). It is further submitted that the appointment of the 2nd Respondent as a prosecutor was done pursuant to and in accordance with the powers and discretion conferred upon the 1st Respondent under the Article 157 of the constitution and pursuant to express statutory provisions empowering the 1st Respondent to appoint an Advocate from private practice and designate him or her as a prosecutor for special purpose specified in the notice gazzetting such appointment in accordance with the Office of the ***Director of Public Prosecution Act***, 2013 and in compliance with the ***Public Procurement and Disposal Act***.

58. To these respondents, the law is that the Courts ought not to usurp the constitutional mandate of the Director of Public Prosecution conferred pursuant to Article 157 of the constitution and reference was

made to **Kenya Commercial Bank Limited & 2 Others vs. Commissioner of Police and Another, Nairobi Petition No. 218 of 20122 (2013) eKLR,** in which **Majanja J.** held that:

> **"the office of the Director of Public Prosecution and Inspector General of the National Police Service are independent and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within the limits provided by the law. But these offices are subject to the Constitution and the Bill of Rights contained therein and in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under the constitution".**

59. The respondents referred to **George Joshua Okungu and Another vs. Chief Magistrate Court Anti Corruption Court at Nairobi and Another [2014] eKLR**, **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170, Meixner & Another vs. Attorney General [2005] 2 KLR 189**, **In Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69**, **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001**, **Republic vs. Commissioner of Police and Another exparte Michael Monari & Another (2012) eKLR** and **Koinange vs. Attorney General and Others (2007) 2 EA 256** to show ,the circumstances under which the court will grant an order prohibiting the commencement or continuation of Criminal Proceedings.

60. In their view, the DPP was satisfied based on sufficiency of evidence and not actuated by any other extraneous considerations. Further the decision of the DPP to charge the Applicant did not violate his fundamental freedoms or rights at all. To them, the prayers in the Application for determination thereof require the court to analyze and examine facts and evidence on the basis of which the guilt, innocence or otherwise of the Applicant shall be determined and the proper forum for consideration and resolution of the factual and evidentiary matter is the trial court and relied on **Bryan Yongo vs. Attorney General HCC 61 of 2006** where it was held that:

> **"It was the duty of the trial Court to take evidence from both prosecution and the defense and to weigh that evidence and determine the case one way or another".**

61. The respondents also cited **William Ruto & Another vs. Attorney General HCC No. 1192 of 2004** where it was held

> **"That analysis of evidence should be done at the trial and not in the constitutional Court".**

62. Further support for the submissions was sought from **Joshua Chelelelego Kulei vs. Republic PT. 66 of 2012** to the effect that:

> **"It is the general position of this Court, with certain exceptions, that it's not its business to determine whether or not the Charges as framed discloses an offence, that would be the function of the trial Court and this Court must be careful not to Usurp the mandate of that Court".**

63. The respondents relied on **Hon. James Ondicho Gesami vs. The Attorney General and two others PT.376 of 2011** in which **Mumbi J.** held as follows:

"With respect I do not find anything discriminatory in preferment of criminal charges against any party in respect of whom he finds sufficient evidence to prefer charges"

64. The respondents reiterated the appointment of the 2nd Respondent as a prosecutor was done in exercise of proper functions and powers of the 1st Respondent and relied on **Elirema and Another vs. Republic [2003] KLR 537**.
65. The above holding was echoed in several other holdings, *inter alia*, **Irungu vs. Republic [2008] KLR 126** that:

"the Law is now well settled that only Advocate of the High Court of Kenya or a police officer not below the rank of an acting inspector of Police maybe a public Prosecutor".

66. To the respondents, since the gist of the above holdings is now expressly enumerated in the ***Office of the Director of Public Prosecutions Act***, ***2013***, the appointment of the 2nd Respondent as a prosecutor by the 1st Respondent is with all respects constitutional, lawful and legal and it has not been demonstrated by applicant how the mere fact that the 2nd Respondent is a politician, a former presidential candidate and a member of Safina Party is bound to cause prejudice to the prosecution of the Applicant by the 2nd Respondent since the Applicant does not allege that the 2nd Respondent was his competitor in 2013 general elections.
67. It was therefore submitted that the Applicant has failed to prove violation of his fundamental freedoms and rights and/or infringement of any law or regulation or abuse of discretion and breach of Rules of Natural Justice and the Application should therefore be dismissed with costs.

2nd Respondent's Case

68. On the part of the 2nd Respondent (herein below referred to as "the respondent"), deposed that he is an advocate of this Court conferred the rank of Senior Counsel, duly licensed to practice as such, having been called to the Bar in 1970.
69. According to him, he is not a public officer within the meaning of the ***Public Officer Ethics Act***, 2003 ("POEA Act") and accordingly the provisions of that Act do not apply to him hence the Applicant's notion that he is in breach of unspecified provisions of the POEA Act are completely misguided.
70. According to the respondent, the Applicant has elaborated in his pleadings that it is the 3rd Respondent ("DCI") who conducted investigations into allegations of unlawful sale of land by Malili Ranch Limited to the Government of Kenya and pursuant to investigations, recommended the prosecution of among others, the Applicant. It is beyond argument, he deposed, that the DCI is constitutionally mandated to conduct investigations into allegations of criminal offences within Kenya. Accordingly, there is nothing illegal, unlawful and *ultra vires* in the DCI's actions to conduct investigations and make recommendations for the prosecution of the offenders. To him, the allegation that the 1st Respondent divested himself of authority is false and baseless since the authority to conduct prosecutions in Kenya is vested in the DPP pursuant to Article 157 of the Constitution. However, Article 157 (9) of the Constitution permits the DPP to delegate prosecutorial powers either under his general or special instructions. Furthermore, section 85 (2) of the Criminal Procedure Code and section 30 of the ***Office of the Director of Public Prosecutions Act, 2013*** ("ODPP Act") expressly permits the DPP to appoint an advocate of this Court for purposes of conducting prosecution of any case. It is a constitutional requirement that in the exercise of his prosecutorial power or functions, the DPP shall not be under the direction or control of any person or authority.
71. According to the respondent, the DPP's action in forwarding the files to him for review was to receive independent advice on the evidence gathered by the DCI against the Applicant and other persons implicated in the unlawful sale of land belonging to individual shareholders of Malili Ranch Limited to the Government of Kenya and upon reviewing the entirety of evidence, he

advised the DPP on the sufficiency of evidence against among other persons, the Applicant hence it was not his decision to prosecute the Applicant. That decision, he contended, was taken by the DPP and communicated to him in a letter dated 28th August, 2014 and his letter to the DPP of 26th August, 2014 clearly stated that *"Subject to your decision and concurrence, the following persons should be charged…your decision is awaited."*

72. According to the respondent, contrary to the Applicant's averment that he instituted criminal proceedings against the applicant, the authority to commence criminal proceedings against him lies in the office of the DPP and the respondent's role is limited to that of conducting the prosecution in the name of the State in accordance with the instructions of the DPP.
73. He disclosed that the Applicant was aware that his legal opinion had been sought by the DPP and on 6th June, 2014, the respondent responded to the Applicant's letter dated 3rd June, 2014 to the DPP and copied to the respondent wherein he stated *"…I expect to complete the exercise in the next three weeks or so and submit my opinion to the DPP for his decision in accordance with the Constitution."*
74. According to the respondent, the applicant's specifics of the acquisition of land by the Government of Kenya from individual shareholders of Malili Ranch Limited and the applicant's alleged role in the entire process, is the Applicant's version of events and is not borne out by the evidence in the respondent's possession as the prosecutor. He added that the documentary evidence and direct evidence from witnesses as compiled by the investigators squarely implicates the Applicant in the criminal enterprise where land belonging to individual shareholders of Malili Ranch Limited was unlawfully sold to the Government of Kenya, without their knowledge, to the illegal benefit of among others, the Applicant. According to the respondent, the Applicant has not tabled any evidence to demonstrate that his prosecution was recommended and instituted in bad faith and for ulterior motives as alleged or at all. To the contrary, the purpose of the Applicant's prosecution is in the public interest where shareholders of Malili Ranch Limited were defrauded of their land without their knowledge by among others, the Applicant.
75. With respect to the allegation that the respondent is a 'political office holder' and the party leader of a registered political party, the respondent stated that he is indeed the party leader of Safina Party, a registered political party and his right to form and join a political party is a fundamental right enshrined under Article 38 of the Constitution and it carries no fetter or bar to his appointment as a prosecutor which is primarily anchored on his qualifications as an advocate of the High Court. To disqualify him, an advocate of this Court, from being appointed by and under the authority of the DPP would be a direct affront and assault to his political rights guaranteed by the Constitution.
76. The respondent asserted that his appointment as a public prosecutor for purposes of prosecuting all proceedings relating to the illegal disposition of the Malili Ranch land has no connection whatsoever with his activities in Safina party and that the Applicant has not shown in what way his leadership of a political party impairs or prejudices his role as a prosecutor or further prejudices the Applicant in the criminal charges he is facing. To him, the case against him has been instituted by the DPP in pursuit of criminal justice.
77. With respect to the respondent's competency in light of the alleged pending criminal case against him in 1999, the respondent averred that he obtained orders staying his prosecution as the case was politically motivated against him by the KANU regime. That notwithstanding, he is constitutionally entitled to the presumption of innocence under Article 50 of the Constitution and cannot accordingly be deemed to be unfit and unqualified by dint of criminal charges which have erstwhile been stayed and not proven against him. To the respondent, it is a matter of notoriety that the President and the Deputy President of the Republic of Kenya have continued to occupy and execute the mandate of their office notwithstanding criminal charges brought against them in the International Criminal Court because this Hon. Court has in the past ruled in favour of the constitutional presumption of innocence. Similarly, the applicant, a State officer within the meaning of Article 260 of the Constitution by dint of his position as the Senator of Machakos County, continues to enjoy the full benefits and terms of his office despite facing the criminal charges in the criminal courts by virtue of the constitutional edict of the presumption of innocence.
78. To the respondent, the insinuation by the Applicant that the DPP's 'ability' to prosecute him in the pending criminal complaint considering his appointment as the Applicant's prosecutor is 'questionable', is not only speculative but also absurd, without merit and wholly irrelevant to the

prosecution of the Applicant. Similarly, the Applicant's insinuation that the respondent has received instructions from the president of the Law Society of Kenya, **Mr. Eric Mutua**, is completely baseless and has no connection whatsoever with the Applicant's prosecution. Furthermore, the Law Society of Kenya is a professional body and is not synonymous with **Mr. Eric Mutua** and decisions to appoint counsel on any matter that the Law Society is involved in is taken in a democratic manner by the council of the Law Society, but not by an individual member of the council.

79. According to the 2nd respondent, the decision to prosecute is the sole preserve and prerogative of the DPP acting within constitutionally and legally permitted boundaries. In cases of conspiracy, more than any other, it is the DPP's duty to consider, after having regard to the available evidence, whom to charge and whom to parade as an accomplice witness in order to prove the ingredients of the offence. This decision is within the DPP's constitutional mandate and cannot be termed as discriminatory or selective simply for the reason that certain participants in the criminal enterprise are being presented as prosecution witnesses.
80. The respondent contended that the Applicant's further insinuation that he has a 'vested interest' to 'justify and vindicate' his advice/ recommendation to the DPP on the Applicant's prosecution is absurd, irrational and ludicrous. Firstly, the entire concept of justification and vindication of his advice is a vagary. It is noteworthy that the recommendation to charge the Applicant, among others, was first rendered by the DCI. Thereafter, after reviewing the evidence, the 2nd respondent independently endorsed the recommendation to charge the Applicant which the DPP agreed with giving the go-ahead for the prosecution. The question of vindication and justification is unfounded and completely without merit.
81. In was averred that in any event, it is trite law that orders of *certiorari* cannot issue to quash recommendations or advice.
82. It was further contended that the Applicant's allegation that the DPP 'divested' himself of authority to prosecute and appointed the 2nd respondent based on media reports that **Eric Mutua**, the Chairperson of the Law Society of Kenya is an active member of the Advisory Board of the Office of the Director of Public Prosecutions is speculative and hypothetical. Since the authority to prosecute the Applicant is at all material times vested in the DPP, the respondent averred that he has simply been appointed to conduct the prosecution, subject at all material times to the directions and instructions of the DPP. Therefore the notion that the DPP 'divested' himself of authority because of the alleged role of **Eric Mutua** in the unlawful sale of the land is meritless and has no connection whatsoever with the merits of the criminal charges facing the Applicant. To the respondent, the DPP's decision to seek counsel outside his chambers is a reasonable, rational and prudent decision, if indeed any of the suspects sits in the Advisory Board of the ODPP. This is international best practice routinely observed by the Crown Prosecution Service of the United Kingdom and appointment of independent counsel instead of District Attorneys in the United States.
83. On the issue of the applicant's legitimate expectations being violated by the criminal charges facing him in that he believes that the matter had been put to rest and that *'the matter having been prosecuted many years ago and in view of the sentiments of the trial Court that heard the matter, it seemed there was no case'*, it was averred that firstly, the Applicant was not charged with any offence in Criminal Case No. 2141 of 2009 or in any other case related to the sale of land by Malili Ranch Limited. Contrary to the Applicant's assertions that he was a whistle blower of the criminal enterprise, there is no evidence that he was a witness in Criminal Case No. 2141 of 2009. It is also important to note that the court hearing criminal case no. 2141 of 2009 did not record any sentiments about the Applicant or the evidence against him. Indeed, the trial court stated in a nutshell that there was no evidence to support the charges that the accused persons in that case faced. It is important to point out that the charges facing the Applicant and the charges facing the accused persons in criminal case no. 2141 of 2009 are separate and distinct. Additionally, the trial court did not bar investigators from conducting fresh investigations to establish and determine the real culprits in the criminal enterprise. Accordingly, the question of the Applicant's legitimate expectations does not arise because he has, prior to the present charges, neither been charged with an offence relating to the sale of land in Malili Ranch nor has he been expressly or impliedly been assured of or granted immunity in respect of the offences.
84. On the allegation of abuse of office, power and authority and bad faith and to achieve an

extraneous purpose, the respondent's position was that the same are unmerited as it has not been demonstrated to any degree of specificity the manner in which he have abused office, power or authority, or acted in bad faith or for ulterior motives and extraneous purpose.

85. To the respondent, the Applicant has not demonstrated that in appointing him, the DPP acted outside the law or abused his power or that the Applicant's prosecution is an abuse of process. Indeed, the Constitution, the ODPP Act and CPC expressly grant authority to the DPP to appoint him as a prosecutor and the DPP's actions were squarely within constitutional and statutory boundaries. He disclosed that he was aware that there are several commonwealth jurisdictions which have established a practice of appointing advocates in private practice as prosecutors for specific cases. Considering the immense human resource challenges that the DPP faces in his office, this is a practice which is allowed by the law and should be encouraged and not vilified.

86. To the respondent, under Article 50 (2) (j) of the Constitution, the Applicant is only entitled to be informed in advance of the evidence the prosecution intends to rely upon and to be given reasonable access to such evidence. The Applicant's demands to be supplied with the documents enumerated in annexture **JNM 10** in the Applicant's bundle go beyond the constitutional threshold so as to require the prosecution to assist the defence in the conduct of their case. All documents to be relied upon by the prosecution at the criminal trial have been made available and or will be made accessible to the Applicant before the commencement of the trial within a reasonable time before the commencement.

87. In relation to the Applicant's allegation that the DPP failed to follow the laid down procedure and laws relating to public procurement in relation to the 2nd respondent's appointment as a public prosecutor, the respondent stated that this allegation is bereft of merit as the Applicant has not tabled any evidence of irregularity in his appointment. Furthermore, where public procurement laws are breached, the Applicant has an avenue to approach the appropriate statutory bodies mandated under the ***Public Procurement and Disposal Act, 2005*** and the rules made thereunder to review procurement processes and seek appropriate relief. The Applicant's allegation is accordingly frivolous and meant only to scandalise and obfuscate the issues for determination in the criminal trial.

88. It was however contended by the respondent that he participated in the procurement process by tendering a bid, which was considered and recommended by the tender committee of the procuring entity. Correspondence exchanged between himself and the procuring entity confirms that the procurement process complied with the law. This position has been confirmed on oath by **Mr. Gitonga Muranga** in paragraph 24 of his affidavit sworn on 8th December, 2014.

89. It was therefore the 2nd respondent's case that this entire application is an abuse of process and ought to be rejected peremptorily. The Applicant is merely fearful that an experienced advocate of this Court will prosecute the case he is facing in the criminal court professionally and to the best of his abilities.

90. It was submitted by **Mr Kilukumi** on behalf of the 2nd respondent that in the application, the Applicant impugned the 2nd Respondent's appointment on the following discernible grounds:-

a. The 2nd Respondent is an unfit, unqualified and improper person to be appointed as a prosecutor;
b. The 2nd Respondent is a 'political office holder' and as a result, his appointment as a prosecutor is *ultra vires* the Constitution of Kenya, 2010 and offends the provisions of the ***Public Officer Ethics Act, 2003*** ("POEA");
c. In appointing the 2nd Respondent as a public prosecutor, the DPP unconstitutionally divested himself of prosecutorial authority and acted outside the statutory and constitutional jurisdiction donated to him;
d. The process of appointment of the 2nd Respondent as a public prosecutor did not adhere to the procurement laws and procedure.
e. The 2nd Respondent has a criminal case pending against him in Criminal Case No. 1800 of 1999 in which the DPP is the prosecuting authority;
f. The professional and personal relationship between the 2nd Respondent and **Eric Kyalo Mutua**, who happens to be a party implicated in the criminal proceedings arising out of the sale and purchase of the land belonging to Malili Ranch Limited will render the 2nd Respondent unable to carry out his prosecutorial mandate impartially.

91. According to the 2nd Respondent, the DPP is vested with constitutional authority under Article 157 (6) of the Constitution to exercise State powers of prosecution and he is accordingly not subject, while exercising prosecutorial powers to the direction or control of any person or authority. In exercising the power to prosecute, the DPP may act in person or through subordinate officers acting in accordance with general or special instructions hence it is crystal clear that the DPP has constitutional authority to appoint any person to subordinate him in order to conduct a prosecution. Furthermore section 85(2) of the ***Criminal Procedure Code***, provides:-

The Director of Public Prosecutions, by writing under his hand, may appoint any advocate of the High Court or person employed in the public service, to be a public prosecutor for the purposes of any case.

92. Section 30 (1) of the ***Office of the Director of Public Prosecutions Act, 2013*** ("ODPP Act") on the other hand provides as follows:-

The Director may from time to time, and as need may arises, engage the services of a qualified legal practitioner to assist in the discharge of his mandate.

93. To the respondent, it is evident from the foregoing provisions of the law that the legislature has vested on the DPP the discretion and authority to appoint Advocates of this Court who are in private legal practice to conduct prosecutions before the Courts in Kenya. Accordingly, the protestations by the Applicant that the DPP acted unconstitutionally and without statutory authority are clearly baseless, unfounded and completely lacking in merit as the Applicant has not demonstrated a single provision of the law that the DPP has breached and or flouted in appointing the 2nd Respondent, an Advocate of this Court, in private practice, for the purposes of prosecuting all cases and inquiry files relating to the purchase of land by the Government of Kenya from Malili Ranch Limited.
94. Similarly, the nebulous ground that 'the DPP unconstitutionally divested himself of prosecutorial authority and acted outside the statutory and constitutional jurisdiction donated to him' is completely unmerited and contrary to express constitutional and statutory provisions permitting the DPP to exercise prosecutorial powers through officers subordinate to him and by appointing independent advocates in private legal practice to conduct prosecutions. To the contrary, the DPP has **NOT** divested himself of prosecutorial power but instead appointed an Advocate of this Court in private practice to exercise the powers of prosecution. Indeed, as evidenced by the exhibits produced before this Court on the communication between the DPP's office and the 2nd Respondent, the 2nd Respondent is answerable and acts under the specific directions and authority of the DPP.
95. With respect to the 2nd Respondent's qualifications, it was submitted that section 30 (1) of the ***ODPP Act*** requires that the person engaged by the DPP be a 'qualified legal practitioner' and "qualification" is defined by ***Black's Law Dictionary***, 8th Edition, page 1275 as:-

The possession of qualities or properties (such as fitness or capacity) inherently or legally necessary to make one eligible for a position or office, or to perform a public duty or function.

96. It was therefore submitted that a qualified legal practitioner is someone who has met the legal requirements for the practice of law in Kenya. Indeed, it is beyond peradventure that the 2nd Respondent is a well-respected and senior advocate in the law profession. Indeed, as exhibited by his certificate of admission to the Bar dated 29th June, 1970 coupled with the printout from the Law Society of Kenya indicating that the 2nd Respondent is duly licensed to practice for the year 2015, it is evident that the 2nd Respondent is a 'qualified legal practitioner' as required by the provisions of the ***ODPP Act*** and the ***Criminal Procedure Code***. In support of this submission the respondent relied on the Court of Appeal case of **Elirema & another vs. Republic** (supra) in which it was held as follows in relation to persons authorised to conduct prosecution, at page 544, line 10:-

"In Kenya, we think, and we must hold that for a criminal trial to be validly conducted within the provision of the Constitution and the Code (Criminal Procedure Code) there must be a prosecutor, either public or private…For one to be appointed as a public prosecutor by the Attorney General one must be either an advocate of the High Court of Kenya or a person a police officer not below the rank of an assistant inspector of police."

97. The respondent pointed out that this Court has already determined the general question as to whether the 2nd Respondent is qualified to prosecute in the ruling on whether leave granted shall operate as stay in these proceedings by rendering itself as follows:-

"In this application if I understood the applicant's case properly, it was not contended that Hon. Paul Muite, SC is generally incompetent or unqualified to prosecute the applicant. Far from it. Hon. Paul Muite, SC, is undoubtedly one of the eminent lawyers and legal minds in this country and a lawyer of no mean repute. Any suggestions that he is generally unqualified to conduct criminal prosecution would in my view be unworthy of consideration by this court."

98. Having already made the above finding, it was submitted that the question as to the qualifications of the 2nd Respondent to prosecute the Applicant has already been determined.
99. It was submitted that the allegation on personal integrity is not pleaded in the application and has been introduced for the very first time in the Applicant's submissions and ought to be rejected on this ground alone.
100. The 2nd Respondent then proceeded to deal with the issue whether he is a political office holder and submitted that the contention that by virtue of the 2nd Respondent being the chairman of a political party known as *Safina*, he (the 2nd Respondent) is unfit and the decision by the DPP to appoint him as a special prosecutor is irregular, absurd, irrational and unreasonable, is in and of itself is absurd, irrational and incongruous. To him, the Applicant does not demonstrate through his pleadings or any evidence presented before this Court in what manner the 2nd Respondent's chairmanship in a political party and activities as a politician have an adverse effect on the conduct of the 2nd Respondent's duties as a prosecutor. According to him, it is imperative to note that Article 38 of the Constitution guarantees every citizen, including the 2nd Respondent, their political rights in the following terms:-

"(1) Every citizen is free to make political choices, which includes the right –

a. ***to form, or participate in forming, a political party;***
b. ***to participate in the activities of, or recruit members for, a political party; or***
c. ***to campaign for a political party or cause.***

(2)……

(3) Every adult citizen has the right, without unreasonable restrictions –

(a) ……

(b)……..

(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.

101. While conceding that he is the chairman of *Safina*, a political party, the 2nd Respondent denied, as contended by the Applicant, that he is a political office holder. Neither is he a public officer as alleged but is merely an appointee under the ***ODPP Act*** for a specific and limited purpose subject at all material times to the authority and direction of the DPP. He submitted that the 2nd

Respondent's political rights are, as outlined above, constitutionally safeguarded and guaranteed and cannot be used as a means of discriminating against him in his appointment by the DPP as a special prosecutor hence the suggestion by the Applicant that the 2nd Respondent's membership in a political party renders him unfit, unqualified and incompetent and further operates as a restriction or bar to his appointment as a prosecutor is devoid of legal or constitutional backing. As already submitted, the principle statutory requirement for appointment of any person as a prosecutor is that they shall be a qualified legal practitioner.

102. It was his further position that the Applicant has not demonstrated through his pleadings, with any particularity whatsoever, the manner in which the 2nd Respondent's chairmanship and membership of a political party has any connection, correlation to or prejudices or hinders and impedes the prosecutorial functions bestowed on the 2nd Respondent hence there is no constitutional or statutory violation in the appointment of the 2nd Respondent to conduct the Applicant's prosecution. It was his submission that the 2nd Respondent is not a 'political officer holder' and the political office that the Applicant allegedly holds has not been specified. Indeed, it is a nebulous and vague allegation to simply state that the 2nd Respondent is a 'political office holder' without specifying with particularity the political office occupied. The 2nd Respondent, it was submitted does not occupy any political office.

103. To the 2nd Respondent, the Applicant's allegation that the 2nd Respondent's appointment is ultra vires the Constitution and the POEA is baseless and unmerited as the Applicant has failed to specify the provisions of either the Constitution or the ***POEA*** which have been breached in appointing the 2nd Respondent to prosecute him. He asserted that no constitutional or statutory provision has been breached in appointing the 2nd Respondent as a special prosecutor since the ***POEA*** applies to public officers and the Respondent is not a public officer within the meaning of the POEA or the Constitution.

104. It was submitted that the Applicant's contention that the procurement process leading to the 2nd Respondent's appointment did not follow the laid out procurement procedures is from the outset devoid of merit and for dismissal *ab initio*. To him, the governing legislation for all public procurement is the ***Public Procurement and Disposal Act, 2005*** ("PPDA") and the ***Public Procurement and Disposal Regulations, 2006*** ("PPDR") and these were the procurement laws applicable to the 2nd Respondent's appointment. However, the Applicant has failed to specify the manner in which the 2nd Respondent's appointment failed to comply with either the PPDA or the PPDR. To the contrary, it was submitted that the DPP dutifully complied with the provisions of Section 30(2) of the ***ODPP Act*** which mandates him to comply with the laws and regulations relating to public procurement. The 2nd Respondent has exhibited in his replying affidavit the documentation relevant to the procurement leading to his appointment as a special prosecutor for purposes of conducting the prosecutions relating to the sale and purchase of land by Malili Ranch Limited to the Government of the Republic of Kenya respectively. It was in any event submitted that in the event there was any legitimate grievance against the procurement process leading to the 2nd Respondent's appointment, the ***PPDA*** provides for specific procedures for review of procurement processes by the Public Procurement Administrative Review Board ("PPARB") under Section 93 of the ***PPDA***; and investigations by the Director – General of the Public Procurement Oversight Authority under Section 102 of the ***PPDA***.The Applicant instead chose to approach this Court, sidestepping the statutory mechanisms available to him to challenge the procurement process. To the 2nd Respondent, it is a settled principle that where there is a specific statutory mechanism and or process to challenge a quasi-judicial decision by a public entity, that process must be followed and reliance was placed on **Narok County Council v Trans Mara County Council [2000] 1 EA 161**.

105. Accordingly, it was submitted that where no evidence exists that procurement laws were not followed – indeed, evidence exists to the contrary, and that it is established that the Applicant did not follow the statutorily laid down mechanisms, this allegation and ground must be rejected and dismissed.

106. With respect to the pendency of criminal proceedings against the 2nd Respondent in Criminal Case No. 1800 of 1999 in which the DPP is the prosecuting authority, it was contended that the criminal charges were politically instigated by the KANU regime in the year 1999 as is evident

from the citation of the case. Furthermore, the 2nd Respondent deposed that he successfully obtained stay orders barring his prosecution. This, can be the only explanation as to why charges instituted almost 16 years ago has not been heard and determined. That notwithstanding and as has been admitted by the Applicant at para. 13 of his supplementary submissions, the Constitution guarantees the 2nd Respondent's right to the presumption of innocence unless the contrary is proven. Article 50 (2) (a) of the Constitution provides that *"Every accused person has the right to a fair trial, which includes the right to be presumed innocent until the contrary is proved."*

107. It was submitted that the Applicant has already been charged in the subordinate courts with various offences which the 2nd Respondent has been appointed to prosecute but the Applicant, who is the Senator for Machakos County continues to hold his constitutional office and discharge his functions as an elected member of parliament by virtue of the constitutional presumption of innocence guaranteed under Article 50 (2) (a) of the Constitution. This Court was urged to take judicial notice that the ***Hon. Uhuru Kenyatta*** and ***Hon. William Ruto*** successfully vied for the constitutional offices of President and Deputy President of the Republic of Kenya in 2013 general elections. As at the time of their election to the highest offices in the land, both were facing criminal charges against humanity in the International Criminal Court ("ICC"). Although in 2014, the charges against the President were dropped by the ICC, the charges and trial against the Deputy President is on-going. Despite this fact, the Deputy President continues to occupy his office and continues to discharge the functions and duties of his office. By parity of reasoning and application, the same way the Deputy President of the Republic, who is a State officer as stipulated under Article 260 of the Constitution, is presumed innocent until proven guilty and continues to discharge the functions of his State office, the 2nd Respondent also enjoys the same constitutional protection and cannot be condemned on this ground alone.

108. This Court was urged to take judicial notice of the trials and tribulations that political figures such as the 2nd Respondent went through during the clamour for multi-party politics and the harassment and intimidation suffered at the hands of a dictatorship regime hence the charges faced by the 2nd Respondent must be appreciated in light of this historical background.

109. Since the constitutional presumption of innocence is at the heart of our criminal justice system it was submitted that the Applicant's desires and whims cannot be used to displace this presumption of innocence hence this ground raised by the Applicant is unmerited and must fail for the reasons advanced.

110. On the alleged relationship between the 2nd Respondent, the DPP and ***Eric Mutua***, it was submitted that this allegation is an entirely speculative ground, devoid of evidence, and that the Applicant has not demonstrated the nature of the relationship that exists between the 2nd Respondent and **Eric Mutua**. The 2nd Respondent denied that **Eric Mutua** has forwarded briefs to the 2nd Respondent to handle on behalf of the LSK. To him, the LSK is a professional body and decisions to appoint counsel to represent the LSK are taken by the council and not **Eric Mutua**. Furthermore, the 2nd Respondent handling briefs on behalf of the LSK has no connection with the Applicant's prosecution.

111. A further speculative ground furthered by the Applicant, it was submitted, was based entirely on newspaper reports in the media. The Applicant alleges that according to media reports, the DPP 'divested' himself of prosecutorial authority in the inquiry files relating to Malili Ranch Limited for reason that Eric Mutua is an active member of the Advisory Board in the Office of the Director of Public Prosecutions ("ODPP") and simultaneously one of the persons implicated in the sale and purchase transaction of land by Malili Ranch Limited to the Government of Kenya. It was submitted that in appointing the 2nd Respondent as a prosecutor, the DPP did **NOT** divest himself of prosecutorial authority but simply acted within the boundaries of the Constitution and statute and that prosecutorial authority is at all times vested in the DPP and throughout the Applicant's trial and the 2nd Respondent acts as per the specific directions and authority of the DPP. It was further submitted that appointment of a private legal practitioner as a special prosecutor is within the DPP's discretion and there is no evidence that it is **Eric Mutua's** involvement in the transactions the subject of prosecution that informed the DPP's decision to appoint the 2nd Respondent. To the 2nd Respondent, it is good practice for the DPP to appoint an independent legal practitioner to review the evidence and conduct the prosecution where the transaction

involves a member of the Advisory Board of the ODPP as this ensures impartiality and professionalism in the prosecution.It is in consonance with maintaining high standards of professionalism and integrity in the prosecution process to appoint independent legal practitioners to conduct prosecutions. Indeed, several international jurisdictions including both the United Kingdom and the United States of America routinely employ the services of independent advocates in private practice to conduct prosecutions.

112. Based on ***The Crown Prosecution Service: Selection of Prosecuting Advocates: Legal Guidance***, it was submitted that the Crown Prosecution Service ("CPS") of the United Kingdom has elaborate mechanisms for selection of advocates in private practice to conduct prosecution in particular circumstances. Essentially, the CPS instructs barristers (external counsel) or solicitors in private practice with higher court advocacy qualifications to prosecute on behalf of the CPS. Similarly based on ***United States Office of the Independent Counsel,*** it was submitted that in the United States of America, there was initially established through the ***Ethics in Government Act*** of 1978 the office of special prosecutor (later changed to Independent Counsel) which could be used by Congress or the Attorney General to investigate individuals holding or formerly holding certain high positions in federal government and in national presidential election campaign organizations. It was therefore submitted that appointment of independent legal practitioners is a practice in well-developed justice systems and indeed it is a practice that ought to be encouraged in Kenya as a fulcrum of promoting integrity, ethics and professionalism in prosecution.

113. It was submitted that the provisions on leadership and integrity contained in Chapter Six of the Constitution are applicable to State officers. State officers are clearly delineated and limited to mean persons holding the State offices expressly stipulated in Article 260 of the Constitution. The 2nd Respondent is not a State officer as defined in the Constitution. Accordingly, the provisions of Article 73 and 75 of the Constitution do not apply to the 2nd Respondent in the discharge of his appointment to prosecute the Applicant.

114. A party, it is submitted, is bound by its pleadings and cannot vary, change and or mutate its case beyond what is specifically pleaded. It was reiterated that none of the grounds on personal integrity or the applicability of Article 73 and 75 of the Constitution were pleaded in the Applicant's motion presented to this Court. Reliance was placed on the Court of Appeal decision in **Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others [2014] eKLR** which quoted with approval an excerpt from an article by Sir Jack Jacob entitled ***"The Present Importance of Pleadings"*** where it was stated:-

> **"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings…for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice…In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."**

115. To the argument by the Applicant that the 2nd Respondent, a public prosecutor appointed under Section 29 (1) of the ***ODPP Act***, is in violation of Section 16 (1) and (2) the ***POEA*** which requires public officers to be politically neutral and not to engage in political activity respectively, it was submitted that the Applicant's contentions are erroneous and absurd and based on a misreading, misinterpretation and misapplication of the law and facts in question. To the 2nd Respondent, hiss

appointment was conducted under the provisions of Section 30(1) of the ***ODPP Act*** and not section 29 of the ***ODPP Act***. Section 30(1) of the ***ODPP Act*** gives the DPP power to appoint private legal practitioners for the purposes of prosecuting any case. The 2nd Respondent, by virtue of this appointment does not become a public officer. He is what can be classified as a 'special prosecutor' appointed for a limited purpose. Whereas public prosecutors attached to the DPP's office are public officers and cannot engage in any other form of private employment or law practice; by the very nature of the limited appointment of an Advocate of this Court in private practice under Section 30 (1) of the ***ODPP Act***, that advocate continues his daily private practice representing his clients in both the civil and criminal courts in the Country in so long as the rules of ethics and conflict of interest are observed and obeyed by the advocate. This is sufficient demonstration that the 2nd Respondent is not a public officer as alleged by the Applicant. It was submitted that whereas the provisions of section 16 (1) and (2) of the ***POEA*** apply only to public officers and not to the 2nd Respondent, it is firstly imperative to note that the Applicant has similarly failed to plead the specific provisions of the ***POEA*** that were violated in his pleadings and only introduced the same in his submissions.

116. To the 2nd Respondent, whilst it is appreciated that he, by virtue of conducting the prosecution was appointed for by the DPP steps into the shoes of the DPP, this appointment neither makes him a State nor public officer and further cannot be used to curtail or override his political rights guaranteed to him under Article 38 of the Constitution.

117. In response to the allegation of violation of the applicant's legitimate expectations based prosecution of two (2) directors of Malili Ranch Limited, it was submitted that this is an outrageous and ludicrous proposition which lends no application to the doctrine of legitimate expectations. Further, the insinuation by the Applicant that he was the whistle blower is not supported by any evidence whatsoever. That notwithstanding, it is not a logical conclusion, that a whistle-blower is himself clean of criminal conduct. Without going into the merits of the evidence to be adduced at the trial, it is sufficient to state that one of the recommendations made by the 3rd Respondent upon conclusion of investigations was that there was a *prima facie* criminal case against the Applicant. The fact that the recommendation by the 3rd Respondent was accepted by the 2nd Respondent and the DPP is indication that there exists a prima facie case against the Applicant. It was submitted that the Applicant's argument that he was the whistle blower and not a perpetrator is an argument best suited as his defence in the trial court which has the mandate of establishing the Applicant's guilt.

118. In highlighting judicial consideration on the doctrine of legitimate expectation, the 2nd Respondent relied on **CCSU vs. Minister for the Civil Service [1984] 3 All ER, 935**.

119. It was submitted that in order for the doctrine of legitimate expectation to apply, a clear, unequivocal and unambiguous representation has to be made, in this present case, to the Applicant, that he would be immunized or shielded from prosecution. Indeed, no such representation was ever made. Furthermore, no evidence whatsoever has been presented before this Court that the Applicant enjoyed any such representation.

120. Though at para. 44 of his submissions the Applicant evasively alludes to representations allegedly made by the Respondent, he does not state which Respondent made these representations and the exact nature of these representations. It was submitted that the entire thread by the Applicant on alleged violation of his legitimate expectations is a mere farce and bereft of any evidence whatsoever and like a deck of cards, this submission cannot stand and must accordingly crumble and be rejected by this Court.

121. According to the 2nd Respondent, there is no requirement under Article 50 of the Constitution that *"the Accused is afforded the right that the trial will be conducted by a Prosecutor that is driven not by the objective of attaining a conviction but on ascertaining the truth of the matter"*. Whereas this ground is, like most others in the Applicant's two sets of submissions not pleaded, it was submitted that the Applicant's allegation that the 2nd Respondent is obsessed with getting a conviction is not only untrue and bereft of merit or factual backing, but there is no evidence whatsoever placed before this Court to demonstrate the wild and baseless assertions. The 2nd Respondent's role as the DPP's appointee to conduct the prosecution is merely to present to the trial court the evidence transmitted to him by the investigators to enable the trial court make a determination of criminal culpability.

122. The assertion by the Applicant at para. 3 of his supplementary submissions that the 2nd Respondent's appointment is a breach of his right to a fair trial because it is the DPP alone who can conduct prosecutions on behalf of the Republic by virtue of Article 157 (6) of the Constitution, is we submit a frivolous and utterly ludicrous argument.
123. It is submitted that Article 157 (9) of the Constitution expressly recognizes that the prosecutorial powers of the DPP may be exercised in person or by *'subordinate officers acting in accordance with general or specific instructions.* This constitutional edict is operationalized by Sections 29 (1) and 30 (1) of the ODPP Act which allows the DPP to appoint public prosecutors and advocates in private practice to conduct prosecutions respectively. When promulgating the Constitution, the Kenyan people could not have envisaged that all prosecutions would be conducted by one man – the DPP; and that failure to do so would amount to an infringement of the right to a fair trial. That, we submit, would indeed be an absurd and impractical scheme of operation.
124. It is our submission that the Applicant's case undergoes further metamorphosis in his supplementary submissions where he alleges at para. 7, 8 and 9 that the 2nd Respondent lacks objectivity and impartiality and is driven by ulterior motive in conducting the prosecution for reason that the 2nd Respondent is under investigation and prosecution by the DPP.
125. It is submitted from the outset that the allegations on lack of objectivity, impartiality and ulterior motive on account of the 2nd Respondent facing criminal charges is a ground fronted for the first time by the Applicant in his supplementary submissions. These grounds were not pleaded. It is a trite principle of the law of pleadings that cases are decided on pleadings and anything outside what is specifically pleaded cannot be considered and must be rejected from the very beginning.
126. It was submitted that the allegations of partiality, ulterior motive and lack of objectivity are red herrings raised by the Applicant in desperate attempts to stop his impending prosecution. Such allegations have not been substantiated through specific actions or inactions by the 2nd Respondent. There is not an iota or shred of evidence to demonstrate or infer that the 2nd Respondent is impartial, lacks objectivity or is driven by ulterior or extraneous motive in his appointment as the Applicant's prosecutor.
127. Consequently, the 2nd Respondent prayed that the Applicant's motion seeking to stop his prosecution by the 2nd Respondent be dismissed with costs and the trial in the subordinate court be ordered to proceed by the legally appointed prosecutor in accordance with the DPP's directions.

Attorney General and 5th Respondent's Case

128. By my ruling herein on 29th July, 2015, I granted leave to the Attorney General to submit in this case based on the documents filed herein and the law. However, the Attorney General attempted to introduce factual matters which this Court disallowed by its ruling of 17th August, 2015. Accordingly I will not waste time dealing with the factual issues depose to in the affidavit which was disallowed.
129. According to the submissions filed by the Attorney General which were highlighted by its Learned Counsel, **Mr Njoroge**, the DPP properly exercised his discretion under section 85 of the ***Criminal Procedure Code*** in appointing the 2nd respondent as a public prosecutor in the case facing the applicant. It was however submitted that the manner in which the duty to investigate a crime, apprehend the offender and the making of the decision to prosecute a suspect is exercised becomes a subject of public scrutiny when challenged as in this case.
130. It was submitted that from the Gazette Notice, it would seem that the decision as to whom to prosecute was taken by the appointed prosecutor rather than the DPP otherwise the 2nd Respondent would have been appointed after the charges had been taken to Court.
131. To the Attorney General the statutes and the Constitution appear to confer directly upon the DPP or an officer subordinate to him (meaning appointed under the ***ODPP Act*** to work in his office, as contrasted with public prosecutor appointed from private practice) the power to decide whether or not a prosecution should be commenced or not. A decision envisaged in section 5(4)(e) to review a decision to prosecute or not, it was similarly submitted, would also only be merited in respect of a decision made by an officer subordinate to the DPP save where the DPP is reviewing decision under Article 157(6)(b).

132. According to the Attorney General, a decision to prosecute cannot be delegated to an appointed private legal practitioner or any other person apart from a subordinate officer appointed in the DPP's office a working as a public officer under him. It was therefore submitted that any decision arrived at by the 2nd Respondent that the applicant be charged does not amount to a decision made by the DPP or his office and is therefore not capable of withstanding legal scrutiny. Whereas the DPP's decision to stay clear of public controversy that would have followed if he had made a decision touching one of the members of the ODPP Board, it was submitted that it went overboard by handling the appointed prosecutor powers of deciding who should be prosecuted. In support of this position reliance was sought from **Stanley Munga Githunguri vs. National Land Commission and Another Nairobi ELC Appeal No. 3 of 2014**. By appointing the same person as adviser and prosecutor, it meant that if the prosecution were to be undertaken, it would be done by the same person who recommended the prosecution hence not benefit from the results of his ow recommendation hence raising an issue of conflict of interest.
133. It was further contended that if the decision to prosecute made by the 2nd Respondent, shows that some people who the investigations found ought to have been prosecuted are left out, then the decision to prosecute cannot be deemed to have been fair to all the suspects since it behoves any public prosecutor to consider and uphold the doctrine of equality of all men under the law and discharge their responsibilities with an eye on equity. To the Attorney General, the 2nd Respondent having received the file from the DPP was not at liberty to remove some people from the list. To the Attorney General, the reasonable man may think that justice is not being done when **Eric Mutua** is omitted from the list of the accused. To the Attorney General, the omission of some of the intended suspects is, in a functioning democracy that believes in the rule of law and equality of all persons, a valid source of grievance to the other to the effect that he is being discriminated against whether that discrimination is real or imagined. To the Attorney General, the Applicant's contention that his legitimate expectations were violated is not farfetched.
134. According to the Attorney General, the DPP should retrieve the criminal file from the 2nd Respondent and discontinue the prosecution of the case by him and make a decision whether to prosecute or not. In the alternative the file should be assigned to an officer subordinate to the DPP within the meaning of the ***ODPP Act*** for review.

Determination

135. I have considered the application, the affidavits both in support of and in opposition to the application, the submissions for and against the grant of the orders sought and the authorities cited on behalf of the parties herein, this is the view I form of the matter.
136. The principles which guide the grant of the orders in the nature sought herein are now old hat in this jurisdiction. The duty of the Court when faced with the application is to apply the same to the facts of the case. The Courts, as appreciated from the parties' submissions have handed down decisions 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. In so doing, however, the Court must always exercise restraint and caution so as not to prejudice the intended or pending criminal proceedings by pronouncing itself in a manner that can amount to transmuting itself into a trial court. The Court in judicial review proceedings is therefore not permitted to delve into the merits or otherwise of the criminal process as that would amount to unnecessarily trespassing into the arena specially reserved for the criminal or trial Court. This Court in determining the 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 any discretion conferred upon them.
137. 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…"**

138. It was well put by **Professor Wade** in a passage in his treatise on ***Administrative Law***, 5th Edition at page 362 and approved 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."

139. However, according to ***Judicial Review Handbook***, 6th 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.
140. In my view Article 47 of the Constitution is now emphatic on the fairness of administrative action. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.
141. However, it is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**
142. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**
143. Judicial review, it has been held time and again, is concerned not with private rights or the merits

of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.

144. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See Chief Constable of the North Wales Police vs. Evans (1982) I WLR 1155.

145. With respect to the ground of Wednesbury unreasonableness, it is not mere unreasonableness which would justify the interference with the decision of an inferior tribunal. It must be noted that unreasonableness is a subjective test and therefore to base a decision merely on unreasonableness places the Court at the risk of determination of a matter on merits rather than on the process. In my view, to justify interference the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. Therefore, whereas the Court is entitled to consider the decision in question with a view to finding whether or not the Wednesbury test of unreasonableness is met, it is only when the decision is so grossly unreasonable that it may be found to have met the test of irrationality for the purposes of Wednesbury unreasonableness.

146. Our current Constitution, as opposed to the retired Constitution permits this Court under Article 23 to invoke its judicial review jurisdiction in the proceedings of this nature in order to grant appropriate orders including the orders sought herein. In effect, judicial review jurisdiction has now been fused with the remedies under the Constitution and this is clearly discernible from the remedies donated under section 11 of the ***Fair Administrative Action, Act, 2015***. This position is similar to the South African position where its Constitutional Court in **Pharmaceutical Manufacturers Association of South Africa & Another vs. Minister of Health Case CCT 31/99** expressed itself as hereunder:

> **"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."**

147. The language of our Constitution being incremental, it follows that the grounds for the grant of judicial review relief ought to be developed and expounded and expanded so as to meet the

changing needs of our society. It must be appreciated that the grounds for grant of judicial review orders keep expanding to meet the changing circumstances of the society. As was stated by **Nyamu, J** (as he then was) in **Republic vs. The Commissioner of Lands *Ex parte* Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998:**

"Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief.....The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a straight jacket.....Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality.....The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations.....Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them.....Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis.....**The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society."**

148. As was held in **R vs. Panel on Take Over and Mergers Ex Parte Datafin [1987] QB 815**, judicial review is developing fast and extending itself beyond the traditional targeted areas and grounds.
149. Similarly in **Bahajj Holdings Ltd. vs. Abdo Mohammed Bahajj & Company Ltd. & Another Civil Application No. Nai. 97 of 1998** the Court of Appeal held that the limits of judicial review continue expanding so as to meet the changing conditions and demands affecting administrative decisions while in **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya), Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47, Nyamu, J** (as he then was) held the view that while it is true that so far the jurisdiction of a judicial review court has been principally based on the "3 I's" namely illegality, irrationality and impropriety of procedure, categories of intervention by the Court are likely to be expanded in future on a case to case basis.
150. Again in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** the Court expressed itself as follows:

"So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions...This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit. The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law."

151. This is in tandem with the holding in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43** that:

"… like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of *Donoghue vs. Stephenson* in the last century…"

152. Article 259 of the Constitution of Kenya, 2010, places a constitutional obligation on courts of law to develop the law so as to give effect to its objects, principles, values and purposes. It follows that this Court in determining judicial review particularly where there are allegations that the applicant's rights and fundamental freedoms are in jeopardy ought, pursuant to Article 20(3) of the Constitution develop the law to the extent that it does not give effect to a right or fundamental freedom. In other words where the law does not give effect to a right or fundamental freedom, this Court is enjoined to develop the same in order to give effect to the same and is so doing adopt the interpretation that most favours the enforcement of a right or fundamental freedom.
153. However, it is generally accepted the mere allegation that the intended or ongoing criminal proceedings are in all likelihood bound to fail, does not merit the grant of judicial review relief in the nature of either prohibiting or quashing criminal proceedings. In other words, an applicant who alleges that he has a good defence in the criminal process ought to advance that defence in a criminal trial rather than to base his application for judicial review thereon. This reasoning is based on the fact that Constitutional or Statutory Commissions and bodies ought to be given space to carry out their constitutional and statutory mandate and the Court ought only to step in to ensure that their mandate is carried out in accordance with the law and that the due process is followed in the process.
154. I associate myself with the position adopted by the Court in **Constitutional Petition Number 359 of 2013 Diana Kethi Kilonzo vs. IEBC and 2 Others** in which it was held that:

"**We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."**

155. However, if the applicant demonstrates by way of credible evidence that the criminal proceedings that the police or the Director of Public Prosecutions intends to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.
156. In **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170,** the Court of Appeal held:

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

secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court."

157.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....."

158.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..."

159.Proceedings of this nature, ordinarily, do not deal with the merits of the case but only with the process. In other words these proceedings, it has traditionally been appreciated determine, *inter alia*, whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made, whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters, whether the decision to commence the criminal charges go contrary to the applicant's legitimate expectation, whether the respondents' decision to charge the applicant is irrational. It follows that where an applicant 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 usual 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 applicant 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 these kinds of proceedings is mainly concerned with the question of fairness to the applicant 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 applicant. 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.

160. However, the Courts have in the exercise of their jurisdiction to expand the confines of judicial review adopted the principle of proportionality as a ground for grant of judicial review orders. In my view the issue of proportionality ought to be seen in the context of rationality. This position is the one prevailing in England as was highlighted by **Lord Steyn** in **R (Daly) vs. Secretary of State For Home Department (2001) 2 AC 532** where it was held that: (1) Proportionality may require the reviewing Court to assess the balance which the decision maker has struck, not merely to see whether it is within the range of rational or reasonable decisions; (2) Proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations; and (3) Even the heightened scrutiny test is not necessarily appropriate to the protection of human rights.

161. Therefore the determination of this case must be seen in light of the foregoing decisions. However, it is upon the *ex parte* applicant to satisfy the Court that the discretion given to the 1st Respondent to investigate and prosecute ought to be interfered with.

162. In this case the applicant contends that he was the whistleblower in respect of the transaction under examination and therefore he ought not to have been treated as a suspect. In other words the applicant contends that he was the one who brought to the attention of the respondents that things were not going as expected with respect to Malili Ranch. He also contended that he was not involved at all in the said transaction. The respondents however contend that according to their investigations, the applicant played a very instrumental role in the transaction. It was contended that during the trial the Prosecution shall adduce evidence to show that the Applicant signed a number of documentation including Minutes of various meetings in relation to the unlawful sale of the land and that the evidence on record clearly shows 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. To them, the evidence on the Police File clearly proves that resolutions provided and made by the Applicants and other Directors of Malili Ranch were all flawed and illegal and therefore of no legal consequence and that upon analysis of the evidence on record the 1st Respondent recommended that the Applicant be charged with offences that are known to law as reflected in the charge sheet. In their view, the decision to charge the Applicant was informed by the sufficiency of evidence on record and the public interest and that the 2nd Respondent has independently reviewed and analysed the evidence contained in the investigations file including the witness statements, documentary exhibits and statements of the applicant 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 Applicant.

163. It is true that in exercising their discretion to charge a person both the police and the DPP's office must take into account and must exercise the discretion on the evidence of sound legal principles. As was held by **Ojwang, J** (as he then was) in **Nairobi HCCC No. 1729 of 2001 – Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another**:

"...policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek

recompense...I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State's prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes".

164. Therefore the police are expected to be professional in the conduct of their investigations and ought not to be driven by malice or other collateral considerations which can either be express or can be gathered from the circumstances surrounding the prosecution. Whereas a prosecution can either be mounted based on an offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officers or agencies, the mere fact, however, that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. I say ordinarily because the mere fact that the version of one of the parties is not considered is not necessarily fatal to the prosecution. However, where exculpatory evidence is presented to the police in the course of investigation and for some reasons unknown to them they deliberately decide to ignore the same one may be justified in concluding that the police are driven by collateral considerations other than genuine vindication of the criminal judicial process. Neglect to make a reasonable use of the sources of information available before instituting proceedings may therefore be evidence of malice and hence abuse of discretion and power.

165. In this case both parties have supported their case by what according to them are evidence which either exculpate or incriminate the applicant. Whether or not those pieces of evidence are credible is not for this Court in these proceedings to scrutinise, investigate and determine. The applicant and the respondents will have to adduce evidence, which evidence will be subjected to cross examination before the Court can determine whose version is credible and believable. In other words the position adopted by the applicant is a matter for the defence.

166. Whereas the applicant may well be correct that there are factors which go to show his innocence, 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. These allegations go to the sufficiency and veracity of the evidence and the innocence of the Applicant, matters which are not within the province of this Court.

167. In **Thuita Mwangi & Anor vs. The Ethics and Anti-Corruption Commission & 3 Others Petition No. 153 & 369 of 2013**, it was held:

" … I am afraid that the High Court at this point is not the right forum to tender justifications concerning the subject transaction let alone test the nature and veracity of these allegations…the Court held that "It is the trial Court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. It would be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court". Similarly…the point being made above is that the DPP though not subject to control in exercise of his powers to prosecute criminal offences, must exercise that power on reasonable grounds. Reasonable grounds, it must be noted, cannot amount to the DPP being asked to prove the charge against an accused person at the commencement of the trial but merely show a prima facie case before mounting a prosecution. The proof of the charge is made at trial."

168. 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 applicant 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. As was held in **R. vs. The Judicial Commission into the Goldenberg Affair and 2 Others exp Saitoti HC Misc Appl. 102 of 2006**:

"It is not good for the DPP to argue that the Applicant should be arrested and charged so that he can raise whatever defences he has in a trial court. The Court has a constitutional duty to ensure that a flawed threatened trial is stopped in its tracks if it is likely to violate any of the applicants' fundamental rights."

169. Similarly as was appreciated in **Githunguri vs. Republic KLR [1986] 1:**:

"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. "

170. However, 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."

171. It was contended by the applicant that by appointing the 2nd Respondent to prosecute the Applicant, the 1st Respondent had abdicated his prosecutorial mandate under Art 157(9) of the Constitution and s. 85(2) of the ***Criminal Procedure Code***. It was contended that whereas Article 157(9) empowers the DPP to exercise the powers conferred upon him in person or by subordinate officers acting in accordance with general or special instructions, the 2nd respondent is not the DPP's subordinate hence the DPP had no powers to delegate his prosecutorial powers to him. Who then is a "subordinate"? ***Black's Laws Dictionary,*** 9thEdn.defines the word "subordinate" as:

"Placed in or belonging to a lower rank, class, or position; subject to another's authority or control, subordinate lawyer."

172. Whereas the 2nd respondent cannot be said to belong to a lower rank, class or position to the DPP, in the exercise of his prosecutorial powers, he is definitely subject to the authority or control of the DPP and hence fits within the definition of the term "subordinate". To contend otherwise would amount to whittling away the DPP's constitutional power and bestowing them upon the 2nd respondent. In my view the DPP must always be in charge of prosecution whether personally or through his agents and subordinates. This position resonates with the provisions of section 85(3) of the ***Criminal procedure Code***, under which every public prosecutor is subject to the express directions of the Director of Public Prosecutions. Similarly, under section 14(2) of the ***ODPP Act***, all public prosecutors appointed under the Act are under the immediate superintendence and control of the Director or his designated officers. As appreciated by the Attorney General by the

words "subordinate officer", it is clearly understood that the person must be subordinate to the DPP and act in accordance with his directions. It is therefore my view that when it comes to who is a "subordinate" of the DPP for the purposes of prosecution, a distinction, as projected by the Attorney General, between employees in the office of the DPP and those in private practice, is one without a difference.

173. It was contended by the Attorney General that a decision to prosecute cannot be delegated to an appointed private legal practitioner or any other person apart from a subordinate officer appointed in the DPP's office working as a public officer under him. Suffice it to say that section 30(1) of the ***Office of the Director of Public Prosecutions Act, 2013*** ("***ODPP Act***") provides:

The Director may from time to time, and as need may arises, engage the services of a qualified legal practitioner to assist in the discharge of his mandate.

174. Similarly, Article 157(9) of the Constitution provides that the powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions. Having found elsewhere in this judgement that there is no evidence that the decision to prosecute was made by the 2nd Respondent, I do not wish in this judgement to enter into the discourse whether or not a legal practitioner in the position of the 2nd respondent can be empowered by the DPP to make a decision to prosecute pursuant to Article 157(9) of the Constitution as read with section 30(1) of the ***ODPPA***. That issue will have to await another day when the Court is properly seized of the matter and the parties are afforded adequate opportunity to address the Court thereon.

175. The respondents however relied on section 85(2) of the ***Criminal Procedure Code*** as justifying the appointment of the 2nd respondent. The said provision empowers the DPP to appoint any advocate of the High Court or person employed in the public service, to be a public prosecutor for the purposes of any case. The applicant has not set out in these proceedings to challenge the said provision. The 2nd respondent, is no doubt an advocate of the High Court of Kenya and as I held in an earlier ruling in this same matter:

"In this application if I understood the applicant's case properly, it was not contended that Hon. Paul Muite, SC is generally incompetent or unqualified to prosecute the applicant. Far from it. Hon. Paul Muite, SC, is undoubtedly one of the eminent lawyers and legal minds in this country and a lawyer of no mean repute. Any suggestions that he is generally unqualified to conduct criminal prosecution would in my view be unworthy of consideration by this court."

176. I still maintain the same position. Accordingly, I do not agree with the applicant that the DPP had no power to appoint the 2nd respondent as a prosecutor. The issue whether or not the 2nd respondent's integrity justifies his appointment as such prosecutor is another matter altogether.

177. It was contended that the 2nd respondent being a politician and a chairperson of Safina, a political party in this Country ought not to have been appointed to prosecute the applicant, also a politician. In other words, the 2nd respondent's role as a leader of Safina Party impairs or prejudices his role as a prosecutor. All Kenyans citizens have rights under Article 38 of the Constitution to make political choices, which includes the right to form, or participate in forming, a political party; to participate in the activities of, or recruit members for, a political party; and to campaign for a political party or cause. Under Article 27(4) of the Constitution this Court, being a State organ is barred from discriminating directly or indirectly against any person on any ground. Therefore to discriminate a person merely on the basis of his political affiliation would amount to a violation of the Constitution. Mere membership or leadership of a political party does not in my view impair one's integrity. That exercise of discretionary powers ought not to be based on political party affiliations was appreciated by the Court of Appeal in **Matiba vs. Moi & 2 Others (No 2) [2008] 1 KLR (EP) 670** where it held:

"the issue whether or not a judge should grant leave to appeal in any particular case is an exercise of judicial discretion. That was agreed on all sides. But being judicial, the discretion

had to be exercised according to reason – not capriciously and not according to private likes or dislikes or private opinion. Mr Justice Pall would not, for example, have been at liberty to say: "Mr Matiba is the leader of an opposition party and I do not like opposition parties. I shall accordingly, in the exercise of my judicial discretion, grant President Moi leave to appeal," and more than he could say "President Moi is the leader of the ruling party KANU and because of that, I shall grant to him leave to appeal." These would not constitute valid reasons for the exercise of judicial discretion, as they are all irrelevant matters, based as they are on personal likes and dislikes."

178. Therefore to disqualify the 2nd respondent based on his political affiliation, the applicant must go further and show that the circumstances of the 2nd respondent's political leaning or inclination make is imprudent that he should prosecute the applicant. To my mind if that is shown this Court may well find that the 2nd respondent is the wrong person to prosecute the Applicant. In other words, this Court cannot rule out the fact that in certain cases, the prosecutor may be so closely link to a political party whose interests are so antagonistic to those of the person he is appointed to prosecute as to become an appendage of that political party. In those circumstances it may well be justified for an applicant to contend that his prosecution is in fact a persecution informed by his political ideals and leanings. If this was proved, I do not see why the Court cannot prohibit the particular prosecutor from proceeding to undertake the prosecution concerned. It ought to be appreciated that under section 4 of the ***Office of the Director of Public Prosecutions Act***, that office is enjoined to be guided by *inter alia* the fundamental principles of impartiality, natural justice (which requires that bias actual or perceived be avoided), promotion of public confidence in the integrity of the Office, the need to discharge the functions of the Office on behalf of the people of Kenya (as opposed to interest of a particular political party), the need to serve the cause of justice, prevent abuse of the legal process and public interest and to secure the observance of democratic values and principles and promotion of constitutionalism.

179. Constitutionalism demands adherence to the values and principles of governance in Article 10 of the Constitution which include the rule of law, democracy, human dignity, equity, social justice, inclusiveness, equality, human rights and non-discrimination. To prosecute a person because of his political leanings in my view is an anathema to these constitutional values and principles, ideals which Kenyans hold so dear to their hearts that they have, under Article 255(1)(d) of the Constitution, reserved unto themselves the power to amend them in a referendum.

180. This position is buttressed by Article 157(11) of the Constitution which provides that in exercising the powers conferred by this Article (which include the State powers of prosecution), the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

181. In my view a person to whom the duty of undertaking prosecution is delegated by the DPP must of necessity adhere to the principles in Article 157(11) of the Constitution as read with section 4 of the ***ODPP Act***. However, a legal practitioner to whom such a duty is reposed does not by that mere fact become a public officer for the purposes of the ***Public Officer Ethics Act, Chapter 183*** since the said person still retains his otherwise character of a legal practitioner in so far as they are not inconsistent and do not conflict with his duties as such prosecutor.

182. It was contended that personal integrity of the 2nd Respondent is questionable. One may be said to lack integrity where his sense of fairness is doubtful. It is in this light that I take it that applicant is questioning the 2nd respondent's integrity. In this instance the applicant contended, firstly, that the 2nd respondent has in recent past represented the ruling coalition, Jubilee, in litigation. There, however, was no tangible evidence to the effect that the 2nd respondent only represented jubilee administration. To the contrary this Court takes judicial notice of the fact that in certain cases, some even before this Court, the 2nd respondent has been retained and has appeared against the said government.

183. The second ground for questioning the 2nd respondent's integrity was the alleged closeness to the President of the Law Society of Kenya, **Mr Eric Mutua**. That the said **Eric Mutua** is a member of the Advisory Board of the Office of the Director of Public Prosecutions is not disputed. That he was the company secretary to Malili Ranch also seems not to be disputed in so far as these proceedings are concerned. However, it is not contended that the decision to appoint the 2nd

respondent as a prosecutor was made by the said **Eric Mutua**. That the decision on whom to instruct to represent the Law Society of Kenya in litigation is by the Council of the Society is also not disputed. Had it been averred and satisfactorily shown that the decision to prosecute the Applicant was made by the said **Eric Mutua**, I may well have been persuaded that that decision ought to be set aside. In my view, where the DPP 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 1st Respondent would not be pursuant to his discretion but at the discretion of another person not empowered by law to exercise such discretion.

184. In this case it was averred that the decision to prosecute was taken by the 2nd Respondent rather than the DPP. The Attorney General seems to have been convinced on this issue by the fact that the appointment of the 2nd Respondent was done before the charges were taken to Court. In my view, the mere fact that a prosecutor is appointed before the charges are taken to Court does not necessarily mean that the decision to prosecute was not made by the DPP. After all a prosecutor ought to be in charge of the prosecution right from the time the charge is filed and there is no provision which was cited before me and I am aware of none which stipulate that a prosecutor can only be appointed after the charges are taken to Court. However, if the DPP appoints a person as a prosecutor before making a determination to prosecute, that may amount to abdicating his role if by so doing he leaves the decision to prosecute in the hands of his appointee. In this case the Gazette Notice, appointing the 2nd Respondent, was dated 26th August, 2014 and appeared in the Special Issue of the Kenya Gazette dated 27th August, 2014. By his letter dated 28th August, 2014, the DPP confirmed to the 2nd Respondent that he had directed that the prosecution should ensue and attached a copy of the charge sheet together with a copy of the said Gazette Notice. It was contended that the decision to prosecute the applicant was made after the appointment of the 2nd Respondent. With due respect that is not what the letter dated 28th August, 2014 states. That letter, in my view, was transmitting a decision already made.

185. On the omission to charge other people who the police recommended to be charged, in particular one **Mr Eric Mutua**, the Attorney General contended that the reasonable man may think that justice is not being done when **Eric Mutua** is omitted from the list of the accused. To the Attorney General, the omission of some of the intended suspects is, in a functioning democracy that believes in the rule of law and equality of all persons, a valid source of grievance to the other to the effect that he is being discriminated against whether that discrimination is real or imagined hence the Applicant's contention that there was a violation of his legitimate expectation is not far-fetched. This Court is aware of the decision in **George Joshua Okungu & Another vs. The Chief Magistrate's Court Anti-Corruption Court at Nairobi & Another [2014] eKLR**, to the effect 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".

186. That decision with due respect sets out the legal position as far as this Court is concerned. However, the circumstances of this case are distinguishable from those that prevailed in **George Joshua Okungu and Another vs. the Chief Magistrate Court and Others**. In this case, apart from the alleged 3rd Respondent's report, the Applicant has not disclosed the role if any played by the said **Eric Mutua** in the said transaction in order to justify this Court in finding that by not levying charges against the said **Eric Mutua**, the prosecution of the Applicant is selective. In ***Okungu's Case***, the petitioner clearly outlined the role played by those who had been left out. Whereas the Applicant relies on the 3rd Respondent's report, as held elsewhere in this judgement, unless the 1st Respondent's decision was shown to violate the provisions of the Constitution in the manner in which persons were being selected for prosecution, the DPP's decision to revise the recommendations of the 3rd Respondent cannot be faulted merely on the basis that he did not implement the 3rd Respondent's report line, hook and sinker. In other words I cannot say, based on the material placed before me in these proceedings, that the roles played by the persons whom the State intended to call as its witnesses in the subject transaction in ***Okungu's Case*** are the same or similar as the role, if any, played by **Eric Mutua** in the instant case. The DPP, as long as his decision does not violate the letter and the spirit of the Constitution is entitled to determine whom to charge, based on his own review of the evidence or upon review by his subordinates duly authorised by him and the mere fact that he makes one decision and not the other is not a ground for interference. 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."

187. In this case, I have consciously avoided to accept the invitation to make adverse comments against the said **Eric Mutua** for the obvious reason that he is not a party to these proceedings. If any party was of the view that he was culpable in any manner he ought to have been joined to these proceedings. To expect the Court to make adverse determinations against the said persons would amount to a violation of the rules of natural justice which this Court is sworn to protect. Accordingly, without sufficient material placed before me and as the said person is not before me, I cannot make adverse findings against him in these proceedings.

188. It was contended that the fact that there are pending criminal proceedings against 2nd respondent render him unfit to undertake criminal prosecution against the Applicant. However, the nature of the said proceedings has not been disclosed in order for this Court to determine whether their pendency is likely to impair the 2nd respondent's ability to carry out his prosecutorial duties impartially. In my view the mere fact that there are pending criminal proceedings against a prosecutor however misconceived cannot *ipso facto* render him impartial unless it is shown that his retainer to prosecute is somehow linked to the pending criminal proceedings and that his impartiality is likely to be compromised by the said proceedings. Since the orders sought herein are discretionary the Applicant ought to have disclosed the nature of the said proceedings as well as their nexus to the integrity of the 2nd respondent to prosecute the Applicant.

189. I must agree with the 2nd respondent that some of the charges levelled against multi-party crusaders of which the 2nd respondent was clearly one were clearly motivated by political expediency and misadventures of the time and were meant to silence those opposed to the repressive tendencies of the then ruling regime. As was appreciated in **Nakusa vs. Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565:**

"The High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system."

190. That we underwent a past of skewed and repressive governance was clearly recognised by the Supreme Court in **Speaker of the Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] eKLR**.

191. I hasten to add however that I cannot say with certainty that the criminal proceedings that were levelled against the 2nd respondent were such politically motivated charges since I am not seized of the full facts thereof and in any case those are pending proceedings before a Court of law which is yet to determine the same. Conversely, I cannot base my decision to disqualify the 2nd respondent from undertaking the prosecution the subject of these proceedings on the same proceedings. In any case the mere fact that a person is facing a criminal charge does not ipso facto render him or her unfit to enjoy his or her rights and fundamental freedoms under the Constitution unless their enjoyment are restricted or limited by the law. That is the whole idea behind the presumption of innocence doctrine which is enshrined in Article 50(2)(a) of our Constitution.

192. Consequently, there is no compelling evidence presented to me on the basis of which I can find that the 2nd respondent's integrity will be impaired either by his political affiliation or by the mere fact that some criminal proceedings against him are pending however misconceived.

193. It was contended that the 2nd respondent having reviewed the files and formed an opinion thereof could not prosecute the same matter. This issue brings to fore the powers of the DPP. Under Article 157(10) of the Constitution, the Director of Public Prosecutions does not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, is not under the direction or control of any person or authority. Does this however confer upon him investigatory powers? Under Article 157(4) of the Constitution, the DPP has the power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General is enjoined comply therewith. Prior to the enactment of the Constitution of Kenya, 2010, the prosecutorial powers were given to the police. However, following abuse of such powers, the prosecutorial powers were conferred on the DPP while leaving the investigatory powers on the police and other agencies such as the Ethics and Anti-Corruption Commission. This departure, in my view, was necessary in order to realize the spirit of the principle of impartiality in Article 157 of the Constitution. It is therefore upon the DPP to analyse the material emanating from investigations and decide whether to prefer charges, decline the same or order further investigations to be carried out. However to lump investigatory powers and prosecutorial powers in one institution may negate the constitutional spirit under Article 157 as read with section 4 of the ***ODPPA***. To permit that to happen would be to take this country back to the pre-2010 Constitution era, a period which Kenyans would like to leave behind them save for the historical purposes geared towards lessons on how not to operate in a free and open democratic society.

194. In this case, the relevant files were passed over to the 2nd respondent to peruse and give an opinion to the DPP. It is the respondents' case that the 2ndrespondent reviewed the files and made a recommendation to the DPP. According to the 2nd respondent, upon reviewing the entirety of evidence, he advised the DPP on the sufficiency of evidence against among other persons, the Applicant, hence it was not his decision to prosecute the Applicant. Whereas in his letter dated 26th August, 2014, the 2nd Respondent referred to completion of further investigations, that letter does not state that the said further investigations were carried out by him and the Applicant has not alleged that the 2nd Respondent did indeed carry out further investigations. In fact, according to

the Applicant at no point was he summoned by the 2nd Respondent to give a statement. In other words, the applicant has not contended that apart from reviewing the files the 2nd respondent undertook further investigations on the basis of which the intended prosecution would be based. The mere fact that the 2nd respondent reviewed the existing evidence and made recommendations to the DPP, does not in my view amount to the 2nd respondent conducting investigations or taking over the Constitutional mandate of the DPP since the DPP was at liberty to disregard his recommendations. In any case the DPP was not bound by either the opinion of the Director of the CID or the 2nd respondent.

195. It was submitted by the Attorney General that the 2nd respondent had no powers to arrive at a different opinion from that formed by the investigators or the DPP. In my view a person to whom the DPP has delegated his power exercises the powers conferred upon the DPP though that does not bar the DPP from making decisions on the direction the prosecution would take. However, I do not see why a person to whom prosecutorial powers have been delegated cannot give his opinion on the prospects of success of the prosecution for consideration of the DPP though the DPP is not bound by such opinion. After all as was held in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** where it was held 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".

196. If however, the DPP directs that further investigations be conducted, it is my view and I so hold that in order to uphold the constitutional spirit of impartiality in the conduct of the prosecution, the person conducting further investigations ought not to be appointed as a prosecutor based on what his investigations has unearthed. Here, however, I do not have evidence that the 2nd Respondent did conduct further investigations in the matter that was given to him to review.

197. The 2nd respondent however contended that since his were mere recommendations, they are not amenable to judicial review relief of certiorari. The general rule is that mere recommendations which have no force of law cannot be a basis for attack in these kinds of proceedings. In **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354** the Court stated:

"The notice that is under challenge in these proceedings gave the applicants 14 days to vacate the disputed land. The letter (Notice) was written based on the findings of the Ndungu Report on land whose recommendations have not acquired any statutory form. They are mere recommendations and have no force of law and it is doubtful whether the said Report can be a basis for issuance of such notice as the one under attack in this application."

198. Similarly in ***Halsbury's Laws of England 4th Edn. Vol. II page 808 para 1508*** it is stated that:

"The rule generally applies, at least with full force, only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be found."

199. However there are exceptions to this rule. In **Re Pergamon Press Ltd [1971] Ch. 388,** the Minister had appointed inspectors to investigate the affairs of a company and on behalf of the directors it was claimed that the inspectors should conduct the inquiry much as if it were a judicial inquiry in a Court of Law. That issue was answered as follows:

"It seems to me that this claim on their part went too far. This inquiry was not a court of

law. It was an investigation in the public interest, in which all should surely co-operate, as they promised to do. But if the directors went too far on their side, Iam afraid that Mr Fay, for the inspectors, went too far on the other. He did it very tactfully, but he did suggest that in point of law the inspectors were not bound by the rules of natural justice. He said that in all the cases where natural justice had been applied hitherto, the tribunal was under a duty to come to a determination or decision of some kind or the other. He submitted that when there was no determination or decision but only an investigation or inquiry, the rules of natural justice did not apply...I cannot accept Mr Fay's submission. It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings. They are not even quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report. They sit in private and are not entitled to admit the public to their meetings. They do not even decide whether there is a prima facie case. But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations and careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about winding up of the company, and be used as material for the winding up...Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial, but are only administrative. The inspectors can obtain the information in any way they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him. They need not quote chapter and verse. An outline of the charge will usually suffice....That is what the inspectors here propose to do, but the directors of the company want more. They want to see the transcripts of the witnesses who speak adversely of them, and to see any documents which may be used against them. They, or some of them, even claim to cross-examine the witnesses. In all these the directors go too far. This investigation is ordered in the public interest. It should not be impeded by measures of this kind."

200. It follows that recommendations may depending on their impact be subject of an order of judicial review. However, as I have found that the 2nd respondent never undertook further investigations but simply perused the material availed to him, nothing turns on this issue.

201. The Applicant however contended that the DPP was guilty of violation of his legitimate expectation that he was not going to face criminal proceedings. **De Smith, Woolf & Jowell,** in ***"Judicial Review of Administrative Action"*** 6thEdn. Sweet & Maxwell page 609 state:

"A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public."

202. In **South Bucks District Council vs. Flanagan [2002] EWCA Civ. 690 [2002] WLR 2601 at [18]** that:

"Legitimate expectation involves notions of fairness and unless the person making the representation has actual or ostensible authority to speak on behalf of the public body, there is no reason why the recipient of the representation should be allowed to hold the public body to the terms of the representation. He might subjectively have acquired the expectation, but it would not be a legitimate one, that is to say it would not be one to which he was entitled."

203. As was held in **Republic vs. Kenya Revenue Authority ex parte Shake Distributors Limited Hcmisc. Civil Application No. 359 of 2012**:

"…the cornerstone of legitimate expectation is a promise made to a party by a public body that it will act or not act in a particular manner. For the promise to hold, the same must be made within the confines of the law. A public body cannot make a promise which goes against the express letter of the law."

204. The three basic questions were identified in **R (Bibi) vs. Newham London Borough Council [2001] EWCA Civ 607 [2002] 1 WLR 237 at [19]** as follows:

"In all legitimate expectation cases, whether substantive or procedural, three practical questions rise, the first question is to what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do."

205. It was further held in **R vs. Jockey Club ex p RAM Racecourses [1993] 2 All ER 225, 236h-237b** that the basic hallmarks of an unqualified representation are:

"(1) A clear and unambiguous representation..(2) That since the [claimant] was not a person to whom any representation was directly made it was within the class of persons who are entitled to rely upon it; or at any rate that it was reasonable for the [claimant] to rely upon it without more…(3) That it did so rely upon it.(4) That it did so to its detriment…(5) That there is no overriding interest arising from [the defendant's] duties and responsibilities."

206. **Fordham Michael,** in ***Judicial Review Handbook*** rationalises the doctrine on the basis that:

"Consistency is a principle of good administration. Judicial Review may lie because treatment is unjustifiably unfavourable with action in relevantly likely cases (or prior treatment in the same case), or because it unjustifiably fails to distinguish other unlike cases. Consistency links with freedom from arbitrariness, each of which also links with (and is promoted by) adequate certainty of approach."

207. Similarly, in **Rank vs. East Cambridgeshire District Council EWHC 2081 Admin**, it was held:

"One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process...But it is also important for the purpose of securing public confidence in the operation of the development control system....The potential relevance arises because consistency is desirable and inconsistency may occur if the authority fails to have regard to a previous decision."

208. Where legitimate expectation is found to apply, if a public authority is to depart from it, it must be demonstrated that there exist good reason for that departure. Hence in **R (Bibi) vs. Newham London Borough Council 2001 EWCA CIV 607**, it was held:

"Unless there are reasons recognised by law for not giving effect to those legitimate expectations then effect should be given to them. In circumstances as the present where the conduct of the Authority has given rise to a legitimate expectation then fairness requires that, if the Authority decides not to give effect to that expectation, the Authority articulates its reasons so that their propriety may be tested by the court if that is what the disappointed person requires."

209. Even then it was held in **R vs. North and East Devon Health Authority ex p Coughlan [2001] QB 213 at [57(c)]** that:

"once the legitimacy of the expectation is established, the court will have the task of weighing the requirement of fairness against any overriding interest relied upon for the

change of policy."

210.That this principle applies to criminal law was put beyond doubt by **Lord Griffiths** in the case of **Bennett vs. Horse Ferry Road Magistrate's Court and Anor [1993] 3 All ER** at page **150** where the expressed himself as follows:

"1. ...there is a clear pubic interest to be observed in holding officials of the State to promises made by them in full understanding of what is entailed by the bargain" 2. ...if the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accepts a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. My lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law. The great growth of administrative law during the latter half of this century has occurred because of the recognition by the Judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended. So also should it be in the field of criminal law and if it comes to the attention of the court, that, there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it."

211.The Learned Judge therefore held:

"I hold that where there is proof of abuse of power and a violation or threat to the rule of law, the court must wholly stop what the perpetrator of those ills intended to do. I apply the principle in the *Benett case* above. The reason for this is that only the might and majesty of law can prevent or act as deterrence against the temptation to abuse power and also, send the right signals, that public administration must adhere to the rule of law. "

212.That this principle applies to both past and future promises appear in the holding in **Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others [2005] 1 KLR 280** where it was stated:

"The principle of a legitimate expectation to a hearing should not be confined only to past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed. It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty. If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability and certainty in their dealings, this is, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence. The principle has been very ably defined in public law in the last century but it is clear that it has its cousins in private law of honouring trusts and confidences. It is a principle, which has its origins in nearly every continent. Trusts and confidences must be honoured in public law and therefore the situations where the expectations shall be recognised and protected must of necessity defy restrictions in the years ahead. The strengths and weaknesses of the expectations must remain a central role for the public law courts to weigh and determine."

213.This reasoning can be traced to **R vs. Devon County Council ex parte P Baker [1955] 1 All ER** where it was held:

"...expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognises that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision."

214. **Lord Diplock** stated in **CCSU vs. Minister for the Civil Service [1984] 3 All ER, 935** at page 949:-

"To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. The procedural part of it relates to a representation that a hearing or other appropriate procedure will be afforded before the decision is made. The substantive part of the principle is that if a representation is made that a benefit of a substantive nature will be granted or if the person is already in receipt of the benefit that it will be continued and not be substantially varied, then the same could be enforced. The representation must be clear and unambiguous. It could be a representation to the individual or generally to class of persons."

215. It is a requirement that for the doctrine of legitimate expectation to be successfully invoked, the expectation must in the first place be legitimate "in the sense of an expectation which will be protected by law". See **R vs. Department for Education and Employment, ex p Begbie [2000] 1 WLR 1115, 1125C-D**. In other words the doctrine of legitimate expectation based on considerations of fairness, even where benefit claimed not procedural, should not be invoked to confer an unmerited or improper benefit.

216. In this case, the Applicant pegs his case for legitimate expectation on the fact that in previous prosecution those who were charged were acquitted. Further he contends that at no point in time was he informed that he was being treated as a suspect. In my view the fact that some people have been charged in respect of an offence does not necessarily give rise to a legitimate expectation on the part of those not charged that they will never be charged. Unless a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage, one cannot claim legitimate expectation. Mere fact of an acquittal does not give expectation which legally acquires legitimacy that those not charged will not be charged. In this case there is no evidence on the basis of which I can find that the Respondents induced in the Applicant a reasonable expectation that he would receive or retain a benefit of advantage of not being charged.

217. It was contended that the respondents ought to have warned the applicant that he was to be charged. Under Article 50(2)(l) of the Constitution an accused person has the right to refuse to give self-incriminating evidence. In this case, it is not contended that at the time the applicant was recording his statement he was an accused person. The investigators have a duty and I daresay an obligation to take statements from all persons connected with a matter which they are investigating and this Court has held that proper investigations demands that the investigator takes statements from both the complainants and the suspect. In this case the applicant's case is that he voluntarily gave his statement as a whistleblower. It is not contended that the statement he gave was self-incriminating. Even if it was, since it was voluntary, I do not see why the applicant would now cry wolf when he offered to assist the police in the investigations. The mere fact that a person offers to furnish the police with evidence does not in my view bar the police from subsequently preferring charges against him if in their opinion the cumulative effect of the evidence collected point to that person as the culprit. As to whether or not the prosecution will succeed is another matter for the trial Court.

218. Caution must however be taken in light of the provisions of Article 50(4) of the Constitution which excludes from admission evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice. That however is a matter which can only be determined after analyzing the nature of the evidence in question and its impact

on the right to fair hearing, a matter which cannot be determined at this stage in these proceedings but must await its consideration by the trial Court.

219. It was contended that taking into account the delay in bringing the charges, it is unreasonable for the Applicant to stand the trial. In **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** it was held that:

"The function of any judicial system in civilized nations is to uphold the rule of law. To be able to do that, the system must have power to try and decide cases brought before the Courts according to the established law. The process of trial is central to the adjudication of any dispute and it is now a universally accepted principle of law that every person must have his day in court. This means that the judicial system must be available to all...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."

220. Article 50 of the Constitution provides for the right to fair trial and under Article 50(1)(e) fair trial includes the right to have the trial begin and conclude without unreasonable delay. Therefore both the commencement and the conclusion of the trial must be conducted without an unreasonable delay. This delay in my view not only encompasses the period between the arraignment and the commencement of the hearing but also includes the period between the discovery of the commission of an offence and the arraignment in court. However what is reasonable depends upon the circumstances of the case such as the nature of the offence, the

collation and collection of the evidence as well as the complexity of the offence. Whereas this Court is not competent to make a definitive finding thereon this view seem to resonate with the view expressed in **Bell vs. Director of Public Prosecutions and Another [1986] LRC 392** where the Privy Council expressed itself as follows:

"..in giving effect to the rights granted by sections 13 and 20 of the Constitution of Jamaica, the courts of Jamaica must balance the fundamental right of the individual to a fair trial within a reasonable time against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions."

221. Again of paramount importance is the effect of the delay on the viability of a fair trial.

222. However as was held by **Kriegler, J** in **Sanderson vs. Attorney General-Eastern Cape 1988 (2) SA 38:**

"Even if the evidence he had placed before the Court had been more damning, the relief the appellant seeks is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins - and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case – is far reaching. Indeed it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will seldom be warranted in the absence of significant prejudice...Ordinarily, and particularly where the prejudice alleged is not trial related, there is a range of "appropriate" remedies less radical than barring the prosecution. These would include a mandamus requiring the prosecution to commence the case, a refusal to grant the prosecution a remand, or damages after an acquittal arising out of the prejudice suffered by the accused. A bar is likely to be available only in a narrow range of circumstances, for example, where it is established that the accused has probably suffered irreparable trial prejudice as a result of the delay."

223. In **George Joshua Okungu & another vs. Chief Magistrate's Court Anti-Corruption Court At Nairobi & Another [2014] eKLR** the Court further held while citing **Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323**:

"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* Case, that as a result of the long delay of commencing the prosecution, the Petitioner may not be able to adequately defend himself. Whereas the decision whether or not the action was expeditiously taken must necessarily depend on the circumstances of a particular case, on our part we are not satisfied that the issues forming the subject of the criminal proceedings were so complex that preference of charges arising from the investigations therefrom should take a year after the completion of the investigations. From the charges leveled against the Petitioners, the issues seemed to stem from the failure to follow the laid down regulations and procedures in arriving at the decision to sell the company's idle/surplus non core assets. In our view ordinarily it does not require a year after completion of investigations in such a matter for a decision to prosecute to be made. That notwithstanding, it is not mere delay in preferring the charges that would warrant the halting of the criminal proceedings. Rather, it is the effect of the delay that determines whether or not the proceedings are to be halted. In this case, there is no allegation made by the Petitioners to the effect that the delay has adversely affected their ability to defend themselves. In other words, the Petitioners have to show that the delay has contravened their legitimate expectations to fair trial."

224. In this case, whereas delay is relied on, the Applicant does not contend that as a result of the said delay there has been a change in the circumstances which militate against a fair trial. Such change

in circumstances may be shown for example by the fact of unavailability of the applicant's potential witnesses or evidence resulting from the said delay. I am therefore not satisfied that in the circumstances of this case the delay in bringing the charges against the applicant without more merits the termination or prohibition of the criminal trial. In this case the applicant has not contended that as a result of the long delay in bringing the criminal charges his defences have been compromised for example by making it impossible for him to efficiently present formidable defences which he could have done had the charges been preferred earlier on. In fact a consideration of the applicant's position reveals that in his view he has formidable defences to the prosecution case.

225. This position was emphasised by **Richardson, J** in **Martin vs. Tauranga District Court [1995] 2 LRC 788 at 799** where he held:

"...where the delay has not affected the fairness of any ensuring trial though; for example unavailability of witnesses or the dimming of memories of witnesses so as to attract consideration...it is arguable that the vindication of the appellant's rights does not require the abandonment of trial process; that the trial should be expedited rather than aborted and the breach of Section 25(b) should be met by an award of monetary compensation. That would also respect victims' rights and the public interest in the prosecution to trial of alleged offenders."

226. In the same case, **Hardie Boys, J** aptly put it as follows:

"The right is to trial without undue delay, it is not a right not to be tried after undue delay. Further, to set at large a person who may be, perhaps patently, guilty of a serious crime, is no light matter. It should only be done where the vindication of the personal right can be achieved in no other satisfactory way. An alternative remedy may be an award of damages."

227. This position was alluded to in **Githunguri vs. Republic KLR [1986] 1** in which it was held:

"… 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."

228. It was contended that procurement procedures were breached in the appointment of the 2nd respondent. However these are not proceedings challenging the process by which the services of 2nd respondent were procured. As rightly submitted on behalf of the 2nd respondent, if there was any legitimate grievance against the procurement process leading to the 2nd Respondent's appointment, the ***Public Procurement and Disposal Act*** provides for specific procedures for review of procurement processes by the Public Procurement Administrative Review Board ("PPARB") under Section 93 of the ***PPDA***; and investigations by the Director – General of the Public Procurement Oversight Authority under Section 102 of the ***PPDA***. By choosing to challenge the said process vide these proceedings, the Applicant was in effect sidestepping the statutory mechanisms available to him to challenge the procurement process. It is a settled principle that where there is a specific statutory mechanism and or process to challenge a quasi-judicial decision by a public entity, that process must be followed. This was the position in **Narok County Council vs. Trans Mara County Council [2000] 1 EA 161** where the Court of Appeal

held as follows:-

"Section 60 of the Constitution does give the High Court unlimited jurisdiction but I do not understand it to mean that it can be used to clothe the High Court with jurisdiction to deal with matters which a statute has directed should be done by a Minister as part of his statutory duty."

229. As was held by this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013:

"…one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute. This position was re-affirmed by the Court of Appeal in Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992, where it was held that there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

230. It was similarly held by the Court of Appeal in **Republic vs. National Environment Management Authority Civil Appeal No. 84 of 2010** as follows:

"...where there was an alternative remedy and especially where Parliament had provided a statutory appeal process it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the real issue is to be determined and whether the statutory appeal procedure was suitable to determine it...The learned judge, in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute. With respect we agree with the judge."

231. There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. See **KipkalyaKones v Republic & Another ex-parte Kimani Wanyoike& 4 Others (2008) 3 KLR (EP) 291, Francis Gitau Parsimei & 2 Others vs. National Alliance Party & 4 Others Petition No.356 and 359 of 2012.**

232. Even at common law it is a 'cardinal principle that save in the most exceptional circumstances, the judicial review jurisdiction would not be exercised and the court must not exercise it where there exist alternative remedy'. In **Re Preston [1985] AC 835 at 825D Lord Scarman** was of the view that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort.

233. This position has now acquired statutory underpinning by the enactment of the ***Fair Administrative Action Act***, No. 4 of 2015. Section 9(2) of the said Act provides:

The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for

appeal or review and all remedies available under any other written law are first exhausted.

234.Subsection (3) thereof provides:

The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

235.Subsection (4) of the said section however provides:

Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

236.It is however my view that the onus is upon the applicant to satisfy the Court that he ought to be exempted from resorting to the available remedies. Such exemption as stated above ought only to be granted in the most exceptional circumstances.

237.In this case the applicant has not shown the reason why the challenge to the procurement process could not have been taken through the alternative statutory avenues hence the need to exempt him from so doing. Judicial review it ought to be remembered is a remedy of last resort and ought not to be applied for where there exist appropriate remedies to redress the grievance complained of. Judicial review it ought to be remembered is a remedy of last resort and ought not to be applied for where there exist appropriate remedies to redress the grievance complained of.

238.That notwithstanding the 1st respondent has placed before the Court material which show that the provisions of the ***Public Procurement and Disposals Act*** were complied with. As to whether the same were sufficient or not is outside the scope of these proceedings.

239.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.

240. 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 applicants are unlikely to receive a fair trial before the trial Court, the Court ought not to interfere simply because the applicants may at the end be found to be innocent.

241. The mere fact that an applicant 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.

242. On this point one needs to remind oneself of the decision in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** to the effect that:

"In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal

prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names."

243. Having considered the allegations made against the 2nd respondent I am not satisfied that the same are merited based on the material placed before me. The mere fact that the Applicant and the 2nd Respondents are both politicians does not ipso facto make the 2nd Respondent legally unsuitable to undertake the prosecution of the Applicant. I have found that there is no evidence that the 2nd Respondent undertook further investigations in the mater apart from reviewing the evidence availed to him. As a prosecutor the 2nd Respondent was properly entitled to give his opinion to the 1st Respondent on the viability of the prosecution which opinion the 1st Respondent was not bound to heed. In my view the 2nd Respondent, though not a public officer, is no lesser person in the conduct of the prosecutorial duties than those employed in the Office of the Director of Public Prosecutions and just as such officers are bound by the provisions of Article 157(11) of the Constitution and section 4 of the ***ODPP Act*** hence are at liberty to give appropriate opinion to the 1st Respondent not only at the inception of the prosecution but also during the course of the prosecution. It is him who would be properly placed for example to inform the 1st Respondent, to for example terminate the prosecution if the same turns out to be inappropriate. To say that he cannot do so, as was purported by the Attorney General would with due respect to turn the 2nd respondent into a robot rather than a prosecutor whose decisions must be informed by the dictates of the law. There are, therefore, no credible grounds on the basis of which I can prohibit the 2nd respondent from undertaking the prosecution against the Applicant.

244. Apart from the challenges taken to the propriety of the 2nd Respondent to prosecute the Applicant, I have found that there is no basis upon which this Court can interfere with the 1st Respondent's discretion not to prosecute **Eric Mutua**. Whereas that decision may be unmerited to some people this Court is not concerned with the merits of the decision. The other issues raised it is my view go to the criminal culpability of the applicant which are matters for the trial Court. The challenges to the merits of the decision to prosecute the applicant can be properly dealt with by the trial court while challenges to exercise of discretion based on the evidence before me do not, in my view, meet the threshold for interfering therewith

245. Before I depart from this judgement I wish to express my gratitude to learned counsel who appeared in these proceedings for the well-researched submissions which I found very useful and which I have considered. If I have not expressly referred to each and every authority cited it is not out of disrespect or lack of appreciation for their industry.

Order

246. Consequently, I find no merit in the Motion on Notice dated 17th November, 2014 which Motion is hereby dismiss.

247. With respect to costs, it is my considered view that the issues raised herein with respect to the competency of the 2nd Respondent to prosecute the Applicant were novel and were not free from both constitutional and legislative controversy. This can be discerned from the fact that the two Constitutional offices, the Office of the Director of Public Prosecutions and the Office of the Attorney General, in a most unusual and rare episode, adopted diametrically opposed positions and viewpoints. Accordingly, there will be no order as to costs.

Dated at Nairobi this 3rd day of November, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Dr Khaminwa, Mr Harun Ndubi, Mr Antony Oluoch and Mr Ndolo (holding brief for Ms

Kethi Kilonzo) for the Applicant.

Mr Ashimosi with Mr Ondimu for the 1st, 3rd and 4th Respondents

Mr Esmail for the 2nd Respondent

Cc Patricia