



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 539 OF 2012

BETWEEN

MOHAN GALOT.....1ST PETITIONER

SANTOSH GALOT.....2ND PETITIONER

AND

THE HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

CHIEF MAGISTRATE, MILIMANI COMMERCIAL COURTS.....3RD RESPONDENT

PRAVIN GALOT.....4TH RESPONDENT

RAJESH GALOT.....5TH RESPONDENT

JUDGMENT

Introduction

1. The petitioners are husband and wife. They have filed the present petition to challenge their prosecution in three criminal cases in the Nairobi Chief Magistrate's Court, being Criminal Case Numbers 1554 of 2012, 1555 of 2012, and 482 of 2014. The complainants in the case are their nephews, **Pravin Galot** and **Rajesh Galot**, who are joined in this petition as the 4th and 5th respondents, with whom the petitioners are embroiled in disputes regarding the shareholding and directorship of Galot Industries Limited, Manchester Outfitters Limited, King Woolen Mills Limited and Mohan Meakin Kenya Limited. The petitioners plead, and this is not disputed, that the disputes over the companies are the subject of civil litigation in H.C.C.C No. 298 of 2009, H.C.C.C No. 55 of 2012 and H.C.C.C No. 430 of 2012.
2. Along with their nephews, the petitioners have lodged their claim against the 1st respondent, the Attorney General (AG) as the principal legal adviser of the Government of Kenya whose office is established under Article 156 of the Constitution; the Director of Public Prosecutions (DPP), whose office has the constitutional mandate to institute and carry out criminal proceedings against any person on behalf of the Government of Kenya as the 2nd respondent, and the Chief Magistrate,

Milimani Commercial Court, which is seized of the criminal prosecution against them, as the 3rd respondent.

Background

3. Mr. Mohan Galot, the 1st petitioner, describes himself as a businessman and the founder, shareholder and Chairman of the Board of Directors of all the Galot group of companies comprising; Galot Limited, Manchester Outfitters Ltd, Galot Industries Ltd, King Woolen Mills Ltd, Galot International Ltd, Mohan Meakin Kenya Ltd, London Distillers Kenya Ltd and M.G Park Ltd. These companies, according to the petitioners, deal in a number of businesses, including but not limited to holding property, shares, alcoholic and non-alcoholic beverage distillery, bottling and sale, as well as fabric and cloth making. It is therefore a multi-billion shilling worth group of companies, and its control is at the centre of the dispute between the petitioners and the 4th and 5th respondents. It would appear that the dispute over the companies has led to activities on the part of the petitioners that the 2nd respondent deems to be criminal in nature, which has spawned the criminal charges against the petitioners, and as a result, given rise to the present petition.
4. The petitioners have been charged in Criminal Case No. 482 of 2014 with offences under Sections 104 (c), 327 (1), 328, and 350 (1) of the Penal Code. They have thus filed the instant petition seeking to stop the criminal proceedings claiming a violation of their constitutional rights under Articles 25, 47 and 50.

The Case for the Petitioners

5. The petitioners' case is contained in the petition dated 21st November, 2012 supported by an affidavit sworn by Mr. Mohan Galot on the same date. They also filed further affidavits dated 8th March, 2014, 1st April, 2014, and 28th April, 2014, as well as submissions dated 16th September, 2014. Their case was presented by Learned Counsel Mr. Nelson Havi.
6. The facts of the case, according to the petitioners, are that sometime in the 1990s, Mr. Mohan Galot invited the 4th and 5th respondents into the Galot group of companies and appointed them directors in some of the companies, but that they thereafter ceased to be directors in some of the said companies on various dates in accordance with the Memorandum and Articles of Association of the companies.
7. Since 2009, the 4th and 5th respondents have been engaged with them and the Galot group of companies in several civil cases in which the 4th and 5th respondents have resisted their removal as directors, while the Galot group of companies has sought to restrain the 4th and 5th respondents from holding themselves out as shareholders and/or directors of any of the companies. The civil disputes in question are namely; **HCCC No 298 of 2009, Ganeshlal Pusharam Galot, Lalita Devi Lalchand Galot and Galot Industries Limited vs Mohan Galot, Santosh Galot, Rita Galot, Nina Galot, Mohan Meakin Kenya Ltd, London Distillers Kenya Ltd and the Attorney General; HCCC No 55 of 2012 (formerly No 63 of 2009), Manchester Outfitters Ltd vs Pravin Galot, Rajesh Galot, Ganesh Galot, Kevin Galot and Manchester Outfitters East Africa Ltd; and HCCC No 430 of 2012, Galot Ltd, Manchester Outfitters Ltd, Galot Industries Ltd, King Woolen Mills Ltd and Galot International Ltd vs Pravin Galot, Rajesh Galot and Kaka Ernest Kamau.** The three suits relate to the issues of who are the shareholders and directors of the Galot group of companies and who is entitled to the properties of the said companies.
8. According to the petitioners, during the pendency of **HCCC No 298 of 2009** and **HCCC No 55 of 2012**, the 4th and 5th respondents initiated unknown criminal complaints against them. As a result, the Criminal Investigations Department (CID) summoned Mr. Mohan Galot without disclosing the

nature of the complaints. He therefore filed **Misc Application No 458 of 2011, Mohan Galot vs Pravin Galot and Rajesh Galot** and obtained an order, amongst others, directing the Commissioner of Police through the CID, to furnish him with further written information and supporting documents regarding the complaint lodged by the 4th and 5th respondents. The petitioners state that the order has never been complied with to date, despite several reminders.

9. Mr. Mohan Galot deposes that during the pendency of the above cases, the petitioners were arrested and charged before the Chief Magistrate, the 3rd respondent to answer to nine counts of charges relating to the 2nd petitioner's status as a director of Galot Industries Ltd and to the propriety of the transfer of three properties of Galot Industries Ltd to M. G Park Limited.
10. Mr. Galot avers that throughout the period of his confinement at the CID, the arresting officer denied him access to his advocate and family and he was informed that there were strict instructions from above to ensure that he spent the night in custody. He was however, released on police cash bail of Kshs. 100, 000.00 at about 9:00 p.m, after persistent efforts and intervention by his family, friends and advocates.
11. The petitioners contend that the institution of criminal charges and the intended prosecution constitutes a denial, violation or infringement, or is a threatened denial, violation or infringement of their constitutional rights and fundamental freedoms as enshrined in Article 47 and 50.
12. They further contend that various officers in the office of the Registrar of Companies, whom they name and whom they allege the Attorney General is responsible for, have altered and falsified the records of the Galot group of companies at the Companies Registry, to indicate that the 4th and 5th respondents were and are shareholders and/or directors of some of the Galot companies with the aim of contradicting and defeating official records submitted by the said companies. It is the petitioners' contention that the said government officers have arrogated to themselves the powers of investigating and determining disputes between the petitioners and the 4th and 5th respondents, when such decisions can only be made by a court of law, and thereby violated their right to fair administrative action.
13. The petitioners have also gone into some detail in the affidavits sworn by Mr. Galot regarding the evidence placed before the court seized of the civil suits: they allege that the signatures of persons employed in the Registrar of Companies office whose signature they are charged with forging have refused to make statements; that the officers responsible for alteration and falsification of the records of Galot Industries Ltd are embroiled in three cases with them and are therefore on a revenge mission against them. The petitioners also challenge the validity of the charges against them, arguing that they are not valid, bona fide or lawful.
14. The petitioners accuse the office of the DPP of violating Article 157 of the Constitution which requires that the DPP, in instituting criminal proceedings, must have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid an abuse of the legal process. They contend that the DPP has failed to do this in the present case.
15. It is also their contention that the DPP has not investigated or considered the significance of the three pending civil cases to the bona fides of the complaints leading to the criminal charges, nor the prejudice of requiring them to meet the challenge concerning their status as shareholders and directors and their powers to deal as such with the properties of Galot Industries Ltd in two parallel dispute determination forums. It is their contention therefore that it is not fair that the dispute between them and the 4th and 5th respondents be processed and determined by the state conflict resolutions agencies in the manner intended by the DPP.
16. The petitioners also accuse the DPP of having failed to ensure that the complaints by the 4th and 5th respondents are fairly investigated and the intended prosecution fairly conducted. They allege that he has allowed the criminal process to be used by the 4th and 5th respondents for extraneous purposes, to oppress the petitioners and assist the 4th and 5th respondents in the three civil cases.

17. It was their argument therefore that their intended prosecution on issues pending determination before the High Court undermines the dignity of the High Court, is unconstitutional as it is intended to deny them a fair hearing, and should be declared null and void.

18. They ask the Court to grant the following orders:

- a. ***A declaration be and is hereby made that the independence of the 2nd respondent in the institution and continuation of criminal proceedings does not override the constitutional and fundamental rights and freedoms of individuals, to a fair trial, the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and a fair hearing in the investigation, arrest and prosecution of alleged criminal offenses.***
- b. ***A declaration be and is hereby made that the arrest, arraignment in court and intended prosecution of the petitioners in Criminal Cases No 1554 and 1555 of 2012, Republic vs Mohan Galot and Santosh Galot over their status of the shareholders and directors and the power to deal as such with properties of Galot Industries Ltd is a denial, violation or infringement, or threatened denial, violation or infringement of the petitioners constitutional and fundamental rights and freedoms.***
- c. ***The 1st, 2nd, 4th and 5th respondents be and hereby directed to pay the petitioners general damages of not less than Ksh5,000,000,000.00 for the 1st, 2nd, 4th and 5th respondents' denial, violation or infringement, or threatened denial, violation or infringement of the petitioners' constitutional and fundamental rights and freedoms.***
- d. ***An order of certiorari be and is hereby issued to remove from the 3rd respondent, bring to the High Court and quash the entire proceedings in Criminal Cases No 1554 and 1555 of 2012, Republic vs Mohan Galot and Santosh Galot.***
- e. ***An order of injunction and/ or prohibition be and is hereby issued restraining the 3rd respondent from continuing with the proceedings in Criminal Cases No 1554 and 1555 of 2012, Republic vs Mohan Galot and Santosh Galot.***
- f. ***An order of injunction and/or prohibition be and is hereby issued restraining the 1st, 4th and 5th respondents by themselves, officers, agents servants or otherwise howsoever from initiating any criminal complaints against the petitioners over the status of the shareholding and directorship of Galot Ltd, Manchester Outfitters Ltd, Galot Industries Ltd, King Woollen Mills Ltd, Galot International Ltd, Mohan Meakin Kenya Ltd, London Distillers Kenya Ltd and M.G Park Ltd.***
- g. ***An order of injunction and/or prohibition be and is hereby issued restraining the 2nd respondent by himself, officers, agents servants or otherwise howsoever from instituting and/or continuing with any criminal prosecutions against the prisoners over the status of the shareholding and directorship of Galot Ltd, Manchester outfitters Ltd, Galot Industries Ltd, King Woollen Mills Ltd, Galot International Ltd, Mohan Meakin Kenya Ltd, London Distillers Kenya Ltd and M.G park Ltd.***
- h. ***The costs of this petition be borne by the respondents.***
- i. ***Any other orders that this Honourable Court may deem fit to grant.***

The Case for the 1st and 3rd Respondent

19. The office of the Attorney General filed grounds of opposition dated 10th December 2012, a replying affidavit sworn on 29th April 2014 by Mr. Francis Ndirangu. Their case was presented by Learned Counsel Mr. Kamau.

20. The respondents argue that the petition is incompetent and a gross abuse of the court process. It is their contention, further, that the rights alleged to have been violated are not absolute; that the petitioners have not shown by way of evidence that their arrests were orchestrated by the AG, no constitutional issues have been raised for the court to determine and neither is there a violation of the Constitution or the petitioners' constitutional rights disclosed.
21. It was submitted on behalf of the AG that Article 157(6) of the Constitution gives the DPP power to undertake and institute criminal proceedings as it has against the petitioners. Under Article 157(11), the power is to be exercised for the proper administration of justice, the public interest and to avoid the abuse of the legal process. In his view, the petitioners had not been able to demonstrate that the DPP did not act in accordance with Article 157(11) of the Constitution.
22. The AG further submitted that the Court has to balance the rights of the petitioners under Article 47 and 50 against the powers of the DPP under Article 157 of the Constitution and determine whether the petitioners rights were violated in light of the concession by the DPP that there are civil cases which may affect the criminal cases.
23. With regard to the petitioners' prayer for damages of Kshs 5 billion from the respondents, the AG's submission was that the petitioners have not shown how the 1st and 3rd respondents have infringed their rights to warrant an order for damages. The AG prayed that the petition be dismissed with costs, and therefore, the petition ought to be dismissed.

The Case for the 2nd Respondent

24. In presenting the case for the DPP, Learned Counsel, Mr. Ashimosi, relied on the affidavits sworn by PC Patrick Maloba on 17th February 2014 and PC Festus Wanjala, a police officer with the Directorate of Criminal Investigations Unit attached to the Capital Market Fraud Investigations Unit, on 25th March, 2014. The DPP also filed submissions dated 12th September, 2014.
25. In his affidavit, PC Wanjala outlines the results of the investigations conducted pertaining to the Galot Group of companies and averred that the petitioners are to be charged with offences recognized by law. It is his deposition that the petitioners have not demonstrated that in undertaking investigations into the complaint lodged against them and in making the decision to prefer charges, either the DPP or any member of staff of the office of the DPP or the National Police Service 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 provisions of the Constitution.
26. The DPP's case was that investigations into the matter the subject of the petition commenced following a complaint vide two letters dated 21st March, 2012 and 24th April 2013 by the 4th respondent through his advocates. On 22nd May, 2012, the 4th respondent recorded a statement with investigators stating that, in the course of auditing the company's properties, he had discovered that the company's title deeds to LR 12867/6- IR 36270, LR 12867/14- IR 36278 and LR 209/2663-IR 57338 had been forged; that the 4th respondent stated that the 1st petitioner, who had been in possession of the title documents, had attempted to transfer the three properties to MG Park Ltd without the knowledge or consent of the other Directors of Galot Industries Ltd.
27. According to the DPP, in the course of its investigations, copies of the three sets of titles and related instruments of transfer in respect of the said parcels of land, apparently signed on the Transferor's section by the petitioners, were received for scrutiny and the investigations revealed that the three title documents were not supported by any relevant records. The Registrars of titles, Mr. Fredrick Indiko Lubullelah and Ms. Sarah Maina, who were indicated to have signed and stamped the three suspected forged title deeds, recorded statements to the effect that they never signed, stamped or had any other involvement in their preparation.
28. It was further averred on behalf of the DPP that specimen and known signatures and official

rubber stamp impressions of the two Registrars were submitted for forensic document examination, alongside the three allegedly forged title deeds and respective transfer instruments and the results from the Document Examiner revealed that the signatures were forged and that according to records obtained from the Registrar of Companies, the transfers were purportedly executed by the 2nd petitioner who was not a director of the company.

29. The DPP therefore argued that the prosecution in question is lawful and undertaken in accordance with the law and does not constitute or threaten to constitute a denial, violation or infringement of the constitutional rights of the petitioners; nor does it in any way bar or impact on the hearing and determination of the pending suits.
30. It is also the DPP's contention that the police officers were within their statutory duty to arrest the petitioners and to summon them for interrogation, and that the investigations were conducted professionally and without bias before a decision was made to prefer criminal charges against the petitioners.
31. The DPP further contended that by dint of Section 193A of the Criminal Procedure Code, the fact that any matter in issue in any criminal proceedings is also directly or substantially an issue in any civil proceedings cannot be a ground for any stay, prohibition or delay of criminal proceedings. In his view, the present petition has been filed in bad faith and is an attempt to defeat the cause of justice, nor has it met the prerequisite requirements for the grant of the orders sought as the issues that the petitioners were raising were the defences to be raised before the trial court.

The Case for the 4th and 5th Respondent

32. Through their Learned Counsel, Mr. Kaka, the 4th and 5th respondents associated themselves with the submissions made on behalf of the AG and DPP. Their position is that **HCCC No 55 of 2012** pending before a 3 judge bench in the High Court only relates to one company, Manchester Outfitters Limited. Mr. Kaka asked the Court to look at the charge sheet against the petitioners and find that Manchester Outfitters Limited is not included in the charge sheets against the petitioners, and to dismiss the petition.

Determination

33. The issue for determination in this petition is whether the institution of criminal proceedings against the petitioners is in breach of their constitutional rights under Articles 47 and 50 of the Constitution.
34. The position of the petitioners is that the disputes between them and the 4th and 5th respondents is civil in nature, pertaining to the shareholding, directorship and properties of the various companies which are the subject of litigation in HCCC Nos. 298 of 2009, 55 of 2012 and 430 of 2012. It is their contention therefore that by instituting criminal proceedings against them, the 1st to 3rd respondents are violating their rights to fair administrative action and fair hearing. They urge the Court to be guided by the decision in **Mohammed Gulam Hussein Faza Karmal and Another vs Chief Magistrates Court Nairobi and Another [2006] eKLR** and **Rosemary Wanja Mwangi and 2 Others vs Attorney General and 3 Others [2013] eKLR** in which the Court stated that civil rights cannot be determined through a criminal process.
35. The respondents position, as exemplified in the submissions by the DPP, is that the petition is premature before the High Court as the matters that the petitioners raise form the defence that they should raise before the trial court. The decision to charge the petitioners was therefore not an abuse of the powers of the DPP, nor was it irrational or actuated by ulterior motive and malice as alleged in the petition.
36. The issue for determination in this matter is therefore fairly straight forward. It requires that this Court addresses itself to the question whether the prosecution of the petitioners amounts to a

violation of their constitutional rights, and if so, whether the Court should stop the said prosecutions.

37. In answering this question, I am called upon to consider the circumstances under which the High Court can properly intervene in proceedings before a lower court in which the Director of Public Prosecutions has undertaken a prosecution against any person with respect to the commission of a criminal offence. This is a question that has been addressed in several decisions, and the response thereto is fairly clear, as will be evident from the pronouncements and principles that emerge from these decisions.

38. In **High Court Petition No 372 of 2013 - Justus Mwenda Kathenge vs Director of Public Prosecutions and 2 Others**, the Court stated as follows:

“[8] It is now trite that Courts cannot interfere with the exercise of the above mandate [exercise of prosecutorial powers] unless it can be shown that under Article 157(11);

(i) he has acted without due regard to public interest,

(ii) he has acted against the interests of the administration of justice,

(iii) he has not taken account of the need to prevent and avoid abuse of Court process.

[9] These considerations are not new and have over time been taken as the only bar to the exercise of discretion on the part of the 1st respondent.

39. The Court then went on to consider the holdings in various decisions in which courts had considered the circumstances under which the power to intervene with prosecutions can be exercised. It cited with approval the decision in **Githunguri vs Republic [1986] KLR 1** in which the AG had commenced a prosecution against the applicant long after the alleged offence had been committed, and where the Attorney-General, who at the time had powers similar to those of the DPP, had assured the applicant that he would not be prosecuted. In quashing the decision to prosecute the applicant, the Court stated, inter-alia, that:

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

40. The court in **Gulam & Another vs Chief Magistrate's Court & Another [2006] eKLR**, observed as follows:

“Whilst the power of the High Court to intervene to stop a criminal prosecution must be exercised sparingly, the High Court must always be ready to intervene to prevent any prosecution which is vexatious, oppressive, malafides, frivolous or taken up for other improper purpose such as undue harassment of a party or abuse of the process of court... 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 institution of criminal proceedings, there must be in existence material evidence on which the Prosecution can say with certainty that they have a probable case. A prudent and cautious prosecutor must be able to demonstrate that he has reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable... Prosecution aimed at securing private vengeance or vindictiveness must be stopped as contrary to public policy and the public interest. The rationale for prohibiting such proceedings is that for a man to be harassed and put to the expense of perhaps a long trial and then given an absolute discharge is hardly from any point of view an effective substitute

for the exercise by the Court (of its inherent power to prevent abuse of its process). On the score of cost alone, the exercise of the power will protect the accused person from expenditure on a trial on indictment which he or she cannot recoup."

41. In **Peter D'Costa vs AG & Another, Petition No.83/2010 (U.R.)** the Court stated that:

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

42. Finally, Warsame J (as he then was) pronounced himself on the issue in the case of **Michael Monari & Another vs Commissioner of Police & 3 Others Miscellaneous Application No.68 of 2011** as follows:

"It is not the duty of the court to go into the merits and demerits of any intended charge to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the Respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment."

43. The petitioners allege that the DPP, by subjecting them to trial has breached or threatened their rights under Articles 47 and 50, and abused his powers under Article 157, thereby violating Article 157(11) which he requires that he should be conscious of the need to safeguard the public interest and avoid an abuse of process. The question is whether the evidence placed before me by the petitioners, demonstrates such abuse of the DPP's power, or whether the respondents are correct that their actions demonstrate a proper exercise of the DPP's constitutional mandate.

44. It is evident that the petitioners and the 4th and 5th respondents, who are related, are embroiled in some civil matters dating back to 2009. Nine years later, the civil disputes are yet to be resolved. They were further complicated by the referral, apparently on the application of the petitioners, to a three-judge bench to hear and determine the issue of the shareholding and directorship of some of the Galot group companies. It is not clear from the pleadings the provisions of law under which the referral to three judges was made.

45. Suffice to say that it now appears that the Galots are engaged in something akin to a Dickensian legal dispute, which has got so muddled up, and so much time has passed without determination, and more and more elements of the dispute evolve, that it may reach the point, as in Dickens' *Jarndyce vs Jarndyce* in *Bleak House*, that the original dispute may well be lost.

46. The question is whether the tangled web of the civil dispute between the petitioners and the 4th and 5th respondents is such as should stop the DPP from prosecuting any of the parties involved, on the basis that such prosecution may aid the others involved in the dispute.

47. The evidence before me indicates that complaints were made, inter alia, with regard to the alleged forging of documents by the petitioners. The allegations are that the petitioners forged the signatures of public officers in the Ministry of Lands and the Registrar of Companies.

Investigations were carried out, witness statements taken from, among others, the government officers whose signatures were allegedly forged by the petitioner(s). Should such acts be found to have been committed, then, notwithstanding the existence of civil cases, the petitioners would be properly subject to the criminal process, and to the penalties provided thereunder. I am therefore unable, under the circumstances, to find that the DPP acted from ulterior motives.

48. While the petitioners and 4th and 5th respondents may be embroiled in civil disputes, that does not, of itself, stop the DPP from proceeding with a matter if investigations reveal the commission of an offence. If it were held otherwise, then all one has to do is file a civil matter related to the facts and circumstances surrounding the possible commission of an offence, and then allege that there is an ulterior motive in his or her prosecution. This is what the provisions of section 193A of the Criminal Procedure Code were intended to prevent. The section provides that "***Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.***"

49. The petitioners have also challenged the charges they are facing. They state for instance, at paragraphs 28 and 29 of their petition, as follows:

28. "That the charges against the 1st Petitioner of converting property entrusted by a director of a company contrary to section 327(1) of the Penal Code, Cap 63 of the Laws of Kenya are not valid, bona fide or lawful and their institution violates the 1st petitioner's rights under Articles 25,47 and 50 of the Constitution, for the following reasons:-

(a) The offence created by Section 327 does not relate to any action of a director of a company, but is limited to actions of trustee;

...

...

29. That the charges against the 2nd petitioner of false assumption of authority as a director contrary to section 104(c) of the Penal Code, Cap 63 of the Laws of Kenya are not valid, bona fide or lawful and their institution violates the 2nd petitioner's rights under Articles 25, 47 and 50 of the Constitution, for the following reasons:-

a. the charge created by Section 104 (c) relate to a person misrepresenting that he/she has authority to sign a document.

...

..."

50. The petitioners further seek to challenge the validity of the other charges facing them, averments that would require an examination of the facts and evidence against the law in order to determine whether the charges are valid or not. This is where the dicta by Warsame J is fully apt: it is not for this Court to examine the facts and evidence: they must be laid before the trial court which will then examine the conflicting evidence presented and make a determination.

51. While the petitioners have alleged violation or threat of violation of their right to a fair hearing under Article 50, it must be borne in mind that this right is guaranteed to all accused persons under Article 50(2). The right is trial related, as the Court of Appeal pronounced in **Julius Kamau Mbugua vs Republic Court of Appeal Civil Appeal No. 50 of 2008**. The petitioners are entitled

to a fair hearing before the trial court. There is no basis at this stage to allege violation of this right. Should it be violated or threatened with violation in the course of the trial, then the petitioners have recourse by way of appeal to the High Court. Apprehensions with regard to something that is yet to happen, however, is not a basis for stopping a prosecution unless it can be shown that the prosecution is arbitrary or unreasonable.

52. What amounts to an arbitrary or unreasonable prosecution, or from an ulterior or improper motive that would justify intervention by the Court? The words of the High Court in **Gulam and Another vs Chief Magistrate's Court** (supra) are useful in this regard. The court observed as follows in that case:

“... 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 institution of criminal proceedings, there must be in existence material evidence on which the Prosecution can say with certainty that they have a probable case. A prudent and cautious prosecutor must be able to demonstrate that he has reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable...”

53. In the present case, and despite the many civil cases subsisting between the petitioners and the 4th and 5th respondents, I am not persuaded, on the facts before me, that there is an ulterior or improper motive in their prosecution, or that the DPP has abused his constitutional mandate under Article 157.

54. By all means let the petitioners and the 4th and 5th respondents keep their civil disputes in the courts indefinitely (which is itself an abuse of the court process that the Commercial Court ought to put a stop to), but should the DPP have evidence of the commission of a crime, even on facts connected with the civil cases, there can be no basis for intervening with the exercise of his constitutional mandate.

55. In the circumstances, having found no merit in the petition, it is hereby dismissed. Each party shall bear its own costs of the petition.

Dated, Delivered and Signed at Nairobi this 4th day of December 2015

MUMBI NGUGI

JUDGE

Mr. Havi & Ms. Ngania instructed by the firm of Havi & Co. Advocates for the petitioners.

Mr. Ojwang instructed by the State Law Office for the 1st and 3rd respondent.

Mr. Muranga instructed by the Director of Public Prosecution for the 2nd respondent.

Mr. Anzala instructed by the firm of Henia Anzala & Associates Advocates for 4th respondent.

Mr. Kaka instructed by the firm of Kaka & Kamau & Co. Advocates for the 5th respondent.