



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
PETITION NOS. 227 & 230 OF 2009

GEORGE JOSHUA OKUNGU.....1ST PETITIONER

MARY KIPTUI.....2ND PETITIONER

VERSUS

THE CHIEF MAGISTRATE'S COURT

ANTI-CORRUPTION COURT AT NAIROBI.....1ST RESPONDENT

HON ATTORNEY GENERAL.....2ND RESPONDENT

JUDGEMENT

INTRODUCTION

1. This judgement is the subject of two petitions which were consolidated and heard together.
2. In petition no. 227 of 2009 the petitioner is **George Joshua Okungu**, hereinafter referred to as the 1st petitioner. The 1st petitioner was the Managing Director of Kenya Pipeline Company a state corporation (hereinafter referred to as "the Company") operating under the government's Ministry of Energy in compliance with the **State Corporations Act** (Cap. 446 of the Laws of Kenya) (hereinafter referred to as the Act) while the 2nd petitioner, **Mary Kiptui**, was the Company Secretary of the Company.
3. The first Petitioner seeks the following orders:
 1. **A prohibition to issue against the Respondents from proceeding with the prosecution of the Petitioner vide ACC No. 7 of 2009 REPUBLIC –VERSUS- GEORGE JOSHUA OKUNGU and MARY KIPTUI or instituting any other proceedings touching on any other matter relating to the resolutions of the Board of Directors of Kenya Pipeline Company Ltd dated 5th October 2006 on disposal of its houses to staff members.**
 2. **A declaration do issue that the resolutions of the Board of Directors of Kenya Pipeline Company Ltd dated 5th October 2006 do not amount to the statutory guidelines as contemplated under Section 45(2) (b) of the Anti-Corruption and Economic Crimes Act, 2003 and hence would not constitute a criminal offence and that to proceed with the**

- intended prosecution would amount to a violation of the Petitioner's fundamental right under section 77(8) of the Constitution.
3. A declaration do issue that proceeding with the prosecution of ACC No. 7 of 2009 REPUBLIC–VERSUS- GEORGE JOSHUA OKUNGU and MARY KIPTUI before the Anti-Corruption court at Nairobi will amount to the contravention of the Petitioner's fundamental right as guaranteed by Section 77 (8) of the Constitution as the counts 1,2,3,4 and 5 relate to commission of offences which are not defined in law and is therefore a mockery of the due process and a nullity in law.
 4. A declaration do issue that to the extent that the letter by the Permanent Secretary Ministry of Energy dated 23rd October 2008 confirmed that the Kenya Pipeline Board of Director's decision to dispose of the residential houses to its staff was approved both by the Treasury and the Ministry of Energy and that the Ministry was fully consulted and briefed at all times and that the sale was prudent and consistent with the then government policy, count 1 together with its alternative count in the charge sheet for ACC No. 7 of 2009 REPUBLIC –VERSUS- GEORGE JOSHUA OKUNGU and MARY KIPTUI before the Anti-Corruption court at Nairobi in so far as they relate to the Petitioner are a contravention his fundamental rights as guaranteed by Section 77 (8) of the Constitution of Kenya and are therefore a mockery of the due process and a nullity in law.
 5. A declaration do issue that to the extent that the letter by the Permanent Secretary Ministry of Energy dated 23rd October 2008 addressed to the 2nd Respondent was copied to the Petitioner confirming that the Kenya Pipeline Company Ltd.'s Board of Director's decision to dispose of the residential houses to its staff was based on valuations done by the Chief Valuer , counts 2 , 3 , 4 and 5 together with their alternative counts in the charge sheet for ACC No. 7 of 2009 REPUBLIC –VERSUS- GEORGE JOSHUA OKUNGU and MARY KIPTUI before the Anti-Corruption court at Nairobi in so far as they relate to the Petitioner are a contravention of his fundamental rights as guaranteed by Section 77 (6) of the Constitution of Kenya and are therefore a mockery of the due process and a nullity in law.
 6. A declaration do issue that the Petitioner's fundamental right to a fair trial as guaranteed by Section 77(2) (a) of the Constitution of Kenya has been and is likely to be violated by inclusion of the said Permanent Secretary Ministry of Energy Mr. Patrick M. Nyoike as a prosecution witness.
 7. A declaration that the Petitioner's fundamental right against being treated in a discriminatory manner as guaranteed by Section 82(2) of the Constitution of Kenya has been and is likely to be violated by selectively preferring criminal charges against him in ACC No. 7 of 2009 REPUBLIC –VERSUS- GEORGE JOSHUA OKUNGU and MARY KIPTUI pending before the Anti-Corruption court to the exclusion of all the members of the Board of Directors of Kenya Pipeline Company Ltd. whose resolutions he was executing by virtue of his employment, the Director of the National Security Intelligence Services who equally participated and benefitted from the transactions, the Permanent Secretary Ministry of Finance and the Permanent Secretary Ministry of Energy both of whom approved the transactions.
 8. A declaration that the Petitioner would not stand a fair trial as required by section 77(2) of the Constitution if the Attorney General who was a party to the passing of the of the Board Resolutions, (the subject of the said charges) by virtue of the Attorney General being a member of the Board is also the same Attorney General to conduct prosecution for the acts he himself authored and implemented as a board member.
 9. A declaration that to the extent that one Amb. Mwanyengela Ngali the then Chairman of Kenya Pipeline Board of Directors on 18th December 2006 executed the Transfer of Lease of Nairobi/Block 91/108 and which is the subject matter of count 4 and it's alternative count on behalf of the Kenya Pipeline Company Ltd. in ACC No. 7 of 2009 REPUBLIC –VERSUS- GEORGE JOSHUA OKUNGU and MARY KIPTUI pending before the Anti-Corruption court at Nairobi, and the said Amb. Mwanyengela has not equally been charged and is lined as a prosecution witness, the Petitioner's fundamental right against being treated in a discriminatory manner as guaranteed by Section 82(2) of the Constitution of Kenya has been and is likely to be violated by selectively preferring criminal charges against him to the exclusion of all the members of the Board of Directors of Kenya Pipeline Company Ltd.

- whose resolutions he was executing by virtue of his employment.
10. A declaration do issue that the Petitioner's fundamental right to a fair trial as guaranteed by Section 77(2) (a) of the Constitution of Kenya has been violated by inclusion of the said Amb. Mwangela Ngali as a prosecution witness.
 11. A declaration that to the extent that one Mr. Focus Mwawasi Mwangoka and employee of Kenya Pipeline Company Ltd tendered and purchased LR No. 209/8192/7 and which is the subject matter of count 3 and it's alternative count in ACC No. 7 of 2009 REPUBLIC – VERSUS- GEORGE JOSHUA OKUNGU and MARY KIPTUI pending before the Anti-Corruption court at Nairobi, for speculative purposes on behalf of Kaniini Kega Ltd and Millicent Wamuyu Weru and instantly profited by Kshs. 4 million and which transaction has subsequently been discovered to be against the resolution of the Board of directors of 5th October 2006 in line with the Ministry of Lands and Housing circular of 18th August 20004, and the said Mr. Focus Mwawasi Mwangoka has not equally been charged and is lined as a prosecution witness together with Millicent Wamuyu Weru, the Petitioner's fundamental right against being treated in a discriminatory manner as guaranteed by Section 82(2) of the Constitution of Kenya has been and is likely to be violated by selectively preferring criminal charges against him and the said charge is therefore an abuse of due process and a nullity in law.
 12. THAT a declaration do issue that the Petitioner's fundamental right to a fair trial as guaranteed by Section 77(2) (a) of the Constitution of Kenya has been and is likely to be violated by inclusion of the said Focus Mwawasi Mwangoka as a prosecution witness.
 13. A declaration the Petitioner's fundamental right to a fair trial as guaranteed by Section 77(2) (a) of the Constitution of Kenya has been violated by preferring criminal charges against in ACC No. 7 of 2009 REPUBLIC –VERSUS- GEORGE JOSHUA OKUNGU and MARY KIPTUI pending before the Anti-Corruption court at Nairobi as a result of sensationalization by the Anti-Corruption Commission and the press and that the said case is merely to diverting the public's attention from the Triton oil scandal by linking the Petitioner thereto by seeking cheap publicity and is therefore a mockery of the due process and a nullity in law.
 14. THAT a declaration be issued to the effect that to select the Petitioner out of a group of persons who participated in an honest and legal transaction and then arraign him in court under the full glare of the press after hood winking them that the Petitioner was to be charged with a multimillion shillings corruption offence and then end up charging the Petitioner with a non-existent offence and then continue to subject the Petitioner to a full trial on such bogus offences in ACC No. 7 of 2009 REPUBLIC –VERSUS- GEORGE JOSHUA OKUNGU and MARY KIPTUI would amount to inhuman treatment and undue and unnecessary mental torture contrary to section 74 of the Constitution
 15. An order acquitting the Petitioner herein of all the charges that he is facing in ACC No. 7 of 2009 REPUBLIC –VERSUS- GEORGE JOSHUA OKUNGU and MARY KIPTUI pending before the Anti-Corruption court at Nairobi.
 16. Costs of this Petition
 17. Any other order that this Honourable court may deem just and fair to grant.
4. On her part the 2nd petitioner seeks the following orders:
- a. **THAT** an order of prohibition do issue prohibiting the Respondents from sustaining, proceeding, hearing, conducting, or in any manner dealing with the charges laid or proceedings conducted in the Anti-Corruption case number 7 of 2009 between the Republic vs George Joshua Okungu and Mary Kiptui or instituting any other charges in any other court against the Petitioner over the same subject matter.
 - b. **THAT** a declaration be issued declaring that the charges and proceedings in the Chief Magistrate's court in Anti-Corruption Criminal case number 7 of 2009 by the Respondents are unconstitutional for being in violation of section 74 of the constitution
 - c. **THAT** a declaration be issued to declare that the existence of the charges and proceedings by the Respondents in the Chief Magistrate's court in Anti-Corruption Criminal case number 7 of 2009 are detrimental, subversive and prejudicial to

Petitioner's interest and the constitutionally guaranteed rights and values of humane, fair and equal treatment before the law as embodied in Sections 74, 77(1), 77(2) (b) and 82 of the Constitution.

- d. **THAT a declaration be issued declaring that the existence of charges and proceedings by the Respondents in the Chief Magistrate's court in Anti-Corruption Criminal case number 7 of 2009 against the Petitioner is unconstitutional for being inconsistent with Sections 77(6) and 77(8) of the Constitution.**
- e. **THAT a declaration be issued declaring that the charges and proceedings by the Respondents in the Chief Magistrate's court in Anti-Corruption Criminal case number 7 of 2009 embodies the right to fair hearing, due process and protection of law enshrined in Sections 70 and 77 of the Constitution which has been violated with impunity by the respondents thus breaching the petitioner's fundamental rights.**
- f. **THAT a declaration be issued to declare that Part II of the Anti Corruption and Economic Crimes Act, 2003 (No. 3 of 2003) is unconstitutional for being inconsistent with Sections 65 and 77(2) (a) of the Constitution.**
- g. **THAT a declaration be issued to declare that the Kenya Anti-Corruption Commission is unconstitutional to the extent that it exercises powers and functions that are inconsistent with Sections 65 and 77(2) (a) of the Constitution.**
- h. **THAT a declaration do issue declaring that the powers conferred upon the Director of the Kenya Anti-Corruption Commission under section 23 of the Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003) are inimical to and inconsistent with the Powers conferred upon Attorney General as envisioned under section 26(4) of the constitution.**
- i. **THAT a declaration be issued declaring that the powers and functions vested in the Kenya Anti-Corruption Commission to prepare and lay before the Attorney General reports of Investigations and quarterly reports of investigations are unconstitutional for being inconsistent with Sections 65 and 77(2) (b) of the Constitution.**
- j. **THAT a declaration that the Petitioner is entitled to damages as redress in respect of each of the above rights that were and continues to be breached against her during the instigated criminal proceedings.**
- k. **An order consequential to the above declarations quantifying the amount of damages in respect of each and every of declaration and orders granted.**
- l. **Costs**
- m. **Interest on (k) and (l).**

THE PETITIONERS' CASE

5. According to the petitioners, the two shareholders of the Company are the Permanent Secretary to the Treasury (a body corporate under the *Cabinet Secretary to the Treasury (Incorporation) Act* Chapter 101 of the laws of Kenya) with Forty Nine Thousand Nine Hundred and Ninety Nine Shares and the Permanent Secretary, Ministry of Power and Communications (now Ministry of Energy) with one share. The Board of the Company comprise of a chairman appointed by the President who is, unless otherwise directed, a non-executive; the chief executive; the Permanent Secretary of the parent Ministry (Ministry of Energy); the Permanent Secretary to the Treasury; not more than seven other members not being employees of the state corporation, of whom not more than three shall be public officers, appointed by the Minister of the parent Ministry (Ministry of Energy); and the 2 ex officio members being the Inspector General (State Corporations) and the Attorney General.
6. Under section 13(1) of the said Act a provision has been made for the disposal of assets of a state corporation if they are current assets in the normal course of business carried on by that state corporation and where the disposal and the utilization of the proceeds have been taken into accordance in an estimate prepared and approved in accordance with section 11 of the said Act while Section 11(1) of that Act on the other hand provides that the estimates of a state corporation's revenue and expenditure for the following financial year accompanied by proposals for funding all projects to be undertaken or which will continue during the financial year have to be included in the budget.

7. The Company in its budget for the year 2006/2007 provided for the sale of its non-core assets in compliance with the said Act and that the disposal of houses to staff members which form the subject matter of the charges against the Petitioner were amongst the items included in the budget and the transaction therein approved.
8. It is the petitioners' case that the Company fully complied with the said Act and provided for the Sale of the Company's Non-Core Assets in the year 2006/2007 budget and the same was duly approved by the Ministry of Energy. At its 181st meeting held on 2nd August 2005, the Board resolved to sell the company's idle/surplus non-core assets mainly residential houses to its staff members, National Security Intelligence Services (NSIS) staff and other interested arms of the government on "as is basis" following a board paper presented by the 1st Petitioner on behalf of the management. Pursuant thereto, processes were put in place for the purposes of the said disposal and by letter dated 7th October 2005 the company instructed the Chief Valuer in the Ministry of Lands to carry out a valuation of all of the said residential houses earmarked for disposal and by a letter dated 15th November 2005 the valuation of the said residential houses earmarked for disposal was forwarded to the 1st petitioner by the Valuer. Subsequently some steps towards the disposals having been reviewed, by letter dated 16th August 2006 the 1st Petitioner in line with the provisions of the said Act sought the approval of the Ministry of Finance as well as the Ministry of Energy for the said disposal on the basis of the valuations carried out by the said Valuer of all of the said residential houses earmarked for disposal and by a letter dated 31st August 2006 the Permanent Secretary in the Ministry of Finance copied to the Company and addressed to the Permanent Secretary of the Ministry of Energy under whose docket the Company falls confirmed that the intended disposal was in satisfaction of Section 13(1)(b) of the said Act, gave approval. The Ministry of Finance similarly *vide* the letter dated 31st August 2006 gave approval to the Company to dispose off the Non-Core Assets and the Company thereafter advertised the sale of Non-Core Assets on open tender on 1st September 2006. However the tenders were cancelled on instructions from the Board despite the fact that by letter dated 5th September 2006 to the 1st petitioner, the Permanent Secretary in the Ministry of Energy under whose docket the Company falls had equally given authority for the intended disposal as well as the Secretary of the State Corporations Advisory Committee *vide* his letter dated 18th September 2006, provided section 13(2) of the said Act had been complied with. The letter pointed out that the applicable laws and regulations for disposal of the Company assets were under the said Act, since at the time the **Public Procurement and Disposal Act**, No 4 of 2005 had not yet commenced.
9. It is however the petitioners' case that the sale of the houses having been included in the 2006/2007 approved budget there was no need to seek approval of the two Ministries to dispose of the houses even though the initiative to do so was taken on the basis of the Board's directive. To the petitioners, the inclusion of the estimates for the sale of the house in the budget fully satisfied the statutory guidelines imposed by section 13 of the said Act.
10. At its 197th meeting held on 5th October 2006 the Board of the Company resolved *inter alia* that the sale of the houses would be to staff of the Company as per the Ministry of Lands valuation and on "as is basis" with first priority being given to the occupant and with a caveat that the offers were to be commensurate to employees grade to avoid speculation for non-employees, and that the Permanent Secretary was to approve the sale to be modelled on the Ministry of Lands and Housing Circular of 18th August 2004. As mandated by the Company's board, the 1st Petitioner duly constituted the Housing Allocation Committee to evaluate the bids and allocate the houses to staff and in a meeting by the House Allocation Committee on 1st November 2006 it was resolved that only the Karura Houses be subjected to a further valuation for individual houses as the previous valuation was uniform but some of the houses were abandoned, roofless and not fit for human habitation. However, there was no resolution that fresh valuations were to be carried out in regard to other houses as the Government valuation which had been tabled was resolved to be the basis of the determination the sale price. At its 198th meeting held on 27th October 2006 the Board of Directors further confirmed that the Commissioner of Lands was only required to prepare a valuation for the Nakuru Milimani House and Nyalı Guest House which had not been valued in November 2005 and the board further resolved that NSIS was to purchase the houses at sums lower than the Government's valuation of 2005. At its 200th meeting held on 4th October 2006 it

was confirmed to the Board that the government had approved the sale of the staff houses to NSIS as resolved at the 198th meeting and that the sale to staff members was on-going. The progress of sale of the said houses to staff members was discussed in all subsequent Board meetings attended by the two Ministries' representatives and the Solicitor General representing the 2nd Respondent and none of them ever raised concern as to any failure to observe any legal guidelines. The Permanent Secretary in the Ministry of Energy in the meeting held on 6th November 2007 in fact reiterated that the staff of the Company should pay the valuation prices for the houses. Thereafter the Ministry of Energy vide their letter dated 18th September 2006 directed that disposal of the undeveloped plots be deferred pending further consultation with the Ministry of Lands and Settlement. Further the Company Board also approved that a 20% discount be given by Ministry of Energy to the staff and that the houses be sold to the staff based on Ministry of Lands Valuation which the Company complied with. There, however, was no resolution by the Company board to have another valuation of the houses to be done before the sale and the Company Board further approved that the NSIS to purchase eight (8) houses and the Social Hall at Kshs. 93.5 million with the purchase of the said 8 houses being at a reduced/lower sale prices compared to the staff of the Company. However, most of the houses were actually abandoned and run down and the members of staff of the Company who purchased the same had to renovate the houses extensively before taking up occupation. The Board approval to sell the houses to the staff vis-à-vis selling the same by open tender to the public was guided by the precedents set by the government and other parastatals such as Kengen, National Social Security Fund and Telkom Kenya, which had sold their houses to their employees. Other than the Government circular and compliance with the Act, there were no other Government guidelines in existence more so since at the time the **Public Procurement and Disposal Act**, No 4 of 2005 had not yet commenced operations. In any event sale was no longer to be done by open tender but by restricted tender to members of staff of the Company who were allocated the houses strictly as per the Board's approval and guidelines. Thereafter, several meetings were held at the Company board level as follow up and there was an allocation committee formed to evaluate the bids for purchase of the houses before allocation and subsequent allocation of the properties to successful bidders and staff allocated the Company properties paid 10% deposit and most fully paid for the houses.

11. According to the petitioners, the houses had been valued before sale and none was disposed off without following the guidelines issued by the Company board. Globally, the houses were constructed at a cost of Kshs. 289,059, 665.55 and sold for Kshs. 470,108,755.30 based on Government valuation as was directed by the 197th Board meeting and took place in the year 2006 and the necessary approvals were granted to dispose off the Company's Non-Core Assets at Nairobi, Nakuru and Mombasa. During the process the Permanent Secretary in the Ministry of Energy was fully consulted and approvals sought as per the Board's guidelines.
12. At the Board meeting held on 6th November 2007, the Board in whose attendance was the Permanent Secretary Ministry of Energy, the 1st petitioner informed the members that the defunct Kenya Anti-Corruption Commission (hereinafter referred to as KACC) were investigating the sale of the said houses. However, representative of the Permanent Secretary in the Ministry of Energy in the said meeting reiterated that the prospective purchasers of the houses who were members of Staff should pay the valuation prices already established for the houses. To the petitioners, it is the said Permanent Secretary in the Ministry of Energy under whose docket Company falls being the Accounting officer who should legally and factually be the complainant in the criminal case the subject of this petition yet the said Permanent Secretary either by himself or by proxy participated in all decisions made by the Board and as members of the Board monitored their implementation by the 1st petitioner which implementations are now made a subject of a criminal proceedings against the petitioners.
13. By letter dated 23rd October 2008, addressed to the 2nd Respondent and copied to the Petitioner by **Mr. Patrick M. Nyoike** the said Permanent Secretary, he confirmed that: the Board of Directors of the Company whose composition included him personally or by representative as well as the Petitioner, approved the sale of the company houses; that the staff purchased the said houses at the government valuation price done by its Chief Valuer; that the Board whose several meetings he attended fully complied with the Act and the approval had been given by both the Treasury and the Ministry of Energy; that the Ministry of Energy was fully consulted and was briefed at all

- times either by correspondence or at all the meetings of the board wherein he attended personally or whereat he was duly represented; and that the sale was prudent and consistent with the Government policy of its disposal of its residential houses to civil servants. The said letter of 23rd October 2008, according to the Petitioners, has however not been included by the 2nd and 3rd Respondents in the prosecution's list and bundle of exhibits.
14. It is contended that one **Soita Wasike**, an employee of the 3rd Respondent commenced his investigations into the said process of disposal of the said houses to the company's employees and recorded the statements of its witnesses between 5th May 2007 and 7th February 2008 when he concluded his investigations as per the copies of the witnesses statements and exhibits to be relied on by the 2nd Respondent.
 15. It is the petitioners' case that the sentiments on the Petitioner's innocence as expressed by the Permanent Secretary, who is lined up as a prosecution witness, has all along been within the knowledge of the 2nd Respondent by virtue of his membership of the Board yet he is bent on prosecuting the Petitioners for acts which he himself sanctioned and directed and which he had acknowledged as a member of the Board were conducted above board and that having so exonerated the Board and indeed the Petitioners by confirming that the disposal was above board it follows as a consequence that preference of the charges by the 2nd Respondent pursuant to a request by the 3rd Respondent before the 1st Respondent is an act of malicious selective prosecution intended to intimidate, harass and torture the Petitioners and as such amounts to the violation of the Petitioners' rights against discrimination as guaranteed by section 82(2) and further a violation of their rights against inhuman treatment as guaranteed by section 74 both of the repealed Constitution.
 16. The petitioners contend that the said Permanent Secretary Ministry of Energy, **Mr. Patrick M. Nyoike**, being the would be complainant having assured the Petitioners and the 2nd Respondent that the disposal of the houses was above board, his inclusion as a witness and purport to prosecute the Petitioners on the basis of hidden sentiments he had held to the contrary as demonstrated in his witness statement would amount to violation of the Petitioner's fundamental rights to a fair trial as guaranteed by Section 77(2)(a) of the repealed Constitution of Kenya. Further, that the Petitioners' fundamental rights against being treated in a discriminatory manner as guaranteed by Section 82(2) of the same Constitution of Kenya has been and is about to be violated by selectively preferring criminal charges against them to the exclusion of all the members of the Board of Directors of the Company who approved and consistently monitored and supervised the transaction and even more specifically the said **Mr. Patrick M. Nyoike** and the 2nd Respondent who both in person and through proxies approved the sale in the course of Board meetings and subsequently confirmed to the 2nd Respondent and the Petitioner that they were fully satisfied with the transaction.
 17. On 18th December 2006 one **Amb. Mwanengela Ngali**, the then Chairman of the Board, who is similarly lined up as prosecution witness, executed the Transfer of Lease of Nairobi/Block 91/108 on behalf of the Company which property is the subject matter of count 4 and it's alternative count in ACC No. 7 of 2009. To the petitioners, the inclusion of the said **Amb. Mwanengela Ngali** as a prosecution witness is a violation of their fundamental right to a fair trial as guaranteed by Section 77(2)(a) of the Constitution of Kenya and the Petitioners' fundamental rights against being treated in a discriminatory manner as guaranteed by Section 82(2) of the Constitution of Kenya has been violated by selectively preferring criminal charges against them to the exclusion of **Mr Nyoike, Mr. Ngali** and the rest of members of the Board.
 18. The petitioners contend that one **Focus Mwawasi Mwangoka**, who in breach of the Resolutions of the Board and the Ministry of Lands and Housing circular of 18th August 2004 tendered for purchase of a house for speculative purposes eventually sold the same at a profit and instead of being charged has similarly been lined up as a prosecution witness in further violation of the petitioners' fundamental rights to fair trial.
 19. The petitioners contend that if at all the disposal of the houses by the Company led to massive losses as alleged, then the Respondents are condoning illegalities and once again acting discriminatively by selectively singling out the Petitioners for indictment and yet ignoring the collective resolution of the Board followed by approval by both Permanent Secretary Ministry of

- Energy and Permanent Secretary Ministry of Finance to sell some of the houses to the NSIS at prices lower than the government valuation and even more intriguing **Mr. Nyoike's** own assertion that the transactions were done above Board to the satisfaction of the government. Similarly, the Director of NSIS ought to have been charged along with the Petitioners as a co-accused having knowingly agreed with the Board, **Mr. Nyoike, Mr Kinyua**, the Permanent Secretary Ministry of Finance to Purchase some of the houses below valuation price at a loss to the Company.
20. However, nothing happened until February 2009 when the Triton saga became big news in the country. This Triton Saga, according to the Petitioner started sometimes in November 2008, when 126.4 million litres of refined oil worth 7.6 billion shillings disappeared from the Kipevu Oil storage facility owned by the Company in Mombasa after having been secretly released to Triton Oil Company who had won the oil importation tender for supply of oil for the month of December 2008. This consequently precipitated massive shortages of oil from the petrol stations and hiked pump prices from December 2008 through to February 2009. The said Triton oil scandal generated a lot of publicity through the press which included the involvement of the 3rd Respondent as well as the police for purpose of determining the circumstances under which the oil disappeared leading to the massive shortages. At the time the Triton scandal came to the fore the investigations into the sale of Staff houses had been concluded and forgotten for over one year. Suddenly on 11th February 2008, one year after the said investigations had been concluded, and when the heat was directed on the government and the Company to explain to the public the origin and cause of the scandal, officers of the 3rd Respondent went to the 1st Petitioner's house at 6 a.m. arrested and had him charged at about 3.20 p.m. with the offences which are the subject matter of this Petition under intense press coverage.
21. It is the petitioners' case that their fundamental rights for a speedy trial as guaranteed by Section 77(1) of the Constitution of Kenya have been violated by preferring criminal charges against them more than 2 years after the offences were allegedly committed and more than 1 year after the investigations had been concluded and the proceedings vide ACC No. 7 of 2009 **Republic – Versus- George Joshua Okungu and Mary Kiptui** are therefore oppressive. To them, the commencement of the said proceedings was purely for extraneous purposes and merely a red herring to divert public attention from the raging negative media publicity on the Triton oil scandal which involved third parties. To the petitioners, the offences they are charged with are said to be in respect of violation of guidelines yet such guidelines have not been defined and are not known in law. They therefore contend that the charges against them are in violation of their fundamental rights under section 77(7) of the Constitution in that they are being prosecuted for unknown offences in law and to subject them to a full trial would constitute extreme injustice over the period of the trial and therefore unfair contrary to section 77(1) of the said Constitution and further subject them to undue torture both physically and mentally contrary to section 74 of the same Constitution.
22. Their case is that the 3rd Respondent who carried out the alleged investigations leading to the preferring of the charges against the accused before the 1st Respondent vide ACC No. 7 of 2009 **Republic –Versus- George Joshua Okungu and Mary Kiptui** has been actuated by malice in that: purporting to conduct an investigation whose singular aim was calculated to smear and dent the public image of the Petitioners with the offences; purporting to indict the Petitioners for the commission of a criminal offences when none existed; stage-managing the public condemnation of the Petitioner by tipping the press of the arrest of the Petitioner by its officers and misleading them that the Petitioner was to be arraigned in court on charges related to the Triton oil scandal which was generating a lot of public attention thereby exposing the Petitioner to public odium and contempt; despite having concluded its investigations in February 2008, actuating the prosecution of the Petitioner more than one year thereafter to divert public attention from the Triton oil scandal; causing the Officer in Charge Kilimani Police station to execute the charge sheet falsely indicting the Petitioners for failing to carry out a current valuation before disposing the staff houses whereas the evidence clearly shows that the resolution of the board of director of 5th October 2006 never required valuations to be done as there were already in existence the Government valuations; causing the 2nd Respondent to present a charge sheet to court falsely indicting the Petitioner for failing to carry out a current valuation before disposing the staff houses whereas the evidence clearly shows that the resolution of the board of director of 5th October 2006

never required valuations to be done as there were already in existence the Government valuations; causing the Officer in Charge Kilimani Police station to execute the charge sheet falsely indicting the Petitioners for failing to obtain the approval of the Permanent Secretary Ministry of Energy before disposing the staff houses whereas the evidence clearly shows that by letter dated 23rd October 2008 to the Attorney General the same Permanent Secretary confirmed that he had given approval for the disposal of the houses to the staff members; causing and or colluding with the 2nd Respondent to present a charge sheet to court falsely indicting the Petitioner for failing to obtain the approval of the Permanent Secretary Ministry of Energy before disposing the staff houses whereas the evidence clearly shows that by letter dated 23rd October 2008 to the Attorney General the same Permanent Secretary confirmed that he had given an approval for the disposal of the houses to the staff members; perpetuating illegalities by selectively singling out the Petitioners for indictment following the collective resolution of the Board of the Company who had even resolved to sell the said houses to the National Intelligence Security Services (NSIS) at prices lower than the government valuation; perpetuating illegalities by selectively withholding vital evidence from the purview of this court out the Petitioner from by failing to disclose that the Permanent Secretary of the Ministry of Energy whose approval is alleged to have not been sought has by letter dated 23rd October 2008 publicly declared that he was at all times informed of the transaction; purporting to carry out valuation by it's own employee long after the suit premises which were sold at dilapidated conditions had been renovated so as to condemn the Petitioner; and perpetuating illegalities by compiling and seeking to rely on evidence to mislead the court that valuations were not carried out whereas the statements of it's witnesses bear evidence to the contrary.

23. It is further contended that 2nd Respondent who preferred the charges against the accused before 1st Respondent vide ACC No. 7 of 2009 **Republic –versus- George Joshua Okungu and Mary Kiptui** has been actuated by malice particulars of which are perverting the course of justice by unlawful conspiracy with the 3rd Respondent to indict the Petitioner for offences not statutorily provided for in law; giving approval to the 3rd Respondent to cause the Officer in Charge Kilimani Police Station to execute the charge sheet falsely indicting the Petitioner for failing to comply with guidelines whereas resolutions of Board do not amount to statutory guidelines as envisaged under Section 45(2)(b) of *The Anti-Corruption and Economic Crimes Act*, No. 3 of 2003; giving consent to the 3rd Respondent to cause the Officer in Charge Kilimani Police Station to execute the charge sheet falsely indicting the Petitioner for failing to carry out a current valuation before disposing the staff houses whereas the evidence to be presented in court clearly shows that the resolution of the Board of 5th October 2006 never required fresh valuations to be done as there were already in existence the Government valuations which had been tabled before it and which it and upon which the Board's resolution was based; presenting a charge sheet to court falsely indicting the Petitioner for failing to carry out a current valuation before disposing the staff houses whereas the evidence to be presented in court clearly shows that the resolution of the Board on 5th October 2006 never required fresh valuations to be done as there were already in existence the Government valuations which had been tabled before it and which it resolved would determine the sale price; giving consent to the 3rd Respondent to cause the Officer In Charge Kilimani Police station to execute the charge sheet falsely indicting the Petitioner for failing to obtain the approval of the Permanent Secretary Ministry of Energy (the implied complainant) before disposing the staff houses whereas he had by letter dated 23rd October 2008 been informed by the said Permanent Secretary confirming that he had given approval for the disposal of the houses to the staff members and which letter was copied to the Petitioner; perpetuating illegalities by selectively singling out the Petitioner for indictment following the collective resolution of the Board of Directors who had even resolved to sell the said houses to the NSIS at prices lower than the government valuation; perpetuating illegalities by selectively singling out the Petitioner for indictment following the collective resolution of the Board of Directors who had even resolved to sell the said houses to the NSIS at prices lower than the government valuation; perpetuating illegalities of the 3rd Respondent to pervert the course of justice by unlawful conspiracy with the latter to exclude from the purview of the court the said letter addressed to him dated 23rd October 2008 absolving the Board members of the Company which included the Petitioner from blame;

relying on the doctored investigation which had been carried out by the 3rd Respondent to give consent and commencing the prosecution of the Petitioner for extraneous purposes; giving consent to and commencing the prosecution of the Petitioner which amounts to nothing more than an abuse of the process of the court; giving consent to and commencing prosecution of the Petitioner in a manner which is oppressive and vexatious for offences allegedly committed between October 2006 and February 2007, in respect of which the 3rd Respondent finalized investigations in February 2008; commencing the prosecution of the Petitioner that does not accord with and or contravenes the fundamental freedoms and rights of the Petitioner as guaranteed by the Constitution; giving consent to and commencing prosecution of the Petitioner on flimsy grounds; and attempting to pervert the course of justice by perpetuating, condoning and endorsing the illegalities of the 3rd Respondent of discriminating against and selectively singling out the Petitioner for indictment following the collective resolution of the Board of Directors of the Company.

24. Consequently, the petitioners were on 3rd March 2009 arraigned by the Respondents, amidst much publicity and hype generated by the public relations officers of the KACC, in the Chief Magistrate's court in Anti-Corruption Criminal Case number 7 of 2009 by the Respondents and charged with several counts the summary of which are: wilful failure to comply with applicable guidelines relating to disposal of public property by selling off KPC's residential houses without seeking the approval of the Permanent Secretary in the Ministry of Energy and in the alternative, neglect of official duty by a public officer by selling off KPC's residential houses without seeking the approval of the Permanent Secretary in the Ministry of Energy; wilful failure to comply with applicable guidelines relating to disposal of public property by selling off KPC's residential house on LR. No. Nairobi/ Block 91/107 without obtaining a current valuation and in the alternative, neglect of official duty by a public officer by selling off the Company's residential house on LR. No. Nairobi/ Block 91/107 without obtaining a current valuation; Wilful failure to comply with applicable guidelines relating to disposal of public property by selling off KPC's residential house on LR. No. 209/8192/7 without obtaining a current valuation and in the alternative, neglect of official duty by a public officer by selling off KPC's residential house on LR. No. 209/8192/7 without obtaining a current valuation; wilful failure to comply with applicable guidelines relating to disposal of public property by selling off KPC's residential house on LR. No. Nairobi/ Block 91/108 without obtaining a current valuation and in the alternative, neglect of official duty by a public officer by selling off KPC's residential house on LR. No. Nairobi/ Block 91/108 without obtaining a current valuation; wilful failure to comply with applicable guidelines relating to disposal of public property by selling off KPC's residential house on LR. No. Nairobi/ Block 91/106 without obtaining a current valuation and in the alternative, neglect of official duty by a public officer by selling off KPC's residential house on LR. No. Nairobi/ Block 91/106 without obtaining a current valuation; abuse of office by improperly conferring a benefit to a third party by selling of KPC's residential house on LR. No. Nairobi/ Block 91/108 in disregard of the guidelines issued by KPC board; and abuse of office by improperly conferring a benefit to herself by selling of KPC's residential house numbered G5 – 15 situated in Karura Estate in disregard of the guidelines issued by KPC board.
25. The petitioners contend that the charges were and are in breach of their fundamental rights and are actuated by malice, ulterior motives and is discriminatory against them; that that the Attorney General has acted maliciously and in a discriminatory fashion towards them; that the charges as laid and proceedings before the Anti-Corruption Court are unconstitutional and are a violation of their fundamental rights and freedoms as contained in the Constitution in light of the following: members of the Board who authorized the sale of the premises are walking scot free so are the other members of the allocation committee who allocated the houses to members of staff; the Chairman of the Board of Directors who signed some of the sale and transfer documents has not faced the same proceedings that the petitioner and her co accused are facing; all the persons who bought the houses, including the NSIS have not been arraigned in court despite buying the houses at much better prices than the Petitioners; there is a clear provision that these properties were not to be bought for the purposes of speculation. One of the purchasers, who will be called as a witness for the respondents, bought and gave away [through a power of attorney], the property that he bought at a profit of over Kshs. Four million. No action has been taken against him by the Respondents; prior to the presentation of these charges in court, the KACC had conducted

thorough investigations of the sale of all the houses for over three years and did not find any wrong doing; it is to be noted that the sale agreements were done in the year 2006. The last witnesses recorded statements in February 2007; the respondents' valuations of the properties were done in the year 2007 [November]. The valuers of the respondents did not even enter the houses for purposes of carrying out their purported valuations; at the time of the presentation of the petitioner to the court, the second respondent was under a lot of public pressure. There had just been a big "scandal" involving the KPC known as the "triton" scandal. The second respondent was being hounded by the public in Kenya for its inability to halt corruption. The second respondent therefore maliciously arrested the petitioners in its efforts to show that it was working; the KACC's communications officers may actually have given the public a wrong view that the petitioner was being arrested over the "Triton scandal"; the KACC therefore stage-managed the petitioners' public condemnation by tipping the press of and misleading them that the petitioner was to be arraigned in court on charges related to the "Triton Oil Scandal" thereby exposing her to public ridicule; the resolution of the Board of directors of 5th October 2006 never required valuations to be done as there were already in existence the Government valuations. As a result, the Government valuations were adopted; in the meantime the Permanent Secretary in the Ministry of Energy had on 23rd October 2008 written to and informed the Attorney General that the sale of the houses to staff was proper, was well done and no irregularity was found since all approvals had been obtained. However, the statements produced and intended to be relied upon by the respondents in the criminal trial have ignored these salient facts; the valuations done by the Ministry of Lands for the purposes of stamp duty gave even lower figures for the value of the houses; the respondents did not disclose to the court that that the Permanent Secretary of the Ministry of Energy whose approval is alleged to have not been sought has by letter dated 23rd October 2008 publicly declared that he was at all times informed, briefed and consulted of the transactions at all times; the Respondents started and concluded the investigation and proceeded to arraign the Petitioner in court for extraneous purposes; the Respondents by charging the Petitioner are engaged in nothing more than an abuse of the process of the court; the prosecution has been done in a manner which is both oppressive and vexatious for offences allegedly committed between October 2006 and February 2007, in respect of which the KACC finalized investigations in February 2007; in any case the prosecution statements substantially contradict each other; and the prosecution has been done in a manner that does not accord with and or contravenes the petitioner's fundamental freedoms and rights as guaranteed by the Constitution of Kenya.

26. The petitioners contend that the charges as laid and proceedings before the Anti Corruption Court are unconstitutional and are a violation of their fundamental rights and freedoms as contained in Chapter V of the Constitution on the following grounds: the laying and sustenance of the charges and proceedings in the Chief Magistrate's court in Anti Corruption Criminal case number 7 of 2009 by the Respondents have been instituted in complete bad faith and in abuse of the due process of the law as envisaged in section 77(1) of the constitution and the legitimate expectations of the Petitioner, as the Respondents have chosen, without any explanation for the inordinate delay, to prosecute the Petitioner 3 years after commencement of their investigations and over one year after conclusion of the investigations and at a time that focus was on a scandal dubbed "the Triton oil scandal", touching on the Company. The prosecution of the petitioner was thus timed to coincide with the Triton saga; the media publicity and hype around the case generated by the KACC herein has violated the cardinal principals of a fair hearing and of presumption of innocence as envisioned in sections 70 and 77(2) (a) of the constitution as the Respondents have created a situation where the Petitioner may be prejudged resulting in the complete absence of impartiality and fairness; the charges and proceedings by the respondents in the Chief Magistrate's court in Anti Corruption Criminal case number 7 of 2009 by the Respondents have been brought under offences which are undefined in law contrary to the provisions of section 77(8) of the constitution; the powers conferred upon the Director of the Kenya Anti Corruption Commission under section 23 of the **Anti Corruption and Economic Crimes Act**, 2003 (No. 3 of 2003) are inimical to and inconsistent with the Powers conferred upon Attorney General as envisioned under section 26(4) of the constitution hence the investigations conducted herein are void *ab initio*; the Permanent Secretary in the Ministry of Energy, the parent Ministry of the Company had written to the Attorney General exonerating the Petitioner from any wrong doing on the subject matter of the charges herein, in effect pardoning the Petitioner and thus the proceedings run *in contra* to the

legitimate expectations of the Petitioner not to be prosecuted of the offences herein and are in conflict with the letter and spirit of section 77(6) of the Constitution. The Permanent Secretary's letter had been brought to the attention of the Petitioner and she had a legitimate right to believe that no prosecution or any other action would be taken, since everything had been done in the correct fashion; the respondents intend to call the Permanent Secretary in the Ministry of Energy as a witness in the case. This being the same person who had cleared the petitioner, it raises questions as to his ability to testify in a dispassionate manner. Having cleared the petitioner, it would be unfair if he is to appear as a witness on the other side. If at all the Respondents believe that the petitioner is guilty, this witness should also be arrested in view of his letter to the first respondent. The Respondents have thus prosecuted the Applicant in a selective and discriminatory manner in breach of the provisions of section 82 of the constitution; there are no official guidelines under the Public Procurement rules with regard to disposal of assets in question and thus the Petitioner cannot be said to have violated any guidelines and thus the Petitioner's continued prosecution is an affront to her constitutionally guaranteed rights envisioned under section 77(8) of the Constitution; that neither the Company as an entity nor its board complained that it has suffered any criminal loss or damage to warrant the laying of the said charges and sustenance of criminal proceedings before the anti corruption court and thus the Respondents have engaged the Petitioner in a "witch hunt", and thus subjected her to servitude contrary to her rights and freedoms as envisioned in sections 70 and 74 of the Constitution; the Respondents have prosecuted the Applicant in a selective and discriminatory manner in breach of the provisions of section 82 of the Constitution as no queries have been raised or charges laid on the properties sold to NSIS at a lower value as per the directions of the board of the Company and Permanent Secretary Ministry of Energy; the existence power and role of the special magistrates appointed by the Chief Justice to run the anti corruption courts is unconstitutional as Section 3 of the ***Anti-Corruption and Economic Crimes Act*** ousts the supremacy of Parliament to create other courts subordinate to the High Court as envisioned under section 65 of the Constitution; the power vested in the Kenya Anti Corruption Commission to lay before the Attorney General reports of their investigations in section 35 of the ***Anti Corruption and Economic Crimes Act***, to prepare quarterly reports as per section 36 (1) of the Act is inimical to the proper functioning of the Commission as pressure is placed on it to bring recommendations for unwarranted prosecutions that are unconstitutional for being in breach of and inconsistent with sections 70, 77(1) and 77 (2) (a) of the Constitution; the respondents are clearly using the criminal process for ulterior purposes. The respondents have taken issues that fall under the ambit of civil jurisdiction, and are trying to have the same determined through criminal proceedings. There is no material or other evidence upon which the respondents can say that they have a good case. In the absence of reasonable and probable cause against the petitioner, the petitioner's prosecution is malicious; and the Respondents are setting bad jurisprudence by attempting to prosecute officials of a state corporation who are deemed to have "breached guidelines" on legitimate contracts which cannot be voided though the Respondents are unhappy with the execution of the same. The Respondents, charging and proceeding with a criminal prosecution are acting in an improper and malicious manner.

27. These two petitions were supported by affidavits sworn by the petitioners and filed together with their respective petitions.

THE RESPONDENTS' CASE

28. The Respondents in opposition to the Petitions filed a Notice of Preliminary objection in which it was contended that the Petitions are incompetent for failing to comply with the mandatory provisions as set out in Legal Notice Number 6 of 2006, High Court Practice and Procedures Rules, 2006.

29. On behalf of the 2nd respondent, a replying affidavit was filed sworn by **Lilian Obuo**, a Senior State Counsel in the State Law Office, Office of the Attorney General attached to the Department of Public Prosecutions on 26th May 2009.

30. According to the deponent, following the investigations carried out by the 3rd Respondent herein

into allegations of irregular disposal of residential houses belonging to the Company to some members of staff of the Company, the 3rd Respondent forwarded to the 2nd Respondent the investigations file with a report as required under section 35(1) of the **Anti-Corruption and Economic Crimes Act**, Act No. 3 of 2003 and upon going through the entire evidence gathered by the 3rd Respondent and having been satisfied about the sufficiency of the evidence incriminating the petitioners herein in the irregular sale of the said houses and that the matter was of sufficient public interest, the 2nd Respondent in exercise of his powers under section 26 of the Constitution made the decision to charge and prosecute the petitioners herein. The petitioners were subsequently arrested and charged in ACC No. 7 of 2009 with the offences contained in the charge sheet. To her, the offences with which the petitioners are charged are clearly spelt out in their respective statutes and the penalties thereof specified and it is therefore not correct as claimed by the petitioners that the offences with which they are charged are unknown in law.

31. It is averred that upon consideration of the evidence contained in the investigations file submitted by the 3rd Respondent to the 2nd Respondent, the 2nd Respondent was satisfied that the Petitioners jointly and separately; wilfully neglected to perform the duties of their respective offices which they were bound by law to perform by disposing off residential houses belonging to the Company to members of staff without first seeking the approval of the permanent secretary of the Ministry of Energy as required by the guidelines issued on the 5th October 2006 by the Board of Directors of the Company, as charged in Count 1 of the charge sheet; wilfully failed and or neglected to comply with the guidelines given on the 5th October 2006 by the Board of Directors of the Company relating to the disposal of the company's residential houses to its members of staff by disposing off house situated on Nairobi/Block 91/107 belonging to the Company to one **Peter Manono Mecha** at Kshs 15,750,000/= without first obtaining a current valuation of the said house, as charged in Count 2 and in the alternative thereof, of the charge sheet; wilfully failed and or neglected to comply with the guidelines given on the 5th October 2006 by the Board of directors of the Company relating to the disposal of the Company's residential houses to its members of staff by disposing off house situated on LR 209/8192/7 owned by the Company to one **Focus Mwawasi Mwangoka** at Kshs 21,000,000/= without first obtaining a current valuation of the said house, as charged in Count 3 and in the alternative thereof, of the charge sheet; wilfully failed and or neglected to comply with the guidelines given on the 5th October 2006 by the Board of Directors of the Company relating to the disposal of the Company residential houses to its members of staff by disposing off house situated on Nairobi/Block 91/108 belonging to the Company at Kshs 16,000,000/- to the 1st Petitioner without first obtaining a current valuation of the said house, as charged in Count 4 and in the alternative thereof, of the charge sheet; wilfully failed and or neglected comply with the guidelines given on the 5th October 2006 by the Board of Directors of the Company relating to the disposal of the company's residential houses to its members of staff by disposing off house situated on Nairobi/Block 91/106 belonging to the Company to one **Absalom Kimaru Kosgei** at Kshs 16,000,000/= without first obtaining a current valuation of the said house, as contained in Count 5 and in the alternative thereof of the charge sheet.
32. It was further deposed that the 2nd Petitioner used her office to improperly confer a benefit to the 1st Petitioner by accepting his offer to purchase from the Company property number LR No. 91/108 in Gigiri Estate in disregard of guidelines by the Board of Directors of the Company issued on the 5th October 2006, as contained in Count 7 of the charge sheet; used her office to improperly confer a benefit on herself by accepting her own offer to purchase from the Company property number G%-15 situated in Karura Estate in disregard of guidelines by the Board of Directors of the Company issued on the 5th October 2006, as contained in Count 7 of the charge sheet.
33. According to the deponent, the decision by the 2nd respondent to charge and prosecute the petitioners is based on the sufficiency of the evidence contained in the investigations file submitted to him by the 3rd respondent and not on any extraneous matters as alleged by the petitioners in their respective supporting affidavits. Furthermore all the matters of facts and evidence deposed to in the respective supporting affidavits of the petitioners herein are matters of evidence for consideration by the trial court during a full trial and on the basis of which the guilt or otherwise of the petitioners or any of them would be determined by that court. In the deponent's

- view, the proper forum for consideration and resolution of all the factual and evidentiary matters is the trial court. To him, the allegations by the petitioners herein that their prosecution in ACC No. 7 of 2009 is selective/discriminatory, actuated by malice or ulterior motive, or a perversion of the course of justice, or an abuse of due process, or a conspiracy between the 2nd and 3rd respondents are unfounded and without factual or legal basis and the prosecution of the petitioners does not in anyway violate any of the petitioners constitutional or fundamental rights or freedoms as alleged or at all and the petitioners have not demonstrated any such violation or likelihood of any such violation in order to warrant the granting of the orders sought in the respective petitions or any other orders.
34. On behalf of the 3rd respondent, two affidavits were filed sworn on 4th May 2009 and 24th June 2009 by **Soita Wasike**, an investigator appointed by the Director of Kenya Anti-Corruption Commission, the 3rd Respondent herein.
35. According to the deponent, the entire procedure as adopted by the Petitioner herein is an abuse of the process of the court since once a party in proceedings before a subordinate court has raised constitutional issues and the court makes a finding that there are constitutional issues, the constitution requires the subordinate court to frame the issues and make a reference to the High Court for determination of those issues. Since no such issues have so far been framed or referred to the High Court for determination and the Petitioner has not sought compliance by the subordinate court of the constitutional requirements under section 67(1) and 84(3) of the Constitution, a party in proceedings before a subordinate court cannot file an independent petition under section 84 of the Constitution in violation of the due procedure as outlined above. It is therefore the deponent's view that this petition and the application thereto have been filed in total disregard of the procedure provided for under section 67(1), 84(1), 84(3), Section 84(6) and the Rules made pursuant to section 84(6) of the constitution hence is incompetent and cannot be sustained in law, or at all.
36. According to the deponent, the 3rd Respondent herein received a complaint sometime in the year 2006 from Kenya Petroleum Oil Workers Union to the effect that the Company's staff houses were being sold in a discriminatory manner without following the conditions for approval by Treasury and that there was conflict of interest as regards the 1st Petitioner in the said sale. A similar report had been made to the Head of the Civil Service and Secretary to the Cabinet, **Amb. Muthaura**. Pursuant to the *Anti-Corruption and Economic Crimes Act*, 2003 which creates the 3rd Respondent, the 3rd Respondent can investigate a matter at the request of the National Assembly, the Minister or the Attorney General, or on receipt of a complaint, or on its own initiative hence an investigation can therefore be commenced even where there is no complainant. The 3rd Respondent therefore embarked on investigations and the same culminated with the charging of the Petitioners with the offences facing them. The investigations established that vide a letter dated 27th September 2005, the 1st Petitioner wrote to the Ministry of Energy and the Ministry of Finance attaching a list of properties that he requested approval to dispose but prior to that on 7th October 2005, the 2nd Petitioner had written to the Chief Valuer, Ministry of Lands listing a number of properties which the Board of the Company had approved their sale. On 3rd January 2006, the Minister for Energy, **Hon. Kiraitu Murungi** wrote to the Minister for Finance seeking approval for disposal of the listed property since the approval of the Treasury was required by virtue of the provisions of the *Exchequer and Audit Act*, Chapter 412, Laws of Kenya. On 6th February 2006, the Permanent Secretary, Ministry of Finance, **Mr. Joseph Kinyua** wrote to the Permanent Secretary in the Ministry of Energy stating that disposal of institutional houses should await the formulation of a comprehensive policy to govern disposal of institutional houses in the entire parastatal sector and this letter was copied to the 1st Petitioner. However, just seven months after the Permanent Secretary, Ministry of Finance advised that disposal of institutional houses should wait, the 1st Petitioner wrote to the said Permanent Secretary on 16th August 2006 requesting Treasury's approval for disposal of non core assets. The said letter was also addressed to the Permanent Secretary, Ministry of Energy and copied to Head of Public Service and Inspector General of Corporations, amongst other persons.
37. That on 31st August 2006, the Permanent Secretary in the Ministry of Finance wrote to the Permanent Secretary, Ministry of Energy giving approval for sale of the listed Company non core

- assets, subject to the company undertaking a professional valuation and sale by open tender in accordance with the public procurement regulations. The said letter also noted that the related proceeds of sale, estimated at Kshs.600 million had been earmarked to part finance the Mombasa-Nairobi Pipeline Augmentation Project and were factored in the approved annual budget for 2006/2007 in line with the State Corporations Act. The letter also noted that the disposal was in satisfaction of Section 13(1)(b) of the Act.
38. According to the deponent, section 11 of the Act requires State Corporations to submit to the Minister and to Treasury for approval, estimates of the State Corporation's revenue and expenditure for the following financial year accompanied by proposals for funding of all projects to be undertaken by the State Corporation while Section 4 of the *Exchequer and Audit Act* provides that all persons concerned with the collection, receipt, custody and payment or issue of public moneys, stores, stamps, securities or other Government Property shall obey all such instructions as they may from time to time receive from the Treasury in respect of public moneys, stores, stamps, securities or other Government property, or accounting for the same. In exercise of this power, the PS Treasury gave approval for the sale on condition that professional valuation be undertaken and sale be by open tender. Therefore, the fact that the Company took into consideration the disposal of assets in the annual estimates of the Company in the annual budget does not mean that the 1st Petitioner was entitled to disregard the directives of the Board and clear instructions of the Permanent Secretary, Ministry of Finance issued pursuant to the provisions of the *Exchequer and Audit Act*.
39. On 5th September 2006, the Permanent Secretary, Ministry of Energy forwarded to the 1st petitioner the letter from the Permanent Secretary, Ministry of Finance and pointed out that the authority granted by the said Permanent Secretary was conditional in that disposal of non core fixed assets had to be done upon professional valuation being undertaken and that the intended sale was to be through an open tender consistent with the *Public Procurement Regulations*, 2001 hence it is clear that there were existing procurement regulations which required to be followed, namely the *Exchequer and Audit (Public Procurement) Regulations*, 2001 which regulations were applicable before the enactment and coming into force of the *Public Procurement and Disposal Act*, No.3 of 2005. On 5th October 2006 during the 197th Company Board meeting, the 1st Petitioner presented a Board Paper on disposal of non core assets which paper made a justification for disposal of the Company residential houses which the Board extensively discussed and directed that the tender for the sale of undeveloped land and houses be cancelled and all the bidders be refunded their money; the staff on permanent terms of employment be given priority to purchase company houses and the offers be commensurate to the employee grade; the sale price of the houses to be based on the Ministry of Lands valuation; approval be sought from the PS, Ministry of Energy to dispose off the houses; that the PS, Ministry of Energy approve the sale of KPC non-strategic houses based on the precedent of the Ps, Ministry of Lands and Housing vide the circular dated 18th August 2004 and the sale of KENGEN houses on the basis of the said circular; that the PS, Ministry of Energy approves the terms and conditions of sale modelled on the Ministry of Lands and Housing circular of 18th August 2004 e.g. 20% discount on the valuation.
40. However the 1st Petitioner disregarded the directions of the Board and proceeded with the sale of the houses without first seeking approval of the Permanent Secretary, Ministry of Energy as recommended by the Board in its meeting held on 5th October 2006 and the 1st Petitioner/Applicant purchased house situated on Nairobi/Block 91/108 despite the fact that he was not on permanent terms of employment as directed by the Board. To the deponent, it is apparent that the Board varied the approval terms that had been given by the Permanent Secretary in charge of Treasury, **Mr. Joseph Kinyua**, in that it resolved that the tender for sale of the houses be cancelled and instead the houses be sold to the staff of the Company whereas the said Permanent Secretary had ordered that the disposal of the houses be by open tender and it is in view of the fact that the Board deviated from the approval which had been given by the Permanent Secretary, Ministry of Finance that it resolved that approval be once again sought from the Permanent Secretary, Ministry of Energy for KPC to dispose off its houses to its staff.
41. According to the statement recorded by one **Festus Wachira Kingori**, an alternate director to the Permanent Secretary, Treasury on the Board of Directors of KPC, the expectation was that the Ministry of Energy would then cascade the matter to the Minister for Finance as it is charged with

- the responsibility of giving instructions with regard to disposal of public property but no such request has been made to Treasury which need was recognised by the 1st petitioner, who being the Managing Director of the Company was duty bound to implement the decisions of the Board. Instead, he proceeded to superintend over the sale of the company's houses to himself and to a few members of staff and without first seeking the required approval from the Ministry of Energy and Ministry of Finance and was therefore properly charged with the offences facing him and this cannot amount to a breach of his fundamental rights. The investigation carried out by the 3rd Respondent established that the 1st Petitioner never reverted to the Board to inform it that he had implemented the proposal to sell the Company houses to staff without adhering to their guidelines and recommendations but deliberately kept them in the dark in this regard hence it is not true that the Board was fully made aware of the actions of the 1st Petitioner.
42. According to the deponent, although he had not seen the letter by the Permanent Secretary, Ministry of Energy dated 23rd October 2008 referred to in the petition and paragraphs 47 -50 of the supporting affidavit, having now seen the same, it does not amount to approval of the sale of the houses and in any event, the said Permanent Secretary had clearly communicated the approval of the Permanent Secretary, Ministry of Finance in the terms of his letter dated 5th September 2006. The said letter referred to above was addressed to the Honourable Attorney General after the investigations by the 3rd Respondent had been concluded and inquiry file forwarded to the Attorney General hence its motive remains curious. In any case, if the letter was meant to be approval letter for the sale of the Company houses, it should have been addressed to the Company and not the Attorney General. To the deponent, the letter contained personal views of the Permanent Secretary, Ministry of Energy, which views the Attorney General indeed disregarded as the evidence of criminal conduct on the part of the Petitioner was apparent and the Attorney General went ahead to charge the Petitioner with the various offences referred to herein above on 11th February 2009 by virtue of the powers bestowed upon him by the Constitution of Kenya. To him, the prosecution is entitled to line up witnesses it deems necessary to not only prove its case but to also give the court information relevant to the case to help the court reach a fair decision hence a decision to line up certain witnesses such as the Permanent Secretary, Ministry of Energy cannot by any stretch of imagination amount to a breach of the Petitioner's fundamental rights provided for under the Constitution. Furthermore, the Petitioner has a right to cross examine those witnesses.
43. The investigation carried out by the 3rd Respondent, according to the deponent, did not disclose any offence against **Amb. Mwanengela Ngali**, the then Chairman of the Board of Directors of KPC, **Focus Mwawasi Mwangoka**, an employee of KPC or the Director of the NSIS hence the Petitioner has not been treated in a discriminatory manner as alleged. Therefore as the 1st Petitioner failed to implement the guidelines of the Board of Directors, he was properly charged with the offences facing him hence the issue that the entire Board of Directors ought to have been charged does not arise under the circumstances as the 1st Petitioner also went ahead to sell the KPC houses himself and staff without obtaining a current valuation as instructed by the Permanent Secretary, Ministry of Finance and only undertook a current valuation of the Karua houses because this suited the staff but failed to carry out a similar valuation to the houses in the up market areas where the value of the said properties had gone up tremendously thereby denying KPC revenue it was entitled to. Furthermore, the only effort to value the house which the Petitioner purchased was in 2005, way before the Permanent Secretary, Ministry of Finance directed that professional valuation be undertaken, and it was valued in the presence of the Petitioner's wife, who was the then Commissioner for Lands. This may have influenced the outcome of the valuation at the time as the Petitioner's wife is indeed a co-owner of the house.
44. It was deposed that the Petitioner has been charged with an offence provided for under Section 45(2)(b) of the *Anti-Corruption and Economic Crimes Act*, 2003 for failing to comply with guidelines given by the Board of KPC on 5th October 2006 which offences are properly created by the law and the applicable guidelines do not have to be in a statute but those that applied to the transaction in question. He denied that there was any connection between the charging of the Petitioner in the Anti-corruption Court in Nairobi ACC 7/2009 with the investigation relating to the loss of oil worth 7.6 billion shillings that disappeared in Kipevu oil storage facility or the so

called Triton oil scandal and that there was no delay in charging the Petitioner after the investigations were concluded. With respect to the presence of the media, it was deposed that the 3rd Respondent has no control of what the press reports about and how they go about their business while with respect to the valuation carried out on the subject houses by a valuer working for the 3rd Respondent, **Mr. Vincent Kiptoo**, it was averred that the said valuations were carried out with a view to ascertaining the open market value of the properties as at 2006, the time when the process of sale of the KPC houses to staff was ongoing. Indeed, the valuation reports post both the open market value for the year 2006 and the year 2007. Although the purpose of his conditional approval on 31st August 2006 by the Permanent Secretary was to maximize the return and value of the assets, the said purpose was clearly not achieved in this instance. This becomes plain when one looks at the valuation undertaken on the various properties by KACC Valuer, **Mr. Vincent Kiptoo**.

45. To the deponent, the Petition filed herein is an abuse of the court process whose sole purpose is to frustrate the proceedings properly before a competent Court as no constitutional rights and fundamental rights of the Petitioner have been violated or are likely to be violated by the proceedings pending before the Magistrates Court. In his view, the Petitioners herein are using the Constitutional Court to subvert the criminal law process; the purported Petition herein does not raise any constitutional issues for determination by this honourable Court; in any event no issues were ever framed as constitutional issues by the trial court as required prior to filing of the petition herein; and the Petitioner herein is using the constitutional court to determine issues of fact that are within the province and competence of the trial court.
46. In the further affidavit, the same deponent denied that the prosecution of the Petitioners is malicious and out of bad faith and stated that the prosecution of the Petitioners has nothing to do with the ongoing investigations involving the Triton oil scam. The investigations are partially concluded and some suspects have been charged hence the outcome of others aspects of the Triton investigation will determine the course of action the 2nd Respondent will take at the appropriate time. Further the 3rd Respondent has a duty to investigate crimes under the Act irrespective of the number of allegations as against a single individual. To him, the arraignment of the Petitioners in court is a consequence of an investigation carried out by the 3rd Respondent in execution of its mandate under the **Anti-Corruption and Economic Crimes Act, 2003**. He denied that there was a delay of over one year between the time of completion of investigations by the 3rd Respondent and the arraignment of the Petitioners in court since the fact that his statement was made on 7th February, 2008 does not mean that the investigations were completed on the said date. The 3rd respondent in compliance with section 35 of the Act prepared a report on the investigations and forwarded the same to the 2nd Respondent on 14th July, 2008 and that the preparation of the aforementioned report by the 3rd Respondent's Legal Directorate involves an elaborate process of evaluation and analysis of the evidence vis-à-vis the applicable law and the time taken by the analysis will vary depending on the complexity of the matter. Further upon submission of the report aforesaid to the 2nd Respondent together with the duplicate investigation file, the same file is re-read and the evidence re-evaluated by the 2nd Respondent and similarly the time taken by the analysis will vary depending on the complexity of the matter. The 2nd Respondent wrote to the 3rd Respondent on the 29th January, 2009 indicating acceptance to the recommendations by the 3rd Respondent with directions that further charges be included and the Petitioners were arraigned in court on 3rd March 2009 soon after the receipt of directions of the 2nd Respondent and after the proposed additional charges had been considered and additional evidence considered to support these additional charges hence there was no unreasonable delay in charging the Petitioners and the right to a fair trial has not been infringed. To him, the Petitioners were the only persons found culpable of the offences charged based on the evidence obtained during the investigations. In his view, the directives from the Board, the guidelines from both Permanent Secretary Treasury and Permanent Secretary, Ministry of Energy among others constitute applicable procedure within the meaning of section 45 (2) (b) of the said **Anti Corruption and Economic Crimes Act**.
47. In his view, in the letter dated 23rd October, 2008 from the Permanent Secretary Ministry of Energy to the Hon. Attorney General the said Permanent Secretary was expressing his personal opinion since the authority to dispose public property is vested in Permanent Secretary, Ministry

of Finance; the 2nd Respondent who is Chief Legal advisor of the Government had the opportunity to review the entire evidence in the matter vis-à-vis the contents of the said letter and he came to the conclusion that the current offences had been committed prompting him to direct that the Petitioners be charged accordingly; the issue of compliance with the law or applicable procedure is a legal issue to be determined by the trial court; the mere fact that the said Permanent Secretary alludes that other parastatals within the energy sector and other sectors had violated the law is in itself not an excuse for the petitioners to disregard the law or applicable guidelines since it can never be government policy to break its own rules, guidelines or laws; the Permanent Secretary Ministry of Energy is a member of the Company Board and the aforementioned letter seems not to be in tandem with the guidelines issued on the 5th October, 2006 by the same Board; and that the authority to prosecute lies with the 2nd Defendant while the authority to determine whether a crime has been committed lies with the trial court and not the Permanent Secretary.

DETERMINATIONS

48. In support of their positions the parties herein filed written submissions together with authorities which were highlighted before us and which we have considered.
49. In our view, it is important to revisit the circumstances under which the Court will grant an order prohibiting the commencement or continuation of a criminal trial process.
50. The law is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions or the authority charged with the prosecution of criminal offences to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings. That a petitioner has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is always open to the Petitioner in those proceedings. However, if the Petitioner demonstrates that the intended or ongoing criminal proceedings constitute an abuse of process and are being carried out in breach of or threatened breach of the Petitioner's Constitutional rights, the Court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, *ipso facto*, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the Petitioner to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. In the exercise of the discretion on whether or not to grant an order of prohibition, the court takes into account the needs of good administration. See **R vs. Monopolies and Mergers Commission Ex Parte Argyll Group Plc [1986] 1 WLR 763** and **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)**.
51. In **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170**, the Court of Appeal held:
- “.....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.”*
52. In **Meixner & Another vs. Attorney General [2005] 2 KLR 189**, the same Court expressed itself as hereunder:

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

Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion if acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution... Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power. Having regard to the law, the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision is correct. The other grounds, which the appellants claim were ignored ultimately, raise the question whether the evidence gathered by the prosecution is sufficient to support the charge. The criminal trial process is regulated by statutes, particularly the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court, which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence and that is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.”

53. 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 that which the courts indeed the entire system is constitutionally mandated to administer... In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely to bear pressure on the applicants in order to settle the civil dispute. It is further alleged that the criminal prosecution is an abuse of the court process epitomised by what is termed as selective prosecution by the Attorney General. It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit... The fact that it has not been argued before however does not mean that the law stops dead at its tracks. An order of prohibition looks to the future and not to the past; it is concerned with the happenings of future events and little, if any, of past events.

Where a decision has been made, there is little that the court can do by an order of prohibition to actually stop the decision from being made, because simply that which is sought to stop has already been done. However in such circumstances, the power of judicial review is not limited to the other orders of judicial review other than prohibition. With respect to civil proceedings prohibition lies not only for the excess of jurisdiction but also from a departure of the rules of natural justice... 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... In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed... There is nothing which can stop the court from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made... Under section 77(5) of the Constitution it is a constitutional right that no person who has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of the offence. What is clear from this constitutional right is that it prevents the re-prosecution of a criminal case, which has been determined in one way or another. However, it does not mean that a civil suit and a criminal case cannot co-exist at any one particular time. This is because the section envisages the re-prosecution of a criminal case substantially dealt with either in fact or law, a case in which issues have been laid to rest. There is no mention in the section that the simultaneous existence of a civil and criminal cases is constituting double jeopardy. The courts have, however stated that the power to issue an order of prohibition to stop a criminal prosecution does not endow a court to say that no criminal prosecution should be instituted or continued side by side with a civil suit based on the same or related facts, or to say that a person should never be prosecuted in criminal proceedings when he has a civil suit against him relating to matters in the criminal proceedings... The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution... A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the

continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution... In the instant case there is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even of manipulation of court process so as to seriously deprecate the likelihood that the applicants might not get a fair trial as provided under section 77 of the Constitution. It is not enough to simply state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an “abuse of process”, is a “manipulation”, “amounts to selective prosecution” or such other processes, or even supposing that the applicants might not get a fair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts. The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial... In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names.”

54. 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 a 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... In this case it is asked to step in to grant an order of prohibition. Prohibition looks into the future and can only stop what has not been done. It is certiorari that would be efficacious in quashing that which has been done but it is not prayed for in this matter. There was no order granted for stay of further proceedings when leave was granted and it is possible that the private prosecution has proceeded either to its

conclusion or to some extent. In the former event an order of prohibition has no efficacy and the court would be acting in vain to grant one. What is done will have been done. If there is anything that remains to be done in those proceedings, however, the order of prohibition will issue to stop further proceedings.”

55. We also associate ourselves with the decision in R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001 that:

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

56. In the said case, the Court expressed itself inter alia as follows:

“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.”

57. 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. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene”.

58. It is therefore clear that whereas the discretion to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt. Similarly where the commencement or continuation of the criminal prosecution will result in abrogation of the Petitioner’s rights and freedoms enshrined in the Constitution, the Court is under a duty to bring such proceedings to a halt. In so doing, it must be emphasised that the Court is not concerned about the innocence or otherwise of the Petitioner. The Court’s duty is only to ensure that the Petitioner’s rights and freedoms as enshrined in the Constitution are protected and upheld. As was held **Wendoh, J** in **Koinange vs. Attorney General and Others [2007] 2 EA 256,** the jurisdiction of the Court in Constitutional matters is limited to inquiring into the allegations of violation of fundamental rights as alleged by the applicant and what remedies, if any, the court can grant.

59. As was stated in the case of **Githunguri vs. Republic KLR [1986] 1:**

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

60. In this case, the Petitioners take issue with the Respondents on the following grounds: Firstly, that the petitioners were charged for failing to adhere to non-existent Regulations hence the charge in question is unknown to law. Secondly, that the process giving rise to the criminal proceedings followed all the laid down regulations and was approved by the Company’s Board. Thirdly, that despite the said approval, the Respondents have decided to discriminate against the Petitioners by preferring criminal charges against them for the actions approved by the Company’s Board as a whole. Fourthly, that in preferring the said charges, the Respondents intend to call as witnesses some of the people who participated in the approval of the resolution made by the Board. Fifthly, that the said charges are being brought after a long period of time when the investigations thereon had been closed. Sixthly, that the decision to prefer the said charges is malicious and is actuated by extraneous motives to fend off public outcry in respect of a matter unrelated to the said charges.

61. With respect to the issue whether or not the charges are non-existent, whereas it is true that to arraign a person in Court for an offence that is unknown to law is unconstitutional under Article 50(2)(m) of the Constitution which provides that every accused person has the right to a fair trial, which includes the right not to be convicted for an act or omission that at the time it was

- committed or omitted was not an offence in Kenya, what the Constitution expressly bars is the conviction of a person for an act or omission which was not an offence. In our view, unless it is outright that the offence with which a petitioner is charged does not exist, the trial Court is in a better position to decide whether or not the evidence and the facts adduced constitute an existing offence. In this case, it is the respondent's position that, there were in fact in existence regulations which the petitioners ought to have adhered to but the same were not adhered to. We are of the opinion that this is not the correct forum to determine that issue which issue the trial court is in a better position to resolve.
62. The next issue that the process giving rise to the criminal proceedings followed all the laid down regulations and was approved by the Company's Board, that contention, even if it was merited would not warrant the order prohibiting the criminal trial from proceeding. As already stated hereinabove in these proceedings the Court is not expected to investigate and determine the merits of the criminal case and the mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, or that the Petitioner has a good defence in the criminal process are matters that ordinarily ought to be dealt with by the trial Court and should not be canvassed in these kinds of proceedings. In other words the Petitioner is not expected to turn these proceedings into a criminal trial. Accordingly we hold that that contention even if true does not warrant the grant of the orders sought herein.
63. The third ground is that that despite the said approval by the Company to sell the company's idle/surplus non core assets, the Respondents have decided to discriminate against the Petitioners by preferring criminal charges against them for the actions approved by the Company's Board as a whole. Again, the mere fact that the Company approved the said process, does not necessarily warrant the grant of the orders sought since, if the same was duly approved and was hence legal, that would be a ground upon which the liability in the criminal proceedings may be challenged.
64. This ground, however ought to be read together with the ground contending that in preferring the said charges, the Respondents intend to call as witnesses some of the people who participated in the approval of the resolution made by the Board. This Court appreciates the fact that the discretion on whom to prefer charges against is on the prosecuting authority who was then the Attorney General and now the Director of Public Prosecution (hereinafter referred to as the DPP). It is also within the discretion of the said Authority and it is perfectly in order for the Authority to call some of the accomplices in a criminal trial as prosecution witnesses. The weight of their evidence is of course subject to the law relating to accomplice evidence.
65. However, Article 157(11) of the Constitution provides as follows:

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

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

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

(a) the diversity of the people of Kenya;

(b) impartiality and gender equity;

(c) the rules of natural justice;

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

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

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

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

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

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

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

68. Similarly, see **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69.**

69. Dealing with abuse of the legal process, **Kimaru, J** in **Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009** expressed himself as follows:

“The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man’s rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it”.

70. 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 Constitutional or Statutory tests decreed hereinabove. It is even worse where from the circumstances 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.

71. Here for example, the Petitioners contend that they took all the necessary steps to obtain the requisite legal advice and approvals or authorisations. To turn round and institute criminal prosecution against the Petitioners while making the very persons who authorised the Petitioner’s action 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, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

72. In his letter dated 13th March, 2007 addressed to the 1st Petitioner, the then Permanent Secretary, Ministry of Energy, **Patrick M. Nyoike**, a prosecution witness stated *inter alia* as follows:

“Approval has been granted for the sale of the Kenya Pipeline Company facilities to the National Security Intelligence Service at a cost of Kshs 93.5 Million per unit basis. It is noted that the difference between the evaluation by KPC and NSIS offer is within the acceptable range...Please expedite.”

73. Similarly, there was another letter dated 27th February, 2007 from the then Permanent Secretary, Ministry of Finance, **Joseph K. Kinyua**, in which he stated *inter alia* that:

“Treasury approval is hereby granted to NSIS to purchase the KPC’s facilities at the stated offer price of Kshs. 93.5 Million since on per unit basis, the difference between the evaluation by KPC and your offer is within the acceptable range...You may

therefore proceed to finalise the process.”

74. In similar vein, we defer to the opinion of **Warsame, J** (as he then was) in **Baseline Architects Limited vs. National Hospital Insurance Fund HCMA No. 1131 of 2007 [2008] KLR 7**, where he held that it is in the public interest that communication between public servants should be given with utmost candour and freedom of expression. Accordingly, it is our view that where such opinion is given by persons who are legally authorised 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 person who gave that opinion as a prosecution witness.
75. In this case, however, it is contended that the letter relied upon by the Petitioners as giving the action a clean bill of health is not what the Petitioners take it to be. It is however curious that the 3rd respondent did not furnish the investigators with this letter and from the replying affidavit it is clear that the decision to prosecute the Petitioners was made without the benefit of this latter. The contents of the said letter have however not been denied by the author who is lined up as one of the prosecution's witnesses. The relevant part of the said letter dated 23rd October 2008 states as follows:

“I wish to report that the KPC Board at its 197th Board meeting approved the sale of the company's houses to its staff...Prior to this Board meeting, the KPC Management had earlier sought approval from the Treasury to sell the non core assets to their employees...The Ministry of Finance vide their letter dated August, 2006 gave approval to KPC to dispose off the non core fixed assets through open tender in accordance with the Public Procurement Regulations...All the houses were sold to KPC staff on permanent and pensionable terms, with priority being given to occupants. Additionally, KPC fully complied with the State Corporations Act and provided for the sale of the Company's non core assets in the year 2007/07 budget which was approved by both the Treasury and the Ministry of Energy...The Ministry of Energy was fully consulted on the sale of the KPC non core assets and was briefed at all times..... I therefore consider the KPC Board decision to have the Company's residential houses sold to the staff members to have been prudent and consistent with the then Government policy on disposal of its residential houses to civil servants.”

76. According to the 3rd respondent, the motive of this letter was “curious”. This statement, in our view, speaks volumes and goes to strengthen the Petitioners' position that despite the curiosity entertained by the Respondents with respect to the author of the said letter, they nevertheless consider him a prime witness against the petitioners. That the opinion expressed by the author of the said letter could have been a purely personal opinion is not within our human ability to unravel. It is, however, clear to us that to selectively prefer criminal charges against the Petitioners while saintly, as it were, treating the said author as a prosecution witness is not only selective but discriminatory as well and contravenes the principles of promotion of constitutionalism which bind the DPP in making a decision whether to prosecute and who to prosecute.
77. Whereas we appreciate the fact that the decision whether or not to prosecute the petitioners is an exercise of discretion this Court is empowered to interfere with the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See **Republic vs. Minister for Home Affairs and Others Ex Parte Sitanze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323**.
78. The Petitioners further contend that the said charges are being brought after a long period of time after the investigations thereon had been closed. Under Article 47(1) of the Constitution, “every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.” It is therefore imperative that criminal investigations be conducted

expeditiously and a decision made either way as soon as possible. Where prosecution is undertaken long after investigations are concluded, the fairness of the process may be brought into question where the Petitioner proves as was the case in ***Githunguri vs. Republic*** 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. The effect of the long delay in prosecuting the applicant was considered in ***Githunguri vs. Republic*** Case, where the Court expressed itself as follows:

“We are of the opinion that two infeasible reasons make it imperative that this application must succeed. First as a consequence of what has transpired and also being led to believe that there would be no prosecution the applicant may well have destroyed or lost the evidence in his favour. Secondly, in absence of any fresh evidence, the right to change the decision to prosecute has been lost in this case, the applicant having been publicly informed that he will not be prosecuted and property restored to him. It is for these reasons that the applicant will not receive a square deal as explained and envisaged in section 77(1) of the Constitution. This prosecution will therefore be an abuse of the process of the Court, oppressive and vexatious...If we thought, which we do not, that the applicant by being prosecuted is not being deprived of the protection of any of the fundamental rights given by section 77(1) of the Constitution, we are firmly of the opinion that in that event we ought to invoke our inherent powers to prevent this prosecution in the public interest because otherwise it would similarly be an abuse of the process of the Court, oppressive and vexatious. It follows that we are of the opinion that the application must succeed in either event.....A prosecution is not to be made good by what it turns up. It is good or bad when it starts. The long and short of it is that in our opinion it is not right to prosecute the applicant as proposed. ”

79. The last ground was that the decision to prefer the said charges is malicious and is actuated by extraneous motives to fend off public outcry in respect of a matter unrelated to the said charges. Here a two pronged attack was unleashed by the Petitioners. It was alleged that the Respondents' conduct of leaking the information of the Petitioners' arrest was evidence of malice. On our part we do not agree that the mere fact that the authorities "leak" information of their pending action to the press necessarily connotes malice as the "leakage" may as well be meant to inform the public on what the authorities intend to do. The second aspect of this allegation of malice is that the prosecution was meant to lull the public into a false sense of security, as it were, that the Triton scandal was being pursued. Whereas we appreciate that where the prosecution is based on extraneous issues other than the need to *inter alia* implement an effective prosecution mechanism so as to maintain the rule of law and contribute to fair and equitable criminal justice and the effective protection of citizens against crime, we are however unable, based on the evidence on record, to find that the decision to prosecute the Petitioners was informed by the need to fend off the public outcry brought about by the Triton saga.

80. We have considered the preliminary objection raised by the respondents and it is our view without going into the details thereof that in the present constitutional dispensation the said objection has no merit and we have no hesitation in disallowing the same.

81. In the final analysis, we are satisfied that the selective, arbitrary and discriminatory manner in

which the Petitioners were arraigned in Court, in light of the fact that the decision to prosecute them arose from a resolution of the Company which resolution was passed with the approval of Treasury and Ministry of Energy, whose then Permanent Secretary is lined up as one of the witnesses, offend the principles of promotion of constitutionalism and amounts to an abuse of the legal process. Just like in *Githunguri vs. Republic* Case, we have no hesitation in arriving at the conclusion both under the Constitution and our inherent powers that **“it is not right to prosecute the applicant as proposed.”**

82. In the foregoing premises the two petitions succeed and without necessarily going through the individual prayers as sought we make the following orders:

1. **We hereby declare that the prosecution of the petitioners in Chief Magistrate’s Court in Anti-Corruption Criminal case number 7 of 2009 in the manner proposed is discriminatory and unjustifiably selective. It goes against the principles of promotion of constitutionalism and is hence unconstitutional and amounts to an abuse of the legal process.**
2. **We hereby prohibit the Respondents from sustaining, proceeding, hearing, conducting, or in any manner dealing with the charges laid or proceedings conducted in the Anti-Corruption case number 7 of 2009 between the Republic vs. George Joshua Okungu and Mary Kiptui or instituting any other charges in any other court against the Petitioner over the same subject matter in the manner contemplated.**
3. **We hereby declare that the charges and proceedings in the Chief Magistrate’s court in Anti-Corruption Criminal case number 7 of 2009 as contemplated by the Respondents are unconstitutional and an abuse of the legal process.**
4. **As Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003), no longer exists, we wish to make no orders in respect thereof or related thereto.**
5. **We decline to award any damages as we have no material before us upon which we can base such an award.**
6. **We have agonised over the issue of costs. In our view, no allegations of impropriety were made against the 1st respondent hence no costs ought to be awarded against it. The authority currently charged with the conduct of prosecutions is the Office of the Director of Public Prosecutions which office is not a party to these proceedings those powers having been conferred on that office by the current Constitution. In the premises the order that commends itself to us in the circumstances of this case is that each party to bear own costs.**
7. **Finally we wish to express our gratitude to counsel for the well researched submissions which we have considered and if we have not expressly referred to the submissions and legal authorities relied upon it is not out of disrespect or lack of appreciation for their industry.**

Judgement read, signed and delivered in court this 7th day of February 2014.

W KORIR

G V ODUNGA

JUDGE

JUDGE

Delivered in the presence of:

Ms Bonyo for Mr Obura for the 1st Petitioner

Ms Kamau for Mr Enonda for the 2nd Petitioner

Mr Chigiti for Mr Okelo for the 1st and 2nd Respondents

Mr Ongondi for 3rd Respondent