



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND JUDICIAL DIVISION**  
**PETITION NO. 471 OF 2013**

**BETWEEN**

**JOSEPHINE AKOTH ONYANGO.....1<sup>ST</sup> PETITIONER**

**SIMON OTIENO ONYANGO.....2<sup>ND</sup> PETITIONER**

**AND**

**THE DIRECTOR OF**

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

**THE DIRECTOR OF CRIMINAL**

**INVESTIGATIONS DEPARTMENT.....2<sup>ND</sup> RESPONDENT**

**AND**

**SEHIT INVESTMENTS LTD.....1<sup>ST</sup> INTERESTED PARTY**

**PETER ODIWUOR NGOGE.....2<sup>ND</sup> INTERESTED PARTY**

**KENYA COMMERCIAL BANK LTD....3<sup>RD</sup> INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. The petitioners have moved the court to impugn the authority of the respondents to investigate and commence criminal proceedings against them as a result of a complaint lodged by the 1<sup>st</sup> interested party in respect of a property known as LR No. 1160/784 (“the suit property”).
2. The issue for consideration is whether and to what extent the Court should intervene to stop the prosecution of the petitioners on account of the violation of fundamental rights and freedoms and for abuse of the court process.

## **Petitioners' Case**

3. The petitioners' case is set out in the petition dated 25<sup>th</sup> September 2013 and is supported by the affidavit of Josephine Akoth sworn on 25<sup>th</sup> September 2013 and a supplementary affidavit sworn on 29<sup>th</sup> November 2013.
4. According to the 1<sup>st</sup> petitioner ("Josephine"), she was introduced to the Rose Mbithe Mulwa ("Rose"), a director of the 1<sup>st</sup> interested party ("the Company") by her brother, the 2<sup>nd</sup> petitioner ("Simon"). The meeting resulted in an agreement dated 24<sup>th</sup> December 2002, where Josephine agreed to buy the suit property from the Company at a price of Kshs 18 million. The sale agreement was prepared by Mr Ngoge, an advocate and the 2<sup>nd</sup> interested party, who acted for both parties under the said agreement. Josephine states that she paid a deposit of Kshs 9.5 million. The balance of Kshs 8.5 million was financed by the 3<sup>rd</sup> interested party ("the Bank"). The firm of *Musyoka and Wambua Advocates* acted for the Company during the loan transaction.
5. According to the petitioners, the transaction was completed by the transfer being registered in Josephine's favour and the Company accessed the proceeds of sale from the Bank. Josephine depones that as she did not require the vacant possession she acceded to the Company's request to allow Rose to continue residing on the property as a tenant paying Kshs 40,000/= per month. The Company paid the rent by way of a lump sum up to sometime in the year 2008 but thereafter stopped paying after Josephine declined persistent requests by Rose to sell the property back to the Company.
6. In September 2009, the Company filed a suit against Josephine, the 2<sup>nd</sup> petitioner ("Simon") and the Bank. The suit ***Milimani HCCC No. 705 of 2009, Sehit Investment Limited v Josephine Akoth Onyango, Simon Otieno, Savings and Loan Kenya Limited and the Attorney General*** sought several reliefs, inter alia, "A declaration that the transfer of the suit premises from the Plaintiff to the 1<sup>st</sup> defendant Josephine Akoth Onyango registered on 22<sup>nd</sup> March 2005 as entry No. 2 on LR No. 1160/784 was undertaken on the basis of no consideration, fraud, misrepresentation on the part of the 1<sup>st</sup> and 2<sup>nd</sup> defendants and therefore null and void and the same be cancelled and revoked forthwith." [Emphasis mine] As against the Bank, Company prayed for, "An order directing the 3<sup>rd</sup> defendant to discharge the charge and to release the discharge of charge and all documents in respect of the suit premises to the Plaintiff."
7. The Company's claim was that the sale and transfer and charge was null and void as Josephine did not pay the full purchase price and that the transfer was procured by fraud and misrepresentation by the petitioners who represented that they were able to complete the transaction. Josephine and Simon denied the Company's allegations and reiterated that Josephine purchased the suit property. Josephine filed a counterclaim seeking an order of vacant possession and alternative orders of eviction as result of the refusal by the Company to pay agreed rent for continued occupation by Rose.
8. The filing of the said suit was accompanied by an application for an interlocutory injunction which was heard inter-parties by Njagi J. The learned judge considered the matter and dismissed the application by a ruling dated 19<sup>th</sup> February 2013 delivered by Ogola J. I am informed by the parties that the said ruling was set aside for other reasons and is yet to be re-argued.
9. Related to this civil suit, Mr Ngoge, filed a suit in February 2013 namely ***Milimani HCCC No. 48 of 2013, Peter Odiwuor Ngoge versus Josephine Akoth Onyango, Kenya Commercial Bank Limited, Walker Kontos Advocates and the Attorney General***. The gist of the cause of action is that the Mr Ngoge did not witness any payments made by Josephine to the Company or witness the transfer instrument conveying the suit property to Josephine. He alleges that all the transactions are fraudulent and as a result seeks cancellation of all the fraudulent entries on the title to the suit property including the transfer to Josephine and the Charge in favour of the bank.

The suit is pending before the court.

10. The criminal process was triggered by a complaint made to the 2<sup>nd</sup> respondent by the Company claiming that the Josephine forged the Transfer and Charge. After conducting investigations, Josephine was arrested and charged on 20<sup>th</sup> December 2012 with the offence of forging a transfer dated 22<sup>nd</sup> December 2003 in **Kibera Criminal Case Number 6531 of 2012**. Simon was subsequently charged with conspiracy **Kibera Criminal Case Number 2178 of 2013** and the two cases were consolidated.
11. The petitioners' case is that their constitutional rights including the right to fair hearing, access to justice and fair administrative action have been infringed and continue to be infringed contrary to **Articles 27, 47, 48 and 50** of the Constitution of Kenya. The petitioners aver that the respondents want to circumvent and embarrass the proceedings in **Milimani HCCC No. 705 of 2009**, that there is a likelihood of conflicting decision being made in the civil and criminal case and that the respondents intentionally failed to accord the petitioners equal treatment before the law.
12. The petitioners complain that they wrote to the respondents and explained to them their version of events but the respondent's refused to take into account its side of events and decided to charge them without regard to the contrary evidence submitted by them thereby breaching their right to a fair hearing. The petitioners aver that the criminal complaint was only brought after the Company realized that it was losing the civil matter.
13. The petitioners aver that the facts given by the complainant are inconsistent with the facts pleaded and deposed to by Rose in the civil proceedings. The petitioners aver that according to the affidavits made on oath by the Rose in the civil case confirm that she executed the transfer and processed a charge over the property from which the Company received the balance of the purchase price of Kshs 8.5 million from the Bank.
14. The petitioners submit that the Court has jurisdiction to halt criminal proceedings where there is a violation of fundamental rights and freedoms or an abuse of the court process. They cited several cases to support their case among them **Mary Ngechi Ng'ethe v Attorney General and Another CA Civil Appl. No. NAI 157 of 2012**, **Joses Ntwiga v Commissioner of Police and Other Nairobi Petition No. 52 of 2011** and **R v Attorney General ex-parte Kipngeno arap Ngeny Nairobi HC Misc. Civil Appl. No. 404 of 2000**.
15. The petitioners pray for the following reliefs;
  - i. *A declaration that the respondents have infringed the petitioner's Constitutional rights contrary to Article 27, 47, 48 and 50 of the Constitution.*
  - ii. *A declaration that the respondents have abdicated and/or abused their authority by charging the petitioners in criminal cases No. 6531 of 2012 and 2178 of 2013 at the Chief Magistrate's Court at Kibera on issues intricately the subject of the High court Civil Case number 705 of 2009.*
  - iii. *An injunction restraining the respondents either jointly, or severally or through any person claiming their authority from prosecuting the petitioners in Criminal Case No. 6531 of 2012 and 2178 of 2013, or a consolidation thereof, or in any matter concerning the Transfer of all the piece or parcel of land known as Land Reference Number 1160/784 to the 1<sup>st</sup> petitioner until the conclusion of High court Civil Case No. 705 of 2009 and any review or appeals therefrom.*
  - iv. *And such other order (s) as this Honourable Court shall deem just in the circumstances.*

### **Respondents Case**

16. The respondents oppose the petition based on the affidavit of Corporal John Mmasi sworn on 29<sup>th</sup> October 2013. The gist of his affidavit is that the police investigated the complaint laid by Rose on 25<sup>th</sup> November 2009 in which she alleged that Josephine had fraudulently transferred the suit property from the Company to herself and charged it to the Bank.

17. Corporal Mmasi depones that he was instructed to commence investigations by the Director of Criminal Investigation. In the course of the investigation he established that the suit property had been transferred to Josephine in 2005. He received a report from the Government document examiner showing that the said transfer documents used in the transfer, the seal and acknowledgment receipts were all forged. He depones that he discovered several other facts that led him to the conclusion that there was sufficient evidence to mount a prosecution. These facts include the following;
- a. That Mr Ngoge, was a stranger to the transfer document as he never drew or witnessed execution of the document.
  - b. That there was evidence that Josephine never fulfilled the mandatory requirements prior to draw down from the Bank and that the draw down was deliberately made by the Bank to legitimize the fraudulent transaction.
  - c. That Josephine was not in a position to purchase the suit property, a fact Simon knew but deliberately withheld from the Company.
  - d. That Josephine demanded that the sale agreement be backdated so that the same conforms to the receipts for acknowledgement of the money.
  - e. That immediately after the suit property was charged, Josephine disappeared leaving the Company to repay the loan of Kshs 8.5 million to save the property and no sooner had the Company cleared the first loan than Josephine reappeared and charged the property with the help of Bank officials.
  - f. That Josephine has never occupied the property.
18. The respondents submit that the issues raised by the petitioners are evidential in nature and must be addressed in the trial court. They contend that the petitioners also have not shown which of their constitutional rights have been infringed and precisely how those rights have been violated by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
19. The respondents further submit on **Article 157** of the Constitution which empowers the Director of Public Prosecutions to direct the Inspector-General of National Police Service to investigate any information or allegation of criminal conduct and the Inspector General shall comply with such direction. The respondents' case is that the Constitution also mandates the Director of Public Prosecutions to institute and undertake criminal proceedings against any person in respect of any offence alleged to have been committed upon conclusion of investigations by the Director of Criminal Investigations. The respondents maintain that the power of the Director of Public Prosecutions is exercised independently having regard to public interest, the interests of the administration of justice and need to prevent and avoid abuse of the legal process as such in the circumstances the orders sought by the petitioner cannot be granted.
20. The respondents contend that **section 24** of the *National Police Service Act* mandates the Police to investigate any complaint brought to their attention. Thus the police are obliged to investigate the complaint and that it is in the public interest that justice is administered equally to all by the investigations of all complaints and prosecution of all persons who break the law and the petitioners herein are not above the law hence are subject to the law as any other citizens of the Republic.
21. As regards the issues of the civil cases, the respondent rely on the provisions of the **section 193A** of the *Criminal Procedure Code* which provides that the subsistence of civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings arising out of the same set of facts.
22. The respondents urge the court to dismiss the petition as it is frivolous and an abuse of the court process and meant to circumvent the criminal justice system.

### **1<sup>st</sup> Interested Party's Case**

23. The Company opposes the petition on the basis of grounds of opposition and written submissions

dated 6<sup>th</sup> February 2014. It principally adopts the position taken by the respondent.

24. Counsel for the Company, Ms Onsare, submitted that the ruling by Njagi J., was set aside and the matters in issue are still in contention. She submitted that the petitioners have not demonstrated that its fundamental rights have been violated by the respondents or the 1<sup>st</sup> interested party.

### **2<sup>nd</sup> Interested Party's Case**

25. The 2<sup>nd</sup> interested party, Mr Ngoge, opposed the petition. He has filed a replying affidavit sworn on 11<sup>th</sup> October 2013 and a supplementary affidavit sworn on 20<sup>th</sup> December 2013.

26. Mr Ngoge avers that although he drew and witnessed the execution of the sale agreement, he did not witness the exchange of money between the parties to the agreement. He avers that as no money was paid by the purchaser through his firm on account of the purchase price for onward transmission to the vendor hence he treated the transaction as frustrated for want of consideration on the part of the purchase price. He also denies that he drew and applied for registration of the transfer instrument that conveyed the suit property to Josephine. He therefore urges the prosecution of the criminal cases to determine whether the transfer instrument dated 22<sup>nd</sup> December 2003 was forged or uttered falsely.

27. Mr Ngoge averred that he filed *Milimani HCCC No. 48 of 2013, Peter Odiwour Ngoge v Josephine Akoth Onyango, Kenya Commercial Bank Limited, Walker Kontos Advocates and the Hon, Attorney General* which suit is still pending before the Court. He stated that he made a report to the police to the effect that his name was being used fraudulently. He submits that there was prima facie evidence upon which the petitioners were charged and that their rights were not violated. He urges the court to dismiss the petition as the petitioners will receive a fair trial.

### **3<sup>rd</sup> Interested Party's Case**

28. The 3<sup>rd</sup> interested party, the Bank, supports the petition through the affidavit of James Odwako sworn on 5<sup>th</sup> December 2013. The Bank's contention is that the criminal proceedings are an abuse of the process and that the criminal complainant is instituted by the Company to force an intended outcome that cannot be achieved in the civil suit.

29. The Bank party claims that the respondents and the Company have deliberately concealed material facts as to the transactions leading to the sale of the property herein. The Bank in the deposition filed on its behalf gave an elaborate account of how the Josephine obtained loans to enable her purchase the suit property. According to the sale agreement Josephine agreed to pay Kshs 9.5 million upon signing the agreement. The Bank confirmed that Josephine obtained two loans; a loan of Kshs 8.5 million and another for Kshs 10 million. Since the loan of Kshs 8.5 million was meant for payment of the balance purchase price, it was a mandatory requirement that the Company and Josephine provide the Bank with a duly executed sale agreement, the transfer and consent to transfer and to charge the said property before the loan amount could be disbursed to the Company.

30. Mr Odwako deposes that on 9<sup>th</sup> March 2005, the Company wrote to the Bank's advocates, *Walker Kontos Advocates*, that it had appointed the firm of *Musyoka and Wambua Advocates* to act on its behalf for the purpose of forwarding to the Bank's advocates the relevant completion documents and receiving the balance of the purchase price for the suit property amounting to Kshs 8.5 million from the mortgage facility. In due course and as instructed by the Company, *Walker Kontos Advocates* wrote to *Musyoka and Wambua Advocates* a letter dated 18<sup>th</sup> March 2005 giving it's professional undertaking, "to pay to you the sum of Kshs. 8,500,000.00 within Fourteen (14) days of receipt by us of the Transfer in favour of Ms. Onyango and the Charge in favour of our client .....

31. The charge dated 4<sup>th</sup> April 2005 was forwarded to Josephine for her execution and simultaneous attestation by her advocate. Josephine returned the said charge document duly signed in the presence of and attested by her advocate Peter Otieno Ngoge, Advocate. On 22<sup>nd</sup> March 2005, *Musyoka and Wambua Advocates* forwarded to the Bank's advocates the application for registration form for the transfer instrument and the consent to charge and informed the said advocates that the transfer instrument was awaiting registration at the Lands Office. By a letter dated 28<sup>th</sup> April 2005, the Bank's advocates released the entire Kshs 8.5 million to the Company's advocates who acknowledged receipt thereof and released the Bank's advocates from the professional undertaking. The Bank avers that Josephine later applied for a further loan of Kshs 10,000,000/= which was secured by a further charge dated 6<sup>th</sup> April 2009 in favour of the Bank.
32. Mr Muga, counsel for the Bank, submitted that the complaint was made in bad faith having regard to the fact that the transactions were done in 2003 and 2005 and the complaint was made in 2012 without any explanation. He further questions why the Company took more than four years to lodge the complaint with the respondents alleging that the transfer and the registration of the charge on the subject property was fraudulent whereas the said transfer and charge were effected in the year 2005 and loan proceeds paid to the Company.
33. The Bank attacks the allegation made by Corporal Mmasi that the reason why respondent initiated these proceedings is in respect of a complaint that property transferred and charged without Company's knowledge. The affidavit of James Odwako depones to the fact the transfer and charge of property was within the knowledge of the complainant. In fact the Bank's case is that the Company facilitated the transaction and received the money.
34. The Bank urges that the criminal cases ought to be terminated as they are an abuse of the process.

### **Determination**

35. There is no dispute as to the nature and extent of the powers of the Director of Public Prosecutions ("the DPP") and the National Police Service and the extent of the Court intervention. The principles upon which the Court intervenes has been set out in several cases cited by the parties. The starting point for this inquiry is **Article 157** of the Constitution provides:

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

36. In view of the authority conferred by the Constitution on the DPP, the Courts should not ordinarily interfere with his discretion in deciding whether or not to institute criminal proceedings. In the case of ***Kenya Commercial Bank Limited & 2 Others v. Commissioner of Police and Another, Nairobi Petition No. 218 of 2011 [2013]eKLR*** this court held that, "*the office of the Director of Public Prosecutions and Inspector General of the National Police Service are independent and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within the limits provided for by the law. But these offices are subject to the Constitution and the Bill of Rights contained therein and in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under the Constitution.*"
37. The Court will interfere with the discretion of the DPP in instances where there is an abuse of court process or a breach of the Constitution. The fact that a civil case has been instituted is not a bar to a parallel criminal process continuing. **Section 193A** of the ***Criminal Procedure Code*** provides, "*Notwithstanding the provisions of any other written law the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.*"
38. The Court in ***George Joshua Okungu and Another v Chief Magistrate's Court Anti-Corruption***

**Court at Nairobi and Another (2014) eKLR** summarised the general principles thus, “*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 good defence 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 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.*”

39. I agree with the principles outlined in the decisions I have cited but ultimately each case must be decided based on its own facts. My decision in this case is influenced by the fact that the Court in **HCCC No. 705 of 2009** issued a ruling in which it declined to grant an injunction in favour of the Company. Njagi J., in his ruling, noted that sale agreement was signed in 2002 and the sale concluded and property charged in 2005 yet the Company only moved the court in 2009. The court held that the delay was unexplained and hence the Company was undeserving of equitable relief.
40. Likewise, I also find that the delay in lodging the complaint by the Company in 2012, three years after the suit was commenced is unexplained. A total of seven years have elapsed since the sale agreement was signed and the complaint lodged and this delay is still unexplained. Although there is no time limitation for prosecutions of criminal cases, this Court can only draw the inference that the purpose of the criminal proceedings is to achieve an ulterior purpose which is to derail the civil proceedings between the parties. Although the ruling of Njagi J., was set aside and the matter will be reheard by another judge only fortifies my view that the civil case is still alive and it would be more appropriate to allow the civil matter to proceed in this instance.
41. Although I am required to exercise circumspection in dealing with the facts as there are other proceedings pending, in ascertaining whether there is an abuse of the court process I must assess the facts to make a determination. I must point to the fact that the Company appointed the firm of *Musyoka Wambua and Company Advocates* to act on its behalf to complete the purchase transaction and to receive the balance of the purchase price on its behalf. The deposition filed on behalf of the Bank shows that the Company participated in the perfection of the security through the firm of *Musyoka and Wambua Advocates*. At no time did the issue of the sale and subsequent transfer of the suit property being fraudulent arise. The respondent and the Company have not said anything about the balance of the purchase price of Kshs 8.5 million forwarded to *Musyoka and Wambua Advocates* as per the instructions from the Company. I find it rather puzzling that the 2<sup>nd</sup> respondent has not disclosed whether in fact it took a statement from the advocate who dealt with the transaction on the Company’s behalf or from the Bank to confirm the authenticity of the transaction.
42. I also note that the charges facing the petitioner revolve around the genuineness of the transfer. The transfer document dated 22<sup>nd</sup> December 2003 is the central document which forms that basis of the charges against the petitioners. It is signed by the directors of the Company. It is one of the documents which the Company referred to as “completion documents” in its letter dated 9<sup>th</sup> March 2005 which would be forwarded to *Walker Kontos Advocates* by *Musyoka and Wambua Advocates*. The Company’s letter confirms that the transfer was in its possession and was to be forwarded to its advocates. How could the Company forward a transfer document, which was not

signed by its directors, to its advocates as part of the completion documents and then complain several years later the transfer itself was a forgery. If indeed the directors did not sign transfer, on what basis did they authorise their advocate to receive the balance of the purchase price.

43. The Company in the plaint in **HCCC No. 705 of 2009** presents facts that are inconsistent with the complaint. The petition is replete with assertions that the Company executed the transfer which is now the basis of the complaint laid against the petitioner. These paragraphs state as follows;

*[11] [T]he Plaintiff again with representations from both the 1<sup>st</sup> and 2<sup>nd</sup> defendant executed a transfer strictly on the understanding that such transfer was intended only to facilitate the financing from the 3<sup>rd</sup> Defendant ..... The transfer in the 1<sup>st</sup> Defendants name was registered on the 22<sup>nd</sup> March 2005.*

*[13] Despite the agreement and understanding between the Plaintiff and the 1<sup>st</sup> defendant, the plaintiff avers that upon the transfer and charge of the suit premises .....*

*[13 d)] The 1<sup>st</sup> and 2<sup>nd</sup> defendants by their joint misrepresentation fraudulently prevailed upon the plaintiff to transfer the suit premises to the 1<sup>st</sup> defendant which the plaintiff would not have done had it known that the 1<sup>st</sup> defendant was not in a position to raise the deposit of the Shs 9.5 million in terms of the sale agreement.*

44. The prayer in the plaint I have quoted at paragraph 6 above goes to confirm that the Company executed the transfer. The Company's case in **HCCC No. 705 of 2009** is not that the transfer is a forgery; it is that in fact that the execution of the transfer by the Company was procured by the fraud and misrepresentation by the petitioners who claimed that they had money to purchase the property. The Company must not be permitted to abuse the criminal process by making a complaint which is inconsistent with matters that had been verified on oath in civil proceedings.

45. The petitioners have been accused of forging acknowledgements of payments. The issue of payment and whether purchase price was paid is at the heart of the dispute between the parties in the civil case. It is in the light of these circumstances that I see Mr Ngoge's position. He only drew and witnessed the sale agreement where he acted for both parties. He did not attest to the signatures of the Company's directors in transfer and since the transfer itself emanated from the Company which forwarded to its advocates, he cannot tell whether in fact it is the petitioners who are responsible for the forgery as it is the Company through its advocates, *Musyoka and Wambua Advocates*, who forwarded the transfer to secure payment of the purchase price.

46. My decision is also influenced by proceedings in **HCCC No. 155 of 2004 Mathew Kyalo Mbobu v Rose Mbithe**. These proceedings are referred to in the plaint in **Milimani HCCC No. 705 of 2009**. In **HCCC No. 155 of 2004** warrants of attachment were issued against Rose for recovery of Kshs 2,150,640.95 on 23<sup>rd</sup> April 2008. After a proclamation was issued against her property, Rose states that in consultation with Josephine, who was then the registered owner of the suit property where Rose was residing, they agreed that objection proceedings be filed in the name of Josephine. Objection proceedings were indeed filed in the name of Josephine and the same allowed and the attachment raised on the basis of these contentions.

47. Although the petitioners have denied the authenticity of the objection proceedings, the implication of those proceedings on Rose and the Company cannot be ignored. By permitting the objection to be lodged for her benefit, Rose impliedly admitted that the property had been registered in Josephine's name. If the transfer of the suit property was fraudulent at the material time in 2008, how could she be silent until 2012? While the Company was not involved in the objection proceedings, Rose, its director, knew all along the status of the property and would not have permitted assertions inconsistent with the Company's proprietary interest to be made in case involving her as the director of the Company.

48. The facts I have outlined show that the Company intends to use criminal process for an ulterior purpose. It intends to ensure that it gets the transfer of the suit property to Josephine reversed by whatever means. In the *HCCC No. 705 of 2009*, the Company clearly admits that it executed the transfer on the basis of fraudulent misrepresentation being made to it. Three years later, it brings a complaint to the Police that the transfer was forged. On the basis of the time taken to lodge the complaint and such contradictory facts from the Company made on oath in the civil suit, I find and hold that to permit the criminal proceedings to go on will amount to an abuse of the court process.

49. It is not in doubt that the High Court has the jurisdiction to halt criminal proceedings in the event there is an abuse of the court process. Furthermore under **Article 157(11)**, the Director of Public Prosecutions shall exercise his power having regard to, inter alia, the need to prevent an abuse of the legal process.

### **Disposition**

50. My assessment of the facts I have outlined above lead to the conclusion that if the criminal proceedings are permitted to continue at this stage they will amount to an abuse of the Court process. All the parties' grievances are, in my view, capable of being settled in *HCCC No. 705 of 2009* which is now being heard.

51. I therefore make the following orders;

- a. **An injunction be and is hereby issued restraining the respondents either jointly, or severally or through any person claiming their authority from prosecuting the petitioners in Kibera Criminal Case No. 6531 of 2012 and 2178 of 2013, or a consolidation thereof, or in any matter concerning the Transfer of all the piece or parcel of land known as Land Reference Number 1160/784 to the 1<sup>st</sup> petitioner until the conclusion of High Court Civil Case No. 705 of 2009 and any review or appeals therefrom or upon further directions from the court.**
- b. **There shall be no order as to costs.**

**DATED and DELIVERED at NAIROBI this 10<sup>th</sup> day of March 2014.**

**D.S. MAJANJA**

### **JUDGE**

Mr Nyawara with him Mr Tebino instructed by Nyawara and Company Advocates for the petitioner.

Mr Ndege, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondents.

Ms Onsare instructed by Miller and Company for the 1<sup>st</sup> interested party.

Ms Ngoge, Advocate instructed by O. P. Ngoge and Associates Advocates for the 2<sup>nd</sup> interested party.

Mr Muga instructed by Robson and Harris Advocates for the 3<sup>rd</sup> interested party.