



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTION & JUDICIAL REVIEW DIVISION
MISC. APPLICATION NO. 166 OF 2013

AND

**IN THE MATTER OF BREACH AND/OR CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOM UNDER ARTICLES 159, 165, 19, 20, 21, 22, 23, 25 AND 27 OF THE
CONSTITUTION OF KENYA.**

BETWEEN

THE HON. THE ATTORNEY GENERAL..... APPLICANT

VERSUS

1. HON. THE ATTORNEY GENERAL

FOR AND ON BEHALF OF.....1ST RESPONDENT

2. THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

3. THE DIRECTOR OF CID 3RD RESPONDENT

4. THE CHIEF MAGISTRATE NAIROBI4TH RESPONDENT

5. THE DIRECTOR OF PUBLIC PROSECUTION... 5TH RESPONDENT

EX-PARTETHOMAS NG'ANG'A MUNENE

JUDGEMENT

1. By a Notice of Motion dated 20th May, 2013, the *ex parte* applicant herein, **Thomas Ng'ang'a Munene**, seeks the following orders:
 1. **THAT this Honorable court be pleased to issue Orders of Certiorari directed to the 1st, 2nd and 3rd Respondents, by themselves, their servants and/or agents or any other officer acting under their authority, bringing to the court for the purpose of being quashed the decision by them on or about 3rd May, 2013 to institute and/or commence criminal proceedings against the subject.**
 2. **Orders of prohibition directed to the 5th Respondent, prohibiting the 5th Respondent or any**

- other officer acting with his authority, prohibiting him and each one of them from proceeding with the conduct and/or prosecution of Criminal Case No.595 of 2013 with regard to the subject and pending before the Chief Magistrate Court Milimani Nairobi.
3. THAT the honourable court be pleased to issue Order of Prohibition directed against the 4th Respondent, by himself, his servants and/or Agent or any other Judicial officer for the time being seized of the prohibiting the 4th Respondent or such other officers conduct of Criminal Case No.595 of 2013 from trying and/or carrying on any further proceedings on the matters pending the full hearing and determination of this application or the further Orders of the court.
 4. THAT the honourable court be pleased to issue Conservatory orders staying any proceedings in the matter as the same are an abuse of the court process, are arbitrary, capricious and brought on mala fides by the Respondent in abuse of the due process of the law and have occasioned the Applicant great prejudice.
 5. The cost of this application to be borne by the respondent.
2. The application was supported by an affidavit sworn by the applicant herein on 15th May, 2013.
 3. According to the applicant, he is the accused in Criminal Case No.595 of 2013 at the Chief Magistrate's Court Milimani (Nairobi) (hereinafter referred to as the criminal case) in which he is charged with two counts of Forgery contrary to section 345 as read with section 349 of the *Penal Code*. According to him, both counts can only be sustained at law if it is proved that the land in question is existing and registered in the name of the complainant; that both **Kibuthu Kagoe** and **Kinyeru Githinji** the joint owners are both alive or the administrators of their estates; and that **David Gitonga Amuru** the now registered owner is the complaint. However, according to him, the alleged complainant **Nelius Wanjiku Gichatha** has no *locus standi* to present a criminal complaint against him since she holds no grant of letters of representation.
 4. The Applicant deposed that **Nelius Wanjiku Gichatha** cannot feign ignorance while all along through her advocates **Masore Nyangau** she had no objection to the sale of the two properties in issue. He added that the whole idea of selling off the two parcels in question was discussed and minutes thereof recorded on 10th November, 2009 and the 2 titles were presented to him by all the parties and were to be forwarded to the purchasers advocates. He then passed the two titles to the firm of **Wachira Ndungu & Company Advocates** which was appointed by the purchaser one **David Gitonga Amuru**. Thereafter he was instructed to pay the commission of 3% of the purchase price to the agents.
 5. To the Applicant, when this transaction was initiated several of the survivors of the original owner were uncomfortable. The Applicant however received a letter from **J. M. Waiganjo Advocates** wherein the Applicant was informed that the firm represented some of the beneficiaries and the Applicant requested him to forward certified copy of the Grant of letters of Administration to proceed further. On advice of all the parties the money was distributed to all of the beneficiaries.
 6. However, on 12th March, 2010 the Applicant received a letter from the Director of Criminal Investigation informing him that they were investigating the two parcels of land a letter to which the Applicant responded. Later he recorded statement at the office of the C.I.D. Nairobi on Kiambu road and on or about the 20th March, 2010 learnt that the transfer had indeed been registered at the Land Registry.
 7. To the Applicant, the Director of Public Prosecution has criminalized matters best dealt with under the *Law of Succession Act* in that upon distribution of an estate, anyone who has benefited will account for such benefit at final distribution. In his view, the complainant **Nelius Wanjiku** who has other recourse under the *Law of succession Act* that her father's estates is still pending further distribution, is misusing and has influenced the Respondents to subject the Applicant to public humiliation and embarrassment to the detriment of the Applicant's professional career of forty years. The Applicant contends that in all the circumstances of this case his prosecution is a deliberate violation of his rights to be tried in a fair manner and warrants the intervention of this court.
 8. There was a further affidavit sworn on 30th January, 2014 in which while relying on various provisions of the law, the ex parte applicant justified why he ought not to be prosecuted in the said criminal case.

9. There was a supplementary affidavit sworn by **William Kamau Gichatha** on 11th June 2013 purportedly filed in support of the instant application. However a perusal of the substance thereof clearly shows that the deponent was raising his own personal issues with the complainant in the criminal case rather than reinforcing the applicant's case.
10. In the said affidavit, he contended that his deceased father **Gichatha Githindi** was polygamous with his mother **Waithira Gichatha** being the senior wife and her stepmother **Hannah Njeri Gichatha** being the mother of complainant **Nellius Wanjiku Nuthu**. He disclosed that there were active disagreements and angry confrontations between the said step-mother aided by the complainant **Nellius Wanjiku Nuthu** resulting in several cases before the Local Administration as well as in **Nairobi High Court Civil Case No.445 of 2006 Hannah Njeri Gichatha Vs. William Kamau Gichatha and David Maina Gichatha**. According to him, the complainant and his step-mother have always held grudges against him and looked for opportunities leading to his being imprisoned.
11. He deposed that in Nairobi Miscellaneous Case No.445 of 2006 his step-mother assisted by the complainant brought contempt proceedings against him but he was only saved by this High Court from imprisonment. According to him, the complainant and his said step-mother's institution of legal disputes was in furtherance of their taking advantage of his deceased father's mental incapacity whereby various assets were transferred to the complainant's side despite the fact that they have always demanded that the same constitute part of the deceased's estate as set out in our claims of fraud in the aforesaid defence. To him, his deceased father was registered as co-proprietor with 8 other persons in L. R. 209/128 and L. R. 209/129 registered as Grant Number I. R. 66931. In L. R. 209/128 registered under Grant I. R. No.66931, the proprietors included **Helena Gathoni Kibuthu** and **Mwangi Kagoe** deceased and **Kinyeru Githinji** among others as "tenants in common in equal shares" which was similarly the position with respect to L. R. 209/136/129.
12. In or about 9th November 2009, he was party to discussions on selling both parcels of land and he accompanied other representatives of the registered proprietors to the offices of **Munene & Company Advocates** for legal consultations and the complainant together with her mother wrote to **Munene and Company Advocates** concurring with the sale of the property and promising to provide a Grant of Letter through **Masore Nyangau & Company Advocates**. In his view, the complainant has no locus standi in this matter as section 41 of the *Law of succession Act* provides for devolvement of a polygamous deceased's assets in the first instance to the houses not directly to a beneficiary hence the complainant can only claim through my step said mother **Hannah Njeri Gichatha** and the complainant does not hold any Grant of Representation to enable her claim any portion of the deceased's estate or have a cause of action thereto.
13. He further deposed that he held discussions with the complainant's mother whereby it was agreed that the deceased's interest in the said properties be distributed equally between 2 houses. Notwithstanding the lack of a Grant of Letters of Administration, the complainant participated or acquiesced to the disposal of the proceeds of deceased **Gichatha Githindi** of L.R.209/2763/37 known as Modern Brewery a partnership were shared to the complainant's mother without demur. Further, the said deceased **Gichatha Githindi** was a shareholder in **Kirima Bus Service Ltd.** whose periodic dividends is paid to all shareholders. Sometime in December 2012, he went to the offices of **Kirima Bus Service Ltd.** to collect his share of the profits he found **Nellius Wanjiku Nuthu** in the cashier's office and the latter signed and collected her portion of the periodic dividends as the deceased's daughter which payment was made without demur and without Grant of Letters having been issued.
14. He deposed that when in the years 2009 and 2010 he initiated talks to enter a consent for Grant of Letter of Representation to enable this estate be distributed, the complainant and her mother rudely rebuffed these overtures and threatened him with bodily injury to a point whereby only this Court will adjudicate. It was therefore his view that the complainant having failed in the attempt to convict him for contempt of court orders is now misusing the respondent's offices to effect a vendetta and victory by way of criminal proceeding instead of civil proceedings which is unconceivable, inequitable and contrary to court precedents. To him, the prosecution initiated by the complainant is tantamount to approbation and approbation by the complainant as she cannot collect **Kirima Bus Service Company Ltd** dividend proceeds whilst denouncing payments relating to other assets where her mother was paid and is further stopped from complaining as her

advocates **Masore Nyangau & Company** clearly stated that the subject properties be sold and the payment be made.

Respondents' Case

15. On behalf of the Respondents a replying affidavit was filed sworn by Cpl **Samuel Kamau**, a Police Officer attached to the CID Headquarters Land Fraud Investigation Unit on 13th January, 2014.
16. According to him, on the 10th March 2010, one **Nelius Wanjiku Gichatha** (interested Party) lodged a complaint at CID Headquarters regarding plots No. LR 209/136/128 – 129 both situated within Nairobi in which she stated that the plots were jointly owned by her late father **Gichatha Githinji** together with eight others and that her family was shocked on receiving a call from the applicant requiring them to collect proceeds of sale of the plots which was done without the family's consent. According to him, investigations revealed that the properties under question were owned under a partnership with nine partners namely, **Peter Enos Wanuthi Keiru, Mwangi Githira, Eliud Thuku Mwangi, Mwangi Kagoe, Macharia Njengo, Kibuthu Kagoe, Kinyeru Githinji, Muya Kamani** and **Gichatha Githinji**. Further investigations revealed that the properties had since been transferred to one **David Gitonga Amuru** and title deeds issued in that name and that of the nine original owners, eight were deceased at the time of the sale transaction namely **Peter Enos Wanuthi Keiru, Eliud Thuku Mwangi, Mwangi Kagoe, Macharia Njeng, Kibuthu Kagoe, Kinyeru Githinji, Muya Kamani** and **Gichatha Githinji**. The sale of the properties resulted from agreement by some representatives of family members from each of the nine partners some of whom did not possess letters of administration the estate of the deceased persons.
17. He further deposed that the sale agreement dated 21st January, 2010 is purportedly signed by among others, seven of the original partners yet six of them were deceased at the time of the transaction and that investigations revealed that the disposal of the properties was done fraudulently by some of the beneficiaries of the deceased persons together with the applicant who executed the sale knowing that some of the persons named as vendors were deceased and that the applicant knowingly went on to certify signatures of the signatories in the sale agreement purporting the same to be that of persons who were deceased. Further and in addition to the foregoing the applicant did knowingly participate in execution of transfers of the property in the names of the deceased persons. According to him, investigations similarly revealed that those transfers were signed by other persons in the presence of the applicant purporting to be the original owners who were since deceased.
18. In his view, the said sale agreement and transfers documents are therefore forgeries as they were never executed by the persons whose names appear as they were since deceased and pursuant thereto, the applicant was then jointly charged with others including one **William Kamau Gichatha** who is the fourth accused in the pending criminal case.
19. Upon completion of investigations that file was forwarded to the 5th respondent who upon scrutiny of the evidence gathered advised that charges be preferred against the applicant among others. According to him, the 5th Respondent is constitutionally mandated to institute and undertake criminal proceedings against any person before any court and that investigations and subsequent charges of the applicant jointly with others has been done in good faith relying on the sufficiency of evidence gathered.

Interested Party's Case

20. In response to the Motion, the interested party, **Nelius Wanjiku Gichatha**, filed her own Motion dated 26th August 2013 seeking that the leave granted to the applicant herein to apply for judicial review orders be set aside and/or varied and the application for leave be dismissed. This application was however directed by the Court to be deemed to be an opposition to the applicant's Motion.
21. In support of the interested party's application, the interested party relied on her affidavit sworn on 26th August, 2013. According to her, she is the complainant in the Criminal Case. According to

- her the applicant's application in which leave was granted to commence these proceedings was incompetent, defective and should not have been allowed. To her the said application ought to have been brought in the name of the applicant rather than in the name of the Attorney General. Further no leave was actually sought but rather what were sought were substantive orders.
22. It was further deposed that the said criminal case is based on alleged fraudulent acts of the applicant with others which acts culminated into the sale and transfer of LR Nos. 209/136/128 and 209/136/129 and not succession matters as alleged by the applicant. According to her the Office of the Director of Public Prosecution is constitutionally mandated to investigate any criminal activities without any interference. Due to the said fraudulent acts on the part of the applicant, the interested party averred that herself and other beneficiaries are the ones who have suffered irreparable loss and not the applicant. It was therefore her contention that the criminal case has not been accentuated by any malice but rather her respect for the rule of law hence the applicant should not be allowed to circumvent the rule of law by rushing to court in the name of seeking judicial review proceedings and hence it is only fair and just that the said proceedings proceed as the applicant will be afforded the right to defend himself.
23. It was contended that the applicant suppressed material facts from the court for his own selfish means.
24. In her replying affidavit, the interested party deposed she is a daughter of the late **Githindi Gichatha** whose estate is subject of the subject criminal proceedings and in her view, the ex-parte Applicant is being economical with the truth by stating that he was approached by representatives for legal advice on the disposal of the properties as he does not state which representatives and what form of documentation made them representatives. Whereas the applicant alleges that the Sale of the properties would cost KSh.50 million, the annexure to the verifying affidavit is clear that the property was to be sold for KSh.52 Million. The interested party however averred that she never consented to the sale of the properties and have never been a client of the firm of **Masore Nyangao & Co. Advocates** and is hence not privy to any correspondences that may have been exchanged amongst advocates prior to the selling of the properties.
25. According to her, the Agreement of Sale dated 28th January, 2010 was not executed and duly signed by the vendors' representatives, and the same is in fact subject to the subject criminal proceedings due to forgery of amongst others, her late father's signature. In her view the applicant's affidavit is contradictory on the aspect of her consent to the sale of the properties.
26. In the interested party's opinion, one does not require to hold a Grant of Letters of Administration prior to making a formal complaint of criminal activities to the requisite institutions. Whereas the ex-parte Applicant would like this Honourable Court to believe that this matter solely falls under the ambit of the laws of succession, in real sense the alleged forgeries are the cause of the criminal case against him.
27. According to her, the ex-parte Applicant has not met the threshold for commencing an application for judicial review. With respect to the supplementary affidavit, the interested party contended that the same is filled with lies and it should be noted that he is also a co-accused in the criminal matter. The said affidavit, she further deposed introduced matters not subject to the judicial review proceedings herein or the criminal proceedings that the Applicant seeks to stop namely **HCCC 445/2006 Hannah Njeri vs. William Kamau Gichatha & ano.** and further she is not party to the said proceedings referred to therein. According to her, the criminal proceedings deal with the forgery and fraudulent disposal of the properties yet the issues introduced in the said Supplementary Affidavit are not in any way related to the matters before this Honourable Court and it is only intended to divert the court's attention from the real issues. According to her there is no evidence to support the matters deposed to in the said affidavit which matters she expressly denied.

Applicant's Submissions

28. On behalf of the Applicant it was submitted that the applicant is not asking the Court to usurp the powers of the Respondents but is challenging the decision making process which challenge is founded on the considered opinion that the decision is wrong, capricious and will lead to an abuse of the due process of the law. It was submitted that since the complainant is not a joint owner of the parcels of land the subject of the criminal case, she has no locus standi to bring forth the criminal

- proceedings.
29. It was further submitted that from the facts of the case the matter in issue is in respect to distribution of the proceeds of the sale rather than forgery. According to the applicant the Respondents did not act fairly in arriving at their decision to institute criminal proceedings against the Applicant and further failed to appreciate relevant material information/facts before proceeding to institute the said criminal proceedings which had they considered they would not have caused the applicant to be charged. In the applicant's view, the decision to charge him was made in a capricious and arbitrary manner with the sole intention of assisting the complainant in humiliating, intimidating and or otherwise harass the Applicant, hence the decision to charge the applicant is biased, malicious and vindictive and based on personal interest with a view to further the complainant's agenda, a matter which the Court must censure since criminal prosecution should be aimed towards upholding and safeguarding public interest and justice based on grounds or suspicions within which a criminal prosecution can be conducted. In support of his submissions the applicant relied on Francis **Kirima M'ikunyua & Others vs. Director of Public Prosecutions & Others Petition No. 461 of 2011**, **Saina Vincent Kibiego vs. The Attorney General Mombasa Misc. Appl. No. 8 of 1997**, **Samson Sapei Ole Maita [2012] eKLR, Republic vs. Commissioner of Police ex parte Intercontinental Hotels Ltd and Republic vs. Director of Public Prosecutions & Others HC JR No. 15 of 2012**.

1st and 4th Respondents' Submissions

30. On behalf of the 1st and 4th Respondents it was submitted that under Articles 156(4)(b), 157(6) and 157(10) of the Constitution there is separation of powers in terms of performance of duties between the Attorney General and the Director of Public Prosecutions hence the 1st Respondent was wrongly sued since the Attorney General cannot be prohibited from doing that which he cannot do in law. Further the 5th Respondent cannot be stopped from enforcing the law against any person it is within its mandate to do so. It is further submitted that since under Article 160(1) of the Constitution the judiciary's independence in terms of adjudication is entrenched, the applicant is overstepping by seeking interference with those powers.
31. It was submitted that the competent court to determine the issue of forgery is the criminal court in criminal proceedings. It was further submitted that under Order 53 of the ***Civil Procedure Rules*** conservatory orders cannot issue. According to these respondents there is no evidence presented to warrant the grant of the judicial review orders sought.

5th Respondent's Submissions

32. On behalf of the 5th Respondent it was submitted that under Article 243 as read with Article 245 of the Constitution as well as section 24 of the ***National Police Service Act*** the National Police Service is empowered to maintain law and order, preserve peace, carry out investigations and apprehend criminals as well as to investigate any offence and enforce the law against persons in contravention thereof. The 5th Respondent on the other hand is empowered under Articles 157(4) and (5) to direct the Inspector General of the Service to investigate any information or allegation of criminal conduct. In this case, it was submitted that the applicant has failed to demonstrate that the respondent's decision to prosecute was motivated by something else other than the discharge of their constitutional mandate
33. It was submitted that the decision to prosecute the applicant is based on the investigations undertaken since under Article 157(10) of the Constitution the 5th Respondent does not require the consent and is not under the direction or control of any person or authority in exercising his prosecutorial functions. In support of the submissions the 5th Respondent relied on **Beatrice Ngonyo Kamau and 2 Others vs. Commissioner of Police and Others Petition No. 251 of 2012**, **Paul Nganga Nyaga & 2 Others vs. Attorney General & 2 Others Petition No. 518 of 2012**, **Francis Mbugua vs. Commissioner of Police and 2 Others Petition No. 79 of 2012** and **Michael Monari and Another vs. The Commissioner of Police & Another Misc. Appl. No. 68 of 2011.**, hi
34. Based on **Kenya National Examinations Council vs. Republic Civil Appeal No. 266 of 1996**, it

was submitted that the 5th Respondent acted within his constitutional mandate in preferring charges against the applicant based on validly gathered evidence disclosing the commission of an offence of forgery which can only be tested by a Court vested with the matter which Court will test the weight of the evidence or consider whether or not a criminal case has been disclosed hence the Respondents should be accorded a fair chance of presenting their evidence before the trial court for determination.

Interested Party's Submissions

35. On behalf of the interested party it was submitted that contrary to the requirements of Order 53 rule 1 of the **Civil Procedure Rules**, the applicant did not seek leave to apply for judicial review but sought substantive orders instead. It was submitted that leave was granted by the Court despite the fact that it was never sought. It was further submitted that the applicant did not cite the provisions under which it was seeking the judicial review orders. It was further submitted that the orders sought in the statement of fact vary from those sought in the Notice of Motion so that even if leave had been granted the Notice of Motion would still be defective. It was further submitted that once leave is granted the substantive application can only be brought in the name of the Republic and not in the name of the Attorney General as was done in these proceedings.
36. It was further submitted that the applicant has not shown how the sale the subject of the criminal proceedings was above board hence he cannot claim that there has been abuse of power in order to justify the orders sought. It was further submitted that the applicant has not proved the grounds which merit the grant of the judicial review orders sought.
37. According to the 5th Respondent, since the applicant has been charged with forgery, it reeks of mischief for the Applicant to purport to state that forgery should be dealt with under the **Law of Succession Act**, Cap 161 Laws of Kenya. It was submitted that it would be upon the applicant to explain to the Court how the interested party's father who died in 2002 was able to consent to the sale of the suit properties in the year 2010.

Determination

38. The first issue for determination in this application is whether the application before me is competent.
39. First it was contended that the application is incompetent on the ground that the applicant did not apply for leave but applied for substantive orders instead hence no leave was granted. I have perused the Chamber Summons dated 1st May, 2013 and it is clear that the applicant's application as drawn was expressed to be seeking substantive orders rather than leave to apply for the same. Order 53 rule 1(1) and (2) of the **Civil Procedure Rules** provides:

(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

(2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.

40. On 16th May, 2013, **Korir, J** granted to the applicant leave to apply for judicial review proceedings. A reading of the provision cited hereinabove, in my view, stresses the need for leave to be granted before the applicant commenced judicial review proceedings proper. Whereas, I am of the view that the application ought to specify that what is being sought is an application for leave as opposed to substantive orders at that stage, where the Court grants leave and not the said substantive orders at that stage, the inadvertence in seeking the latter at that stage in my view ought pursuant to the provisions of Article 159(2)(d) of the Constitution to have been cured by the Court on own motion. It is not contended that the Court on its own motion cannot deem an improperly drawn application as properly drawn by granting the orders that ought to be granted. In my view and it has been held that court sits to administer justice, and not to supervise a game of

forensic dialectics and that the court exists for the purpose of deciding the rights of the parties and not imposing discipline. See **Philip Chemwolo & Another vs. Augustine Kubende [1986] KLR 492; (1982-88) KAR 103.**

41. Therefore as the Court duly granted leave, the provisions of Order 53 rule 1 was in my view substantially complied with. However, the Court would be properly entitled to take into account such careless drafting of applications when it comes to the issue of costs.
42. The second issue was that the orders sought in the statement are at variance with the orders sought in the substantive motion. Order 53 rule 4(1) of the said Rules provides:

Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.

43. In the statement which was filed herein the applicant indicated that the relief it was intending to seek were:

1. **That the Honourable court be pleased to bring this court for purposes of being quashed the decision and/or directive by the 3rd Respondent's servant and/or agents and/or any other person acting on his behest made on or about 3rd May 2013 to prohibit the 3rd Respondent and all the Respondents to institute and/or continue with criminal proceedings against the subject being criminal case No. 595 of 2013 pending at the Chief Magistrate's court Milimani Nairobi.**
2. **THAT the Honourable court be further pleased to issue Orders of Prohibition directed against the 4th Respondent prohibiting the 5th Respondent or any other judicial officer acting with the authority or on behalf of the Chief Magistrate from further proceeding with the hearing and/or conducting any other consequent proceedings in Criminal Case No. 595 of 2013 pending the full hearing and determination of the application or the further orders of the court.**
3. **THAT pending the full hearing and determination of the application, this Honourable Court be pleased to issue Conservatory Orders, stopping any proceedings in Criminal Case No. 595 of 2013 against the subject and pending before the Chief Magistrate Milimani court (Nairobi) pending the full hearing and determination**

44. First and foremost, it can be clearly seen that apart from the first relief, the other two reliefs were indicated to be sought pending the application or further orders. It is therefore clear that the only prayer which could competently form the subject of the Notice of Motion was the first relief.

45. Whereas it is clear that Motion herein is not an epitome of impeccable, elegant or paragon drafting in that the prayers sought in the Motion are not exactly in the same terms as the aforesaid relief it is clear that in substance the applicant is seeking to quash the Respondents' and prohibit them instituting or continuing with criminal proceedings against the him and it is clear the proceedings in question are in respect of criminal case No. 595 of 2013 pending at the Chief Magistrate's court Milimani Nairobi. Accordingly it is my view that though the Motion was with due respect, drafted in a rather sloppy manner and could have been better drafted, I am not prepared to dismiss the application solely on that ground.

46. It was further contended that there is no applicant before the Court as the Application is expressed to be brought by the Attorney General. At this stage it is important to revisit the manner in which both application for leave and the substantive application are to be intitled.

47. The intitlement of an application for leave was dealt with by **Maraga, J** (as he then was) in **Republic vs. Minister for Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others Mombasa HCMCA No. 617 of 2003 [2006] 1 KLR (E&L) 563**, where he held that an application for leave ought to be intitled as hereunder:

In the Matter of An Application by (the applicants for leave to apply for orders of certiorari and prohibition

And

In the Matter of Kenya Ports Authority Act

And

In the Matter of the National Environmental Management and Co-ordination Act 1999.

48. This was in line with the decision in **Farmers Bus Service and Others vs. Transport Licensing Appeal Tribunal Civil Appeal No. 63 of 1959 [1959] EA 779** where the East African Court of Appeal held that the ex parte application for leave ought to have been intitled:

**“In the matter of an application by (applicants) for leave to apply for an order of Certiorari
and**

**In the matter of Appeals Nos. 11 to 16 inclusive, 30, 32-35 inclusive, 37, 39, 41-43 inclusive,
all of 1958, of the Transport Licensing Appeal Tribunal.”**

49. With respect to the substantive Motion, it was held in **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486** as follows:

“Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intitled and accordingly, the orders of *Certiorari*, *Mandamus* or *Prohibition* are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for *Mandamus* is: -

“Republic.....applicant

V

THE ELECTORAL COMMISSION OF KENYA.....RESPONDENT.

EX PARTE

JOTHAM MULATI WELAMONDI”

50. The rationale for this was given in **Mohamed Ahmed vs. R [1957] EA 523** where it was held:

“This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners’ offices and in some registries of the High Court. The appellant’s advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intitled and served accordingly. The Crown cannot be both applicant and respondent in the same matter”.

51. Nevertheless, in **Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** the Court of Appeal stated:

“Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are

curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court”.

- 52.I, however, must warn the litigants that the failure by a party to properly intitle the proceedings may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs since it must be remembered that judicial review proceedings are special proceedings which are neither criminal nor civil. Proper intitulement of applications both for leave and the substantive Motion not helps in minimizing confusion at the appellate level, but is a reflection of the fact that judicial review proceedings are in substance commenced so as to enable parties seek and obtain orders which are not ordinarily available in the usual civil proceedings.
- 53.In the circumstances of this case I am not prepared to dismiss the application on the ground of improper intitulement of the application.
- 54.That now brings me to the merits of the application. t is trite that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution. 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 by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, 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 applicant 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. Section 193A of the ***Criminal Procedure Code*** on this issue provides:

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

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

“While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court. This is case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations”

- 56.Therefore, 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).

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

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

58. 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.”

59. 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 the 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 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 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.”

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

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

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

61. I also agree 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”.

62. 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”.

63. It is therefore clear that whereas the discretion given to the 3rd respondent 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.

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

65. Therefore the determination of this case must be seen in light of the foregoing decisions. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the DPP

- to investigate and prosecute ought to be interfered with.
66. In this case it is the applicant's case that the complainant in the criminal proceedings has no locus standi to lodge a complaint in respect thereof since she is not the registered proprietor of the suit parcels of land. In this application, the Court cannot decide with finality whether or not the criminal case is bound to fail on that basis. However, if the evidence which the prosecution intend to call even if true would not constitute an offence there would be no point in allowing the same to continue. Prima facie a criminal offence is an offence against the State and the "complaint" is technically just one of the witnesses. Without finally deciding, there is no requirement that a person who is aware that a crime has been committed or is about to be committed cannot file a complaint with the police for investigations. Whether or not the evidence gathered for the complaint would be sufficient to support a conviction against the applicant is another matter altogether and is a matter which only the trial Court is properly placed to determine.
67. In this case, the applicant's position is that he was simply an advocate who was instructed in the transaction the subject of the criminal case. Where the prosecution's only case against an advocate is that the advocate acted in a transaction the subject of criminal complaint, the Court may well be entitled to halt such proceedings. In this case, it is alleged that the sale transaction which was entered into took place long after the registered proprietors of the suit parcels were dead. Notwithstanding that the documents relating to the sale purportedly indicated that their signatures were witnessed. If this was the position, it may well be true that there could have been a reason to suppose that an offence might have been committed to justify investigations. As to whether the offence of forging a title deed can succeed in light of the facts is something that the trial Court would be better placed to determine. It may well be that the applicant was not aware of the death of the registered proprietors of the suit parcels of land but that is a matter which this Court cannot determine in these proceedings.
68. It was further contended that the dispute herein is purely a matter of distribution of the estate of the deceased. Based on the material before me, I am however unable to, make that determination. The allegations made may, subject to evidence, well found a case for intermeddling with the estate of deceased persons which is a criminal offence under section 45 of the **Law of Succession Act** though I cannot say with certainty that this is the case. In other words I am not satisfied that the allegations giving rise to the criminal proceedings are matters which purely fall within the **Law of Succession Act** and not any criminal offence.
69. It was alleged that the institution of the criminal proceedings was conducted in a capricious and arbitrary manner with the sole intention of assisting the complainant in humiliating, intimidating and or otherwise harass the Applicant, hence the decision to charge the applicant is biased, malicious and vindictive and based on personal interest with a view to further the complainant's agenda. I regret to say that the applicant did not elaborate on these allegations. In my view even in cases where it is shown that the prosecution is partly motivated by malice or other extraneous considerations unless it is shown that the predominant motive for preferring charges is informed by such malicious or extraneous matters, the Court ought not to interfere if apart from such motives the facts of the case justified the course taken. In other words malice ought to be the driving force behind the institution of the criminal process and not just one of the factors.
70. The applicant extensively from the law on partnership and ownership of land in attempt to show that the criminal charges cannot be successfully prosecuted. Whereas that may be so and the applicant may well prove at the trial that the he is after all innocent, it is not for this court to consider the strength of the prosecution case vis-à-vis the defence and make a determination as to which one has more weight. As opposed to where the prosecution has no evidence at all the court will not halt a prosecution simply because the court is of the view that the evidence would not in all probability lead to a conviction. To do that would, as I have stated hereinabove, amount to this court in a judicial review proceedings stepping into the shoes of the trial court and usurping the powers of the trial court.
71. Similarly, it is not for this Court to stop the DPP in his tracks simply because the Court believes that the DPP ought to have done better. The constitutional discretion given to the DPP ought not to be lightly interfered with especially if on the evidence in his possession if true may well sustain a prosecution. Trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on his defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of an

appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words I am not satisfied based on the material before me that the applicant will not receive a fair trial before the trial court more so as no allegations are made against the 5th respondent towards that direction. Therefore the mere insufficiency of evidence does not in my considered view justify the halting of a criminal trial.

72. In these types of proceedings the Court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings. As judicial review proceedings are concerned with the process rather than merits of the challenged decision or proceedings the court is not entitled to make definitive findings on matters which go to the merit of the impugned proceedings.

73. In the premises I am not satisfied that this is a proper case in which the court ought to bring the criminal proceedings to a halt. The applicant will be afforded an opportunity to defend himself, cross-examine witnesses and adduce evidence in support of his case and that in my view is the proper course to take in the circumstances of this case.

Order

74. In the result the Notice of Motion dated 20th May, 2013 fails and is dismissed with costs to the Respondents and Interested Parties.

Dated at Nairobi this 4th day of June 2014

G V ODUNGA

JUDGE

Delivered in the absence of the parties

Cc Kevin