Dande & 3 others v Director of Public Prosecutions & 2 others (Civil Appeal 378 of 2018) [2022] KECA 102 (KLR) (4 February 2022) (Judgment)

Neutral citation: [2022] KECA 102 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 378 OF 2018

MSA MAKHANDIA, M NGUGI & P NYAMWEYA, JJA

FEBRUARY 4, 2022

BETWEEN

HENRY HAROLD DAYAN DANDE .... 1ST APPELLANT

ELIZABETH NAILANTEI NKUKUU .... 2ND APPELLANT

PATRICIA NJERI WANJAMA .... 3RD APPELLANT

SHIV ANOOP ARORA .... 4TH APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS .... 1ST RESPONDENT

BRITISH AMERICAN ASSET MANAGERS LIMITED .... 2ND RESPONDENT

CHIEF MAGISTRATE'S COURT AT NAIROBI .... 3RD RESPONDENT

(Being an appeal against the judgment and decree of the High Court at Nairobi (Mativo, J.) dated 11th September, 2021in Constitutional & Judicial Review Cause No. 8 of 2017)

JUDGMENT

1. Pursuant to the leave sought and obtained by the appellants from the High Court of Kenya at Nairobi (Aburili J) to commence judicial Review proceedings on 1st February 2017, the appellants moved the trial court by way of a notice of motion dated 3rd February 2017 seeking orders of: certiorari to quash the decision of the Director of Public Prosecutions "DPP" made on about 4th November 2016 to institute criminal proceedings against them in criminal case number 1735 of 2016 before the chief magistrate's court at Nairobi " the criminal case"; an order of certiorari to quash the proceedings in the criminal case; an order of prohibition to prohibit the chief Magistrate's court from hearing and determining the criminal case and costs of the application.

2. The grounds in support of the application were that: despite an order made by the court on 1st November 2016, granting stay of any arrest or prosecution of the appellants in Judicial review application number 435 of 2015, the 1st respondent had knowingly and willfully violated and or disobeyed or disregarded the said orders by instituting the criminal case on the 4th November 2016 before the Chief Magistrate Court at Nairobi against them: the said criminal case relate to two counts of theft by servant against the appellants for the sums of Kshs. 1,161,465,388 and Kshs. 10,132,368.50/= respectively being the property of the 3rd respondent, the appellants' previous employer; the sums in respect to which the said charges relate were the subject matter of the claims in two civil suits, HCCC numbers, 352 and 353 of 2014 lodged by the 3rd respondent which suits had been compromised, settled and withdrawn; none of the appellants benefited from the impugned sums and that no loss was suffered by the 3rd respondent as it recovered the full amounts from Acorn Group Limited, its affiliates as well as the special purpose vehicles in which the money had been invested by the appellants: the reasons for their prosecution was therefore not vindication of the rule of law but was instigated by the 3rd respondent for the purposes of eliminating them from business competition and was a contravention of article 157 (10) of the *Constitution*, as there was no reasonable factual basis upon which the 1st respondent could conclude that charges of theft by servant could be instituted against them, and that no reasonable decision maker faced with similar circumstances would have arrived at the decision to prosecute the appellants. As a result of the foregoing, their prosecution was an abuse of power and unreasonable.

3. In support of the motion, the 1st appellant in various affidavits sworn on his own behalf and on behalf of the other appellants reiterated and expounded on the above grounds. Suffice to add that they were former employees of the 3rd respondent. That the 3rd respondent, being unhappy with their mass resignations from its employment, looked for ways to ruin their blossoming careers and growing business elsewhere. First, it filed various suits against them claiming that they had conspired and transferred colossal sums of money on account of investing in real estate as part of a partnership between the 3rd respondent and Acorn Group Ltd which was false. Further, that the 3rd respondent lodged various complaints to their professional bodies. For instance, the complaint against the 3rd appellant was lodged with the Disciplinary Committee of the Law Society of Kenya; the 2nd and 3rd appellants were also reported to the Certified Financial Analyst Institute-CFA, the 2nd appellant was further reported to the institute of Certified Public Accountants of Kenya (ICPAK). They thereafter successfully sought for judicial review orders in the nature of a prohibition, mandamus and certiorari against the Inspector General of the National Police Service (IG) and Directorate of Criminal Investigations (DCI) in Judicial Review Aapplication Number 435 of 2014, resulting in them being prohibited from arresting the appellants pending the decision by the 1st respondent on whether or not to prefer charges against them. The aforesaid notwithstanding, the 1st respondent went ahead and instituted the criminal case against them. That the sums in respect of which the charges were laid were the subject of the claims in the civil suits aforesaid which suits had been withdrawn following an out of court settlement. That the 1st respondent did not subject the investigations to an independent analysis and that it never demonstrated that the transfer of funds led to any loss, nor had it demonstrated that the transfer of the funds were illegal, fraudulent and unauthorized. The appellants further deposed that the decision by the 1st respondent to institute criminal proceedings against them was pursuant to a story that had been published in the Standard newspaper on 30th October 2016 titled, "Britam ex-staff to face 1bn theft suit" and because of this the 3rd respondent authorized their prosecution; on 6th November 2016, the same newspaper further published a story to the effect that the DCI had sought directions from the 1st respondent on whether to press charges against them while noting that the civil suits had been settled; that there was no reasonable basis to conclude that a criminal offence had been

committed; that all the payments were made in accordance with the governance process which included various board approvals; that there was no loss of any money as alleged; all the audits disclosed gaps in documentation clearly showing there was no fraud and therefore the decision to institute criminal proceedings was irrational and the same should be quashed.

4. The 1st respondent opposed the application through grounds of opposition and replying affidavits sworn by Gitonga Muranga, a Principal Prosecution Counsel on 24th January and14th February 2017 respectively. With regard to the grounds of opposition, the 1st respondent argued that the application was an abuse of court process as it was res judicata since the issues raised were conclusively determined in Judicial Review number 435 of 2014; that there was a pending appeal in the Court of Appeal as a result; that the 1st respondent had the mandate to institute criminal cases; the existence of civil proceedings was not a bar to the institution of criminal prosecution and that the appellants had not demonstrated that it acted without or in excess of its powers.

5. In the replying affidavit it was deposed in summary that; on 16th October 2014, the acting Chief Executive Officer of the 3rd respondent made a complaint to the DCI alleging that a sum of Ksh.10,132,368.50 and Ksh.1,161,465,388 respectively had been fraudulently misappropriated by the appellants who were its employees between 1st September 2014 and 31st July 2014 from its Real Estate Fund; investigations were launched by the DCI and upon conclusion, the file was forwarded to the 1st respondent for purposes of decision making as to whether or not the appellants should be prosecuted; that from the investigations it was noted that instructions for payment of the funds was generated by the 4th appellant, reviewed by the 2nd appellant and approved by the 1st appellant; these monies were thereafter disbursed into various unauthorized accounts. That specimen signatures confirmed that they belonged to the appellants and further that the appellants thereafter immediately resigned from the employment of the 3rd respondent in a calculated move to frustrate investigations. In addition, the investigations revealed that the 3rd respondent had no interest in the accounts where the funds in question were credited or disbursed; the delay in making the decision by the 1st respondent whether or not to charge the appellants was due to stay granted in the Judicial Review Application No. 435 of 2014. It was not until 14th September 2016 when the said application was dismissed that upon reviewing the file, the 1st respondent filed the case against the appellants. The decision to charge the appellants was not geared towards settling scores; the appellants had not demonstrated that they would be prejudiced in the event the prosecution proceeded; the 1st respondent did not require the consent of any person to commence a case against any party; the appellants had not demonstrated that the 1st respondent was acting beyond the power conferred to it by the law, more so the Constitution. The Learned Prosecution Counsel also maintained that the existence of any civil proceedings relating to the same matter was not a bar to the institution of criminal proceedings, and in any event, since the appellants had stated that they had settled the civil suits, it cannot be said that the criminal case was geared towards forcing them into a settlement of the said cases or for other ulterior motives.

6. The 2nd respondents filed its grounds of opposition and stated that it had jurisdiction and competence to hear and determine the case before it; there was no allegation of procedural or substantive impropriety on its part and that there is no allegation of perceived bias against it. It filed no replying affidavit though.

7. The 3rd respondent filed its response through a replying affidavit sworn by Jude Brian Anyiko Oluoch, the Group Investment Officer. He deposed that the 3rd respondent was the complainant in the criminal case whilethe appellants were its employees and they had resigned on diverse dates between August and September 2014. That prior to their resignations, the 1st appellant was its Managing Director, while

the 2nd appellant was the Senior Portfolio Manager, the 3rd appellant was the Head of Legal (Services?) and Assistant Company Secretary and the 4th appellant was the investment analyst.

8. It was deposed further that during their employment, the appellants amongst themselves and with third parties engaged in conspiracy to carry out activities which had not been approved by the 3rd respondent. Further that through subsequent investigations undertaken by the DCI, it was discovered that the appellants were engaged in fraudulent, irregular and unauthorized withdrawal of funds held or managed by the 3rd respondent and fraudulent, irregular, unauthorized and clandestine execution of contracts that were adverse to the interests of the 3rd respondent. Mr. Oluoch further deposed that on diverse dates, the appellants fraudulently and without authority instructed a company known as Acorn Group Ltd to transfer funds owned, entrusted to and controlled by the 3rd respondent to various limited liability partnerships owned and controlled by Acorn Properties Limited, prompting the 3rd respondent and its related affiliates to file civil suits in October 2014 against the appellants and Acorn Group together with Acorn's related entities seeking restitution of the said funds, properties and or other benefits by which each and all parties named in the suits as defendants had been unjustly enriched at the expense of the 3rd respondent and its affiliates. The funds being sought to be recovered had been transferred to Acorn Properties Ltd, Acorn Investments Ltd and Acorn Group Ltd.

9. It was his further deposition that the Acorn companies aforesaid entered into an out of court settlement with the 3rd respondent whereupon the Acorn companies agreed to re-transfer the funds to the 3rd respondent and the suits were accordingly compromised and marked as settled. Mr. Oluoch went on to depose that the acts of the appellants in question were criminal in nature, hence a formal complaint was lodged by the 3rd respondent and upon investigations by the DCI, it was ascertained that sufficient evidence existed to justify the appellants' prosecution and accordingly, the charges were preferred against them. The 3rd respondent did not exert pressure on the 1st respondent to prosecute the appellants and the restitution of the funds is not a bar to the prosecution of the appellants. As to whether or not there is a basis for the said prosecution, Mr. Oluoch deposed that the trial court was best suited to determine the said issue and the 1st respondent had a constitutional mandate to undertake criminal proceedings against anybody. Lastly he deposed that the appellants were simply seeking immunity from criminal process and that since they had lodged an appeal against the decision in Judicial Review Number 435 of 2014, this suit was an abuse of the court process.

10. In a judgment delivered on 11th September 2018, the court held as follows:

> " However as stated above, the illegality of the impugned decision has not been established nor has it been established that the respondents acted illegally or in excess of their powers nor has the decision to prosecute been shown to be illegal, irrational or a nullity. Accordingly, I hereby dismiss the applicants notice of motion dated 3rd February 2017 with no order as to costs and direct that Nairobi Chief Magistrate's criminal case number 1735 of 2016 proceeds to hearing and determination."

11. Aggrieved by the decision, the appellants filed the instant appeal citing the following grounds; that the trial court erred in: dismissing the appellants notice of motion; holding that the application was an abuse of the court process; determining a matter on which it was not addressed on; holding that the High Court was not aware of the stay-order; holding that the said application and stay-application sought the same reliefs; finding and holding that the appellants were playing lottery with the judicial process; essentially sitting on an appeal against the decision of Aburili J. a judge of concurrent jurisdiction; granting; adopting unduly restrictive, indeed almost impossible test as to the circumstances under which the High Court may interfere with the prosecutorial powers of the 1st

respondent; not following and applying the binding decision of this court in *Diamond Hasham Lalji & 7 Others v. Attorney General & 4 Others, Civil Appeal No. 274 of 2014(UR)*: failing to address the appellants contention that the criminal proceedings were unlawful as they had been filed in violation of a court order, failing to consider all the facts as well as evidence upon which the appellants contended that the prosecution was being mounted without any factual foundation; failing to find and hold that there was no or no reasonable factual basis for their prosecution; failing to consider and evaluate the actual grounds upon which the appellants contended that the decision to prosecute them was not independent; failing to find and hold that the 1st respondent had failed to place any or any sufficient material to show that its decision to charge them was independent and not influenced by any extraneous factors; directing that

> "Nairobi Chief Magistrates Criminal Case No. 1735 of 2016 proceeds to hearing and determination" when the relief was not available nor was it sought and the court addressed on it."

12. The appeal was canvassed by way of written submissions with limited oral highlights. The appellants submitted that the High Court in its judgment at paragraph 31 stated as follows:

> "I also find that pursuing two identical applications in two separate courts seeking substantially identical reliefs constitute abuse of court process."

13. The appellants' contention was that the court had erred in finding that the issues before it were res judicata on account of a similar decision heaving been made in Judicial Review Number 435 of 2014 yet his decision did not involve the 1st respondent.That though the court declined to grant the reliefs sought, it nonetheless ordered the IG not to harass or arrest the appellants pending the decision by the 1st respondent whether to charge them or not. It was further submitted that the trial court had already decided on the issue of res judicata in Judicial Review proceedings leading to the instant appeal when at the leave stage Aburili J held as follows:

> "The learned judge was clear that no decision had been taken by the applicants hence some of the issues raised in the proceedings were speculative. In the present case, it is not denied that the director of public prosecutions has now taken an administrative decision as contemplated in section 2 of the *Fair Administrative Action Act, 2015*, to prefer charges against the applicants and even drawn a charge sheet which is due for plea on 2nd February 2017. It is also not in dispute that the director of public prosecutions was never a party to the JR 435/2014 and therefore there is no way these proceedings which quash the decision of the director of public prosecutions to prosecute the applicants and to stop the chief magistrates court from proceedings with the impending trial can be res judicata JR 435. 2014."

14. That the Court went ahead and made a determination on abuse of the court process, an issue not raised by any of the parties, but had already been addressed as above. If the court was inclined to make such a determination, then parties should have been invited to address it on the issue. The case of *Independent Electoral and Boundaries Commission & Another v. Stephen Mutinda Mule & 3 Others [2014] eKLR* was cited in support of this proposition.

15. In addition to the above, the trial court was faulted for holding that there was abuse of court process in his judgment when the issue had already been determined. The appellants argued that the trial court was in the circumstances sitting on an appeal over a decision of a judge of co-ordinate jurisdiction when it failed to stop the investigations by the IG and DCI, yet in Judicial Review Number 435 of 2014, the court had held that the 1st respondent was not a party to the proceedings, the conduct of the IG and

DCI was condemned and the reliefs asked being certiorari, mandamus and prohibition were declined. To buttress this argument, we were referred to the decision in *Bellevue Development Co. Ltd v. Francis Gikonyo & 7 Others [2018] eKLR* where this court held as follows:

> " I have no difficulty upholding the learned judge's holding that as a judge of the high court he had no jurisdiction to enquire into or review the propriety of the decisions of the judges, who were of concurrent jurisdiction as himself. In our system of courts, which is hierarchical in nature, judges of concurrent jurisdiction do not possess supervisory jurisdiction over each other..."

16. That the ruling by the trial court was clear in regard to the two judicial review proceedings; that is, Judicial Review Application Numbers 435 of 2014 and 8 of 2017 when it held that in Judicial Review Application Number 435 of 2014, the 1st respondent was not a party while the second judicial review application aforesaid, was as a result of the decision by the 1st respondent to charge the appellants and it could not in any way therefore be res judicata.

17. We were further urged to find favour with the appellants' arguments that it is the constitutional responsibility of the 2nd respondent to protect the rights of the accused and ensure that public authorities exercise their powers in accordance with the law. We were referred to the case of Diamond Hasham Lalji & Another v. A.G (supra) where this court held that the prosecutorial discretion of the 1st respondent was not absolute. Further, that the courts would interfere with such prosecutorial discretion if it is evident that the powers were being abused or are being used for ulterior motives, and this was such case.

18. It was the appellants' submissions that the trial court erred when it failed to question the 1st respondent's decision to prefer charges against them when there was an order of stay. That the trial court ought in the circumstances have declared their prosecution a nullity ab initio. The trial court was also criticised for failing to consider the facts and the evidence which the 1st respondent used to prefer charges against the appellants as the same could not sustain the charges. The appellants had established a prima facie case for lack of evidential foundation on the charges preferred against them which the court failed to consider. The 1st respondent's decision to prosecute them, it was submitted, was not independent since there was some interference with the decision by the 3rd respondent and the media. We were referred to the decision in *R. v. Commissioner for Co-operatives ex-parte Kirinyaga Tea Growers Co-operative Savings and Credit Society Ltd [1999] 1EA 245* and *The Commissioner of Police and Director of Criminal Investigations Department & Another v. Kenya Commercial Bank Ltd & 4 Others [2013] eKLR* to buttress these arguments. Lastly, it was submitted that the trial court erred when it directed that the criminal case does proceed to hearing yet there was no such prayer in the motion nor had parties addressed the trial court on it.

19. The 1st respondent in its submissions pointed out that there was no bar to the prosecution of the appellants. The 1st respondent was exercising its constitutional mandate pursuant to Article 157 of the Constitution when it preferred the charges against the appellants of stealing by servant contrary to section 281 of the *Penal Code*. That the criminal case was instituted on sound legal principles and that investigations were carried out by the DCI after the 3rd respondent lodged a complaint. Following thorough investigations, an offence of stealing by servant was disclosed, as a result of which the criminal case was preferred against the appellants. The 1st respondent had therefore acted in a reasonable manner to charge the appellants and it did not in any way violate the appellants' constitutional rights. The appellants had failed to demonstrate that the prosecution was mounted with an ulterior motive other than upholding the criminal justice system and was not meant to pressure the appellants to settle the

civil suits; in his decision the 1st respondent was only guided by the evidence gathered; the decision was not an abuse of the court process nor did it amount to harassment or contrary to public policy. Neither was it in contravention of the appellants' constitutional rights. In addition, it was submitted that the existence of the civil proceedings was not a bar to the institution of a criminal case against the appellants by the 1st respondent. Lastly, it was submitted that the 1st respondent did not violate any court order when it preferred charges against the appellants. That in Judicial Review Number 435 of 2014, the court had prohibited the IG and the DCI from arresting the appellants until the 1st respondent had made a decision on whether to charge them or not. The order therefore did not bar the 1st respondent from prosecuting the appellants. In any event, the order was clear that it would last for as long as the 1st respondent had not made a decision to prosecute them. Finally, the 1st respondent was not even a party to those proceedings.

20. Opposing the appeal, the 3rd respondent submitted that the appellants were its former employees who had conspired to carry out activities without its approval or authorization that caused it a loss of a total sum of Kshs. 11,293,833,888/=. On 16th October 2014, it lodged a complaint with the DCI and investigations commenced. In the meantime, it filed civil suits seeking restitution of the funds that had been dissipated as aforesaid. On the other hand, the appellants filed Judicial Review Application Number 435 of 2014 seeking an order to prohibit the DCI from arresting them or interfering with their property. However, the 3rd respondent was not made a party to the application. The relief sought was declined and the appellants lodged an appeal before this court and also sought a stay of execution of the judgment and decree which motion was dismissed on 20th December 2016. It was then that the 1st respondent made a decision to prosecute the appellants for the offence of stealing by servant. In a bid to stop this, the appellants filed a Judicial Review Application Number 8 of 2017, the subject of this appeal, which was dismissed and the court directed that the criminal case aforesaid proceeds to hearing. Thus the appellants' argument that the 1st respondent preferred charges against them in violation of a court order staying their prosecution had no legal basis at all. There was no order barring the 1st respondent from prosecuting the appellants and in any event it was not a party to those proceedings. To buttress this argument, we were referred to the case of *Ernest Orwa Mwai v. Abdul Rashid & Anor, Civil Appeal No. 39 of 1995 (UR)* in which it was held that a court order does not bind a non-party to the proceedings.

21. It was submitted that the trial court applied the correct principles in considering the decision of the 1st respondent to prefer the criminal case against the appellants. With regard to the appellants' argument that the trial court did not follow the principles laid down in Diamond Hasham Lalji & Another v. A.G & 4 Others (supra), to the effect that the prosecutorial powers of the 1st respondent arenot absolute and are limited by Article 157(11) of the Constitution which provides that the 1st respondent shall have regard to public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process in making his decision, it was submitted that the trial court's decision was consistent with the aforesaid principles. Further, that this court has held in several decisions that courts could only interfere with the exercise of the 1st respondent constitutional mandate sparingly. The court had observed. and rightly so, that it was up to the 1st respondent to determine whether the evidence was sufficient to justify the institution or continuation of a prosecution. The issue as to whether the investigations were lawfully conducted is an issue in Civil Appeal No. 246 of 2016 which is before this Court for determination. The 3rd respondent further referred us to section 193A of the Criminal Procedure Code which provides that a matter in issue in any criminal proceedings which is also an issue directly or substantially in any civil proceeding shall not be a ground for any stay, prohibition or delay of the criminal proceedings. This was in response to the appellants' argument that the civil suits had

been marked as settled and therefore the prosecution was unlawful by virtue of the funds in question having been recovered.

22. Lastly, it was submitted that the appellants' argument that the 1st respondent's decision to prosecute them was not independent was false. The appellants relied on newspaper reports for that assertion which was hearsay evidence and which cannot therefore support the allegation that the 1st respondent was pressured by the media expose to charge the appellants. For this proposition, we were urged to rely on the case of *IEBC v. National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR*. The 3rd respondent urged us to dismiss the appeal with costs to the respondents.

23. This is a first appeal and we have the duty to re-consider the evidence tendered in the trial court, re-evaluate it and draw our own conclusions. In *Gitobu Imanyara & 2 Others v. Attorney General [2016] eKLR*, this Court with regard to the foregoing observed thus:

> [A]n appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect"

24. We have considered the record of appeal, the oral and written submissions by counsel, the authorities cited and the law. In our view, all the grounds of appeal can be collapsed into one issue: whether the appellants were deserving of the prayers for certiorari and prohibition sought in their substantive motion.

25. The appellants argued that the trial court erred in determining a matter on which it was not addressed on nor canvassed by the parties. The issue in contention here is the trial court's determination that the appellants' Judicial Review Application was an abuse of the court process. What was sought in Judicial Review Application Number 435 of 2014 was for an order of prohibition, prohibiting the IG and the DCI from arresting or harassing or in any manner interfering with the liberty or property of the appellants and an order of mandamus compelling the IG and DCI to return forthwith the cellphones impounded from the appellants. Upon hearing the parties, the court (Odunga J.) held that:

> " To grant the orders sought in this application in my view would be both pre-emptive and presumptuous in light of the fact that the DPP's decision on review is still unknown. This court ordinarily does not interfere with the exercise of constitutional and statutory power of executive authorities unless there exist grounds for doing so. I am afraid that there are no sufficient material on the basis of which I can find that upon the completion of the review by the DPP the applicants will certainly be arraigned in court to face the various charges the subject of these proceedings."

26. The court then made the following orders: "in the premises whereas I decline to grant the orders in the manner sought by the applicants, I issue an order prohibiting the 1st and 2nd respondents from taking any action in the nature of criminal proceedings until the DPP makes a determination on the matter."

27. It was the trial court's reasoning that in the circumstances of this case, the proceedings before it was an abuse of the court process. It was the appellants' argument that this issue was not pleaded nor had it been addressed by the parties and therefore the trial court ought not have determined it. The appellants in Judicial Review Application Number 8 of 2017 leading to this appeal informed the court that they had filed a judicial review application number 435 of 2014 seeking the orders stated above, however the court upon hearing the parties declined to grant the orders sought. The respondents too intimated

to the court regarding the same judicial review application, and the fact that following its dismissal the appellants had moved to this court by way of an appeal, the appellants had similarly sought for stay of the criminal case pending the hearing and determination of the appellants intended appeal.

28. The assertion by the appellants would have stood scrutiny if none of the parties would had brought up the issue of the aforesaid Judicial Review application. As seen above the parties touched on them and it was therefore brought to the court's attention and the trial court could not have avoided commenting on it. We are fortified in this conclusion by the decision in the case of *G.K. Macharia & Anor v. Lucy N. Mungai [1995] eKLR*, in which this Court held that:

> "It is the duty of the court to frame issues as may be necessary for determining the matters in controversy between the parties. In this respect, a trial court may frame issues on a point that is not covered by the pleadings but arises from the facts stated by the parties or their advocates, and on which a decision is necessary in order to determine the dispute between the parties."

29 The parties themselves having raised the issue of the previous judicial review proceedings, it behooved the trial court to deal or at least comment on the issue. The trial court cannot therefore be faulted for holding that the proceedings before it were an abuse of the process of the court having regard to those previous proceedings.

30 The foregoing notwithstanding, the appellants also submitted that the 1st respondent disobeyed the order issued in Judicial Review Application Number 435 of 2014. When the 3rd respondent lodged a complaint with the DCI on the 16th October 2014 alleging irregular activities carried out by the appellants, the appellants felt threatened since the same was highlighted in the Standard newspaper. Fearing that they could be arrested they moved the High Court vide Judicial Review Application Number 435 of 2014. The court gave the order already alluded to elsewhere in this judgment. This is the order the appellants claim was disobeyed by the 1st respondent when it decided to charge them with two counts of theft by servant for the sums of Kshs. 1,161,465,388 and Kshs. 10,132,368.50 respectively. Of importance to note is that the judicial review application had been filed against the DCI and IG. The order implied that only the IG and DCI could not initiate any criminal case against the appellants until the 1st respondent made a decision. It is noteworthy that the order was never directed at the 1st respondent. Rather, it was directed at the IG and DCI. Further, the order was limited in its application. It remained in force for as long as the 1st respondent had not made up his mind whether or not to charge the appellants. Once he reached the decision either way, the order was rendered otiose. As it is apparent, the appellants were only charged after the 1st respondent had made a determination. It cannot therefore be said that the 1st respondent was bound by the order. In the premises we are satisfied that there was no order of stay by any court directed at the 1st respondent barring or prohibiting him from instituting a criminal case against the appellants as at the time he decided to charge them on 4th November 2016.

31. Turning to the question of whether the appellants sought the same reliefs in Judicial Review Application Numbers 435 of 2014 and 8 of 2017 and if so whether the doctrine of res judicata applied, we note that the appellants moved the court vide Judicial Review Application Number 8 of 2017 which is the basis of this appeal. At the stage of seeking leave to commence the said judicial review proceedings, the appellants sought for stay of the criminal case. before Aburili, J. That Aburili, J. upon hearing the parties, held that the dispute at hand was not res judicata as the 1st respondent at that time had not yet made a decision to charge the appellants and that the decision to charge the appellants was in any event made after Judicial Review Application Number 435 of 2014 was dismissed.

32. The doctrine of res judicata is provided for in section 7 of the *Civil Procedure Act*. It is in these terms:

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

33. As already stated, Judicial Review Application Number 435 of 2014 was dismissed but the respondents therein were barred from arresting the appellants until the 1st respondent made a determination on whether or not to charge them. Though the issues were the same in the two judicial review applications, in the former, the orders were directed at the IG and DCI not to arrest and prosecute the appellants until and unless the 1st respondent had made a determination to that effect. Thus the order was made was not directed at the 1st respondent. Indeed, the court declined to grant the reliefs sought for the reason that the appellants were being speculative as the 1st respondent had not made any decision to charge them. We thus find, just like the trial court did, that the doctrine of res judicata was inapplicable in the circumstances of the case.

34. On whether the trial court sat on an appeal over the decision by Aburili J, we reiterate that the question of res judicata was dealt with and determined in Judicial Review Application Number 435 of 2014 in which the court held that the 1st respondent had not made a decision to prosecute the appellants. However, in Judicial Review Application Number 8 of 2017, the decision had been made to charge them and in fact a charge sheet had been drawn and plea was to be taken on 2nd February 2017. The trial court in its judgment determined issues on whether the application was an abuse of the court process and whether the appellants had demonstrated any grounds to justify the orders sought. It is obvious that the issues canvassed in the two applications were not similar in any way. In the premises we are satisfied that the trial court did not sit on appeal over the decision of a Judge with concurrent jurisdiction.

35. The gist of this appeal really revolves around the exercise of powers bestowed on the 1st respondent by the Constitution and whether the trial court failed in its duty to protect the appellants from skewed and malicious prosecution. The question is simply this; did the 1st respondent act independently in instituting the criminal case against the appellants or was it orchestrated by ulterior motives? The 1st respondent is a constitutional organ in terms of article 157 of the Constitution. It has unfettered jurisdiction in the exercise of state powers of prosecution as follows:

> " (a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
>
> (b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
>
> (c) subject to clauses (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b)."

36. The above powers have however to be exercised with caution and circumspection. In this regard, article 157(11) of the constitution provides inter alia:

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

37. The appellants submitted that the 1st respondent's decision to charge them was not independent. That it's decision was influenced by the 3rd respondent and pressure from the media. This allegation was denied by the respondents' in toto. The Supreme Court in *Cyrus Shakhalanga Khwa Jirongo v. Soy Developers Ltd & 9 Others [2021] eKLR* held as follows:

> " Although the DPP is thus not bound by any directions, control or recommendations made by any institution or body, being an independent public office, where it is shown that the expectations of Article 157(11) have not been met, then the High Court under Article 165(3)(d)(ii) can properly interrogate any question arising therefrom and make appropriate orders."

38. We find that even though the appellants were the former employees of the 3rd respondent, there is no evidence that it exerted pressure on the 1st respondent to press charges against them or that he did so due to pressure from external forces such as the media. Apart from making that bold assertion, the appellants provided no evidence to prove the allegation. It is not enough for a party to make wild allegations and leave it to court to surmise. Nor was there evidence that the 1st respondent instituted the criminal proceedings in a bid to pressurize the appellants to settle claims instituted against them by the 3rd respondent. The appellants have themselves indeed conceded that by the time the criminal case was being preferred against them, the civil suits had already been compromised.

39. Did the court err in not considering the factual grounds upon which the 1st respondent made the decision to commence the criminal case against the appellants? The appellants submitted that they did not derive any benefit from the funds involved, which in any event were recovered and therefore the 3rd respondent lost nothing to warrant their prosecution. In the circumstances they ought not to have been charged. The charges in the two counts against the appellant relate to the sums of Ksh.1,161,465,388 and Ksh.10,132,368.50/= respectively that were disbursed by the appellants without authority from the 3rd respondent. It is true that these amounts were the subject of various civil suits which have since been withdrawn after an out of court settlement was reached. The appellants urged that there was therefore no factual basis and or material evidence to sustain their prosecution. In a replying affidavit, the investigating officer from DCI, detailed the investigations he carried out and once satisfied that the evidence gathered disclosed an offence, the investigations file was forwarded to the 1st respondent to make a decision on whether or not to charge the appellants. The learned judge in his judgment held as follows on the issue:

> " Upon analyzing the material presented in this case, I find nothing to suggest that the DPP did not carefully analyze the evidence or acted carelessly or abused his powers. As stated earlier it is not the function of this court to weigh the veracity of the evidence. In my view, a prosecution should be instituted or continued if there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the accused. It has not been established that the facts presented in this case do not disclose an offence known to the law."

40. We do not think that the trial court erred in its decision when it stated as aforesaid in regard to the factual basis of the evidence that was gathered before charges were preferred against the appellants. Whether the disbursed amounts were fully recovered has nothing to do with the commission of the offence. Once the elements that constitute an offence are established by the evidence, it does not matter that after the commission of the offence, the amounts involved were recovered. However, that may be a consideration in mitigation in the event of a conviction and sentence. The appellants further submitted that the court failed to refer to the principles set out in Diamond Hasham Lalji & Another v. A.G & 4 Others (supra) regarding when the courts can interfere with the 1st respondent's constitutional power to prosecute. In the said case the court held that:

> "In considering the evidential test, the court should only be satisfied that the evidence collected by the investigative agency upon which DPP's decision is made establishes a prima facie case necessitating prosecution. At this stage, the courts should not hold a fully-fledged inquiry to find if evidence would end in conviction or acquittal. That is the function of the trial court. However, a proper scrutiny of facts and circumstances of the case are absolutely imperative. State of Maharashtra Ors v Arun Gulab Gawall & Ors – Supreme Court of India – Criminal Appeal No. 590 of 2007 para 18 and 24, Meixner & Another v Attorney General [2005] 2 KLR 189."

41. Considering the details in the replying affidavits aforesaid we do not agree with the appellants' assertion that there was no factual basis upon which they should have been prosecuted. The investigating officer had established that payments had been made by the appellants without the knowledge and consent of the 3rd respondent and deposited in various accounts that did not belong to or sanctioned by the 3rd respondent. The appellants indeed admitted that they authorized the remittances and had subsequently agreed to reimburse the amount in a bid to settle the dispute. Prima facie therefore, there was evidence of the commission of the offence. As to whether the evidence was sufficient to found a conviction is for the trial court. We must emphasize that prima facie evidence does not necessarily mean that it should lead to a conviction as contended by the appellants. The arguments by the appellants in that regard must therefore fail.

42. Turning to the question whether the civil proceedings could be a bar to criminal proceedings and if the court was right in ordering the criminal proceedings to proceed, the appellants argued that the 3rd respondent sued them in various civil suits which were later withdrawn when the parties reached an out of court settlement. It was their case that since the 3rd respondent had recovered all funds, then the criminal proceedings against them could not be undertaken and therefore the 3rd respondent's insistence on their prosecution was for ulterior motives.

43. Section 193A of the Civil Procedure Act provides that the fact that a matter is in issue in any criminal proceedings and is also directly or substantially in issue in any pending civil proceedings does not act as a bar to the commencement of criminal proceedings. The issue could not have been made more clear than this! Be that as it may, criminal proceedings do not have to be oppressive, vexatious and abuse of the court process or that which amounts to a breach of fundamental rights and freedoms of an accused. When this turns out to be the case then the High Court has the residual power to intervene and stop such criminal proceedings. However, this was not the case here. As correctly submitted by the respondents, the existence of a civil suit is not a bar to the commencement of the criminal proceedings against a party. Indeed, it does not constitute double jeopardy as the appellants seem to imply in their submissions. However, it may be desirable to put on hold criminal proceedings pending the determination of the civil case and once concluded depending on the outcome, the criminal case can proceed. This is what exactly happened here and the trial court cannot therefore be faulted in its

approach. No matter how serious the criminal charges may be, they should never be used to further ulterior motives and purposes. When a prosecution is not impartial but only intended to use the machinery of justice to cause an injustice to another party courts may come in handy. The appellants contend that the 3rd respondent's ulterior motive in preferring charges against them was to frustrate them since they had set up business ventures in competiton with the 3rd respondent. From the record, the civil cases were either withdrawn and or settled at the instigation of the appellants. The appellants have not satisfied us that the criminal proceedings were being used to frustrate them or that they were for ulterior purposes. This court in *Commissioner of Police and Director of Criminal Investigations Department v. Kenya Commercial Bank [2013] eKLR*, held as follows:

> "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 that power must be exercised responsibly, in accordance with the laws of the land and in good faith."

44. It is not enough to simply state, as the appellants do, that because there was in existence a civil dispute or suit, the entire criminal proceedings commenced on the same set of facts was an abuse of the criminal process or was calculated to victimize them. The appellant had to show that the process is being abused or misused. Like the trial court, we are persuaded that the commencement of the criminal case against the appellants was not in any way in bad faith, and therefore the civil cases could not impact on the criminal case against them. The trial court was also right to order that the pending criminal case to proceed to hearing, having found that the civil suits could not be a bar to the criminal proceedings. There was no need for the prayer to have been made or parties to have been invited to address the court on the same. In any event this was merely a consequential order and nothing much really turns on it.

45. Further, the appellants had to demonstrate that the criminal proceedings were being used as a vehicle for extraneous purposes other than the pursuit of criminal justice. It is then that the court can justly interfere with the powers vested in the 1st respondent. This court in *Njuguna S. Ndungu v. Ethics and Anti-Corruption Commission [2018] eKLR* held as follows:

> "The jurisprudence shows that the standard of review of the discretion of DPP to prosecute or not to prosecute is high and courts will interfere with the exercise of discretion sparingly."

It further stated that:

> "The burden of proof rests with the person alleging unconstitutional exercise of prosecutorial power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision."

46. Whether or not an abuse of the power of criminal process has occurred depends on the circumstances of each case. As discussed above, the 1st respondent did not have any other reason to charge the appellants but the decision was based solely on the evidence collected from the investigations carried out which according to the 1st respondent established the commission of an offence. The trial court was thus right in holding that:

> The constitutional provision in Article 157(10) of the constitution ensures that the DPP has complete independence in his decision making process, which is vital to protect the integrity of the criminal justice because it guarantees that any decision to prosecute a person is made free of any external influences. This court respects this constitutional imperative and will hesitate to interfere with the functions of the dpp unless there is clear evidence of breach of the constitution or abuse of discretion to prosecute. No evidence has been tendered to show

that the dpp abused his discretion or powers under the constitution. The court is inclined to respect the decision by the dpp to prosecute for two reasons, (a) it is constitutional imperative that the constitutional independence of the dpp must be respected, (b) for the court to intervene, there must be clear evidence of breach of the constitutional duty to act on the part of the dpp or abuse of discretion."

47. We find no fault in this reasoning and the order of the court that the criminal case to proceed to hearing and determination since the decision to charge was independent and was arrived at after the DCI carried out thorough and independent investigations. The 1st respondent on independently reviewing the evidence was satisfied that there was sufficient evidence to prefer the charges against the appellants.

48. In the result we are satisfied that the appeal is devoid of merit. Accordingly, it is dismissed with costs to the 1st and 3rd respondents.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY FEBRUARY, 2022.

ASIKE-MAKHANDIA

...

JUDGE OF APPEAL

MUMBI NGUGI

...

JUDGE OF APPEAL

P. NYAMWEYA

...

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR