IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KIAGE & SICHALE, JJ.A)

CIVIL APPEAL NO. 349 OF 2013

BETWEEN

1. TATU CITY LIMITED.....1ST APPELLANT

2. KOFINAF COMPANY LIMITED.....2ND APPELLANT

AND

1. ROSEMARY WANJA MWANGIRU.....1ST RESPONDENT

2. STEPHEN MBUGUA MWAGIRU.....2ND RESPONDENT

3. ROBERT GITHUI.....3RD RESPONDENT

4. THE HONOURABLE

ATTORNEY GENERAL.....4TH RESPONDENT

5. DIRECTOR OF PUBLIC PROSECUTIONS.....5TH RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Ngugi, J.) dated 12th November, 2013

in

Constitutional Reference No. 165 of 2011)

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JUDGMENT OF THE COURT

By this appeal, the appellants **Tatu City Limited** and **Kofinaf Company Limited** challenge the judgment and decree of the High Court (Mumbi Ngugi, J.) made on 12th November, 2013 by which it made the following orders;

> ***"(i) That the institution and maintenance of Nairobi Chief Magistrates Court Criminal Case No. 2077 of 2010 is an abuse of the process of the court.***
>
> ***(ii) An order of prohibition is hereby issued stopping the criminal proceedings in Chief Magistrates Criminal Case No. 2077 of 2010.***
>
> ***(iii) The respondents are hereby restrained from in any manner whatsoever instituting criminal proceedings against the petitioners in relation to the caveats lodged at Land's office by the petitioners which are the subject of litigation in Nairobi High Court Civil Case No. ELC 561 of 2010 and Milimani High Court Civil Cases No. 831 and 859 of 2010."***

The appellants had been named the 2nd and 3rd respondents, respectively, in a constitutional petition filed by **Rosemary Wanja Mwangiru**, her son **Stephen Githui**, who were minority shareholders in the two companies, and **Robert Githui**, an advocate in a law firm that

represented them in various suits and dealings (hereafter the petitioners). The 1st and 4th respondents in the petition were the Hon. Attorney-General and the Director of Public Prosecutions, respectively.

The petitioners had been charged before the Chief Magistrate's court in Nairobi with the offence of **forgery** contrary to section 349 of the Penal Code the particulars whereof were that;

> ***"On 11th June 2010 at Nairobi, within City centre within Nairobi area jointly with others not before the court, they forged a certain document namely CR 12C 1135765 Registrar of Company report dated 10th June, 2010 purporting to be a genuine document issued by the Assistant Registrar of Companies Wilson Gikonyo."***

Rosemary the 1st petitioner faced an additional charge of uttering a false document contrary to **section 353** of the Penal Code in relation to the said document.

The petitioners complained regarding the institution of the criminal proceedings as follows;

> ***26. That sometime in late 2010, the 2nd and 3rd respondents, through the Chairman of the Board of Directors of the 2nd and 3rd respondents Nahashon Ngigi Nyaga, converted the Civil disputes between the first and second petitioner with the majority shareholders in the second and third respondents into criminal offences and set in motion a criminal offences and set in motion a criminal process against the 1st and 2nd petitioners, minority shareholders in the said 2nd and 3rd respondents."***

The civil disputes were mentioned in the petition as;

> ***(a) Milimani Winding Up Cause No. 29 and 30 of 2010 filed jointly by the petitioners seeking winding up orders against the companies several.***
>
> ***(b) ELC NO. 561 of 2010 filed by the companies to compel the petitioners to remove caveats placed against the companies properties***
>
> ***(c) Milimani High Court Civil Suit No's 831 and 859 of 2010 filed by the companies respectively claiming over Kshs. 3.8 billion and Kshs. 1 billion in compensation for the caveats and winding up causes.***

The petitioners contended that the manner in which the criminal proceedings were instituted constituted arbitrary, capricious and discriminative conduct by the Director of Public Prosecutions and that various of their constitutionally-guaranteed rights were violated including privacy; freedom and security of the person including protection from violence, torture or cruel inhuman and degrading treatment; protection of the law, access to justice and fair administrative action. They also complained that when arrested various of their rights and guarantees were violated and that the charges that were laid against them were fabricated, false and malicious the predominant object being;

> ***"(i) to put illegal pressure of the 1st and 2nd petitioners to withdraw Winding Up Petition Cause Nos. 29 and 30 of 2010.***
>
> ***(ii) to put illegal pressure on the 1st petitioner and her daughters to withdraw or remove the caveats placed on the properties of Kofinaf Company Limited and or consent to judgment being entered for the 2nd and 3rd respondents as prayed in High Court Civil Case No. ELC 561 of 2010.***
>
> ***(iii) to punish the petitioners for exercising their rights under Article 47 of the Constitution to an administrative action and undertake searches in the companies registry of the shareholders in all directors of the 2nd and 3rd respondents.***
>
> ***(iv) to compel the first and second petitioners to pay to the second and third respondents compensation demanded of them in Milimani High Court Civil Cases No. 831 and 859 of 2010."***

On the basis of those complaints the petitioners sought various orders sought of which the ones we set out earlier in this judgment declaring the criminal charges an abuse of the process of the Court, stopping **Criminal Case No. 2077 of 2010** and restraining the respondents from instituting any criminal proceedings against the petitioners in relation to the caveats they lodged, were granted.

Aggrieved by those orders the appellants appealed. In the memorandum of appeal they raised a dozen or so grounds on which they claimed the learned Judge erred. They can besummarized as;

> *Holding that criminal charges were an abuse of prosecutorial powers.*
>
> *Holding that caveats lodged on the appellants' properties were at the heart of the litigation between the parties yet none had been so lodged.*
>
> *Holding that the criminal charges revolved around caveats lodged, yet they were of forgery and uttering a Form CR 12C irrelevant to civil proceedings which could not resolve the issues of forgery and uttering.*
>
> *Holding that the complaints and charges were for collateral purposes without a claim of their invalidity or sustainability and*

without evidence of mala fides.

Holding that the appellants were "galloping litigants" when parties to the civil suits were entitled to commence and maintain them.

Prohibiting the criminal case without a challenge to the magistrate's jurisdiction or complaint of violation of natural justice therein.

Prohibiting the criminal proceedings on account of civil proceedings contrary to section 193A of the Criminal Procedure Code that excludes such prohibition.

Failing to find that the petitions were belated and not grantable

Misconstruing and failing to correctly interpret binding authorities cited.

At the hearing of the appeal, **Mr. Sekwe**, learned counsel for the Attorney-General who is named as the 4th respondent prayed that the Attorney General be excused from the proceedings as they related to prosecutorial powers which lies in the realm of the Director of Public Prosecutions. There was no objection from the other parties and we ordered the Attorney-General duly excused. The Director of Public Prosecutions did not appear by counsel or at all at the hearing although the record is clear that he had strenuously opposed the petition at the court below and been represented at case management by **Mr. Jalson Makori** holding brief for **Mr. Okello** and who had addressed the Deputy Registrar that parties had agreed to file submissions within 45 days. At any rate, service of the hearing date was effected on the office of the Director of Public Prosecutions on 10th July, 2018.

We did direct also that the petitioners' preliminary objection filed on 2nd July, 2018 be canvassed within the appeal itself. The objection is in the following terms;

"NOTICE OF PRELIMINARY OBJECTION

TAKE NOTICE that the hearing of this appeal, the 1st to 3rd respondents shall object to the same and urge the Honourable Court to strike it out with costs on the grounds that:

1. This Honourable Court lacks jurisdiction to hear an appeal filed by an interested party against a judgment in which the 5th respondent was prevented from proceeding with criminal proceeding by the support court.

2. The appellants, by filing this appeal, have usurped the 5th respondent's power under Article 157 (6)(a) and (c) of the Constitution, to institute and undertake criminal proceedings against any person and to discontinue at any stage before judgment any criminal proceedings instituted by him.

3. By virtue of what is stated in (2) above, it is only the 5th respondent who has the right to appeal against the judgment which was delivered by the High Court on 12th November, 2013.

4. The 5th respondent has not lodged any appeal against the said judgment delivered on 12th November, 2013 by the superior court."

Urging the appeal, learned Senior Counsel **Mr. Ahmednassir Abdullahi** collapsed the eleven grounds into a single issue: that the learned Judge erred in holding that **Criminal Case No. 2077 of 2010** against the petitioners was an abuse of the court process when no evidence was placed before the Court to the said petitioners to show such abuse. He accused the learned Judge of having analyzed the case law on the subject but failed to properly apply that analysis to the case before her. He pointed out that from paragraphs 30 to 42 of the judgment the learned Judge engaged in analysis and only at paragraph 43 did she address the factual and legal issue on the case before her. The learned Judge stated she would look at "*the unique facts and circumstances of the matter*," but did not in fact do so. Counsel then asserted that there was nothing unique or unusual about the five cases between the parties. He took serious issue with the learned Judge's finding that the caveats lodged by the petitioners were at the heart of all the cases yet they were not all about the caveats. To demonstrate, counsel indicated that two of the cases were about winding up, two about the caveats and one about damages.

The learned Judge was wrong, contended counsel, to state that the caveats were directly in issue in the criminal case as well when, in fact, the criminal case was about the forgery and uttering of a **Form CR. 12** and not at all about the caveats. He faulted the learned Judge for failing to analyze the events unfolding prior to the eventual institution of the criminal case. Had she done so, she would have concluded that the process was well-founded instead of concluding that it was a case of harassment, for which there was no evidence.

Mr. Abdullahi took serious issue with the learned Judge's description of the appellants as "*galloping litigants*." He was unable to fathom why the appellants, who filed two suits against the petitioners, would be so-described and not the petitioners, who had filed three of their own against the appellants. Moreover, urged senior counsel, the learned Judge borrowed heavily from the factual determination by Kuloba, J. in ***VINCENT KIBIEGO SAINA vs***. ***ATTORNEY GENERAL***, High Court Miscellaneous Civil Application No. 839 of 1999, which was apt for the conduct of the litigant in that case, and erroneously misapplied it to the appellants. The learned Judge was wrong, he contended, to treat a factual description based on that case's evidential ingredients and apply it to the present case as if the same were a legal construct.

Counsel faulted the learned Judge's reasoning and conclusion at paragraph 55 where she stated as follows;

> ***"55. Indeed, one senses some frustration on the part of the 2nd and 3rd respondents who, in the affidavit of Josphat Kibogo Kinyua, accuse the petitioners of seeking to delay the determination of the issues related to the caveats by seeking to delay the hearing of the civil cases. Nonetheless, it cannot be proper that a party unhappy with the civil process seeks to speed things up, as it were by (mis)using the criminal justice process, and I therefore find that the criminal complaint and subsequent criminal prosecution initiated pursuant to the complaint by the 2nd and 3rd respondents and undertaken by the 1st and 4th respondent in Nairobi Chief Magistrate's Criminal Case No. 2077 of 2010 was for a purpose other than the honest enforcement of the law. It is therefore an abuse of the court process and should not be permitted to continue."***

Learned counsel contended that the learned Judge misunderstood and "*turned upside down*" what the deponent had stated to arrive at the unfounded conclusion that the appellants were trying to use the criminal process "*to speed things up*," thus abusing the process of the court when that had never been the case or complaint of the petitioners, and was not borne out by the evidence. Abuse of process was not pleaded as the petition was all about violation of constitutional rights.

Counsel further contended that it was clear from paragraphs 56 and 60 of the judgment that the learned Judge believed that there was a firm basis for the criminal charges yet was expressing herself as not exonerating the petitioners as she proceeded to prohibit their prosecution. He maintained that the learned Judge had no basis to casually accuse the appellants of having converted a civil dispute into a criminal complaint.

Returning to the theme of abuse of process, counsel insisted that it did not arise in the petition, was not pleaded in the petition, was not mentioned in a single sentence of the supporting affidavit and was not available for the learned Judge to base her grant of the petition. Moreover, it was entirely unclear who exactly is supposed to have abused the process of the court. Only if it was shown that the Director of Public Prosecutions had taken specific improper acts could the learned Judge stop the prosecution, yet she went ahead and did so without specific attribution of abusive acts on the Director of Public Prosecutions, which is impermissible. He pointed out to the ruling of Ochieng, J. dated 24th October, 2011 when he granted leave to the petitioners to prosecute their petition but declined to order that the same operate as a stay of the criminal proceedings and also rejected the request for a conservatory order because abuse of process was not evident.

In responding to the Preliminary Objection, **Mr. Abdullahi** described it as completely misplaced and asserted that this Court has full jurisdiction to entertain this appeal. He pointed out that the appellants were not mere interested parties at the High Court but were an integral part of the suit having been sued as the 2nd and 3rd respondents. It was therefore preposterous for the petitioners who had so sued them, to contend that the appellants cannot appeal. The appeal did not at all constitute a usurpation of the Director of Public Prosecution's constitutional role under ***Article 157*** of the Constitution as what was before the High Court was not a criminal case but a constitutional petition. Counsel rested by accusing the petitioners of abusing the process of the court by filing a preliminary Objection instead of filing an application to strike out the appeal. He urged us to dismiss the preliminary objection.

Rising to oppose the appeal, Senior Counsel **Dr. Kamau Kuria** submitted that in so far as under **Article 157** of the Constitution the power to institute criminal proceedings resides in the Director of Public Prosecutions, his not filing an appeal against the High Court judgment means he had decided not to proceed with the prosecution of the petitioners. He went on to assert that in the same way a court must down its tools on the face of a criminal proceeding filed by a person other than the Director of Public Prosecutions, so also must we down our tools on this appeal instituted by any person other than the Director of Public Prosecutions.

Dr. Kuria then characterized the appellant's submissions as an exercise in equivocation because the question was whether they had power to institute criminal proceedings against the petitioners, which they did not. He defended their description as galloping litigants "*because they had mixed civil and criminal cases*." He maintained that there was ample evidence to show that the dominant purpose of the criminal complaint was to pressurize the minority shareholders into stopping the pursuit of their rights and so the learned Judge was right to conclude that the criminal process was being abused by the Director of Public Prosecutions. He cited in aid the book by John L.J. Edwards ***THE ATTORNEY GENERAL; POLITICS AND THE PUBLIC INTEREST*** Street on Maxwell, 1984 Chapter 3 whereof deals with the philosophic differences in approach to the office of Attorney-General. He concluded that the appeal before us is for academic purposes as only the Director of Public Prosecutions can institute criminal cases and the appeal is seeking to distort his independence. Moreover, a public prosecution cannot mutate into a private prosecution.

To those submissions **Mr. Abdullahi** retorted that the petitioners were trying to take refuge under ***Article 157(6)*** of the Constitution because they have no answer to this appeal. What was before the High Court was a constitutional petition and whether or not the Director of Public Prosecutions filed an appeal, the appellants had a right to file their own and it is properly before this Court for decision.

We have given due consideration to those rival submissions and the authorities cited in light of the record before us. This being a first appeal, we proceed by way of rehearing. Had the matter before the learned Judge proceeded by way of *viva voce* evidence we would have to operate under a deliberate caution not to disturb the trial court's factual findings especially if based on the credibility of witnesses, alive to the fact that we did not ourselves see and hear the witnesses. Where, however, the Judge based the decision, as here, on the pleadings and affidavits filed by the parties, we have a greater latitude to depart as we subject the whole case to a fresh and independent consideration. In the matter before us, the facts do not appear to be complex or much contested and the principal question we have to answer is whether, on those facts, the learned Judge properly appreciated and applied the law in order of prohibition to immunize the petitioners from the prosecution that had commenced against them.

We are cognizant of the fact that the learned Judge in dealing with the petition before her that sought prohibition was exercising a discretion and we would therefore be slow to reverse her unless we are satisfied that the discretion was not exercised judicially and judiciously. It has been said time and time again that this Court will only interfere with a discretionary decision of a Judge where it is established that the Judge misdirected himself in law; or that he misapprehended the law; or took into account; considerations that he should not have taken into account; or failed to take into account considerations that he should have taken into account or where the decision was plainly wrong. See ***UNITED INDIA INSURANCE CO. LTD vs. EAST AFRICAN UNDERWRITTERS (KENYA) LTD [1985] EA 898; ABERDARE FREIGHT SERVICES LTD vs. KENYA REVENUE AUTHORITY [2006] 2 KLR 303.***

Before we go into a determination of whether or not the learned Judge acted properly in her discretion, we need to deal with the objection raised by the respondents herein by way of a preliminary objection. Preliminary objections are of doubtful standing before this Court, not only because they are not provided for in the Court of Appeal Rules, but the more because most of the matters that parties tend to raise by way of such objections are capable of being addressed by way of formal applications to strike out appeals for incompetence or other infirmities. It is therefore neither proper, nor a practice to be encouraged, for parties to attempt to strike out appeals, as the respondents here seek by the instrumentality of preliminary objections. They normally do so to try and circumvent the strict timelines for bringing striking out applications. In the present case, whether or not an appeal lies at the instance of the appellants, as raised in the third point, ought to have been brought by application under ***Rule 84*** which provides in rather straight- forward terms as follows;

> ***"84. A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.***
>
> ***Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be."***

Our finding on the manner in which an application to strike out an appeal should be brought ought to dispose of the preliminary objection but we shall add the following. The objection proceeds from the notion, clearly mistaken in our view, that the appellants were Interested Parties in the court below who had no right to file an appeal. The record is quite clear that the petitioners sued the appellants, not as interested parties, but as respondents in the petition. That being the case, we cannot see the basis for the contention that being aggrieved by the decision of the learned Judge, they could not file an appeal. They most certainly could.

We also do not see any basis for the presumption that an interested party who has participated in proceedings as such in the court appealed from, is precluded from filing an appeal by reason of having been an interested party. Indeed, ***Rule 75(1)*** makes clear who it is that may appeal to this Court as follows;

> ***"Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court."***

The rule recognizes that the right to appeal belongs to *any person*. It does not speak of 'any party' or 'main party' or 'substantive party'. There therefore can be no rational basis for purporting to deny a party the right to appeal to this Court no matter what its role or description was before the first instance court. This is the same philosophy that informs the requirement under ***Rule 77*** that a notice of appeal shall be served on all persons directly affected by the appeal. Interested parties would be affected as would be parties. All such persons would be entitled to file cross-appeals, which are appeals no less, and goes to reinforce our understanding that the appellants had the right to file the appeal whether or not the Director of Public Prosecutions, or any of the other parties, filed appeals of their own.

It is a misapprehension of the nature of both the proceedings before the court below, and this appeal, for the petitioners to contend as they do, that only the Director of Public Prosecutions could appeal against an order prohibiting a prosecution. Such an appeal is not an institution of a criminal prosecution, which falls within the exclusive preserve of the Director of Public Prosecutions. It is also not a criminal appeal that the Director of Public Prosecutions only can file. Rather, it is a civil appeal emanating from a constitutional determination, and the appellants were perfectly within right to file it. The preliminary objection is devoid of merit, and is dismissed.

Turning to the appeal proper, we are quite content to deal with all the grounds of appeal simply as one issue as was argued by the appellants' counsel: Whether the learned Judge has right to prohibit the prosecution of the petitioners in **Criminal Case No. 2077 of 2010** as an abuse of process. Even though counsel for the appellants forcefully submits that abuse of process was not pleaded and did not feature in the proceedings, a cursory glance at the petition does show that abuse of office was alleged. To cite but one example, the petitioners at paragraph 36 contended that;

> ***"36. (i) The use of the criminal process to compel a citizen to settle a civil dispute as dictated by the complainant in a criminal case, is not only an abuse of the criminal court process but also a contravention of the petitioner's right under Article 48 of Access to Justice."***

They repeated at paragraph 55 that the institution of the charges against them was and still remained an abuse of the process of the criminal court and, at paragraph 61 alleged that the criminal charges were "fabricated, false, and malicious" with a predominant object that was unrelated to the lawful and proper enforcement of criminal law.

What we need to determine is whether, on the evidence tendered, and a proper consideration of the law on the subject, the criminal case amounted to an abuse of the process of the court and called for judicial termination through an order of prohibition as indeed issued. The learned Judge identified the issue she considered crucial to answering the question of whether or not the criminal proceedings were an abuse of the process of the court at paragraph 49 of the judgment as follows;

> ***"What emerges from the above analysis of the civil suits pitting the 2nd and 3rd respondents against the 1st and 2nd petitioners is that the issue of the caveat placed against the 2nd and 3rd respondents' properties is at the heart of all the litigation between the parties. As is also apparent from the analysis in the earlier part of this judgment, the criminal case also revolves around the impugned caveats. Thus, the subject issue of the caveats is directly in issue in both the pending civil suits and in the criminal prosecution. This is a key factor in determining whether or not the impugned criminal case is an abuse of the process of the Court."***

Clearly, the learned Judge considered that the caveats lodged by the petitioners were an issue in the pending civil suits and in the criminal

prosecution. It is argued by the appellants, and the record seems to bear them out, that this was a total misapprehension of the facts because; first, the litigation between the parties did not all involve the caveats and the learned Judge was therefore clearly in error to say that ***".. the caveat …[was] at the heart of all the litigation between the parties."***

It seems clear to us that the learned Judge misdirected herself on the nature of the cases. Out of a total of five civil cases, two only related to the caveats. Moreover, with regard to the criminal case, there was no mention at all of the caveats. The charges as laid against the petitioners were in specific terms: they were alleged to have; first, **forged** a document **CR 12-C135765** dated 10th June, 2010 purporting it to be a genuine document issued by **Wilson Gikonyo** a registrar of companies and; second to have **uttered** the said forged document to **George Gichuhi,** the Land Registrar. The pleadings in the Civil Cases and the charge sheet in the criminal case were clear and unequivocal in their terms, and could not rationally admit to the construction that the learned Judge gave them. This error was central to the learned Judge's finding of abuse of office and constituted a wrongful exercise of discretion inviting, indeed compelling, our interference.

Intimately linked with that misapprehension is the attachment of the *"galloping litigant"* appellation to the appellants. After quoting *in extenso* from the Judgment of Kuloba, J. in the ***VINCENT KIBIEGO SAINA vs. ATTORNEY GENERAL***, (supra), case, the learned Judge arrived at this conclusion on the criminal case filed against the petitioners;

> ***"While appreciating that in many instances parties who are rightly and properly brought before the criminal justice system will often cry violation of rights and allege that the matters at issue are best determined through a civil process, I agree with Kuloba, J, (Rtd) that there are instances where parties, in order to get their way in a civil dispute, will employ every process possible, including lodging criminal complaints and getting state officers or state agents charged with the responsibility of investigation and prosecution for criminal offences, to play in their corner, in breach of the state agents' constitutional or statutory mandate. This is what appears to have happened in the present case."***

We have anxiously perused the petition and the supporting affidavits but are unable, with great respect to the learned Judge, to find evidence that the appellants could fairly be said to have been trying to employ *"every process possible to get their way in a civil dispute"* or that *"they got state officers or state agents to play in their corner in breach of their constitutional or statutory mandate*." Our thinking is that there needs to be some solid evidence that goes beyond mere allegations, before the regular day-to-day acts of such officers can be called into such serious question. There has to be, as a pragmatic matter, a presumption, rebuttable only by evidence, that public officers act in good faith. The reverse cannot be the case as seems to be implicit in the learned Judge's reasoning.

Given that out of 5 cases between the parties, 3 had been filed by the petitioners and the remaining 2 by the appellants, it is difficult to fathom the basis upon which the term *"galloping litigant,"* itself little more than a picturesque description of a vexatious litigant, could be attached to the appellants, and not to the petitioners who would have merited it more if numbers alone were enough to warrant its usage. But it should not be about the number of cases merely. The description given by Kuloba, J. which the learned Judge readily accepted was this;

> ***"A galloping litigant, moving scenes of the same forensic battle from one jurisdiction to another, engulfing nearly all institutions and means of dispute resolution either simultaneously or successively, with little or no merit, and putting a pinch of criminality on or otherwise civil dispute, must be stopped; and if a subordinate court entertains him, the High Court must check it. Experience has shown some litigants who will dress up their disputes in so many garments and present them to every authority available within our national borders, and even personalities with no legal powers to assist in the resolution of the same dispute. They vex their opponents and everyone else they may be minded to vilify, intimidate and blackmail."***

Again, with respect, we do not see how the facts of this case warranted that description. The Director of Public Prosecution's position in the court below, shared by the Attorney General below was that there was a genuine and valid complaint and that there was an evidentiary basis, including a document examiner's report, to support the decision to charge the petitioners with the criminal offence of forgery, and the same was done in good faith. There is nothing to show that evidence suggesting otherwise was placed before the learned Judge. In this as well, she erred.

This finally brings us to the question of whether the learned Judge misdirected herself on the law. The beginning point of our analysis is a reaffirmation that the mere co-existence of criminal and civil claims cannot be a justification for a court to halt the criminal proceedings. Indeed, it is axiomatic that many disputes often traverse various fields of law so that it is possible to have a dispute touching on the law of contract, implicate constitutional questions and also reveal the commission of a criminal offence. If any doubt should linger about such contemporaneous processes, they are dispelled by ***section 193A*** of the Criminal Procedure Code in express terms;

> ***"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."***

It is a wonder that despite such clear statutory direction, persons charged with criminal offences are quite adept at making out cases of abuse of process or the pursuit of collateral aims in a criminal prosecution based only, it would seem, on the mere existence of a civil dispute, between the parties. The existence of a civil dispute by statutory pronouncement as well as an appreciation of the nature of legal disputes, should not of itself be a basis for injuncting or delaying the criminal proceedings. Were that the case, its pernicious and deleterious effects would be clear to see. Criminal suspects would stand immunized from prosecution by the mere subterfuge of filing a civil case or two against the potential or actual criminal complainants Ochieng, J. well-appreciated this human propensity when in his ruling in this very matter granting leave but rejecting the plea that such leave operate as a stay, which we quote at length in affirmation, delivered himself thus;

> ***"By dint of section 193A of the Criminal Procedure Code, the fact that there was an ongoing criminal case in which the matters in issue were also directly or substantially in issue in a pending civil case, shall not be a ground for any stay, prohibition or delay of the criminal proceedings.***

One or another party to a civil dispute may commit an offence of a criminal nature. If that were to happen, there would be no justification, in law, to stop the police from carrying out investigations into the alleged criminal offences. And if the investigations revealed that a criminal offence had been committed, the police would be required by law, to prefer criminal charges against the person concerned.

If the existence of civil disputes were to act as a bar against the institution of criminal charges simply because the alleged offence arose from facts which were also directly or substantially in issue in the civil proceedings, suspects would need only to rush to the civil courts if they wanted to

put on hold any potential criminal charges. It is such an action which would, in my considered view, be deemed as an abuse of court process.

On the other hand, a suspect should find comfort in the fact that unlike in civil proceedings where the standard of proof is on a balance of probabilities, in the criminal case, the prosecution would have to tender proof beyond any reasonable doubt."

We note that the learned Judge in stopping the criminal case made reference to ***JORAM MWENDA GUANTAI vs. CHIEF MAGISTRATE NAIROBI,*** Civil appeal No. 228 of 2003 where this Court stated as follows;

"…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. It was succinctly put in Stanley Munga Githunguri vs Republic [1985] KLR 91 that 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 that the High Court has an inherent power and a 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."

That was a proper enunciation of the law for, whenever there is abuse of process and oppression, the High Court is entitled, duty-bound even, to step in and stop such abuse. This power has properly been used in many cases post- ***GITHUNGURI*** (supra) including more famously,in ***JARED BENSON KANGWANA vs.ATTORNEY GENERAL*** Nairobi High Court Miscellaneous Application No. 446 of 1995 and ***SAMWEL KAMAU MACHARIA & JOSEPH GILBERT KIBE vs. ATTORNEY GENERAL & NGENGI MUIGAI,*** High Court Miscellaneous Civil Application No. 356 of 2000, cited by **Dr. Kamau Kuria** before us. Those cases are good law but it is not enough for a party to merely complain of abuse of power, oppression and the like. He must place before the court evidence backing up the complaint, failing which the orders will not issue. We are not satisfied that there was evidence to back up the petitioners' bare allegations herein. Again, we agree with what Ochieng, J. had to say on this aspect upon perusing the case as placed before him;

"If the petitioners demonstrated that the criminal charges constituted an abuse of process, this Court would have had no hesitation in putting on hold the proceedings before the criminal court.

However, there is nothing before me to show that either the Attorney General or the Director of Public Prosecution has simply pandered to the wishes of the complainants in the criminal case.

The evidence before me suggests that the police carried out their own investigations, which appear to have revealed a forgery. As forgery and the uttering of a forged document are both criminal offences under Kenyan law, I find that it

cannot constitute an abuse of the court process if the police thereafter preferred criminal charges against the person or persons they perceive to be culpable.

In other words, I find myself unable to accept the petitioners' contention that;

'…the fact that prima facie case exists is no bar to a stay if the process is being abused.'

Whereas the petitioners have not demonstrated that the decision made by the Attorney General or the Director of Public Prosecutions was only intended to bring pressure on the petitioners to settle the civil disputes between them and the 2 companies (Tatu City Limited and Kofinaf Company Limited.)"

We think, with respect, that Ochieng, J. evinced the correct approach that courts must have in the face of attempts to stop criminal proceedings. Any other approach goes to defeact the aims of the criminal justice system and is decidedly against the public interest. The stoppage or truncation of criminal charges, cases, investigations and processes must issue only in exceptional circumstances, and not willy-nilly so long as an accused person complains, notwithstanding that he has not demonstrated the abuse of process or oppression complained of with satisfactory evidence.

We accept as reasonable the persuasive observations of the Supreme Court of India in ***STATE OF MAHARASTHRA & ANOR vs. ARUN GULABGAWALI & OTHERS*** Criminal Appeal No. 590 of 2007 that;

"12. The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the complaint, unless the allegations are so patently absurd and inherently improbable so that

no prudent person can ever reach such a conclusion."

See also ***REPUBLIC vs. DIRECTOR OF PUBLIC PROSECUTIONS EXPARTE KEBILENE & OTHERS [2000] 2AC 326***, a decision of the former House of the Lords that sharply curtailed the scope for review of a decision to prosecute by the Crown Prosecution Service.

We are satisfied that this approach of deference and circumspection is the one the learned Judge ought to have adopted. In failing to do so, she committed a reversible error of law. The effect of these errors we have pointed out, singly and cumulatively, is to taint the learned Judge's exercise of discretion and, in the totality of the circumstances of the cases the decision she arrived at was plainly wrong.

The upshot is that this appeal succeeds. The decision of High Court is set aside and substituted by an order dismissing the petition with costs.

And the appellants shall have the costs of this appeal to be paid by the 1st, 2nd and 3rd respondents.

Dated and delivered at Nairobi this 10th day of May, 2019.

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR