



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: VISRAM, KARANJA & OTIENO-ODEK, JJA)**

**CIVIL APPEAL NO. 43 OF 2017**

**BETWEEN.**

**SOY DEVELOPERS LIMITED..... 1<sup>ST</sup> APPELLANT**

**SAMMY BOIT ARAP KOGO.....2<sup>ND</sup> APPELLANT**

**ANTOINETTE BOIT.....3<sup>RD</sup> APPELLANT**

**AND**

**CYRUS SHAKHALAGA KHWA JIRONGO.....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL .....2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTION.....3<sup>RD</sup> RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATIONS.....4<sup>TH</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE FORCE.....5<sup>TH</sup> RESPONDENT**

**CHIEF MAGISTRATE'S COURT NAIROBI.....6<sup>TH</sup> RESPONDENT**

**DEPOSIT PROTECTION FUND BOARD (AS LIQUIDATOR OF**

**POST BANK CREDIT LTD.....7<sup>TH</sup> RESPONDENT**

**ASL LIMITED.....8<sup>TH</sup> RESPONDENT**

**(APPEAL FROM THE JUDGMENT OF ODUNGA, J.**

**DELIVERED ON 11<sup>TH</sup> JANUARY 2017 IN NAIROBI**

**JR MISC. APPLICATION NO. 78 OF 2016)**

**AND**

**CIVIL APPEAL NO. 48 OF 2017**

**BETWEEN**

**DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> APPELLANT**

DIRECTOR OF CRIMINAL INVESTIGATIONS.....2<sup>ND</sup> APPELLANT

INSPECTOR GENERAL NATIONAL POLICE SERVICE...3<sup>RD</sup> APPELLANT

AND

CYRUS SHAKHALAGA KHWA JIRONGO.....1<sup>ST</sup> RESPONDENT

THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT

THE CHIEF MAGISTRATE’S COURT NAIROBI.....3<sup>RD</sup> RESPONDENT

AND

SOY DEVELOPERS LIMITED.....1<sup>ST</sup> INTERESTED PARTY

DEPOSIT PROTECTION FUND BOARD (AS LIQUIDATORS OF

POST BANK CREDIT LIMITED).....2<sup>ND</sup> INTERESTED PARTY

SAMMY BOIT ARAP KOGO.....3<sup>RD</sup> INTERESTED PARTY

ANTOINETTE BOIT.....4<sup>TH</sup> INTERESTED PARTY

ASL LIMITED.....5<sup>TH</sup> INTERESTED PARTY

#### JUDGMENT OF THE COURT

1. This judgment is a determination of two appeals filed before this Court as **Nairobi Civil Appeal No. 43 of 2017** and **Nairobi Civil Appeal No. 48 of 2017**.

#### **BACKGROUND FACTS**

2. On 9<sup>th</sup> February 2016, the Director of Public Prosecution made a decision to indict and charge the 1<sup>st</sup> respondent, **Mr. Cyrus Shakhhalaga Khwa Jirongo** and instituted criminal proceedings in **Case No. 207 of 2016** before the Chief Magistrate’s Court in Nairobi.

3. The charge against the 1<sup>st</sup> respondent contained four counts as follows:

**“i. Count I – Obtaining execution of security by false pretences contrary to Section 314 of the Penal Code.**

**ii. Count II – Making a document without authority contrary to Section 357 (a) of the Penal Code.**

**iii. Count III – Uttering a false document contrary to Section 353 of the Penal Code.**

**iv. Count IV – Giving false information to a person employed in the public service contrary to Section 129 of the Penal Code.”**

4. Upon being charged, **Mr. Jirongo** moved to the High Court in a judicial review application and sought an order of prohibition directed to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents to prohibit them jointly and severally from carrying out and or proceeding with **Nairobi Chief Magistrate’s Court Criminal Case No. 207 of 2016 (Republic -v- Cyrus Shakhhalaga Khwa Jirongo)** and or any other criminal proceedings in connection with the same subject matter or property. A further order sought was prohibition directed to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents from reopening or purporting to reopen, bringing, instigating, instituting, carrying out and or proceeding with any criminal proceedings or charges in connection with the sale and or purchase of **Nairobi LR No. 209/11151** between the 1<sup>st</sup> respondent and the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> appellants herein.

#### **STATEMENT IN SUPPORT OF JUDICIAL REVIEW**

5. The indictment and charge of the 1<sup>st</sup> respondent is founded on a sale agreement in relation to Nairobi LR No. 209/11151.

6. In his application for judicial review, the 1<sup>st</sup> respondent stated that on or about the year 1991, the 2<sup>nd</sup> appellant **Sammy Kogo Boit** offered to sell to him Nairobi LR No. 209/11151 situated at Upper Hill at the corner of Elgon Road and Upper Hill Road in Nairobi. At the material time, the property was registered in the name of the 1<sup>st</sup> appellant company - **Soy Developers Limited**. At the time of sale agreement, the

Directors and shareholders of **Soy Developers Limited** were the 2<sup>nd</sup> and 3<sup>rd</sup> appellants. The 1<sup>st</sup> respondent states that after negotiations, it was agreed that the purchase price was Ksh. 20 million. The 1<sup>st</sup> respondent stated that upon taking into consideration that the disputed property was the only asset of **Soy Developers Limited**, it was agreed that he would purchase the company and all its shares. Upon this agreement, it is asserted that the 1<sup>st</sup> respondent made a payment of Ksh. 10 million being 50% of the purchase price by way of banker's cheque payable to the 2<sup>nd</sup> appellant - **Mr. Sammy Boit arap Kogo**. The cheque was banked and encashed. Upon payment of the said sum, the original company registration documents and the title deed to the suit property LR No. 209/11151 were released to the 1<sup>st</sup> respondent who proceeded to charge the same to City Finance Bank Limited to secure a loan of Ksh. 30 million.

7. The 1<sup>st</sup> respondent contends that on or about early 2015, he came to learn that the Criminal Investigations Department was investigating an alleged loss of the title deed to the suit property upon complaint by the 1<sup>st</sup> appellant - **Soy Developers Limited**. He was informed that the allegation and complaint was that the title deed to the suit property was lost and the 1<sup>st</sup> appellant company never sold the property. Based on these allegations and complaint, the Director of Public Prosecution made a decision to indict and charge the 1<sup>st</sup> respondent with the four counts in **Nairobi Chief Magistrate's Court Criminal Case No. 207 of 2016 (Republic -v- Cyrus Shakhhalaga Khwa Jirongo)**.

## RESPONSE IN OPPOSITION TO JUDICIAL REVIEW

8. In opposing the judicial review application, the appellants filed a replying affidavit dated 1<sup>st</sup> April 2016 deposed by **Mr. Sammy Boit arap Kogo**. The 1<sup>st</sup> appellant company denied ever selling the suit property to the 1<sup>st</sup> respondent; that the instrument of transfer of the suit property is fraudulent; the appellants remain the lawful owners of the suit property; that whereas the 1<sup>st</sup> respondent paid a deposit to the appellants, the performance of the sale agreement was frustrated and the respondents terminated the agreement. On shareholding and directorship, it is deposed that there has been no change of directorship of the 1<sup>st</sup> appellant company; no person had the authority of the 1<sup>st</sup> respondent company to execute any instrument of transfer of the suit property to the 1<sup>st</sup> respondent; that upon termination of the sale agreement, the 1<sup>st</sup> respondent refused to return the title deed to the property; and that in view of this, the appellants severally attempted to protect their interest in the suit property by way of caveat but the land registry file could not be traced; the efforts to trace the missing land registry file continued for over twenty-five years; in early 2015, the land registry file mysteriously reappeared and title to the suit property had been transferred to 8<sup>th</sup> respondent - **ASL Limited** without the knowledge, consent and authority of the appellants; that a search at the lands registry revealed there were several transactions on the suit property and which transactions were without the knowledge, consent or authorization of the appellants; that upon realizing that the suit property had been transferred to the 8<sup>th</sup> respondent, the appellants lodged complaint with the Criminal Investigation Department leading to indictment and charge of the 1<sup>st</sup> respondent.

9. One of the grounds in support of the judicial review application is delay of over 25 years from 1991 to 2015 in charging the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent in his application stated that the prosecuting him after a delay of 25 years from when the sale agreement was entered into is tantamount to unfair trial; that in any event, the dispute between the appellants and the 1<sup>st</sup> respondent is civil in nature.

10. In opposing the judicial review application, the appellants contended that there was no limitation period in criminal cases; the delay was due to a well-choreographed ploy the 1<sup>st</sup> respondent to defraud the appellants that he would purchase the suit property; the deceit by the 1<sup>st</sup> respondent is that upon obtaining possession of the title deeds, he fraudulently charged the property twice and defaulted in repayment of his loan to **Post Bank Credit Limited** thereby leading to the sale of the property to the 8<sup>th</sup> respondent. It was deposed that the appellants did not discover the 1<sup>st</sup> respondent's fraud until 2015 when the land registry file resurfaced.

11. Upon discovery of the alleged fraud, the appellants contend that simultaneous to the criminal complaint, they filed a suit against the 1<sup>st</sup> respondent at the Environment and Land Court being **ELC Cause No. 132 of 2015**. The civil suit was filed well before the criminal charge was preferred against the 1<sup>st</sup> respondent; that the decision to prosecute the 1<sup>st</sup> respondent is at the sole discretion of the Director of Public Prosecution.

12. Before the trial court, the Attorney General and the Director of Public Prosecution filed a replying affidavit in opposing the judicial review. The replying affidavit is deposed by the Investigating Officer attached to Directorate of Criminal Investigation (DCI) **Sergeant Maxwell Otieno** dated 29<sup>th</sup> March 2016.

13. **Sergeant Otieno** deposed that DCI received a complaint from the 2<sup>nd</sup> appellant **Mr. Sammy Boit Kogo** a Director of the 1<sup>st</sup> appellant company that the 1<sup>st</sup> respondent, **Mr. Cyrus Jirongo**, was fraudulently holding himself out as a Director and shareholder of the 1<sup>st</sup> appellant company; that the 1<sup>st</sup> respondent in so holding himself had executed a charge dated 25<sup>th</sup> September 1992 in favour of Post Bank Credit Limited over LR No. 209/11151 to secure overdraft facilities to **Cypress Projects International**. **Sergeant Otieno** further deposed that the 1<sup>st</sup> respondent while recording his statement with the DCI falsely stated that he paid one **Jonathan Moi** Ksh. 7,000,000/= towards the purchase price of the disputed property an assertion which has been refuted by the said **Jonathan Moi** and one **Solomon Cheruiyot**.

14. It was further deposed by **Sergeant Otieno** that forensic analysis was conducted and the conclusion made was that **Sammy Boit Kogo** and **Antoinette Boit** did not author the signature appearing on the Deed of Indemnity purporting to indemnify the 1<sup>st</sup> respondent from any claims and demands; that **Sammy Boit Kogo** did not author the signature appearing on the purported irrevocable authority authorizing the 1<sup>st</sup> respondent to pay **Jonathan Moi** the sum of Ksh. 7,000,000/=; that **Davy Koech** did not author the signature appearing on the charge dated 25<sup>th</sup> September 1992; that the Registrar of Companies has confirmed that **Sammy Boit Kogo** and **Mrs Antoinette Boit** are the directors of Soy Developers Limited; the Registrar confirmed the 1<sup>st</sup> respondent is not a director of the 1<sup>st</sup> appellant company.

## JUDGMENT OF THE HIGH COURT

15. Upon hearing the parties by way of affidavit evidence and oral submissions by counsel, the trial court issued an order directed at the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents prohibiting them from continuing any criminal proceedings against the 1<sup>st</sup> respondent in relation to the suit property or any subject matter and transaction connected therewith. In issuing the prohibitory order, the learned Judge expressed himself as follows:

**161. Having considered the material placed before me in this application, without making a finding as to the innocence of the applicant, it is my view and I so hold that in the circumstances of this case, it would be unjust and contrary to Article 50 of the Constitution to prosecute the applicant for an offence which was allegedly committed nearly two and a half decades ago particularly when both the complainants and the applicant contend that the relevant transactional documents may have been lost, misplaced or tampered with.**

**162. In the premises, I find merit in the Notice of Motion dated 17<sup>th</sup> February, 2016 and I issue the following orders:**

**1. An order of certiorari removing into this Court and quashing the decision of the 1<sup>st</sup> Respondent made on or about 9<sup>th</sup> February 2016 to charge and institute criminal proceedings in Criminal Case No. 207 of 2016 against the Applicant.**

**2. An order of certiorari removing into this Court and quashing the charges contained in the Charge Sheet dated 9<sup>th</sup> February, 2016 in Police Case No. 121/41/2016 charging the Applicant with the following offences and counts:**

**a. Count I – Obtaining execution of security by false pretences contrary to section 314 of the Penal Code.**

**b. Count II – Making a document without authority contrary to section 357(a) of the Penal Code.**

**c. Count III – Uttering a false document contrary to section 353 of the Penal Code; and**

**d. Count IV – Giving false information to a person employed in the public service contrary to section 129 of the Penal Code.**

**3. An order of prohibition directed to all the Respondents jointly and severally prohibiting any of them from carrying out and/or proceeding with Nairobi Chief Magistrate's Court Criminal Case No. 207 of 2016 – Republic v Cyrus Shakhalaga Khwa Jirongo and or any other criminal proceeding in connection with the same subject matter or property.”**

## **GROUNDS OF APPEAL**

16. Aggrieved by the *certiorari* and prohibitory orders in the judgment of the court, two appeals were filed. The appellants in this matter filed the instant appeal being **Nairobi Civil Appeal No. 43 of 2017**. A second appeal was filed by the Director of Public Prosecution, the Director of Criminal Investigations and the Inspector General of Police being **Nairobi Civil Appeal No. 48 of 2017**. The two appeals were heard together, the primary file being **Civil Appeal No. 43 of 2017**. This judgment considers and determines the two appeals.

17. The compressed, consolidated and abridged grounds of appeal in the two appeals are:

**i. The judge erred in exceeding his jurisdiction in judicial review by delving into the merits of the decision rather than the process of arriving at the decision.**

**ii. The judge erred in failing to find the court had no jurisdiction to quash a decision to prosecute an individual without a finding that the decision was made contrary to law.**

**iii. The judge erred in making conclusions on proprietorship of the suit property, Nairobi LR No. 209/11151, thereby violating the sub judice rule when the ownership of the property is the subject matter in Environment and Land Case No. 132 of 2015.**

**iv. The judge erred in finding that the 8<sup>th</sup> respondent had been given a clean bill of health as proprietor of the suit property in ELC No. 24 of 2008 as consolidated with ELC No. 567 of 2008.**

**v. The judge erred in failing to address his mind to the official CR-12 of 2015 which prove the 2<sup>nd</sup> and 3<sup>rd</sup> appellants are the directors and shareholders of the 1<sup>st</sup> respondent company.**

**vi. The judge erred when he made conclusions contrary to the evidence on record.**

**vii. The judge misdirected himself on the application of the principles that govern institution of criminal proceedings after a long period of delay as enunciated in the case of R – v- Kipngeno arap Ngeny (HCC No. 406 of 2001) and Erick Kibiwott Tarus & 2 others – v-Director of Public Prosecutions (2014) eKLR.**

**viii. The judge erred in finding material documents may have been lost and erred in failing to find that both parties had annexed all witness statements and vital documents relating to the transaction between the parties.**

- ix. The judge erred in finding that relevant lands registry documents were missing and had to be reconstructed and failed to appreciate the original file had been traced with all documents intact.
- x. The judge erred in failing to appreciate it is not the length of delay but effect of delay that is important when seeking to stop criminal prosecution.
- xi. The judge erred in interfering with the constitutional and statutory mandate of the Director of Public Prosecution as provided for in Article 157 of the Constitution without proof the DPP had acted in contravention of the Constitution.
- xii. The judge erred when he delved into the issue of balance of purchase price of Ksh. 10 million.
- xiii. The judge erred in concluding the complaint relating to the suit property was instituted after inordinate delay.
- xiv. The judge erred in failing to appreciate the import of Section 175A of the Criminal Procedure Code, (Cap 75 of the Laws of Kenya) that allow criminal proceedings to be pursued simultaneously with civil actions.
- xv. The judge erred in delving into matters of evidence by making conclusions on the issue of execution of the contract of sale between the 1<sup>st</sup> respondent and the appellants.
- xvi. The judge erred by failing to interrogate the process leading to the decision to charge the 1<sup>st</sup> respondent and further erred by treating the criminal case as a contest between the 1<sup>st</sup> respondent and the appellants which is not a matter within the province of judicial review.
- xvii. The judge erred in applying the decision in *Stanley Munga Githunguri – v- Republic [1986] KLR 1* to the facts of this case.
- xviii. The judge misdirected and contradicted himself in his judgment.

18. At the hearing of this appeal, learned counsel *Mr. S. Ligunya* and *Mr. E. Mumyia* appeared for the appellants. Learned counsel *Mr. F. S. Ashimosi* appeared for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents. Learned counsel *Mr. Maina* holding brief for *Mr. Kariuki* appeared for the 7<sup>th</sup> respondent and learned counsel *Mr. Akhaabi* holding brief for *Mr. Kamau Karori* appeared for the 8<sup>th</sup> respondent. The firm of *Rachier & Amollo Advocates* who are on record for the 1<sup>st</sup> respondent was served with the hearing notice on 18<sup>th</sup> January 2019 and failed to appear. The *Attorney General* was served with the hearing notice on 10<sup>th</sup> January 2019 and did not appear. Being satisfied that all parties were served with the hearing notice scheduled for 27<sup>th</sup> March 2019, this Court proceeded to hear the appeal.

#### APPELLANTS SUBMISSIONS

19. In their written and oral submission, the appellants contend that the Judge exceeded the scope of his jurisdiction in judicial review proceedings; the Judge erred and allowed a suspect to block his investigation, charging and subsequent prosecution; the court erred and interfered with the discretion of the Director of Public Prosecution to make decision to charge an individual; the Judge erred in allowing judicial review to interfere with the operations of the criminal justice system.

20. Elaborating the grounds of appeal, the appellants repeated that the Judge erred in failing to address his mind to the fact that the official CR-12 of 2015 indicted that the directorship and shareholders of the 1<sup>st</sup> appellant company; CR-12 of 2015 clearly shows the 2<sup>nd</sup> and 3<sup>rd</sup> appellants as directors of the 1<sup>st</sup> appellant company; that there is no evidence on record to contradict the directorship and shareholding as contained in CR-12; the directorship of the 1<sup>st</sup> appellant company has never changed since its incorporation; that CR-12 proves the 1<sup>st</sup> respondent is neither a director nor shareholder of the 1<sup>st</sup> appellant company.

21. The appellants further submitted that the Judge erred and demonstrated open bias by referring to the appellants' claim to the suit property as "scandalous, gluttonous, corrupt and fraudulent"; that these conclusions can only be made after trial; the Judge also ignored the issue of ownership of the suit property is the subject matter in Nairobi ELC Case No. 132 of 2015; the court erred in making findings and conclusions prejudicial to the pending case before the Environment and Land Court.

22. The appellants submitted that the Judge erred in concluding Criminal Case No. 207 of 2016 was instituted to achieve a collateral purpose. In this regard, the court failed to appreciate the import of **Section 175A** of the **Criminal Procedure Code** that allows criminal proceedings to be pursued simultaneously with civil actions.

23. It was further submitted that the Judge erred in interfering with the powers of the Director of Public Prosecutions as stipulated in **Article 157** of the Constitution and the **Office of Director of Public Prosecutions Act 2012**.

24. The appellant retold that the Judge erred in concluding that the complaint about the suit property was initiated after inordinate delay even when the evidence on record pointed at diligence and keenness on the part of the appellants to safeguard their interests in the suit property.

25. Citing the case of ***Pastoli -v- Kabale District Local Government Council & others [2008] 2 EA 300***, it was submitted that a court should not substitute its decision with that of the decision making authority. It was urged that the Judge erred in substituting the decision of the Director of Public Prosecution to charge the 1<sup>st</sup> respondent with its own decision not to charge the 1<sup>st</sup> respondent. Citing the case of

**Republic -v- Kenya Revenue Authority ex parte Yaya Towers [2008] eKLR**, it was stated that judicial review is concerned not with reviewing the merits of the decision but the decision making process; that in the instant case, the Judge erred and reviewed the merits of the decision of the Director of Public Prosecution to charge the 1<sup>st</sup> respondent. The appellant further cited the case of **Diana Kethi Kilonzo -v- IEBC & 2 others (Constitutional Petition No. 359 of 2013)** where it was held that institutions should respect each other's roles and mandate. In the instant case, the court did not respect the role and mandate of the Office of Director of Public Prosecution (ODPP).

26. The appellants further faulted the trial court for concluding that the 1<sup>st</sup> respondent will not have fair trial whereas **Section 175A** of the **Criminal Procedure Code** specifically allows both civil and criminal proceedings to take place simultaneously. The Judge ignored that there is no limitation period in criminal prosecution and finally the court ignored that it is not the length of delay that is important but the effect of delay. It was submitted that the 1<sup>st</sup> respondent did not obtain any concession or representation from the ODPP that he will not be prosecuted and thus the court erred in applying the dicta from the case of **Stanley Munga Githunguri -v- Republic [1986] KLR 1**.

27. In concluding their submissions, the appellants urged that the 1<sup>st</sup> respondent did not demonstrate any prejudice he is likely to suffer if prosecution took place. In any event, the 1<sup>st</sup> respondent is at liberty during his criminal trial to present any exculpatory evidence in his possession and to respond to the accusations raised. Counsel urged us to allow the appeal so as not to prejudice the case pending before the Environment and Land Court.

28. In summary, the appellants submitted that the Judge exceeded his jurisdiction in judicial review by delving into the merits of the decision to charge the 1<sup>st</sup> respondent; the court exceeded jurisdiction by pronouncing itself on ownership and proprietorship of the suit property; the Judge ignored the doctrine of *sub-judice*; the court erred in making conclusions that can only be made by a trial court after hearing oral evidence.

### **3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> RESPONDENTS SUBMISSIONS**

29. The Director of Public Prosecutions, Director of Criminal Investigations and the Inspector General of Police as the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents respectively support the appeal. In their joint oral submissions by learned counsel Mr. Ashimosi, it was urged the Judge erred in going into the arena of analyzing evidence between the 2<sup>nd</sup> appellant complainant and the 1<sup>st</sup> respondent; that it is not within the province of judicial review for the court to analyze and evaluate such evidence. It was submitted the court erred in failing to appreciate that the delay of 25 years in instituting the charge against the 1<sup>st</sup> respondent was not the fault of the prosecution; it is not delay *ipso facto* that is central but the effect of the delay. It was submitted all the witnesses in this matter are alive, all documents are available and none is lost; the land registry file is available and there has never been representation made to the 1<sup>st</sup> respondent that he will not be prosecuted. Based on these facts, the respondents urged us to allow the appeals.

### **1<sup>st</sup> RESPONDENT'S SUBMISSION**

30. The 1<sup>st</sup> respondent, **Mr. Cyrus Jirongo**, filed written submission opposing the appeal. It was submitted that the appeal crystallizes the issues in contention into two namely: (i) *whether the learned judge exceeded jurisdiction in a judicial review application and (ii) whether prosecution of the 1<sup>st</sup> respondent would deprive him a fair trial.*

31. In his written submissions, it is urged that the traditional approach to judicial review has been expanded to include constitutional and statutory grounds; the Judge's approach to the hearing and determination of the judicial review application is supported by law and within judicial parameters that balance between enforcement of criminal law on one hand and the law of the Constitution and principles of natural justice on the other hand. It is recounted that the Judge cited more than thirty cases and satisfied himself he had jurisdiction to determine the dispute between the parties. It is further submitted the learned Judge in citing the House of Lords judgment in **Director of Public Prosecutions -v- Humphreys [1976] 2 All ER 497 at 511** was alive to the caution that the power to stop a prosecution or indictment *in limine* should only be exercised in the most exceptional circumstances; that in the instant case, the Judge proceeded with caution in arriving at the decision to prohibit prosecution of the 1<sup>st</sup> respondent; the court identified and enumerated several grounds upon which it was established that the orders of *certiorari* and prohibition were merited. Among the grounds the Judge was satisfied relate to the principles of natural justice, impartiality, promotion of public confidence in the integrity of the ODPP, the need to prevent abuse of the legal process and promotion of constitutionalism. All these would be violated if the court allows the 1<sup>st</sup> respondent to be prosecuted.

32. It was further submitted that the sale transaction of the suit property which is the basis of indictment and charge of the 1<sup>st</sup> respondent took place more than twenty years ago; there has been inordinate delay in institution of the criminal prosecution and the delay justifies termination of the case by way of judicial review.

33. It was submitted that the Judge did not err in finding prosecution of the 1<sup>st</sup> respondent would deprive him a fair trial; that whereas **Section 175A** of the **Criminal Procedure Code** allows criminal proceedings to be pursued simultaneously with civil actions, **Article 50** of the Constitution obliges court to be impartial and accord fair hearing.

34. The 1<sup>st</sup> respondent submitted the learned Judge correctly applied dicta from the case of **Stanley Munga Githunguri -v- Republic [1986] KLR 1**. It was urged that prosecuting the 1<sup>st</sup> respondent after 24 years amounts to unfair trial; that there is no equality of arms in the prosecution of the 1<sup>st</sup> respondent which was done in a discriminatory manner; the appellants failed to make full disclosure to the police on matters relating to the civil dispute and civil transactions regarding the suit property including the whereabouts of the title documents and status of the suit property. The 1<sup>st</sup> respondent submitted that in the instant matter, there is evidence that crucial documents relating to the sale transaction were either lost or were unavailable; the land registry file had to be reconstructed and the appellants lied about the whereabouts of the title documents and this demonstrates lack of candour on their part. It was further submitted that the 1<sup>st</sup> respondent demonstrated that there has been abuse of court process and use of the criminal justice system to cause injustice. Submitting on the statement by the Judge that

the appellants conduct was “scandalous, gluttonous, corrupt and fraudulent”, it was pressed that this was not an invention of the court but an extrapolation of the proposition placed before the court by the 1<sup>st</sup> respondent through his pleadings and written submissions.

35. The 1<sup>st</sup> respondent cited several judicial authorities in support of his submissions.

#### **7<sup>th</sup> RESPONDENT’S SUBMISSION**

36. The Deposit Protection Fund, 7<sup>th</sup> respondent, opposes the appeal. Counsel citing the case of **Kyalo Peter Kivuli -v- Hon. Wavinya Ndeti & 3 others [2017] eKLR** submitted that the Judge correctly held that the decision of the DPP to charge the 1<sup>st</sup> respondent was illegal, biased and prejudicial on account of unreasonable delay in taking the said decision; the Judge properly confined himself to matters which led the court to conclude the DPPs decision to charge the 1<sup>st</sup> respondent was biased and an abuse of power; the court properly considered the effect of delay in prosecuting the 1<sup>st</sup> respondent. Counsel cited dicta from the case of **Diamond Hasham Lalji & another -v- Attorney General & 4 others [2018] eKLR** where it was stated the delay in prosecution would affect the quality of evidence and cause prejudice rendering a trial unfair; that delay in itself, if sufficiently prolonged, would itself be unfair and oppressive as to amount to abuse of court process.

37. Learned counsel submitted that the Judge properly found the intended prosecution of the 1<sup>st</sup> respondent is aimed at achieving a collateral purpose. Citing dicta from **Kuria & 3 others -v- Attorney General [2002] eKLR 69** it was submitted the machinery of criminal justice is not to be allowed to become a pawn in personal feuds and individual vendetta.

38. On independence of the ODPP, the 7<sup>th</sup> respondent submitted that the prosecutorial power of the DPP is reviewable by the High Court pursuant to **Article 165 (2) (d) (ii)** of the Constitution. Counsel concluded his submissions by stating the judgment of the court does not in any way prejudice the pending suit before the Environment and Land Court.

#### **8<sup>th</sup> RESPONDENT’S SUBMISSION**

39. The 8<sup>th</sup> respondent opposes the appeal and associated with submissions made by the 1<sup>st</sup> and 7<sup>th</sup> respondents. Through learned counsel Mr. Akhaabi it was submitted that the Judge did not err in arriving at the decision to issue *certiorari* and prohibitory orders. Counsel urged pursuant to **Articles 22 (2), 24 and 47** of the Constitution as applied by **Section 7** of the **Fair Administrative Actions Act**, judicial review can delve into the merits of decision making. Citing the case of **Suchan Investment Limited -v - Ministry of National Heritage & Culture & 3 others [2016] eKLR**, it was submitted that **Section 7 (2) (i) and (iv)** of the **Fair Administrative Actions Act** allows merit review of administrative decisions in a judicial review application.

40. Counsel further submitted that the court did not violate the doctrine of *sub judice* as the issues in dispute in the instant appeal and in the case pending before the Environment and Land Court are different; that the parties are different and the remedies sought are different. It was urged the Judge did not make a finding in respect of the suit property.

#### **ANALYSIS and DETERMINATION**

41. In this appeal, we have considered the written and oral submission made by the parties and the authorities cited. The central issue in the two appeals is whether the Judge erred in issuing orders of *certiorari* and prohibition stopping indictment and prosecution of the 1<sup>st</sup> respondent. Tangential to the central issue is whether the Judge exceeded his jurisdiction and if prosecution of the 1<sup>st</sup> respondent would deprive him a fair trial.

42. This is a first appeal. As was stated by Sir Kenneth O’Connor JA in **Peters -vs- Sunday Post Limited [1958] EA 42**:

**“... An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.**

43. The duty of an appellate court was restated in **Okeno vs. Republic [1972] EA 32** the Court of Appeal for East Africa held that:

**"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses..."**

44. In **Director of Public Prosecutions -v - Martin Maina & 4 Others [2017] eKLR**, this Court considered the grounds upon which criminal prosecution may be prohibited. The Court cited with approval the decision by the Supreme Court of India in **State of Maharashtra & Others -v - Arun Gulab Gawali & Others, Criminal Appeal No. 590 of 2007**. The grounds are as follows:

**“i. Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice;**

ii. Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction;

iii. Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; and

iv. Where the allegations constitute an offence alleged but there is either no legal evidence adduced clearly or manifestly fails to prove the charge.”

45. In this matter, the *ratio decidendi* of the impugned judgment is expressed by the court as follows:

**“161. Having considered the material placed before me in this application, without making a finding as to the innocence of the applicant, it is my view and I so hold that in the circumstances of this case, it would be unjust and contrary to Article 50 of the Constitution to prosecute the applicant for an offence which was allegedly committed nearly two and a half decades ago particularly when both the complainants and the applicant contend that the relevant transactional documents may have been lost, misplaced or tampered with.** (Emphasis supplied)

46. In this matter, the decision of the learned Judge turned on the issue of delay in instituting criminal prosecution of the 1<sup>st</sup> respondent. The appellants contend the delay of over 25 years from 1991 to 2015 can be explained.

Conversely, the 1<sup>st</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents contend the delay of over 25 years is inordinate and prejudicial to the 1<sup>st</sup> respondent; that no fair trial can be achieved after such a long period of delay.

47. The appellants submitted the delay of 25 years has been explained by the evidence on record which the learned Judge ignored. First, there is no limitation period for instituting criminal proceedings. Second, there has never been any representation made to the 1<sup>st</sup> respondent that he will not be prosecuted. Third, the delay was occasioned by the missing land registry file relating to the suit property but when the file resurfaced, a complaint was lodged within reasonable time with the Criminal Investigation Department. Fourth, no prejudice will be occasioned to the 1<sup>st</sup> respondent if he is prosecuted as all relevant witnesses are alive and all documents relevant to the transition involving the suit property are available.

48. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents submitting on the issue of delay urged delay *per se* is not the determining factor but effect of delay on intended prosecution is the critical factor. It was submitted that the Judge erred in applying the decision in **Stanley Munga Githunguri – v- Republic [1986] KLR 1** to the facts of this case. In arriving at this decision, the Judge expressed himself as follows:

**“142. It is therefore incorrect to contend as the Respondents do, that the only reason why the trial in the Stanley Munga Githunguri vs. Republic (supra) was halted was due to the representations made by the Attorney General that no prosecution would be commenced.**

49. The High Court in **Stanley Munga Githunguri -v- Republic [1986] KLR 1**, in granting a prohibitory order to stop criminal prosecution cited the case of **R v Grays Justices, ex parte Graham [1982] 3 All ER at p 653** where it is stated:

**“In our opinion, although delay of itself, with nothing more, if sufficiently prolonged, could in some cases be such as to render criminal proceedings brought long after the events said to constitute the offence both vexatious and an abuse**

**.....In this instance the delay is said to have been nine years, six years and four years. The Court has not been told why these offences have been unearthed after they remained buried for so long. What caused turning up the soil! It is too long, too much of delay. The Attorney-General is not bound to tell the Court the reason but it would have made us knowledgeable if told.”**

50. Delay in instituting criminal proceedings has been considered by this Court in **Diamond Hasham Lalji & another - v- Attorney General & 4 others**

[2018] eKLR where it is reported:

**“[61] .... Due to lapse of time, the original file of the first company could not be traced, the company books of accounts were missing and a potential witness – Ismael whose evidence was necessary to ascertain whether there was a quorum when the impugned resolutions of the company was made, had died.**

**Thus, contrary to the finding of the learned judge, the 20-year delay would cause prejudice to the appellants by rendering the trial unfair.**

In view of the fact that the 5<sup>th</sup> respondent set in motion the criminal investigations twelve years after the commission of the alleged offences, and after encountering difficulties in the prosecution of the suits, the delay itself would, in the circumstances of the case be prolonged delay rendering the prosecution unfair and unjustifiably oppressive to the appellants and thus amounting to abuse of process.

[62] As regards the element of alleged improper exercise of discretion by DPP to review the decision not to prosecute, the DPP in his decision letter of 23<sup>rd</sup> February 2012 said in part:

“...I have come to the conclusion that the facts that the events which are the subject matter of this inquiry occurred way back between 1991 and June 1992, is not a sufficient ground to warrant closure of the inquiry file when, as confirmed by the commission, there is sufficient evidence to support the proposed charges.”

The appellants averred, inter alia, that the decision to review in the absence of new and important matters and without informing the appellants of the right to be heard was an abuse of power, unfair, oppressive and an abuse of criminal process.

The 4<sup>th</sup> respondent relied in the High Court, amongst other authorities on the case of Carlin v Director of Public Prosecutions [2010] 1 ESC 14, a decision of the Supreme Court of Ireland for the proposition that the DPP is entitled to change his decision not to prosecute even without new evidence. However, Denham J. said in that case at para.7 thus:

“The prosecutor must not only be independent but must be seen to be independent. If the Director is seen to change his decision where there are no new factors but simply after presentations by a victim or his family, it raises issues as to integrity of the initial decision and the process and thus may impinge on the confidence in the system. It is important that a prosecutor retain the confidence of society in the process of decision making.”

.....

[71] In the light of the foregoing combined findings, we are satisfied that the appellants proved their case and that the learned judge erred in withholding an order of certiorari and prohibition. However, as the application essentially related to criminal prosecution, the Attorney General and EACC were improperly joined.

Accordingly, the appeal is allowed, the decision of the High Court is set aside. The orders of certiorari and prohibition are granted in terms of prayer 1 and 2 of the amended notice of motion.”

51. In the instant appeal, we have considered the issue of delay and submission by the parties. We have taken into account dicta from the decisions in Stanley Munga Githunguri -v- Republic [1986] KLR 1 and Hasham Lalji & another -v- Attorney General & 4 others [2018] eKLR. The two cases are distinguishable. In both cases, there was direct representation made that no prosecution would be made. In the instant case, the DPP did not make any representation to the 1<sup>st</sup> respondent that he would not be prosecuted. The uncontroverted evidence on record shows all relevant witnesses are alive. In the *Diamond Lalji Case*, the crucial witness *Mr. Ismael* was dead. As regards documentation, in the instant matter, it is not controverted that all relevant documents and the land registry file on the suit property are available. Except for conjecture and speculation, there is no evidence on record to demonstrate prejudice that will be suffered by the 1<sup>st</sup> respondent if he is given an opportunity to put forth his defence in a criminal trial.

52. We are cognizant of the holding in R. vs. The Judicial Commission into the Goldenberg Affair and 2 Others exp Saitoti HC Misc Appl. 102 of 2006 where it was stated:

“It is not good for the DPP to argue that the Applicant should be arrested and charged so that he can raise whatever defences he has in a trial court. The Court has a constitutional duty to ensure that a flawed threatened trial is stopped in its tracks if it is likely to violate any of the applicants’ fundamental rights.”

As appreciated in *Stanely Githunguri Case*:

“What kind of a mad man who has an opportunity to apply for prohibition would opt for a trial, the risk of conviction and imprisonment?”

53. In arriving at our decision, we note that the learned Judge expressed that it is incorrect to contend that the only reason why the trial in the Stanley Munga Githunguri -v- Republic [1986] KLR 1 was halted was due to the representations made by the Attorney General that no prosecution would be commenced. We have considered this statement by the Judge and find it is not supported by the *ratio decidendi* of the *Githunguri Case*. Further, there is no risk of the 1<sup>st</sup> respondent being convicted and imprisoned if he is innocent; the presumption of innocence and the safeguards for fair trial are well engrained in Kenya’s legal system. Urging in blanket form that in this matter a magistrate court will conduct an unfair trial is impeachment of the magistracy and Kenya’s criminal justice system of which we decline to do.

We find the delay in instituting criminal proceedings against the 1<sup>st</sup> respondent has been explained to our satisfaction.

54. The Judge in arriving at his decision on delay made a finding that:

**“146. In this case, the applicant contends that as a result of the long lapse of time during which time the complainants took no action against the applicant, the applicant has lost crucial documents which would have aided him in his defence....**

**147. From the complainant’s own version, it is clear that for a considerable period of time even the government records went missing and records had to be reconstructed....**

**4. Taking into account the manner in which the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> interested parties herein have conducted themselves one cannot help but agree that the applicant’s case that the belated feigned interest and claim in connection with the property is a scandalous, gluttonous, corrupt, fraudulent and illegal scheme to unlawfully reclaim the property, and for unjust enrichment since the complainants have never taken any steps whatsoever or utilised any of the remedies available to them to enforce any alleged wrongdoing in connection with the transaction” may well be well founded. If that is the position, then it is clear that the commencement of the criminal proceedings is meant for the achievement of a collateral purpose other than its legally recognized aim.”**

55. We have considered the foregoing paragraphs in the judgment of the court.

With due respect, the narrative in paragraph 149 on “*scandalous, gluttonous, corrupt, fraudulent and illegal scheme to unlawfully reclaim the property, and for unjust enrichment...*” are extraneous matters not supported by the evidence on record. The Judge erred in making the foregoing observations without the benefit of oral evidence and cross-examination of the parties.

56. We have examined the record and are satisfied that the relevant documents are not missing; original documents are available, all witnesses are alive and the witness statements are available. If any witness has memory lapse, cross-examination, credibility and demeanor of such a witness will reveal the same during trial. At this stage, it is speculative and conjecture to assume memory lapse on any the part of any witness.

57. The next issue for our consideration is whether the Judge erred and exceeded his jurisdiction in judicial review. In **Municipal Council of Mombasa -v-Republic & Umoja Consultants Ltd. Civil Appeal No. 185 of 2001** it was held that judicial review is concerned with the decision making process and not with the merits of the case.

58. In the instant appeal the appellants contend that the Judge exceeded jurisdiction by delving into the merits of the case rather than laying emphasis in the process that led to the making of decision to charge and prosecute the 1<sup>st</sup> respondent. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents submitted that the Judge erred and failed to consider and evaluate the affidavit evidence of ***Sergeant Maxwell Otieno*** that detailed forensic analysis of the transactions leading to the decision to institute a criminal charge against the 1<sup>st</sup> respondent.

59. We have considered the submission by the appellants and respondents as to whether the Judge erred in delving into the merits of the dispute relating to the suit property. We have also considered the submission that the Judge erred in substituting the DPP’s decision to charge the 1<sup>st</sup> respondent with his own decision not to charge the 1<sup>st</sup> respondent. Taking into account the Judge did not exhaustively consider the evidence of ***Sergeant Otieno***, we affirm and apply the dicta of this Court in **Suchan Investment Limited -v-Ministry of National Heritage & Culture & 3 others [2016] eKLR**, where it was expressed that a court has no mandate to substitute its own decision for that of the decision maker. This Court expressed itself as follows:

**“56..... It must be noted that the even if the merits of the decision is undertaken pursuant to the grounds in Section 7 (2) of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act.”**

60. In **Njuguna S. Ndung’u -v- Ethics & Anti-Corruption Commission (EACC) & 3 others [2018] eKLR**, Okwengu, JA in a dissenting judgment expressed herself thus:

**“[46] In moving to court to stop his prosecution even before the charges were brought, the appellant jumped the gun. The prosecution had barely started”.**

61. We are also cognizant of the majority decision in **Njuguna S. Ndung’u v Ethics & Anti-Corruption Commission (EACC) & 3 others [2018] eKLR** where Githinji, JA stated:

**“[24] The charges against the appellant were largely dependent on documentary evidence and most of the facts were not in controversy. The High Court was called upon to find out whether or not the omissions allegedly committed by the appellant prima facie constituted the alleged criminal offences under the procurement law.**

**A decision on that issue could have been made without embarking on a trial by scrutinizing the documents and upon consideration of the circumstances of the case and the law.”**

62. In **Stephen Muregi Chege -v- Inspector General of Police & 3 others [2018] eKLR**, this Court expressed:

**“28. Where the allegations in the first information or complaint against an accused person or a suspect, at their face value or upon investigations by the police or other investigative offices, reveal commission of a criminal offence and the DPP, being so**

satisfied, chooses to commence criminal proceedings, the task of evaluating the weight of that evidence against any evidence that may be tendered by the accused person or suspect falls upon the trial court, not the Superior Court hearing a petition or application to prohibit prosecution.

**29. There are issues that can only be determined upon hearing and cross examination of witnesses.** The appellant sought to rely on a multiplicity of documents attached to his affidavit to demonstrate that the respondents' case was not well founded. Most of those documents had been disputed by the respondents.

**30. In such instances, the accuracy and veracity of the documents could only be established in a hearing where the documents are produced and witnesses cross examined.**

**31. In our view, the appellant did not demonstrate that the institution of the criminal case amounted to abuse of the Court process or that his constitutional rights and freedoms had been violated because of the commencement of the criminal proceedings."**

(Emphasis supplied)

63. In this matter, it is not in dispute the case against the 1<sup>st</sup> respondent is partly founded on documentary evidence. The nature of the transaction and agreement between the parties can only be determined through viva voce evidence. For instance, it is only oral evidence that can determine if there was agreement between 1<sup>st</sup> respondent and the 2<sup>nd</sup> and 3<sup>rd</sup> appellants to buy and sell shares in the 1<sup>st</sup> appellant company. In the persuasive decision of **Republic v Chief Magistrate, Milimani Criminal Division & 4 others Ex-Parte John Wachira Wambugu & another [2018]** it was correctly stated the decision as to whether there is a reasonable prospect of conviction requires an evaluation of how strong the case is likely to be when presented in court. It must take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the arbiter of fact, and the admissibility of any alleged confession or other evidence.

64. In this matter, it is manifest that the Judge considered and evaluated the documentary evidence on record. However, the appellants as well as the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents contend that the forensic evidence of **Sergeant Otieno** was not considered by the court. The criminal case against the 1<sup>st</sup> respondent is founded on allegations of fraud. In principle, fraud is not proved by documentary evidence, viva voce evidence tested through cross-examination is a critical component in proving or disproving an allegation of fraud. It is not the duty of a court to evaluate veracity of the contents of disputed documentary evidence that has not been tested through cross-examination.

65. In the instant matter, we find that the learned Judge erred in making conclusions grounded on disputed contents of documents that were put in evidence by the parties. Specifically, the Judge erred in making or failing to make findings on CR-12 when the factual veracity of the contents of CR-12 is in dispute. The 1<sup>st</sup> respondent's case is that he purchased the 1<sup>st</sup> appellant company and he was shareholder of the company; the appellants' case is that directorship and shareholding of the 1<sup>st</sup> appellant company has never changed since incorporation. The dispute relating to the veracity of the content of CR-12 is not a matter that can be determined by affidavit evidence in a judicial review application. We find the learned Judge erred in delving into evidential matters without according the parties an opportunity for oral hearing that a trial offers.

66. Another issue for our consideration is whether the Judge erred and interfered with the discretion bestowed upon the DPP to initiate and conduct prosecution. It is the appellants' case that the Judge erred and substituted the decision of DPP to charge the 1<sup>st</sup> respondent with his own decision not to prosecute the 1<sup>st</sup> respondent. Under **Article 157** of the Constitution, the DPP has the discretion to initiate criminal proceedings. **Article 157 (11) of the Constitution** states expressly that:

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

67. The discretion of the DPP to initiate prosecutions must be exercised in accordance with **Article 157(11)** taking into account the principles and values of the Constitution. In **Alfred N. Mutua -v- Ethics and Anti-Corruption Commission & 4 Others (2016) e KLR** it was held the court has a duty to ensure that the DPP exercises his constitutional mandate having regard to public interest, interest of the administration of justice and the need to prevent abuse of the legal process. Comparatively, in **Uganda -v- Jackline Uwera Nsenga - Criminal Session Case No. 0312 of 2013** it was held that it is only the DPP who decides the charges to prefer in each file forwarded to him.

68. In this matter, the 1<sup>st</sup> respondent submitted that the Judge did not err in finding prosecution of the 1<sup>st</sup> respondent would deprive him a fair trial; that whereas **Section 175A** of the **Criminal Procedure Code** allows criminal proceedings to be pursued simultaneously with civil actions, **Article 50** of the Constitution obliges court to be impartial and accord fair hearing.

69. At the outset, we state the correct provision is not **Section 175A** of the **Criminal Procedure Code**. There is no **Section 175A** in the Code. The correct provision is **Section 193A** of the **Criminal Procedure Act**, **Cap 75** of the Laws of Kenya.

**70. Section 193A** provides:

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

71. In Kuria & 3 others -v- R [2002] 2 KLR 69, it was correctly stated:

**“It is not enough to simply state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an “abuse of process”, is a “manipulation”, “amounts to selective prosecution” or such other processes, or even supposing that the applicants might not get a fair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts. The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bipolar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have A. fair trial...”**

72. In the instant matter, upon our perusal of the record we have failed to find scintilla of evidence that the decision to prosecute the 1<sup>st</sup> respondent was actuated by bias or collateral motives or abuse of power. In this regard, we adopt the persuasive statement by the High Court in Republic -v- Director of Public Prosecution & 2 others Ex-parte Francis Njakwe Maina & another [2015] eKLR where it was expressed:

**“32. The burden was therefore upon the applicants to place before the Court, not by mere allegations, but also by way of available evidence that the respondent’s conduct in preferring the criminal charges in the face of existing civil proceedings is reprehensible and an abuse of the Court and legal process and ought to be arrested. As I have said the applicants have failed to produce the crucial evidence in support of their allegations that the evidence presented by the complainant proves their case that the criminal process was put into motion with a view to intimidating them into admitting liability in the civil suit.**

**33. It must always be remembered that the mere fact that criminal proceedings are being undertaken at the same time as the civil proceedings does not ipso facto amount to an abuse of the court process. The applicant ought to go further and show that the dominant motive for the institution of the criminal proceedings is to scuttle the civil process or force the applicant into abandoning his civil claim or force the applicant into submitting to the civil claim. If it is shown that the object of the prosecutor is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court. In other words the prosecutor must be actuated more by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose in such circumstances would be to further that ulterior motive and that is when the High Court steps in.”**

73. On the issue of *sub-judice*, the appellants contend the learned Judge erred in delving into matters that can only be determined through trial. It was submitted that the issue of fraud and the ownership of the suit property are matters pending before the Environment and Land Court in Case No. 132 of 2015. In Republic -v- Senior Resident Magistrates (Milimani Chief Magistrates Court) & 6 others [2019] eKLR, the High Court in declining to grant an order prohibiting criminal prosecution expressed as follows:

**“34. It is my view that the orders sought by the Applicants, if granted, would have the effect of determining contested matters of facts, without having heard the parties on the merits. In addition, the merits of the Applicant’s arguments as to the issue of the rightful owner of the subject property can only be heard and determined by the Environment and Land Court, which is the Court conferred with the jurisdiction to hear and determine disputes relating to title to land pursuant to Article 162 of the Constitution, and not by this Court.”**

74. We have considered the judicial authorities cited by the parties and the record of appeal as well as the judgment of the learned Judge. There is no evidence on record to prove bias on the part of the DPP or ulterior or collateral purpose in the making of decision to charge the 1<sup>st</sup> respondent. Issues relating to ownership and proprietorship of property are best considered and determined through civil proceedings. However, issues relating to fraud are public interest issues best suited for determination and punishment in criminal proceedings. It is our considered view the trial Judge went against public interest in preventing investigation and prosecution of allegations relating to fraudulent transfer and acquisition of the suit property. In going against the public interest, the Judge interfered with the prosecutorial mandate of the DPP to make decision to charge or not to charge an individual. Further, the Judge in failing to evaluate the affidavit evidence of *Sergeant Otieno* arrived at a conclusion without considering all the evidence on record.

75. The upshot of our re-appraisal of the facts and applicable law in this matter leads us to conclude the two appeals filed against the judgment of the High Court have merit. Accordingly, **Civil Appeal No. 43 of 2017** and **No. 48 of 2018** be and are hereby allowed. The judgment of the High Court dated 11<sup>th</sup> January 2017 delivered in **Miscellaneous Application No. 78 of 2016** be and is hereby set aside in entirety. The appeals be and are hereby allowed with costs.

**Dated and delivered at Nairobi this 19<sup>th</sup> day of July, 2019**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**