**REPUBLIC OF KENYA**

**IN THE COURT OF KENYA AT MALINDI**

**CONSTITUTIONAL PETITION NO. 12 OF 2020**

**SALAMA BEACH HOTEL LIMITED.....1ST PETITIONER**

**ISAAC RODROT ..... 2ND PETITIONER**

**STEFFANO UCCELLI..... 3RD PETITIONER**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTIONS .....1ST RESPONDENT**

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

**HON. ATTORNEY GENERAL.....3RD RESPONDENT**

**AND**

**HANS JURGEN LANGER .....1ST INTERESTED PARTY**

**TEMPLE POINT RESORT LIMITED ..... 2ND INTERESTED PARTY**

**Coram: Hon. Justice Reuben Nyakundi**

**Munyithya, Mutugi, Umara & Muzna Co. Advocates for the 1st and 2nd Petitioners**

**Kibunja & Associates Advocates for the 3rd Petitioner**

**The Director of Public Prosecutions**

**The Hon. Attorney General**

**Makambo Makabila & Co. Advocates for the 1st Interested Party**

**Githogori & Harrison Advocates for the 2nd Interested Party**

**RULING**

**Introduction**

This Suit was commenced by a Petition dated 8th June 2020 and filed on 9th June 2020. Contemporaneously, the petitioners filed a Notice of Motion application supported by an affidavit sworn by the 2nd Petitioner, **Isaac Rodrot**. The court, having certified the matter urgent, issued orders on 9th June 2020 directing that the respondents' be served with the Motion and that the parties canvass by way of written submissions the issue of grant of interim conservatory orders sought in the Notice of Motion. The matter was to come up for further directions on 15th June 2020. Subsequently, the 1st and 2nd Interested Parties filed respective applications seeking to be enjoined as parties on account of the instant suit having a bearing on an existing dispute between them and the petitioners. On 15th June 2020, the court allowed the Interested Parties' application for joinder.

By a Notice of Motion application dated 30th June 2020 and filed on the same day with an accompanying affidavit sworn by **Hans Jurgen Langer,** the 1st Interested Party sought to have the Court disqualify itself and have the matter transferred to the High Court in Mombasa.

In chambers on 1st July 2020, upon hearing the 1st Interested Party's application for disqualification of the court and transfer of the suit to Mombasa where the subject matter arose, the court directed that the relevant parties be notified and served and thereafter the parties to respond to the recusal application by way of submissions.

In a Notice of Preliminary Objection dated 1st July 2020 and filed on 7th July 2020, the 2nd Interested Party seeks to have the petitioners application and Petition of 8th June 2020 dismissed on account of them being fatally defective and bad in law. That the 2nd and 3rd Petitioners lack capacity to institute the suit on behalf of the 1st petitioner; the application runs afoul of Order 2 Rule 15 of the Civil Procedure Rules, 2010; and that no valid resolution was passed appointing the firm of **Munyithya, Mutugi, Umara & Muzna Co. Advocates** as advocates for the 1st petitioner.

This instant Ruling relates to the petitioners' application for conservatory orders dated 8th June 2020, the 1st Interested Party's application for recusal of the bench dated 29th of June 2020 and the Notice of Preliminary Objection raised by the 2nd Interested Party.

**The Notice of Motion Application dated 8th June 2020**

The application is brought under Articles 22 and 23 of the Constitution and Rules 23 and 24 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms Practice and Procedure Rules of 2013). As relates to the instant Ruling, it seeks for orders:

***I. Spent***

***II. Spent***

***III. Pending the hearing and determination of the Petition:***

***a. This Honourable Court be pleased to issue conservatory orders staying all proceedings in Mombasa SRMCC Criminal Case No. 854 of 2020; Republic -vs- Steffano Uccelli & Isaac Rodrot alias Mwaura.***

***b. The officer commanding police station be compelled by way of a mandatory order to put the 2nd and 3rd Petitioners in possession of all that property known as Salama Beach Hotel Limited/ Temple Point Resort standing on PLOT GRANT NO. 11576 AND PLOT NO. 9890 WATAMU in compliance with the order dated 30/4/2015 issued by the High Court in HCCC NO. 118 OF 2009-MALINDI.***

***c. This Honourable court be pleased to issue conservatory orders staying further interrogations and questioning relating to Mombasa SRMCC Criminal Case No. 854 of 2020; Republic -vs- Steffano Uccelli & Isaac Rodrot alias Mwaura and/or any further interference by the agents of the Respondents relating to the management, ownership and control of the assets and business of Salama Beach Hotel Limited/Temple Point Resort.***

***IV. That this matter be referred to his Lordship the Chief Justice under Article 165(3) to constitute a bench of not less than 3 judges to hear and determine the petition.***

***V. That the costs of this application be provided for.***

**The Applicants' Arguments**

The Motion is buttressed by the grounds expressed therein as well as in the affidavit of **Isaac Rodrot**. The Applicant avers that the prayers sought in the main Petition are:

***a. A Judicial Review Order in the form of orders of certiorari quashing all the criminal proceedings in Mombasa SRMCC Criminal Case No. 854 of 2020; Republic -vs- Steffano Uccelli & Isaac Rodrot alias Mwaura.***

***b. A declaration that the rights of the petitioners to property as guaranteed under Article 40 of the Constitution, The right to a fair trial contrary to Article 50 of the Constitution. The right to a fair trial under Article 50 of the Constitution, the right to highest attainable standard of health under Article 43(1) (a) of the Constitution have been breached.***

***c. A declaration that the fair trial contemplated under Article 50 of the Constitution includes charges arising from an impartial investigation by officers operating under the armpit of Chapter Six of the Constitution.***

***d. A declaration that the arrest, transportation and arraignment in court contrary to the Covid-19 guidelines by Committee of National Council of Administration of Justice compromised the right to good health as guaranteed under Article 43(a) of the Constitution.***

***e. A declaration that where there is a cessation of movement imposed in a County/Counties/Parts of a County any criminal suspect arrested within the affected County should be arraigned in court within that County unless under special circumstances***

***approved by Committee of National Council of Administration of Justice.***

***f. A declaration that the act of surrendering the suit property by the agents of the respondents to the complainant on 28/5/2020 was a clear manifestation that the investigating officers were acting as agents the complainant to settle commercial and civil disputes between complainant and their petitioners through a criminal trial contrary to the principles set out in Article 73 and 75 of the Constitution and eroded all the gains to the petitioners derived from decisions of the High Court in the order of 30/4/2015 and judgment dated 15/12/2017 in COURT OF APPEAL CIVIL APPEAL NO. 36 OF 2015- MALINDI have been rendered nugatory against the rules of natural justice, Article 50 and Chapter Ten of the Constitution.***

***g. A declaration that the role of courts exercising civil jurisdiction under Chapter Ten of the Constitution to conclusively determine issues between parties and the resultant rights so conferred cannot be set aside, varied and/or amended through a criminal trial after such determinations have been made conclusively by courts of competent jurisdiction exercising civil jurisdiction.***

***h. A declaration that this Petition raises issues of great public and national importance which go to the core of the justice system and should be handled by a bench of more than 3 judges appointed by the Chief Justice under Article 165(3)(b) and (3)(d) of the Constitution.***

***i. A mandatory order directing the respondents to restore the control, management, and occupation of all that property known as Salama Beach Hotel Limited/ Temple Point Resort standing on PLOT GRANT NO.11576 AND PLOT NO. 9890 WATAMU to the Petitioners in compliance with the order dated 30/4/2015 in HCCC NO. 118 OF 2009- MALINDI.***

***j. Damages for malicious/unconstitutional prosecution.***

***k. Costs of the Petition.***

It is averred that a Petition of this nature may take a long before hence the need for conservatory interim orders.

According to the applicant, to give the full picture, it is necessary to give a brief history of conflict between the complainant and the Applicants over all that property known as **Salama Beach Hotel Limited/ Temple Point Resort** standing on **PLOT GRANT NO. 11576 AND PLOT NO. 9890 WATAMU ("the suit property").** He avers that the 1st Petitioner is the registered proprietor of the suit property on which stands a hotel known as Temple Point Resort. That for a long time, there has been a dispute has been going on between **Hans Jurgen Langer (Langer),** the 1st Interested Party herein, Zahra Langer and their company known as **Accredo AG** against the petitioners.

As the applicants' story goes, in the year 2009, **Langer and Zahra** filed **HCCC NO. 118 OF 2009**- in Malindi through their company, **Accredo AG** as the Plaintiff and Salama Beach Hotel Limited, the 1st petitioner, as the defendant. That by a decree issued on 20th January 2010, both **Hans Langer and Zahra Langer** were given shares in the 1st petitioner Company. Subsequently, the 3rd petitioner filed an application for review of the decree dated 20th January 2010. On 30th April 2015, **Hon. Chitembwe J**. granted orders which divested the ownership, control, and possession of all the assets of the 1st Petitioner company from **Hans Langer and Zahra Langer.** It further is averred that this ruling was appealed whereupon the Court of Appeal in **CIVIL APPEAL NO. 36 OF 2015 MALINDI** dismissed the appeal on 15th December 2017 reaffirming the Ruling and Order of **Chitembwe J.** of 30th April 2015.

According to the Applicant, the orders by both the High Court and Court of Appeal have not been set aside or varied. That an attempt to do so was made in in 2018 before **Honourable Justice Korir** sitting in Malindi. This application, it is averred, was dismissed on 21st March 2018. That a further appeal to the Court of Appeal in **CIVIL APPEAL NO. 43 OF 2018-MALINDI** was equally dismissed with costs on 21st August 2019. That an attempt to appeal this dismissal to the Supreme Court was also dismissed with cost.

The Applicants' contend that a ruling by this Court on 24th February,2020 clarified the position of the suit property in relation to rights of the Complainant and those of the Petitioners.

It is averred that on 21st February 2020, after waiting for almost five years, the Officer Commanding Police Station Watamu after consultation with the entire security team, Kilifi County, escorted the 2nd and 3rd Petitioners to the suit property in compliance with the Order dated 30th April 2015 in **HCCC NO. 118 OF 2009- MALINDI.** That this was the first time the 2nd and 3rd Petitioners set their feet on the suit property since they were evicted in August 2010.

Arising from the foregoing, the applicants' aver that they acquired rights protected under Article 40 of the Constitution under which rights the state cannot take them away arbitrarily. That **Hans Langer and Zahra** are not shareholders or directors of **Salama Beach Hotel Limited** and any resolution passed or action taken by them is invalid and in express contempt of the orders of **Chitembwe J.** of 30th April 2015 and the Court of Appeal judgment of 15th December 2017.

According to the Applicants' **HCCC NO. 10 OF 2019-MALINDI** is pending determination before the High Court.

**Mr. Rodrot** contends that in the evening of 28th May 2020 while at the suit property, he was informed that some police officers were at the property looking form him. That, together with the 3rd applicant/petitioner, they presented themselves and were informed that there was an intention to charge them both for alleged offenses relating to the registration of the 1st applicant/petitioner in the year 2010. He avers that this reminded him that sometimes in 2018 in **CIVIL SUIT N0.8 OF 2018- MALINDI (Now 10 OF 2019),** the 1st Interested Party, **Hans Jurgen Langer**, had filed an application in which in the supporting affidavit included copies of police documents emanating from the CID

headquarters Nairobi. He raises the concern that the Interested Party was in possession of documents which to his knowledge are confidential and ponders where the 1st Interested Party obtained them.

The 2nd applicant/petitioner avers that after being informed of their impending arrest, together with the 3rd applicant/petitioner, they were bundled into a 5-passenger vehicle and driven from Malindi to Mombasa. He charges that they were with 3 police officers in the car with them who were not wearing masks and that the vehicle had no sanitizers. The 2nd applicant further contend that he protested that his rights under Article 43(a) of the constitution were threatened in view of the prevailing life-threatening challenges caused by the Covid-19 Pandemic. He contends that he inquired as to they were being taken to Mombasa rather than being charged in Malindi while at the time, there was an order for cessation of movement from Malindi (Kilifi County) to Mombasa County.

It is further contended that the 2nd applicant not only questioned the intention of the arresting officers for arresting them on a Thursday before a Friday that would have culminated in a long weekend seeing as the 1st June 2020 was a public holiday but also read mischief in this action.

The applicant avers that before leaving the suit property, he called his advocate, **Mr. Stephen Kibunja** and in his presence signed a piece of paper handed to him by the arresting officers confirming that they had recovered two pistols from his house. He confirms that he is a licensed firearm holder.

The deponent states that on 29th May 2020 at around 12.30pm, he and the 3rd Applicant were arraigned before the Senior Resident Magistrate in Mombasa, they only took plea at 4.00pm and despite the efforts by their advocates, the Magistrate reserved his ruling for 2nd June 2020 and directed that they be held by the court police.

Referring to the charges facing them in **Mombasa SRMCC Criminal Case No. 854 of 2020; Republic -vs- Steffano Uccelli & Isaac Rodrot alias Mwaura,** it is averred that the prosecution accuses them of committing offenses spanning a period of time and relating to the falsifying of company ownership documents including filing false returns at the Companies Registry. That these accusations are contrary to their rights as the matter of the ownership of the 1st petitioner/applicant has been conclusively determined in a court of law as evinced by the decisions of the High Court and Court of Appeal alluded to above.

The applicant contends that contrary to the assertions advanced by the prosecution that they engaged in forgery, several documents attached as annexures confirm that they are the valid owners of the suit property.

He denies having access to the property between August 2010 and 21st February, 2020 when they were lawfully re-installed by the court in the presence of the OCS Watamu Police Station. He challenges the contention that the Applicants blocked security agents from accessing the suit property between 21st February, 2020 and the evening of 28th May, 2020.

That in an affidavit of **Alice Mwendwa**, an Assistant Registrar of Companies sworn on 18th December 2014, it is confirmed that the issue before the court was a subject of police investigation as set out in a letter dated 17th August 2010.That letter alleged an investigation into forgery contrary to Section 349 of the Penal Code and an attempt to defraud involving one of the **Directors of Salama Beach Hotel Limited**. That the police requested to be supplied with certified copies of CR 12 Number 34417 dated 21st July 2010 issued to **Fadhil and Kilonzo Advocates**. The Registrar replied on 23rd August 2010 and enclosed several documents in the end noting that the transfer of shares by **Isaac Rodrot to Accredo AG** was conditional upon payment by **Hans Langer**. That any transfer before payment was made in full and as agreed would have been null and void.

**Mr. Rodrot** avers that there in a second affidavit by **Alice Mwendwa** sworn on 18th December 2014 in which the deponent attached a power of **Attorney by Salama Beach Hotel Limited** appointing **Mr. Isaac Rodrot** as a sole agent, resolutions and minutes which led to the appointment of **Isaac Rodrot** as agent, a copy of a charge registered by **Uni-Credit Banca D'impresa S.P.A** against **Salama Beach Hotel Limited** which was signed by the 2nd applicant on behalf of **Salama Beach Hotel Limited**, and a copy of Certificate of Registration of the mortgage.

It is averred that in the minutes by **Salama Beach Hotel Limited** of 4th April, 2005 the company allocated the 2nd Applicant 40,000 shares in **Salama Beach Hotel Limited** and that these minutes were implemented by the filing of returns by **Victor Were and Associates** on 28th February 2010 This was after the Decree of 20th February 2010 in **HCCC NO. 118 OF 2009** had been issued.

It is also averred that in an affidavit by **Faith Chirchir** sworn on 24th September 2012, an attached a copy of an official search showing that the suit property as at 27 October 2014 belonged to the 1st petitioner and against it was a Decree registered arising from Civil Suit No. 118 of 2009 restraining the defendants from selling, disposing or alienating the property.

The deponent charges that the Applicants are aggrieved by the entire criminal proceedings since **Hans Jurgen Langer**, the complainant and 1st Interested Party herein is using a criminal process to undermine the integrity of conclusively determined civil proceedings.

**The 1st and 2nd Respondents Responses**

The 1st and 2nd respondents raised six grounds of opposition to the Notice of Motion dated 8th June 2020. They charge that it lacks merit and is an abuse of the process of the court as it seeks to usurp the constitutional mandate of independent offices with the aim of derailing **Mombasa SRMCC Criminal Case No. 854 of 2020; Republic -vs- Steffano Uccelli & Isaac Rodrot alias Mwaura.** That it offends the provisions of Section 193A of the Criminal Procedure Code in that it seeks to stay criminal proceedings on the grounds that the criminal

proceedings are directly in issue in civil proceedings. They aver that this court lacks jurisdiction to examine the sufficiency of evidence in the pending criminal case, issues which can only be determined by a criminal trial court. They contend that Article 157 of the Constitution and the Office of Director of Public Prosecutions Act enjoin the Director of Public Prosecutions to take into consideration the Public Interest, the interest of the administration of justice and the need to prevent the abuse of legal process. It is averred that the Petitioners have failed to demonstrate in what way their Constitutional rights have been violated, infringed and/or threatened by the respondents; and finally that the petitioners intend to delay the trial in the lower court having failed demonstrate that the petition herein raises a substantial question of law that would warrant constituting a bench of uneven number of Judges.

The gist of the respondents' response is contained in the affidavit sworn by **Boniface Muli** a detective at the DCI headquarters and a member of the investigation team in. He depones that investigations into a complaint lodged by one Hans Langer were commenced at the CID Headquarters in Nairobi on 31st August 2010. In the complaint, it is deponed, it was alleged that the 2nd and 3rd Petitioners herein who were the sole signatories to the **Salama Beach Hotel LTD** had obtained from the 1st Interested Party 290,000.00 Euros while purporting that they were going to pay VAT and other taxes to the Kenya Revenue Authority(KRA) and subsequently withdrew Ksh. 23,333,345.90

It is averred that the investigations carried out involved an in-depth examination of witnesses, collection of documents, verification, and analysis of documentary evidence both in Kenya and Italy. That in the statement recorded by the complainant, he set forth a chronology of events beginning with a dispute between two foreign companies in Italy arising from a tenancy agreement; the determination of the said dispute before the court of Milan in Italy and ultimately his visit to Kenya where he instituted a suit through his **Company Accredo AG** to enforce a foreign judgment issued by the court of Milan dated 24th December 2001.

The deponent states that from investigations, it was established that Hans Langer, a German Citizen, through one of his companies **Beau Vallon Properties** entered into a lease agreement with **Viaggi Del Ventaglio Ltd ("Ventaglio")** over its property **Coral Strands Hotel** situated in Seychelles as from 14th April 2001 at the annual rent of Euro 1,650,000.00 but Ventaglio defaulted in paying the rent and left the **Coral Strands Hotel** on the 16th October 2001.

It is averred that **Accredo AG**, through its consultation company known as **Adinos Ag** of Switzerland sued Ventaglio in Italy vide Court of Milan file No 62662/2001 and obtained judgement in its favour for **Accredo Ag**. Thereafter, **Hans Langer** travelled to Italy armed with the court's ruling and sought to establish what properties were owned by Ventaglio from the Companies registry in Italy. While in Italy, Hans Langer met the directors of Ventaglio, one **Bruno Colombo** and **Mario Scotti Camuzzi** and learnt they were also the **Directors of Salama Beach Hotel LTD** situated at Watamu in Kenya.

As the deponent's case goes, on the 4th September 2009, **Langer** received a letter from **Bruno Colombo** with a two pronged offer on the settlement of the debt owed to **Accredo AG** that is: to undertake a valuation of **Salama Beach Hotel Ltd** and pay the balance or, to lease the property known as **Salama Beach Hotel Ltd** to recover the debts owed to **Accredo AG** by Ventaglio. Pursuant to the proposal made by Bruno Colombo, it is contended, Hans Langer travelled to Malindi to survey the hotel and to meet Bruno Colombo's contact known as **Isaac Rodrot**, the 2nd Petitioner, at the **Salama Beach Hotel Ltd** then trading as **Temple Point Hotel** in Watamu.

**Mr. Muli** avers that on the 24th July 2009, **Hans Langer** travelled to Kenya where he met the 2nd and 3rd applicants/petitioners who introduced themselves to him as the manager and director of the **Salama Beach Hotel Ltd**.

It is further averred that during his first visit to Kenya, the 2nd and 3rd applicants/petitioners introduced one **Charles Kilonzo** as the lawyer representing the Hotel and upon briefing them over the matter they demanded the court proceedings from the Court of Milan in Italy in order to legalise the possession of the company.

The deponent's contention is that the 1st Interested Party was then furnished with a copy of title **CR 11576 LR 9890** and **Survey Plan No 70364** whereupon he immediately instructed **Mr. Charles Kilonzo** to immediately institute a suit in Malindi High Court to enforce the said judgement from Milan. Hence, **Malindi HCCC No. 118 of 2009** was duly filed and a decree issued on 21st January,2010 pursuant to a consent order. It is averred that on 9th February, 2010 a meeting of the directors of **Salama Beach Hotel** was held where it was resolved that the 2nd applicant, **Isaac Rodrot**, would be allotted 40,000 ordinary shares and further that he would be appointed a director of the 1st applicant company while the 3rd applicant/petitioner was to remain director without shares.

It is asserted that the 1st Interested Party later realized that he had been duped to sign the minutes of the meetings when he established that **Abacus Services Ltd** was shareholder of **Salama Beach Hotel** and had all along been excluded from the deliberations of the company where far reaching resolutions affecting his company had been made. The 1st Interested Party further established that all the documents in his possession did not bear the company seal as it had all long been in the custody of the duly appointed Company Secretary for **Salama Beach Hotel Ltd**, one Nitin Pandya whose company **Abacus Services Ltd** held 9000 ordinary shares while 81,000 shares were held by Ventaglio in 1996.

The assertion is that **Nitin Pandya** recorded a statement in which he set forth a chronology of the appointment of directors of the Hotel since 1996 and affirmed as the Company Secretary, that no Company meetings had been held in Salama Beach Hotel Limited since 2008 as the audited accounts for the year 2009 had not been prepared. That **Nitin Pandya** confirmed that all the assets of the Hotel plus 100% shares of the Company were charged under a joint and several debentures with a deposit of shares to **Unicredit Banca D'impresa SPA** and **Banca Intessa SPA** together with the supplementary charge against title on property on LR 9890 in Watamu. It is further asserted that it was established that Nitin Pandya had received demand letters on 30th September 2010 and 1st October 2010 from **Unicredit Banca D'Impresa Intessa Spa** demanding repayment of the amount owed by Ventaglio.

According to **Mr. Muli, Nitin Pandya** stated that he was surprised to learn through one of the daily papers that **Isaac Rodrot** whom he knew as the Chief Accountant of the Hotel, was claiming ownership of **Salama Beach Hotel LTD** and further that shares had been transferred to Hans and **Zahra Langer** pursuant to a court order that had been directed to the Registrar of companies as no Company

meeting had been held to pass such a resolution. He was further surprised that shares belonging to **Abacus Services Ltd** had been transferred to **Accredo AG** yet Abacus did not owe **Accredo AG** any debt whatsoever.

It is averred that having gathered all this information the Office of the Director of Public Prosecutions wrote to the competent authority of Italy requesting for assistance in the investigations by a letter dated 30th April 2012 whereupon the Italian Government sent a Note Verbale authorizing the Kenyan authority to travel to Italy to conduct further investigations. Following receipt of the **Note Verbale**, it is averred that **IP Patrick Khaemba** visited Italy on the 7th March 2015 and in order to verify facts already in his knowledge, appeared before Civil Court No. 26 presided over by **Dr. Franco Cantu** before whom the directors of **Viaggi Del Ventaglio- Bruno Colombo** and **Mario Scammuzzi** appeared and confirmed that a civil case had been determined in favour of **Accredo AG**. The directors further confirmed that **Salama Beach Hotel** run as **Temple Point Hotel** in Watamu was one of the 44 companies spread all over the world run by **Viaggi Del Ventagglio**. That the two directors further confirmed before the Italian court that **Viaggi Del Ventaglio** had consented to the Hotel being taken by **Accredo AG** and that **Viaggi Del Ventaglio** had been put on Insolvency by the Italian Authority

It is contended that investigations further established that **Salama Beach Hotel LTD** held 3 accounts namely Kenya Shillings, USD, and Euros and that the signatories to the Hotel account transferred money from the Euro account which they withdrew the authority of **Accredo AG Directors**.

Having concluded the investigation, it is averred that the file was forwarded to the Office of Director of Public Prosecutions, Headquarters for directions and upon reviewing the file the DPP was satisfied the evidence disclosed offences against the suspects and consented to the prosecution of the 2nd and 3rd petitioners as charged vide **Mombasa SRMCC Criminal Case No. 854 of 2020; Republic -vs- Steffano Uccelli & Isaac Rodrot alias Mwaura.**

**Mr. Muli** maintains that the arrest and arraignment of the 2nd and 3rd petitioners was based on professionally conducted investigations and a Decision to Charge arrived at after the DPP considered the evidence gathered considering all the relevant facts and circumstances of the case.

In response to the petitioners' assertion that the Criminal prosecution of the 2nd and 3rd Petitioners is malicious, oppressive and an abuse of the criminal process to settle civil disputes, it is asserted that the evidence gathered discloses offences against the suspects and that their prosecution on the Charges preferred is warranted. That under Article 157(10) of the Constitution, the DPP does not require any consent from any authority commence criminal proceedings neither does he act under directions or control of any authority. As such, the deponent surmises, the Petition is and not only an attempt to usurp the constitutional mandate of the DPP to investigate and undertake prosecution in the exercise of the discretion conferred upon that under Article 157 of the Constitution but also a challenge to the merits of the decision making process of the Office of Director of Public Prosecutions an independent institution acting in the interest of the administration of justice.

In closing, it is averred that as the petitioners contend that they have a good defence to the charges preferred against them before the Chief Magistrate's court in Mombasa, they ought to ventilate that defence before the trial court and not to invoke the same to seek the halting of criminal proceedings undertaken bona fides since this court is not the correct forum where the defences available in a criminal cases ought to be determined.

**The 1st Interested Party's Case**

**Hans Jurgen-Langer** avers he is the 1st Interested Party herein and conversant with the facts. He states that he is ordinarily a resident in Watamu within Kilifi County in Kenya but currently in Germany having travelled following the direction by the Federal Government of Germany that required its Citizens to return home.

**Mr. Langer** denies that the 2nd Petitioner is the lawful shareholder in **Salama Beach Hotel Limited**, the 1st applicant/petitioner, or that the Ruling and Orders obtained by the 2nd and 3rd Petitioners in Malindi HCCC No. 118 of 2009 grant the them immunity from investigations being carried out or prosecution in Mombasa CM Criminal Case No. 854 of 2020. He maintains that these orders were obtained fraudulently and the Honorable Court was duped into issuing the said orders based on forged documents purportedly showing that the said Petitioners were shareholders and Directors of the 1st applicant.

According to the 1st Interested Party, the 1st applicant has no lawful interest in either properties **LR. No Plot No. 11576 and No 9890 Watamu** or in the 2nd Interested Party herein Temple Point Resort Limited. It is further contended that the 1st Applicant/Petitioner has over the years managed a high-end holiday resort known as **Temple Point Resort** (formerly known as **Salama Beach Hotel**).

The story according to the 1st Interested Party is that sometime in 2009, he came to Kenya to enforce an award of Euros 825,000 in favour of his company **Accredo AG** obtained in Milan Italy against **Viaggi Del Ventaglio** arising from a claim for payment for services rendered by his other company **Adinos AG** in Seychelles. That **Viaggi Del Ventaglio** was one of the companies in the Ventaglio Group of Companies and related to the principal shareholder in the 1st applicant, **Ventaglio International S.A.**

According to **Mr. Langer,** the 1st Applicant as at 2009 had 90,000 issued up shares owned by two shareholders namely **Ventaglio International S.A** with 81,000 shares and Abacus Services Limited with 9,000 shares. It is averred that **Ventaglio International SA** is a limited liability company incorporated in Luxembourg and Italy and one of the many companies within the Ventaglio Group of companies such as **Viaggi Del Ventaglio** while Abacus Services Limited was a local company represented by one **Nitin Pandya** who also doubled up as the company secretary for the 1st applicant.

The 1st Interested Party avers that at all material times, the 2nd applicant/petitioner was an employee of the 1st applicant, having joined the company sometime in 1990 as an Assistant Accountant drawing a monthly salary of Kshs. 5,525/=. It is also contended that he and has never

been a shareholder in the said company except through forgery of documents. It is further averred that the 3rd Petitioner is an Italian citizen and joined the 1st applicant sometime in 2005 as a non-shareholding director but has over time become an enabler of the 2nd Petitioner's fraud and have colluded to forge ownership documents to divest the 1st Interested Party of his lawful interest and investment in the 1st petitioner.

It is averred that the takeover of the 1st applicant to recover the Judgment in Milan Court was approved by the directors of Ventaglio International in Italy including Messrs Bruno Colombo and **Mario Scotti Camuzzi**. That when the 1st Interested Party arrived in Kenya, he held several meetings with the 2nd petitioner who was then General Manager and the 3rd petitioner. The said petitioners were always in the company of the company lawyer for the 1st Applicant, **Maurice Kilonzo Advocate**. That they allowed him to take over the Hotel after consulting with the management in Italy and on sound legal advice.

The contention is that at no time did the 2nd applicant/petitioner claim that he was a shareholder in the 1st applicant prior to 2009 and he together with the 3rd petitioner recommended to the 1st Interested Party the Advocate who filed Malindi HCCC No. 118 of 2009 seeking to enforce the Milan Judgment. That the 2nd and 3rd Applicants freely and willingly admitted to the claim leading to the Consent Orders made on 21st January 2010 granting the 1st Interested Party and **Zahra Langer** shareholding in the 1st Applicant.

It is averred that as while initially **Accredo AG** had in its favour a claim for 825,000 Euros plus interest against **Viaggi Del Ventaglio SPA**, this was reduced to 525,000 Euros in the final award made in 2013 following appeals in Italy. It is averred that this notwithstanding, the claim by **Accredo AG** was truly owing and admitted by the management in Italy in the Court process and the takeover of the 1st Applicant was sanctioned by the true directors of Ventaglio International in Italy.

The 1st respondent charges that after taking over the management of **Salama Beach Hotel** in 2010, investment in excess of Kshs. 500,000,000/- was made to renovate the Hotel, pay employees' salaries, pay tax arrears, and clear debts then outstanding to creditors. This investment was made based on rights granted to the 1st Interested Party by **Ventaglio International SA** and ratified through Court process with full knowledge of the 2nd and 3rd Petitioners in their then roles as General Manager and Director of the 1st applicant. It is further averred that over the years, the investments in the hotel are in excess of Kshs.2 Billion.

According to the 1st Interested Party, soon after taking over the management of the Hotel, the 2nd and 3rd Petitioners came up with dubious claims and attempted to black mail him to pay them money and when he refused, they petitioned the High Court to set aside the Consent orders made in 2010 **HCCC No. 118 of 2009** using a forged CR 12 documents dated 15th January 2010 purportedly depicting them as shareholders and Director of Salama Beach Hotel Limited.

It is averred that when the 2nd and 3rd applicants made the fraudulent claims, the 1st Interested Party reported their conduct to the police, questioning the manner in which they had obtained the shareholding and directorship depicted in the CR 12 of 15th January 2010 in respect **Salama Beach Hotel Limited** purportedly assigning the 2nd petitioner/applicant 40,000 shares in the 1st applicant. According to the 1st Interested Party, the police in Malindi did not act on the complaint and when they escalated the matter to the Headquarters in Nairobi, it took inordinately long for the investigations to be carried out.

It is averred that while the investigations were still going on, this Honourable Court went ahead and heard and set aside the lawful Consent Order issued on 21st January 2010 in favour of **Accredo AG** relying on the forged documents exhibited by the 2nd and 3rd Petitioners in Court without the benefit of confirmation of the veracity of the said documents by the police, and vested the ownership and control of the 1st Applicant in the hands of the 2nd and 3rd petitioners. It is contended that it was out of desperation and determination to seek justice that **Accredo AG** appealed the decisions made in **Malindi HCCC No. 118 of 2009** in the Court of Appeal but could not get the orders overturned without the benefit of the report by the police on the fraud.

It is averred that sometime early this year, after lengthy investigations it has emerged that the CR 12 dated 15th January 2010 used by the 2nd and 3rd petitioners to petition the High Court to set aside the Consent Judgment of 21st January 2010 was forged and that the 2nd petitioner has in fact never been a shareholder of the 1st Applicant. It is these investigations, reports and findings that form the basis for the arrested of the 2nd and 3rd applicants for various offences including forgery of the CR 12 documents.

The 1st Interested Party denies that the criminal case is an extrapolation of civil claims and contends that the criminal case is founded on a complaint made way back in 2010 and informed by findings from thorough investigations. It is contended that the 2nd and 3rd Applicants cannot purport to invoke the doctrine of res judicata or finality to avoid being investigated or prosecuted in respect of their forgeries. It is also contended that none of the civil disputes has been head and determined on merits including **Malindi HCCC No. 118 of 2009** which is still pending and the doctrine of finality cannot be appropriately invoked in the circumstances.

The 1st Interested Party avers that the office of the DPP is an independent office established under Article 157 of the Constitution of Kenya and the decision whether or not to prefer charges solely lies with the DPP. That whereas the 2nd and 3rd Petitioners allege that the 1st respondent is acting under the influence of the 1st Interested Party, they have not adduced any evidence to support that allegation. It is further averred that this Court does not have power to investigate criminal offences and cannot interfere with the prosecutorial decision of the 1st Respondent reached following thorough investigations unless where there is proof of abuse of the process or violation of fundamental rights and freedoms.

According to the 1st Interested Party, the 2nd and 3rd petitioners have not offered any explanation on the forged documents except retorting that they have obtained orders in the civil courts in their favour. That the existence of a civil dispute or suit alone is not enough to stop criminal proceedings commenced based on the same set of facts. It is asserted that the 2nd and 3rd petitioners have not adduced evidence to

show that respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations them to warrant the orders sought on both the application and the Petition.

It is contended that the 2nd and 3rd petitioners violently attacked and evicted the 1st Interested Party from the Hotel on 10th March 2020, notwithstanding that the Commercial Court in Milimani in **Insolvency Petition No. E016 OF 2018** had issued orders on 26th February 2019 and 18.2020. The 1st Interested Party denies the allegations that the police have handed over the Hotel to him and put the Petitioners to strict proof thereof. Mr. Langer contends that he has come to learn that during the arrest of the 2nd and 3rd petitioners, the police found suspicious substances, weapons and other contraband in the Hotel and the Hotel has been sealed by the police as a crime scene.

To conclude, the 1st Interested Party contends that if the orders sought are granted, it will be a mockery to the court process and administration of justice particularly in light of the overwhelming evidence showing that the Orders given by this Court in **Malindi HCCC No. 118 of 2002** granting the 2nd and 3rd applicants control of the Hotel were obtained based on forged documents and a fraud upon the Court. On this basis, the 1st Interested Party opposes the prayers sought in the Notice of Motion and the Petition and beseechs the Court to dismiss both the Application and the Petition to allow the Criminal Court seized of the matter to make determination on the charges on merits.

**The 2nd Interested Party's Case**

The 2nd Interested Party's case is illustrated by **Elmar Wagner** one of its directors. Off the bat, he contends that the petition as drawn is fatally defective as it fails to disclose the constitutional rights alleged to be violated and that the 2nd applicant/petitioner does not have the locus standi to instigate any suit on behalf of the 1st applicant/petitioner as he is neither a director nor a shareholder. He further avers that the Petitioners have not attached any resolution or valid resolution of the 1st applicant/petitioner company approving the institution of this suit contrary to the provisions of Order 2 rule 15 of the civil Procedure Rules.

In the deponent's summation, the Application as filed is perspicuous in that it involves the control, management of the property known as **Salama Beach Hotel/Temple Point Resort** erected on the property known as Grant 11576 and 9890 notwithstanding the fact that the 2nd applicant/petitioner is neither a shareholder nor director of the 1st applicant and the 3rd petitioner has not attached any resolution from the 1st applicant to instigate this suit hence they cannot seek any orders affecting the rights conferred on the 1st Applicant/Petitioner as the registered proprietor.

According to the 2nd Interested Party, at all material times relevant to the Application and Petition, the 2nd Interested Party had leased the subject property from the 1st applicant/petitioner for a period of 15 years and at a consideration Ksh.1.4 to 5.4 Million. It is averred that during the subsistence of the lease the 2nd Interested Party invested over the sum of 698,935,670 into the hotel until 2017 when wrangles over the ownership of the 1st applicant/ petitioner caught up with them. That out of the constant threats of eviction by the 2nd and 3rd applicant/petitioner they instigated Insolvency petition E016 OF 2018 Nairobi wherein they obtained a court order dated 18th February 2020 restraining the Petitioners and the police from evicting them. It is averred that on 20th February 2020, in blatant disregard to the court orders, the 2nd and 3rd petitioners evicted the 2nd Interested party from the subject property. That pleas to the 2nd and 3rd applicants to allow the 2nd Interested Party get their movable assets from the subject property fell on deaf ears and the financial position of the company has been crippled as it had colossally invested in the subject property.

The deponent contends that the issue of the management and control of the subject property was adjudicated in Civil Suit 118 of 2009- Malindi and as such if indeed there is contempt, if any, or subversion of justice of the orders issued in Civil Suit 118 of 2009- Malindi, the recourse then lies in the 2nd and 3rd petitioner instigating proceedings in the said suit.

According to the 2nd Interested Party, while the petitioners claim a violation of their rights under article 40 of the constitution because the subject property was allegedly handed over to the complainant's agent, they in the same breath affirmed that the prosecutor in the criminal proceedings informed the court that the subject property was handed over to the OCS watamu as it is deemed that the hotel is a crime scene. It is averred that if indeed the Petitioners have any substantive evidence to contrary, that ought to be brought to the attention of the trial court.

It is averred that the basis of the criminal prosecution in **Mombasa SRMCC Criminal Case No. 854 of 2020; Republic -vs- Steffano Uccelli & Isaac Rodrot alias Mwaura** is the fact that the 2nd and 3rd applicants forged the certificate of incorporation of the 1st Petitioner herein with an intent to defraud the 1st petitioner. Therefore, their prosecution as undertaken by the Director of Public Prosecutions falls squarely within the mandate conferred by Article 157(6) of the Constitution. It is averred that an investigating officer need only establish reasonable suspicion before preferring charges under the auspices of Section 14(1) of the Police Act.

The 2nd Interested Party contends that no evidence whatsoever has been advanced by the 2nd and 3rd petitioners to demonstrate that the respondents acted maliciously, unfairly, or oppressively in their investigations and subsequent decision to charge.

After an analysis of the orders issued by the Court in **Malindi HCCC No. 118 of 2009** on 30th April 2015 and confirmed on appeal, the 2nd Interested Party contends that the issue of directorship of the 1st Applicant Petitioner was never determined save to the directions of the removal of **Hans - Juergen Langer** and **Zahra Langer** from **Salama Beach Hotel Limited**. As such, the criminal proceedings regarding forgery of the company records are not in any way interfering with the any determination made and is not undermining any authority of the court.

According to the **Mr. Wagner,** on 20th February 2020, the 2nd Interested party was evicted from the subject property in blatant contempt of a court order in Insolvency petition E016 OF 2018- Nairobi dated 18th February 2020 that was expressly directed to Kilifi county

Intelligence and Security Committee, Malindi Sub County Intelligence restraining them by way of an Injunction from interfering with the operations of the Salama Beach Hotel or evicting anyone therein.

It is further averred that the criminal case is not meant to bring pressure to bear upon the applicants to settle a civil dispute as the civil dispute in reference of the subject property has already been determined in HCCC 118 of 2009.

It is averred that the investigations, arrest and arraignment of the 2nd and 3rd applicants/petitioners was done in accordance with Article 157(4), (6) and (10) as well as Article 245(5) of the Constitution. That no reasonable cause has been given by the petitioners to warrant the quashing of the charges and in any event, the evidence to be tendered in support of the Charges should be tested at the trial Court. Further, no evidence had been placed before this Court to show that the petitioners would not be accorded a fair trial in the Magistrate's Court. That there is no evidence to show that the respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the petitioners.

Finally, it is averred that all the issues raised in the application and Petition are matters for the trial court. That the petitioners have come to this Court with unclean hands wherein they materially and deliberately failed to disclose to the Court material facts and thus do not deserve equitable remedies as they seek to subvert the course of justice. This application should be dismissed as it is misconceived and is merely intended to obstruct a lawful prosecution and is therefore also an abuse of Court process.

**The Submissions**

Advocate for the applicants in his submissions addresses the twin issues of whether the Motion dated 8th June 2020 warrants the issuance of conservatory orders; and whether the Petition raises substantial questions of law to warrant the referral to the Chief Justice for an empanelment of an uneven bench of Judges. On the first issue, it is submitted that courts do not determine the issues of fact or law when considering applications for conservatory orders. That an applicant must establish a prima facie case and demonstrate that they will be greatly prejudiced in the event the conservatory orders are not granted. This point is supported by citing **Speedex Logistics Limited & 2 others v Director of Criminal Investigations & 3 others [2018] eKLR**. Further, for what constitutes a prima facie case and more so one for conservatory orders, Counsel directs the Court to **Ezekiel Waruinge v Director of Public Prosecutions & 2 others [2017] eKLR**.

Making extensive reference to the averments made in support of the Application and Petition as outlined in the foregoing, it is submitted that the events leading to **Mombasa SRMCC Criminal Case No. 854 of 2020: Republic -vs- Steffano Uccelli & Isaac Rodrot alias Mwaura** and the proceedings therein are suggestive of malice, abuse of prosecutorial powers, subversion of the rule of law and abuse of the court process; all worthy of judicial interference. It is submitted that based on these facts, it is manifest that the criminal proceedings are a sham and that the real intention of the proceedings is to re-try **Malindi HCC 118 of 2009**. That the complainant in the criminal case claims that the 2nd and 3rd applicants defrauded him by obtaining the registration of the 1st petitioner. That it is also claimed that the applicants have stolen from the 1st petitioner. These claims, it is submitted, are absurd since the complainant is neither director nor shareholder of the 1st petitioner.

It is submitted that while the charges faced by the 2nd and 3rd applicants in the criminal case have elements of fraud, the **High Court at Malindi in HCCC 118 of 2009** was categorical that it was the complainant and his cronies that obtained their directorship of the 1st petitioner through fraud and misrepresentation. Hence, counsel submits, the continued interrogation and hearing of the criminal proceedings will prejudice the applicants as it will be a retrial of issues that were determined by a civil court. It is submitted that to allow commercial disputes to be reignited in criminal proceedings after conclusive determinations by the civil court will erode the principle of finality of justice and *staire decisis.* That while Article 157 (11) is clear on how the DPP ought to exercise his mandate, the Applicants' prosecution has no regard for public interest, the interests of administration of justice or the need to prevent and avoid abuse of that power. It is submitted that courts can interfere with the exercise of the DPP's powers in the event the DPP exercises his discretion for an improper purpose. Reliance is placed on **Ezekiel Waruinge v Director of Public Prosecutions & 2 Others [2017] eKLR**. and **Barloworld Limited v Anti-Counterfeit Agency & another [2017] eKLR**

Drawing strength from the preceding arguments, it is Counsel for the Applicants submission that they have made out a prima facie case warranting the issuance of interim conservatory orders.

Turning to the issue of empanelling an uneven bench to hear the Petition, Article 165(4) of the Constitution of Kenya is cited for the submission that it permits the constitution of a bench of more than one High Court Judge. It is submitted that for this to be done, the High Court must certify that the matter raises a substantial question of law. This question must appertain to whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; or where the matter involves a question on whether any law is inconsistent with or in contravention of the Constitution or whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of the Constitution. Alternatively, it must be a question relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; or a question relating to conflict of laws under Article 191. For this line of submissions, the Court is directed to **Wycliffe Ambetsa Oparanya & 2 others v Director of Public Prosecutions & another [2016] eKLR.**

Consequently, it is submitted that the instant Petition meets the criteria set out above given that the 2nd and 3rd applicants'/petitioners' right to own property has been violated and continues being threatened by the complainant's occupation of the 1st petitioner contrary to the orders of the High Court in HCC 118 of 2009 and the Court of Appeal in **CA No 36 of 2015.** That the 2nd and 3rd petitioners' right to a fair trial is threatened by the retrial of civil issues in a criminal court that is subordinate to the Court of Appeal and the High Court. This right is further violated by the open bias shown by the 2nd respondent's, who have handed over the 1st applicant/petitioner to the complainant at the point of the applicants' arrest.

It is submitted that the 2nd and 3rd petitioners' right to the highest attainable standard of health has been violated by the deliberate arrest and transfer of the Petitioners from Watamu to Mombasa, a Covid-19 hotspot, for arraignment in court. That the 2nd and 3 Petitioners' denial of

cash bail at the port police station with no compelling reasons for the same was in violation of Article 49 (h) of the Constitution.

It is submitted that the instant matter is one of general public importance considering the public notoriety of the dispute regarding the ownership of 1st Petitioner and the complexity of the issues therein and the fact that this matter adversely affects the rights of the petitioners. Reliance is placed on the Indian decision of **Chunilal V. Mehta vs Century Spinning and Manufacturing Co. AIR 1962 SC 1314.**

In closing, the applicants' submit that they have demonstrated a prima facie case warrant the conservatory orders sought; that the motion has met the test for a substantial question of law pursuant to Article 165(4) of the Constitution and therefore the Honourable Court ought to grant the prayers sought as well as the costs.

Addressing whether the prosecution of the petitioners is in breach of their constitutional rights, counsel for the respondents cites Article 157(6)(a) of the Constitution of Kenya which provides the DPPs mandate to institute and undertake criminal proceedings. It is submitted that for the court to interfere with the decision of the DPP, the petitioners had an obligation to provide sufficient proof that the DPPs decision to prosecute was actuated with malice and made in bad faith hence ultravires and amounted to abuse of office. It is submitted that a careful analysis of the evidence in the respondents' replying affidavits and the annexures demonstrates the petitioners fraudulent acts in regards to **Salama beach Hotel Limited** and provide the foundation upon which their prosecution is based. Further, that the respondents have a constitutional duty to ensure crime is detected and that those responsible held to account. Next, counsel submits on whether a court when exercising civil jurisdiction to conclusively determine issues between parties and resultant rights can be set aside, varied, and/or amended through a criminal trial after such determinations have been made conclusively. Reference is made to Section 193A of the Criminal Procedure Code for the submission that nothing precludes the Inspector General of police or the Director of public Prosecutions from acting on a criminal complaint that is substantially in issue in a pending civil proceedings. That the law is settled that both the civil and criminal processes can run concurrently. In substantiating the foregoing arguments, reliance is placed on the case of **Paul Ng'ang'a Nyaga vs Attorney General & 3 Others [2013] eKLR**

State Counsel for the respondents submits that the petitioners' assertion that the decision to charge them in **Mombasa SRMCC Criminal Case No. 854 of 2020; Republic -vs- Steffano Uccelli & Isaac Rodrot alias Mwaura** was based on the consideration of exterior matters which are against the principles in Chapter 6 of the Constitution is spurious as no proof of exterior matters considered by the respondents was placed before the Court to warrant such a declaration.

It is submitted that the factual basis of the prosecution's case is disclosed in the affidavit of **PC Boniface Muli** and it is easy to discern the basis upon which the 1st respondent made the decision to charge the Petitioners. Counsel submits that at this stage, all the court needs to satisfy itself about is whether there is a prosecutable case against the petitioners. It is only the trial court that has the responsibility to determine the criminal case on its merits. Hence Counsel urges the court to find that the respondents' carried out their respective constitutional duties transparently and made the decision to charge based on objective, cogent and comprehensible evidence gathered professionally.

As to whether **Temple point Resort** in Watamu was illegally and procedurally handed over to the agents of the complainants by the arresting officers on 28th May, 2020, it is submitted that the police were executing their constitutional mandate as provided under Article 244 of the Constitution and in so doing acted very transparently and no evidence has been placed before the court to support the allegation that the said property was placed in the hands of the agents of the complainant. Counsel refers the Court to Article 243 of the Constitution of Kenya which establishes the National Police Service and Section 24 of The National Police Service Act No. of 2011 for the functions of the Kenya Police.

In support of the submission that the DPP is acting within its mandate articulated under Article 157 and that stopping the prosecution of the Petitioners would be tantamount to usurping the mandate of the DPP more so as no evidence has been placed before the court to support the Petitioners' averments, inspiration is drawn from **Speedex Logistics Limited & 2 others v Director of Criminal Investigations & 3 others [2018] eKLR and Republic vs Director of Public Prosecution & Another Ex-parte Geoffrey Mayaka Bogonko & Another[2017] eKLR.**

On the question of whether the Petition should be referred to the Chief Justice under Article 165(4) to constitute a bench of not less than 3 judges to hear and determine the petition as it raises issue of great public concern, it is submitted that the determination of whether an issue is of great public concern is a judicial one. As such, Counsel submits, the Court is obliged either on its own motion or on an application of the parties to the cause to identify the issues which in its view raise substantial questions of law. It is posited that no material has been placed before the court that would persuade the court that the Petition herein raises a substantial question of law that would warrant the constitution of a 3 Judge bench that this court would not be able to determine. Reference is made to Article 165(4) as well as Article 165(3) for the jurisdiction of the high court. In buttressing their points counsel references **Wycliffe Ambetsa Oparanya & 2 others vs DPP & Another[2016] eKLR; Peter Ng'ang'a Muiruri vs. Credit Bank Limited & Another Civil Appeal No. of [2008] eKLR; Harrison Kinyanjui vs. Attorney General & Another [2012] eKLR; and Vadag Establishment vs. Y A Shretta & Another, (Commercial & Admiralty Division) Nairobi Misc. High Court Civil Suit No. 559 of 2011.**

In closing, it is submitted that the decision to charge the Petitioners in the instant matter was sound in law and made without any bias or bad faith, neither can it be said to have been made to achieve ulterior motives. The decision was based on cogent and comprehensible evidence gathered professionally which discloses the deceitful nature of the petitioners in their acquisition of control of the **Salama Beach Motel Limited.** That the DPP and the Inspector General of Police working jointly have a constitutional duty and obligation to maintain law and order, initiate and conclude investigation and apprehend and prosecute offenders. Counsel cites **Republic vs. Attorney General Ex-parte Kipngeno Arap Ng'eny High Court Civil Application No. 406 of 2001.**

**The Application for Recusal dated 30th June 2020**

This application is in terms of under Articles 50 and 129 of the Constitution of Kenya, 2010 and Rule 3 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, Section 1A, 1B, 3B and 63 (e) pf the Civil Procedure

Act Cap 21, and any other enabling provisions of the law. The petitioners' are seeking the following orders:

> ***(a) That the directions given by Court on 15th June 2020 to during the hearing of the Petitioners' application be stayed and/or discharged pending the hearing and determination of this application.***
>
> ***(b) That the Court disqualifies itself from hearing and determination of the dispute between the parties.***
>
> ***(c) That the Court be pleased to transfer the matter to the High Court in Mombasa where the cause of action rose for hearing and determination.***
>
> ***(d) That costs be provided for.***

The application is supported by an affidavit sworn by **Hans Jurgen-Langer** annexed to it. The 1st Interested Party is of the view that this Court as constituted may be biased against him. **Mr. Hans Jurgen-Langer** says that in that this court has adjudicated a similar dispute involving the same parties herein and over the same subject matter and has severally tendered decisions in favor of the petitioners in blatant disregard or observance of the evidence presented by the 1st Interested Party.

The 1st Interest Party further claims that this Court in its ruling dated 24th February 2020, in HCCC 118 of 2019, despite demonstrable evidence that the petitioners had forged documents from the register of Companies naming them as directors of Salama Beach Hotel, chose to ignore the said evidence and held that the matter was Res-judicata. The Interested Party finds the same to be a violation to the Rule of Law and dispensation of justice.

It is asserted that the 2nd and 3rd petitioners have been charged with various criminal offences including forgery of documents relating to the shareholding and directorship of Salama Beach Hotel Limited, the 1st petitioner herein. The 1st Interested Party alleges that this Court's involvement in the said earlier ruling, the alleged strong convictions and comments it made on the matter of ownership of Salama Beach Hotel in that ruling gave him a strong belief that the Court is already prejudiced and doubts that it cannot give a fair adjudication to the issues to be raised by the respondents and the Interested Parties.

It is trite law that Superior Courts in this country ought to give reasons for decisions for decisions and indicate their assessment of the evidence placed before the court. This court did that in the impugned ruling despite it not having touched on the merits of the case but rather simply ensured enforcement of orders that were previously made by Judges of concurrent jurisdiction and the same confirmed by the Court of Appeal.

**The Submissions on Recusal**

The 1st Interested Party alleges that this Court will not be able to handle or adjudicate the dispute espoused in the Petition herein in an impartial manner given sentiments I made in the previous related matter. The substratum of the Petition which the court has been sought to recuse itself is **Mombasa SRMC Criminal Case No. 854 of 2020** wherein the 2nd and 3rd petitioners have been charged on various charges including forgery of documents in relation to the shareholding and directorship of **Salama Beach Hotel Limited**, the 1st Petitioner. The 1st Interested party peddles the argument that the investigation which has been carried out by the police unmasked that the 2nd and 3rd petitioners have employed the alleged forged documents to hoodwink law enforcement and obtained favorable Court orders giving them access and control of the hotel known as **Temple Point Resort** (formerly known as **Salama Beach Hotel**) thereby depriving the 1st Interested Party and his related entities of their rightful interest and investment.

It is the 1st Interested Party's position that this Court in **Malindi HCCC No. 118 of 2009** delivered a ruling in favor of the 2nd and 3rd petitioners directing that the suit property be handed to them. It is further alleged that in the said ruling, this court showed an inclination to side with the 2nd and 3rd petitioners' narrative and dismissed the Interested Parties' application which sought to set aside previous orders obtained by the 2nd and 3rd petitioners' on account of the alleged forged documents. It is further argued that this court made remarks that the issues pertaining to the ownership of the suit property are decided when in fact the matter has not been heard and determined.

The Counsel for Interested party also alleges that the 2nd and 3rd petitioners' publicly declared confidence about the outcome of the Petition in question. He therefore submitted that to a reasonable and fair-minded person, inevitable draw the conclusion that this court has already made its mind concerning the disputes pertaining to **Salama Beach Hotel**. Counsel finds the same as reason enough for this Court to recuse itself.

The Counsel for the Interested Party also delved into the question as to whether the Petition herein ought to have been filed in Mombasa. He holds the position that the petition ought to have been filed at the High Court in Mombasa and not at Malindi for the following reasons: the fact that the criminal proceedings which the Petitioners' sought to stop are being conducted by a Magistrate's Court sitting at Mombasa, which is well within the administrative supervisory jurisdiction of the High Court in Mombasa; that in the petition, the petitioners have extensively complained of alleged mistreatment in police custody, plea taking and the manner in which their application to be admitted to bail was handed as well all the processes including the police cells are in Mombasa and that the respondents handling the **Mombasa SRMCC Criminal Case No. 854 of 2020** are protagonists on the ownership of **Salama Beach Hotel.**

It is therefore argued that since the petitioners' cause of action, if any, arose in Mombasa, this petitioner as well ought to have been filed in Mombasa. Further that the 2nd and 3rd petitioners' herein are known for forum shopping and they have always obtained favorite outcomes. Given the foregoing, Learned Counsel submitted that the application is merited in this Court to grant the orders sought.

**Analysis and Determinations**

With the benefit of the pleadings, the evidence tendered and the submissions highlighted by respective advocates, it is evident that the instant applications relate to prayers for conservatory orders; empanelment of a bench of uneven number of judges; disqualification of the bench and a transfer of the suit to the High Court at Mombasa. These prayers form the substratum of the issues warranting resolution by this Court. These issues are for determination:

> ***a. Whether the application for recusal of the bench is merited;***
>
> ***b. Whether the Petitioners have prima facie satisfied the conditions for issuance of a conservatory order stopping their prosecution in Mombasa SRMCC Criminal Case No. 854 of 2020;***
>
> ***c. Whether the request for the constitution of an uneven bench to hear the Petition is merited;***
>
> ***d. Whether the instant Petition ought to have been filed in Mombasa; and if so, should it be transferred to Mombasa for final determination?***

**Whether the application for recusal of the bench is merited**

As the system was originally conceived in the first place before any step is taken by a Judge to recuse or not to recuse himself or herself the weighty of this words by Justice Cory of Canada should have a significant bearing as reminisced:

> ***"Often the most significant occasion in the career of a Judge is the swearing of the oath of office. It is a moment of pride and joy coupled with a realization of the onerous responsibility that goes with the office. The taking of the oath is solemn and a defining moment etched forever in the memory of the Judge to render justice impartially. To take that oath is the fulfilment of a life's dreams. It is never taken lightly. Courts have rightly recognized that there is a presumption that judges will carry out their oath of office. This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold, the presumption can be displaced with cogent evidence, that demonstrates that something that the Judge has done gives rise to a reasonable apprehension of bias."* (See RDs v R {1997} 3 SCR 484) Supreme Court of Canada)**

For this reason judicial integrity is a state interest of the highest order. Notwithstanding, these weighty words by **Justice Cory** in RDS (supra). The Courts have on several occasions taken this approach as exemplified by the principle in **Edgar v K. L. 93 F. 3D, 256, 259 – 60 7th circuit 1996** that:

> ***"Litigants are entitled to nothing less than the cold neutrality of an impartial Court; that it is of primary importance that a litigant's case be decided by an impartial and unbiased Court, and that the requirement of judicial impartiality is both a fundamental principle of the administration of justice and a necessary one if the public is to maintain confidence in the judiciary."***

As a matter of course, my point of departure is the question on whether the bench ought to recuse itself from hearing the Petition. The 1st Interested Party seeks the disqualification of this bench since it has exhibited bias through orders granted in favor of the Petitioners' in a preceding application. Disqualification or recusal is according to the **Black's Law Dictionary, 8th Edition at page 1303** defined as ***'Removal of oneself as Judge or policy-maker in a particular matter because of a conflict of interest.'***

The same dictionary at page 171 defines the word bias as:

> ***"Inclination; prejudice …judicial bias. A Judge's bias towards one or more of the parties to a case over which the judge presides. Judicial bias is usually insufficient to justify disqualifying a judge from presiding over a case. To justify disqualification or recusal, the judge's bias usually must be personal or based on some extrajudicial reason."***

The rule on recusal is that a judge ought to recuse themselves from hearing a cause in which they have personal interest in the outcome or where the public might have a reasonable apprehension that they might not bring an impartial or an unbiased mind to the adjudication of such case or matter. **See Locabail (U.K) Ltd v Bayfield Properties Ltd. (2000) QB 451, 472.** The rationale behind the rule is to protect the rights of litigants, maintain and preserve public confidence in the integrity of the administration of Justice.

The general presumption is that judges faithfully exercise their mandate without fear or favour, affection or ill-will and in terms of fundamental human rights to a fair and public hearing by an independent and impartial tribunal and judicial independence. It is assumed that they can be disabuse their minds of any relevant personal beliefs or predispositions and they are seen as independent-minded persons of intellect and integrity. Thus, there is a presumption of impartiality which carries considerable weight. Furthermore, true impartiality requires that the judge be free to entertain and act upon different points of view with an open mind. This principle was well expressed by the Constitutional Court of South Africa in **President of the Republic of South Africa v South African Rugby Football Union 1999 (4) S.A. 147, 177** thus:

> ***"….the reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience."***

Conversely, recurrent recusal may bring public disfavor to judges and judicial officers. The same also instills the impression that parties can pick and choose which judge will decide their case; an undesirable impression. In **Panday v Virgil Mag App No. 75 of 2006 at [29b] Archie JA** stated that a judge has to be firm-minded in recusing himself where there is an objection of substance and in not recusing himself where the objection is fanciful. In the same vein, Mason J of the High Court of Australia in **Re JRL ex p CJL (1986) CLR 342 at 352** gave the following useful guidance:

> ***"Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."***

Circumstances which would ordinarily not amount to bias are set out in **Locabail (UK) Ltd. v Bayfield Properties Ltd. [2000] QB at [25]**, the court stated:

> ***a. "It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on***
>
> **b.** ***the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge…***
>
> **c.** ***the judge's social or educational or service or employment background or history, nor that of any member of the judge's family;***
>
> **d.** ***previous political associations;***
>
> **e.** ***membership of social or sporting or charitable bodies;***
>
> **f.** ***Masonic associations;***
>
> **g.** ***previous judicial decisions;***
>
> **h.** ***extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers);***
>
> **i.** ***previous receipt of instructions to act for or against any party, solicitor or advocate, engaged in a case before him;***
>
> **j.** ***membership of the same Inn, circuit, local Law Society or chambers (see K.F.T.C.I.C. v Icori Estero S.p.A. (Court of Appeal of Paris, 28 June 1991, International Arbitration Report, vol. 6, 8/91).***

Further guidance as to situations which do not require a judge to recuse himself were provided by the U.S. Court of Appeals, Tenth Circuit in **United States v Robert Cooley 1F.3d 985 at [53]**:

> ***"1. Rumour, speculation, beliefs, conclusions, innuendo, suspicion, opinion, and similar non-factual matters, United States v Burger, 964 F.2d at 1069; Glass v Pfeffer, 849 F.2d at 1267; Willneer v University of Kansas, 848, F.2d at 1027; Hinman v Rogers, 831 F.2d at 939-40; United States v Hines, 696 F.2d at 719;***
>
> ***2. The mere fact that a judge has previously expressed an opinion on a point of law, Leaman v Ohio Dep't of Mental Retardation, 825 F.2d 946, 949 n. 1 (6th Cir.1987); United States v Bray, 546 F.2d 851, 857 (10th Cir.1976), or has expressed a dedication to upholding the law or a determination to impose severe punishment within the limits of the law upon those found guilty of a particular offense, United States v Gigax, 605 F.2d at 514; United States v Haldeman, 559 F.2d 31, 134 n. 302 (D.C. Cir.1976), cert. denied, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977);***
>
> ***3. Prior ruling in the proceeding, or another proceeding, solely because they were adverse, see Glass v Pfeffer, 849 F.2d 1261, 1268 (1988); Green v Dorrell, 969 F.2d 915, 919 (10th Cir.1992); Willner v University of Kansas, 848 F.2d at 1028;***
>
> ***4. Mere familiarity with the defendant(s), or the type of charge, or kind of defense presented, see Frates v Weinshienk, 882 F.2d at 1506;***
>
> ***5. Baseless personal attacks on or suits against the judge by a party, United States v Bray, 546 F.2d at 858;***
>
> ***6. Reporters' personal opinions or characterizations appearing in the media, media notoriety, and reports in the media purporting to be factual, such as quotes attributed to the judge or others, but which are in fact false or materially inaccurate or misleading; and***
>
> ***7. Threats or other attempts to intimidate the judge. See United States v Studley, 783 F.2d 934, 940 (9th Cir.1985); United States v Grismore, 564 F.2d 929, 934 (10th Cir.1977), cert denied, 435 U.S. 954, 98 S.Ct. 1586, 55 L.Ed.2d 806 (1978).***

***Finally, we have emphasized that "there is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is."Hinman, 831 F.2d at 939."***

The Supreme Court of Kenya has laid out illuminating precepts on recusal to which this court wholly associates. In the case of **Jasbir Singh Rai & 3 Others -vs- Tarlochan Singh Rai & 4 Others (2013) eKLR,** Supreme Court of Kenya Petition No. 4 of 2012 **Hon. Justices P. K. Tunoi, J. B. Ojwang, N. S. Ndungu, M. K. Ibrahim and S. Wanjala (JJSC)** had the following to say:

***"(6) Recusal as a general principle, has been much practised in the history of the East African Judiciaries, even though its ethical dimensions have not always been taken into account. The term, is thus defined in Black's Law Dictionary, 8th Edition (2004) (P. 1303);***

***'Removal of oneself as Judge or policy maker in a particular matter, (especially) because of conflict of interest'."***

***[7] From this definition, it is evident that the circumstances calling for recusal, for a Judge, are by no means cast in stone. Perception of fairness, of conviction, of moral authority to hear the matter, is the proper test of whether or not the non-participation of the judicial officer is called for. The object in view, in the recusal of a judicial officer, is that justice as between the parties be uncompromised; that the due process of law be realized, and be seen to have had its role; that the profile of the rule of law in the matter in question, be seen to have remained uncompromised.***

***[8] It is an insightful perception in the common law tradition, which the justice of a case does not always rest on the straight lines cut by statutory prescriptions, and the judicial discretion in its delicate profile, is critical to equitable outcomes. This is what Sir David Maxwell Fyfe meant when he attributed to Lord Atkin a "constructive intuition which operates after learning and analysis are exhausted" [in G. Lewis, Lord Atkin (London: Butterworths, 1983), p. 166]. It is precisely such delicate elements of judicial fairness that will also feature in the judgment as to whether or not the recusal of a Judge, particularly in the case of a collegiate Bench, is of any materiality, in a given case.***

***[9] Different jurisdictions make provisions, through statute or practice directions, for certain grounds for the recusal or disqualification of Judges hearing matters in Court. The most common examples, in this regard are: where the judicial officer is a party; or related to a party; or is a material witness; or has a financial interest in the outcome of the case; or had previously acted as counsel for a party.***

In determining the question of recusal on the basis of bias, the court has to carefully examine the facts which are alleged to show bias and from those facts draw an inference, as any reasonable and fair-minded person would do, that the judge is biased or likely to be biased. Once more, as **Tunoi J. A** pointed out, sight must not be lost of the fact that losing litigants might be more inclined to explain their loss on the alleged wickedness of other people rather than on the weakness of their own case. See **Miscellaneous Criminal Application 82 of 2013 eKLR.**

The 1st Interested Party alleges that this Court will not be able to impartially adjudge the dispute espoused in the petition herein, given the orders made in a previous ruling rendered on 24th February 2020. In that impugned ruling, the court simply ensured compliance with the orders granted by **Justice Chitembwe** in **HCCC No. 118 of 2009** on 30th April 2015. These same orders were affirmed by the Court of Appeal in a Judgement delivered on the 15th December 2017. The contention that the Court made a finding regarding the ownership of **Salama Beach Hotel Ltd** is therefore misleading.

Bias, whether actual, presumed or real likelihood of bias, must be proven by means of evidence. While the Interested Parties' have alleged bias, no particulars of actual bias have been put forward. What is left is apparent bias and the test of which is whether a fair-minded and informed observer, considering the facts would conclude that there was a real possibility that the tribunal was biased. The 1st Interested Party has heavily relied on the sentiments encapsulated in my previous ruling as the basis for recusal. In any event, if this Court had dealt with the matter on merits and issued orders which are adverse to the Interested party's case, the same would not have sufficed to prove bias. I find useful guidance in the **Locabail Case (supra)** where it was held that the mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. Very often a question of bias is alleged against a sitting Judge to recuse himself or herself from exercise jurisdiction over a pending criminal or civil matter. Not surprisingly, Judges have found difficulty in acceding to such requests at the whims of the litigants without derogating from their solemn oath of office. The object of the Courts is to prevent this at all costs by standing guard against the frontiers of subjective bias to draw a distinction altogether on the question contended for recusal.

In such a case it seems almost self-evident that the Judge who has to consider whether there is reason to recuse or not to recuse himself or herself must be entitled to receive the vital evidence on which the existence of bias relied upon depends in **Indore Development Authority & Another v Shyam Verma & others {2018} 3 SCC 405 Justice Misura** held as follows on his recusal:

***"The ultimate test is that it is for the Judge to decide and to find out whether he will be able to deliver impartial justice to a cause with integrity with whatever intellectual capacity at his command and he is not prejudiced by the fact or Law and is able to take an independent view. In case the answer is that he will be able to deliver justice to the cause, he cannot and must not recuse from any case as the duty assigned by the Constitution has to be performed as per the oath and there lies the larger public interest."***

Further a Judge rendering a Judgment on a question of Law would not be a bar to her or his participation in the present or future proceedings. The previous Judgment cannot constitute bias or a pre-disposition nor can it be seen as such, nor can expressions through a Judgment based on the outcome of arguments in an adversarial process be a subject matter to a recusal for bias on the merits.

An uncolored analysis of the 1st Interested Party's assertions leaves me convinced that no fair-minded and informed observer would conclude that there is a real possibility of bias on the part of this court in the circumstances. Of consequence is that the application for the disqualification of this bench fails.

**Whether the Petitioners have prima facie satisfied the conditions for issuance of a conservatory order stopping their prosecution in Mombasa SRMCC Criminal Case No. 854 of 2020**

What is required of me in considering the applicants' prayer for conservatory orders halting their prosecution is only to establish whether they have demonstrated a prima facie case with a chance of success and whether, should the prayer sought be denied, they stand to suffer real prejudice. As conservatory orders have a public law leaning, a decision to grant them rests on the inherent merits of the case; taken in tandem with the public interest, the constitutional values, the proportionate magnitudes, and priority levels attributable to the relevant causes. I need not delve into the merits of the Petition as that is not the province of the Court at this interlocutory juncture. This position is not novel. The Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** succinctly sets it out thus:

> ***"[86] "Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes."***

My train of thought is advanced by the finding in **Judicial Service Commission v. Speaker of the National Assembly & Another [2013] eKLR** where it is held:

> ***"Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person."***

In **Speedex Logistics Limited & 2 others v Director of Criminal Investigations & 3 others [2018] eKLR** to which Counsel for both the Applicants' and Respondents'' referred, the learned judge held:

> ***"15. It has severally been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success. Accordingly, in determining this application, this Court is not required, and is in fact forbidden from making any definite and conclusive findings on either fact or law. I will therefore not make any determinations on matters of fact or law as that would have the effect of prejudicing the hearing of the main Petition."***

Likewise, in **Centre for Rights Education and Awareness (CREAW) & 7 Others vs. Attorney General Nairobi Petition No. 16 of 2011,** the Court held:

> ***"...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."***

Following a now familiar trajectory, the Majority bench in **The Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012**, held:

> ***"In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission."***

Applying the dicta in the antecedent authorities, the first port of call is to establish whether the applicants have established a prima facie case. In the realm of conservatory orders, it has been severally held, as it was in **Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others [2018] eKLR,** that a *primafacie* case is not a case which must succeed at the hearing of the main case. Nonetheless, it is not a case which is frivolous. Ergo, an applicant must show that they have a case which discloses arguable issues; and in a case alleging violation of rights, arguable constitutional issues.

Does the applicants' plight raise arguable constitutional issues? To answer this, rehashing some pertinent facts is due. The 2nd and 3rd applicants maintain that based on the ruling by **Chitembwe J** dated 30th April 2015 in **Malindi HCCC No. 118 of 2009,** subsequently affirmed in the judgement dated 15th December 2017 in **Malindi Court of Appeal CA NO. 36 of 2015**, they were put into possession of the

1st applicant property. These two rulings they charge, still subsist and are valid. That despite the rulings in their favour, it was not until 20th February 2020 that the orders were enforced; putting them in actual possession of the property in question. That however on 28th May 2020, they were arrested and transferred to Mombasa, arraigned before the Senior Principal Magistrate and charged in **Mombasa SRMCC Criminal Case No. 854 of 2020; Republic -vs- Steffano Uccelli & Isaac Rodrot alias Mwaura** with 8 counts of offences, all relating to forgery of company CR12 forms for the 1st applicant and filing false returns.

The 2nd and 3rd applicants' gravamen is that their arrest and subsequent arraignment was conducted in violation of their constitutional rights and tailored towards achieving the end of relitigating the issue of the ownership of the 1st Applicant, an issue conclusively settled in a court of law. Specifically, they contend that their right to property under Article 40 has been violated by virtue of the attempt to dispossess them of control of the 1st Applicant, a property they have been established to have a lawful interest in by virtue of competent orders that have neither been varied nor set aside. They further contend that their right to a fair hearing under Article 50 was breached by the way their arrests were executed. That they were transferred to and charged in Mombasa while the subject matter of the alleged offences they were charged with was in Watamu, within the jurisdiction of this court. That further, the allegations of forgery of company documents and the use of the 1st and 2nd respondents to charge them is a veiled attempt at disenfranchising them. As such, they contend that the 1st respondent's decision to charge them was motivated by factors other than meeting the ends of justice.

In their retort, the respondents maintain that they are well within their mandate to arrest and charge the 2nd and 3rd Applicants in the manner that they did. That the 1st respondent acted in accordance with the powers granted to it under Article 157 and the instant application and Petition is an attempt to usurp the constitutional mandate of independent offices with the aim of derailing **Mombasa SRMCC Criminal Case No. 854 of 2020; Republic -vs- Steffano Uccelli & Isaac Rodrot alias Mwaura.** They proffer that the application offends the provisions of Section 193A of the Criminal Procedure Code in that it seeks to stay criminal proceedings on the grounds that the criminal proceedings are directly in issue in civil proceedings. Their position is that this court lacks jurisdiction to examine the sufficiency of evidence in the pending criminal case, issues which can only be determined by a criminal trial court. They cite Article 157 of the Constitution and the Office of Director of Public Prosecutions Act which they aver enjoin the Director of Public Prosecutions to take into consideration the public interest, the interest of the administration of justice and the need to prevent the abuse of legal process. In sum, they contend that the Petitioners have failed to demonstrate in what way their Constitutional rights have been violated, infringed and/or threatened by the Respondents; and the Application and the Petition are a ruse designed to delay their impending trial in the lower court.

Analyzing the contesting rendition of events, I am swayed by the version as depicted by the 2nd and 3rd petitioners. It is not in doubt that they are in possession of valid court judgements in their favour. While the import of the decisions may be contested

In light of the foregoing, it is my finding, and I do so hold that the Petition of 8th June 2020 on a prima facie level, raises serious constitutional issues worthy of further interrogation. The 2nd and 3rd respondents are therefore deserving of the conservatory order putting a hold to their prosecution pending the hearing and determination of the main Petition.

**Whether the request for the constitution of an uneven bench to hear the Petition is merited**

The Applicants have asked this court to have the Chief Justice empanel a bench as the circumstances of the case raise substantial questions of the law. They invoke Article 165 (4) of the Constitution which provides that: ***Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.*** *Articles 165 (3) (b) and (d) on the other hand read:*

> ***(3) Subject to clause (5), the High Court shall have—***
>
> ***(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;***
>
> ***(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—***
>
> ***(i) the question whether any law is inconsistent with or in contravention of this Constitution;***
>
> ***(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;***
>
> ***(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and***
>
> ***(iv) a question relating to conflict of laws under Article 191; and***
>
> ***(e) any other jurisdiction, original or appellate, conferred on it by legislation.***

Empanelment of a bench is a decision sparingly taken, and for good reason. Regard must be made to the exigencies of scarce judicial resource and the reality that the process takes time while justice should always be delivered without undue delay. This is precisely why the circumstances that would demand the exercise of this remit by the court ought to be extraordinary. As **Mwongo J** puts it in **Evangelical Mission for Africa & Another vs Kimani Gachihi & Another [2014] eKLR, empanelment** arises when circumstances are special and the jurisdiction to be exercised is not ordinary. It is for this reason that the court must be satisfied that the Petition raises a substantial question of law under Article 165 (3) (b) of (d).

As to what constitutes a substantial question of the law, I harken to the edict of the Supreme Court of India in the case of **Chunilal Mehta v Century Spinning and Manufacturing Co. AIR 1962 SC 1314**, where the court held that:

> ***" A 'substantial question of law' is one which is of general public importance or which directly and substantially affects the rights of the parties and which has not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd,, the question would not be substantial"***

In **Santosh Hazari vs. Purushottam Tiwari (2001) 3 SCC 179** it was held that:

> ***"A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis."***

Bringing it closer home, I am persuaded by the views espoused by **Odunga J** in **Martin Nyaga & others v Speaker County Assembly of Embu & 4 others & Amicus Curiae [2014] eKLR** where the learned Judge elucidates that:

> ***"…the decision whether or not to empanel a bench of more than one Judge ought to be made only where it is absolutely necessary and in strict compliance with the relevant Constitutional and statutory provisions. In this country we still do not have the luxury of granting such orders at the whims of the parties. Judicial resources in terms of judicial officers in this country are very scarce. Empanelling such a bench usually has the consequence of delaying the cases which are already in the queue hence worsening the problem of backlogs in this country. I therefore associate myself with the position taken by Majanja, J in Harrison Kinyanjui vs. Attorney General & Another [2012] eKLR that the meaning of "substantial question" must take into account the provisions of the Constitution as a whole and the need to dispense justice without delay particularly given specific fact situation."***

My esteemed colleague goes further to delineate the factors that justify a question of law being qualified as one of substantial nature to wit:

> ***"It is therefore my view that a matter would be construed to raise a substantial question of law if inter alia any or all of the following factors are present: whether the matter is moot in the sense that the matter raises a novel point, whether the matter is complex, whether the matter by its nature requires a substantial amount of time to be disposed of, the effect of the prayers sought in the petition and the level of public interest generated by the petition."***

To be qualify as substantial a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. Hence, my determination on whether the issues raised herein are of a substantial nature is premised on the answers to the following questions. Do the petitioners' contentions raise a novel point? Is there any complexity in the issues raised? By its nature, does the Petition require a substantial amount of time to be disposed of? What would be the effect of granting the orders sought in the Petition? And finally, does the Petition raise public interest?

In the eyes of the applicants', the questions raised by the Petition are substantial to the extent that they involve the violation of the 2nd and 3rd applicants'/petitioners' right to own property contrary to the orders of the **High Court in HCC 118 of 2009** and the **Court of Appeal in CA No 36 of 2015.** That the 2nd and 3rd petitioners' right to a fair trial is threatened by the retrial of civil issues in a criminal court that is subordinate to the Court of Appeal and the High Court. It is reasoned that the 2nd and 3rd petitioners' right to the highest attainable standard of health under Article 43 was violated by the manner in which they were arrested and transferred from Watamu to Mombasa, a Covid-19 hotspot by officers that failed to observe the Covid-19 health guidelines on sanitizing, wearing masks and keeping social distance.

The contention is that the instant matter is one of general public importance given the public notoriety of the dispute regarding the ownership of 1st petitioner and the complexity of the issues therein and the fact that this matter adversely affects the ownership rights of the Petitioners.

For the respondents', it is quite simple, their conclusion is that no material has been placed before the court that would persuade the court that the Petition herein raises a substantial question of law.

Taking cue from the litigious procedural matrix summarized at the beginning of this analysis, it is with little labour that I find the matters raised in the Petition to be of great complexity. An interrogation into the weighty issues as raised would no doubt require considerable judicial resource. This is further amplified by the fact that, if the petitioner's claims are to be believed, the real intent of the criminal proceedings which the petition seeks to quash is a ploy that seeks to disentitle them of property lawfully granted to them by dint of two superior court decisions.

**Whether the Petition herein should have been filed in Mombasa.**

The last question relates to the role of forum non conveniens and principle of comity in the exercise of supervisory jurisdiction under Article

165 (16) and (7) of the Constitution. The doctrine of forum non conveniens, it hardly needs to be gain said, is that a stay of civil or criminal proceedings will be granted if another forum is more appropriate in the sense if it being more suitable to meet the ends of justice.

The Law in this area is clear. The High Court has supervisory authority over subordinate Court and inferior tribunals, throughout the Republic given the facial textual structure of Article 165 (6) and (7) founding evidence suggests that the existence of supervisory power may well describe the differing geographic and subject matter jurisdiction of the various Courts established throughout the country by the Chief Justice. To put the importance of this feature in context, it's first necessary to appreciate the justification that apparently underlies the proposition of also the statutory source of the stated supervisory authority. At the core of adjudication under Article 165 (6) (7) the power is not exercisable without accurate and relevant factual record of the subordinate Court or inferior tribunal. The true supervisory power cases demands of the Court to approach the matter in a practical manner. In the present petition the criminal proceedings actually relied upon originate from the Chief Magistrate Mombasa.

In my Judgment, it is for the High Court in Mombasa to determine the Lawfulness of a decision taken by the respondents in the exercise of their Constitutional and statutory powers to charge the petitioners with the offence of forgery. By determining that issue the petitions could have avoided any perception that there were other considerations other than the desire in the interest of justice.

The next question is whether principles of comity will add anything to the analysis. I have in mind the power and jurisdiction of each High Court as statutory established to freely and autonomously determine disputes arising from Magistrates Courts and inferior tribunals and to organize itself and to exercise such jurisdiction within its territory. Comity in this context refers to informal acts performed and rules observed by various Courts in adherence to the Constitution and statute in their mutual relations of politeness and convenience in the administration of justice. It is a fundamental feature of our Laws that any enforcement of a right is adjudicated pursuant to Article 50 (1) of the Constitution on a fair and public hearing before a Court or if appropriate another independent and impartial tribunal. In essence every dispute must be resolved by a Court, or tribunal or body anchored in the statute, of our legal system. In general terms, the seat of the dispute dictates the exercise of supervisory jurisdiction over the subordinate Court or tribunal.

Accordingly, the High Court in Mombasa has a greater control over the Magistrates Court within its jurisdiction and with greater powers of intervention other than a High Court seated in another county like Malindi outside its jurisdiction. The whole point of the factors under Article 165 (6) & (7) of the Constitution as read in conjunction with Section (11) & (12) of the High Court Organization and Administration Act No. 27 of 2015 is for the Court to weigh and reflect the principles of comity as between competent Courts. The forum has an appropriate convenience on the promotion of effectiveness and efficiency in the administration of justice.

The learned Counsel for the Interested party holds the view that the Petition in question ought to have been filed in the High Court at Mombasa. The reason being that the criminal proceeding sought to be stopped is being conducted in Mombasa which is well within the administrative supervisory jurisdiction of the Mombasa High Court. In other words, Learned Counsel argues that the Petitioners' cause of action, if any, arose in Mombasa, hence the petition ought to have been filed in Mombasa. He proceeded to allege that the filing of the petition in Malindi is nothing other than forum shopping. On this limb, the Court has been requested to transfer the petition to the High Court in Mombasa for hearing and determination.

It is noteworthy that the law in terms of Article 165 of the Constitution confers supervisory jurisdiction upon this court over all subordinate courts both in civil and criminal matters. This means therefore that both the Mombasa High Court as well as this Court are clothed with jurisdiction over the petition in question. In any event, the fact that the cause of action arose in Mombasa cannot suffice to be a ground for transfer of the case from Malindi to Mombasa. But it could have been more practical, cost-effective, expeditious and to maintain orderliness in the administration of justice to file the petition in the Mombasa High Court. However, the actions of filing the petition in Malindi by the petitioners' exhibit a well-calculated inclination for forum shopping and that is unacceptable.

Indeed, the cause of action arose in Mombasa but the petitioners' lacks bona fide in deciding to come to Malindi to file the petition in question thereby causing unnecessary delay and expense to the opposing parties. It is trite law that cases be heard and determined expeditiously as delay defeats equity, and denies the parties legitimate expectations that disputes between or among them would be resolved expeditiously. Also, the Constitution of Kenya, by dint of Article 159 (2) (b) thereof commands courts to administer justice without undue delay. The oxygen principle also commands courts to seek to do substantial justice in an efficient, proportionate and cost-effective. In light of the foregoing, I am inclined to allow the transfer of the petition to Mombasa.

Finally, as a matter of general or judicial notice, I am alive to the cases filed within Malindi High Court registry set out on perspectives in one way or another premised on **Salama Beach Hotel** or **Temple Point** thus:

1. ***Petition No. 6 of 2019***
2. ***Petition No. 10 of 2020***
3. ***Petition No. 12 of 2020***
4. ***HCCC No. 10 of 2020***
5. ***HCCC No. 118 of 2009***
6. ***HCCC No. 10 of 2019***

What this means in the context of the Petition it is for the Court generally speaking to appreciate the circumstances derived from the pending or concluded suits on their limitations or causal link to the constitutional issues raised by the petitioners. It is not therefore vulnerable to encroach into the wider ambit of these suits so as not to run into the risk of conflicting decisions on cross-cutting issues.

**Dispositions.**

For these reasons I would accede to the various interlocutory applications by granting the following orders:

***a. The prayer in the Notice of Motion dated 30th June 2020 seeking to have the bench disqualify itself from hearing the Application and Petition is dismissed.***

***b. Pending the hearing and determination of the Petition, conservatory orders do remove from this Court staying all proceedings in Mombasa SRMCC Criminal Case No. 854 of 2020; Republic -vs- Steffano Uccelli & Isaac Rodrot alias Mwaura.***

***c. The Petition is hereby referred to the Lord Chief Justice under the terms of Article 165 (4) for the constitution of an uneven bench for the final determination of the Petition.***

***d. This court invokes its inherent jurisdiction and directs that the Petition be transferred to the territorial jurisdiction of the High Court in Mombasa where the criminal proceedings in Mombasa SRMCC Criminal Case No. 854 of 2020; Republic -vs- Steffano Uccelli & Isaac Rodrot alias Mwaura arose.***

***e. That save for as expressly directed herein, the other prayers in the Application dated 8th June 2020 and 30th June 2020 are dismissed.***

***f. Costs shall be in the cause.***

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 1ST DAY OF SEPTEMBER 2020**

**.....**

**R. NYAKUNDI**

**JUDGE**

**<u>In the presence of</u>**

1. Munyithya Advocate for the petitioners
2. Igonga for Kemo for the DPP
3. Makambo Advocate for the 1st Interested Party
4. Githongori Advocate for the 2nd Interested Party