



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

*(Coram: A.C. Mrima, J.)*

**CONSTITUTIONAL PETITION NO. 215 OF 2018**

**-BETWEEN-**

**ESTHER GATHONI MWANGI.....PETITIONER**

**-VERSUS-**

- 1. DIRECTOR OF PUBLIC PROSECUTIONS**
- 2. DIRECTOR OF CRIMINAL INVESTIGATIONS**
- 3. INSPECTOR GENERAL OF POLICE ....RESPONDENTS**

**-AND-**

- 1. DR. WILLIAM CHARLES FRYDA**
- 2. ASSUMPTION SISTERS OF NAIROBI LIMITED**
- 3. ST. MARYS HOSPITAL REGISTERED TRUSTEES**
- 4. LAW SOCIETY OF KENYA.....INTERESTED PARTIES**

**JUDGMENT**

**Introduction:**

1. The dispute before this Court is yet another constitutional challenge to the powers of the Director of Criminal Investigations, herein (hereinafter referred to as '*the 2<sup>nd</sup> Respondent*' or '*the DCI*') and the Inspector General of Police (hereinafter referred to as

'*the 3<sup>rd</sup> Respondent*' or '*the IG*') to investigate and recommend the commencement of criminal charges to the Director of Public Prosecutions (hereinafter referred to as '*the 1<sup>st</sup> Respondent*' or '*the DPP*') on one hand and the constitutionality of the powers of the DPP to commence criminal proceedings against a person, on the other hand.

2. The Petition is opposed.

### **The Background:**

3. A synopsis of factual background is that, on 29<sup>th</sup> September, 2017 the Petitioner herein, *Esther Gathoni Mwangi*, an Advocate of the High Court of Kenya, received instructions from one *William Charles Fryda* (hereinafter referred to as '*the 1<sup>st</sup> Interested Party*' or '*Dr. Fryda*') to represent him in some matters involving the ownership of some parcels of land and hospitals standing thereon. There is currently a pending *Civil Appeal No. 184 of 2017* (hereinafter referred to as '*the Appeal*') before the Court of Appeal.

4. At the heart of the Appeal was the judgment delivered in Nakuru *Environment & Land Court Case No. 224 of 2010, William Charles Fryda -vs- Assumption Sisters of Nairobi Registered Trustees & Another* as consolidated with *ELC 238 of 2012* (hereinafter referred to as '*the ELC case*').

5. In the course of representing the 1<sup>st</sup> Interested Party herein, the Petitioner was caught up in the crossfire.

6. On 28<sup>th</sup> March, 2018 the Respondents froze the Petitioner Firm's Client Account on allegations that they were investigating a case of money laundering.

7. It is the Petitioner's case that the suspicion of money laundering was based on legal fees she received from the 1<sup>st</sup> Interested Party, which was sourced from *The Trustees of Medical Mission Charitable Trust*, whose account was also frozen.

8. On 29<sup>th</sup> May, 2018 the Petitioner stated that she was called and ordered by *No. 61369 SGT Police Constable Peter Ouma* to avail herself at the DCI Headquarters for questioning.

9. The Petitioner did not avail herself as requested and asked the said police officer to meet her at her offices if he needed any information.

10. On 6<sup>th</sup> June, 2018 the Petitioner was charged in *Milimani Chief Magistrates Court Criminal Case No. 1028 of 2018 Republic -vs- Esther Gathoni* (hereinafter referred to as '*the criminal case*') in absentia and a warrant of arrest issued.

11. The Petitioner was charged with the following offences: -

### **Count I:**

**Stealing contrary to Section 268(1) as read with Section 275 of the Penal Code.**

**"On the 24th Day of November 2017 at Prime Bank Riverside Drive Branch within Nairobi County, jointly with others not before court stole Kshs 2,850,000/= the property of St. Mary's Mission Hospital.**

### **Alternative Count:**

**Handling stolen goods contrary to Section 322(10(2) of the Penal Code** Esther Gathoni Mwangi; on the 24th day of November 2013 at prime bank Riverside drive Branch within Nairobi county, otherwise than in the course of stealing dishonestly received Kshs 2,850,000/= (Two Million Eight Hundred and Fifty Shillings) knowing or having reason to believe them to be stolen property.

### **Count II:**

**Conspiracy to commit a felony contrary to Section 393 of the Penal Code**

**'On diverse dates between 29th December and 29th January 2018, at Prime Bank Riverside Branch within Nairobi County, jointly with others not before Court conspired to commit a felony namely stealing Kshs 153,468,000/=(One Hundred and Fifty Three Million, Four Hundred Sixty Eight Thousand Shillings) from St. Mary's Mission Hospital.**

Count III:

**Money Laundering contrary to section 3(b)(iii) as read with section 16(i)(a) of the Proceeds of Crime and Anti-Money Laundering Act of 2009**

On diverse dates between 29th December and 29th January 2018, at Prime Bank Riverside Branch within Nairobi County, received 153,468,000/= which you reasonably ought to have known formed part of the proceeds of the crime.

12. It was the Petitioner's position that the Respondents were hell bent to intimidate her to abandon representing the 1<sup>st</sup> Interested Party in all the cases his client, Dr. Fryda, faced.

13. Further, the Petitioner contended that the 1<sup>st</sup> Respondent's decision to prosecute her and to seek a warrant of arrest without being summoned to make any statement or being notified to attend Court was a blatant violation of her rights and fundamental freedoms as guaranteed in the Constitution.

**The Petition:**

14. Through the Amended Petition dated 9<sup>th</sup> August, 2018 supported by the affidavit of Esther Gathoni Mwangi deposed to on 7<sup>th</sup> June, 2018 and the Further Affidavit sworn on 19<sup>th</sup> July, 2018, the Petitioner contested the investigations and the resultant prosecution in the criminal case.

15. In the main, the Petitioner sought the following orders: -

1. A Declaration be and is hereby issued that all the acts and or threatened acts by the Respondents and their agents of harassment, intimidation questioning, investigations, charging, prosecution against the petitioner by the Respondents amounts to an infringement against the Petitioner's constitutional rights as enshrined in the Bill of Rights and are therefore unconstitutional.

2. A declaration be and is hereby issued that the actions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and or their agents are unfair unreasonable, irrational, illegal and the acts of harassment, intimidation, questioning, investigations, charging, prosecution charge and or prosecute the Petitioner has been made in abuse of power and malice in contravention of Article 47 of the constitution and Sections 4, 5 & 7 of the Fair Administrative Actions Act.

3. A restraining order be and is hereby issued against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents whether by themselves, agents from charging, prosecution, arrest, continued harassment, questioning, intimidation apprehension on any matter concerning the Petitioner's alleged involvement in the affairs of St. Mary's Mission Hospital, the Assumption Sisters of Nairobi and Dr. William Charles Fryda.

4. An order of a permanent injunction be and is hereby issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, whether by themselves, their agents, privies and any other person acting on their instructions from prosecuting, charging, arresting, harassing in any manner whatsoever intimidating, causing an arrest, threatening to arrest and or interfering with the Petitioner's fundamental rights and freedoms in respect of the managerial and day to day affairs of St. Mary's Mission Hospital, the Assumption Sisters of Nairobi and Dr. William Charles Fryda.

5. An order of prohibition directed against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents whether by themselves and or their servants, agents or any person acting on their instructions from interfering and or unjustly harassing the Petitioner in respect of matters arising from the St. Mary's Mission Hospital, The Assumption Sisters of Nairobi and Dr. William Charles Fryda.

6. An order of prohibition directed against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and or their agents from lodging, preferring charges or in any other way attempting to implicate the Petitioner from all matters as it relates to the management and day to day activities of St. Mary's Mission Hospital, the Assumption Sisters of Nairobi and Dr. William Charles Fryda.

7. An order of prohibition directed against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and or their agents from using the documents that they have seized in the petitioner's office against her and to prefer criminal charges on the basis of the said documentations.

8. And order of certiorari to quash and set aside the decision of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to charge and prosecute the Petitioner on the charges preferred against vide the Charge Sheet dated 6<sup>th</sup> June 2018 in Criminal Case No. 1028 of 2018: Republic v Esther Gathoni Mwangi.

9. This Honourable Court be pleased to grant an order of a permanent injunction be and is hereby issued restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, whether by themselves, their agents, privies and any other person acting on their instructions from prosecuting, charging, arresting, harassing in any manner whatsoever intimidating, causing and arrest, threatening to arrest and or interfering with the Petitioner's fundamental rights and freedoms in respect to any matters relating to the management and day to day activities of St. Mary's Mission Hospital, the Assumption Sisters of Nairobi and Dr. William Charles Fryda.

The Petitioner's submissions:

16. The Petitioner filed written submissions dated 1<sup>st</sup> October, 2022.

17. She submitted that the decision to summon and charge her in the criminal case and all consequential proceedings are unconstitutional, abuse of Court process and unlawful that call for this Court's immediate intervention.

18. It was submitted that the seizure of the Petitioner's assets and Bank accounts interfered with the Petitioner's obligation as an Advocate of the High Court of Kenya and with third parties and her right to property under Article 40 of the Constitution.

19. Further, the Petitioner posited that the intrusions by the Respondents including obtaining freezing orders against her Bank Account in *Miscellaneous Criminal Application No. 3605/2017*, have infringed on her rights to privacy, dignity and negatively impacted her livelihood.

20. It was argued that at the time of filing the instant Petition, the Petitioner was not aware of the existence of the criminal case and that the case was mounted to settle scores between the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties and the 1<sup>st</sup> Interested Party. Further it was submitted that the criminal case was meant to frighten the Petitioner out of representing the 1<sup>st</sup> Interested Party in the matters he faced including the appeal.

21. The Petitioner also submitted that the decision to prosecute was actuated by malice since she was charged after the complaint that the 1<sup>st</sup> Interested Party failed to comply with Court orders in the ELC case.

22. She urged that the 1<sup>st</sup> Respondent's power to make the decision to prosecute her was not absolute. That power must be exercised within limits set by the Constitution and the Director of Public Prosecution's Act. To that end reference was made to *Republic -vs- Inspector General of Police & Another Ex-parte Patrick Macharia Nderitu* (2015) eKLR where it was observed that the Court has the power to interfere with the exercise of discretion of the decision maker.

23. While seeking to buttress impropriety of the prosecution, it was submitted that in *Miscellaneous Application 68 of 2018, 992 of 2018, 225 of 2018, 1536 of 2018 and 68 of 2018*, where the Respondents sought to freeze and investigate various accounts belonging to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties herein, the Court observed that the Respondents were being used in a purely civil claim.

24. The Petitioner submitted that there was no basis of charging her in absence of the nexus between her Firm's Accounts and the accounts of Medical Mission Charitable Trust who only paid her firm legal fees, which payment resulted from a resolution of the Board of Trustees of her client, Medical Mission Charitable Trust.

25. In emphasizing the unreasonableness of the decision to charge, support was found in *Republic -vs- Kikuyi Magistrates Court (Criminal Division) & 9 Others Ex- Parte Charles Mbugua Njuguna* 2016 eKLR where it was observed: -

The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. .... The police or any other prosecution arm is not a mere conduit for complaints.

...where as it is in this case, exculpatory evidence is presented to the police in the course of investigations and for some reasons unknown to them they deliberately decide to ignore the same, one can only conclude that the police are driven by collateral considerations other than genuine vindication of the criminal judicial process.

26. The Petitioner further submitted that she was not accorded an opportunity to be heard and to make representations before the Respondents' decision to charge her was arrived at. That being the case, she submitted, the decision to prosecute was irrational and tainted with *Wednesbury* unreasonableness.

27. Further submissions were made that the prosecution has the obligation to abide by the constitutional requirement of public interest and fair administration of justice. To that end, support was derived from *Mohammed Gulam Hussein Fazal Karmal & Another -vs- Chief Magistrates Court Nairobi & Another* (2006) eKLR.

28. While seeking to further show illegality of the criminal case, it was submitted that the Complainant in the Charge Sheet, is *Assumption Sisters of Nairobi* as opposed to *Medical Mission Charitable Trust*, the entity that paid Petitioner through a resolution. She submitted that the Respondents were pursuing criminal prosecution against her in a case where her client, Medical Mission Charitable Trust, had no complaint against her.

29. It was the Petitioner's submission that there was not enough information for the Respondents to arrive at the decision to prosecute her as they failed to take into account the Advocate-Client relationship. It was reiterated that the current Complainant was neither the account holder nor had any claim over the monies paid to her as legal fees.

30. She submitted that the motive of the prosecution was not the ends of justice but a means to pressure her to cease acting for the 1<sup>st</sup> Interested Party.

31. To buttress the foregoing, reliance was placed on *R -vs- AG & Another Exparte Ng'eny* (2001) KLR 612 and in the matter of *R -vs- DPP Ex-Parte George Kuria Mwaura* (2015) eKLR where it was observed

A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose.

32. To assert that the criminal case was contrary to public interest, it was submitted that in *Mohammed Gulam Hussein Fazal Karmali & Another -vs- Chief Magistrate Nairobi & Another* (2006) eKLR, the Court observed thus: -

The first is that the public interests in the administration of justice require that the Court protects its ability to function as a Court of law by ensuring that its processes are used fairly by state and citizen alike.

...unless court protects its ability to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court process may lend themselves to oppression and injustice.

33. In urging the Court to exercise its powers to stop abuse of criminal justice system, reliance was placed in *Kuria & Another -vs- Attorney General* (2002) (2) KLR 69 where it was observed: -

The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution of extraneous matters divorced from goals of justice that guide their instigation.

34. The Petitioner reiterated the findings of the Court in *Miscellaneous Application No. 2413 of 2018* where the Court found that the prosecution was tainted with malice.

35. In driving the impropriety of the criminal case further, it was submitted that the Respondents had pursued the Petitioner in several other matters including *Miscellaneous Criminal Application No.2413 of 2018, 2500 of 2018, 992 of 2018, 225 of 2018, 1536 of 2018, 68 of 2018 3605 of 2017, 2500 of 2018, 1354 of 2018, 1266 of 2018 and 83 of 2018* an indication that there was clear abuse of Court process.

36. In the end, the Petitioner submitted that the institution of the criminal case was in bad faith and was tainted with illegalities as previous Courts had so held in the above mentioned applications.

37. This Court was urged to allow the Petition as prayed.

38. As the Petition was supported by the 1<sup>st</sup> Interested Party, I will now deal with its case.

**The 1<sup>st</sup> Interested Party's case:**

39. The 1<sup>st</sup> Interested Party, *Dr. William Charles Fryda*, supported the Petition through written submissions dated 9<sup>th</sup> August, 2020.

40. It was his case that upon instructing the Petitioner to lodge the appeal, he and his Co-Trustees established Medical Mission Charitable Trust which institution runs a High School for orphans in Lang'ata and a Nursing Home in Nakuru.

41. He submitted that on 15<sup>th</sup> September, 2017 the Board of Trustees of Medical Mission Charitable Trust through a resolution paid the Petitioner legal fees and that the criminal investigations, charges and the freeze orders on the Petitioner's Account were fishing expeditions by the Respondents meant to intimidate her and put her career at disrepute in violation of her constitutional right to dignity.

42. It was argued that the Medical Mission Charitable Trust and St. Mary's Mission Hospital are distinct entities and there is no evidence by the Petitioner of collusion to commit any offence for the money paid as legal fees.

43. Pursuant to the interpleader proceedings in *Nakuru Environment and Land Court Civil Case No. 1 of 2018, OS*, that ordered handing over of all Bank accounts to the 2<sup>nd</sup> Interested Party and halted any transactions therein, it was submitted that the Petitioner could not have transacted in any of those accounts neither was any nexus demonstrated between the Petitioner and those Accounts.

44. Dr. Fryda maintained that St. Marys' Mission Hospital was fully in-charge of the Accounts for which the Petitioner was being prosecuted for.

45. In seeking to further dissociate the Petitioner with the operations and monies of St. Mary's Mission Hospital, Dr. Fryda submitted that the issue had been severally argued in Court including in *Miscellaneous Criminal Application No. 3605/2017*.

46. The 1<sup>st</sup> Interested Party urged this Court to clip the DPP's prosecutorial powers and to that end found support in the Court of Appeal in *Commissioner of Police & Director of Criminal Investigations Department -vs- Kenya Commercial Bank and Others* where it was observed that the powers of police to investigate crime must be exercised responsibly in accordance with the laws of the land and in good faith.

47. He further submitted that the powers of the police in this case were contrary to Article 244 of the Constitution which requires highest standard of professionalism, observance of human rights, transparency and need to prevent corruption.

48. Further to the foregoing, the 1<sup>st</sup> Interested Party submitted that this Court must have regard to the Advocate-Client relationship that existed between the Petitioner and her client encompasses confidentiality and good faith.

49. In the end, it was submitted that the Petitioner was entitled to the reliefs sought. The Court's attention was drawn to *R. -vs- Attorney General ex-parte Kipngeno Arap Ng'eny* where it was observed that the exercise of prosecutorial powers must not be exercised arbitrarily and in such a case the High Court will employ its powers to stop it.

**The 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Respondent's case:**

50. The Respondents opposed the Petition through the Replying Affidavit of *No. 61369 Sgt. Peter Ouma*, one of the investigators attached to the Financial Investigations Unit of the DCI. The Affidavit was deposed to on 3<sup>rd</sup> July, 2018.

51. He deposed that the criminal case against the Petitioner was commenced upon receiving a letter from *Mrs. Wanja G. Wambugu* of *W.G. Wambugu & Co. Advocates*, then acting for the Assumption of Sisters of Nairobi on allegations of money laundering and other related offences.

52. It was his case that upon investigations, it came out that the 1<sup>st</sup> Interested Party and the 2<sup>nd</sup> Interested Party were embroiled in a dispute as to the manner in which the 2<sup>nd</sup> Interested Party was managed, a dispute which led to the opening of Medical Mission Charitable Trust by the 1<sup>st</sup> Interested Party.

53. He deposed that the said Medical Mission Charitable Trust opened an Account in Prime Bank Ltd where upon investigations he received information that funds amounting to Kshs. 153 Million had on various occasions been transferred from the account of Medical Mission Charitable Trust to a newly opened Account No. 3000128231 in the same Bank, but in the name of *Mwangi E.G. & Co. Advocates*, the Petitioner's Firm.

54. It was his case further that through *Miscellaneous Criminal Application No. 225 of 2018* he obtained an order to investigate the said account where they found out that the deposits had been liquidated and paid out to an undisclosed payee on 29<sup>th</sup> December, 2017.

55. He deposed that on 24<sup>th</sup> January, 2018 he established that a sum of Kshs. 153 Million was paid to Family Bank under the Petitioner's Firm Account No. 063000007202 in the name of *E. G. Mwangi & Co. Advocates*.

56. He deposed further that he noted that investigations revealed that the accounts had been closed and re-opened on diverse dates between 23<sup>rd</sup> March, 2015 and 29<sup>th</sup> December, 2017.

57. He stated further that on 20<sup>th</sup> January, 2017 the Petitioner's Firm Account 3000128231 had received money transfers amounting to Kshs. 104,447,000/- and that on 24<sup>th</sup> January, 2018 several fixed deposit accounts both in Kenyan Shillings and U.S dollars were liquidated and transferred to the same account.

58. He deposed that suspicion was raised on 24<sup>th</sup> January, 2018 when a total of Kshs 153,468,000/- in the Petitioner's Law Firm's Account in Prime Bank was transferred to her other Firm Account in Family Bank which was closed a day after, that is on 25<sup>th</sup> January, 2018.

59. Sgt. Peter Ouma deposed that upon the transfer, Family Bank Ltd rejected the transfer of the large deposit for lack of supporting documents.

60. Sgt. Peter Ouma further deposed that on 29<sup>th</sup> January, 2018 the Petitioner deposited a total of Kshs. 125,000,000/- on three separate fixed accounts namely Account Nos. 3000128231, 3000128927 and 063000007202 which upon investigation, there was evidence of likelihood of fraud and money laundering.

61. It is on the foregoing basis that Sgt. Peter Ouma requested the Petitioner to avail herself before the DCI Headquarters to clarify the nature of transactions, but that the Petitioner failed to honour the summons.

62. Subsequent to the foregoing, Sgt. Peter Ouma deposed that on 6<sup>th</sup> June, 2018 he registered a Charge Sheet in the criminal case where he obtained a warrant of arrest against the Petitioner.

63. It was his case that the 2<sup>nd</sup> Respondent has the constitutional and statutory mandate to detect and investigate crime and to that end, does not require the consent of anyone or authority since it is independent.

64. He also deposed that the DPP has the obligation to have regard to public interest and that of administration of justice and the need to prevent abuse of the legal process as mandated under Article 157(11) of the Constitution and to uphold national values as per Article 10, 21(1) be accountable to the public under Article 73(2)(d) of the Constitution as well as being accountable for administrative actions under Article 232(e) of the Constitution.

65. He averred that the Respondents are neutral and not parties to the civil dispute between *Assumption Sisters of Nairobi* and the 1<sup>st</sup> Interested Party.

66. It was his case that the prosecution was commenced following an inter-bank money movement and that there was no intention to harass the Petitioner when she was summoned for questioning.

67. It was his deposition that the Petitioner was raising the defence of his criminal culpability in the instant Petition yet the criminal process is the right forum for such defence.

68. In urging the Court to dismiss the Petition, he deposed that the Petitioner had not demonstrated how the Respondents had acted without or in excess of the powers conferred upon it by the Constitution.

69. He deposed further that the Petitioner had failed to demonstrate how the 1<sup>st</sup> Respondent had failed to act independently, impartially or abused the legal process as to trigger the instant Petition.

70. On the basis that the Petitioner will have protection of Constitution and the law, she is guaranteed fairness in the process, Sgt. Peter Ouma pleaded that the Petition be dismissed.

#### **The Submissions:**

71. In their written submissions dated 30<sup>th</sup> September, 2020 the 1<sup>st</sup> and 2<sup>nd</sup> Respondents reiterated the impropriety of the Petition and argued that the Petition was imprecise as to the nature of the constitutional entitlements violated.

72. To that end, it was claimed that the Petition failed to meet the precision requirement as established in *Anarita Karimi Njeru -vs- The Republic* (1976) KLR 1272.

73. It was also submitted that the prosecution of the Petitioner was empowered by Article 157(6) of the Constitution and to that extent did not need the consent of any person under Article 157(10) of the Constitution.

74. It was maintained that the prosecution of the Petitioner was in public interest, the administration of justice and the need to prevent the abuse of legal process.

74. In refuting the prayer prohibiting the arresting, charging and prosecuting of the Petitioner, it was submitted that grant of such order is discretionary and is only tenable where a public body has acted in excess of their powers. Support was found in Petition No. 537 of 2017 *Stephen Oyugi Okero -vs- Milimani Chief Magistrate Court & DCI* where the decision in *Bennet -vs- Horseferry Magistrate Court & Another* was referred to where the Court observed that: -

... The Court ought not usurp the constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in that the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for halting these proceedings by way of Judicial Review since Judicial Review are not concerned with the merits but with the decision making process.

76. It was further submitted that a good defence in the criminal case ought not be used by this Court as a basis to halt the criminal



case. Further reference was made to *R -vs- Monopolies and Mergers Commission Ex Parte Argyl Group Plc* (1986 1 WLR and *Re Bivac International SA Bureau (Bureau Veritas)* (2005) 2 EA (HCK).

77. It was also submitted that the prayer to quash the prosecution was not merited since the investigation file was forwarded to the DPP and where the matter was independently reviewed and a decision made to charge the Petitioner.

78. The Respondents urged this Court to dismiss the Petition.

**The 2<sup>nd</sup> & 3<sup>rd</sup> Interested Parties case:**

79. The 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties also opposed the Petition through the Replying Affidavit of *Maria Felix Mwikali* deposed to on 18<sup>th</sup> October, 2018.

80. In reference to the ELC case, Maria deposed that the Court granted the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties an Order directing the 1<sup>st</sup> Interested Party not to deal with and to release and or surrender all accounts which were in the name of 3<sup>rd</sup> Interested Party to the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties, but that the 1<sup>st</sup> Interested Party failed to honour the order despite service.

81. She deposed that the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties then received information that the 1<sup>st</sup> Interested Party and or his agents had started moving some money from various accounts domiciled in various Banks.

82. It is her case that the failure by the 1<sup>st</sup> Interested Party and the Banks to comply with the Court order necessitated the lodging of a complaint and hence investigations were commenced.

83. Maria denied that the 3<sup>rd</sup> Interested Party took over monies from all the Bank accounts, but rather stated that it is the 1<sup>st</sup> Interested Party who moved funds from the 3<sup>rd</sup> Interested Party's numerous accounts and deposited it in his own and his company's accounts and subsequently transferred to the Petitioner's accounts and that such constitutes an arrestable offence.

84. Maria maintained that the Medical Mission Charitable Trust was solely created by the 1<sup>st</sup> Interested Party to launder the 3<sup>rd</sup> Interested Party's funds to the Petitioner's Accounts.

85. She reiterated that the Petition was imprecise and that the investigation of the Petitioner's accounts and those of the 1<sup>st</sup> Interested Party by the Respondents was conducted within the Constitution and the law.

86. In their written submissions dated 3<sup>rd</sup> December, 2019 the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents opposed the Petition claiming that the Petitioner violated the Advocates Professional Code of Conduct by receiving monies from the 1<sup>st</sup> Interested Party knowing that it was illegally obtained.

87. To lend credence to the foregone, it was submitted that the 1<sup>st</sup> Interested Party was also charged in another criminal case at Nairobi City Court for money laundering and uttering false document.

88. Further submissions were made to the effect that the 1<sup>st</sup> Respondent, under Article 157(10) of the Constitution, had no obligation to abide by the directions of any person in the making the decision to prosecute.

89. To fortify the foregoing, reliance was placed in *Martin Luther Bwanga & 2 Others -vs- The Director of Public Prosecutions & 4 Others*.

90. Further reliance was placed on *Republic -vs- Commissioner of Police & another Ex-Parte Michael Onari & Another* and in *Kenneth Kanya Rati & 2 Others -vs- Inspector General of Police Director of Criminal investigations & 2 Others* to variously demonstrate the independence of the Police to investigate any complaint once it's made under Article 252(1) and 243(2) of the Constitution as well as Section 24 of the Police Service Act.

91. In reference to the decision in *The Republic -vs- Chief Magistrate Court Nairobi & 3 Others ex-parte Stephen Oyugi Okero* (2015) eKLR, it was submitted that a plea of absence of evidence in the criminal case cannot be ground to quash the case.

92. It was submitted that all issues of evidence ought to be settled in the trial of the criminal case.

93. It was their case that the criminal case has safeguards to protect the constitutional rights of the accused person including presumption of innocence, placing an accused on his defence and appeal mechanism. To fortify the position, support was found in *Uwe Meixner & Another -vs- Attorney General* (2005) eKLR where it was observed inter alia: -

The criminal trial process is regulated by statutes, particularly, the Criminal Procedure Code and the Evidence Act. There are also Constitutional safeguards stipulated under section 77 of the constitution to be observed in respect of both criminal prosecution and during Trials.

94. In conclusion it was their case that there were no exceptional circumstances justifying this Court's intervention and the Court was urged to dismiss the Petition with costs.

#### **The 4<sup>th</sup> Interested Party's case:**

95. The 4<sup>th</sup> Interested Party, the Law Society of Kenya (hereinafter referred to as '*the LSK*'), neither supported nor opposed the Petition, but sought to defend the independence of the legal profession.

96. It urged its case through the Replying affidavit of *Mercy Wambua*, the Chief Executive Officer, sworn to on 23<sup>rd</sup> November, 2018.

97. She deposed that the prosecution of the Petitioner was contrary to the Constitution and principles of governance not to harass, intimidate or coerce any professional from discharging his/her/its duties.

98. She deposed that under Article 50(2) of the Constitution, every person has the right to be represented by an Advocate of his/her/its choice and to that end, the 1<sup>st</sup> Interested Party's rights ought to be protected.

99. She deposed further that there is need to preserve the independence of the legal profession, not to be threatened with prosecution or administrative, economic sanctions, to be provided with security, not to be associated with their client or clients cause as a result of discharging their functions since Advocates are at the forefront in protection and realization of fundamental rights and freedoms.

100. To buttress the foregoing, reference was made to the *Basic Principles on the Role of Lawyers, 1990* adopted on the 8<sup>th</sup> United Nations Congress on the Prevention of Crime and Treatment of Offenders.

101. She deposed further that Lawyers have a Code of Conduct and Ethics and is self-regulating mechanism for punishing members for actions of misconduct and, as such, Advocates ought not to be victims of police threats and victimization.

102. On the foregoing, she deposed that the LSK had not received any complaint against the Petitioner in relation to matters raised in the Petition.

#### **The Submissions:**

103. The 4<sup>th</sup> Interested Party filed written submissions dated 20<sup>th</sup> February, 2020. It submitted that Advocates in Kenya have suffered brutality in the discharge of their functions despite their independence being pivotal in the society.

104. In submitting on the right to representation under Article 50, it was stated that the action of the Respondents had limited that 1<sup>st</sup> Interested Party's right to be represented without justification as required under Article 24 of the Constitution.

105. It was its case that Respondents should not use their powers so as to result in limitation and infringement of the rights of any person.

106. This Court was invited to consider the holistic conduct of the Respondents having regard to Article 47 on Fair Administrative Action and whether it amounted to harassment, coercion or intimidation of the Petitioner in discharge of her duties. To that end, the Court's attention was drawn to *Kenya Human Rights Commission & Another -vs- Non-Governmental Organization's Coordination Board & Another* (2018) eKLR where the importance of fair administrative action was discussed.

107. It was further reiterated that the Respondents should not exercise their powers for an unlawful purpose. Support was found in *Njuguna S. Ndung'u -vs- Ethics and Anti-Corruption Commission & 3 Others* (2018) eKLR.

108. It was also submitted that the Respondents had the onus of proving the validity of their actions.

109. Further submissions were made that if there was any dispute as regard legal fees, then there exists an elaborate mechanism under the Advocates Act on how such disputes are to be resolved and the Court ought to make a distinction on whether the Petitioner came into possession of the disputed monies through criminal conduct or in the discharge of her professional obligations.

110. In conclusion, it submitted that this Court has the duty to ensure that the fundamental rights and freedoms in the Constitution are upheld.

111. The LSK further urged the Court, to consider the need to protect the independence of Advocates in Kenya in the discharge of their functions in accordance with the law.

#### **Issues for determination:**

112. From the foregoing discourse, the following issues emerge for determination: -

- i. Whether the Petition has attained the precision test so as to properly invoke the jurisdiction of the Court.
- ii. In the event (i) above is answered in the affirmative, whether the prosecution of the Petitioner is in violation of the rights and fundamental freedoms guaranteed in the Bill of Rights and whether the prosecution of the Petitioner is also in violation of Article 157(11) of the Constitution.

113. I will now deal with the above issues in *seriatim*.

#### **Analysis and Determinations:**

##### **a. Whether the Petition has attained the precision test so as to properly invoke the jurisdiction of the Court:**

114. This issue was raised by the Respondents and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in their respective responses.

115. Courts, since the pre-2010 constitutional era, have variously emphasized the need for clarity of pleadings. I echo the position.

116. *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (commonly referred to as '*the Mutunga Rules*'), being a **constitutional instrument**, provides for the contents of Petitions in Rule 10.

117. The said Rule 10 of the Mutunga Rules further urges Courts to accept even an oral application, a letter or any other informal documentation as long it discloses denial, violation, infringement or threat to a right or fundamental freedom and treat such as a Petition. It is the Court's duty to reduce an oral application into writing.

118. The Supreme Court in *Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others* [2014] eKLR had the following in the manner in which constitutional Petitions ought to be presented before Court for adjudication:

Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru vs. Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

119. Petitions, therefore, must be clear on what they challenge. The nexus between the Constitution and the alleged violation ought to be precise, hence, the precision principle.

120. The precision principle basically emphasizes the position that Petitions must raise constitutional issues. I will, therefore, albeit briefly look at what constitutional issues are.

121. In *Fredricks & Other vs. MEC for Education and Training, Eastern Cape & Others* (2002) 23 ILJ 81 (CC), the South Africa Constitutional Court, rightly so, delimited what a constitutional issue entails and the jurisdiction of a Constitutional Court as follows: -

The Constitution provides no definition of ‘constitutional matter’. What is a constitutional matter must be gleaned from a reading of the Constitution itself: if regard is had to the provisions of... Constitution, **constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State.... the interpretation, application and upholding of the Constitution are also constitutional issues. So too .... is the question of the interpretation of any legislation or the development of the common law promotes the spirit, purport and object of the Bill of Rights.** If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly on extensive jurisdiction...

122. In the United States of America, a *constitutional issue* refers to any political, legal, or social issue that in some way confronts the protections laid out in the US Constitution.

123. Taking cue from the foregoing, and broadly speaking, a constitutional issue is, therefore, one which *confronts the various protections laid out in a Constitution*. Such protections may be in respect to the Bill of Rights or the Constitution itself. In any case, the issue must demonstrate *the link between the aggrieved party, the provisions of the Constitution alleged to have been contravened or threatened and the manifestation of contravention or infringement*. In the words of **Langa, J** in *Minister of Safety & Security vs. Luiters*, (2007) 28 ILJ 133 (CC): -

... When determining whether an argument raises a constitutional issue, the Court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the Court to consider constitutional rights and values...

124. Whereas it is largely agreed that the Constitution of Kenya, 2010 is transformative and that the Bill of Rights has been hailed as one of the best in any Constitution in the world, as **Lenaola, J** (as he then was) firmly stated in *Rapinder Kaur Atal vs. Manjit Singh Amrit case* (supra) ‘... Courts must interpret it with all liberation they can marshal...’

125. Resulting from the above discussion and the definition of a constitutional issue, this Court is in agreement with the position in *Turkana County Government & 20 Others vs. Attorney General & Others* (2016) eKLR where a Multi-Judge bench affirmed the profound legal standing that claims of statutory violations cannot give rise to constitutional violations.

126. I have perused the Petition. It has several parts including the description of the parties, the Petitioner’s *locus standi* and the jurisdiction of the Court, the impugned decisions, the facts of the Petition, the constitutional provisions violated and the reliefs

sought.

127. The Petition clearly brings out the alleged violations of the Constitution, the manner the violations were inflicted and the effect of the violations on the Petitioner.

128. It is this Court's position that the Petition fully complied with Rule 10 of the Mutunga Rules as well as the requirements in *Communications Commission case* (supra). I must therefore find and hold, which I hereby do, that the submission that the Petition is devoid of clarity that it fails to properly invoke the jurisdiction of this Court cannot be maintained. The same is for rejection.

129. As the first issue is answered in the affirmative, this Court will now deal with the next issue.

**(b) Whether the prosecution of the Petitioner is in violation of the rights and fundamental freedoms guaranteed in the Bill of Rights and whether it is also in violation of Article 157(11) of the Constitution:**

130. Every challenge on investigatory powers of the police and the prosecutorial powers of the DPP must be looked at critically through the lenses of the various provisions of the Constitution, the law and established constitutional ideals generally.

131. The parties herein, through pleadings and submissions, have so aptly captured the manner in which Courts are to deal with allegations calling for termination of criminal proceedings for various reasons. This Court has greatly benefitted from the parties' input thereof.

132. Recently, this Court attempted a summary of the discussion on the investigatory powers of the police, the prosecutorial powers of the DPP and instances where a criminal prosecution may be halted in Nairobi High Court Constitutional Petition No. E231 of 2021, *Mohammed Edin Adan -vs- Director of Public Prosecutions & another* [2022] eKLR.

133. This Court, while making reference to the Constitution, statutory provisions and various authorities, made an extensive tour on the subject and as follows: -

72. I recently broadly discussed this issue in Nairobi High Court Constitutional Petition No. E033 of 2021 *Maura Muigana vs. Stellan Consult Limited & 2 Others* (unreported) and also in Nairobi High Court Constitutional Petition No. E216 of 2020 *Reuben Mwangi v Director of Public Prosecutions & 2 others; UAP Insurance & another (Interested Parties)* [2021] eKLR.

73. As part of the introduction of the subject in *Maura Muigana vs. Stellan Consult Limited & 2 Others* case (supra), I acknowledged the many writings by legal scholars and decisions by Courts and appreciated that whereas it would have been desirable to come up with all the marvellous work on the issue in a 'one-stop shop', that was a tall order given the time constraints and the need for expeditious disposal of cases. I, however, rendered a concise discussion on the subject.

74. I then traced the legal basis of the exercise of prosecutorial powers in Kenya to the Constitution and the law. **Article 157** of the Constitution establishes the Office of the Director of Public Prosecutions as under: -

- 1) There is established the office of Director of Public Prosecutions.
- 2) The Director of Public Prosecutions shall be nominated and, with the approval of the National Assembly, appointed by the President.
- 3) The qualifications for appointment as Director of Public Prosecutions are the same as for the appointment as a judge of the High Court.
- 4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

- 5) The Director of Public Prosecutions shall hold office for a term of eight years and shall not be eligible for re-appointment.
- 6) The Director of Public Prosecutions shall exercise State powers of prosecution and may--
  - a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
  - b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
  - c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).
- 7) If the discontinuance of any proceedings under clause (6) (c) takes place after the close of the prosecution's case, the defendant shall be acquitted.
- 8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.
- 9) The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.
- 10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.
- 11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.
- 12) Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions.

75. There is, as well, the **Office of Director of Public Prosecutions Act** No. 2 of 2013 (hereinafter referred to as '**the ODPP Act**'). It is an Act of Parliament aimed at giving effect to Articles 157 and 158 of the Constitution and other relevant Articles of the Constitution and for connected purposes. The ODPP Act provides in Section 4 the guiding principles in prosecution of cases as follows:

- (4) In fulfilling its mandate, the Office shall be guided by the Constitution and the following fundamental principles—
- (a) the diversity of the people of Kenya;
  - (b) impartiality and gender equity;
  - (c) the rules of natural justice;
  - (d) promotion of public confidence in the integrity of the Office;
  - (e) the need to discharge the functions of the Office on behalf of the people of Kenya;
  - (f) the need to serve the cause of justice, prevent abuse of the legal process and public interest;
  - (g) protection of the sovereignty of the people;

(h) secure the observance of democratic values and principles; and

(i) promotion of constitutionalism.

76. The ODPP Act, among other statutes, variously provide for the manner in which the DPP ought to discharge its mandate. Suffice to say, the exercise of prosecutorial powers by the DPP has been subjected to legal scrutiny and appropriate principles and guidelines developed.

77. *Article 239* of the Constitution provides for the national security organs. They include the National Police Service. The primary object of the national security organs and security system is to promote and guarantee national security in accordance with the principles mentioned in *Article 238(2)*.

78. *Article 243* of the Constitution establishes the National Police Service. Under *Article 244*, the Constitution provides the objects and functions of the National Police Service as follows: -

(a) strive for the highest standards of professionalism and discipline among its members;

(b) prevent corruption and promote and practice transparency and accountability;

(c) comply with constitutional standards of human rights and fundamental freedoms;

(d) train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and

(e) foster and promote relationships with the broader society.

79. The National Police Service is under the command of the Inspector-General of Police. The manner in which the Inspector-General of Police is to carry out its mandate is provided for under *Article 245(2)(b)* and (4) of the Constitution as follows: -

#### **1. The Inspector General –**

(a) .....

(b) **shall exercise independent command over the National Police Service**, and perform any other functions prescribed by national legislation.

*4. The Cabinet Secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector General with respect to—*

(a) the investigation of any particular offence or offences;

(b) the enforcement of the law against any particular person or persons; or

(c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.

5. Any direction given to the Inspector-General by the Cabinet secretary responsible for police services under clause (4), or any direction given to the Inspector-General by the Director of Public Prosecutions under *Article 157(4)*, shall be in writing.

80. *Article 157(4)* of the Constitution provides that: -

The Director of Public Prosecutions shall have power to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

81. The independence of the Inspector-General of Police is constitutionally-insulated from any form of interference or directional command. Apart from the Director of Public Prosecutions and only to the extent so provided, no other person, body or entity has the power to give any form of directives to the 2<sup>nd</sup> Respondent on how to discharge its functions. The position is further ring-fenced in that even the power donated to the Cabinet Secretary under Article 254(4) of the Constitution to issue any directives to the Inspector-General of Police is only limited to policy issues.

82. Pursuant to the provisions of Article 239(6) of the Constitution, The *National Police Service Act*, No. 11A of 2011 (hereinafter referred to as '*the Police Act*') was enacted on 30<sup>th</sup> August, 2011. It is an Act of Parliament to give effect to Articles 243, 244 and 245 of the Constitution; to provide for the operations of the National Police Service; and for connected purposes.

83. Sections 24, 27 and 35 of the Police Act variously provide for the functions of the Kenya Police Service, the Administration Police Service and the Directorate of Criminal Investigations respectively as follows: -

#### ***24. The Functions of the Kenya Police Service***

The functions of the Kenya Police Service shall be the—

- (a) provision of assistance to the public when in need;
- (b) maintenance of law and order;
- (c) preservation of peace;
- (d) protection of life and property;
- (e) investigation of crimes;
- (f) collection of criminal intelligence;
- (g) prevention and detection of crime;
- (h) apprehension of offenders;
- (i) enforcement of all laws and regulations with which it is charged; and
- (j) performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.

#### ***27. The Functions of the Administration Police Service***

*The functions of the Administration Police Service shall be the—*

- (a) provision of assistance to the public when in need;
- (b) maintenance of law and order;



- (c) preservation of peace;
- (d) protection of life and property;
- (e) provision of border patrol and border security;
- (f) provision of specialized stock theft prevention services;
- (g) protection of Government property, vital installations and strategic points as may be directed by the Inspector-General;
- (h) rendering of support to Government agencies in the enforcement of administrative functions and the exercise of lawful duties;
- (i) co-ordinating with complementing Government agencies in conflict management and peace building;
- (j) apprehension of offenders;
- (k) performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.

### **35. Functions of the Directorate**

The Directorate shall —

- (a) collect and provide criminal intelligence;
- (b) undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime among others;
- (c) maintain law and order;
- (d) detect and prevent crime;
- (e) apprehend offenders;
- (f) maintain criminal records;
- (g) conduct forensic analysis;
- (h) execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of the Constitution;
- (i) co-ordinate country Interpol Affairs;
- (j) investigate any matter that may be referred to it by the Independent
- (k) Police Oversight Authority; and perform any other function conferred on it by any other written law.

84. Having set out the constitutional and statutory parameters within which the Respondents must exercise their powers, I will now

look at some decisions which dealt with the various aspects of the scope and exercise of the said powers.

85. Recently, the Supreme Court in Petition No. 38 of 2019 *Cyrus Shakhlanga Khwa Jirongo v Soy Developers Ltd & 9 others* [2021] eKLR discussed some of the applicable parameters.

86. On whether the High Court exceeded its jurisdiction in interfering with the prosecutorial mandate of the Director of Public Prosecutions contrary to the Constitution, the Supreme Court stated as follows: -

[79] The High Court in its finding, prohibited the Respondents from proceeding with any criminal proceedings against the Appellant in relation to the suit property or any subject matter and transaction connected to the suit property. The Court of Appeal reversed this judgment by holding that the High Court had interfered with the discretion given to the Director of Public Prosecutions (DPP) to initiate and conduct prosecution. Essentially, the Court of Appeal found that the High Court went against public interest in preventing investigation and prosecution of allegations relating to fraudulent transfer and acquisition of the suit property and that the learned Judge interfered with the prosecutorial mandate of the DPP to decide on whether to charge or not to charge an individual.

[80] The 5th, 6th and 7th Respondents on their part, maintain the position that the decision to commence investigations against the Appellant was consistent with the provisions of Article 157 of the Constitution and Section 6 of the Office of Director of Public Prosecutions Act. They also submitted that the decision to institute criminal proceedings by the DPP is discretionary and that such exercise of power is not subject to the direction or control by any authority as provided for under Article 157(10) of the Constitution.

[81] Under Article 157(6) of the Constitution, the DPP is mandated to institute and undertake criminal proceedings against any person before any Court. Article 157(6) provides as follows:

(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may-

(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.”

Article 157(4) provides that:

(4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

However, Article 157(11) stipulates that:

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

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

[83] In that regard, the Court of Appeal in the case of *Commissioner of Police & Another v Kenya Commercial Bank Ltd & 4 Others* [2013] eKLR persuasively found that the High Court can stop a process that may lead to abuse of power and held that: -

Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, it is too fairly well settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why courts in this country have consistently held that it would be an unfortunate result for courts to interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The courts must wait for the investigations to be complete and the suspect charged.

By the same token and in terms of Article 157 (11) of the Constitution, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. **If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution. See Githunguri v Republic [1985] LLR 3090.**

*It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See Ndarua v R.[2002] IEA 205. See also Kuria & 3 Others V. Attorney General [2002] 2KLR. (emphasis supplied)*

[84] *Furthermore, the Supreme Court of India in R.P. Kapur v State of Punjab AIR 1960 SC 866 laid down guidelines to be considered by the Court on when the High Court may review prosecutorial powers. They are as follows:*

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

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

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

**(IV) Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.**

[85] We are persuaded that this is a good guide in the interrogation of alleged abuse of prosecutorial powers and read alongside Article 157(11) of the Constitution, we have sufficiently expressed ourselves elsewhere in this Judgment to show that the unconstitutional continuance of the criminal proceedings against the Appellant amounts to abuse of Court process and that, balancing the scales of justice, the weight would favour the Appellant and not the Respondents.

87. On public interest, the Supreme Court expressed itself as follows:

[86] On public interest, what is in issue is a dispute arising from a commercial transaction 24 years ago where the complainants have not denied receiving part payment of the purchase price. There is hardly any public interest element in such a transaction save the wide interest of the law to apprehend criminals.

[87] The learned Judge of the High Court, in our view, was well within his mandate under Article 165(3)(d)(ii) as read with Article 157(11) of the Constitution to curtail the Appellant's prosecution and the DPP'S powers have not in any way been interfered with, outside the constitutional mandate conferred on the High Court.

88. This Court also discussed the various principles and guidelines in *Reuben Mwangi v Director of Public Prosecutions & 2 others; UAP Insurance & another (Interested Parties)* case (supra) as follows: -

91.Regarding the exercise of prosecutorial discretion by the Director of Public Prosecutions, the Court of Appeal in *Diamond Hasham Lalji & another v Attorney General & 4 others* [2018] eKLR stated as follows:

[41] **Thus, the exercise of prosecutorial discretion enjoys some measure of judicial deference and as numerous authorities establish, the Courts will interfere with the exercise of discretion sparingly and in the exceptional and clearest of cases.**

However, as the Privy Council said in Mohit v Director of Public Prosecutions of Mauritius [2006] 5LRC 234:

these factors necessarily mean that the threshold of a successful challenge is a high one. It is however one thing to conclude that the courts must be sparing in their grant of relief to seek to challenge the DPP's decision to prosecute or to discontinue a prosecution, and quite another to hold that such decisions are immune from any such review at all...

In Regina v. Director of Public Prosecutions ex-parte Manning and Another [2001] QB 330, the English High Court said partly at para 23 page 344:

At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the tests were too exacting, an effective remedy could be denied.

**Although the standard of review is exceptionally high, the court's discretion should not be used to stultify the constitutional right of citizens to question the lawfulness of the decisions of DPP.**

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

In Ramahngam Ravinthram v Attorney General (*supra*) *the Court of Appeal of Singapore* said at p. 10. Para 28:

however, once the offender shows on the evidence before the court, that there is a prima facie breach of fundamental liberty (that the prosecution has a case to answer), the prosecution will indeed be required to justify its prosecutorial decision to the court. If it fails to do so, it will be found to be in breach of the fundamental liberty concerned. At this stage the prosecution will not be able to rely on its discretion under Article 35(8) of the Constitution without more, as a justification for its prosecutorial decision.

92. The High Court in Bernard Mwikya Mulinge v Director of Public Prosecutions & 3 others [2019] eKLR had the following to say about the role of the Director of Public Prosecutions in prosecuting criminal offences: -

**25. It is therefore clear that the current prosecutorial regime does not grant to the DPP a carte blanche to run amok in the exercise of his prosecutorial powers. Where it is alleged that the standards set out in the Constitution and in the aforesaid Act have not been adhered to, this Court cannot shirk its constitutional mandate to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, the Constitution itself. I associate myself with the sentiments expressed in Nakusa vs. Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565 to the effect that:**

the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system... In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of Domnic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003 is that interpretation of the Constitution has to be progressive and in the words of Prof M V Plyee in his book, *Constitution of the World*: "The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time..... In our role as "sentinels" of fundamental rights and freedoms of the citizen which are founded on laissez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent "sentinels" of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right.

93. Long before the advent of the Constitution of Kenya, 2010 the High Court in R vs. Attorney General exp Kipngeno arap Ngeny Civil Application No. 406 of 2001 expressed itself as follows: -

.... Although the state's interest and indeed the constitutional and statutory powers to prosecute is recognized, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognized lawful parameters...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious...A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds....

94. It has also been well and rightly argued that, on the basis of public interest and upholding the rule of law, Courts ought to exercise restraint and accord state organs, state officers and public officers some latitude to discharge their constitutional mandates. The Court of Appeal in **Diamond Hasham Lalji & another v Attorney General & 4 others** (supra) stated as follows: -

The elements of public interest and the weight to be given to each element or aspect depends on the facts of each case and in some cases, State interest may outweigh societal interests. In the context of the interest of the administration of justice, it is in the public interest, inter alia, that persons reasonably 'suspected of committing a crime are prosecuted and convicted, punished in accordance with the law, that such a person is accorded a fair hearing and that court processes are used fairly by state and citizens.

95. The Court of Appeal in **Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others [2018] eKLR** referred to the Supreme Court of India in *State of Maharashtra & Others v. Arun Gulab & Others, Criminal Appeal No. 590 of 2007, where the Court stated:*

**The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction to the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor can it soft-pedal the course of justice at a crucial stage of investigation/proceedings.**

**The provisions of Articles 226, 227 of the Constitution of India and Section 482 of the Code of Criminal Procedure, 1973 (hereinafter called as "Cr.P.C.") are a device to advance justice and not to frustrate it. The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of power of the Court, but the more the power, the more due care and caution is to be exercised in invoking these powers.**

96. The High Court in **Bernard Mwikya Mulinge case** (supra) expressed itself as follows: -

**14. As has been held time and time again the Court ought not to usurp the constitutional mandate of the Director of Public Prosecutions (DPP) to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution. The mere fact therefore that the intended or ongoing criminal proceedings are in all likelihood bound to fail, is not ipso facto a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. An applicant who alleges that he or she has a good defence in the criminal process ought to ventilate that defence before the trial court and ought not to invoke the same to seek the halting of criminal proceedings undertaken bona fides since judicial review court is not the correct forum where the defences available in a criminal case ought to be minutely examined and a determination made**

thereon.....

97. In *Meixner & Another vs. Attorney General* [2005] 2 KLR 189 the Court stated as follows: -

The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion is acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution....

98. *Mumbi Ngugi, J (as she then was), in Kipoki Oreu Tasur vs. Inspector General of Police & 5 Others (2014) eKLR* stated that:

The criminal justice system is a critical pillar of our society. It is underpinned by the Constitution, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior Courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated...

99. In *Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another* [2012] eKLR the Court held that:

... the police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court...As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene....

100. Recently, the High Court in *Henry Aming'a Nyabere v Director of Public Prosecutions & 2 others; Sarah Joslyn & another (Interested Parties)* [2021] eKLR dealt with several instances where a Court may intervene and stop a prosecution. They include where: -

- (i) There is no ostensible complainant in respect to the complaint;
- (ii) The prosecution fails to avail witness statements and exhibits without any justification;
- (iii) There is selective charging of suspects; or
- (iv) An Advocate is unfairly targeted for rendering professional services in a matter.

89. And, in *Maura Muigana vs. Stellan Consult Limited & 2 Others* case (supra), I further discussed the subject as follows: -

58. I have also come across several other decisions on the subject. I will refer to only some few. In *Anthony Murimi Waigwe v Attorney General & 4 others* [2020] eKLR, the Court held that the Prosecutor has a duty to analyze the case before prosecuting it and it should let free those whom there is no prosecutable case against them. It expressed itself thus: -

48. It is no doubt dear that under Article 157 (1) of the Constitution the ODPP is enjoined in exercising the powers conferred by the aforesaid Article to have regard to public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process. Interest of the administration of justice dictates that only those whom the DPP believes have a prosecutable case against them be arraigned in Court and those who DPP believes have no prosecutable case against them be let free. This is why Article 159 (2) of the Constitution is crying loudly every day, every hour that "justice shall be done to all, irrespective of status". Justice demands that it should not be one way and for some of us but for all of us irrespective of who one is or one has.

49. The Petitioner in support of interest of administration of justice dictates referred to the National Prosecution policy, revised in 2015 at page 5 where it provides that: "Public Prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction, In other words Public Prosecutors should ask themselves• would an impartial tribunal convict on the basis of the evidence available"

50. In the case of Republic v. Director of Public Prosecution & Another ex parte Kamani, Nairobi Judicial Review Application No. 78 of 2015 while quoting the case of R vs. Attorney General ex Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001; the Court held;

A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper ... there must be in existence material evidence on which the prosecution can say with certainty that it has a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and inactionable.

51. In a democratic society like ours, no one should be charged without the authorities conducting proper investigation. The prosecutor on the other hand is under duty to consider both incriminating and exculpating evidence, In the case of Republic v. Director of Public Prosecutions & Another ex parte Kaman/ Nairobi Judicial Review Application Nog 78 of 2015 (supra), the court expressed itself as follows:

this court appreciates that the court should not simply fold its arms and stare at the squabbling litigants/disputants parade themselves before the criminal court in order to show-case dead cases. The seat of justice is a hallowed place and ought to be reserved for those matters in which the protagonists have a conviction stand a chance of seeing the light of the day. In my view the prosecution ought not to institute criminal cases with a view of obtaining an acquittal. It is against the public interest as encapsulated in section 4 of the Office of the Director of Public Prosecutions Act to stage-manage criminal proceedings in a manner intended to obtain an acquittal. A criminal trial is neither a show-biz nor a catwalk.

59. In *Meme -vs- Republic & Another* (2004) eKLR the Court of Appeal discussed abuse of the Court process thus: -

An abuse of the court's process would, in general, arise where the court is being used for improper purpose, as a means of vexation and oppression, or for ulterior purposes, that is to say, court process is being misused.

60. In quashing a criminal prosecution on the basis of abuse of Court process, the Court in *Peter George Anthony Costa v. Attorney General & Another* Nairobi Petition No. 83/2010 expressed itself thus:-

The process of the Court must be used properly, honestly and in good faith, and must not be abused This means that the court will not allow its function as a court of law to be misused and will summarily prevent its machinery from being used as a means of vexation or of oppression in the process of litigation. It follows that where there is an abuse of the court process there is a breach of the petitioner's fundamental rights as the petitioner will not receive a fair trial. It is the duty of the court to stop such abuse of the justice system.

61. Still on abuse of Court process in using Court to settle personal scores, the Court in *Rosemary Wanja Mwangi & 2 Others V Attorney General & 2 Others, Mumbi J* (as she then was) stated that: -

The process of the court must not be misused or otherwise used as an avenue to settle personal scores. The criminal process should not be used to harass or oppress any person through the institution of criminal proceedings against him or her. Should the court be satisfied that the criminal proceedings being challenged before it have been instituted for a purpose other than the genuine enforcement of law and order, then the court ought to step in and stop such maneuvers in their tracks and prevent the process of the court being used to unfairly wield state power over one party to a dispute.

62. On the need for a Prosecutor to act within the law, the Court in *Thuita Mwangi & 2 Others vs. Ethics and Anti-Corruption Commission & 3 Others* stated that: -

The discretionary power vested in the Director of Public Prosecution is not an open cheque and such discretion must be exercised within the four corners of the Constitution. It must be exercised reasonably within the law and to promote the policies and objects of the law which are set out in Section 4 of the Office of Director of Public Prosecution Act. These objects are as follows: the diversity of the people of Kenya; impartiality and gender equity; the rules of natural justice, promotion of public confidence in the integrity of the office; the need to discharge the functions of the office on behalf of the people of Kenya, the need to serve the cause of justice; prevent abuse of legal process and public interest, protection of the sovereignty of the people; secure the observance of democratic values and principles and promotion of constitutionalism. The court may intervene where it is shown that the impugned criminal proceedings are instituted for other means other than the honest enforcement of criminal law, or are otherwise an abuse of the court process.

63. In **Republic v. Commissioner of Co-operatives ex parte Kirinyaga Tea Growers Cooperative Savings & Credit Society Ltd CA 39/97 119991 EALR 245** the Court of Appeal warned against the improper use of power in the following words: -

...it is axiomatic that statutory powers can only be exercised validly if they are exercised reasonably. No statute ever allowed anyone on whom it confers power to exercise such power arbitrarily, capriciously or in bad faith....

64. The above position was amplified in Nairobi High Court Miscellaneous Application No. 1769 of 2003 **Republic vs. Ministry of Planning and Another ex-parte Professor Mwangi Kaimenyi**, where it was held:

So, where a body uses its power in a manifestly unreasonable manner, acted in bad faith, refuse to take relevant factors into account in reaching its decision or based its decision on irrelevant factors the court would intervene that on the ground that the body has in each case abused its power, The reason why the court has to intervene is because there is a presumption that where parliament gave a body statutory power to act, it could be implied that Parliament intended it to act in a particular manner.

65. The need for Courts to act with deference and accord constitutional and legal entities to discharge their mandates was revisited in **Paul Ng'ang'a Nyaga vs Attorney General & 3 Others** (2013) eKLR, where it was held that: -

... this Court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they have acted in contravention of the Constitution.

66. I believe I have said enough on the general exercise of prosecutorial powers and for the purposes of this case. I will now look at what Legal Scholars and Courts have rendered on concurrent civil and criminal proceedings.

90. In the same case, **Maura Muigana vs. Stellan Consult Limited & 2 Others** case (supra), I also dealt with the issue of *abuse of Court process*. This is what I stated: -

67. The subject of abuse of Court process was discussed by the Court of Appeal in **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others** Civil Appeal No. 25 of 2002 [2009] KLR 229, as follows: -

The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it...The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice. Examples of the abuse of the judicial process are: -

i. Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.

ii. Instituting different actions between the same parties simultaneously in different courts even though on different grounds.

iii. Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's



notice.

iv. Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness.

68. The Court of Appeal went on and stated as follows: -

In our view, the often quoted principle that a party should have his day in court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine. Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice...We approve and adopt the principles so ably expressed by both Lord Roskil and Lord Templeman in the case of *ASHMORE v CORP OF LLOYDS* [1992] 2 All E.R 486 at page 488 where Lord Roskil states:

It is the trial judge who has control of the proceedings. It is part of his duty to identify crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judges' time as is necessary for the proper determination of the relevant issues.

Unless a trial is on discernable issues it would be farcical to waste judicial time on it.

69. In Nairobi *Civil Appeal No. 70 of 2017 Prafulchandra Bharmal v Chief Magistrate Kibera & 3 others* [2020] eKLR, the Court of Appeal further rendered itself as follows: -

20. In answering whether there was abuse of power, the Judge too discussed at length the safeguards that exist under criminal law in regard to an accused person to ensure a fair trial which is also a guaranteed right enshrined in the Constitution. He also appreciated that *Section 193 A of the Criminal Procedure Code*, allows concurrent litigation of civil and criminal proceedings arising from the same issues but cautioned that the prerogative of the police to investigate crime must be exercised according to the laws of the land and in good faith. What we understand the Judge to be saying in this regard is that the mere fact that leave was granted to the appellant to institute private criminal prosecution, this ipso facto did not mean that the 2<sup>nd</sup> respondent would not get a fair trial because the principles of a fair trial are well ingrained in law and practice. Having said that, the Judge went further to infer the unique circumstances prevailing in this matter, and posited that, if the private prosecution were to proceed, it would amount to an abuse of process. He pointed out and rightly so in our view, that if both the civil and the private criminal prosecution cases which were all centred on the *Bakaranian* agreement were to proceed for hearing in both courts, there was a likelihood of the two processes giving rise to two different outcomes as there were also two sets of evidence in form of document examiners' reports. To us this was not a merit determination but a commentary on the process. We do not also see any contradictions as the Judge was restating the well-established principles of a fair trial.

21. Was there abuse of process to warrant an order prohibiting the criminal charge" In *Jago v District Court (NSW)* 168 LLR 23, 87 ALR 57) Brennan, J. said in part at p. 47-48: -

**An abuse of process occurs when the process of court is put in motion for purposes which in the eye of the law, it is not intended to serve. The purpose of criminal proceedings, generally speaking, is to hear and determine finally whether the accused has engaged in a conduct which amounts to an offence and on that account is deserving of punishment. When criminal process is used only for that purpose and is capable of serving that purpose, there is no abuse of process.**

We are aware that the categories of abuse of process are not limited. Whether or not an abuse of power of criminal process has occurred ultimately depends on the circumstances of each case. One of the important factors at common law which underlie a prosecutorial decision is whether the available evidence discloses a realistic prospect of a conviction. In *Walton v Gardener* [1993] 177 CLR 378, the High Court of Australia said at para 23 –

**The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all categories of cases in which the process and procedures of the court which exist to administer justice with fairness and impartiality may be converted into instruments of injustice and unfairness. Thus, it has long been established that regardless of the**

person responsible for their institution and maintenance, proceedings will constitute an abuse of process if they can be seen clearly to be foredoomed to fail..., if that court is in all circumstances of the particular case a clearly inappropriate forum to entertain them..., if, notwithstanding that circumstances do not give rise to an estoppel their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate a case which has already been disposed of by earlier proceedings.

21. It is not lost to us that both the appellant and 2<sup>nd</sup> respondents are siblings; they have been involved in a dispute over the suit property for a long time; the appellant is the one who filed a civil suit, a defence was filed and when the civil suit was still pending, he instituted a private criminal prosecution. At the backdrop of all this, even the appellant's complaint against the 2<sup>nd</sup> respondent was subjected to police investigations and the DPP directed the police file be closed. *We are on our part persuaded that in the circumstances of this matter, an order of prohibition was justified to protect the court process from being used to settle a civil dispute which was pending and that allowing the criminal process was likely to embarrass the courts. To us, this order was appropriate as the Judge had to navigate carefully so as not to make far reaching pronouncements that would embarrass the pending civil trial.*

83. The High Court in **Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others** Nairobi (Milimani) HCCC No. 363 of 2009 stated as follows with respect to the Court's power to prevent abuse of its process: -

This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. *In the civilized legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing.* Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it. (emphasis added).

84. From the foregoing, it is the case that the subject of abuse of Court process is wide and whether there is an abuse of the due process depends on the circumstances of a case.

85. As I come to the end of the second issue, I must state that I have deliberately endeavored the above somehow elaborate discussion covering the general exercise of prosecutorial powers, the concurrent civil and criminal proceedings under Section 193A of the CPC and the subject of abuse of Court process so as to lay a sound basis for consideration of the main issue in this matter which is whether the prosecution facing the Petitioner herein should be stopped since the dispute is civil in nature and the criminal case amounts to an abuse of Court process.

86. That consideration is the gist of the next issue.

87. From the foregoing, it comes to the fore that there are instances where a Court ought to exercise its discretion and stop a prosecution. Such instances, *include, and where it is demonstrated that:* -

- (i) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court;
- (ii) Where the quashing of the impugned proceedings would secure the ends of justice;
- (iii) Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction;
- (iv) Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do

not constitute the offence alleged;

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

(vi) The prosecution is not in public interest;

(vii) The prosecution is not in the interests of the administration of justice;

(viii) The prosecution is oppressive, vexatious and an abuse of the court process;

(ix) The prosecution amounts to a breach of rights and fundamental freedoms;

(x) The investigation and prosecution amounts to abuse of power and discretion and is aimed at achieving an ulterior or improper motive;

(xi) The investigation and the prosecution are tainted with illegality, irrationality and procedural impropriety;

(xii) The investigation and prosecution is in gross contravention of the Constitution and the law;

91. Having set out the parameters for the exercise of prosecutorial and police powers, I will now interrogate whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents actions were within the Constitution and the law.

92. I will ascertain, of particular importance, whether there were complainants and criminal wrongs were committed in the circumstances of this case. I will also consider whether 1<sup>st</sup> Respondent acted properly in sanctioning the criminal prosecution.

93. *Section 2 of the Criminal Procedure Code, Cap. 75 of the Laws of Kenya* defines a 'complaint' as follows: -

an allegation that some person known or unknown has committed or is guilty of an offence.

94. The **Black's Law Dictionary** 10<sup>th</sup> Edition defines a '*complainant*' as follows: -

The party who brings a legal complaint against another.

95. An '*offence*' is defined under the *Office of the Director of Public Prosecutions Act*, No. 2 of 2013 to mean: - an act, attempt or omission punishable by law.

134. The foregoing partly sets the confines within which this Court ought to determine the dispute.

135. In so doing, this Court must balance the interests of all parties in the matter. Of much importance is that the Court ought to exercise judicial deference so as not to wade into the arena of giving direction and or making decisions for other constitutional organs.

136. The facts in this matter are fairly straight-forward. They are captured elsewhere above in this judgment.

137. In a snapshot, *Dr. Fryda*, the 1<sup>st</sup> Interested Party herein, has since 2010, been entangled in an ownership dispute with the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties in respect of some parcels of land whereon some hospitals stand.

138. The dispute was eventually lodged in the Environment and Land Court at Nakuru in **Civil Suit No. 224 of 2010** and was

consolidated with **ELC No. 238** of **2012** (hereinafter referred to as '*the ELC Case*').

139. The matter was heard and a judgment rendered on 28<sup>th</sup> September, 2017.

140. Dr. Fryda was represented by the Petitioner through her firm *Messrs. Mwangi E. G. & Co. Advocates*.

141. In its judgment, the Court held as follows: -

(i) That the properties LR No. 27228; LR No. 27229; LR No. 9361/10 and Kiine/Rukanga/2846 are not held in trust for Rev. Dr. William Fryda.

(ii) That the properties LR No. 27228; LR No. 27229; LR No. 9361/10 and Kiine/Rukanga/2846 currently registered in the name of Assumption Sisters of Nairobi Registered Trustees be transferred to the company St. Mary's Mission Hospitals being a company limited by guarantee and to be held by the said company under a charitable trust for purposes of developing, maintaining and/or operating a hospital specifically aimed for the poor in society.

(iii) That the hospitals located in LR No. 27228 and/or LR No. 27229, and LR No. 9361/10 commonly identified as St. Mary's Mission Hospitals be henceforth under the management of the company St. Mary's Mission Hospitals a company limited by guarantee.

(iv) That Regina Pacis University has no claim over the land parcel LR No. 27229, or over any of the other land parcels in issue in this suit and the Trust Deed assigning land to the said University is void to the said extent.

(v) That the user of the properties LR NO. 27228; LR No. 27229; LR No. 9361/10 and Kiine/Rukanga/2846 other than that of providing health services to the poor or such other auxiliary purposes is null and void and Assumption Sisters of Nairobi are hereby directed to embark on a relocation or discontinuation programme of any such purposes.

(vi) That in respect of accounts, Dr. William Fryda to provide details of all accounts forthwith and to surrender the same to St. Mary's Mission Hospital (the company) and if found necessary submit to an audit as directed in this judgment.

(vii) That the prayer to have Dr. William Fryda permanently restrained is not granted but the parties to agree on the position of Dr. Fryda within the hospitals given the import of the judgment herein that ownership of the suit properties and management of the hospitals will be with the company St. Mary's Mission Hospital.

(viii) There shall be no orders as to costs.

142. On instructions of Dr. Fryda, the Petitioner's Firm lodged an appeal to the Court of Appeal against the judgment. The appeal is still pending.

143. As a result of the above decision, the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties sought to take over the operations of some bank accounts which were held in Prime Bank Ltd. In the midst of the tussle with Dr. Fryda, the Bank filed interpleader proceedings in the Environment and Land Court at Nakuru in **ELC No. 1 of 2018 (OS)** seeking the Court's directions in respect of the operations of the bank accounts.

144. On 8<sup>th</sup> February, 2018 the Court in Nakuru in HCC No. 1 of 2018 (OS) gave the following orders: -

(i) The applicant to henceforth hand over the accounts for the 3 stated accounts, which are in the name of St. Mary's Mission Hospital, that is 3\*\*\*\*\*60, 3\*\*\*\*\*72 and 3\*\*\*\*\*88 to the 1st and 2<sup>nd</sup> respondents.

(ii) The applicant to allow those accounts to be operated and continued only as may be directed by the 1st and 2nd respondents and not to allow the 3rd respondent, William Charles Fryda, to operate the said accounts in any way.

(iii) I make no orders in respect of the two accounts namely, 2\*\*\*\*\*53 and 3\*\*\*\*\*67, which are in the personal name of William Charles Fryda.

(iv) I make no orders as to costs.

145. According to the disposition by the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties, Dr. Fryda refused to comply with both the judgment and the orders requiring the handing over of the Bank accounts to the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties.

146. As a result, the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties lodged a complaint to the police which culminated with police investigations. The position was confirmed by Maria Felix Mwikali who swore the Replying Affidavit on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties. The deponent stated as follows: -

**10. That non-compliance by the 1<sup>st</sup> Interested Party and the bank necessitated the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties to lodge a complaint.**

147. The position was reiterated by the Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties in its submissions where it was stated as follows: -

**Your Lordship the said order was not complied with by Prime Bank Limited as directed and hence the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties lodged a complaint to which police investigations culminated into criminal cases against the Petitioner and the 1<sup>st</sup> Interested Party.**

148. It is, therefore, clear that had Dr. Fryda and the Prime Bank Limited complied with the orders of the Court and released the Bank accounts to the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties, no complaints would have been lodged with the police.

149. The lodging of the complaints to the police was, hence, a way of compelling Dr. Fryda to comply with the Court orders issued by the Land and Environment Court. Needless to say, the said orders were subject of an appeal before the Court of Appeal. In other words, the police intervention was sought for purposes of enforcing the judgment of a Civil Court.

150. The foregoing was rightly captured by the Magistrates Court in *Miscellaneous Criminal Application No. 3605/2017* where the Court observed: -

... Looking at the Complaint triggered by the Assumption of Sisters of Nairobi, it is obvious that the Directorate of Criminal Investigations is being used unwittingly to assist a party in a purely civil matter, the manner in which the Interested Party (St. Marys Hospital Nairobi) has argued against setting aside the orders (freezing orders) is telling on this.

151. Further, in *Miscellaneous Application No. 2413 of 2018* still before the Magistracy, the Court further observed thus: -

**... the orders sought are intended to coerce the 2<sup>nd</sup> Respondent (the Petitioner herein) to concede to matters relating to St. Mary's Mission Hospital and Dr. William Charles Fryda whom the 2<sup>nd</sup> Respondent represents...**

152. There are several decisions which this Court has referred to above which buttress the position that the coercive nature of the criminal justice system should not be used to force a party to satisfy an otherwise civil claim. However, that is exactly what the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties did in this matter.

153. In this case, the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties ought to have instituted execution proceedings including contempt of Court instead of lodging a complaint with the police. Since the matter was already before Court where several Court orders and a decree had been issued, the police had no business in enforcing the decisions of the Courts, unless otherwise so directed by the Courts.

154. The prosecution of Dr. Fryda and the Petitioner were, therefore, initiated for purposes of settling civil scores other than in the interest of administration of justice. Such an approach runs counter Article 157(11) of the Constitution.

155. There is another aspect of the issue worth mentioning. There is no doubt that the Petitioner's firm of Advocates has been appearing for Dr. Fryda in the civil matters including the pending appeal.

156. The dispositions did not indicate that the Petitioner was offering pro-bono services to Dr. Fryda. In such a scenario, Dr. Fryda remained under both a constitutional and legal duty to satisfy the Petitioner's legal fees and costs.

157. Dr. Fryda did as expected. He paid the Petitioner's legal fees and costs by transferring some money from his bank accounts to the Petitioner's bank accounts. Dr. Fryda so informed the police during the investigations.

158. In the course of their investigations, the police formed an opinion that the money paid by Dr. Fryda to the Petitioner on account of legal fees and costs had been stolen from the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties and found the Petitioner as part of the syndicate to defraud the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties.

159. An investigator must tread carefully when dealing with matters relating to the affairs between Advocates and their clients given the Advocate-Client confidentiality relationship. In this case, the investigator was aware that the Petitioner had and was still representing Dr. Fryda in Court cases. Further, there was an explanation by Dr. Fryda on the money he paid to the Petitioner. The money was in respect of legal fees and costs.

160. The investigator, however, opted to pursue the Petitioner and ensure that she was charged. The conduct of the investigator, therefore, added to the Petitioner's contention that the prosecution was aimed at forcing her not to appear for Dr. Fryda in the appeal before the Court of Appeal. By taking into account the unique circumstances of this case, such an inference remains very reasonable and believable.

161. There is also the issue of infringement of Article 47 of the Constitution. The Petitioner posited that the investigator called her through her cell phone and asked her to go to the DCI Headquarters over the matters the investigator was handling.

162. The Petitioner asked the investigator to see her in her office in case he needed any clarification over the matter. According to the Petitioner, the investigator never reverted to her and she later on learnt that the investigator had proceeded to Court and obtained a warrant of arrest against her in the criminal case.

163. The investigator affirmed the position in his affidavit at paragraphs 19 and 20 where he deposed as follows: -

19. That on various days between 29th May, 2018 and 5 June, 2018 I made efforts to call Esther Gathoni Mwangi through her mobile phone requesting her to appear at DCI Headquarters to clarify on the transactions but she failed and declined to do so.

20. That on 6th June, 2018 I registered charge sheet for criminal case No. 1028/2018 at Milimani Chief Magistrate's Court and obtained a warrant of arrest for the Petitioner (Esther Gathoni Mwangi). The matter was fixed for mention on 20/6/2018 and on that date the counsel for Esther Gathoni Mwangi informed the court that they have obtained a restraining order, restraining the investigating officer from arresting, charging questioning or prosecuting her. (Annexed and marked PO7 is the said charge sheet).

164. Article 47 of the Constitution states as follows -

1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
  - a. provide for the review of administrative action by a Court or, if appropriate, an independent and impartial tribunal; and

b. promote efficient administration

165. The legislation that was contemplated under Article 47(3) is the Fair Administrative Actions Act. No. 4 of 2015.

166. Section 4 thereof provides that: -

1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
2. Every person has the right to be given written reasons for any administrative action that is taken against him.
3. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

a. prior and adequate notice of the nature and reasons for the proposed administrative action;

b. an opportunity to be heard and to make representations in that regard;

c. notice of a right to a review or internal appeal against an administrative decision, where applicable;

d. a statement of reasons pursuant to section 6;

e. notice of the right to legal representation, where applicable;

f. notice of the right to cross-examine or where applicable; or

g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.

4. The administrator shall accord the person against whom administrative action is taken an opportunity to-

a. attend proceedings, in person or in the company of an expert of his choice;

b. be heard;

c. cross-examine persons who give adverse evidence against him; and

d. request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

5. Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

6. Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.

167. Section 2 of the Fair Administrative Act defines an '*administrative action*' and an '*administrator*' as follows: -

'administrative action' includes -

i. The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

ii. Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

‘administrator’ means ‘a person who takes an administrative action or who makes an administrative decision’.

168. In Civil Appeal 52 of 2014 *Judicial Service Commission vs. Mbalu Mutava & Another* (2015) eKLR Court of Appeal addressed itself on the above. The Court held that: -

Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.

169. Emerging from the above, there is no doubt the investigator’s decision in not formally summon the Petitioner was an administrative action. In sum, it was an administrative action because the investigator was discharging a duty bestowed in law and further the decision affected the legal rights and interests of the Petitioner. As such the decision had to pass the constitutional and statutory tests of lawfulness, reasonableness and procedural fairness.

170. As admitted by the Investigator, the impugned decision did not conform to the requirements of Article 47 of the Constitution and Fair Administrative Actions Act. At a minimum, to meet the constitutional and statutory threshold, the investigator had to: -

(i) Issue formal Summons requiring the attendance of the Petitioner at the DCI Headquarters.

(ii) Inform the Petitioner of the purpose of the attendance.

(iii) Inform the Petitioner of her right to attend with a Counsel if she so wished.

(iv) Inform the Petitioner of the consequences of non-attendance.

171. The Respondents’ impugned decision in not formally summoning the Petitioner and instead proceeding to obtain a warrant of arrest, therefore, infringed Articles 47 and 50(1) of the Constitution as well as the Fair Administrative Actions Act. The impugned decision is hence constitutionally infirm.

172. This Court believes that it has said enough to demonstrate that the Petitioner was only and unfairly targeted for offering professional services to Dr. Fryda and in a manner to curtail her from further discharging her duties as a professional.

173. The totality of the prosecution is that it is contrary to public interest, such does not serve the interests of administration of justice or at all, but is aimed at aiding parties to settle personal scores which are civil in nature and that the prosecution amounts to an abuse of the Court process.

174. The upshot is that the actions of the Respondents jointly and severally infringes the Petitioner’s rights and fundamental freedoms as guaranteed in Article 27(1) for not according the Petitioner equal protection and equal benefit of the law, Article 28 for infringing on the Petitioner’s dignity, Article 31 for unnecessarily requiring the Petitioner to disclose her private affairs, Article 39 for curtailing the Petitioner’s freedom of movement, Article 40 for interfering with the Petitioner’s property, Articles 47(1) and 50(1) for failing to accord the Petitioner a fair administrative action and a hearing.

175. The impugned conduct as well contravenes Article 157(11) of the Constitution for not serving public interest or the interests of the administration of justice and amounts to an abuse of the Court process.



176. In such a scenario, this Court is justified to intervene and uphold the Constitution in enforcing the rights and fundamental freedoms of the Petitioner as well as ensuring that the Constitution is not contravened.

**Disposition:**

177. Drawing from the foregoing, suffice to say that the Petition is successful and the following final orders hereby issue: -

**a. A declaration be and hereby issues that all the acts and or threatened acts by the Respondents and/or their agents, privies and any other person acting on their instructions of harassment, intimidation, questioning, investigating, charging, prosecuting against the Petitioner by the Respondents amounts to infringement of the Petitioner's rights and fundamental freedoms as enshrined in Articles 27(1), 28, 31, 40, 47(1) and 50(1) as well as the contravention of Article 157(11) of the Constitution and are, therefore, unconstitutional.**

**b. An Order of Certiorari be and hereby issues to bring the decision by the Respondents to charge and prosecute the Petitioner on the charges preferred against her *vide* the Charge Sheet dated 6<sup>th</sup> June 2018 in Milimani Chief Magistrates Court Criminal Case No. 1028 of 2018: Republic v Esther Gathoni Mwangi before this Court and to quash and set aside the said decision. The said decision be and is hereby quashed and/or set-aside forthwith.**

**c. An Order of Prohibition be and is hereby issued restraining the Respondents whether by themselves and/or their agents, privies and any other person acting on their instructions from charging, prosecuting, arresting, continued harassment, questioning and intimidation on any matter concerning the Petitioner's alleged involvement in the affairs of St. Mary's Mission Hospital, the Assumption Sisters of Nairobi and Dr. William Charles Fryda in her capacity as an Advocate of Dr. William Charles Fryda.**

**d. That the costs of this suit be jointly and severally borne by the Respondents, the 2<sup>nd</sup> and the 3<sup>rd</sup> Interested Parties.**

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 31<sup>ST</sup> DAY OF MARCH, 2022**

**A. C. MRIMA**

**JUDGE**



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