REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO.78 OF 2015

IN THE MATTER OF: ARTICLES 23, 25, 27, 50, 157 AND 165 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: SECTIONS 4 & 5 OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION ACT

AND

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES,

AND

IN THE MATTER OF: SECTION 8 & 9 OF THE LAW REFORM ACT,

AND

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI

AND MANDAMUS DIRECTED TO THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

THE ETHICS AND

ANTI-CORRUPTION COMMISSION.....INTERESTED PARTY

EX PARTE

CHAMANLAL VRAJLAL KAMANI

DEEPAK CHAMANLAL KAMANI

RASHMI CHAMANLAL KAMANI

JUDGEMENT

Introduction

1. This case, as the applicants rightly appreciate, touches on one of the most "(in) famous" or even notorious events in Kenya's political history known as "Anglo leasing and Anglo leasing like" contracts which for the past decade together with its many progenies have been part of the indelible national psyche of the country. The said Anglo leasing and Anglo leasing like contracts have in the process evolved into a very scary metaphor that has been used by certain members of the Kenyan political elites and Kenyans in general to define grand corruption in Kenya

2. Arising from the said events, the applicants were charged with two criminal cases which are the subject of these proceedings. In Anti-Corruption Case No. 2 of 2015 at the Chief Magistrates Court at Nairobi Milimani Law Courts they were charged with the following:

I. Count One *– Conspiracy to commit an economic crime contrary to Section 47A as read with Section 48 of the Anti-Corruption and Economic Crimes Act, 2003.*

Particulars*: Between 30th October, 2003 and 14th April 2004 in Nairobi, within the Republic of Kenya, conspired with others not before Court to commit an economic crime to wit, engaging in a scheme to defraud the Government of Kenya of Euros 40,000,000 through a supplier's credit contract agreement for the Modernization of Police Security Equipment and Accessories Project.*

II. Count Two *– Fraudulent acquisition of public property contrary to Section 45 (1) (A) as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act, 2003.*

Particulars: On or about 14th April, 2004 in Nairobi within the Republic of Kenya fraudulently acquired public property, to wit, Euros 1.2. Million from the Ministry of Finance on the pretext that they were able to provide credit to the Government of Kenya for the purchase of Security equipment under modernization of police equipment and accessories project.

3. On the other hand in Anti-Corruption Case No. 4 of 2015 at the Chief Magistrates Court at Nairobi Milimani Law Courts they face the following:

I. Count One *– Conspiracy to commit an economic crime contrary to Section 47A as read with Section 48 of the Anti-Corruption and Economic Crimes Act, 2003.*

Particulars*: On unknown dates between July 2003 and June 2004 in the City of Nairobi, within the then Nairobi Province, in the Republic of Kenya, conspired with others not before court to commit an economic crime to wit, engaging in a scheme to defraud the Government of Kenya of Euros 59, 688, 250 through a supplier's financing agreement for the computerization of security, law and order systems and procedures for the Kenya Police project code named "E-Cops".*

II. Count Two *– Fraudulent acquisition of public property contrary to Section 45 (1) (A) as read with*

Section 48 of the Anti-Corruption and Economic Crimes Act, 2003.

Particulars: *On or about 12th January, 2004 being the beneficial owners of the assets in the account of the Infotalent Limited and a limited liability company respectively, jointly fraudulently acquired public property by receiving a sum of Euros 1, 786, 898 into the bank account no. 1385496 in the name of Infotalent Ltd held with HSBC Republic Bank (Suisse) SA paid by the Government of Kenya without delivery of financing services.*

III. Count Three *– Fraudulent acquisition of public property contrary to Section 45 (1)(A) as read with Section 48 of the Anti-Corruption and Economic Crimes Act, 2003.*

Particulars*: On or about 21st April 2004 being a limited liability company and beneficial owners of the assets in the account of the said Infotalent Ltd jointly fraudulently acquired public property by receiving a sum of Euros 3, 500, 266.00 into the bank account No. 1385496 in the name of Infotalent Ltd held with HSBC Republic Bank (Suisse) SA paid by the Government of Kenya without delivery of services.*

4. It is these criminal cases which provoked these proceedings which were substantially commenced by way of a Motion dated 17th March, 2015, in which the *ex parte* applicants herein, **Chamanlal Vrajlal Kamani, Deepak Chamanlal Kamani** and **Rashmi Chamanlal Kamani**, seek the following orders:

(a) An order of CERTIORARI to remove and bring to this Honourable Court for the purposes of quashing, the decision of the Respondent to prosecute the ex-parte applicants contained in the Charge Sheet in Anti Corruption Cases Number 2 of 2015 and Number 4 of 2015 before the Chief Magistrates Court (Milimani Law Courts), Nairobi.

(b) A DECLARATION that the decision of the Respondent to criminalize commercial contracts entered into by the Government of the Republic of Kenya and Infotalent Limited and Sound Day Corporation respectively dated 19th November 2003 and 17th December 2003 amounts to an abuse of power.

(c) A DECLARATION that the contracts between the Government of the Republic of Kenya and Infotalent Limited dated 19th November, 2003 and Sound Day Corporation dated 17th December 2003 represent valid and binding obligations between the parties thereto.

(d) An order of CERTIORARI to remove and bring to this Honourable Court for the purpose of terminating, the prosecution of the ex-parte applicants before the Chief Magistrate's Court in Nairobi (Milimani Law Courts) in Anti Corruption Cases Number 2 of 2015 and Number. 4 of 2015, including an order to submit travel documents to the court with respect to these proceedings.

(e) An order of PROHIBITION directed against the Respondent, prohibiting it through its servants and/or agents from commencing, proceeding with and/or continuing with any criminal proceedings against the ex-parte applicants emanating from the contracts entered into by the Government of the Republic of Kenya and Infotalent Limited dated 19th November 2003 and the contract entered into by the Government of the Republic of Kenya and Sound Day Corporation dated 17th December 2003.

(f) Costs of the Application be provided for.

Applicant's Case

5. The application was supported by affidavits sworn by **Deepak Chamanlala Kamani**.

6. The deponent deposed tzhat Infotalent Limited ("Infotalent") entered into a contract with the Government of the Republic of Kenya (GoK) on 19th November, 2003 for Services for the Supply, Installation, Commissioning and Support of the Kenya E-Cops Security, Law and Order Systems and for Credit for the purpose of financing for the Kenya E-Cops Security, Law & Order Systems and Services provided by the Agreement which contract was executed by **Mr. D.M. Mwangi**, the then Permanent Secretary for Provincial Administration & National Security and **Mr. Joseph M. Magari**, the then Permanent Secretary to the Treasury, Ministry of Finance on the one part and **Bradley Birkenfeld**, the Managing Director of Infotalent on behalf of Infotalent on the other part. Pursuant thereto, the Government of Kenya issued a series of Promissory Notes to Infotalent covering both principal and interest amounts of the Contract and the Attorney General on his part issued a Legal Opinion on the validity of the Promissory Notes issued to the order of Infotalent as beneficiary with varying dates of maturities, in respect of both principal and interest payments. In his opinion, it was deposed, the Attorney General noted that each Promissory Note constitutes an unconditional promise made by the Government of Kenya, engaging to pay on demand, at a fixed and determinable future time, the sum stated in each Promissory Note to the order of Infotalent and were thus valid, binding and enforceable.

7. According to the deponent, in fulfilment of their contractual obligations, Infotalent commenced the project by deploying a team of 9 engineers to take up system study and site surveys for the various subsystems under the E-Cops System. The Project Director, **Captain D.J. Raju** wrote to the Police Commissioner requesting issuance of official notice of authorization that Infotalent is officially appointed for this project and that Infotalent Teams are given permission to gain access and collect necessary information required in the course of carrying out their responsibilities and assignments relating to systems study, design and implementation. Further**,** the Project Director wrote a subsequent letter to the Steering Committee of the E-Cops project informing them that the first phase of the survey for the siting of the CCTV security surveillance system in the City of Nairobi had been completed with 143 buildings having been surveyed.

8. It was deposed that since the implementation of the project involved customization of the project through a detailed system study and configuration/modification of software application, site Surveys, technical studies and design work were undertaken throughout the country and Infotalent further took steps to purchase goods from Bosch Security Systems worth Euro 7,648.78 to aid the implementation of the project. Subsequently, Infotalent submitted a detailed Project Status Report to the Kenya Police (the User) which included a detailed study of the implementation and an Automated Fingerprint Identification System (AFIS) and received a letter from the then Financial Secretary from the Ministry of Finance dated 9th June, 2004 indicating that the buyers were, at that time, experiencing severe budgetary constraints with regard to the financing of the project. The Government of Kenya then expressed their desire to review the progress of the project with a view of postponing the implementation or terminating the project till such time as they will be able to afford it. In the letter, the Government of Kenya further required that in the case of postponement or termination, the monies paid to the Supplier be repaid back to the Government pending the procedures of termination/postponement of the project.

9. It was disclosed that consequently, Infotalent, through a letter dated 11th June, 2004, accepted the Buyer's request contained in their letter dated 9th June, 2004 and in view of their financial difficulties, agreed to voluntarily cancel the contract with no further obligations on either side, and to pay back the full amount paid on the contract date. It was disclosed that Clause 28. 3 of the aforementioned Contract required the Buyer to pay, on the date of contract, 3% of the Credit, which was Euros 1,786,898 as arrangement, commitment and administration fee which amount was received by Infotalent from the Buyer and upon termination of the Contract, it was fully refunded to the Buyer. Apart from that the

aforementioned Promissory Notes received by the Supplier from the Buyer were also returned to the buyer upon termination of the Contract. It was therefore the deponent's position that in so far the contract involving Infotalent the parties discharged from each other their further performance and returned all monies that were paid.

10. The applicants' position was therefore that it is untenable in law for the government in light of its previous conduct and plea to Infotalent to turn round and charge the applicants with receiving monies, knowing very well that the same was received pursuant to the contract and that it was subsequently returned at the request of the government upon the cancelation of the contract.

11. It was further deposed that on 30th October, 2003, the Sound Day received a letter from the Permanent Secretary Provincial Administration and National Security seeking financial arrangements such as supplier's credit to support the funding requirements of the Government's plans to enhance the performance of the Police Department and other security agencies by further modernizing police equipment and accessories. In the aforesaid letter, the Government termed the project as a priority project occasioned by heightened concerns about law and order and the complications arising from international terrorism and the specific targeting of Kenya, including the major bombings that have taken place and recent serious threats of continued terrorist activities. They thus requested the Supplier to arrange credit financing with reasonable terms and conditions for undertaking the project as outlined in their technical document. In response, Sound Day Corporation, in a letter dated 20th November, 2003, confirmed their interest in the project and attached a proposed contract for the project, including the level of financing that can be arranged and the terms and conditions for the financing and the services. In a letter to the then Permanent Secretary of the Treasury Department, the Permanent Secretary Provincial Administration and National Security in the Office of the President requested the former's approval for direct procurement for the national security project for modernization of police equipment and accessories. These processes, it was deposed, culminated in Sound Day entering into a contract with the Government of the Republic of Kenya on 17th December, 2003 for the purpose to modernise police security equipment and accessories for the Kenya Police Department of the Office of the President of the Government of Kenya and to provide credit financing facility for said modernisation of equipment and accessories which contract was executed by **Mr. D.M. Mwangi**, the then Permanent Secretary for Provincial Administration & National Security and **Mr. Joseph Mbui Magari**, the then Permanent Secretary to the Treasury, Ministry of Finance on the one part and **Brian Mills**, the Managing Director of Sound Day on the other part. Pursuant thereto, on the 5th of January, 2004, the Buyer issued a series of Promissory Notes to the order of the Supplier as beneficiary covering both principal and interest amounts of the Contract and the then Attorney General issued a Legal Opinion on the validity of the Promissory Notes issued to the order of the Supplier as beneficiary with varying dates of maturities, in respect of both principal and interest payments in which he noted that each Promissory Note constitutes an unconditional promise made by the Government of Kenya, engaging to pay on demand, at a fixed and determinable future time, the sum stated in each Promissory Note to the order of the Supplier and were thus valid, binding and enforceable.

12. The deponent deposed that pursuant to the terms of the contract and an order from the Buyer Ref NO. ZZ/36/183/03, the buyer dispatched part of the goods and forwarded the same through a letter dated 27th October, 2004 in which the following documents were attached:

i. Original Invoice no. SDC/0801/1st Desp/04 – dated 27/10/04.

ii. A copy of Air Way Bill no: 0200 2758 1595

iii. A Delivery Note dated 27/10/04 of Goods Valued at EUR 1, 158, 434.00

13. Pursuant to the terms of the contract and on a further order from the Buyer Ref OP/14/18/1A**,** the buyer once again dispatched part of the goods ordered and forwarded the same through a letter dated 5th December, 2004 in which the following documents were attached:

i. Original Invoice no. SDC/407/7th Desp/04 Part B dated 29/11/04.

ii. A copy of Bill of Lading No: IRSL PEL 1734 IHQ 0516

iii. A Delivery Note dated 5/12/04 Of goods valued at **USD 6,452,434**

14. It was therefore deposed that a total of goods valued at **Euros 7,109,382** were delivered to the buyer and no payment for them had been done to date. It was reiterated that the Supplier is in possession of the Promissory Notes issued to its benefit by the Buyer and that the Government of the Republic of Kenya is in breach of the contract dated 17th December 2003 between them and Sound Day Corporation.

15. According to the deponent, the foundational basis of the matters before the Anti Corruption Court is borne from a commercial transaction between Infotalent Limited and the Government of the Republic of Kenya. He averred that the Respondent indeed acknowledged the creation of contractual rights bestowed upon the parties to the Agreement as aforementioned since in count VI of the Charge Sheet in ACC No. 2 of 2015, the applicants' co-accused, the then Permanent Secretary in charge of Provincial Administration in the Office of the President is charged with executing a supplier's credit contract agreement with the Supplier conferring contractual rights to the Supplier thereby creating an obligation against the Government of Kenya to pay the contractual sum. Further in counts VII, VIII and IX of the Charge Sheet in ACC No. 4 of 2015, their co-accused, the then Minister for Finance, **Mr. David Mwiraria** and the then Permanent Secretary, Ministry of Finance **Mr. Joseph Magari** are charged with signing a financial agreement with the Supplier conferring contractual rights to the Supplier thereby creating an obligation against the Government of Kenya to pay the contractual sum.

16. Based on Counsel's advice, it was deposed that a contract creates contractual obligations where one party performs its duties and the other performs its obligations under the contract and as such, no action by any party to the contract in fulfilment of their duties and obligations should be criminalised. To the applicants, the decision of the Respondent to criminalise a commercial agreement is an abuse of his discretionary powers under the Constitution and the law. In their view, the Respondent has preferred criminal charges against the ex-parte applicants arising from the said transactions, with the sole view of extricating or attempting to excuse the government of Kenya from its wilful and well calculated breach of the agreements. Whereas the Respondent has preferred criminal charges against the ex-parte applicants for offences allegedly committed by various limited liability companies, there is no nexus between the ex-parte applicants and the limited liability companies who are accused persons in the attached charge sheets. In his view, the decision of the Respondent to prosecute what is clearly a commercial dispute before a criminal court is unreasonable and amounts to an abuse of power reviewable by this court.

17. In his view, the said action is a clear violation of Article 27(1) of the Constitution as it puts the government in a position where it literally does as it wishes and places the applicants at a huge disadvantage and in the process the right of equal protection before the law is thrown to the four winds. The applicants therefore relied on **Petition Number 390 of 2009, Nedermar Technology BV vs. The Kenya Anti Corruption Commission and the AG, [2008] eKLR** and **Midland Finance & Securities Globetel Inc. vs. The AG and Kenya Anti Corruption Commission [2005] eKLR** for the proposition that contractual cases couldn't be simply be transformed into a criminal case at the election of the State

and that the state as a contracting party to the agreement must abide by the terms of the contract and seek remedies in civil courts. In the applicants' view, the criminal proceedings against them instituted by the Respondent constitute an abuse of power by the government and are an abuse of the court process as they are an attempt to criminalize valid contracts that in some instances are part performed by both parties to the contracts while in other the criminal trials are complete mala fide, and are based on complete falsehood on the part of the state as everything it claims is untrue. To the contrary, its own documents show the opposite of the rationalization it provides for prosecution. The state knows that its case is utterly false. It knows that it has a zero chance of success.

18. It was asserted that criminal trials and prosecutions are not meant, designed for or prosecuted to attain a conviction or even punish a criminal conduct. In this case, the purpose is collateral; the aim is extraneous to the purposes of criminal prosecution; and the objective is to give the state a breathing space in the political arena. In light of the run away corruption scandals that have engulfed and consumed, literally, important organs of government, coupled with in its ability to address this defining feature of the regime, the government is engaging in a classical scapegoating. Soft targets that are not part of important political matrix of the state or constituencies are conveniently targeted.

19. It was further the deponent's belief that the criminal cases preferred against the ex-parte applicants are "political show trials" in the classical sense of the term since the applicants have been identified in a political process as sacrificial lambs and are being taken through a criminal process to showcase the government's credentials in the fight against corruption yet the Government recognizes that the no criminal culpability attaches to the contracts that are the subject of this application. In the applicants' view, the criminal cases preferred against the ex-parte Applicants have nothing do with the ex-parte applicants' criminal culpability or otherwise. It has all to do with the government's propaganda effort to hoodwink the country that it indeed has the will to fight graft in the country hence a criminal trial rationalized along those lines are unconstitutional, an abuse of the process and a grave, egregious and vicious abuse of their constitutional rights as they are meant to send political signals and thus intimidate, coerce, force and trample on their civil and human rights and have no place in our constitutional dispensation.

20. It was averred that the action on the part of the government to prefer the charges against the ex-parte applicants has a profound impact on the relationship between the state and its citizenry and brings into sharp focus whether they are any institutions in place that can stand for the rule of law and a government limited by the law. It was reiterated that the criminal cases preferred against the ex-parte applicants herein are basically based on contractual contracts between the government of Kenya and companies hence civil in nature and that these contracts are part performed and have gone through the legal and statutory validations of the government of Kenya as they were initiated, processed and approved by the Attorney General of Kenya. Further despite the fact that these contracts have inbuilt process and procedure for redress for both parties as they have arbitration clauses, and choice of law and choice of forum clauses, the government using the coercive and behemoth power of the state and in complete abuse of its powers with the sole aim of making the applicants "an example" for others has criminalized a process that has not a single iota of criminality. In effect, the state through the criminal trials and processes seeks to transmute its remedies and rights under the contracts through a criminal trial and takes out of its self the civil remedies available under the contract despite the fact that a criminal court lacks the constitutional and civil safeguards that are so important in such a trial.

21. To the applicants, Articles 27 (the Due process clauses), 25 (the non derogation of the right to a fair trial) and Article 50 are brought into sharp focus by the actions of government. If one party to contract, after part performance seeks to get rid of the same and instead of paying damages to the innocent part herein the applicants can simply flip the coin and arraign before its courts its innocent partners to the

contracts, then Article 27(1) that establishes the right to equal protection of the law is completely undermined by the state in relation to the applicants herein. To them, the criminal cases instituted by the Respondents against the applicants herein are untenable for the same are instituted for ulterior motives as the government is using these cases as a sales pitch for its propaganda in the fight against corruption; The same are tainted with mala fide intentions on the part of the state; the court's process is being abused for purposes that are extraneous to its core function and mandate; a genuine civil dispute exists between the applicants and the state and it is inconceivable in law for the state to turn round and simply place the contracting party on the other side on the dock and charge them with a criminal case; the processes of a criminal trial are obviously being abused by the state in the criminal cases; the criminal trial is to solely used to oppress and breakdown the applicants; the criminal prosecution is vexatious, mala fide, and oppressive and is being conducted for improper purposes and the government has no evidence that can sustain the prosecution but to the contrary has in its possession evidence and advice that these cases should not be prosecuted, as there exists no credible and sufficient evidence.

22. It was the applicants' apprehensions that unless this Honourable Court intervenes, the ex-parte applicants will continue to suffer prejudice in the hands of the Respondent.

23. It was deposed that for the purposes of reviewing the investigations in the Anglo-Leasing type contracts, a Committee comprised of officers from both the Respondent and Interested Party was formed to conclude the investigations which Committee commenced work in March 2014 and upon conclusion of the review of the investigations, prepared reports of their findings with the first report dealing with the five investigation files returned by the Director of Public Prosecution with issues to be covered. During their review, the Committee observed that the issues raised by the Director of Public Prosecution in the five files would apply to the other remaining eleven (11) contracts and therefore embarked on completing the entire Anglo Leasing investigation. The report above concluded that there were gaps in the prosecution case and despite the evident lack of a prima facie case on which to proceed with the prosecution, the Respondent selected to initiate and commence criminal proceedings against the Ex-Parte Applicants. The Committee prepared a further report which interrogated the contracts referred to as "Security Projects" which were carried out in similar circumstances, style and by the same officials in the Government. The report dealt with each contract separately, giving the history, developments and status of each project. Both reports authored and authenticated by officials of the Respondent as well as the Interested Party acknowledge that there is no basis for the prosecution of the ex-parte applicants. Moreover, in the report, both the Respondents and the Interested Party acknowledge the existence of ***Anti-Corruption Case Number 8 of 2005 between Republic –v- Sylvester Mwandime Mwaliko & 3 Others*** **(The Anti-Corruption Case)** which case involved a similar Anglo-Leasing type contract as the contracts subject matter to the instant proceedings.

24. The deponent quoted the testimony of the then Finance Minister, **Mr. David Mwiraria** as follows:

"I read the minutes MFI-21 and discussed the minutes with PS Magari. I approved the recommendations. It became my document. It became approved contract of the Government of Kenya. I discharged my duty. I was not unhappy with the memo. I got clarifications from the PS before I approved the memo. Anglo-Leasing Saga could have been a trade war. I talked about it earlier – British were not happy after we cancelled the British contract for De La Rue for currency printing"

25. The Attorney General, the then Honourable Attorney General **Amos Wako**, it was contend on his part testified as to the legality of the contracts viz:

"The people who signed the agreement had legal authority to sign and the Promissory Notes are

recognized under our laws. After the agreement is signed, a legal opinion is ordinarily sought in some cases. There was a special authorization by Minister of Finance to his PS (Treasury) Mr. Magari. The promissory notes were signed by PS (Magari) on authorization by the Minister of Finance. I therefore confirmed that everything was legal. The legal opinion was prepared by the Department and it has to be signed by the AG. There was a note from D. Achapa to me. It requested me to consider and sign the Legal Opinion. [The promissory notes had been approved by Cabinet if I am not wrong]. The Promissory Notes were 29 in number. The people who signed the contract therefore had authority to sign and the Promissory Notes were recognized by our Laws…"

26. The deponent then revealed that the 2nd, 3rd and 4th accused in the Anti-Corruption Case were acquitted under Section 210 of the ***Criminal Procedure Code*** and found to have no cases to answer on all the charges facing them. Furthermore, in separate proceedings before the Court of Appeal in Civil ***Application No. 110 of 2014 (UR 88/2014) between The Law Society of Kenya –v- the Cabinet Secretary Treasury & Anor,*** the Senior Deputy Solicitor General in the Office of the Attorney General in an affidavit in response to an Application by way of Notice of Motion deposed:

"25. <u>THAT</u> the two contracts were amongst the 18 contracts in the Public Accounts Committee Report 2006 which recommended that in contracts with over 60% completion rate, the Government should negotiate with the suppliers and financiers…"

27. The applicants' case was therefore that having been part of the 18 contracts referred to in the Public Accounts Committee Report 2006, the contracts subject matter in this Judicial Review Application fell within the ambit of the recommendation of the Public Accounts Committee. Subsequently, rather than institute criminal proceedings against the ex-parte applicants, the office of the Government should have negotiated with the financiers and suppliers. The Government instead entered into a consent in the above mentioned appeal to the effect that pending the hearing and determination of the Law Society of Kenya's intended Appeal, and Petition No. 213 of 2014 before the High Court, there be Conservatory Orders staying the payment of Kshs. 3.5 Billion and any other moneys arising from the eighteen (18) Anglo-leasing type contracts. To the applicants, it is clear from the consent above that the Government never intended to fulfil its obligations in the aforesaid contracts and is subsequently resorting to criminal avenues to escape its obligations. Based on legal advice, it was contended that the Respondent abused its power in commencing criminal proceedings against the ex-Parte Applicants.

28. It was submitted on behalf of the applicants that according to the popular political narrative, Anglo leasing like contracts involved phantom stealth companies unregistered anywhere in the world, with ghost directors who delivered zero goods and services and were paid full purchase price by the Government of Kenya. This popular narrative peddles the incredible theme that Anglo leasing like companies had in the process fleeced the Kenyan taxpayers the colossal sum of Kshs 18 Billion! However to the applicants, this popular narrative is a simple fairy tale since Anglo leasing type contracts were simple commercial contracts, entered into between the Government of Kenya and corporate entities legitimately and lawfully registered in a number of different jurisdictions. The contracts were predominantly in the security sector. All the contracts were performed to the satisfaction of the parties privy to the contracts. In all the contracts the applicants performed more than what the Government has paid.

29. According to them there has been too much negative writings and adverse publicity on these matters and they appreciated the fact that they were going against a strong current and a popular narrative that adjudged the Applicants guilty as charged in the lower court and that adverse publicity specially when sustained over a long period and when it then metamorphoses into legends and myths becomes part of

the national narrative and cannot be easily ignored hence the effect of the said publicity and the pigeon holing of the Applicants, as the architects of the infamous grand corruption of Anglo leasing cannot be easily ignored. They however expressed full confidence that this court would ignore and shutout the past sustained and crude adverse publicity on this matter and would simply look into the facts and the law as we present it before it. They added that unlike adverse comments during the trial of the case especially criminal trials that attract the wrath of the court, media trials usually leave lasting impression on the subject of their investigation and the subsequent trial in court. Reference was accordingly made to **John D. Pennekamp v State of Florida** (19460 328 US 331 where it was stated that:

"No judge fit to be one is likely to be influenced consciously, except by what he sees or hears in court and by what is judicially appropriate for his deliberations. However, judges are also human and we know better than did our forbearers how powerful is the pull of the unconscious and how treacherous the rational process—and since judges, however stalwart, are human, the delicate task of administering justice ought not to be made unduly difficult by irresponsible print".

30. Similarly, it was submitted that **Isha Tyagi** and **Nivwdita Grover** in an article titled, ***Media Trials and the rights of the Accused,*** states:

"Another worrying effect of "media trials" is that of prejudicing the judges presiding over a particular case. The American view appears to be that the jurors and judges are not liable to be influenced by media publications, while the Anglo-Saxon view is that judges, at any rate may still be subconsciously (thought not consciously) influenced and members of the public may think that judges are influenced by such publication under such a situation. Therefore, Lord Denning stated in the Court of Appeal that judges will not be influenced by the media publicity, a view that was not accepted in the House of Lords. Cardozo, one of the greatest judges of the American Supreme Court, referring to the "forces which enter into the conclusions of judges" observed that "the great tides and currents which engulf the rest of men do not turn aside in their course and pass the judge by".

31. The seminal writing of **Benjamin N. Cardozo** the former Justice of the Supreme Court of America, according to the applicants, could not have put it better when referring to many issues that may influence the judge when adjudicating over a case when he expressed himself in ***The Nature of the Judicial Process***, Yale University Press, New Haven, 6th print (1928).thus:

"I have spoken of the forces of which judges avowedly avail to shape the form and content of their judgments. Even these forces are seldom fully in consciousness. They lie so near the surface, however, that there existence and influence are not likely to be disclaimed. But the subject is not exhausted with the recognition of their power. Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge. I wish I might have found the time and opportunity to pursue the subject farther. I shall be able, as it is, to do little more than remind you of its existence. There has been a certain lack of candor in much of the discussion of the theme, or rather perhaps in the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limitations. I do not doubt the grandeur of the conception which lifts them into the realm of pure reason, above and beyond the sweep of perturbing and deflecting forces. None the less, if there is anything of reality in my analysis of the judicial process, they do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do. The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by. We like to figure to ourselves the processes of justice as coldly and

impersonal."

32. It was submitted, firstly, that the criminal cases facing the accused person in the lower court are wicked and iniquitous transmutation of simple commercial contracts between companies and the Government of Kenya with not an iota of criminality and that the contracts both in substance and in form have no criminal component. In the premise the Government of Kenya as a contracting party who is in material default of the said contracts can not be allowed to take advantage of its coercive powers as a government to criminalize contractual provisions with a view to escape its default of the said contacts. To the applicants contrary to known heads relating to discharge that will excuse a party from further performance of a contract, the Kenyan government intends to create a new and indigenous head for discharging contracts when a government is party to a contract. This court was urged not to allow the Government to do so by allowing a contracting government to a commercial contract to turn round and bundle the innocent party into its own criminal courts at a time of its choice and liking. The applicants relied on Article 27of the Constitution on equality before the law and equal protection of the law in support of this submission. The second ground justifying the orders sought, according to the applicants was the fact that the Attorney General of the Republic of Kenya rendered a Legal Opinion that attested to the validity and legality of the contracts in question in which the Applicants were given the green light and acted upon whose strength the contracts were performed which opinion the Applicants have not been informed has been changed. In support of this submission, reliance was placed on **Stanley Githunguri v Republic,[1986] eKLR,** for the position that the representation by the Attorney General whether in a criminal or civil case, once acted upon by a party who relied on that representation is valid and binding on the Government hence no criminal prosecution can be brought against them on the basis of the contracts. The third ground was that in the case of the Infotalent contract, the Government of Kenya and the Company had mutually agreed to terminate their contractual relations. They further agreed to discharge each other and covenanted not to raise any claim in future against one another. Consequently, it was submitted that the Government is estopped from reopening the case and changing the legal matrix of the agreements.

33. To elaborate on these three grounds, the applicants submitted that since the contracts between the parties are simply commercial contracts negotiated at arms length and partly performed and mutually discharged by the parties to the contract, it is material to note that the Government of Kenya is a contracting party to the contracts in dispute. The false impression created in the charge sheets that that the money in question was received with a view to defraud the Government of Kenya, in the applicants' view, hold no water as the monies were received pursuant to the contracts in which it was agreed between the parties that the monies will be paid by the Government of Kenya and will be received by the contracting companies. For **Anti Corruption Case Number 4 of 2015**, the Infotalent Contract that forms the foundation of the criminal case was duly executed by the contracting parties, the promissory notes issued as guarantees by the Government of Kenya for its due performance and the Attorney General of Kenya issued the following certification to the contract:

"As the Attorney General and the principal legal advisor to the government of the Republic of Kenya, I have been asked to give an opinion on the validity of the above series of promissory notes covering both principal and interest issued by the government of Kenya of the Republic of Kenya…to the order of Infotalent Limited as beneficiary. 2 I have examined such laws and instruments, as I have considered necessary for the purposes of this opinion. In particular I have examined: - (a) A copy of the agreement dated 19th November 2003 between the Government of Kenya as buyer and Infotalent Limited as supplier for the Kenya E-COPS security, law and orders systems project for the police department which agreement covers both the supply and financing of both the equipment and services secured thereunder, (b) A letter of special authorization dated 3rd October 2003 signed by Hon David Mwiraria, Minister for the time being responsible for

Finance in the government of the republic of Kenya authorizing Joseph Mbui Magari, permanent secretary to the Treasury, ministry of finance to sign the agreement and any documents thereof in connection with the said agreement on behalf of the Republic of Kenya…in my opinion each promissory note constitutes an unconditional promise made by the government of Kenya, engaging to pay on demand, at a fixed and determinable future time the sum stated in each promissory note to the order of Infotalent Limited".

34. Stressing the value of the legal opinion of the Attorney General in any matter where a government is a party to and upon which the other party relies on, the applicants relied on the Ugandan case of **Uganda vs. Banco Arabe Espanol** (2007) EA at 33 where the court observed:

"In my view the opinion of the Attorney General as authenticated by his own hand and signature regarding the laws of Uganda and their effect or binding nature or any agreement contract or other illegal transaction should be accorded the highest respect by government and public institutions and their agents. Unless there are other agreed conditions, 3rd parties are entitled to believe and act on that opinion without further inquiries or verifications. It is improper and untenable for the government, the Bank of Uganda or any other public institution in which the government of Uganda has an interest to question the correctness or validity of that opinion in so far as it affects and interests 3rd parties".

35. It was therefore contended that in light of the legal certification and opinion of the Attorney General of the Republic of Kenya, that the contract that forms the substratum of the criminal cases before the Magistrates Court complies with the procedural and substantive laws of the land and was valid on all grounds and that it binds the Government of Kenya and that all is fine with the same, in terms of the formation and execution of that contract, the same must be appreciated in the context that the parties simply entered into a valid agreement, openly, transparently for value and for adequate consideration. Further reliance was placed on the **Stanley Githunguri v Republic** (supra) in which the court referring to the statements made by the Attorney General in Parliament stated:

"In our view both statements, made publicly in no less a forum than the National Assembly, constituted a positive assurance that the applicants would not be prosecuted. That is the conclusion to which the reasonable man in the market hearing these utterances would have come to. That being so the reasonable man in the market would also believe that the Attorney General's world would be honored".

36. It was submitted that based on the foregoing, Infotalent Limited embarked on the process of performing its side of the contract sequentially and onerously hence the assertion by the Respondents and the Interested Party that the Companies received money from the Government with no intention of delivering the goods and services contracted for is baseless, uninformed and careless. However, in the midst of performance of the contract, the Government of Kenya as a contracting party in a letter to Infotalent Limited as the contracting party, informed Infotalent that it was "currently expressing severe budgetary constraints" and requested Infotalent to "review the progress of the project with a view of postponing the implementation or terminating the project till such time that we are able to afford it" in which case it would be "necessary that the monies paid to you be paid back to the government pending the procedures of termination/postponement of the project..." a request which Infotalent obliged and the money duly refunded. It was therefore the applicants' view that once the parties to the contract agreed openly to terminate and discharge each other from due and further performance of the contract, and indeed did so, the parties agreement kicks in the doctrine of estoppel which prohibits either party to take a second bite on any facet of the said contract in light of the agreement between the parties which doctrine operates both in the realm of civil and criminal context and prohibits any off-shot of the

agreement, whether civil or criminal that was mutually terminated. In the latter, once the government moves for a criminal case; clearly a palpable case of bad faith will be easily shown as in this case. For the Respondents to renege on their representation just because it is a Government shows that it breaches the principle of equality as provided for in Article 27 of the Constitution.

37. The applicants argued that the contract was openly negotiated and validated and as it was very detailed and professionally drawn, the lawyers for the parties must have poured over the minute details of the same which contract appreciated a choice of law and choice of forum in case of a dispute or disagreement and that the criminal court is not such a forum as contemplated by the parties. To the applicants in light of the foregoing, the Respondent and the Interested Party cannot possibly maintain the criminal charges of Count 1 and Count II in Anti Corruption Case Number 4 of 2015 hence without conducting their defence to the criminal charges they face in the lower courts before this court, it was submitted that a cursory glance of the charges of conspiracy to defraud is absolutely untenable in light of the evidence before the court. To the contrary what it graphically shows is the oppressive and the mala fide intentions of the Respondents, their abuse of the court process and the collateral purpose of the intended criminal prosecution.

38. With respect to Anti-Corruption Case Number 2 of 2015, it was submitted that its genesis is the contract between the Government of Kenya and Sound Day Corporation, signed and sealed on 17th December, 2003 and just like the Infotalent contract, it too went through the same governmental process, authorization and scrutiny and the contracting company delivered a substantial portion of the contract goods, guns and pistols supplied to the Police Department in the Office of the President. Whereas, the company supplied goods worth Euro 7,109,382, Government has only paid 1,786,898 Euros being 3% Commitment Fee, leaving substantial balances due to the company. Accordingly, it was submitted that there is nothing criminal about demanding payment when one supplies good contracted for.

39. To support its case the applicants have relied on by letter the Attorney General demanding USD 9,497,303 pursuant to the contracts that form the basis of the criminal case. However, the applicants appreciated that the said demand letter is not a demand on the contracts in question, but contend that it shows the intention was to recover funds in the other Anglo Leasing type cases.

40. On the Fourth ground, the applicants contended that this very court in two previous cases involving the Respondents and the Interested Party had decided on similar cases touching on similar Anglo-Leasing type contracts. In those cases, the court authoritatively ruled against the Respondents and held the parties to their contractual bargains and the terms therein and in a most lucid, gravitating and emphatic manner ruled that a commercial dispute between the government and private individuals could not be turned into a criminal case at the sole instigation or election of the government as a contracting party. Further and very importantly, the court ruled that the remedies and recourse of any aggrieved party lies as provided for in the contracts. To the applicants, the two decisions of the court create estoppel by record.

41. It was submitted that this very court presided over by the **Hon Justice Nyamu** in two similar cases involving companies related to Anglo-Leasing type contracts and the Respondents prohibited and stopped the Respondents from criminally prosecuting them and these cases were identified as (a) **Nedermar Technology BV limited vs. The Kenya Anti Corruption Commission and the Attorney General, Petition Number 390 of 2006, 2008 eKLR,** and (b) **Midland finance & Securities Globetel Inc vs. Attorney General and Kenya Anti corruption Commission [2008] eKLR.** The Court was urged to take judicial notice of the fact that the Government has partly discharged its obligations in the Nedermar contract by paying 80% of the value of the contracts without levying charges against private

individuals therein.

42. To the applicants, these cases are on all fours as the instant two before this Court and the judgments by the court are persuasive and create both issue estoppel and estoppel by record hence binding on the Respondents. To them the court cannot ignore, sidestep or disregard what in their view are strong, analytically cogent and jurisprudentially sound decisions of the court.

43. In the **Nedermar case,** it was submitted the parties entered into a commercial agreement in the security sector just like the one before the court. The Government defaulted and then tried to turn the table on the innocent party by instituting criminal proceeding against Nedermar and its Directors. The court held at pages 558, 559 and 567 stated:

"**Thus where as in this case both the Hon the Attorney General and the GoK have made clear contractual and commercial representations concerning the validity of the agreement as set out earlier in this judgment to the other contracting party, KACC cannot as a matter of law be allowed to undo a commercial transaction under the guise of criminal investigation. It is equally bound by the presentations of the Honorable Attorney General and the GoK...I hold both Respondents are not entitled in law to criminalize a commercial transaction while it is clear to all that the greater public interest, which is recovery of any loss can be secured in the Arbitration…A one sided approach to investigations, is a government big brother threat or the flexing of government muscle in order to offset a contractual balance of power**…**in a situation where the chief legal advisor to the GoK cannot walk the high moral ground due to clear opinion and representations he has made to the other contracting party/petitioner when the contract was made, the court must restrain him from the intended action in order to uphold the needs of public morality and public policy of the country because failure to do so would result in the misuse of the law and abuse of power. Constitutional job holders hold power in trust for the people and it is against the public interest not to use power for the intended purposes or to allow public officials to act contrary to the mandate given by law**".

44. The court, it was averred, reached a similar determination in the **Midlands Finance & Securities Globetel Inc in which its** important findings at Page 581, 583 and 584 were:

"I could not agree more with the above holding because, this court in the R v Attorney General Ex-parte George Saitoti did walk the same path and held inter alia the Attorney General was bound by an opinion he and the minster of finance had in turn given…the court held that as a country we must have and maintain an acceptable measure or standard of public morality or standard of public opinion. Consequently, court held the Attorney General to his bargain, both on the ground of public morality and the principle of good faith…Whereas the Attorney General or any public authority cannot be estopped from performing their constitutional or statutory duties, the Attorney General's opinion was given in the context of an international commercial transaction agreement, and the court is of the view that the principle of estoppel would apply...I hold the view that the doctrine of estoppel is recognized by our constitution because justice is one of the principal objectives of our constitution. The doctrine of public policy is also based on public policy, which in turn broadly means the requirements of justice, good faith and fairness…Estoppel is a principle of justice and it is the responsibility of the courts under the constitution to secure justice in the exercise of judicial power vested in the courts by the constitution."

45. To the applicants, the legal doctrine of estoppel needs further interrogation at several levels. First, from a contractual point of view, once the parties agree to end their contractual relationship in a given

manner and both act on the same, the “turning of the tables” by one of the parties is illegal and unethical. At the second level, this court has held that were the Attorney General makes a representation or certain validation and the party on whose benefit the representation was made acts on it, then the Attorney General or any department of the government will be estopped if they renege or revisit the said representations. In support of this contention, support was sought from the Tanzanian Court of Appeal decision in the case of **Issa Athumani Tojo vs. The Republic, Criminal Appeal No 54 of 1996** where while citing **Lawson, J** in **Regina vs. Hogan**, [1974] 1Q.B 398 at 401 held:

“Issue estoppel can be said to exist when there is a judicial establishment of a proposition of law or fact between parties to earlier litigation and when the same question a rises in a later litigation between the same parties. In the later litigation the established proposition is treated as conclusive between the same parties. It can also be described as a situation when, between the same parties to current litigation, there has been an issue or issues distinctly raised and found in earlier litigation between the same parties”.

46. To the ex parte applicants, the High Court having determined the two cases on their merit and conclusively, both issue estoppel and estoppel by record arises and this court should not re-litigate the same but simply issue the orders as issued by the court previously did. This is principally because the Court has addressed all the issues herein and made a determination on the same. To them, issue estoppel is a trite principle of law which holds that once an issue has been raised and distinctly determined between the parties, then as a general rule, neither party can be allowed to fight over that issue and support for this proposition was sought from **Yukos capital vs. OJSC Rosneft Oil Company** [2011] EWHC 1461(Comm), (b) **Thoday v Thoday** [1964] 1 ALL ER 341. The applicants also relied on Halsbury’s Laws of England, 4th edition Vol 16 where it is stated at paragraph 1503 that:

“Estoppel of record or quasi of record, also know as estoppel per rem judicatam, arises (1) where an issue of fact has been judicially determined in a final manner between parties by a tribunal having jurisdiction, concurrent or exclusive, in the matter, and the same issue comes directly in question in subsequent proceedings between the parties (this is sometimes known as cause of action estoppel); (2) where the first determination was by a court having exclusive jurisdiction, and the same issue comes incidentally in question in subsequent proceedings between the parties (this is sometimes known as issue estoppel); (3) in some cases where an issue of fact affecting the status of a person or thing has been necessarily determined in a final manner as a substantive part of a judgment in rem of a tribunal having jurisdiction to determine that status, and the same issue comes directly in question in subsequent civil or criminal proceedings between any parties whatever”.

47. It was consequently contended that the interpretative aspects of the contracts, their validity and tenor, the choice of law and choice of forum and whether the Respondents can criminalize a commercial contract are issues conclusively heard and determined by the court.

48. The Fifth ground, according to the applicants, was that the cases before the Magistrate Courts are political show trials; the government is prosecuting the cases to score political points; the cases are part of a sophisticated political propaganda on the part of the government to prop its tattered image in the fight against graft; the Applicants are being used as bogeymen to divert the current runaway corruption that has engulfed and is vicariously consuming the government; the criminal cases are diversionary technique on the part of the government to hoodwink Kenyans.

49. It was submitted that the criminal trials before the lower court are pure political show trials and the Respondents herein are abusing the court process for collateral purposes. It is our humble submission

that the cases before the Magistrate's Court have nothing to do with the criminal culpability or otherwise of the Applicants.

50. It was the applicants'' case that the Kenya Government faces a run away corruption situation or scenario and that corruption has become a defining feature of the Government and its credibility is in complete tatters. The Kenyan people, it was alleged, are fed up with the situation where government coffers are literally raided and looted through tendering process that is opaque and criminal in nature by the very persons entrusted with its protection. As for the interested Party who is the investigating arm of this case, despite having the mandate to fight corruption in the country, it is embroiled in all kinds of scandals itself and that all the three commissioners of the interested parties have either resigned or are facing tribunals for their removal. Corruption and wheeling dealing has become the norm of this institution. It was disclosed that the interested party has spent considerable time and resources in the investigation of these cases. It fought cases in Kenya, England and Switzerland. It lost all cases in all three jurisdictions. In Kenya it lost every criminal cases it brought against any aspect of the Anglo leasing cases. In Switzerland and England it lost every commercial cases it litigated on the Anglo leasing type cases. To support this position the applicants supplied copies of the decisions in Republic and Canton of Geneva, Switzerland between ***First Mercantile Securities Corporation and The Republic of Kenya C/1861/2006-17*** and ***The High Court of Justice Queens Bench Division, England between Universal Satspace (North America) LLC and The Government of the Republic of Kenya Claim No. 2006 Folio 881.***

51. In its own investigations, it was averred that the Interested Party had variously reached the conclusion that they is absolutely no criminal culpability in the contracts to be investigated. The applicants therefore opined that the executive arm of government has forced the Respondents to prefer the charges against the applicants, the total absence of criminal culpability notwithstanding. It is simply a powerful political edict, order or direction on the part of the Government of Kenyan designed to deceive and impress the people of Kenya and even the international community that the Government is not only tough on corruption but is also very tough on old/historic corruption. The criminal cases before the lower courts are however purely political Public relation (PR) exercise on the part of this government. This is what this country finds itself in. A pathetic situation where independent constitutional commissions and office are browbeaten and bullied into total submission and forced in the process to become an appendage of an executive that is intolerant of dissenting opinion and allergic to objective and independent institutions that exercise their powers according to the dictates of the law.

52. The applicants further grounded their application on the fact that the criminal trials are a classic abuse of the court process are oppressive and vexatious and are not intended to obtain a conviction but are mounted for collateral purposes, that the current administration is tough on decade old grand corruption. The Respondents want the Applicant to be fighting the cases endlessly and just want to buy time yet they are themselves aware that on the premise of their own evidence, they have a weak prosecutorial case.

53. In support of this submission, the applicants cited **George Joshua Okungu and Another Versus the Chief Magistrate Court and Others, [2014] eKLR** where the cited **Joram Mwenda Guantai v The Chief Magistrate, Civil Appeal Number 228 of 2003 [2007] 2 EA 170.**

54. It was contended that **Senator Amos Wako** who was then the Attorney General of the Republic of Kenya rendered a legal opinion that gave all the parties comfort and assurance that the contract is in compliance with the law. **Amos Wako** is now the principle prosecution witness in the case, yet he is the same person who validated and gave the parties herein both the comfort and the green light to move forward. The court, it was averred captured this eloquently in **George Joshua Okungu and Another**

vs. the Chief Magistrate Court and Others (supra) at paragraph 70 when it ruled: -

"Where therefore the prosecution has been commenced or is being conducted in an arbitrary, discriminatory and selective manner which cannot be justified, that conduct would amount to an abuse of the legal process. Similarly, where the prosecution strategy adopted is meant to selectively secure a conviction against the petitioner by ensuring that certain individuals from whom the petitioner derived his decision making power are unjustifiably shielded therefrom, it is our considered view that such prosecution will not pass either the constitution or statutory tests decreed hereinabove. It is even worse where from the circumstance of the case, the same persons being shielded could have been potential witnesses for the petitioner and who have, with a view to being rendered incompetent as the petitioner's witnesses have been in a way enticed to be prosecution witnesses. That strategy we hold constitutes an unfair trial under Article 50 of the constitution. Here for example, the petitioners contend that they took all the necessary steps to obtain the requisite legal advice and approvals or authorizations. To turn round and institute criminal proceedings against the petitioners while making the very persons who authorized the petitioner's actions into prosecution witnesses, in our view, amounts to selective and discriminatory exercise of discretion. In such an event the director of the public prosecution cannot be said to have been guided by the requirement to promote constitutionalism as mandated under the constitution and the Office of the Director of Public Prosecutions Act. To the contrary the DPP would be breaching the constitution which inter alia bars in Article 27 discrimination "directly or indirectly against any person on any ground, including race, sex, pregnancy, martial status…Accordingly it is our view that where such opinion is given by persons who are legally authorized to give the same and acted upon by persons under their authority, it would amount to selective application of the law to charge the persons to whom the opinion or advice was given while treating the persons who gave that opinion as a prosecution witness".

55. It was further submitted that the prosecution shamelessly displays favouritism in this case in selectively picking on certain individuals for prosecution. Certain individuals, including **Senator Amos Wako**, **Musalia Mudavadi** and **Chris Murungaru,** it was contended, have deliberately been left out and lined as prosecution witnesses on the order of the executive as they are considered vital for the political programs of the executive in the 2017 elections. To the applicants these individuals are the same ones that authorized the contracts in question and/or rendered a legal opinion to the applicants that the contract they entered into with the government is in total compliance with all relevant laws of the Republic.

56. It was submitted that the instant circumstances bear resemblance with the circumstances in **Mohammed Gulam Husseign Fazal Karmali and Another vs. The Chief Magistrate, Nairobi and AG [2006] eKLR**. In which the Government of Kenya entered into a contract for the supply of 540 units of Hyundai cars with the ex-parte applicant. The terms were set out in the contract between the parties. Like the case before the court, the Government of Kenya issued promissory notes in favour of the ex-parte Applicant. The criminal charges are at page 3 of the judgment and are very similar to the ones the Applicants face at the lower court. The dispute was whether the right number of motor vehicles was supplied and the remedies available to the government. In the case, the Applicants contended that they were harassed and oppressively treated by government officials and the criminal process was being used to improperly secure settlement of a disputed civil claim. They further alleged that the criminal process was being used unfairly, vexatious and oppressively.

57. The applicants relied on **R vs. Attorney General &Another exparte Hussein Mudobe High Court Misc Application Number 898 of 2003 (unreported),** In which the Court expressed itself as follows:

"I wish to repeat here what I said in my own judgment in the case of R v Attorney General & Another exparte Hussein Mudobe…where I found that the Police in instituting criminal proceedings were being used by one of the parties to a written lease to criminalize the terms of the lease and where I had no hesitation in frowning upon the practice by granting an order of certiorari and prohibition to stop the criminal proceedings. I had this to say at pages 9, 21, 22, respectively: "It follows therefore that under the constitution and our law, a civil right or obligation cannot be determined in a criminal court in view of (s 77(1) and s 77(9) of the constitution and the definition of court in the Civil Procedure Act. Any attempt to determine any such right or obligation in a criminal court, clearly in my opinion violates the constitution and it would be therefore unconstitutional. A criminal court does not have the necessary procedural safeguards which can lead to a fair trial…we must also remind ourselves that the reason why that independence was conceived, fought for and maintained in the first place was to enable us to hold the scales of justice in cases such as this between the power of the state on the one hand (to prosecute) and the liberty and freedom of the individual…in this case I find that the institution of the action in a criminal court is indeed unconstitutional I further and that the institution and the charging of the applicant is tainted with mala fides and that the court process has been abused. I further find that there was an ulterior purpose in the institution of the prosecution...It is also significant to note that clause 9 of the first agreement contains an arbitral clause which is binding on all parties including the government. The two agreements are commercial agreements which in unequivocal terms provide for the only means of resolving any commercial dispute arising from the agreements that is arbitration in London under the rules of International Commercial Arbitration (LCICA). The effect of this is that the parties had by consensual process agreed to resolve any dispute or differences arising from these agreements by arbitration. This Court has a responsibility to uphold party autonomy".

58. It was submitted that the Court considered the provisions of sections 2 and 10 of the ***Arbitration Act*** and proceeded to hold:

"The importance of this provision is that if the proceedings in the Magistrate's Court Criminal Case 2804 of 2004 were civil proceedings and not criminal proceedings the court would have a statutory duty to stay the proceedings under s 6 of the Arbitration Act so as to uphold the party autonomy to go to arbitration as per the agreement. I dare say by analogy even a criminal court has no business (quite apart from lacking competence) adjudicating commercial agreements where the dispute is arbitrable under the relevant contract as in this case and where there is an enforceable arbitral clause and underlying commercial agreement. In view of the definition of court as above a criminal court would not be competent to uphold the principle of party autonomy and this is even the more reason for the court making a finding that the criminal process is being abused or used for an improper purpose...In resolving the matter does reveal both the fact that the State is patently using the criminal process in a manner that smacks of oppression, manipulation and a clear abuse of the criminal justice system and [s] macks bona fides associated with commercial transactions. In the view of the court, the chosen method of recovery is contrary to public policy and public interest. The public interest is better secured by recovery of the undelivered units if any by using the arbitral process or recovery damages which an arbitrator would award after establishing any breach of contract. To me this case reveals an incredible poor sense of judgment in articulating public interest in that the Government of Kenya cannot through the criminal proceedings recover a single unit of the assorted Hyundai motor vehicles. It is also manifestly clear to the court that the Government cannot recover a penny or a cent or a dollar through the criminal process. The invocation of the criminal process, in place of the arbitration process is contrary to the public interest".

59. To the applicants, in the case of **exparte Duran Hussein Mudobe** (ibid), the court even though it was alive to the fact and the law that a civil and criminal case can concurrently subsist and continue independent of each other, was nonetheless appreciative of the coercive use of the criminal case at the instigation of a party in the civil dispute to gain an advantage. This, it was submitted, is a question of fact, and the court whenever it sees that the nexus between the two cases is to achieve a collateral purpose will rule that the court's process is being abused and found such nexus and proximity of abuse when it held at page 18 line 3: -

"The inescapable conclusion by this court is that the criminal process was set in motion for a purpose that is foreign to criminal justice or to advance the objectives of criminal justice at all. It was In fact a well-inspired move by the complainant/landlady with the police in the forefront to harass the applicant to regain possession of the lease premises. The mala fides are patently clear in the face of the agreements set out above, the acceptance of rent by the landlady even after the alleged alterations had been effected. Criminal justice has its own objectives but they cannot reasonably include the construction, interpretation enforcement of lease or tenancy agreements and the recovery of any consequential loss. This is clearly the province of civil courts. The police I believe have more than they can handle in terms of engaging proper criminal prosecution and maintain security instead of acting like errand boys for parties engaged in civil disputes and allowing themselves to be mistakenly used and as a result, instituting such criminal charges as has happened in this case. It is not their business at all. Where there are mala fides an order of prohibition ought to issue to protect the freedom of the aggrieved party. Mala fide constitutes evidence of an abuse of the court process".

60. The applicants were of the view that a distinct and critical feature of the case that shows the perilous nature of the prosecution the Applicant seeks to stop must be emphasized. Unlike the other cases where a private citizen involved in a dispute with another citizen instigates the criminal case to obtain an advantage the case herein is remarkable different. Here the state is the contracting party in the commercial dispute with the applicants. The state is in default. In a similar contract, the State makes a demand for payment through the Attorney General. Then it is the state that makes the decision to prosecute the case once the Applicant's rightly in our view refuse to pay.

61. While appreciating that under Article 157 of the Constitution, the office of the Director of Public Prosecution is an independent constitutional office, it was averred that it is nonetheless part of the executive arm of government in terms government organization and budgetary needs. So where the government is a party to a commercial dispute and a party to the said commercial contract is charged with a criminal offence, it is was submitted that that this court should adopt a higher degree of judicial scrutiny in prosecution cases instigated on its behalf by the office of the DPP. To the applicants, our jurisprudence on the matter is pristinely clear and soundly settled. Our jurisprudence is well developed and very progressive. Where the government is a party to a commercial contract, the law is that it cannot use the criminal process, which it solely owns, and controls to settle the dispute with private citizens. Further, even among ordinary Kenyans commercial disputes can only be settled through a civil process and the coercive use of the criminal process to tilt the scales of justice in favour of a party is forbidden. Most importantly, it is now established law that it is against public policy of Kenya for the government to forgo the recovery of money in a disputed commercial transaction by pursuing the punitive mechanism of criminal trials. The election of the latter process is a clear proof of mala fide, oppression and big brother attitude on the part of government.

62. Based on **Republic vs. AG Exparte Diamond Hashim Lalji and Another [2014] eKLR,** it was submitted that where an applicant adduces a proper evidential basis the court will prohibit such prosecution and indeed it has the discretion and power to prohibit criminal prosecution though that power

involves a delicate balancing of the power of the state to prosecute and the right of the individual to liberty and freedom from mala fide and oppressive prosecution. Here, it was submitted, the evidence the prosecution intends to adduce doesn't show any criminal culpability. A simple commercial contract is in dispute, and it is the government as the contracting party that is in default. To void their civil/commercial liability the state now wants to prosecute the applicants for a most useless and frivolous case. The Government knows the positions of the current Attorney General and his predecessor. Both have resolutely maintained that the matter is a simple commercial dispute. The progressively and expansive drawing of the jurisprudential contours of when and how the court can prohibit criminal prosecution, according to the applicants were demarcated in **Kuria & 3 Others v Attorney General [2002] 2KLR 69.**

63. In support of their case the applicants relied on **Jared Benson Kangwana vs. Attorney General, Misc. App Number 446 of 1995. (Unreported)** in which the Court held:

"The power of the Attorney General to institute and withdraw criminal proceedings notwithstanding, I think there is more than meets the eye in the withdrawal of the criminal proceedings against Mr. Lubulellah in this matter. I should be careful not to go into the area of the merits of the pending criminal proceedings but I think I can remark that the withdrawal of the case against Mr. Lubullelah leaving Mr. Kangwana alone, even in count III, had the extraneous purpose of frightening Mr. Kangwana to exert in him more mental pressure to yield, to seek mercy, to pay the disputed debt…That is the act of exerting pressure upon the Applicant through criminal proceedings to pay a debt bonafide disputed had been intensified to amount to harassment of the applicant so that the criminal proceedings become vexatious to him".

64. Similarly reliance was placed on the speech by Lord Salmon in the case of **D.P.P v Humphrey's (1976) 2 AllER 497 at 527-8** when he expressed himself as hereunder:

"A judge has not and should not appear to have any responsibility for the institution of prosecutions, nor has he any power to refuse to allow a prosecution to proceed merely because he considers that as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to interfere. Fortunately, such prosecutions are hardly brought but the power of the court to prevent them is, in my view, of great constitutional importance and should be jealously preserved".

65. To the applicants, Lord Salmon was refereeing to a mature and sophisticated democracy of a country that has been in existence for centuries. His speech was within the socio-political development of Great Britain. However, same can not be said of an institution like the DPP in this country that is hardly three years old and which operates in a politically intolerant environment where the executive wants to micromanage independent constitutional bodies. To them the Court has a special role it must play in light of the recent institutions we have and that the overbearing executive we are saddled with. To that extent, a Kenyan court adjudicating over a judicial review case must have a different perspective and a different take than an English or an Australian court. The court must have a keen eye for the legal/political dynamics and maturing steps of our institutions and democracy. In the premise the court must exercise eternal vigilance with regard to its powers and ensure that its processes are not abused for extraneous and collateral purposes. In a young democracy like ours where institutions are evolving in terms of both structure and normative the court has an important supervisory powers or role to play.

66. The court in **Jared Benson Kangwana vs. Attorney General** (supra) went to great length to determine what constitute abuse of process and when a criminal trial is collateral to obtaining conviction

of the accused person. The court held that where one of the accused persons is excused from the criminal case and made a prosecution witness, that act transforms the criminal case as one designed to achieve a specific objective, usually political and concluded at page 129:

"The end result of all that I have been saying therefore is, in summary, that there is abuse of the process of the court in criminal case No 2270 of 1994 in the chief magistrate's court, Nairobi on each of the following grounds: Firstly, Transnational bank limited instigated and had the criminal proceedings instituted and maintained against Jared Benson Kangwana to exert pressure upon him for the payment of a debt he bonafide disputes, when those criminal proceedings are not for the purpose of deciding the disputed debt. Secondly, the criminal proceedings have been instigated and are being maintained by Transnational Bank Limited against Jared Benson Kangwana with malafides. Thirdly, the criminal proceedings are oppressive and vexatious against Jared Benson Kangwana."

67. It was contended that the Respondent's case breached **Articles 10(1), (2)**, **21(1), 27(1), (2) and (4), 50(1) and (2)(n) and 157(11)** of the Constitution which breach show the *mala fide* intentions of the Respondents.

68. It was the applicants' contention that the affidavits in reply filed by the Respondent and the Interested Party have not addressed any of the substantial points in the Applicants' Application. Instead they paint a picture of two institutions bogged in a morass of incompetence and ineptness, unaware of their calling and obligations, abusive of both the rights of the applicant and their sweeping powers, un-respectful of the law, oblivious of what the case entails, cavalier in substance, malicious *ab initio*, vexatious and annoying without reason and limping and wobbling in the dark. They concluded that both Affidavits are embarrassingly simplistic. The tone is naïvely made. The arguments at best quasi-legal. They simple narrate a certain set of facts but in a wishy-washy manner. Then they make their own conjuncture and unilateralist interpretation of a contract. Their unpersuasive interpretation and awkward insinuation of criminality is premised on the use of extrinsic evidence to explain the content of the two contracts. The same in their view is laughable.

69. It was the applicant's case that the entire case is based on the very uninspiring interpretive skill of the Respondents. These are cases the office DPP should never have brought to court. They however provide a classic case study for what is not to be prosecuted by the DPP. And this court should deliver the coup de grace by prohibiting its prosecution in the lower court. It will waste the court's time and the resources of all concerned. It isn't worth it. The applicants therefore prayed that the orders sought herein be granted as prayed together with the costs thereof.

Respondent's Case

70. On its part the Respondent in opposition to the application filed a replying affidavit sworn on 20th April, 2015 by **Mercy Gateru**, its Assistant Director of Public Prosecutions and one of the counsels handling the subject criminal cases on behalf of the Office of the Respondent.

71. According to her, in the Verifying Affidavit the Applicants make depositions in respect of Sound Day Corporation (the 9th accused in ACC 2 of 2015) and Infotalent Limited (the 8th accused in ACC No. 4 of 2015) yet the companies mentioned, who are co-accused with the Applicants in the above named cases, have made no depositions in this matter.

72. With respect to **ANTI-C0RRUPTION CASE NO. 2/2015 (Inquiry File No. 25 of 2005)**, the deponent deposed that investigations in the subject matter were commenced by the then Kenya Anti- Corruption

Commission (KACC) following the Auditor General's letter to the Permanent Secretary, Provincial Administration and Internal Security dated 28th January, 2005 regarding the circumstances under which a contract was fraudulently awarded to Sound Day Corporation to supply the Kenya Police Department of the Office of the President with modern security equipment and accessories costing Euros 40, 000, 000. A Special Audit was carried out by the Auditor and Controller General on the Financing, Procurement and Implementation of security related projects and a report made on April 2006.

73. It was averred that on receipt of these allegations, the then KACC commenced investigations which were later taken over and completed by Ethics and Anti-Corruption commission (EACC). The investigation had both local and international aspects that were completed in 2014 and the KACC first submitted to the Attorney General the investigation file with a report as required under Section 35(1) of the ***Anti Corruption and Economic Crimes Act*** No. 3 of 2003 (ACECA) in 2006 upon perusal of which the then Attorney General identified gaps and deficiencies in the investigations and directed the then KACC to cover the gaps by way of further investigations. Pursuant thereto, the EACC made the first supplementary report to the Respondent on the 16th October, 2014. Once again, the Respondent found gaps and deficiencies in the investigations and directed EACC to cover them and resubmit. On 26th February, 2015, EACC resubmitted inquiry files **No. KACC/FI/INQ/25/2005** and **Inquiry file No. 19/2005**, having covered the areas outlined by the Respondent for further investigations with recommendations to prosecute the Applicants amongst others and upon perusal of the inquiry files and the second supplementary report, the Respondent was satisfied that there was sufficient evidence to charge the Applicants herein and others.

74. According to the deponent, the evidence gathered demonstrates the circumstances leading to the cases as summarised hereunder:-

ACC 2/2015 (Inquiry Files No. KACC/FI/INQ/25/2005)

i. On 30th October, 2003, **Mr. Dave Munya Mwangi** without any reference to the user department i.e. Kenya Police department wrote a letter to the Sound Day Corporation asking them to arrange for Credit Financing for Modernization of Police Equipment and Accessories.

ii. Sound Day Corporation replied on 20th November, 2003 attaching a proposed contract for the project vide letter dated 27th November, 2003.

iii. On 5th December, 2003 **Dave Mwangi** wrote to the Permanent Secretary Treasury, **Mr. Joseph Mbui Magari** seeking approval to use direct procurement method as it involved a National Security Project.

iv. **Mr. Joseph Magari** responded on 10th December, 2003 suggesting the reduction of the supplier's interest rate from 4.5% as it was high and extension of the repayment period from 48 months.

v. On receipt of this letter, **Dave Mwangi** communicated **Mr. Magari's** concerns to Sound Day Corporation vide a letter dated 10th December, 2010.

vi. The managing Director of Sound Day Corporation responded the following day on 11th December, 2003 agreeing to reduce the interest rates to 4% but indicated they could not offer an extension of the repayment period hence maintained the 48 months.

vii. Consequently, on 17th December, 2003 the Head of Debt Department **David Onyonka** prepared a memo to permanent Secretary Treasury indicating that after consultations the repayment period had been extended from 48 to 72 months a fact which was false as evidenced in the aforementioned

contract.

viii. On that basis **David Onyonka** advised that the Ministers authority for single sourcing be sought and that Office of the President commit itself to the payment of 3% as per the contract. Further that the payment of the initial instalment be split into two as it was not included in the budget. He attached to the memo the Minister's authority to the Permanent Secretary to sign the contract.

ix. On 17th December, 2003 **Hon. David Mwiraria** then the Minister for Finance gave special authorization to the Permanent Secretary **Mr. Joseph Magari** to sign the contract on behalf of the Republic of Kenya and on 23rd December, 2003 he approved the project which was neither planned nor budgeted for.

x. On the 17th December, 2003 before the approval by the Minister had been given, a Suppliers Credit Agreement was entered into between the Government of Kenya (GOK) and Sound Day Corporation.

xi. The signatories to the purported contract were:

a) Mr. Dave Mwangi - P.S Provincial Administration,

b) Mr. Joseph Magari - P.S Treasury

c) Mr. Brian Mills - Managing Director, Sound Day Corporation.

xii. A payment vide vouchers dated 23rd and 26th March 2004 of a sum of Euros 1,200,000 for 3% arrangement and commitment fees was made to **Apex Finance Corporation of P. O. Box 3655, 1211-CH GENEVE 3 Switzerland**.

xiii. The amount was paid through an account held by Apex Finance Corporation in its bank account No. 60439, held at Schroder & Co. Bank AG.

xiv. The aforesaid documents directly link the Applicants with Sound Day Corporation and Apex Finance Corporation.

xv. Further, the documents gathered show that the Applicants were signatories and beneficial owners of the account **No. 60439 in the name of Apex Finance Corporation** at **Schroders & Company Bank AG** in which account the alleged 3% arrangement and commitment fees amounting to Euros 1,200,000 was paid.

xvi. Further there were blatant contraventions of the applicable law on the procurement, that is, The Exchequer and Audit (Public Procurement) Regulations, 2001 by the Government officials concerned and named in the aforementioned charge sheet in awarding the contract to Sound Day Corporation.

xvii. The evidence further shows that the purported contracts were an outright fraud and conspiracy between GoK officials (who have also been charged) together with the Applicants herein and the companies in question.

75. According to the deponent, upon perusal of the said purported contract, it became clear that:

i. Though Sound Day Corporation was to provide credit and supply the equipment to the GoK, the same contract provided that no equipment would be supplied before the GoK made the first payment.

ii. Sound Day Corporation would charge an interest of 3% for alleged financing which in effect meant that GoK was to pay interest upon monies that it was providing. There was no credit to be advanced to the GoK by Sound Day.

iii. This was a classic case of reverse financing where Sound Day Corporation was to earn interest based on credit advanced to it by the GoK as payment for the equipment.

iv. Sound Day Corporation received from GoK a sum of Euros 1.2 million on the strength of arranging for financing that never was.

76. Further evidence, according to the deponent, demonstrates the following:

i. None of the government officials herein jointly charged with the Applicants ever met one Brian Mills who allegedly executed the contract on behalf of Sound Day Corporation.

ii. The alleged signatures by the said Brian Mills in various correspondences between Sound Day Corporation Gok in respect of the said contract do not bear the same hand.

iii. Effectively, the Applicants were the controlling minds of Sound Day Corporation and Apex Finance Corporation and the beneficial owners of the assets of the said company.

iv. The fact that Sound Day Corporation was requesting for money from the Government of Kenya to enable it to supply as per the purported contract indicate that there was no intended financing by Apex Finance Corporation and the purported contract was just a conduit to siphon money from the Government.

v. The Police Department was not consulted in this procurement which was meant for acquisition of Police equipment and accessories.

vi. No police equipment/accessories were ever delivered and/or supplied pursuant to the contract signed between GoK and Sound Day Corporation on 17th December, 2003.

ACC 4/2015 (INQUIRY FILE NUMBER 19/2005)

77. Investigations in the subject matter were commenced by the then KACC following the Auditor General's letter to the Permanent Secretary, Provincial Administration and Internal Security, Office of the President dated 22nd February, 2005 in which letter, the Controller and Auditor General's concern was the Government's irregular procurement of a Supplier's Financing Contract awarded to M/s Infotalent Limited for the implementation of a project known as "The Kenya Police- Security and Law and Order Project" and code named "E-Cops" at a contract price of Euros 59,688,200/. As at the date of the letter, the Controller and Auditor General observed that a total sum of Euros 5,287,164/- had already been paid by the Kenya Government, and the same amount subsequently refunded by the credit supplier after the Government unilaterally terminated the purported contract. The Controller and Auditor General was apprehensive that the Government may be exposed to liability on the contract. He further questioned the procedure of procurement and the pricing of the goods and services.

78. It was disclosed that investigations commenced by the then KACC and later completed by EACC had both local and international aspects and from the witness statements recorded and documents collected in the course of investigations the following was established:-

i. In early 2003, M/s Infotalent Systems Ltd. had, in unclear circumstances, submitted to the Office of the President a technical proposal on an ambitious national project to computerize virtually the entire operations of the Kenya Police Department.

ii. From a ministerial memorandum on priority projects prepared on the 26th February 2003, this project was neither identified, prioritized for implementation during the 2003/2004 financial year nor had its funding been posted in the year's budgetary estimates.

iii**. Mr. Dave Munya Mwangi**, the then Permanent Secretary in the Office of the President, caused an agreement to be prepared between the Government and M/s Infotalent Ltd and immediately wrote several letters all exhibiting a sense of urgency.

iv. On 11th July, 2003, **Mr. Mwangi** wrote a letter to the then Commissioner of Police, **Mr. Edwin Nyaseda Otieno** (deceased), requesting his concurrence on the proposed project within a fortnight.

v. On the 29th July, 2003, **Mr. Mwangi** wrote a letter to the Attorney General requesting for an opinion on the draft agreement and indicated that the matter was very urgent and he required a response within seven days. In response, the Attorney-General pointed out issues that needed to be addressed. One of these issues was to establish whether M/s Infotalent Systems Limited was incorporated in Switzerland and had its offices at the address given.

vi. On the 9th September, 2003, **Mr. Mwangi** wrote to M/s Infotalent Limited requesting that some amendments be incorporated in the agreement to which the said company obliged.

vii. On 29th August, 2003, **Mr. Dave Mwangi** wrote a letter addressed to **Mr. Joseph Magari**, the then Permanent Secretary, Ministry of Finance, justifying the need for the project's immediate implementation. He requested for authorization to use direct procurement method and to execute the supplier's financing agreement.

viii. By a memo dated 1st October, 2003, **Mr. David Onyonka** recommended the approval of the request made by **Mr. Mwangi** for direct procurement.

ix. On the 16th November, 2003, **Mr. Mwiraria** approved the execution of the supplier's finance agreement and direct procurement for the project. He also signed a special authorization delegating the duty to sign the agreement to **Mr. Joseph Magari**.

x. The agreement was ultimately executed on the 19th November, 2003 by **Mr. Dave Mwangi** on behalf of the Office of the President and **Mr. Magari** on behalf of the Ministry of Finance and a **Mr. Bradley Birkenfeld** on behalf of M/s Infotalent Ltd.

xi. Subsequently, **Mr. Mwangi** caused re-allocation warrants to be prepared transferring funds allocated to other identified projects to meet the 3% commitment fee. A payment advice was thereafter prepared and approved by **Mr. Magari**.

xii. On the 31st March, 2004, another payment advice was raised by the Ministry of Finance in the sum of Euros 3,500,266. The same was approved by **Mr. Magari** and the payment effected.

79. In the deponent's view, the Evidence gathered demonstrates:

i. Project E-cops, as it came to be known, was not a priority project.

ii. **Mr. Mwangi** did not carry out due diligence test on the supplier to verify its legal, financial and technical capacities to enter into and perform the contract with the Government.

iii. There was no evidence of any business experience, financial or technical capacity to deliver on the contract. The company was incorporated 10 days before the first letter over the subject project was written by **Mr. Mwangi** on 11th July 2003.

iv. As at the time the supplier was paid the first instalment, it had not delivered any services commensurate with the payment.

v. There was no budgetary allocation duly approved by Parliament in breach of section 3(2) of the External Loans and Credits Act Cap 422, Laws of Kenya.

vi. **Rashmi Chamanlal Kamani** and **Deepak Kumar Chamanlal Kamani**, the Applicants herein are named as the beneficial owners of assets deposited into the Infotalent Limited bank account No. 1385496 held with HSBC Private Bank (Suisse) SA into which Euros 5,287,164/- was paid by the Government of Kenya pursuant to the purported contract. (Annexed hereto is a bundle of documents obtained through Mutual legal assistance to British Virgin Islands and Switzerland marked **"MG 35".)**

vii. The 2nd Applicant's Passport Number **A588856** and 3rd Applicant's Passport Number **B065131I** are disclosed as part of the account opening documents in HSBC Private Bank, Switzerland.

viii. Effectively, as the beneficial owners of the assets of the said company, the two Applicants are the controlling minds of Infotalent Ltd.

ix. As the controlling minds and beneficial owners of the assets of Infotalent Limited, the 2nd and 3rd Applicants were involved in the management and control of the Company.(Annexed hereto is a letter dated 5th September, 2003 obtained through Mutual legal assistance request to Switzerland marked **"MG 36**")

x. As at the time the commitment fees equivalent to Euros 1,786,898 was deposited on 12th January, 2004 the bank account of Infotalent Ltd had a nil balance pointing to the fact that Infotalent Ltd was a conduit used purposely to siphon money fraudulently from the government of Kenya. The first instalment of Euros 3,500,266 was paid into the Infotalent Ltd account on 21st April, 2004.

xi. Even after receiving payment totalling Euros 5,287,164/- Infotalent Limited did not perform the purported contract.

xii. Infotalent Limited did not have the capacity to perform the contract as stipulated in the in the contract and did not perform.

80. It was therefore the deponent's opinion that from the foregoing, the Applicants are culpable by virtue of the manner in which the purported contracts in question were initiated, negotiated and executed and upon consideration of the evidence contained in the aforementioned investigation files, the Respondent was satisfied there was sufficient evidence to support the charges preferred against the Applicants and others.

81. In her view, the decision to charge the Applicants and others in the two case files was made based on the sufficiency of evidence and public interest in accordance with the National Prosecution Policy hence the allegations by the Applicants to the contrary are unfounded and have no basis.

82. She therefore deposed that the Applicants have not demonstrated how their rights under Article 25 and 27 of the Constitution, 2010 have been violated by their being charged and prosecuted. She alternatively averred that the Applicants having not enjoined the subordinate court in this Application, renders the same incurably defective and concluded that the Notice of Motion Application dated 17th March 2015 ought to be dismissed with costs to the Respondent.

83. In the submissions made on behalf of the Respondent, it was contended that the decision to charge the Applicants was informed by the sufficiency of evidence on record and the public interest and not any other considerations. However, it was submitted that the accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of evidence gathered and properly adduced in support of the charges. To the Respondent, the contention by the Ex parte applicants that the action by the Office of the Director of Public Prosecutions to order his arrest and charging with criminal offences is fraught with impropriety is unfounded and bad in law in that under Article 157 of the Constitution, state powers of prosecution are exercised by the Director of Public Prosecutions personally or by persons under his control and direction; in thereof, the Director of Public Prosecutions is subject only to the Constitution and the law and does not require the consent of any person or authority, is independent and not subject to the direction or control of any person or authority; and that the High Court would be crossing into the line of the independence of the DPP to descend into the arena of finding whether there is a prima facie case against the Ex parte applicants. It was further submitted thatsection 35 and 37of the ***Anti Corruption and Economic Crimes Act*** mandates the DPP to receive and act on investigation reports submitted by EACC hence the respondent acted within the provisions of the relevant enabling legislation and as such so the orders of certiorari cannot be sustained.

84. It was therefore submitted that the said pleadings have failed in total to demonstrate how the decision by the DPP to prefer charges is without or in excess of the powers of the DPP under the Constitution and the Office of the Director of Public Prosecutions Act, 2013.

85. The Respondent asserted that the applicants had not demonstrated that the DPP has not acted independently or has acted capriciously, in bad faith or has abused the process in a manner to trigger the High Court's intervention. Further the applicants had failed to demonstrate that the DPP lacked the requisite authority, acted in excess of jurisdiction or departed from the rules of natural justice in directing that the Ex parte Applicants be charged with the offences disclosed by the evidence gathered. In their view, there was no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even manipulation of the court process so as to seriously deprecate the likelihood that the applicants might not get a fair trial as provided for under the Constitution to warrant the High Court to interfere with the criminal process before the subordinate court.

86. It was the Respondent's case, based on **Kenya National Examination Council and the Republic, Civil Appeal number 266 of 1996**,that an order of certiorari issues if the decision sought to be quashed is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons. Additionally, an order of certiorari cannot issue against an action or decision which has been taken or made in execution and discharge of a Constitutional or legal mandate.

87. With respect to an order of prohibition, it was submitted based on the same authority that it is an order of the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not lie to correct the course, practice or procedure of an inferior tribunal or a wrong decision on the merits of proceedings. Since, the DPP is conferred with State powers of prosecution

under Article 157 of the Constitution of Kenya 2010 and as the charges sought to be quashed were preferred pursuant to those powers, in the absence of demonstration that the DPP acted in excess of jurisdiction or in contravention of the laws, the High Court sitting on Judicial Review cannot assume the role a trial Court, that is, to take evidence and make a determination as to whether a crime has been committed. In support thereof, the Respondent relied on **High Court Petition number 369 of 2013, Thuita Mwangi & 2 others versus the Ethics & Anti-Corruption Commission & 3 others** as well as ***Halsbury's Laws of England*, 4th Edition, volume 1 at page 37, paragraph 128**).

88. To the Respondent, to issue or grant the orders sought would be tantamount to ordering the Director of Public Prosecutions not to discharge his Constitutional mandate and functions.

89. The Respondent further was of the view that since an order of prohibition looks at the future, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice an order of prohibition, it would not be efficacious against the decision so made since prohibition cannot quash a decision which has already been made but can only prevent the making of a contemplated decision. In the Respondent's view, it is apparent from the foregoing provisions that the respondents acted within the provisions of the relevant enabling legislation so the orders of certiorari and prohibition cannot be sustained.

90. It was submitted, on the authority of **Chief Constable of the North Wales Police vs. Evans (1982) All ER 141 at 155,** that the Judicial Review Court cannot sit on appeal of the DPP's decision to prosecute but can only review the manner in which the decision was made. It therefore cannot weigh the merits or demerits of the decision.

91. On the allegations that the respondent abused his prosecutorial powers by instituting proceedings in a contractual dispute and that there is no sufficient evidence to sustain the charges and further that the criminal cases are "political show trials" meant to send political signals the Respondent reiterated its position as enumerated in Article 157 of the Constitution and asserted that the Applicants failed to demonstrate that the DPP was influenced by extraneous or irrelevant factors; that the fact that the GoK entered into contracts with Info talent and Sound Day does not imply that, no criminal liability can arise from the initiation and negotiation of the contracts and that criminal offences can be committed in the execution of what appears to be a legal transaction (contract). To the Respondent, a contract is the culmination of a process hence if laws are violated during the process, this may give rise to criminal liability. To the Respondent, the alleged contracts were used as instruments to access government finance and as such the contracts entered were predicated on crime hence void *ab-initio*. To the Respondent, taking into account the Respondent's powers under Article 157 of the Constitution the contention that the respondent is conducting "a political show trial" for the benefit and at the instigation of the GoK has no basis.

92. The allegation that the Criminal cases are based on "contractual contracts" between the GoK and companies hence are civil in nature was rebutted on the basis of section 193A of the ***Criminal Procedure Code*** (CPC), under which it is acknowledged that the mere fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.

93. As regards, the alleged earlier prohibitory proceedings, it was submitted each case must be determined on its own facts and circumstances and that the facts and circumstances of the cases cited by the Applicants are distinguishable from the ones the Applicants have challenged and finally that in any case the cited decisions of the High Court are persuasive and have been challenged in the Court of Appeal, a fact well within the knowledge of the ex parte Applicants.

94. Responding to Articles 25 and 27 of the Constitution, it was submitted that whereas Article 25 of the Constitution provides that, fundamental rights and freedoms may not be limited while Article 27(1) provides that, every person is equal before the law and has the right to equal protection and benefit before the law, the applicants had not demonstrated how the respondents have contravened the rights of the Applicants under the foregoing provisions of the Constitution, and since the applicants are guaranteed fair hearing under Article 50 of the Constitution, their rights thereunder have been accorded to them during proceedings in the subordinate court. In any case it is not sufficient for the applicants to allege violation of rights without advancing any grounds to support such allegations.

95. On the issue of refund, it was submitted that the fact that the applicants refunded the monies paid to them pursuant the contracts in question does not in itself exonerate the Applicants from criminal liability. With respect to the allegation that the Respondent is using the criminal cases to force the ex-parte applicants to abandon their claims against the GoK for breach of the contracts and further the contracts have no iota of criminality, it was contended that the Respondent is not a party to any proceedings for breach of contract between the GOK and the Applicants; that under section 193A of the CPC, such proceedings are not a bar to criminal proceedings; and that in any event, there cannot be a breach of a contract proven to be predicated on crime.

96. It was the case of the Respondent that the grounds in support of the application as set out in the Statement of facts dated 17th March 2015 together with the verifying affidavit sworn by the 2nd applicant and the annextures thereto all amount to evidence and are best canvassed before the trial court as the laws of Kenya provide essential safeguards for a fair trial which is also entrenched in the Constitution of Kenya 2010 and it had not been demonstrated that the applicants will not be accorded a fair trial before the subordinate court to warrant the granting of the orders sought. To the Respondent, the applicants shall have their day in court with the opportunity to challenge evidence, cross examine witnesses, tender their own evidence and generally invoke such provisions of the Constitution of Kenya 2010, ***Evidence Act***, Cap 80, ***The Criminal Procedure Code*** Cap 75, the ***Penal Code***, Cap 63, and such other pieces of legislation as are appropriate in proof of their innocence or otherwise. To the Respondent, it has neither been demonstrated that the applicants are likely to be denied the rights as aforesaid nor accorded a fair trial as envisaged under the above laws. In support of these submissions the Respondent, relied *inter alia* on **Kenya Commercial Bank Limited & 2 others vs. Commissioner of Police and Another, Nairobi Petition No. 218 of 20122 (2013) eKLR; Kingori & 4 others vs. Mwangi & Another (1994) KLR 297, Richard versus Republic (2006) 2 KLR 620; Matalulu vs. DPP (2003) 4 LRC 712, Marshal vs. DPP (2007), 4 LRC 557; and Republic vs. Director Of Public Prosecutions, Ex parte George Peter Opondo Kaluma (2014) eKLR.**

97. In conclusion, the Respondent submitted that the Applicants has failed to prove violation of his fundamental freedoms and rights and/or infringement of any law or regulation or abuse of discretion and breach of Rules of Natural Justice and the Application should therefore be dismissed with costs.

Interested Party's Case

98. In opposition to the application the interested party filed three affidavits sworn by **John Kiilu**, its Forensic Investigator, **Pacal Maweu**, its Acting Assistant Director Forensic Investigations and **Godfrey Oyugi,** a member of the team that analysed the evidence obtained in five files in the category of what has come to be known as 'the Anglo-leasing scandal' two of which are the subject matter of these proceedings.

99. According to the interested party, the evidence gathered in the investigations established a fraudulent scheme to acquire public funds which, at its barest structure, the Applicants who are Kenya

citizens, registered or acquired shelve companies in foreign jurisdictions and purported to finance the Government of Kenya in the implementation of high value security projects through an opaque procurement process in criminal circumvention of the existing legal framework. The co-accused persons who were public officials then in position of influence, acted as insiders and, in abuse of their positions of public trust, vouched for award of contracts to the Applicants companies on a single sourcing basis.

100. According to the interested party, the fraudulent procurement scheme was designed to defraud the tax payer through contracts characterised by circumvention of the budgetary process, breach of the prevailing procurement and external borrowing laws and procedures, concealment and misrepresentation of facts and capacities of the single sourced financiers and suppliers and manifest abuse of office by public officers motivated by private gain to the detriment of public interest. It was disclosed that evidence gathered further established that the fraud was executed with public servants as co-conspirators. In this case the public servants (Applicants' co-accused persons) singularly made proposals for hitherto unknown projects, branded them secret, shielded the identified suppliers and financiers from competition and democratic scrutiny of external borrowing by Parliament effectively concealing the underlying criminal conduct. The Applicants, on the other hand used corporate vehicles whose registration and ownership structure is designed to conceal or disguise their true ownership and controlling mind by use of anonymous fronts. The corporate entities acting as financiers or suppliers in the projects, it was contended are invariably characterized by registration in offshore financial centres known for corporate law that allows single corporate director; having business address and bank account in yet another foreign jurisdiction with a notable preference for jurisdictions then known for banking secrecy; active management and control through management agents in the same or other jurisdiction for enhanced anonymity; execution of contracts by persons who are not directors of the companies and whose relationship the projects financiers/suppliers could easily deny when need arises such as in the current prosecutions; and a beneficial ownership of the assets of the corporate entities (money in bank accounts) in this case traceable to the Applicants.

101. According to the interested party a reading of the supporting affidavit reveals that the Applicants are beholden to the same scheme by swearing to facts and exhibiting documents that can only be known to or in possession of the contracting companies while at the same time denying any nexus with the said companies. Among the projects investigated, it was disclosed, include the fraudulent procurement contracts awarded to Infotalent Ltd and Sound Day Corporation and from the evidence gathered, it was clear that the contracts allegedly entered into were made upon a substratum of crime, are nullity, and perpetrators of the underlying crimes are culpable of criminal liability. The interested party's position with respect to these two cases was the same as that of the Respondent.

102. With respect to **Anti-Corruption Case No. 4 of 2015 (The case of Infotalent Ltd.),** it was deposed that the matter was referred to the defunct Kenya Anti-Corruption Commission for investigations following some audit queries that were raised by the Controller and Auditor General in his letter dated 25th February 2005. In his said letter, the Controller and Auditor General's concern was the Government's irregular procurement of a supplier's financing contract awarded to M/s Infotalent Systems Ltd., for the implementation of a project known as "The Kenya Police- Security and Law and Order Project" and code named "E-Cops" at a contract price of Euros 59,688,200/-. As at the date of his letter, the Controller and Auditor General observed that a total sum of Euros 5,287,164/- had already been paid by the Kenya Government, and the same amount subsequently refunded by the credit supplier after the Government unilaterally terminated the contract. The Controller and Auditor General was apprehensive that the Government may be exposed to liability on the contract and further questioned the procedure of procurement and the pricing of the goods and services.

103. It was averred that investigations into the matter revealed that sometimes in 2003, an entity calling

itself **Infotalent Systems Ltd**. submitted, to the Office of the President, an unsolicited technical proposal for an ambitious national project to computerize virtually the entire operations of the Kenya Police Department which technical proposal promulgates that the systems and applications will help the Police Department to improve performance, give better service to the public and build confidence for greater national security, law and order. However, perusal of a ministerial memorandum on priority projects prepared on the 26th February 2003 disclosed that this project was neither identified leave alone prioritized for implementation during the 2003/2004 financial year. Further, it also came to light that the project had neither been budgeted for by the Police Department nor had its funding been posted in the year's budgetary estimates. To the interested party, despite all diligence in investigations, there is no evidence of registration of a corporate entity known as **Infotalent Systems Ltd** or commercial presence at the two different addresses stated in the available correspondences and documents. It will however be noted that the agreement signed on 19th November 2003 was entered into between the Government of Kenya and **Infotalent Ltd**, a company whose name is confusingly similar to that which submitted the technical proposal but having different office address. It is also notable that the same entity known as Infotalent Systems Ltd prepared a letter dated 4th March 2004 requesting for authorisation for study and design of police systems in apparent preparation for implementation of a similar project to the one which the Infotalent Ltd was to finance and implement; a project status report for a project similar to the one which the Infotalent Ltd was to finance and implement; a letter dated 11th June 2004 conceding to termination of the contract for entered into between Infotalent Ltd and the Government of Kenya; that there is no evidence of assignment of the subject project to Infotalent Systems Ltd and the company purportedly implementing the project remained a shadowy entity. Based on the material revealed by the investigations, the interested party contended that it was evident that the contract was signed barely 4 months from the date of registration of Infotalent Ltd. It was also established from the available evidence that due to complicity of the responsible public officers, no due diligence test on the supplier was undertaken which would have exposed the supplier's incapacity to finance the Government of Kenya, its lack of experience and technical capacities to perform the contract of such magnitude for the Government.

104. The interested party's position was, according to it reinforced from the following facts:

i. Bank account opening and customer due diligence documents obtained from HSBC Republic Bank (Suisse) SA pursuant to a mutual legal assistance request to Switzerland demonstrate that Infotalent Ltd opened an account with HSBC Republic Bank (Suisse) SA on **8th July 2003,** one week after it was registered.

ii. HSBC Republic Trust Services (Suisse) SA is the subscriber to the Memorandum of Association which in turn appointed **First Corporate Director Inc.** as the sole director of the company. Its corporate Directors are listed as **Lion International Management Limited** and **Lion International Corporate Services Limited**.

iii. The beneficial owners of the assets of Infotalent Ltd are disclosed to the company's banker as 6th accused, **Kamani Rashmi Chamanlal** holder of Kenya passport number A588856 and 7th accused **Kamani Deepak Kumar Chamanlal** holder of Kenya passport number B065131. Both share the address P.O Box 49615, Nairobi, Kenya.

iv. It is evident that there was effort to conceal the natural persons who comprised the controlling mind of Infotalent Ltd.

v. Indeed account was not effectively opened until 17/07/2003 when the first entry on the statement of account was made showing a nil balance. This nil balance status obtained up to and including the

statement dated 31/12/2003.

vi. The bank account of Infotalent Ltd with HSBC Republic Bank (Suisse) SA is plainly identifiable as Client No. 1385496 in the name of Infotalent Ltd. The movement of the funds has been traced as follows: A payment advice No. 073819 dated 16.12.2003 initiated the first remittance of a sum of Euros 1,786,898.00. This money was received into the account on 12/01/2004. The 2nd payment was made on 1/04/ 2004 Euros 3,500,250. This was made vide a payment advice No. 097047. The statement of account shows that a sum of Euros 3,500,266.00 was received from the Government of Kenya and credited to the account on 21/04/2004.

105. According to the interested party, it was clear from the foregoing evidence that Infotalent Ltd was not doing any form of business or any profitable business, if at all, prior to its engagement by the Government of Kenya in the subject mega project and that the agreement dated 19th November 2003 is made on a substratum of crime, is a fraud on the Kenyan tax payer and the alleged acts of the Government of Kenya are indeed acts of co-conspirators. It was contended that it is also apparent from the evidence available that the alleged contract is no more than a tool to illegally access and acquire public funds and cannot be seen otherwise than in the wider context of fraud. It was disclosed that from the letter dated 4th March 2004 and the project status report that the entity known as Infotalent Systems Ltd was still undertaking system requirement studies, carrying out surveys to determine the equipment, specifications and configurations alluded to in the project proposal six months after the agreement was signed with Infotalent Ltd. To the interested party, documents bear testimony to the fact that the actual requirements in terms of equipment, specifications, configuration, were yet to be determined and the technical proposal by Infotalent Systems could not have formed the basis of an agreement with Infotalent Ltd in which equipment were clearly defined and costing stated. To this party, the agreement, being a central pillar in architecture of the elaborate fraudulent scheme, is void *ab initio* and incapable of being breached.

106. On the earlier decisions relied upon, it was contended that the same comprise impugned jurisprudence that was the subject matter of negative pronouncement by eminent jurists of the Judges and Magistrates Vetting Board against the presiding Judge hence are not binding on this court and are in any event subject of appeals now pending before the Court of Appeal.

107. It was the interested party's case that the letter dated 3rd June, 2004 addressed to Infotalent Ltd requesting for postponement or termination of the contract and refund of the money paid and the response thereto are inconsequential in view of the criminal conduct by the accused persons to secure this contract. It was however disclosed that preliminary investigations into related bribery allegations demonstrate **Mr. Joseph Oyula**, the author of the letter terminating the contract received the benefit of a property known as LR No. 12325/27 through the a company known as Kitamli Ltd as a reward or inducement for his role in other procurement contracts related to the Applicants herein. Further, the letter written by **Mr. Oyula** was done prior to the results of the investigations by EACC which exposes criminality in the creation of the subject contract.

108. In its submissions, the interested party averred as a general principle, once the office of the Director of Public Prosecution (DPP) has in exercise of its constitutional prerogative, directed that a prosecution be commenced against a person, that prosecution ought not to be interrupted unless DPP is abusing his powers. The applicant must establish a mental element that would justify the quashing of EACC's decision to recommend prosecution and the DPP'S decision to charge. The interested party relied on CA No. 1 of 2013 **Director of Public Prosecutions vs Crossley Holdings Ltd & 2 Others** to the effect that absent dishonesty, bad faith or some exceptional circumstance, the decision of the Commission and the AG to investigate, recommend and prosecute respectively should not be amendable to judicial

review. Further reliance was placed on **Hon. James Ondicho Gesami vs The Hon. Attorney General & 2 others**, Petition No. 376 of 2011 in which **Mumbi Ngugi, J** observed:

"The DPP is at liberty to prefer charges against any party in respect of whom he finds sufficient evidence to prefer charges. I do not know of anything in the law that would require that all members of the CDF Committee for West Mogirango Constituency be prosecuted for alleged misappropriation of funds unless there was evidence against them...In my view, requiring that the petitioner subjects himself to normal criminal prosecution process mandated by law where he has the safeguards guaranteed by the Constitution does not in any way amount to an attack on his human dignity in violation of his constitutional rights'. "

109. Based on **Erick Kibiwott Tarus & 2 others vs Director of Public Prosecutions & 7 Others** (JR Application No. 89 of 2014) [2014] eKLR, the interested party relied on this Court's holding to the effect that:

"Dealing with the merits of the application, it is trite that Court ought not to usurp the Constitutional mandate of the Director of Public prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution. The mere fact that the intended or ongoing criminal proceedings are in likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but the decision making process...Similarly, it is not for this court to stop the Director of Public Prosecutions (the DPP) in his tracks simple because the Court believes that the DPP ought to have done better. The Constitutional discretion given to the DPP ought not be lightly interfered with especially if on the evidence in his possession if true may well sustain a prosecution..."

110. This Court was accordingly urged to be slow to allow a collateral challenge to the prosecution of a criminal case once the prosecuting authority has, upon consideration, decided to charge a person with a criminal offence since it is in the public interest that criminal cases, particularly those touching on misuse of public funds, be prosecuted expeditiously as was appreciated in **Wilfred Karuga Koinange vs Commission of Inquiry into Goldenberg Commission** (Misc. Appl. 372 of 2006) 2006 eKLR, where the Court (**Justice Anyara Emukule**) held:

"The state represents a community of individuals, who all contribute to the welfare of the state. In the wider context therefore, it is in the interest of the state, the community of Kenyans and all persons living within the territorial boundaries of Kenya, and perhaps beyond, that lawsuits including criminal prosecutions which particularly impinge upon the welfare of the state and therefore the community within the state be prosecuted in a sequence and within a reasonable time and not by way of a multiplicity of suits, motions over other motions and sometimes cross-motions...The multiplicity of such motions is but gerry-mandering through the court corridors contributing nothing but delays in the dispensation of justice to the individual accused or the applicant and also the community of Kenyans because the issues raised, like in this case, and the previous applications, whether or not the disbursement of Kshs. 5.8 billions was legal or illegal should be determined in a proper trial, and should not be stayed by the court merely because they relate to issues raised 4, 8, 12 or more years ago."

111. In furtherance of this position, the interested cited the decision of **Ojwang, J** (as he then was) in **Republic v Attorney General & another Ex parte Vaya & another** (2004) KLR 281, that public policy demands good husbandry of scarce national resources.

112. It was submitted that it is in the public interest that major scandals are thoroughly investigated, the perpetrators are prosecuted and punished and assets recovered. To the interested party, it bears restating that under article 10 of the Constitution, an officer interpreting the Constitution is obligated to have regard to such national values as the rule of law, good governance, integrity, transparency and accountability. Article 259 similarly commands that the Constitution should be interpreted in a manner that advances *inter alia* the rule of law, permits the development of law and contributes to good governance. In its view, adopting jurisprudence that tends to inhibit accountability through the criminal process is decidedly against the letter and spirit of the Constitution. In this respect, the interested party relied on **Kuria & 3 others versus Attorney General [2002] 2 KLR 69.**

113. It was submitted that the Applicants have not demonstrated any compelling evidence to the effect that their prerogative or constitutional rights have been infringed to warrant stoppage of the criminal process. It was its position that judicial review proceedings are special proceedings hence reliefs therefor can only be applied for on limited grounds which include illegality, procedural unfairness, and unreasonableness. It concerns itself with the decision making process rather than the merits of the decision; with legality rather than correctness of the decision. However, it was submitted that the Applicants have not pleaded and/or proved any ground known to judicial review in support of their case and all that the applicants are doing is pre-arguing their defence in this court which is not the proper forum. This include contentions that: the charges do not disclose any offences; the contracts provide for rights and obligations of parties and have dispute resolution clauses; the Respondent is conducting a political show trial for the benefit of the Government; the charges are based on falsehood, are a government propaganda, coercive and are a vicious abuse of the Applicants' constitutional rights; there is a contravention of Article 25 and 27 of the Constitution; the criminal prosecution is grounded on bad faith and is being used oppressively to punish the Applicants; and that the charges are outrageous, unreasonable and in bad faith. None of the grounds, in the interested party's opinion is beyond the competence of the trial Magistrate. Further, none of the grounds raised is sufficient to invoke the judicial review jurisdiction of this court.

114. In any event, the validity and effect of the purported contracts is one of the questions for determination by the trial Magistrate. Yet the Applicants have extensively relied on the provisions of the disputed contract to urge this court to exonerate it from blame. For instance, they submits that the contract contains an arbitration clause and as such prosecution should not be allowed. The implication of such an argument is that public officers and third parties can use the instrument of a contract to grant themselves immunity by merely inserting an arbitration clause. Such a conclusion, according to the interested party, goes against the fundamental principle that no one is above the law nor can preclude the criminal jurisdiction of the court. Both civil and criminal consequences should flow from breach of law hence it was contended that in the circumstances that the disputed contracts cannot be relied upon to stop prosecution.

115. It was reiterated that the upshot of the foregoing submissions is that the purported contracts were nothing but huge conspiracies to defraud public funds through sham processes. The persons who purported to sign on behalf of the Government acted illegally and are co-accused in the criminal cases facing the applicants. With respect to the financing contracts payments were made before performance and as such no financing took place. Thus public funds were expended for no consideration.

116. On the doctrine of reasonableness, it was submitted that based on **Associated Provincial Picture Houses, Limited vs. Wednesbury Corporation** (1948) 1 K.B. 223 (famously referred to as the *Wednesbury* principle) requires a high standard for review. For the decision to be reviewable on this ground, it must be 'so unreasonable that no reasonable authority could have come to it'. In the said case, the court observed that to prove the case for unreasonableness would require 'something

overwhelming'. That the decision must be so unreasonable that no other like body (not the court) would have arrived at the same. They further held that it must be so bad that the decision maker 'must have taken leave of his senses'. The rationale for this high standard is obviously to ensure that the court does not usurp the functions of the decision making power of the public body. It was reiterated that the investigations into the Anglo-leasing scandal are borne out of great public interest. It involves colossal amounts of money. The offences for which the Applicants have been charged are grave. In the circumstances, requesting for stoppage of prosecution of the Applicants in the criminal cases after a rigorous investigation cannot be termed as an act of bad faith by any stretch of imagination.

117. In its view, since the criminal court has the competence to handle all the issues being raised by the Petitioner, the High Court should be slow to interfere with the criminal process as the allegations being passed off as grounds for constitutional or judicial review applications are squarely within the competence of the Criminal Court.

118. It was the interested party's case that issues raised by the Applicants such as contractual rights and obligations; prosecution of a commercial dispute in a criminal court; abuse of power by the Respondent to prosecute; value of the legal opinion of the Attorney General etc, can be competently handled by the trial magistrate.

119. Commenting on the previously decided cases relied upon by the applicants, it was submitted that majority of the local decisions are not necessarily binding on this court and in any case in respect of **Nedemer Technology Ltd vs KACC** and **Midlands Finance &Securities vs AG** are pending appeal. Further, the decisions vary to a great extent and it is upon the court to adopt such jurisprudence as would advance the course of justice and deal with impunity. The jurisprudence arising from some of the decisions relied upon by the applicants have been criticized by eminent scholars and lawyer such as **Prof. Paul Musili Wambua** in his article ***'The Emerging Jurisprudence in the Control of Irregularities'***, Significantly, it was disclosed that one of the decisions espousing the jurisprudence in *Nedermar* being HC. Civil Appl. No. 695 of 2007; **Republic vs KACC ex parte First Mercantile Securities Corporation**, another Anglo-leasing related case was overturned by the Court of Appeal in CA No. 194 of 2008, **KACC VS Mercantile Securities Corporation**, where the Court held:

"The Appellant in its operations is independent of GOK. The Appellant can investigate GOK officials if they are suspected to have been involved in corrupt practices or to have committed economic crimes. The investigations the Appellant was asking the 'Swiss Authorities' were not confined solely to the Respondent. The names of high ranking GOK officials were specifically mentioned in the MLA. Are those investigations also to be stopped""

120. The interested party concluded that the application is without merit. In the totality of this case, the prosecution pursuant to the Anti-Corruption Cases No. 2 of 2015 and 4 of 2015 ought not to be stopped. The claims of infringement of rights have not been proved. More importantly, it is in the public interest that said criminal cases be tried and duly concluded. The Applicants will have opportunities to challenge the evidence so obtained at the trial court. In so submitting reliance was placed on the decision of **Emukule, J** in Nbi.HC. Misc. Appl. No. 1413 of 2005; **Neptune Credit Management ltd & another v Chief Magistrate's Court & 2 others** (supra) in which he expressed himself thus:

'**In my very humble opinion, many applicants including these Applicants rush to this Court for orders to stop the law enforcement agencies and other Constitutional offices, like the Attorney–General, charged with statutory duties from carrying out their legitimate duties. This does not mean that the CID and other agencies are always right but where they are found not be right or not to accord with the law, the rights of the persons affected are always vindicated by**

either acquittals or where appropriate the tendering of Nolle Prosequi(S). At the tail end of such process, the persons affected retain the right to vindicate their rights through a constitutional reference under S. 84(1) of the Constitution……..'

121. In its view, to allow this application would be to deny the public accountability with respect to one of the most egregious scandals that this Country has ever witnessed hence the Court was urged to dismiss the notice of motion application dated 16th March, 2015 with costs to the Interested Party.

Determination

122. I have considered the application, the affidavits both in support of and in opposition to the application, the submissions for and against the grant of the orders sought and the authorities cited on behalf of the parties thereto.

123. Before dealing with the merits of the applicants' case, it was the Respondent's and Interested Party's case that the orders sought herein are inherently unwarranted. I wish to deal first with that position because if I sustain the same, there would be no reason to plunge into the other issues.

124. It was contended that it is in the public interest that criminal cases, particularly those touching on misuse of public funds, be prosecuted expeditiously. That may be so. However on this point I can do no better than cite the decision in **Kinyanjui vs. Kinyanjui [1995-98] 1 EA 146** where it was held:

"For a Court of law to shirk from its constitutional duty of granting relief to a deserving suitor because of fear that the effect would be to engender serious ill will and probable violence between the parties or indeed any other consequences would be to sacrifice the principle of legality and the dictates of the rule of law at the altar of convenience as would be to give succour and sustenance to all who can threaten with sufficient menaces that they cannot live with and under the law."

125. In my view, criminal proceedings ought not to be instituted simply to appease the spirits of the public yearning for the blood of its perceived victims. This is a country governed by the rule of law and any action must be rooted in the rule of law rather than on some perceived public policy or dogmas. The former has been branded an unruly horse, and when you get astride it, you never know where it will carry you. See **Richardson vs. Mellish (1824) 2 Bing 229.**

126. I associate myself with the decision in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** where it was held that:

"A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have 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 actionable".

127. As was held in **Dr. Christopher Ndarathi H Murungaru vs. Kenya Anti-Corruption Commission & Another Civil Application No. Nai. 43 of 2006 [2006] 1 KLR 77:**

"Lastly, before we leave the matter, Professor Muigai told us that their strongest point on the motion before us is the public interest. We understood him to be saying that the Kenyan public is

very impatient with the fact that cases involving corruption or economic crimes hardly go on in the Courts because of the applications like the one we are dealing with. Our short answer to Professor Muigai is this. We recognize and we are well aware of the fact that the public has a legitimate interest in seeing that crime, of whatever nature, is detected, prosecuted and adequately punished, the Constitution of the Republic is a reflection of the supreme public interest and its provisions must be upheld by the Courts, sometimes even to the annoyance of the public and the only institution charged with the duty to interpret the provisions is the High Court and where permissible, with an appeal to the Court of Appeal. Since the Kenyan nation has chosen the path of democracy rather than dictatorship, the Courts must stick to the rule of law even if the public may in any particular case want a contrary thing and even if those who are mighty and powerful might ignore the Court's decisions since occasionally those who have been mighty and powerful are the ones who would run and seek the protection of the Courts when circumstances have changed...The courts must continue to give justice to all and sundry irrespective of their status or former status."

128. It has been said that the Courts must never shy away from doing justice because if they did not do so justice has the capacity to proclaim itself from the mountaintops and to open up the Heavens for it to rain down on us. Courts are the temples of justice and the last frontier of the rule of law. See **Republic vs. Judicial Commission of Inquiry into The Goldenberg Affair, Honourable Mr. Justice of Appeal Bosire and Another Ex Parte Honourable Professor Saitoti [2007] 2 EA 392; [2006] 2 KLR 400.**

129. Justice, it has been said is not a cloistered virtue and that where justice is done and public interest upheld, it is acknowledged by the public at large, the sons and daughters of the land dance and sing, and the angels of heaven sing and dance and heaven and earth embrace. See **Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443.**

130. It was contended that without quashing the decision by the Respondent to prosecute the applicants the Respondents cannot be prohibited from proceeding with the said prosecution.

131. In my view where a decision has been made, a party cannot seek to prohibit the same without having the same quashed. However where the decision is in the process of being made and the only decision that was taken was that the action in question be undertaken, I do not see why the Court cannot in those circumstances prohibit the decision from being concluded even without quashing the decision that the same be undertaken. That is my understanding of the decision of the Court of Appeal in **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge & Others Civil Appeal No 266 of 1996** where the Court expressed itself as follows:

"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, *where a decision has been made*, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. *Prohibition cannot quash a decision which has already been made*; it can only prevent the making of a contemplated decision…Prohibition is an order from the High Court directed to an inferior tribunal or body which *forbids that tribunal or body to continue proceedings* therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings…Only an order of *certiorari* can quash a *decision*

already made **and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter."** [Emphasis mine].

132. It is therefore clear that the Court was emphatic that the remedy of prohibition is only lost where a decision has been made and not where the proceedings in question are still continuing. Accordingly, since the applicants herein are seeking to stop the Respondent from *inter alia* continuing with their prosecution, the mere fact that a decision was made to prosecute them, is not a ground to decline to entertain an application seeking to prohibit the continuation of the said prosecution.

133. In **Kuria & 3 Others vs. Attorney General** (supra) it was held that

"It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been be argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law... In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed...There is nothing which can stop the Court from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made..."

134. This was this Court's holding in **Republic vs. Director of Public Prosecutions & Others ex parte Eric Kibiwott & Others Nbi Judicial Review Civil Application No. 89 of 2014.**

135. The respondent took issue with this Court's power to grant the orders against it. It seemed to have taken the view that this Court has no power to interfere with the exercise of his constitutional mandate. However as was held in **Paul Imison vs. Attorney General & 3 Others Nbi HCMCA No. 1604 of 2003**:

"I do not think that our Constitution which is one of a democratic state would condone or

contemplate abuse of power...The Attorney General in some of his constitutional functions does perform public duties and if he were to be found wanting in carrying them out or failing to perform them as empowered by the Constitution or any other law, I see no good reason for singling him out and failing to subject him to judicial review just like any other public official. I find nothing unconstitutional in requiring him to perform his constitutional duties. A monitoring power by the court by way of judicial review would have the effect of strengthening the principles and values encapsulated by the Constitution. To illustrate my point, Judicial Review tackles error of law and unlawfulness, procedural impropriety, irrationality, abuse of power and in not too distant future, human rights by virtue of the International Conventions which Kenya has ratified. In exercising the Judicial Review jurisdiction the court would not be sitting on appeal on the decisions of the Attorney general, he will still make the decisions himself but the lawfulness, etc. of his decisions should be within the purview of the courts..."

136. This Court therefore has the powers and the constitutional duty to supervise the exercise of the Respondent's mandate whether constitutional or statutory as long as the challenge properly falls within the parameters of judicial review. See **R vs. Attorney General exp Kipngeno Arap Ngeny** (supra).

137. In **George Joshua Okungu & another vs. Chief Magistrate's Court Anti-Corruption Court at Nairobi** (supra) this Court cited with approval the holding in **Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323** and held:

"Whereas we appreciate the fact that the decision whether or not to prosecute the petitioners is an exercise of discretion this Court is empowered to interfere with the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable…"

138. It was the Respondent's case that the omission to join the Court was fatal to these proceedings. Order 53 rule 3(2) of the ***Civil Procedure Rules*** provides:

The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.

139. Prima facie, the said rule is mandatory. However, the rules do not provide for the consequences of non-compliance. As was held in **Standard Chartered Bank Ltd. vs. Lucton (Kenya) Ltd. Nairobi (Milimani) HCCC No. 462 of 1997,** the use of the word "shall" in a statute only signifies that the matter is *prima facie* mandatory and its use is not conclusive or decisive and it may be shown by a consideration of the object of the enactment and other factors that the word is used in a directory sense only. What emerges from a consideration of various decisions is that while the word ***'shall'*** is ordinarily interpreted as mandatory, it will be considered as directory depending on the text and context thereof; and that a statute will be deemed as directory or mandatory having regard to the purpose and object it seeks to achieve. See **M/S. Sainik Motors, Jodhpur and Others vs The State of Rajasthan 1961 AIR 1480, 1962 SCR (1) 517; C. Ramasamy vs The Assistant Engineer W.P. No. 18868 of 2013; State of**

U.P. v. Baburam Upadhya AIR 1961 SC 751, and F. A. R. **Bennion Statutory Interpretation, A Code, Fourth 4th Edition, Page 34.** Failure to comply with a mandatory requirement invalidates the act done; where it is merely directory, the thing done will be unaffected though there may be sanctions imposed on the person affected.

140. Order 53 rule 3(4) of the ***Civil Procedure Rules*** provides:

If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct.

141. It follows that the omission to join the presiding officer of the Court as provided hereinabove cannot be fatal to the application. Whereas it may offend the rules of natural justice, where allegations are made against the Court, where there are no allegations made against the Court, and where the matter is capable of being determined without the Court being involved, it cannot be said to be fatal though the Court, even in such circumstances, may in the exercise of its discretionary powers on costs take the failure to comply with the rules into account. It also ought to be noted that Order 53 rule 3(2) deals only with situations where "***the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein".*** Having looked at the orders sought herein apart from the declaratory orders and the consequential order as to costs, all the other orders are directed at the Respondent as opposed to the Court. Accordingly, the failure to join the presiding officer of the Court to these proceedings is not fatal.

142. In this case, however, apart from reliefs in the nature of judicial review, the applicants are seeking declaratory orders. Article 259 of the Constitution of Kenya, 2010, places a constitutional obligation on courts of law to develop the law so as to give effect to its objects, principles, values and purposes. However under Article 47(3) of the Constitution, Parliament is required to enact legislation to give effects to the rights to fair administrative action thereunder. Apart from the ***Law Reform Act***, an Act of Parliament which was enacted prior to the current Constitution and which continues in force pursuant to section 7 of the Sixth Schedule to the Constitution, subject to alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution, to the best of my knowledge there is no other law in force enacted with a view to effectuating Article 47.

143. Judicial review jurisdiction, it has been held, is a special jurisdiction which is neither civil nor criminal and the ***Civil Procedure Act*** does not apply. It is governed by sections 8 and 9 of the ***Law Reform Act*** being the substantive law and Order 53 of the ***Civil Procedure Rules*** being the procedural law. Section 8 of the ***Law Reform Act*** specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, *mandamus*, *certiorari* and prohibition. Whereas this Court agrees with **Mr Ahmednasir, SC**, learned counsel for the applicants that judicial review has acquired a constitutional angle and has to be developed, that development in my view is with respect to the grounds upon which the Court would grant such reliefs. I appreciate that the traditional grounds are nolonger sufficient and as I have held elsewhere in this judgement, the grounds for the grant of judicial review must continue expanding. That however, does not entitle the Court in an application of this nature to craft remedies other than those contemplated under the law. It is however my view and hope that in due course Parliament will hasten the enactment of the law contemplated under Article 47(3) in order to align it with the provisions of Article 23 of the Constitution.

144. Currently, a declaration does not fall under the purview of judicial review for the simple reason that

the court would require *viva voce* evidence to be adduced for the determination of the case on the merits before granting the declarations sought. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application. See **Commissioner of Lands vs. Hotel Kunste Ltd Civil Appeal No. 234 of 1995 and Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354.**

145. Accordingly pursuant to the current substantive law guiding judicial review applications, the only orders capable of being granted are in the nature of the aforesaid reliefs. It follows that the prayers for declaratory orders are incapable of being granted in these proceedings. My position is reinforced by the decision in South African case of **Pharmaceutical Manufacturers Association of South Africa & Another vs. Minister of Health Case CCT 31/99,** with respect to the provisions of the Constitution of that Country which bears similarities to our own Constitution. In that case, the Constitutional Court of South Africa (**Chaskalson, P**) expressed itself as follows:

"Powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution…Whilst there is no bright line between public and private law, administrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their inter-relationship and the boundaries between them. Prior to the coming into force of the interim Constitution, the common law was "the main crucible" for the development of these principles of constitutional law. The interim Constitution which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law. That is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development. But there has been a fundamental change. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution which defines the role of the courts, their powers in relation to other arms of government, and the constraints subject to which public power has to be exercised. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed. The written Constitution articulates and gives effect to the governing principles of constitutional law. Even if the common law constitutional principles continue to have application in matters not expressly dealt with by the Constitution, (and that need not be decided in this case) the Constitution is the supreme law and the common law, in so far as it has any application, must be developed consistently with it, and subject to constitutional control."

146. Dealing with the merits of the case, it is, in my respectful view, important to understand the principles which guide the grant of the orders in the nature sought herein before applying the same to the circumstances of this case. Several decisions have been handed down which in my view correctly set out the law relating to circumstances in which the Court would be entitled to prohibit, bring to a halt or quash criminal proceedings. It is however always important to remember that in these types of proceedings the Court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings. As judicial review proceedings are concerned with the process rather than merits of the challenged decision or proceedings the court, is not entitled to make definitive findings on matters which go to the merit of the impugned proceedings. In determining the issues raised herein

the Court ought therefore avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial Court.

147. The Court in determining judicial review proceedings ought not to usurp the Constitutional and statutory mandate of the Respondent and Interested Party to investigate and undertake prosecution in the exercise of the discretion conferred upon them. It was in recognition of this fact that the House of Lords in **Director of Public Prosecutions vs. Humphreys [1976] 2 All ER 497 at 511** cautioned that:

"A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval…If there is a power…to stop a prosecution on indictment in limine, it is in my view a power that should only be exercised in the most exceptional circumstances."

148. It was also along those lines that, in my view, **Ojwang', J** (as he then was) in **Republic v Attorney General & another Ex parte Vaya & another** (supra), expressed himself that:

"One critical custodian of this public policy is the Attorney General in his prosecutorial role; and in a matter such as the one in hand, this Court ought not hold that no prosecutions may be brought against persons suspected of committing offences touching on national resource use. Accordingly I hold that there is no public policy to limit the competence of the Attorney General to prosecute persons in the position of the applicants."

149. As was held by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**:

"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision…It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute."

150. I must hasten however that the Court is aware of the dynamic nature of the law; it is always speaking and develops as new legal problems emerge in society or the old ones metamorphose into complicated and coloured problems. As was held in **R vs. Panel on Take Over and Mergers Ex Parte Datafin [1987] QB 815**, judicial review is developing fast and extending itself beyond the traditional targeted areas and grounds. The reason for saying this is due to the recognition that the grounds upon which the Court exercises its judicial review jurisdiction are incapable of exhaustive listing. As was stated by **Nyamu, J** (as he then was) in **Republic vs. The Commissioner of Lands *Ex parte* Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998*:***

"Availability of other remedies is no bar to the granting of the judicial review relief but can

however be an important factor in exercising the discretion whether or not to grant the relief...The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a straight jacket...Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality...The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations...Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them...Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis...The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society."

151. Similarly in **Bahajj Holdings Ltd. vs. Abdo Mohammed Bahajj & Company Ltd. & Another Civil Application No. Nai. 97 of 1998** the Court of Appeal held that the limits of judicial review continue expanding so as to meet the changing conditions and demands affecting administrative decisions while in **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya), Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47, Nyamu, J** (as he then was) held the view that while it is true that so far the jurisdiction of a judicial review court has been principally based on the "3 I's" namely illegality, irrationality and impropriety of procedure, categories of intervention by the Court are likely to be expanded in future on a case to case basis.

152. Again in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** the Court expressed itself as follows:

"So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions...This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit. The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law."

153. This is in tandem with the holding in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43** that:

"… like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with

branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of *Donoghue vs. Stephenson* in the last century…"

154. According to ***Judicial Review Handbook***, 6th Edition by **Michael Fordham** at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority power.

155. Whereas it is true that judicial review remedies presently have a constitutional basis in Kenya by virtue of Articles 10, 25, 27, 47 and 50 of the Constitution and the conventional grounds for judicial review take a secondary role after the constitutional benchmarks, the South African Constitutional Court, itself recognised in **Pharmaceutical Manufacturers Association of South Africa & Another vs. Minister of Health** (supra) that:

"The common law supplements the provisions of the written Constitution but derives its force from it. It must be developed to fulfil the purposes of the Constitution and the legal order that it proclaims — thus, the command that law be developed and interpreted by the courts to promote the "spirit, purport and objects of the Bill of Rights." This ensures that the common law will evolve within the framework of the Constitution consistently with the basic norms of the legal order that it establishes. There is, however, only one system of law and within that system the Constitution is the supreme law with which all other law must comply. What would have been ultra vires under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality. In this respect, at least, constitutional law and common law are intertwined and there can be no difference between them. The same is true of constitutional law and common law in respect of the validity of administrative decisions within the purview of section 24 of the interim Constitution. What is "lawful administrative action," "procedurally fair administrative action" and administrative action "justifiable in relation to the reasons given for it," cannot mean one thing under the Constitution, and another thing under the common law…Although the common law remains relevant to this process, judicial review of the exercise of public power is a constitutional matter that takes place under the Constitution and in accordance with its provisions. Section 167(3)(c) of the Constitution provides that the Constitutional Court "makes the final decision whether a matter is a constitutional matter". This Court therefore has the power to protect its own jurisdiction, and is under a constitutional duty to do so. One of its duties is to determine finally whether public power has been exercised lawfully. It would be failing in its duty if it were to hold that an issue concerning the validity of the exercise of public power is beyond its jurisdiction."

156. In my view since the Constitution is incremental in its language, what the current constitutional dispensation requires is that the grounds in judicial review applications be developed and the grounds for granting relief under the Constitution and the common law be fused, intertwined and developed so as to meet the changing needs of our society so as to achieve fairness and secure human dignity. It is within those prescriptions that judicial review is seen in our context. But care should be taken not to think that the traditional grounds of judicial review in a purely judicial review application under the ***Law Reform Act*** and Order 53 of the ***Civil Procedure Rules*** have been discarded or its scope has left the airspace of

process review to merit review except in those cases provided in the Constitution. In other words the categories of judicial review grounds are not heretically closed as opposed to their being completely overtaken or that the Court's jurisdiction under Order 53 of the ***Civil Procedure Rules*** should include merit review. Once that distinction is made, there shall be little difficulty for this Court to maintain that it should and shall be concerned with process review rather than merit review of the decision of the Respondent.

157. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***

158. The courts will therefore interfere with the decision of a public authority if it is outside the band of reasonableness. It was well put by **Professor Wade** in a passage in his treatise on ***Administrative Law***, 5th Edition at page 362 and approved by in the case of the **Boundary Commission [1983] 2 WLR 458, 475**:

"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended."

159. I am also mindful of the decision of this Court in **Constitutional Petition Number 359 of 2013 Diana Kethi Kilonzo vs. IEBC and 2 Others** in which it was held that:

"**We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."**

160. Therefore, the mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not 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. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.

161. Therefore, in the exercise of the discretion on whether or not to grant judicial review orders, the court takes into account the needs of good administration. See **R vs. Monopolies and Mergers Commission Ex Parte Argyll Group Plc [1986] 1 WLR 763** and **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK).**

162. In **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170,** the Court of Appeal held:

"It is trite that an order of prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court."

163. In **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69,** the High Court held:

"The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far from that which the courts indeed the entire system is constitutionally mandated to administer....."

164. In **Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703**, it was held:

"It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to

cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth... When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court... In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in..."

165. As was aptly put in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR**:

"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."

166. Finally, in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** it was held that:

"The function of any judicial system in civilized nations is to uphold the rule of law. To be able to do that, the system must have power to try and decide cases brought before the Courts according to the established law. The process of trial is central to the adjudication of any dispute and it is now a universally accepted principle of law that every person must have his day in court. This means that the judicial system must be available to all...Although the Attorney General enjoys both constitutional and statutory discretion in the prosecution of criminal cases and in doing so he is not controlled by any other person or authority, this does not mean that he may exercise that discretion arbitrarily. He must exercise the discretion within lawful boundaries...Although the state's interest and indeed the constitutional and statutory powers to prosecute is recognised, 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 recognised 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...In doing so the Court may be guided by the following principles: (i). Where the criminal prosecution amounts to nothing more than an abuse of the process of the court, the Court will employ its inherent power and common law to stop it. (ii). A prosecution that does not accord with an individual's freedoms and rights under the constitution will be halted: and (iii). A prosecution that is contrary to public policy (or interest) will not be allowed...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. Evidence of extraneous purposes may also be presumed where a prosecution is mounted after a lengthy delay without any explanation being given for that delay...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...A criminal prosecution that does not accord with an individual's freedoms and rights, such as where it does not afford an individual a fair hearing within a reasonable time by an independent and impartial court, will be the clearest case of an abuse of the process of the Court. Such a prosecution will be halted for contravening the constitutional protection of individual's rights...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."

167. It is therefore clear that whereas the discretion given to the respondent to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt. Similarly where the Respondent is shown not to be acting independently but just reading a script prepared by someone else or that he has been pressurised to go through the motions of a trial, the Court will not hesitate to terminate the proceedings as in such circumstances, the powers being exercised by the Respondent would not be pursuant to his discretion but at the discretion of another person not empowered by law to exercise such discretion.

168. That said, judicial review applications, however, do not deal with the merits of the case but only with the process. In other words judicial review determines, *inter alia*, whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and once the Court is satisfied that the same are bona fides and that the same are being conducted in a fair manner, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution's evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.

169. Therefore the determination of this case must be seen in light of the foregoing decisions. However,

it is upon the ex parte applicant to satisfy the Court that the discretion given to the Respondent to investigate and prosecute ought to be interfered with.

170. It was contended that the subject contracts were simple commercial contracts, entered into between the Government of Kenya and corporate entities legitimately and lawfully registered in a number of different jurisdictions. To the applicants the subject dispute is purely a contractual matter between the companies in question, Infotalent Limited and Sound Day Corporation hence ought not to be elevated to the level of a criminal action. It is true that to transmute what is purely a civil or contractual matter to take the shape of a criminal offence may well be construed to amount to an abuse of the legal process. However, the interested party's position is that whereas the documents show that the contract was purportedly entered into by or on behalf of the Government of Kenya, the investigations revealed that the contract was made on a substratum of crime, is a fraud on the Kenyan tax payer and the alleged acts of the Government of Kenya are indeed acts of co-conspirators hence the agreement, being a central pillar in architecture of the elaborate fraudulent scheme, is void *ab initio* and incapable of being breached. To determine that issue would require more than just allegations and counter allegations. Evidence would have to be adduced, subjected to cross-examination and a determination made thereon either way.

171. It was further contended that all the contracts were performed to the satisfaction of the parties privy to the contracts and that in all the contracts the applicants performed more than what the Government has paid. It is however not clear from the applicants' case taken as a whole whether their case is that the companies in question, Infotalent Limited and Sound Day Corporation, are not liable to the Government of Kenya (GoK) or that the ex parte applicants have nothing to do with the said companies. Whereas paragraph 37 of the supporting affidavit seem to suggest that the ex parte applicants are strangers to the said companies, the rest of the affidavit seems to present the case that the said companies are not liable to the Government. Whether the said companies are liable or not in my view can only be propounded by those who are alter egos of the said companies, the directors thereof. Therefore if the applicants have no nexus with the said companies, the case that the said companies are not liable cannot be vouchsafed. That however, is not an issue that can be determined with finality in the proceedings of this kind.

172. It was alluded that the adverse publicity generated by the transactions in question might not augur well for the fair determination of the proceedings in question. The issue of adverse publicity was dealt with in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** as hereunder:

"The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial..."

173. I am also in agreement with the sentiments expressed in **Dream Camp Kenya Ltd vs. Mohammed Eltaff and 3 Others Civil Appeal No. 170 of 2012** that:

"Every litigation is inconvenient to every litigant in one-way or another. Also no one in his right senses enjoys being sued and ipso facto no one cherishes litigation of any nature unless it is

absolutely necessary. With respect, we accept litigation is expensive and no litigant would enjoy the rigours of trial. The aftermath of vexatious and frivolous litigations is normally taken care of by way of costs. The discomfort of litigation would not certainly render the success of the intended appeal nugatory if we do not grant the application sought. If the learned Judge is eventually found wrong on appeal, and the applicant succeeds in its intended appeal, then the orders so made by the learned Judge would be quashed and the applicant would be compensated for in costs."

174. As was held in **Jago vs. District Court (NSW) 106**:

"..it cannot be said that a trial is not capable of serving its true purpose when some unfairness has been occasioned by circumstances outside the court's control unless it be said that an accused person's liability to conviction is discharged by such unfairness. This is a lofty aspiration but it is not the law."

175. It has not been alleged that there is a risk that as a result of the adverse publicity so far generated by the transaction in issue, the applicants' right to fair trial is threatened. In fact no allegation has been made against the trial Court along those lines and in these proceedings no orders are expressly sought against the trial Court.

176. It was contended that the Attorney General of the Republic of Kenya having rendered a legal opinion that attests to the validity and legality of the contracts in question, the Respondent is barred from charging the applicants with an offence arising from a transaction which had been given a clean bill of health as it were. It was contended that the Applicants were given the green light and acted upon and performed the contracts on the strength of the former Attorney General's legal validation/advise and that to date, the Applicants have not been informed of a change in the Attorney General's opinion on the same. This submission gives rise to two issues. Firstly, is the issue of legitimate expectation and secondly, is estoppel. As was held in **Keroche Industries Ltd vs. Kenya Revenue Authority & Others [2007] KLR 240,** stated simply, legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way. In this case there is no evidence that a promise was made to the applicants that they would not be prosecuted. What is stated is that the Attorney General having given the transaction a clean bill of health, the Government ought not to renege thereon by instituting criminal proceedings against the applicants. In my view, and as stated herein below, the legal opinion seems on a prima facie reading to have been based on the authenticity of the documents rather than on the sanitation of the transaction. In my view the mere fact that he opined that the documents were signed by persons authorised to do so does not mean that fraud could not have been committed by the self-same persons. I however cannot in this decision make a definitive finding thereon.

177. The position however, is that legitimate expectation cannot override the law. This was the position in **Republic vs. Kenya Revenue Authority ex parte Aberdare Freight Services Limited [2004] 2 KLR 530** where it was held:

"…a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others. Judicial resort to estoppel in these circumstances may prejudice the interests of third parties. Purported authorisation, waiver, acquiescence and delay do not preclude a public body from reasserting its legal rights or powers against another party if it has no power to sanction the conduct in question or to endow that party with the legal right or inventory that he claims… Legitimate expectation is founded upon a basic principle of fairness that legitimate expectation ought not be thwarted – that in judging a case a judge should achieve

justice, weigh the relative "strength of expectation" of the parties. For a legitimate expectation to arise the decision must affect the other person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision maker not to be withdrawn without giving him first an opportunity of advancing reasons for contending that they should be withdrawn…A representation giving rise to legitimate expectation must however be based on full disclosure by the applicant. Thus where he does not put all his cards face up on the table it would not be entitled to rely on the representation. In this case any legitimate expectation has clearly been taken away firstly by the conduct of the applicant and the provisions of the Statute Act and therefore there is no discretion."

178. Where a promise has been made that a person will not be prosecuted, to turn round and prosecute the said person without evidence of any change in the circumstances may be frowned upon and going contrary to legitimate expectation. However caution must be taken when this principle is sought to be relied upon. It is a requirement that for the doctrine of legitimate expectation to be successfully invoked, the expectation must in the first place be legitimate "in the sense of an expectation which will be protected by law". See **R vs. Department for Education and Employment, ex p Begbie [2000] 1 WLR 1115, 1125C-D**. In other words the doctrine of legitimate expectation based on considerations of fairness, even where benefit claimed not procedural, should not be invoked to confer an unmerited or improper benefit. **See R vs. Gaming Board of Great Britain, ex p Kingsley [1996] COD 178 at 241**. As was held in **Republic vs. Kenya Revenue Authority ex parte Shake Distributors Limited Hcmisc. Civil Application No. 359 of 2012**:

"…the cornerstone of legitimate expectation is a promise made to a party by a public body that it will act or not act in a particular manner. For the promise to hold, the same must be made within the confines of the law. A public body cannot make a promise which goes against the express letter of the law."

179. Legitimate expectation based on an erroneous legal position, in my view ought not to be upheld because such an expectation cannot be said to be legitimate. In other words just like estoppel, legitimate expectation cannot operate against the law.

180. In my view, based on the material before me, legitimate expectation in so far as the subject criminal proceedings are concerned does not arise here as am not satisfied that the then Attorney General either promised the applicants that they would not be prosecuted or conducted himself in a manner that would amount to legitimate expectation and even if that were so legitimate expectation cannot operate against the law.

181. With respect to estoppel, promissory estoppel as opposed to a proprietary estoppel, it has been held, operates as a shield rather than as a sword. In other words, it cannot found a cause of action. See **16 *Halsbury's Laws of England* (4th Edn) Para 1514**; **Argy Trading Development Co. Ltd Vs. Lapid Development Ltd [1977] 3 All ER 799.**

182. On a prima facie view, and without determining the import and impact of the former Attorney General's opinion with finality a task which I cannot perform in these proceedings without the risk of prejudicing the criminal trial, the said Attorney General was giving an opinion as to whether the documents supplied to him complied with the law. The subject of the criminal cases, however, seems to be the antecedents as opposed to the formalities *per se* of the subject contracts. Accordingly, in

distinguishing the decisions in **Uganda vs. Banco Arabe Espanol** (supra) and **Stanley Githunguri vs. Republic** (supra) in which definite decisions had been made, in the instant case, I, based on the material before me, cannot say that in giving his opinion, the AG addressed the circumstances which led to the contracts in question being entered into in order to sanitise those circumstances. In this case, it is the Respondent's view that laws were contravened during the process of initiating and executing the contracts the subject matter of ACC 2 & 4 of 2015 hence the decision to prefer criminal charges.

183. It was contended that in the case of the Infotalent contract, the Government of Kenya and the Company had mutually agreed to terminate their contractual relations. They further agreed to discharge each other and covenanted not to raise any claim in future against one another. The parties have pursuant to the said representation, it was contended, ended one of the contracts that is the subject matter of the criminal case in the lower court hence the Government is estopped from reopening the case and changing the legal matrix of the agreements. The applicants' case is that following the termination of the Infotalent contract they were discharged therefrom hence the Government ought not to charge them with the offences in question. In other words, the applicants contend that they are nolonger liable to the Government. This contention, in light of the deposition in paragraph 37 of the supporting affidavit, seems self-contradictory. In any case, this position, if true, in my view, may well amount to a formidable defence to the criminal cases and the mere fact that a party has a formidable defence, without more, ought not to be the basis upon which criminal proceedings are to be terminated. As was held in **Meixner & Another vs. Attorney General [2005] 2 KLR 189,** the same Court expressed itself as hereunder:

"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 if 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...Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power. Having regard to the law, the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision is correct. The other grounds, which the appellants claim were ignored ultimately, raise the question whether the evidence gathered by the prosecution is sufficient to support the charge. The criminal trial process is regulated by statutes, particularly the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court, which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence and that is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court."

184. In this case, it is not contended that the intention of the Government in instituting the subject

criminal cases is to coerce the applicants into payment of further monies in respect of the Infotalent contract. In other words, with respect to the said contract and in so far as this ground is concerned there is no allegation of abuse of the process save that the applicants' liability is disputed. Whereas bad faith is alleged, it ought to be appreciated that bad faith or collateral motive is only decisive in cases of this nature where it is the dominant factor rather than just one of the motives. The applicants have contended that since the contract had provision for the choice of law and choice of forum in case of a dispute or disagreement, the subject criminal proceedings, not being the chosen forum ought not to have been commenced. That argument is generally correct. To commence criminal proceedings *in lieu* of arbitration would clearly amount to an abuse of the legal process. However, there ought to be cogent evidence that the said criminal proceedings are being commenced in lieu of the agreed arbitral proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, *ipso facto*, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. Section 193A of the ***Criminal Procedure Code*** on this issue provides:

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

185. However caution ought to be exercised and as was held by the Court of Appeal in **Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others Nairobi Civil Appeal No. 56 of 2012 [2013]eKLR:**

"While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings" It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court."

92. 186. In this case, based on the cold-print affidavit evidence I am unable to find with certainty that that is the case.

187. With respect to the Sound Day contract, whereas the applicants contend that the criminal proceedings are being instituted by a party in default, I have not been addressed on the motive for the same. It is not being alleged that the institution of the criminal proceedings is meant to intimidate the applicants into abandoning what in their view is their lawfully due payments. Even if there was such allegation, the applicants ought to place before this Court some satisfactory evidence, though not necessarily conclusive, that this is in fact the position. Reference to a demand letter made in respect of a contract not the subject of the criminal proceedings under challenge, in my view, cannot be the basis upon which this Court can found such evidence. It was upon the Applicants to adduce credible evidence on the basis of which this Court could find that his prosecution ought to be halted. See **Kuria & 3 Others vs. Attorney General,** (supra):

188. The applicants contended that this very court in two previous cases involving the Respondents and the Interested Party had decided on similar cases touching on similar Anglo-Leasing type contracts. These cases were identified as **Nedermar Technology BV limited vs. The Kenya Anti Corruption Commission and the Attorney General, Petition Number 390 of 2006, 2008 eKLR,** and (b) **Midland Finance & Securities Globetel Inc vs. Attorney General and Kenya Anti corruption Commission [2008] eKLR.** I agree with the decisions made by the Judge in those decisions as propounding the correct law. With due respect I wish to disabuse the interested party from the misguided notion that the said decisions are not good law simply because the same were the subject of the proceedings before the Vetting of Judges and Magistrates Board. That Board, in my view, is not an appellate Court and its decisions cannot by any stretch of imagination be construed to overturn decisions of the High Court which decisions can only be overturned on an appeal to a higher Court. However, in those cases, it is clear that the Court was dealing with an attempt to re-open matters which conclusively fell within the realm of the contracts in question. The criminal cases were commenced against a contracting party. In this case, it is contended that the applicants concealed their true identities and roles in the subject transactions hence defrauded the Government in the process. I must admit that the Respondent's position is clearly clouded and convoluted and may not be easily understood. However, I cannot conclusively find based on the material before me that the applicants' position is exactly the same as the position of the petitioners in the said two earlier cases in order to warrant the invocation of the principle of issue estoppel in favour of the applicants. The Respondent's position that the alleged contracts were used as instruments to access government finance and as such the contracts entered were predicated on crime hence void *ab-initio*, with due respect is not an issue which can be resolved in the proceedings of this nature. Whether such a view, which in the applicants' view is far-fetched, will find favour with the trial Court is another matter altogether. I have held that I am unable to find that the representation given by the Attorney General in the instant cases validated the process leading to the contractual agreements and their legality as opposed to the authenticity of the documents themselves.

189. Whereas I agree with the decisions in **Issa Athumani Tojo vs. The Republic** (supra) **Yukos capital vs. OJSC Rosneft Oil Company** (supra) and **Thoday vs. Thoday** on the applicability of issue estoppel, I with due respect, am unable to find that based on the facts as disclosed before me the said doctrine ought to be applied to the instant cases in order to justify the grant of the prayers sought herein.

190. It was alleged that the cases before the Magistrate Courts are (a) political show trials. First, and foremost, I must reiterate that in determining whether or not to halt criminal proceedings, the Court must consider the dominant motive for bringing the criminal proceedings. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the ***predominant*** purpose is to further some other ulterior purpose and 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. See **Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another** (supra) and **R vs. Attorney General exp Kipngeno Arap Ngeny** (supra).

191. Where it is not the predominant purpose the Court ought not to interfere. Where the ground relied upon to halt the same is some collateral motive which on its own does not warrant the halting of the said proceedings, the Court ought not to take such exceptional step of bringing to an end criminal proceedings where there possibly exist other genuine motives. Therefore, even if it is true that the government intends to achieve some political mileage in the fight against corruption, that would not warrant the halting of the criminal proceedings if that is not the dominant motive. I am not in this case convinced, and it has not been alleged, that the predominant purpose of the commencement of the criminal proceedings is for the achievement of a collateral purpose other than the vindication of a criminal offence.

192. As was held in **Jago vs. District Court (NSW) 106**:

"An abuse of process occurs when the process of the court is put in motion for a purpose which, in the eye of the law, it is not intended to serve or when the process is incapable of serving the purpose it is intended to serve. The purpose of criminal proceedings, generally speaking is to hear and determine finally whether the accused has engaged in 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 not abuse of process...When process is abused, the unfairness against which a litigant is entitled to protection is his subjection to process which is not intended to serve or which is not capable of serving its true purpose. But it cannot be said that a trial is not capable of serving its true purpose when some unfairness has been occasioned by circumstances outside the court's control unless it be said that an accused person's liability to conviction is discharged by such unfairness. This is a lofty aspiration but it is not the law."

193. This Court appreciates that a distinction must be made between a situation where what is alleged is insufficiency of evidence as opposed to where the evidence to be adduced does not disclose an offence. In the former, the right forum to deal with the matter is the trial Court. In the latter, it would amount to an abuse of the criminal process to subject the applicant to such a process. Criminal process ought to be invoked only where the prosecutor has a conviction that he has a prosecutable case. Whereas he does not have to have a full proof case, he ought to have in his possession such evidence which if believable might reasonably lead to a conviction. He does not have to have evidence which disclose a prima facie case under section 210 of the ***Criminal Procedure Code*** since a decision as to whether a prima facie case is disclosed is a jurisdiction reserved for the trial Court. He however must have evidence which satisfy him that his is a case which ought to be presented before a trial Court. He must therefore consider both incriminating and exculpatory evidence in arriving at a discretion to charge the accused. Unless this standard is met, the Court may well be entitled to interfere with the discretion of the prosecutor since that discretion, as stated hereinabove, is not absolute.

194. The applicants contend that the evidence in possession of the Respondent cannot sustain a conviction. That may be so, however, the material placed before me disclose a conflict of view with respect to the roles played by the applicants herein as opposed to the companies in question vis-à-vis the Respondent. It is contended that the case being advanced by the Respondent cannot possibly be true on the basis of the material placed before the Court. The interested party, which investigated the case, on the other hand contends that the fraudulent procurement scheme was designed to defraud the tax payer through contracts characterised by circumvention of the budgetary process, breach of the prevailing procurement and external borrowing laws and procedures, concealment and misrepresentation of facts and capacities of the single sourced financiers and suppliers and manifest abuse of office by public officers motivated by private gain to the detriment of public interest. It was averred that in this case the public servants (Applicants' co-accused persons) singularly made proposals for hitherto unknown projects, branded them secret, shielded the identified suppliers and financiers from competition and democratic scrutiny of external borrowing by Parliament effectively concealing the underlying criminal conduct. The Applicants, on the other hand used corporate vehicles whose registration and ownership structure is designed to conceal or disguise their true ownership and controlling mind by use of anonymous fronts. It is not positively averred that the case being advanced by the Respondent, even if true, cannot sustain a conviction. Accordingly, I do not agree with the applicants that the mere fact that the Respondent's case is hopeless and bound to fail is necessarily a basis for halting the criminal proceedings. I however, cannot, in fact I am not permitted to examine minutely and in details the parties' respective cases in order to determine where the truth lies.

195. The applicants further grounded their application on the fact that the criminal trials are a classic abuse of the court process are oppressive and vexatious and are not intended to obtain a conviction but are mounted for collateral purposes, that the current administration is tough on decade old grand corruption. The Respondents want the Applicant to be fighting the cases endlessly and just want to buy time yet they are themselves aware that on the premise of their own evidence, they have a weak prosecutorial case. It was contended that **Senator Amos Wako** who was then the Attorney General of the Republic of Kenya rendered a legal opinion that gave all the parties comfort and assurance that the contract is in compliance with the law despite having validated and gave the parties herein both the comfort and the green light to move forward. Reliance for this submission was placed on **George Joshua Okungu and Another vs. The Chief Magistrate Court and Others** (supra).

196. It is important at this juncture to appreciate the circumstances under which the holding cited by the applicants was pronounced. In that case, the persons lined up as prosecution witnesses were the very same persons who sat in the Board which made the decision that was the basis of the prosecution case. In fact they were part and parcel of the decision making process. In this case, from the opinion given and it has not been so asserted, one cannot conclude that the Attorney General was part of the decision making process. As I have held hereinabove, the opinion given seems, without being conclusive on the matter, to have been limited to the validity of the legal documents in question in terms of their authenticity and the authority of the authors thereof. With respect to **Musalia Mudavadi** and **Chris Murungaru**, apart from an allegation that they are the same ones that authorized the contracts in question there is no material played before the Court on the basis of which this Court can arrive at that decision. It is my view that the level of participation in the decision making process of the person sought to be called as a witness in a criminal case is a factor to be considered in determining whether or not the new role intended to be carried by that person would augur well for a fair trial to the accused. It ought to be noted that in **George Joshua Okungu and Another vs. the Chief Magistrate Court and Others** (supra), the Court did not give a blanket bar to the prosecution of the petitioners but simply barred the Respondents from conducting their prosecution in the manner contemplated. In that case, the persons lined up as witnesses could well have been co-accused in the said criminal case. Whereas this Court appreciates that an accomplice may in certain cases be “enticed” by the prosecution to be prosecution witnesses, it is my view and I so hold that where to do so is patently selective and discriminatory and has the effect of denying the accused of evidence favourable to him, the prosecutor ought to justify such action since the exercise of discretion where it has the effect of contravention of an accused’s rights ought to be explained on rationalised basis. The discretion given to the Respondent is required under 4 of the ***Office of the Director of Public Prosecutions Act*** to be guided *inter alia* by the principles of the need to serve the cause of justice, prevent abuse of the legal process and public interest and constitutionalism and some of the principles of constitutionalism under our Constitution are transparency and accountability.

197. I am however of the view and I so hold that the circumstances of this case are distinguishable from those that prevailed in **George Joshua Okungu and Another vs. the Chief Magistrate Court and Others** (supra) though I believe the Court arrived at the correct decision in the later. In other words I cannot say, based on the material placed before me in these proceedings, that the roles played by the persons whom the State intended to call as its witnesses in the subject transaction in ***Okungu’s Case*** are the same as the roles, if any, played by **Musalia Mudavadi** and **Chris Murungaru** in the instant case.

198. It was contended that the former Attorney General, Hon Amos Wako, had in the previous legal proceedings gave evidence to the effect that the “Anglo-leasing type” contracts were properly entered into. Accordingly, the applicants contended that the said former Attorney General cannot be expected to turn round and give evidence contrary to what he testified earlier. In such circumstances one may well

be justified in questioning the wisdom of parading the said former Attorney General as a witness in the instant criminal proceedings. If the said former Attorney General was the only witnesses in the said case, the prosecution may well be hard put to convince the Court that the instant criminal proceedings are no more than a cloak, mask or sham, a devise or stratagem for enabling the accused to obtain an acquittal and that the same are merely meant to hoodwink the public that some action is being undertaken to fight crime. However, in this case, it is not intended that the only witness lined up to testify in the said criminal case is the said former Attorney General. Accordingly, whereas his earlier testimony is bound to attract serious questions in cross-examination, I do not believe that on that basis alone the subject criminal proceedings ought to be terminated.

199. The applicants have, going by their allegations, put forward what appears to be a formidable defence to the criminal charges facing them. However, in these kinds of proceedings, it is not sufficient to do so since this is not the Tribunal where the merits of the applicants' case is to be determined. It would be upon the prosecution to show at the trial that the defences which the applicants have alluded to are not available to them. In these proceedings however, the rules are reversed and it is upon the applicants to show that there possibly cannot be any prosecutable case against them, a burden which is no doubt heavy as it has the result if determined in favour of the applicants, of barring the Respondent from executing its constitutional and statutory mandate. I associate myself with the decision of **Majanja, J** in HC. Pet. No. 153 of 2013; **Thuita Mwangi and 2 others vs. the Ethics and Anti-Corruption Commission,** that:

"While these arguments are forceful, attractive and cogent, I am afraid that the High Court at this point is not the right forum to tender the justifications concerning the subject transaction let alone test the nature and veracity of these allegations."

200. 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 preserved 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 cat-walk.

201. However it must also be taken into account that our criminal process entails safeguards which are meant to ensure that an accused person is afforded a fair trial and the trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of an appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words unless the applicants demonstrate that the circumstances of the impugned process render it impossible for the applicant to have a fair trial, the High Court ought not to interfere with the trial simply on the basis that the applicant's chances of being acquittal are high. In other words a judicial review court ought not to transform itself into a trial court and examine minutely whether or not the prosecution is merited.

202. Having considered the issues raised in this application, I am not satisfied based on the material before me that the applicants will not receive a fair trial before the trial court more so as no allegations are made against the Court.

203. Before I conclude this Judgement I wish to express my sincere gratitude to learned counsel who appeared in this matter for their research. If I have not referred to all the decisions cited, it is not out of lack of appreciation for their industry.

204. In the premises I find no merit in this application. As was held in **Kuria & 3 Others vs. Attorney General,** (supra):

“In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names.”

Order

205. In the result this Motion fails and is dismissed with costs.

206. It is so ordered.

Dated at Nairobi this 18th day of September, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ahmednasir, SC for the Applicants

Mr Mutuku and Mr Mule for the Respondent

Mr Murei for the Interested Party

Cc Patricia