

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Mwilu, DCJ & VP, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)

PETITION NO. 38 OF 2019

—BETWEEN—

**CYRUS SHAKHALANGA KHWA
JIRONGO.....PETITIONER/APPELLANT**

—AND—

SOY DEVELOPERS LTD.....1ST RESPONDENT
SAMMY BOIT ARAP KOGO.....2ND RESPONDENT
ANTOINETTE BOIT.....3RD RESPONDENT
ATTORNEY GENERAL.....4TH RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS.....5TH RESPONDENT
DIRECTOR OF CRIMINAL INVESTIGATIONS.....6TH RESPONDENT
**INSPECTOR GENERAL OF
NATIONAL POLICE SERVICE.....7TH RESPONDENT**
CHIEF MAGISTRATE’S COURT AT NAIROBI.....8TH RESPONDENT
**DEPOSIT PROTECTION FUND
[as LIQUIDATOR OF POST BANK CREDIT LTD].....9TH RESPONDENT**
ASL LIMITED.....10TH RESPONDENT

*(Being an appeal from the Judgment of the Court of Appeal at Nairobi
(Visram, Karanja & Otieno-Odek, JJA) in Civil Appeals No.43 and 48
of 2017 (consolidated) delivered on 19th January 2019)*

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] Before this Court is an appeal challenging the Judgment of the Court of Appeal (*Visram, Karanja & Otieno-Odek, JJA*) in *Civil Appeals No. 43 and 48 of 2017* (consolidated) which decision set aside the orders of *certiorari* and prohibition issued by the High Court (*Odunga J.*) in *Miscellaneous Application No. 78 of 2016*.

B. BACKGROUND

[2] Sometime in the year 1991, the Appellant entered into a conveyancing transaction with the 2nd and 3rd Respondents through Soy Development Ltd (SDL), for the sale of a parcel of land known as LR. No. 209/11151 (the suit property) for a total consideration of Kshs 20 Million. The suit property which is situate in Nairobi's Upperhill Area was registered in the name of SDL, the 1st Respondent herein. Pursuant to the sale agreement, the Appellant paid a deposit of Kshs 10 Million *via* a Bankers Cheque No. NA/AE 219907 drawn from Barclays Bank of Kenya. Upon payment of the aforesaid sum, the original company registration documents of the 1st Respondent Company and the title deed of the suit property were released to the Appellant.

[3] Subject to the release of the documents, the Appellant, on 13th December 1991, proceeded to charge the suit property to City Finance Bank Limited to secure a loan of Kshs 30 Million. Soon after the loan was settled and the suit property discharged, the Appellant, on 21st October 1992, again charged the suit property to Post Bank Credit Limited for a total sum of Kshs 50 Million. The Appellant contended that the charge was executed by himself and his partner, Davy Koech. The suit property was eventually discharged from all encumbrances and transferred to ASL Ltd, the 10th Respondent.

[4] A dispute arose when the 2nd and the 3rd Respondents, on or about the year 2015, alleged that the Appellant, while fraudulently holding himself as a director of SDL, executed a charge dated 25th September 1992 in favour of Post Bank Credit Ltd which he used to secure an overdraft facility for the Appellant's Company, *M/s Cyperr Projects International Ltd*. The 1st Respondent thus instituted a civil suit, ELC No. 132 of 2015; ***Soy Developers Limited v Deposit Protection Fund Board, ASL Ltd and Chief Land Registrar*** over alleged fraudulent transfer of the suit property.

[5] According to the 2nd and 3rd Respondents, the charge documents that they allege had been fraudulently executed by the Appellant were subsequently investigated and subjected to forensic examination. Upon conclusion of the investigations, the Forensic Examiner's report dated 1st April 2015, revealed preliminary findings which ascertained that the 1st Respondent's suit property had been fraudulently charged and that the 2nd and 3rd Respondent's signatures had been forged. Consequently, a complaint was lodged at the Directorate of Criminal Investigation (DCI) requesting them to further investigate the alleged fraud and thereafter, take appropriate action.

[6] Pursuant to the recommendation by the DCI, the Director of Public Prosecutions (DPP), on 9th February 2016, instituted criminal proceedings against the Appellant before the Chief Magistrates' Court at Nairobi being *Criminal Case No. 207 of 2016* where he was charged with the following offenses; *i. Obtaining execution of security by false pretenses contrary to Section 314 of the Penal Code; ii. Making a document without authority contrary to Section 357(a) of the Penal Code; iii. Uttering a false document contrary to Section 353 of the Penal Code; iv. Giving false information to a person employed in the public service contrary to Section 129 of the Penal Code.*

[7] Aggrieved by institution of the said charges, the Appellant moved the High Court in *Miscellaneous Application No. 78 of 2016(JR)* seeking the following

reliefs; i. an order of certiorari to quash the decision of the 1st Respondent made on 9th February 2016, to charge and institute criminal proceedings against the Appellant; ii. an order of certiorari to quash the charges contained in the charge sheet dated 9th February 2016; iii. an order of prohibition directed to the Respondents jointly and severally prohibiting any of them from carrying out and/or proceeding with the criminal case; iv. an order of prohibition directed to all the Respondents prohibiting them from reopening or purporting to reopen, bringing, instigating, instituting, carrying out any criminal proceedings in connection with the sale of the suit property.

[8] It was the Appellant's case before the High Court that the preferred charges were selective, partial, discriminatory, unreasonable, an abuse of the court process and constituted an illegal exercise of discretion. Furthermore, due to the 24-year delay in instituting the prosecution, the Appellant's fundamental rights, freedoms and legitimate expectations had been infringed.

[9] In analysing the evidence, the High Court (*G.V Odunga J.*) considered the issue of the delay and concluded that a mere lapse of time between the alleged commission of the offense and the criminal charges did not *ipso facto* justify the halting of the criminal process. However, the learned Judge placed the onus upon the Appellant to satisfy the court that in the circumstances of the case, a fair trial would not have been possible in the sense that it would be prejudicial to him as a result of the lapse of time.

[10] The Court also made a finding that a considerable period of time had passed and records in relation to the transaction had gone missing and had to be reconstructed. The learned Judge thus observed that the manner in which the 2nd and 3rd Respondents conducted themselves was scandalous, gluttonous, corrupt, fraudulent and an illegal scheme to unlawfully reclaim the suit property. He also faulted the 2nd and 3rd Respondents for failing and/or neglecting to utilize the

available remedies of enforcing any alleged wrongdoing in relation to the transaction.

[11] As regards the right to a fair hearing as envisaged in Article 50 of the Constitution, the High Court held that where the right is violated or threatened with violation, the Court, without necessarily pronouncing itself on the innocence or otherwise of the Applicant, is entitled to and has a duty to step in and does not have to wait until the Applicant's rights are actually violated before doing so. As such, the mere fact that the Applicant would be subjected to a criminal process where he will get an opportunity to defend himself is not a reason for allowing a clearly flawed, unlawful and unfair trial to run its course.

[12] Consequently, in allowing the Appellant's motion, the learned Judge in his Judgment dated 11th January 2017 granted the orders sought and expressed himself thus;

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

[13] Dissatisfied by the decision of the High Court, the 1st, 2nd and 3rd Respondents lodged an appeal at the Court of Appeal being *Civil Appeal No. 43 of 2017*. Contemporaneously, the 4th, 5th and 6th Respondents also appealed against the same decision *vide Civil Appeal No. 48 of 2017*. The two appeals were consolidated and heard simultaneously. The learned Judges of Appeal framed

three issues for determination as follows; *i. whether the learned Judge erred in issuing orders of certiorari and prohibition stopping indictment and prosecution of the 1st Respondent; ii. whether the learned Judge exceeded his jurisdiction; iii. whether the prosecution of the Appellant would deprive him of a fair trial.*

[14] By a Judgment delivered on 19th July 2019, the Court of Appeal (*Visram, Karanja & Otieno-Odek, JJA*) allowed the two appeals and set aside the Judgment of the High Court. Specifically, on the issue of delay in instituting criminal proceedings against the Appellant, the Judges of Appeal found that the delay was explained to their satisfaction. It was also their view, that no evidence was provided to demonstrate the prejudice that the Appellant would suffer if given an opportunity to put forth his defense in a criminal trial.

[15] On whether the learned Judge exceeded his jurisdiction, the Appellate Court observed that the learned Judge delved into extraneous matters not supported by the evidence on record by making adverse observations without the benefit of oral evidence and cross-examination of the parties. In this regard, the learned Judges held that the trial Judge erred in making conclusions grounded on disputed contents of documents submitted by the parties.

[16] In addressing the issue of whether the High Court interfered with the DPP'S constitutional mandate of initiating prosecutions, the Court of Appeal found that there was no evidence on record to prove bias on the part of the DPP or any ulterior or collateral purpose in the making of the decision to charge the Appellant. As such, it was their considered view that the trial Judge went against public interest in preventing the investigation and prosecution of allegations relating to fraudulent transfer and acquisition of the suit property.

[17] Aggrieved by the Appellate Court's finding, the Appellant has now filed the present Petition of Appeal dated 24th July 2019, anchored on the following provisions of the Constitution; Articles 10(1) & (2), 19(2) & (3), 22(1), 25(c), 27(1)

& (2), 47(1) & (2), 50(2)(a), 50(4), 157(11), 163(3)(b), 164(4)(a) and 249(1) & (2) of the Constitution. The Appellant seeks the following orders:

(a) The entire Judgment of the Court of Appeal sitting at Nairobi delivered on 19th July 2019 in Nairobi Civil Appeal No. 43 of 2017 and Civil Appeal No. 48 of 2018 be set aside and the Judgment and Orders of the High Court in Miscellaneous Application No. 78 of 2016 delivered by Honourable Mr. Justice Odunga on 11th January, 2017 be reaffirmed.

(b) The costs of this Appeal and costs of proceedings in the Court of Appeal and in the High Court be awarded to the Appellant herein in any event.

(c) Any other orders that this Court may deem fit in the circumstances.

[18] The appeal is premised on the following grounds; *That the learned Judges of the Court of Appeal erred;*

(a) In failing to appreciate that the Appellant had established a clear and/or intended infringement of his constitutional rights in breach of Articles 19(1) & (2), 20(1), 25(c), 27(2) and 50(2) of the Constitution;

(b) In failing to consider that the Appellant had entered into a simple and straightforward conveyancing transaction where he honoured his obligations as per the terms of the sale agreement;

(c) In failing to consider that the Respondents waited for more than two decades to institute criminal proceedings, which action was prejudicial to the Appellant;

(d) In failing to apply constitutional standards of justice, fairness, equity and/or dignity of the Appellant which requires this Court's interpretation and application of the Constitution.

[19] It is noteworthy that as at the time of filing this appeal, the Appellant concurrently filed an interlocutory application under certificate of urgency, being

Petition Application No. 22 of 2019, seeking a stay of execution of the Court of Appeal's decision, pending the hearing and determination of this appeal. On 19th September 2019, this Court rendered its ruling in favour of the Appellant and granted the stay of execution.

[20] Subsequent to the filing of the appeal, the Appellant also filed a Notice of Motion dated 19th December 2019 on 16th January 2020 being an application for leave to adduce fresh and new evidence. The application was premised on the main ground that the new and fresh evidence could not, with any due diligence, have been discovered or adduced earlier because the Appellant's own office file could not be traced. As such, the Appellant could only request the National Bank of Kenya to retrieve the same from its archives.

[21] By a Ruling delivered on 4th August 2020, this Court dismissed the Motion seeking to adduce additional and new evidence on the basis that the Appellant had failed to demonstrate that this new evidence could not have been obtained by him upon the exercise of due diligence during the hearing of the matter before the High Court.

C. PARTIES' SUBMISSIONS

(a) The Appellant

[22] The Appellant invokes this Court's jurisdiction pursuant to Articles 163(b)(1) and 163(4)(a) of the Constitution. At the hearing, Dr. Kenneth Kiplagat, Counsel for the Appellant, rehashed what is stated in the written submissions dated 23rd September 2020. He urges that the Appellant's right to a fair trial under Article 50 of the Constitution is threatened, and is thus entitled to appeal the decision of the Court of Appeal as of right, being a decision directly arising out of a constitutional determination of his rights. The Appellant further impugns the decision of the Court of Appeal to the effect that the learned Judges shifted the

burden to him to explain the 2nd and 3rd Respondents' inactivity and failure to raise any complaints during the 24-year delay period.

[23] The Appellant furthermore criticizes the learned Judges of Appeal for validating and sanitizing the 2nd and 3rd Respondent's fraudulent act of claiming that the title to the suit property was lost when in fact, they had willingly and voluntarily surrendered the same to the Appellant through their advocate, Mr. Ambrose Rachier. Accordingly, he submits that the decision to prosecute the Appellant was unreasonable, irrational and an afterthought which was intended to repair their case in *Civil Suit No. 132 of 2015* at the ELC Court in which the 2nd and 3rd Respondents had alleged that the title to the suit property was lost. The Appellant further submits that the Court of Appeal had disregarded the pleaded facts and documentary evidence that unequivocally established that the alleged criminal charge was contrived.

[24] The Appellant, in addition, concurs with the High Court's finding that the intended criminal prosecution was contrived with a clear intent to bully the Appellant in a manner prohibited by law. He relies on the decision of ***Republic v Chief Magistrates Court at Mombasa Ex Parte Ganijee & Another*** [2002] eKLR where the learned Judge of the High Court expressed himself thus: *"It seems to me, whichever way I look at it, that the interested party in this matter is more actuated by a desire to punish the applicant or 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."*

[25] The Appellant also disputes the Court of Appeal's finding that there would be no prejudice if the criminal trial were to be allowed to proceed. He contends that the missing files and documentary history from the Ministry of Lands and Registrar of Companies were material to his defense whereof absence of the

aforesaid documents had denied him the very tools necessary to prove his innocence, thus breaching his right to fair hearing.

[26] The Appellant has also faulted the reasoning of the Court of Appeal in arriving at the unsupported conclusion that bias was not established by the High Court. According to him, the statements that were made to Court and to the Police about the lost title were blatantly false. Furthermore, the 5th and 6th Respondents failed to take any steps to query, charge or otherwise interrogate the false utterances. Moreover, the Court of Appeal erred in holding that a party was still entitled to *viva voce* proof of the original documentation, notwithstanding the long period of delay and expiry of the relevant statutory period of limitation.

[27] In regards to Article 10 of the Constitution, the Appellant submits that the sole reason why the criminal process was activated was so as to save and salvage the 2nd Respondent's civil case which the Appellant has upended by joining the proceedings and scampering the 2nd Respondent's fraudulent claims.

[28] Lastly, on the issue of private rights of the accused *vis-a-vis* the rights of a complainant and the public interest, the Appellant points out that the 2nd Respondent has a myriad of cases against him which are all related, hence the public interest aspect in this matter is lacking as this is a personal contest between two parties who have previously dealt in the same transaction. It is on this basis that the Appellant urges that the Court of Appeal failed to properly consider the grave prejudice that he was now being exposed to, not only given the effluxion of time, but the convenient disappearance of original records as well. As such, the Appellant prays that this Court ought to set aside the decision of the Court of Appeal and reinstate the High Court's decision with costs.

(b) The Respondents'

i. 1st, 2nd and 3rd Respondents

[29] In opposing the appeal, the 1st, 2nd and 3rd Respondents on 16th January 2020 filed a Replying Affidavit dated 1st January 2020, sworn by Sammy Boit Kogo as a Director of the 1st Respondent Company. Thereafter they filed their written submissions dated 9th October 2020 in which they deal, firstly, with the issue of this Court's jurisdiction which, they submit, has been wrongly invoked by the Appellant. Reliance was placed on the case of **Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 others**, SC Petition No.10 of 2013 [2013] eKLR where this Court set the principles required to evaluate its jurisdictional standing.

[30] The 1st, 2nd and 3rd Respondents are also of the view that the role assumed by the High Court of evaluating evidence, can only be effectively discharged by the trial Court which shall have the chance to interrogate the reliability of the evidence tendered, the demeanor of the witnesses procured and the sustainability of the charges proffered. Therefore, they add, this Court cannot also assume the role of that Court.

[31] More specifically, they argue that Article 157(6) of the Constitution grants the DPP prosecution powers to institute criminal proceedings. Further to the above, Section 35 (b) of the National Police Service Act provides for the functions of the Directorate of Criminal Investigations to *inter alia* undertake investigations on serious crimes. In that context, they rely on the persuasive case of **Diana Kethi Kilonzo vs Independent Electoral & Boundaries Commission & 10 others** [2013] eKLR to emphasize that this power is continually donated and it is thus the intention of the Constitution that each constitutional organ, commission and body should be allowed to exercise their respective mandates without interference.

[32] Further, the 1st, 2nd and 3rd Respondents elucidate that, under Article 50 of the Constitution, an accused person has the right to be presumed innocent unless the contrary is proved; right to adduce and challenge evidence; right to challenge a decision of the Court through appellate mechanisms and that the Kenyan Criminal Justice System has inbuilt constitutional safeguards which ensure that the criminal process is not subjected to any form of abuse.

[33] Based on the foregoing, it is submitted that the office of the DPP and the Police ought to be accorded leeway to perform their functions without interference. In comparing with other jurisdictions, the 1st, 2nd and 3rd Respondents refer us to the **House of Lords Commentary on the Statutory and Constitutional Powers of Public Entities and Offices** on the need to accord offices sufficient ambience to exercise their duties as was also expressed in the case of ***Director of Public Prosecutions vs Humphreys*** [1976] 2 ALL ER 497 at 511.

[34] They furthermore contend that the Appellant did not provide sufficient evidence to demonstrate that the decision by the 5th Respondent was actuated by malice, ill-will or ulterior motives. The 1st, 2nd and 3rd Respondents in addition, maintain that the DCI carried out investigations based on their complaint to the DPP and later forwarded the findings to the DPP for further action. The High Court case of ***Republic vs Commissioner of Police & Another Ex Parte Michael Monari & Another*** [2012] eKLR is relied on to support the argument that the Police have a “... *duty to investigate on any complaint once a complaint is made...*”

[35] The 1st, 2nd and 3rd Respondents also take the view that the trial Magistrates’ Court ought to be afforded an opportunity to establish the nature and veracity of the charges preferred against the Appellant against any defense that might be tendered thereto by way of taking *viva voce* evidence.

[36] With regard to the issue of whether the intended prosecution of the Appellant will infringe his fundamental rights and freedoms, the 1st, 2nd and 3rd

Respondents assert that the inordinate delay in charging him did not violate his rights to a fair trial for the reasons that; first, there is no time limitation within which the DPP can prefer criminal charges and second, the 24-year delay period was satisfactorily explained. They also urge that the institution of the criminal proceedings will not be prejudicial to the Appellant because none of the documents are lost, none of the witnesses are dead or cannot be found or are of diminished memory.

[37] As such, they reiterate that delay in itself cannot suffice as a defense to stop a criminal prosecution; it is the effect of the delay that matters. To support this point, they rely on the authority of the Constitutional Court of South Africa in ***Frank Peter Zanner v The Director of Public Prosecution*** [2006] ZASCA 56 (RSA) where the Court concluded that an accused person must show definite and not speculative prejudice, and in what specific manner the missing witnesses would have aided the defense. (See – ***US v Trammel*** [1998] USCA10 55; 133 F 3d 1343).

[38] In his oral submissions, Mr. Ligunya, Counsel for the 1st, 2nd and 3rd Respondents clarified that the pending Civil Suit in *ELC No. 132 of 2015* is about recovery of the suit property from the 10th Respondent. On the issue of whether the Appellant is entitled to the reliefs sought, it is urged that the Appellant's conduct does not warrant this Court's exercise of discretion in his favour on the basis that he has deliberately exuded lack of respect for constitutional offices and institutions and; secondly, he has misrepresented to the Court that he recently came across additional evidence while this matter was still pending in this Court. It is thus their position that this Court ought to dismiss the appeal with costs for being an abuse of the court's process.

ii. 5th, 6th and 7th Respondents

[39] In their written submissions dated 7th October 2020 and filed on even date, the 5th, 6th and 7th Respondents identify five issues for determination; *jurisdiction*;

decision to charge; constitutional mandate of the DPP; when courts may prohibit or quash a prosecution; and delay in commencement of prosecution. On the issue of jurisdiction, they concede that *prima facie* this Court has jurisdiction to consider the appeal by dint of Article 163(4)(a) as the appeal is challenging the interpretation or application of some Articles of the Constitution including Articles 50 and 157.

[40] On the decision to charge the Appellant, they submit that the decision to charge him was made independently based on sufficiency of evidence and the underlying public interest in relation to prosecution of criminal offenses. They further submit that the Appellant has failed to demonstrate the DPP's abrogation (if any) of any provisions of the Constitution or any written law.

[41] The 5th, 6th and 7th Respondents reiterate that the office of the DPP is an independent prosecution authority established under Article 157 of the Constitution. Therefore, the decision to institute criminal proceedings by the DPP is discretionary and such exercise of power or functions is not subject to the direction or control by any authority by dint of Article 157 (10) of the Constitution and Section 6 of the Office of the Director of Public Prosecutions Act.

[42] On whether the Courts may prohibit or quash a prosecution, it is their assertion that the Court can only interfere with or interrogate the Office of the DPP where there exists a clear contravention of the Constitution. They cite authorities such as ***Paul Nganga Nyaga v Attorney General & 3 Others*** [2013] eKLR; ***Francis Anyango Juma v Director of Public Prosecutions & another*** [2012] eKLR; ***Kenya Commercial Bank Ltd & 2 Others V Commissioner Of Police and the Director Of Criminal Investigations Department & Another Interested Party Benjoh Amalgamated Ltd*** [2012], eKLR to emphasize that the Office of the DPP and the Police are independent and a Court would not ordinarily interfere in the exercise of their discretion within limits provided by law.

[43] The question posed then is, under what circumstances will the Court grant an order prohibiting the commencement or continuation of criminal proceedings? In answer, they refer us to the case of *George Joshua Okungu & Another v Chief Magistrates' Court Anti-Corruption Court at Nairobi & another* [2014] eKLR where the Court summarized the considerations that do not form the basis for a Court to interfere with the DPP's mandate.

D. ANALYSIS AND DETERMINATION

[44] Having considered the respective parties' pleadings and submissions in the instant Petition, this Court is of the considered view that the issues arising for determination are;

- (a) Whether there is a right of appeal to this Court following the decision of the Court of Appeal under Article 163(4)(a) of the Constitution;**
- (b) Whether the inordinate delay in instituting the intended prosecution of the appellant would infringe his rights and freedoms under Articles 19,20,27 and 50 of the Constitution;**
- (c) Whether the High Court exceeded its jurisdiction in interfering with the prosecutorial mandate of the Director of Public Prosecutions contrary to Article 157 of the Constitution; and**
- (d) What are the appropriate reliefs?**

We shall determine each issue separately as here below:

- (a) Whether there is a right of appeal to this Court following the decision of the Court of Appeal under Article 163(4)(a) of the Constitution**

[45] The Appellant argues that this Court has the jurisdiction to determine the appeal under Article 163(4)(a) of the Constitution, which allows appeals as a matter of right, in cases involving the interpretation or application of the Constitution. He maintains that the main issue for determination is whether his right to a fair trial was infringed due to, *inter alia*, the delay in instituting criminal proceedings. The 5th, 6th and 7th Respondents concur that this Court does have the jurisdiction to entertain the appeal as the Appellant is challenging the interpretation and application of **Articles 50 and 157** of the Constitution. The 1st, 2nd and 3rd Respondents however take a contrary view, arguing that though this Court has appellate jurisdiction, the Appellant has wrongly invoked it.

[46] Article 163(4)(a) states as follows on the appellate jurisdiction of this Court:

“(4) Appeals shall lie from the Court of Appeal to the Supreme Court –

(a) As of right in any case involving the interpretation or application of this Constitution; and

(b) In any other case in which the Supreme Court, or Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)

(5) A certification by the Court of Appeal under clause (4) (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned.”

[47] This Court has on many decisions, pronounced itself on its jurisdiction to determine appeals under the said Article 163(4)(a) of the Constitution. In the case of ***Lawrence Nduttu & 6000 Others v Kenya Breweries Ltd & Another*** SC Petition No. 3 of 2012; [2012] eKLR, a two-Judge Bench of this Court (*Tunoi and Wanjala SCJJ*) remarked that [paragraph 28];

“The appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163 (4) (a).”

[48] Further, in the case of ***Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others***, SC Petition No. 10 of 2013, this Court settled the applicable test on the jurisdiction of this Court in the handling of Article 163(4)(a) appeals by holding thus:

[37]: ***“In light of the foregoing, the test that remains, to evaluate the jurisdictional standing of this Court in handling this appeal, is whether the appeal raises a question of constitutional interpretation or application, and whether the same has been canvassed in the Superior Courts and has progressed through the normal appellate mechanism so as to reach this Court by way of an appeal, as contemplated under Article 163(4)(a) of the Constitution...”*** [Emphasis added].

[49] Therefore, for us to determine whether the present appeal is properly before us, we must confirm that issues of constitutional interpretation and application

presented before us have risen through the normal appellate process before reaching us.

[50] In that context, a perusal of the record and the determinations by the two Superior Courts below would lead to only one inescapable conclusion; the issues canvassed before them related to an interpretation and application of the Constitution with regards to the Appellant's main claim that he was being subjected to an unfair criminal trial contrary to Article 50 of the Constitution as well as alleged bias and abuse of power by the DPP contrary to the mandate conferred by Article 157 of the Constitution. Those issues are squarely before us, having been the subject of the determinations by the Superior Courts below and without saying more, and following our prior decisions cited above, we hold and find that we have been properly moved under Article 163(4)(a) to determine the present appeal.

(b) Whether the inordinate delay in instituting the intended prosecution of the appellant would infringe his rights and freedoms under Articles 19, 20, 27 and 50 of the Constitution

[51] The Appellant claims that the events surrounding the sale transaction of the suit property, which is the basis of indictment and institution of fraud charges against him took place 24 years before the criminal proceedings were initiated. The Appellant thus claims that his constitutional rights founded on the right to equality before the law and the right to equal protection and equal benefit of the law provided for under Article 27 (1) of the Constitution and the right to a fair trial provided for under Article 50 of the Constitution were violated.

i) Reason for the delay

[52] The 5th, 6th and 7th Respondents insist that the reason for the delay was that land registry file on the suit property was missing at the Lands registry hence the complaint against the Appellant was lodged only when the file was found in 2015.

They also insist that there is no limitation period for instituting criminal proceedings and maintain that the Appellant does not stand to suffer any prejudice if his prosecution proceeds.

[53] The 1st, 2nd and 3rd Respondents on their part deny that the Appellant's imminent prosecution violated his right to a fair trial arguing that Article 50 of the Constitution had inbuilt mechanisms to protect this right; that the delay was explained and the Appellant did not stand to be prejudiced as he had all the evidence to rebut the allegations and all the relevant witnesses were also available. They reiterate that delay is not a defence to stop any criminal prosecution.

[54] The High Court, while addressing the issue of delay, where a complainant lodges a complaint after a long period of time *vis-a-vis* its implication on an accused person's right to a fair hearing held as follows:

“140. Where a person against whom wrongdoing has been allegedly committed takes an inordinately long period of time before lodging his complaint with the police and as a result of which crucial evidence is lost and or witnesses become unavailable, to subject the applicant to a process of prosecution will amount to nothing but persecution. This is not to say that the applicant is in such circumstances innocent. It is simply a recognition that the criminal process must be conducted in an atmosphere of fairness to both the accused person and the complainant and where the right to a fair hearing has been jeopardised by the long delay in the commencement of the criminal process thus placing the applicant's rights into jeopardy, such a process must not be permitted to continue.”

[55] The Court of Appeal on its part, and to the contrary, found that the Respondents had submitted evidence that showed that all the relevant witnesses are alive and that the relevant documentation and the Land Registry file on the suit property are available. The Court thus found that the Appellant did not stand to be prejudiced if he is given an opportunity to defend himself and found the reason for delay issued by the Respondents in the institution of the criminal proceedings as satisfactory to them.

ii) Was the delay inordinate and was the appellant's right to a fair trial infringed?

[56] The question of delay with respect to the lodging of criminal prosecutions has been addressed by our Courts in several matters. The leading persuasive decisions on the subject are the High Court cases of ***Githunguri v Republic*** (1986) KLR 1 and ***Republic v Attorney General & Another Ex Parte Ng'eny*** (2001) KLR 612 which both Superior Courts relied on.

[57] In ***Githunguri v Republic*** (supra), the Court stated as follows:

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

We are of the opinion that to charge the applicant four years after it was decided by the Attorney-General of the day not to prosecute, and thereafter also by neither of the two successors in office, it not being claimed that any fresh evidence has become available thereafter, it can in no way

be said that the hearing of the case by the Court will be within a reasonable time as required by section 77(1). The delay is so inordinate as to make the non-action for four years inexcusable in particular because this was not a case of no significance, and the file of the case must always have been available in the Chambers of the Attorney-General. It was a case which had received notable publicity, and the matter was considered important enough to be raised in the National Assembly.

We are of the opinion that two indefeasible reasons make it imperative that this application must succeed. First as a consequence of what has transpired and also being led to believe that there would be no prosecution the applicant may well have destroyed or lost the evidence in his favour. Secondly, in the absence of any fresh evidence, the right to change the decision to prosecute has been lost in this case, the applicant having been publicly informed that he will not be prosecuted and property restored to him. It is for these reasons that the applicant will not receive a square deal as explained and envisaged in section 77(1) of the Constitution. This prosecution will therefore be an abuse of the process of the Court, oppressive and vexatious.”

[58] Similarly in the case of *Republic v Attorney General & Another Ex Parte Ngeny* (2001) KLR 612, the Court addressed this question and stated that:

“In the case before us, the delay was nine years. No attempt has been made to explain it. The subject matter of the charges against the Applicant is a colossal sum involving an institution that was strategic to the Government when

the losses were occasioned; so why did the State not mount a prosecution immediately? Nine years is too long a delay. We cannot think anything else but that the criminal prosecution against the Applicant was motivated by some ulterior motive. It is not a fair prosecution. It was mounted quite late: Nine years after the Applicant had vacated the relevant public office alleged to have been abused. We were told, and this was not challenged, that having been out of office for that long, he does not have in his possession material to prepare his defence. This we believe. We are of the view that to allow delayed prosecutions is akin to putting a noose around the necks of individuals and then saying to them: 'Go, you may go. We shall decide your fate as and when we wish.' This is to keep the individual in fear. This does not accord with constitutional guarantees of individual rights and freedoms and is nothing more than an abuse of the process of the Court”.

[59] The argument put forth by the Appellant is that his right to be tried within a reasonable period of time has been infringed in view of the fact that it has taken 24 years for him to be prosecuted. The Appellant cites the various hurdles to the impending trial that will result in him not having a fair trial; the missing Land Registry file as well as the loss of vital documentary evidence.

[60] The Appellant also contends that as a result of the long delay before the charges were instituted, his defense has been compromised since the documents involved in the company registration and transfer of shares, which allowed for the registration of the charges against the 1st Respondent company as regards the suit property, including the company forms required for effecting change at the Registry of Companies, are missing.

[61] The Appellant thus argues that he stands to suffer prejudice due to the long period of time that has lapsed since the events surrounding the sale of the suit property, occurred between 1991 and 1993.

[62] In addressing this issue, we note that in the case of ***George Joshua Okungu & Another v The Chief Magistrate’s Court Anti-Corruption Court at Nairobi & Another*** (*supra*), the High Court persuasively held that:

“.....it is not mere delay in preferring the charges that would warrant the halting of the criminal proceedings. Rather, it is the effect of the delay that determines whether or not the proceedings are to be halted. In this case, there is no allegation made by the Petitioners to the effect that the delay has adversely affected their ability to defend themselves. In other words, the Petitioners have to show that the delay has contravened their legitimate expectations to fair trial.”

[63] In that regard, the right to fair hearing is provided under Article 50(1) of the Constitution which provides:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.” [Emphasis supplied]

[64] The rights of an accused person are then set out in Article 50(2) of the Constitution which specifically provides that an accused person must be accorded a fair trial without delay. The said Article provides that:

“(2) Every accused person has the right to a fair trial which includes the right-

(e)to have the trial begin and conclude without unreasonable delay.”

[65] This Court in the case of ***Hon. Christopher Odhiambo Karan v David Ouma Ocheing & 2 Others*** [2018] SC Petition No. 36 of 2019 had an opportunity to discuss the significance, distinctive meaning, scope and implication of the right to a fair trial and stated that ***“It is therefore settled law that all persons who come to any Court are entitled to a fair hearing whether the matter instituted is criminal or civil in nature. In this context, the drafters of the Constitution 2010 in Article 25(c) placed a bar on limitation of the right to a fair trial, in civil and criminal matters.”***

[66] It is in the above regard trite that there is no limitation of time to institute and prosecute criminal offences but as stated in ***Githunguri***, where the delay has the effect of denying a suspect the legal tools to mount a credible defence, then the High Court is properly mandated by the Constitution to step in and stop the intended prosecution.

[67] Similarly, where the delay was occasioned by deliberate inaction on the part of a complainant with the intent of getting at a suspect to force the suspect's hand in say, a different transaction between them at a later date or even use the complaint to force settlement in ongoing civil proceedings, then, again the High Court, as a Court of first instance, must step in because the intended prosecution is tainted with malice and not the otherwise unassailable intent to furnish criminal wrong doing, promptly.

[68] Furthermore, both Articles 49(1)(a)(ii) and 50(1) and (2)(e) of the Constitution expect that in resolution of disputes, fairness must necessarily include the promptness of action and the inhibition against unreasonable delay. What is reasonable, it is now settled, includes both the reason for delay and the period of delay.

[69] In the present case, all the evidence before us points to the fact that the documentation necessary to prove the alleged fraud may no longer be available and we agree with the learned Judge of the High Court that, where both parties have admitted that the same issues are also pending resolution in another Court, and that the issue of lost documentation remains unresolved, it would be most unfair to subject the Appellant to a criminal trial, 24 years after the impugned transaction.

[70] What of the fact that it is admitted that the 2nd and 3rd Respondents indeed received part purchase price for purchase of the suit property? Why would it take them 24 years to decide that they were now entitled to the balance thereof as well as return of the title documents? Our position is that such a delay and use of the criminal process to force the hand of the Appellant fatally taints the fairness of the resultant prosecution.

[71] Lastly, in instituting the prosecution, the ODPP, without in any way taking away the constitutional mandate to prosecute crimes, ought always to act judiciously and not act in perpetuation of an unfair and malicious criminal complaint. In doing so, that office must always be guided by the principle that the right to a fair trial cannot be limited thus raising the bar in the determination of the question whether to prosecute or not.

[72] It is therefore our finding, and in agreement with the learned Judge of the High Court that, the prosecution of the Appellant is in breach of his right to a fair trial as protected by Article 25(c) as read with Article 50 of the Constitution and we have stated why.

iii) Are the proceedings more of a criminal or civil nature?

[73] The above question is pertinent and must be addressed as a corollary to the issues we have determined above. In that context, the Appellant claims that he purchased lawfully all shares in the 1st Respondent's company and eventually

became a director and shareholder. The 2nd and 3rd Respondents on the other hand maintain that there has never been any change of the directorship or shareholding of the 1st Respondent, claiming instead that they have always been its sole directors and shareholders. It is evident therefore that the main issue in contention involves the company registration forms of the 1st Respondent company as well as the alleged change of its ownership.

[74] The question whether a complainant can pursue both civil and criminal proceedings at the same time is not a new one in our realm. In the present case, it is admitted that the 2nd and 3rd Respondents have instituted *Civil suit No.132 of 2015* at the ELC and one of the claims made therein is that title documents for the suit property have been lost.

[75] The Appellant has however argued that the 2nd and 3rd Respondents then instituted his prosecution on alleged fraud charges and unlawful use of the title documents to obtain credit whilst also claiming that the same documents had been lost thus pointing to malice in his prosecution. What is the law in such a situation?

[76] The Court of Appeal persuasively stated in the case of ***Commissioner of Police & the Director of Criminal Investigation Department & another v Kenya Commercial Bank & 4 others*** [2013] eKLR that:

“Clearly, the company and the guarantor through their directors were employing criminal process to assist them in resolving their civil dispute. 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 that 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 the administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court. This is a case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations. We have no doubt in our minds that the belated involvement of the police in this purely civil dispute is an abuse of their power. The police should direct their energies and resources to prevention of crime which we all know is rampant in this country and is about to get out of control.”

[77] We respectfully agree and adopt this position in this case but must add that where it is obvious to a Court, as it is to us and was to the learned Judge of the High Court, that a prosecution is being mounted to aid proof of matters before a civil Court or where the hand of a suspect is being forced by the sword of criminal proceedings to compromise pending civil proceedings, then Section 193A of the Criminal Procedure Code cannot be invoked to aid that unlawful course of action. Criminal proceedings, whether accompanied by civil proceedings or not, cannot and should never be used in the manner that the 2nd and 3rd Respondents have done. It is indeed advisable for parties to pursue civil proceedings initially and with firm findings by the civil Court on any alleged fraud, proceed to institute criminal proceedings to bring any culprit to book. In addition, we shall, later in

this Judgment, express ourselves on the criteria to be used by the High Court before terminating any criminal prosecution.

[78] Having so said, we have already expressed ourselves on the right to fair trial and we must now make a finding that, in the unique circumstances of the present case, the institution of civil proceedings, simultaneously with criminal proceedings, claiming on one hand that title documents had been lost, while in another, claiming that they were in the possession of the Appellant and his banks or a third party, ASL Ltd, the 10th Respondent, is indeed an expression of mischief and dishonesty. This or another Court should never countenance such conduct for it brings the entire criminal justice into disrepute.

c) Whether the High Court exceeded its jurisdiction in interfering with the prosecutorial mandate of the DPP contrary to the Constitution

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

[80] The 5th, 6th and 7th Respondents on their part, maintain the position that the decision to commence investigations against the Appellant was consistent with the provisions of Article 157 of the Constitution and Section 6 of the Office of Director

of Public Prosecutions Act. They also submitted that the decision to institute criminal proceedings by the DPP is discretionary and that such exercise of power is not subject to the direction or control by any authority as provided for under Article 157(10) of the Constitution.

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

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

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

Article 157(4) provides that:

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

However, **Article 157(11)** stipulates that:

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

[82] Although the DPP is thus not bound by any directions, control or recommendations made by any institution or body, being an independent public

office, where it is shown that the expectations of Article 157(11) have not been met, then the High Court under Article 165(3)(d)(ii) can properly interrogate any question arising therefrom and make appropriate orders.

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

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

By the same token and in terms of Article 157 (11) of the Constitution, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these

functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution. See *Githunguri v Republic* [1985] LLR 3090.

It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See *Ndarua v. R.*[2002] 1EA 205. See also *Kuria & 3 Others V. Attorney General* [2002] 2KLR.” (Emphasis supplied)

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

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

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

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

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

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

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

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

E. CONCLUSION

[88] Having held as above, we are of the opinion that the Court of Appeal erred in setting aside the decision of the learned Judge of the High Court and we have affirmed the latter decision in all its facets. What of costs? Costs

follow the event and so the Appellant shall have the costs in this Court, the Court of Appeal and the High Court as against the 1st, 2nd and 3rd respondents only.

F. DISPOSITION

[89] The final orders to be made are as follows:

(a) The entire Judgment of the Court of Appeal sitting at Nairobi delivered on 19th July 2019 in Nairobi Civil Appeal No. 43 of 2017 and Civil Appeal No. 48 of 2018 be set aside and the judgment and orders of the High Court in Miscellaneous Application No. 78 of 2016 delivered by Honourable Mr. Justice Odunga on 11th January, 2017 be reaffirmed.

(b) The costs of this Appeal and costs of proceedings in this Court, the Court of Appeal and in the High Court be awarded to the Appellant herein in any event as against the 1st, 2nd and 3rd Respondents only.

[90] It is so ordered.

DATED and DELIVERED AT NAIROBI this 16th day of July, 2021.

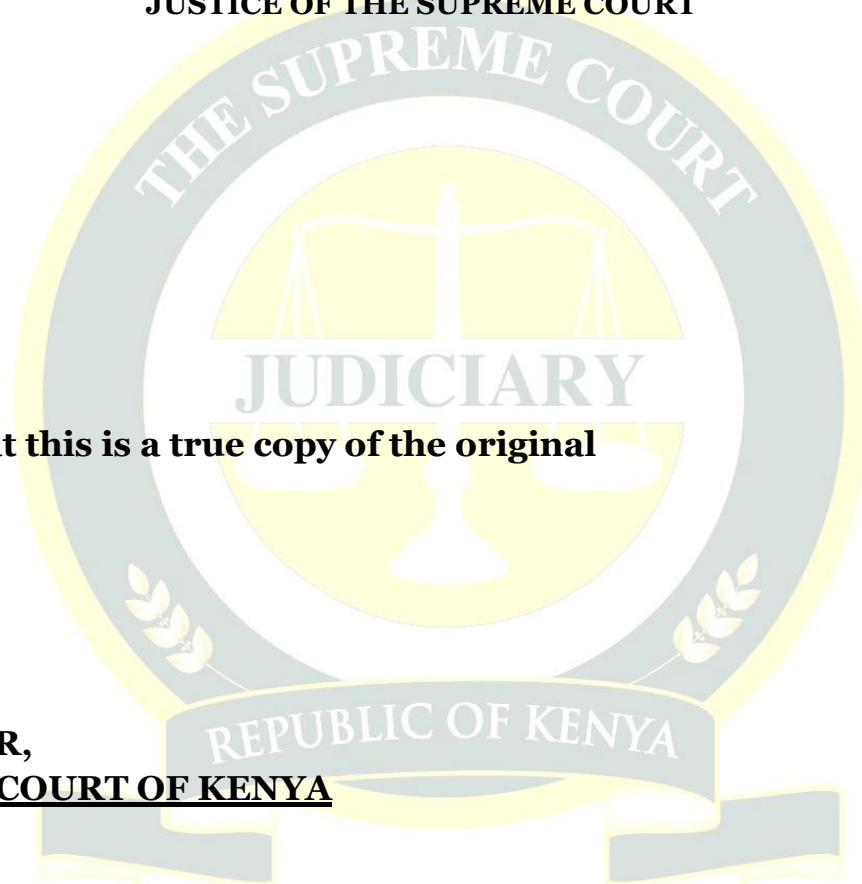
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P. M. MWILU
DEPUTY CHIEF JUSTICE &
VICE PRESIDENT OF THE SUPREME COURT

.....
M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

S. C. WANJALA
JUSTICE OF THE SUPREME COURT

NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT



I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA