REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

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

PETITION NO. 18 OF 2015

–BETWEEN–

PETER ODIWUOR NGOGE T/A
O.P. NGOGE & ASSOCIATES .... APPELLANT

–AND–

JOSEPHINE AKOTH ONYANGO .... 1ST RESPONDENT

SIMON OTIENO ONYANGO .... 2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS ....3RD RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS
DEPARTMENT ....4TH RESPONDENT

SEHIT INVESTMENTS LIMITED .... 5TH RESPONDENT

KENYA COMMERCIAL BANK LTD ....6TH RESPONDENT

(Being an appeal from the Judgment of the Court of Appeal delivered at Nairobi on the 2nd October 2015 in Civil Appeal No. 51 of 2014)

JUDGMENT OF THE COURT

I. INTRODUCTION

[1] This appeal contests the decision of the Court of Appeal delivered at Nairobi on the 2nd October 2015, in *Civil Appeal No. 51 of 2014,* which was filed on 23rd October, 2015, seeking Orders that:

(a) *the Judgment of the Court of Appeal dated 2nd October 2015 be set aside, and in its place the appeal herein be allowed as prayed in the memorandum of appeal dated 25th March 2014, filed in the Court of Appeal by the appellant herein;*

(b) *further or alternatively, the Court be pleased to recommend criminal prosecution of the 1st and 6th respondents forthwith, for uttering and registering the fraudulent transfer instrument dated 22nd December 2003, which instrument conveyed title in Land Reference No. 1160/784 to the 1st respondent, without the knowledge or consent of the appellant, thereby exposing the appellant to risks of prosecution and disbarment, and of damaged reputation, apart from circumventing payment of legal fees to the appellant-advocate;*

(c) *the costs of this appeal be borne by the 1st, 2nd and 6th respondents, in any event.*

[2] The petition of appeal was supported by an affidavit sworn by the petitioner, Mr. Peter O. Ngoge, on 12th October, 2015. The essence of the matter is that the petitioner is aggrieved by the decision of the High Court (*Majanja, J)* in *Constitutional Petition No. 471 of 2013*, for 'curtailing' his fundamental human rights, as provided for in Articles 10, 25, 27 and 48 of the Constitution. He is aggrieved by the decision to merge two matters: *HCCC No. 48 of 2013*, and *Nairobi HCCC No. 705 of 2009,* and avers that due to the 'merger' of the cases, the findings of fact (together with the analysis and commentaries by the learned Judge on the question of land-title transfer) substantively exonerated the 1st, 2nd and 6th respondents from blame and liability under both criminal and civil law – thereby, technically, dismissing and prejudicing *Nairobi HCCC No. 48 of 2013*, which suit has yet to be heard and determined on merits.

[3] The petitioner is also aggrieved by the Court of Appeal decision which adopted 'verbatim' the Judgment of the High Court, and avers that, by agreeing with the High Court, the Court of Appeal has also technically dismissed and prejudiced Civil Case, *Nairobi HCCC No. 48 of 2013* – thereby shielding the defendants from accountability under both criminal and civil law. This Court has been called upon to intervene, in that regard.

II. BACKGROUND

[4] The background of the case is that in the year 2002, by an agreement dated 12^{th} December of that year, Josephine Akoth Onyango, the 1^{st} respondent herein, entered into a contract to buy from the 5^{th} respondent, Sehit Investment Ltd., a property known as LR No. 1160/784, at a price of Ksh.18 million. The agreement for sale was drawn by the petitioner, Mr. Peter Odiwuor Ngoge, an advocate of the High Court, who at the time was acting for *both* the purchaser and the seller. The transaction was duly completed, and the suit property transferred to the 1^{st} respondent, after payment of Ksh.9.5 million. The balance of Kshs.8.5 million was to be obtained from Kenya Commercial Bank, the 6^{th} respondent, on the strength of a charge to secure repayment – this being registered in the Bank's favour, against the title. According to the 1^{st} respondent, the 5^{th} respondent received the balance of Ksh.8.5 million from the 6^{th} respondent (the Bank); but this is denied by the petitioners, and is the genesis of the dispute between the parties.

[5] Be that as it may, in the year 2009, the 5^{th} respondent (as plaintiff) instituted *HCCC No. 705 of 2009* in the High Court at Milimani Courts, against the 1^{st} and

2nd respondents who were named as the 1st and 2nd defendants, besides a subsidiary of the 6th respondent, Savings and Loan Kenya Ltd. (named as 3rd defendant) – on the basis that the suit property had been charged to it, to secure the repayment of Ksh.8.5 million. The Attorney-General and the Director of Public Prosecutions were named as the 4th and 5th defendants, respectively. The 5th respondent as plaintiff, averred in that suit that the 1st respondent was unable to complete the purchase of the suit property, even though the property had been transferred to her. The 5th respondent's claims, therefore, were: a declaration that the transfer of the suit property to the 1st respondent was null and void, for want of consideration, misrepresentation, and fraud on the part of the 1st and 2nd respondents; cancellation and revocation of the transfer; discharge of the charge; and re-conveyance of the suit property to the 5th respondent's name. The 1st and 2nd respondents denied those allegations, and in particular the attribution of fraud. They defended the transaction as genuine, and prayed for vacant possession of the suit property.

[6] Meanwhile, the 5th respondent lodged a complaint with the police, that the 1st respondent (Josephine Akoth Onyango) had forged the transfer and charge relating to the suit property. The 1st respondent was thereafter arrested and charged before the Chief Magistrates' Court at Kibera, in *Criminal Case No. 6531 of 2012*; and the 2nd respondent was subsequently arrested and charged with conspiracy in *Criminal Case No. 2178 of 2013* – the two cases being subsequently consolidated. The charges against the two were for conspiracy to defraud, forgery, making false documents, and uttering false documents – and all relating to the transfer of the suit property from the name of Sehit Investments Ltd (5th respondent) to that of Josephine Akoth Onyango (1st respondent).

[7] In the same year, 2013, the petitioner herein filed HCCC *No. 48 of 2013* in the High Court at Milimani, Nairobi against the 1st and 6th respondents, M/s. Walker

Kontos Advocates, and the Attorney-General, as 1st, 2nd, 3rd and 4th defendants, respectively. The petitioner averred in that suit that he did not witness the payment by the 1st respondent to Sehit Investments Ltd., and that the transfer of the property was fraudulent. He sought cancellation of the registration of the 1st respondent as proprietor of the suit property, and of all the entries relating to the registration of the transfer to the 1st respondent.

[8] Meanwhile, the 1st and 2nd respondents, believing that the criminal charges against them were ill-motivated and an abuse of Court process, supported Sehit Investments Ltd (5th respondent) to regain the suit property, which it had allegedly sold to the 1st respondent. The 1st and 2nd respondents thus filed *Constitutional Petition No. 471 of 2013* in the High Court at Nairobi, to stop the Director of Public Prosecutions and the Director of the Criminal Investigations Department from prosecuting them in the Chief Magistrates Court *Criminal Cases Nos. 6531/2012* and *2178/2013.*

[9] The two suitors contended that the issues in the criminal cases were "intricately the subject of the Suit", HCCC No. 705 of 2009 pending in the High Court, in which they, and Savings & Loan Kenya Ltd., and the Attorney-General were the defendants, while Sehit Investments Ltd. was the plaintiff. Sehit Investments Ltd., Peter Ngoge, and Kenya Commercial Bank Ltd. were 1st, 2nd and 3rd interested parties in that (constitutional) matter. In a Judgment dated 10th March, 2014, the High Court (*Majanja, J)* held that the continuation of the criminal proceedings would be an abuse of the process of the Court; and issued an injunction stopping prosecution, until the hearing and determination of *HCCC No. 705 of 2009.*

[10] The learned Judge, in that case, made the following specific Orders:

"(i) an injunction be, and is hereby issued restraining the respondents either jointly or severally, or through any person claiming their authority from prosecuting the petitioners in Kibera Criminal Case No. 6531 of 2012 and 2178 of 2013, or a consolidation thereof, or in any matter concerning the transfer of all that piece or parcel of land known as Land Reference Number 1160/784 to the 1st petitioner, until the conclusion of High Court Civil Case No. 705 of 2009, and any review or appeal therefrom, or upon further directions from the Court;

(i) there shall be no Order as to costs."

[11] It appears that neither the 5th respondent, who had lodged the criminal complaint, nor the 3rd respondent (DPP), who was prohibited from continuing the prosecution of the 1st and 2nd respondents, was aggrieved by the Judgment, and did not lodge an appeal therefrom. Instead, it is the petitioner herein who felt dissatisfied with the Judgment of the High Court, and lodged an appeal at the Appellate Court. He, therefore, filed a notice of Appeal, followed by the appeal itself in *Civil Appeal No. 51 of 2014,* and sought the setting aside of the High Court Judgment; he urged that the criminal proceedings against the 1st and 2nd respondents be allowed to continue; he wanted the "fraudulent transfer instrument" of the suit property dated 22nd December, 2003 to be set aside *ex debito justitiae*; and he sought general and exemplary damages, factored on the basis of violations of fundamental rights of the Constitution. The main thrust of his grounds of appeal was that the learned Judge of the High Court had erred in his decision, having insulated the 1st and 2nd respondents from criminal prosecution, to the detriment of the petitioner, as regards his rights under Articles 25, 27 and 48 of the Constitution.

[12] The Appellate Court identified one essential point for determination: *"was the learned Judge correct in his decision?"* The Court, in its Judgement of 2^{nd} October, 2015, upheld the decision of the High Court, and dismissed the appeal with costs to the 1^{st}, 2^{nd} and 6^{th} respondents. The Appellate Court's decision has aggrieved the petitioner, and hence this appeal.

III. GROUNDS OF OBJECTION

[13] In response to the petition, the 1^{st} and 2^{nd} respondents filed grounds of objection dated 3^{rd} November, 2015, and contested the petition on the following grounds:

(a) *that the petitioner's grounds of appeal consist of factual complaints which fall outside the jurisdiction of this Court; and that no second appeal is to arise on the ground of erroneous finding of fact, as the findings of a first appellate Court upon questions of fact are final;*

(b) *that the grounds of appeal as couched, fall short of stating in what way the Appellate Court Judges had adopted an incorrect approach to the questions of law involved;*

(c) *that the question as to whether evidence for, or against a given party has been properly admitted by both the trial Court and the 1^{st} appellate Court, is a question of fact, falling outside the jurisdiction of a Court sitting on a 2^{nd} appeal;*

(d) *that the petition of appeal is frivolous and vexatious, as it merely expresses dissatisfaction with the Judgment of the*

1st appellate Court, and as such, is aimed at occasioning frustration to the 1st and 2nd respondents;

(e) *that the petitioner lacks an arguable appeal on the merits, and the petition should, therefore, be struck out.*

It will be apparent, shortly, why we begin from the foregoing grounds of opposition.

IV. SUBMISSIONS BY THE PARTIES

(a) 1st and 2nd Respondents

[14] Through learned counsel, Mr. Nyawara, the 1st and 2nd respondents submitted that this Court has no jurisdiction to entertain the petition. Counsel submitted that the petition, as couched, alleges certain infringements to the constitutional rights of fair hearing, and also claims a denial of access to justice. However, counsel contended that there cannot be grounds for a petition, since every litigant who goes to Court expects fair hearing, and he runs no risk of being denied access to justice; and that such allegations are not a sufficient basis for moving this Court on appeal, without leave.

[15] The two respondents, in their skeleton arguments dated 15th March, 2016, cited the case of ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Limited 7 Another*** [2012] eKLR, submitting that mere allegation of violation of a right under the Constitution does not bring the intended appeal within the purview of Article 163(4)(a) of the Constitution.

[16] It was also urged that the petitioner, Mr. Ngoge, was merely an interested party in the case before the High Court, and that no adverse Orders had been made against him, as the Orders were directed at the Office of the DPP, who did not appeal from that decision; Mr. Ngoge, however, appealed to the Court of Appeal, which dismissed his appeal, on the ground that his cause lacked gravamen.

[17] Counsel urged that the issues of fact raised in the main petition had been conclusively determined by the Court of Appeal. He submitted that an appeal of the nature of the petitioner's, must raise issues touching on the interpretation and application Constitution – and that such a test was not satisfied by the petition.

(b) 6th Respondent

[18] The 6th respondent, Kenya Commercial Bank Limited, through learned counsel Mr. Ouma, supported the 1st and 2nd respondents' objection to jurisdiction. In his submissions dated 9th May, 2016, counsel cited this Court's caselaw, starting from ***Samuel Kamau Macharia & Another v. Kenya Commercial Bank & 2 Others*** [2012] eKLR, and urged that this Court should not create for itself jurisdiction by way of judicial craft. He submitted further, that the petitioner was inviting this Court to assume jurisdiction beyond what is prescribed by law – the Constitution, and the Supreme Court Act. He also submitted that the alleged violation of fundamental rights, had no place; and that the two superior Courts, the High Court and the Court of Appeal, had ably interpreted, determined and resolved all issues of law touching on the subject matter, such that no further input of this Court would be required.

(c) Petitioner in Response

[19] The petitioner, Mr. Ngoge, contested the preliminary objection, submitting that, from the submissions of the 1st and 2nd respondents' counsel, no true preliminary objection had been raised, and that it was only a response to the grounds of the appeal.

[20] Mr. Ngoge urged that the High Court had proceeded under Article 22 of the Constitution: to uphold the fundamental rights and freedoms of his clients – thus bringing the matter within the purview of constitutional interpretation and application. He submitted, therefore, that the decisions of the High Court (*Majanja, J.)* and the Court of Appeal had aggrieved him, and so he had a clear right of appeal under Article 163(4)(a) of the Constitution.

[21] Learned counsel and petitioner, Mr. Ngoge submitted in addition, that this Court does indeed have jurisdiction, and that if allowed to prosecute his appeal, he would be able to show that the High Court had failed to give effect to the sanctified rules of natural justice. He further urged that this Court has original jurisdiction to countermand such human rights violations as had been overlooked by the Court of Appeal, and maintained that the Court of Appeal had contravened his rights, contrary to rules of natural justice, and that the High Court denied him fair trial, and access to justice. He urged, therefore, that the Court should dismiss the preliminary objection, as what had been raised by the 1st and 2nd respondents were issues of fact, rather than of law as is expected in any proper preliminary objection.

(d) 3rd and 4th Respondents

[22] The petitioner was supported by the 3rd and 4th respondents, in contesting the preliminary objection. Through learned counsel Mr. Ashimosi, they submitted that this Court has jurisdiction to hear and determine this matter. Counsel in that regard, referred to the original proceedings in the High Court, urging that, that Court had been asked to exercise its power under Articles 23(1) and 165 of the Constitution; and that the Court considered whether the DPP had exercised his powers under Article 157(11) of the Constitution, and had come to the conclusion that the proceedings as lodged, were an abuse of Court process. He argued, therefore, that this was a case entailing the interpretation of various constitutional provisions, and that, on that account, this Court has jurisdiction.

(e) 1st and 2nd Respondents, in Response

[23] In reply to the responses to the preliminary objection, learned counsel Mr. Nyawara, submitted that the mere fact of reliance upon a provision of the Constitution, does not warrant the right of appeal to the Supreme Court. He thus urged that, no question of interpretation of the Constitution had been brought before this Court, and that the Constitution was merely referred to: that Article 157(11), as relates to the DPP, had come in on bare reference, rather than as a subject of *constitutional interpretation.*

V. ISSUE FOR DETERMINATION

[24] Having considered the petition before us, and taking into account the submissions summarized above, we deem it proper to address a single question, namely,

> *whether this Court is clothed with the jurisdiction to hear and determine the appeal herein, by virtue of Article 163(4)(a) of the Constitution.*

VI. ANAYSIS

[25] The question of this Court's exercise of its appellate jurisdiction under Article 163(4)(a) of the Constitution, has been considered already, in a number of cases.

[26] In the case of ***Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others*** [2012] eKLR, this Court signalled that the exercise of its remit, would have due regard to the jurisdictions of the other Courts in the judicial hierarchy, and, until a matter clearly rises through the appellate rank-setting, the Supreme Court will not assume jurisdiction. This is the essence of paragraph [30] in the ***Ngoge*** case:

> ***"In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court."***

[27] On the foregoing principle, it behoves us to consider the question that came up before the High Court, proceeding to the Court of Appeal, that is cardinal, and of real moment, such that it now merits a place before the Supreme Court.

[28] The Court returned to this very issue in the ***Lawrence Nduttu*** case, when it endorsed its earlier jurisprudence in ***Erad Suppliers & General Contractors Limited v. National Cereals & Produce Board*** [2012] eKLR, thus (para.25):

> ***"What then is a case involving the interpretation or application of the Constitution? Does the mere allegation by an intending appellant that a question of constitutional interpretation or application is involved, automatically, without more, bring an appeal within the ambit of Article***

163 (4) (a) of the Constitution? A two Judge Bench of this Court had occasion to deal with this issue in the case of *Erad Suppliers & General Contractors Limited v. National Cereals & Produce Board, SC Petition No. 5 of 2012*. ***In disposing of this issue among others, the Court opined as follows and we quote:***

> *'In our opinion, a question involving the interpretation or application of the Constitution that is integrally linked to the main cause in a superior Court of first instance is to be resolved at that forum in the first place, before an appeal can be entertained. Where, before such a Court, parties raise a question of interpretation or application of the Constitution that has only a limited bearing on the merits of the main cause, the Court may decline to determine the secondary claim if in its opinion, this will distract its judicious determination of the main cause; and a collateral cause thus declined, generally falls outside the jurisdiction of the Supreme Court'."*

[29] The Court thus continued (paras. 27-28):

> "***This Article [164(4)(a)] must be seen to be laying down the principle that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court. The only other instance when an appeal may lie to the Supreme Court is one contemplated under Article 163 (4) (b) of the Constitution.*** *Towards, this end, it is not the mere*

allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application.

" 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 [adopted] 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)."***

[30] In the case ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*** [2014] eKLR [Munya 1], the Court rationalized the import of the ***Ngoge*** case in the following terms (paras. 68, 69):

> ***"In the case of*** *Peter Oduor Ngoge v. Hon. Ole Kaparo & Others, S.C. Petition No. 2 of 2012*, ***while declining to admit the petitioner's case under Article 163 (4) (a), the Court stated as follows:***
>
> > ***'In the Petitioner's whole argument, we think he has not rationalized the transmutation of the issue from an ordinary subject of leave-to-appeal, to a meritorious theme involving the interpretation or application of the Constitution, such that it becomes,***

as of right, a matter falling within the appellate jurisdiction of the Supreme Court.'

"The import of the Court's statement in the *Ngoge* ***case is that, where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate, is that the Court's reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application."***

[31] The Court later collated its earlier pronouncements on Article 163(4)(a) of the Constitution, and enunciated its jurisprudence in the case of ***Justus Kariuki Mate & Another v. Martin Nyaga Wambora & Another*** [2014] eKLR .

[32] The emerging principles were subsequently applied in ***Evans Odhiambo Kidero & 5 Others v. Ferdinand Ndungu Waititu and Others,*** Sup. Ct. Petition No. 18 of 2014, in the following terms (para. 130):

"Since its inception, this Court has consistently pronounced itself on the nature, scope, extent and limits of its jurisdiction under Article 163(4)(a) of the Constitution (see *Re IIEC; Peter Oduor Ngoge; Lawrence Ndutu; Erad Suppliers; Hassan Ali Joho; Munya 1 & 2).* ***In each of those decisions, the Court has considered different angles of the jurisdictional question. In his concurring opinion in*** *Munya 2,* **Mutunga, CJ & P**

analysed the various facets of the Court's pronouncements into 'guiding principles', to be taken into account by appellants who seek to predicate their appeals upon Article 163(4)(a) of the Constitution. Such guiding principles are hereby restated with appropriate elaboration as is consistent with the terms of this Court's other decisions:

(i) a Court's jurisdiction is regulated by the Constitution, by statute law, and by the principles laid out in judicial precedent;

(ii) the chain of courts in the constitutional set-up have the professional competence to adjudicate upon disputes coming up before them; and only cardinal issues of law or of jurisprudential moment deserve the further input of the Supreme Court;

(iii) not all categories of appeals lie from the Court of Appeal to the Supreme Court under Article 163(4)(a); under this head, only those appeals from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court;

(iv) and under that same head, the lower Court's determination of an issue which is the subject of further appeal, must have taken a trajectory of

constitutional application or interpretation, for the cause to merit hearing before the Supreme Court;

(v) an appeal within the ambit of Article 163(4)(a) is one founded on cogent issues of constitutional controversy;

(vi) with regard to election matters, not every petition-decision by the Court of Appeal is appealable to the Supreme Court; only those appeals arising from the decision of the Court of Appeal in which questions of constitutional interpretation or application were at play, lie to the Supreme Court."

[33] It is against such a background, that the instant matter is to be determined. The first question calling for an answer is: *what was the issue before the High Court?* This calls for examination of the case before that Court: *Constitutional Petition No. 471 of 2013*. The matter was filed by *Josephine Akoth Onyango* and *Simon Otieno Onyango*, as the 1st and 2nd petitioners, respectively. The *DPP* and *the Director of Criminal Investigations Department* were the 1st and 2nd respondents – and the only respondents. There were three interested parties: *Sehit Investments Ltd, Peter Odiwuor Ngoge*, and *Kenya Commercial Bank Ltd,* respectively. The nub of that petition is captured in the first two paragraphs of the High Court's Judgment, thus:

"1. The petitioners have moved the Court to impugn the authority of the respondents to investigate and commence

> ***criminal proceedings against them, as a result of a complaint lodged by the 1st interested party in respect of a property known as LR No. 1160/784 ('the suit property').***
> ***"2. The issue for consideration is whether, and to what extent, the Court should intervene to stop the prosecution of the petitioners, on account of the violation of fundamental rights and freedoms, and for abuse of the Court process."***

[34] Clearly, the matter dealt with the question as to whether or not the criminal proceedings instituted against Josephine Akoth Onyango and Simon Otieno Onyango should be discontinued. In determining the matter, the High Court acknowledged the powers of the DPP, as provided for in Article 157 of the Constitution. It cited caselaw (***Kenya Commercial Bank Limited & 2 Others v. Commissioner of Police and Another***, Nairobi Petition No. 218 of 2011, [2013] eKLR), in finding that: "*in view of the authority conferred by the Constitution on the DPP, the Courts should not ordinarily interfere with his discretion in deciding whether or not to institute criminal proceedings*". It further stated that the Court will only intervene as regards an exercise of the discretion of the DPP, in instances where there is an abuse of Court process, or a breach of the Constitution. The Court held that the fact that a civil case has been instituted, is not a bar to a parallel criminal process taking place, especially in view of Section 193A of the Criminal Procedure Code.

[35] The learned Judge then considered the facts of the matter before him, taking into account the Ruling in *HCCC No. 705 of 2009* where Sehit Investment Limited (5th respondent herein), was denied an injunction, as an equitable relief, on grounds of undue delay. The learned Judge made a finding as follows (para.40):

"Likewise, I also find that the delay in lodging the complaint by the Company in 2012, three years after the suit was commenced, is unexplained. A total of seven years have elapsed since the sale agreement was signed and the complaint lodged, and this delay is still unexplained. Although there is no time limitation for prosecution of criminal cases, this Court can only draw the inference that the purpose of the criminal proceedings is to achieve an ulterior purpose which is to derail the civil proceedings between the parties. Although the Ruling of *Njagi J* ***was set aside, and the matter will be reheard by another Judge, this only fortifies my view that the civil case is still alive, and it would be more appropriate to allow the civil matter to proceed in this instance."***

[36] The learned Judge proceeded to find as follows (para. 48):

"The facts I have outlined show that the Company intends to use criminal process for an ulterior purpose. It intends to ensure that it gets the transfer of the suit property to Josephine reversed, by whatever means. In HCCC No. 705 of 2009, the Company clearly admits that it executed the transfer on the basis of fraudulent misrepresentation being made to it. Three years later, it brings a complaint to the police that the transfer was forged. On the basis of the time taken to lodge the complaint, and [in view of] such contradictory facts from the Company made on oath in the civil suit, I find and hold that, to permit the criminal

proceedings to go on will amount to an abuse of Court process."

[37] This Court is cognizant of the High Court's jurisdiction to halt criminal proceedings, in the event there is an abuse of Court process. Furthermore, under Article 157(11) of the Constitution, the Director of Public Prosecutions is under duty to exercise his power in such a manner as to prevent an abuse of legal process. We find that the Court, in issuing the injunction, stopping the criminal proceedings, was well within the law. It is important to note that the High Court, in issuing the injunction Order, did not bar the prosecution of the 1st and 2nd respondents *indefinitely*. On the contrary, the injunction stands only until the conclusion of the hearing of HCCC *No. 705 of 2009*. This factual finding is in clear contrast with the petitioner's submission that the High Court "shielded the respondents from the criminal justice system." As a general rule of law, there is no statute of limitation to criminal proceedings. It suffices, therefore, to state that, were *HCCC No. 705 of 2009* to be concluded, then the complainant-company could still approach the DPP to consider 'revival of the criminal case'.

[38] From the foregoing appraisal of the High Court Judgment, it emerges that the single issue before the Court was: whether or not a case had been made of abuse of legal process by the company, Sehit Investment Limited, in making a complaint that culminated in the commencement of criminal proceedings against the 1st and 2nd respondents. The 'dominant parties' in that *Constitutional Petition* were Josephine Akoth Onyango, and Simon Otieno Onyango as the petitioners; the DPP, and the Director of Criminal Investigations Department (the prosecution and investigating arms of government); and the 1st interested party, Sehit Investment Ltd (the complainant in the criminal matter in the Chief Magistrates Court). The injunction issued was clearly directed at the respondents: to halt the prosecution of the two petitioners.

[39] The petitioner, thereafter, moved the Court of Appeal on appeal. In its decision, the Appellate Court evaluated the High Court Judgment, and noted that at no time, was the High Court called upon to consider whether the petitioner's (Mr. Ngoge's) rights under the Constitution had been violated*: "that was not an issue before the Court. Indeed the petition did not seek any reliefs from the appellant and the Court did not grant any" [*the Court of Appeal stated].

[40] The appellant at the Court of Appeal spoke as the Advocate who had drawn the land sale agreement between the 5th respondent on the one hand, and the 1st and 2nd respondents on the other – contending that the High Court should not have stopped the criminal prosecution, as there was fraud in the transaction, which would have been exposed through the intended criminal trial. However, it was the Appellate Court's observation that the appellant had not been able to pinpoint the alleged manifestation of fraud. The Court thus observed (para. 20):

> *"We have perused with circumspection the record of appeal and have given due consideration to the submissions made by all the counsel. This appeal appears bizarre because no Orders were sought against the appellant in the petition, and the Court did not grant any against the appellant in the impugned Judgment. So why, and in respect of what, is the appellant aggrieved? His grievance is that the decision of the Court in the impugned Judgment 'insulated' the 1st and 2nd respondents from prosecution. To address the appellant's said grievance, we have to make a determination in this appeal, whether the impugned decision was correct or not.* ***The appeal has a melancholy ring to it. It is not your normal appeal where the issues appertaining to legal rights asserted are unambiguous. Glaringly, the appellant's interest is to see the 1st and 2nd respondents prosecuted. At the centre of the***

legal imbroglio is the suit property which is sought to be wrestled from the 1st respondent" [emphasis provided].

[41] The foregoing observation by the Appellate Court is a penetrating and profound one. This Court, upon appraisal of the record and the pleadings before it, would adopt the Appellate Court's perception. It is apposite to recall, in that context, the specific terms of the Appellate Court's findings (paras. 25, 26, 27):

> ***" The High Court was enjoined by the Constitution to determine whether the 1st and 2nd respondents' fundamental rights enshrined in the Bill of Rights had been or were being violated, infringed or threatened. The record of appeal shows that the Court directed itself correctly to the issues before it and took into account relevant factors in reaching its decision. The Court had a duty to ensure that the 3rd respondent adhered to Article 157(11) of the Constitution which enjoins the 3rd respondent as follows:***
>
> > *'In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.'*
>
> ***In our view the High Court discharged the mandate given by Article 23(1) of the Constitution which stipulates:***
>
> > *'The High Court has jurisdiction, in accordance with article 165, to hear and determine the applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of rights.'*

In Commissioner of ***Police & Others v. Kenya Commercial Bank Ltd & 4 Others****, CA No. 56 of 2012*, ***this Court considered the terms of Article 157(11) and stated as follows:***

> *'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 prosecution.'*

"Earlier, in *Joram Mwenda Guantai v Chief Magistrate, Nairobi*, CA No. 228 of 2003, ***this Court expressed itself thus, in an appeal where it was contended that the prosecution of the appellant was oppressive and in abuse of power:***

> *'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 victim of oppression. It was succinctly put in* ***Stanley Munga Githunguri v. Republic*** *[1985] KLR 91 that if prosecution amounts to an abuse of the process of the Court and is oppressive and vexatious the Judge has the power to intervene and that the High Court has an inherent power and a 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. This dictum is now an everyday edict in our Courts and we are indeed surprised that the learned Judge was shy to so declare.'*

We respectfully agree.

"In the result, we uphold the decision of the High Court. We find no merit in the appeal which we hereby dismiss with costs to the

1st, 2nd and 6th respondents."

[42] We have given due consideration to the decisions of both the High Court and the Court of Appeal, not to review, or sit on appeal therefrom, but in an attempt to find any such *issues of constitutional interpretation or application,* as this Court would be properly called upon to determine. There is none, in our finding. *No specific constitutional issue was ever delineated for determination by either of the Superior Courts*. We, therefore, agree with the 6th respondent's submissions that it is not enough to state that Article 157(11) of the Constitution, as regards the exercise of the powers of the DPP, was referred to by the High Court, and hence a matter now qualifies for appeal before this Court under Article 163(4)(a). Article 157(11) was *not the subject of any interpretation or application* in this case; and such "interpretation" as urged by the 3rd and 4th respondents, can only open a floodgate of otherwise frivolous and vexatious appeals before this Court.

[43] It bears restating, that this Court was *not created as a typical hierarchical layer in an appellate edifice;* nor was it meant to give litigants a second bite at the cherry. On the contrary, this Court was designed to serve a specific dispute-resolution mandate, that is well elaborated under the Constitution, especially in Article 163.

[44] Consequently, in the case before us, we are in agreement with the 1st and 2nd respondents, that in the proceedings before the High Court, the petitioner was merely an interested party, and no relief was sought against him, nor was any Order made against him. Ordinarily, one approaches a Court of law to have certain rights and/or interest safeguarded. It remains unclear what interest, personal or even public, the petitioner seeks to safeguard in his petition. We find that the petitioner's intention, all along, as succinctly grasped by the Court of Appeal, is nothing but to see the 1st and 2nd respondents subjected to a criminal process.

[45] Who should be subjected to criminal prosecution? Determining this question devolves to the DPP, as already noted herein. Neither this Court, nor any other Court, bears the remit to superintend the legitimate actions of independence constitutional offices, such as that of the DPP, and in particular, where no distortions of discretion or mandate is attributed to them, with the notion of *ultra vires* being invoked.

[46] Although the appellant contended that no preliminary objection had been formally raised, and that grounds of objections by themselves, cannot be deemed to constitute such an objection, it is this Court's finding that the core issue, upon which all parties made submissions, was *jurisdiction*. This Court has repeatedly pronounced itself on the question of jurisdiction; and it is settled law that such a question can be raised *at any time and in any manner*. It is recognized that this question can be raised even by the Court itself. Consequently, even without the urging of the respondents in this matter, this Court was under duty to consider whether it has jurisdiction to hear and determine this matter.

VII. CONCLUSION AND ORDERS

[47] The consequence is that the petition of appeal before us fails to meet the requisite jurisdictional threshold, as ordained under Article 163(4)(a) of the Constitution.

[48] Our determination attracts appropriate **Orders** as follows:

(a) We hereby strike out the petition of appeal.

(b) The costs of the petition shall be borne by the petitioner.

DATED and **DELIVERED** at **NAIROBI** this **5th** day of **October**, **2017.**

....

PHILOMENA MWILU
DEPUTY CHIEF JUSTICE &
VICE-PRESIDENT OF THE
SUPREME COURT

....

J.B. OJWANG
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

<u>REGISTRAR, SUPREME COURT</u>