IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 274 OF 2014

BETWEEN

DIAMOND HASHAM LALJI.....1ST APPELLANT

AHMED HASHAM LALJI…….....2ND APPELLANT

AND

THE ATTORNEY GENERAL....….....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS……2ND RESPONDENT

COMMISSIONER OF POLICE…….....3RD RESPONDENT

ETHICS & ANTI-CORRUPTION COMMISSION….....4TH RESPONDENT

BANADURALI HASHAM LALJI.....5TH RESPONDENT

(An Appeal from the Judgment and Order of the Human Rights

and Constitutional Division of the High Court of Kenya at

*Nairobi (**G.V. Odunga, J.**) delivered on 28th day of July, 2014*

in

Misc. Application No. 153 OF 2012)

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JUDGMENT OF THE COURT

[**1**] This is an appeal from the judgment of the High Court (**Odunga, J.)** dismissing an amended application for judicial review for orders of certiorari and prohibition.

By an application dated 12th April, 2012, the applicants, Diamond Hasham Lalji and Ahmed Hasham Lalji, who are the appellants herein sought leave to file a judicial review application for an order of

prohibition to prohibit the attorney General, Director of Public Prosecutions, (DPP) Commissioner of Police and the Ethics and Anti-Corruption Commission, the respondents herein either jointly or severally from harassing, arresting, incarcerating, charging or prosecuting the appellants in respect of investigations/re-investigation relating to C.I.D. inquiry file No. 36 of 2004 and Kenya Anti-Corruption inquiry file KACC/AT/1/2007 or any matters relating thereto. On 12th April 2012 Ochieng, J. granted leave to institute "action" for judicial review.

[**2**] The appellants named **Bahadurali Hasham Lalji (**5th respondent) as an interested party in the application. An application for judicial review seeking an order of prohibition in the same terms as in the application for leave was duly filed in which the 5th respondent was joined as an interested party. On 24th July, 2012, the appellants filed a notice of intention to file an amended statement and a further affidavit under Order 53 rule 4(2) of Civil Procedure Rules, 2010 (CPR) in which they sought leave to amend the statutory statement and to file a further affidavit. The application for leave to amend was not opposed by any of the parties and was allowed by **Githua, J**. on 26th July, 2012.

The appellants duly amended the notice of motion and the statutory statement and also filed a further affidavit. By the amended application and statutory statement, the appellants sought two additional reliefs, namely, an order of certiorari to quash the decision of the Director of Public Prosecution to prosecute the appellants and order of prohibition prohibiting the Chief Magistrate Mombasa from taking plea or hearing or proceeding with the determination of **Criminal Case No. 1172 of 2012- Republic vs. Ahmed Hasham Lalji & Diamond Hasham Lalji.**

The Ethics and Anti-Corruption Commission, the 4th respondent, filed a further affidavit and averred, inter alia, that the orders of certiorari and prohibition as prayed in the amended notice of motion could not be granted as the appellants did not apply for and obtain leave of the court pursuant to order 53 rule 1 of CPR. That objection was upheld by the learned judge in the impugned judgment and the prayers for certiorari and prohibition were struck out as incompetent at the threshold.

[**3**] The application for judicial review was supported by a statement and a verifying affidavit to which numerous documents were annexed. The DPP and Ethics & Anti-Corruption Commission (EACC) filed replying affidavits sworn by **Mercy Gateru** and **Peter Muriithi** respectively. The 5th respondent also filed a replying affidavit annexing numerous documents.

The history and the chronology of events as particularly disclosed by the appellants and the interested party in their respective affidavits and documents is briefly as hereunder.

[**4**] The appellants, the 5th respondent, Sultan Hasham Lalji and Esmail Hasham Lalji are brothers. They are the sons of Hasham Lalji Nuram who died in 1952. One of the brothers Esmail Hasham Lalji died shortly after recording his statement with Criminal Investigation Department (CID) in 2005. The five brothers owned several family businesses through several companies including Atta (1974) Limited in accordance with family constitution and mutual trust.

[**5**] On 25th November, 1995, the 5th respondent herein filed **Civil Suit No. 3434 of 1995** in the High Court of Kenya against his four brothers and Samvir Management Services Limited (Samvir) in connection with the alleged fraudulent sale of Atta (1974) Limited (**1st Company**) in which he was a director and shareholder with Diamond Hasham Lalji (Diamond) the 1st appellant herein. He averred in the plaint, inter alia, that after the fraudulent sale, another company Atta (Kenya) Limited was incorporated by the two directors of Samvir at the time when Samvir was the Company secretary of Atta (1974) Limited. Further, he averred that the two founding directors of Atta (Kenya) Limited resigned and were replaced by two appellants who later took a loan of Shs. 115,000,000/- from a bank using the assets of Atta (1974) Limited.

The reliefs sought in the suit included a declaration that the interested party is a director and shareholder to the value of 25% in Atta (Kenya) Limited. That suit was struck out by the High Court on a technicality.

[**6**] That precipitated the filing of a second suit, **High Court Civil Suit No. 189 of 1998**. The suit was filed by Atta 1974 Limited and the three brothers Sultan Hasham Lalji; Bahadurali Hasham Lalji and Esmail Hasham Lalji against the two brothers – Ahmed Hasham Lalji (Ahmed), Diamond, and three other parties – Atta (Kenya) Limited, Diamond Jamal and Azim Virjee. The last two were the directors and shareholders of Samvir who incorporated the Atta (Kenya) Limited.

The three brothers averred in the plaint that they and the 1st defendant (Ahmed) were shareholders of Atta (1974) Limited while Diamond was a non shareholding director and that the assets of Atta (1974) Limited were fraudulently transferred to Ahmed and thereafter to Atta (Kenya) Limited and done with a view to benefit two brothers – Ahmed and Diamond to the exclusion of the plaintiffs.

[**7**] The alleged fraudulent sale transactions were pleaded in the first suit and more clearly in the second suit. Briefly, it was alleged as follows:

By a letter dated 4th November, 1991, Samvir resigned as company secretary of Atta (1974) Limited. None of the plaintiff's three brothers received Samvir's letter of 15th November, 1991 allegedly sent to them purporting to act as company secretary for Atta (1974) Limited. On or about 13th November, 1991, a Board of Directors meeting of the 1st company was purportedly held in the offices of Samvir at which Esmail, Ahmed and Diamond were present. The meeting resolved that the assets of the 1st company be disposed of by way of sale with the first option going to existing shareholders.

On or about 15th November 1991, Samvir allegedly wrote to all shareholders inviting offers for the purchase of the assets to be addressed to the Managing Director of the 1st company. The offer letter stipulated the conditions of sale including a requirement for a banker's cheque for 10% of the amount offered. By a letter dated 27th December 1991, Ahmed who was the Managing Director and purported to hold a power of attorney duly given by Bahadurali (5th respondent) made an offer to purchase the 1st company at Shs. 40,000,000/- being the 10% of the offer price. By a letter dated 30th November 1991, a named firm of lawyers based in Mombasa purportedly acting on behalf of the interested party made an offer of Shs. 35 million to cover the 10% deposit. The offer letter was accompanied by a recommendation from a named bank based in Mombasa. One set of the minutes of the meeting held on 8th January 1992 at which Esmail, Ahmed and Diamond were purportedly present indicated that the only offer received was from Ahmed which offer was accepted but completion was to be delayed to enable the 1st company to finalise its matters. The second set of minutes indicated that two offers were received and that Ahmed's offer was accepted and the interested party's offer rejected.

On 31st March 1992, the 2nd company was incorporated; initial subscribers being the two directors of Samvir. By a resolution made on or about 2nd June 1992, the initial directors of the 2nd company resigned and Ahmed and Diamond were appointed directors after which the two new directors used the assets of the 1st company which had not yet been transferred to the 2nd company to obtain a loan of Shs. 85 million, from three banks.

[**8**] It was alleged in the two suits that Esmail was not notified of the meeting which resolved to sell the assets, that he did not attend any of the meetings and that the meetings were held without knowledge of the three plaintiffs.

On his part, the 5th respondent averred that he was not aware that the assets of the company were to be sold; that he did not instruct the firm of advocates to act for him; that he did not apply for any cheque from a bank nor ask the bank to give a recommendation. Additionally, the plaintiffs averred that the 1st company was operating at a profit and the sale was both unnecessary and not in the interest of the company; that the assets were sold at gross undervalue and that Ahmed and Diamond fraudulently and with fraudulent help of the two directors of Samvir appropriated to themselves the assets of the 1st company to the exclusion of the other three shareholders.

The main reliefs sought in the second suit was a declaration that the transfer of assets of the 1st company to Ahmed and subsequently to the 2nd company was fraudulent, appointment of a receiver, accounts and restitution of the assets to 1st company. The statements of defence, if any, filed by the defendants in the two suits were not disclosed. It was averred in the judicial review application that the 2nd suit was similarly struck out on a technicality resulting in filing of **Civil Appeal No. 3 of 2003** in the Court of Appeal which was still pending for determination at the time the judicial review application was made.

[**9**] The interested party annexed various correspondences to his replying affidavit indicating that he made complaints to several institutions, namely, the Hon. the Chief Justice, the Law Society of Kenya, the Minister of Justice and Constitutional Affairs and the Kenya National Commission on Human Rights regarding the handling of the civil suits by the judges and the conduct of the advocates for the defendants in the proceedings. He disclosed in some of the correspondences that before he left for Canada, he left behind signed blank sheets of paper, proxy forms, blank guarantee forms, powers of attorney and other instruments of trust, which were abused and used to defraud him and some of his brothers of his interest in the family group companies.

[**10**] By a letter dated 16th August 2003, the 5th respondent made a formal complaint to the Director of Criminal Investigations Department of the theft of assets of Atta (1974) Limited and requested the Director to ***"commence urgent investigations with a view to bringing the perpetrators of fraud to book".***

In the course of the investigations, the CID, as 5th respondent deposes in the replying affidavit, made a proposal to facilitate a settlement of the dispute but the 5th respondent by a letter dated 20th August 2004 rejected the offer requesting for prosecution of all perpetrators if evidence was found to be sufficient.

After the completion of the investigations of the alleged theft of assets of Atta (1974), the CID by a letter dated 3rd March 2005 notified the interested party, partly as follows:

> ***"After thorough investigations and perusal of the evidence gathered, we have been unable to establish criminal culpability on the part of the suspects. As such you may pursue a civil action which you are already doing before the High Court."***

[**11**] The 5th respondent by a letter dated 29th March 2005 requested the Chief Justice to, *inter alia*, review the decision in the two civil suits and others, to have the cases consolidated and heard on priority basis. He also wrote to the Director of Criminal Investigations Department on 7th April 2005 asking for reasons of the decision to close the file and by a further letter dated 21st April 2005 asked the Director of Anti-Corruption Authority to undertake urgent investigations of his complaint. As the Director was later to report in his letter dated 10th March 2008, the CID re-opened the file and sent it to KACC for an independent review after which it was decided that further investigations would thereafter be handled jointly by the two agencies.

A preliminary report by KACC before fresh investigations were conducted indicated that the complaint raises complex corporate and criminal law issues which would require an independent investigation by KACC and further stated in paragraph 7 in respect of recovery thus:

> ***"The complainant has suffered various set-backs in the courts. The prevention of Corruption Act, the Anti-Corruption and Economic Crimes Act, and the Penal Code all have provisions of restitution which can be invoked at the conclusion of the criminal trial to recover assets for the complainant.***
>
> ***There is also every possibility that if the investigations are re-opened Ahmed and Diamond might make an offer of compensation to their brothers Sultan Esmail and the complainant. We have not been advised whether there is the possibility of the family settling this dispute outside the court."***

[**12**] After the completion of investigations Justice Ringera, the then Director of KACC by a letter dated 10th March 2008 made a recommendation to the Attorney General that Ahmed and Diamond be charged with three offences – two under the Penal Code and one under the Companies Act.

The 1st count was the fraudulent appropriation of company property contrary to section 328(a) of the Penal Code, the particulars being that between 13th November, 1991 and June 1992 they jointly sold the business and assets of Atta (1974) Limited to themselves with intent to defraud and omitted to make a full and true entry thereof in the books of accounts.

The 2nd count was making a false statement with intent to defraud contrary to section 329(a) of the Penal Code the particulars thereof, being in essence, that during the same period they concurred in making a statement purporting to be minutes of the Board of Directors meeting, resolving to sell the business assets of the said company.

Ahmed was to be charged with an alternative charge of making a false document without authority contrary to section 352 (a) of the Penal Code on the basis that on 8th February, 1992, he, with intent to defraud made minutes of the Board of Directors purporting to sanction the sale of the company. In the proposed 3rd count, Ahmed and Diamond were to be charged with the offence of failure by a director to disclose interest in a contract contrary to section 200(4) of the Companies Act – it being alleged that being directors of Atta (1974) Limited they jointly failed to declare the nature of their interest in a contract with the company at a meeting of the directors of the company. The report indicated that there was no sufficient evidence to sustain a criminal charge against Azim Virjee (director of Samvir).

[**13**] However, the Director of KACC drew to the attention of the Attorney General certain factors to be considered regarding the suitability of preferring charges. He pointed out that the events, the subject matter of the investigations, occurred more than 15 years before and much of the information and even primary evidence appear to have been lost on both sides. He also referred to the history of the matter including the institution of the two previous suits, and advised that there was a danger of the prosecution being construed as both an abuse of the process of the court and an infringement of constitutional rights of the suspects. He also observed that the 17 years delay in prosecuting the offences may not augur well for the quality of evidence adduced pointing out that the original file of Atta (1974) Limited could not be traced at the Companies Registry, that the companies books of accounts were missing – a fact which made it difficult to conclusively determine if any or proper entries were made; that Esmail, a potential witness, who could have been useful in clarifying some of the issues had passed on, while Diamond claimed in a further statement that he was unable to recall a number of issues as he suffers from neurological disorder which has allegedly affected his memory –

The Attorney General by the letter dated 29th January, 2009 under the hand of Keriako Tobiko – DPP advised the Director of KACC thus:

> ***"The Hon. the Attorney General has considered your recommendations on the above subject and concurs with your recommendations that the file be closed.***
>
> ***Be advised accordingly."***

[**14**] It would appear from the letter dated 27th October, 2010 by Prof. P.L.O. Lumumba who succeeded Justice Ringera, that the interested party by a letter dated 26th July 2010 had requested the new Director of KACC to re-examine all issues raised. In that letter, Prof. PLO Lumumba indicated that he had reviewed the complaint pursuant to the request by the interested party. After tracing the history of the case, he informed the interested party that:

> ***"Unless there is additional overwhelming piece of information or evidence in your possession it may not be easy to re-open/or continue with further investigations into the matter."***

However, he indicated that the commission was ready and willing to petition the Attorney General to

reconsider the concerns raised in the commission report against prosecution if it would be shown that the fears were unfounded and that a successful prosecution was still possible. By a letter dated 30th July 2010, addressed to Prof. PLO Lumumba, the 5th respondent stated that he did not agree with the recommendation that prosecution cannot be successful due to anticipated difficulties and requested that the matter be re-opened and the earlier recommendation to charge the suspects be executed.

[**15**] By a further letter dated 18th October, 2011 addressed to DPP, Mugambi Imanyara of Mugambi Imanyara & Co. Advocates on behalf of 5th respondent addressed the concerns of KACC and requested the DPP to re-evaluate the matter afresh and make an appropriate decision.

Upon receipt of the fresh request, the DPP requested the Ethics & Anti-Corruption Commission (EACC) the successor of KACC to re-submit to it the duplicate inquiry file for consideration. That was apparently done and on 23rd February 2012 the DPP wrote to EACC partly as follows:

> ***"I have received the re-submitted inquiry file and given due and careful consideration to the reports and recommendations earlier given by the commission. I have also given consideration to the numerous representations made by the complainant and his advocates seeking review of our decision to close the inquiry file. Having done so, I have come to the conclusion that the fact that the events which are the subject matter of this inquiry occurred way back between 1991 and June 1992 is not sufficient ground to warrant closure of the inquiry file when as confirmed by the commission there is sufficient evidence to support the proposed charges.***
>
> ***Accordingly, I direct that the suspects be charged with the offences specified at page 15, 18 and 20 of the original report of the commission.***
>
> ***Do proceed to cause an appropriate charge sheet to be prepared and inform us the date when the suspects would be arraigned in court."***

The charges were duly framed and registered in court on 10th April 2012. The appellants were scheduled to take plea on 25th April 2012. An application for leave to apply for judicial review was filed on 12th April 2012 and leave granted on the same day. The grant of leave was ordered to operate as a stay of the arrest and the charging of the appellant initially for a period of 60 days.

[**16**] In the light of the foregoing circumstances, the appellants averred, *inter alia*, that:

> (i) The decision by DPP to recall and review a file which he had himself closed on behalf of the Attorney General and in the absence of discovery of new and important matters and without informing the appellants of their right to be heard was an abuse of power conferred by article 157 of the Constitution and a breach of principles of public service stipulated in Article 232 of the Constitution.
>
> (ii) The decision of DPP to receive and act on the advice and instructions of third parties to the detriment of the appellants amounted to abrogation of his duties.
>
> (iii) The decision by officers of the Commission to independently review a file that had been formerly closed and over which they had no authority to conduct investigations was tantamount to abuse of investigative powers.
>
> (iv) Prosecuting the appellants for an offence allegedly committed 20 years ago without any explanation and justification of delay is oppressive, unjust and tantamount to an abuse of criminal process.
>
> (v) The seeking of different forums of investigations by complainants i.e. CID, KACC and EACC is a gross abuse of process and investigative manipulation intended to achieve what the complainants failed to achieve through civil process.

[**17**] The first issue that the learned judge dealt with was the competency of the two additional reliefs of certiorari and prohibition introduced by the amended notice of motion. As already stated, the application for leave, the statement and the verifying affidavit were filed to support an application for leave to prohibit the four respondents from doing various acts, the main one being, from charging or prosecuting the appellants. The application was granted ex-parte and the application for order of prohibition was duly filed. Later a notice of intention to file an amended statement and a further affidavit was filed pursuant to rule 4(2). A notice of motion seeking leave to amend was also filed. The application to amend the statement and to file further affidavit was allowed without any objection by the respondent or the interested party.

[**18**] The learned counsel for the EACC contended in his written submissions in the High Court that leave to file a judicial review application is distinguishable from leave to amend, that the two do not serve the same purpose and are not interchangeable, that there was no application to re-open the issue of leave and that the court lacked jurisdiction to grant additional leave. The other two respondents did not raise a similar objection in the High Court.

[**19**] The High Court considered the provisions of Order 53 rule (1)(1) CPR which makes it mandatory that leave should first be obtained before any application for orders of mandamus, prohibition or certiorari is made; and provisions of rule 4(1) and (2) of CPR and also section 9(3) of the Law Reform Act which provides that leave to apply for certiorari should not be granted unless the application for leave is made not later than six months after the date of the impugned proceedings.

The learned judge reasoned that an amendment to introduce a relief for which leave was neither sought nor granted is not permissible as it was likely to lead to situations where parties may go round the limitation provided by section 9(2) of the Law Reform Act and introduce relief which is expressly barred by the limitation. The learned Judge concluded:

> ***"It is therefore my view that since no leave was sought and obtained to apply for prayers 1 and 3 in the motion, notwithstanding the amendment of the motion, those prayers are incompetent before this court. The same are accordingly struck out."***

[**20**] The appellants fault the finding of the learned Judge on five grounds which were argued together. **Mr. Waweru Gatonye**, learned counsel for the appellants contended, *inter alia*, that additional reliefs were introduced by an amendment; that the learned judge proceeded as though he was dealing with an application for leave for the first time; that the learned judge had no jurisdiction to hear and determine a matter that was decided by a fellow judge of concurrent jurisdiction; that by Order 8 Rule 3(2) CPR, a judge has discretion to grant leave even where any relevant period of limitation has expired and that had the court not struck out the additional reliefs, it would have arrived at a different conclusion.

The 2nd to 4th respondents and the interested party support the findings of the learned judge. Learned Senior Counsel, Mr. Ahmednassir who is for the 5th respondent has in his lengthy submissions reiterated the mandatory requirement for leave, and the principles for granting leave, and submitted that since the amended application sought to introduce new prayers which were not part of the application for leave, the amended application was a nullity in law.

[**21**] The question raised in the five grounds of appeal is whether grounds of application for judicial review and the reliefs sought in the application for leave can be lawfully amended to introduce both additional grounds and additional reliefs. The appellants' contention is that an applicant can introduce new grounds and reliefs if leave to amend the application is granted. The 2nd and 3rd respondents and interested party contend otherwise.

Section 9 of the Law Reform Act gives power to make rules of the court to regulate applications for order of mandamus, prohibition and certiorari and stipulates the matters which may be regulated by the rules. The matters include the requirement that leave should be obtained first (S.9 (1)(c)).

[**22**] The rules in order 53 of the CPR have been made pursuant to provisions of section 9 of the Law

Reform Act. There is no dispute that leave to apply for orders of mandamus, prohibition and certiorari is a mandatory requirement under Rule 1(1). Rule 4(1) provides:

"(1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies if any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereinafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and reliefs set out in the said statement.

(2) The High Court may on hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising from the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and any proposed amendment of his statement, and shall supply on demand copies of any such further affidavits" (*emphasis added****)***

By Rule 1(2), the statement is required to set out the name and description of the applicant, the relief sought and the grounds on which relief is sought.

[**23**] If follows logically that since the court has power to allow the amendment to the statement which contains the grounds on which relief is sought and the relief itself, then new grounds and reliefs can be introduced by amendment. A true construction of Rule 1(2) read together with rule 4(1) and 4(2) is that whereas a party is prohibited from relying on grounds of relief and the relief itself other than the ones contained in the statement, if leave to amend is granted, a party can amend the statement and rely on the additional grounds and seek additional reliefs.

There is no requirement in the rules that a party seeking leave to amend the statement should make a fresh application for leave. A judge considering an application for leave to amend the statement exercises the same discretion as a judge to whom the application for leave is first made. Before granting leave to amend, he must exercise the discretion judicially and satisfy himself that the new grounds raised and the new reliefs sought by the amendment disclose an arguable case.

Thus, an order granting leave to amend is ipso facto a grant of leave to seek judicial review on the basis of the additional grounds and to seek additional reliefs.

[**24**] The High court has taken the same view. In a ruling delivered by W. Korir, J. on 24th February 2011 **in Republic v. Chief Land Registrar & Others, ex-parte James Njoroge Njuguna** the learned judge adopted his own reasoning in Nairobi HC JR ELC 9 of 2012 **Republic v. Commissioner of Lands and 2 others ex-parte Jimmy Mutinda** where he said in part:

> ***"Once the court grants an applicant leave to amend a statement and the substantive notice of motion, the court has by that act, granted leave for an order of mandamus, prohibition or certiorari in the terms of the amended pleadings."***

That it is not necessary to renew an application for leave to rely on new grounds or to additional reliefs where the court has power to allow an amendment of a statement, is supported by the English case of **R. v. Bow Street Stipendiary Magistrate ex parte Roberts and others** [1990] 3 ALL ER 447 and by the ruling of Chief Justice of Belize in the **Queen v The Department of Environment & Belize Achand of Conservation** – Non Governmental Organizations -Supreme Court of Belize Action No. 61 of 2002.

[**25**] In the instant case, the appellant complied with the rules relating to the amendment of the statement and there being no objection raised by the respective counsel, leave was granted and ultimately effected. The leave so granted has never been set aside. It follows that the learned judge fell into error in finding that no leave to apply for additional reliefs had been applied for and obtained, and in striking the reliefs of certiorari and prohibition. We would for these reasons, allow the consolidated grounds of appeal which relate to competence of the orders of certiorari and prohibition owing to absence of leave.

[**26**] Further, we wish to point out that the proceedings in the High Court were commenced and concluded

before the Fair Administrative Action Act, 2015 came into effect on 17th June 2015. We are gratified to note that Article 47 of the Constitution which gives a right to Fair Administrative Action as a fundamental right and the Fair Administrative Action Act which gives effect to Article 47 has drastically transformed the procedural law on judicial review and conferred added jurisdiction to the High Court. The procedure for judicial review stipulated in section 9 of the Fair Administrative Action Act does not expressly require leave as a pre-requisite for commencement of an application for judicial review and section 11 confers jurisdiction on the court to grant any relief which is just and equitable including declaration of rights, injunctions and the setting aside of the administrative action.

[**27**] Before embarking upon the consideration of the rest of the grounds of appeal, it is necessary to spell out the constitutional powers of the DPP and the jurisdiction of the court to monitor the exercise of his powers.

Before the promulgation of the Constitution of Kenya 2010, (current Constitution) on 27th August, 2010, the custodian of the prosecutorial powers of the State were vested in the Attorney General by the repealed Constitution. Section 26(3) of the repealed constitution gave powers to the Attorney General to institute and undertake criminal proceedings, to take over and continue criminal proceedings instituted by another person or authority, and to discontinue any criminal proceedings. Section 26(8) provided that in the exercise of the functions vested upon him;

> ***"the Attorney General shall not be subject to the direction or control of any other person or authority."***

The office of the Director of Public Prosecution existed under the repealed constitution as a department in the office of the Attorney General. The Director of Public Prosecution performed his duties under the superintendence of the Attorney General.

[**28**] The current Constitution restructured the executive and other State offices. The prosecutorial powers were transferred from the Attorney General and vested in the DPP who is nominated by a panel and appointed by the President with the approval of National Assembly. The Constitution has limited the tenure of DPP to an eight year non-renewable term.

Article 157 of the current Constitution establishes the office of DPP and gives him similar powers regarding prosecutions as the repealed constitution gave to the Attorney General, except that the DPP may not discontinue a prosecution without the permission of the court (Article 157(8).

[**29**] Article 157(10) provides

"The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in exercise of his or her powers or functions, shall not be under the direction or control of any person or authority."

However, Article 157(11) provides:

> ***"In exercising the powers conferred by this Article, the Director of prosecutions shall have regard to public interest, the interest of the administration of justice and the need to prevent and avoid abuse of legal process."***

[**30**] In 2013, the National Assembly enacted the Office of the Director of Public Prosecutions Act (Act No. 2 of 2013) (**ODPP Act**) which commenced on 16th January, 2013 to give effect, *inter alia*, to Article 157 of the current Constitution. The ODPP Act in section 4 stipulates the guiding fundamental principles which, in addition to the Constitution, guide the DPP in the performance of his powers and functions.

One of the powers given to DPP by Section 5(4) (e) of the ODPP Act is to review a decision to prosecute or not to prosecute any criminal offence. He has also power under section 5(1)(c) of the ODPP Act to formulate and keep under review a public prosecution policy. Section 57(1) of the ODPP Act stipulates

that the application of the Act extends to offences committed and prosecutions, appeals, and revisions brought before or commenced before the commencement of the ODPP Act and S.57 (3) provides, *inter alia,* that consent given before the commencement of the ODPP Act by the Attorney General, Director to commence proceedings in relation to an offence shall not be abated or affected. The DPP has formulated "The National Prosecution Policy" 2015 which repealed the 2007 prosecution policy. The policy, amongst other things, stipulates the factors to be taken into account before a decision to prosecute or not to prosecute is taken including the application of evidential test and public interest test and also the factors to be considered before a review of the decision to prosecute or not to prosecute is made.

[**31**] There are other principles of the Constitution which every public officer including DPP should take into account in exercising his power in performing his functions including the supremacy of the Constitution, the national values which includes rule of law, human dignity, transparency and accountability; and fundamental rights and freedoms, an integral part of which includes fair administrative action and right to fair trial.

[**32**] As regards the jurisdiction of the High Court in enforcing the Constitution, Article 165(3) (d) (ii) of the Constitution gives the High Court jurisdiction to hear:

> ***"the question whether anything said to be done under the authority of this Constitution or any other law is consistent with, or in contravention of this Constitution."***

This jurisdiction is distinct from the common law inherent jurisdiction of the High Court or indeed any other court to control its own process by preventing the prosecution of a criminal proceeding which amount to abuse of the process of the court. However, considering that the DPP has a constitutional duty to prevent and avoid abuse of legal process and that what constitutes abuse of legal process is the same in both jurisdictions, the exercise of discretion by DPP could be impugned by the High Court on constitutional grounds without invoking the inherent jurisdiction of the court.

[**33**] From the foregoing, there cannot be any doubt that the prosecutorial discretion of DPP is not absolute. It is limited by Article 157(11) which specifies the mandatory considerations that underlie the exercise of discretion; by the constitutional principles to which we have referred and by statute.

In **Ramalingam Ravinthran v. Attorney General [2012] SGCA 2,** the Court of Appeal of Singapore said at para 53:

> ***"The Attorney General is the custodian of prosecutorial power. He uses it to enforce criminal law not for its own sake but for the greater good of the society, i.e. to maintain law and order as well as to uphold rule of law.***
>
> ***Offences are committed by all kinds of people in all kinds of circumstances. It is not the policy of the law under our legal system that all offenders must be prosecuted, regardless of the circumstances in which they have committed offences. Furthermore not all offences are provable in a court of law. It is not necessary in the public interest that every offender must be prosecuted, or that an offender must be prosecuted for the most serious possible offence available in the statute book. Conversely, while the public interest does not require the Attorney General to prosecute any and all persons who may be guilty of the crime, he cannot decide at his own whim and fancy who should or should not be prosecuted and what offence or offences a particular offender should be prosecuted for. The Attorney General's final decision will be constrained by what public interest requires."***

That passage applies with equal force to the considerations that the DPP must employ.

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

such a person is accorded a fair hearing and that court processes are used fairly by state and citizens.

[**34**] It is also indubitable that the constitutional prosecutorial power of DPP is reviewable by the High Court as Article 165(2)(d)(ii) of the Constitution ordains. However, the doctrine of separation of powers should be respected and the courts should not unjustifiably interfere with the exercise of discretion by DPP unless it is exercised unlawfully by, *inter alia*, failing to exercise his/her own independent discretion; by acting under the control and direction of another person; failing to take into account public interest or interest of the administration of justice in all their manifestations; abusing the legal process; and by acting in breach of fundamental rights and freedoms of an individual.

The DPP is entitled to make errors within his constitutional jurisdiction and the decision will not be reviewed solely on the ground that it was based on misapprehension of facts and the law. (**Matululu and Anor v. DPP [2003] 4 LRC 712**). Further, authority show that courts are generally reluctant to interfere with prosecutorial decisions made within jurisdiction.

[**35**] The above discussion leads to the consideration of the 9th ground of appeal – that the judge erred in holding that the DPP has power to re-open a criminal investigation which had been closed and discontinued by the Attorney General – his predecessor in law. In his submissions in the High Court which were adopted in this appeal, the appellant had framed the issue:

> ***"Is the office of the Director of Public Prosecution bound by the decision of its predecessor, the Attorney General in which the Attorney General acting on the recommendations of the then Kenya Anti-Corruption Commission, closed the file and dropped the intended prosecution against the ex-parte applicants?"***
>
> The learned judge answered that issue thus:
>
> ***"In my view I do not agree with a blanket view that where criminal investigation has been purportedly closed it can never be re-opened under any circumstances. In my view the discretion to close the matter and a reversal of the same depends on the particular circumstances of the case."***

The appellants' counsel submitted in this appeal that the decision of the Attorney General could not be re-opened without discovery of fresh evidence and that the right to change decision was lost. It was contended on behalf of DPP that, DPP, just like the courts of law, have power to review a decision not to prosecute and to continuously review the evidence. On his part, the 5th respondent submitted that there is no time limit for prosecution of serious offences.

[**36**] It seems that the appellants are now contending that the decision by the Attorney General not to prosecute made under the previous constitution cannot be reviewed by his successor. The contention now being raised is that the decision cannot be re-opened without discovery of fresh evidence. That is an entirely different matter.

As we have shown in the chronology, the decision not to prosecute was made by the Attorney General in exercise of his powers under section 26(3) of the repealed Constitution. The impugned decision by DPP to review the decision was made by DPP under the current constitutional order where the prosecutorial powers are now reposed in the office of the DPP. Although section 26(3) of the repealed Constitution did not expressly give power to the Attorney General, power to review is a right inherent in the prosecution process which facilitated the effective performance of his duties under the repealed Constitution. Although, when the DPP reviewed the decision of the former Attorney General on 23rd February 2012, the ODPP Act which expressly gives DPP power to review his decision was not in place, the current Constitution was in place and the DPP had assumed all the powers of the former office of the Attorney General in respect to prosecutions. Moreover, Clause 31(5) and 33 of the Transitional and Consequential provisions in the Sixth Schedule of the Constitution provided a seamless transition of functions of the office of the Attorney General under the repealed Constitution to the office of DPP under the current Constitution. Under clause 31(5), the functions of DPP were to be performed by the Attorney General

under the current Constitution until the DPP was appointed and by Clause 33, the office of DPP is the legal successor of the office of the Attorney General in so far as prosecutorial powers are concerned.

Since the powers of DPP are exercised in the public interest, there cannot be any estoppel against execution of a public duty conferred by the Constitution or statute. The decision of his predecessor became his own and by succeeding to the office he had power to do what his predecessor could have done.

It follows that the decision of the learned judge that the DPP had jurisdiction to review the decision of his predecessor in title was correct. However, whether or not the decision should have been re-opened will be considered later.

[**37**] We now turn to the consideration of grounds 6, 7 and 8 which deal with the core dispute in the High Court. The learned judge at the outset spelled out the principles applicable and further stated that it was upon the appellants to satisfy the court that discretion of DPP should be interfered with. On the complaint that EACC had no power to investigate crimes committed 20 years ago, the learned judge found the issue irrelevant as the ultimate decision to charge the appellants lay with the DPP.

The learned judge also made a finding that whether or not evidence relating to the crimes committed 20 years ago was admissible could properly be determined by the trial court.

On the contention that the closure of the case by the Attorney General gave rise to legitimate expectations that the matter would not be re-opened, the learned judge rejected the contention saying that there was no evidence that the Attorney General or DPP either promised the appellants or conducted themselves in a manner that could amount to legitimate expectation.

As regards the question of the long delay between the time of alleged commission of offences and the commencement of the prosecution, the learned judge accepted that the delay of 20 years was long but nevertheless held that there were no allegations that the appellants would not get a fair trial or proof that a fair trial could not be possible nor proof that the appellants stood to suffer prejudice.

Regarding the contention that the criminal proceedings were instituted to achieve a collateral purpose in view of the pending civil proceedings, the learned judge in essence held that section 193A of the Criminal Procedure Act allowed concurrent proceedings and that he was not convinced that the purpose of criminal proceedings was to achieve collateral purpose than vindication of a criminal offence.

As to the right of the appellants to be heard before re-opening the file, the learned judge appreciated that before re-opening a file based on discovery of new evidence, people sought to be charged ought to be given an opportunity to comment on fresh evidence but observed that there was no fresh investigation and the DPP only reviewed the existing evidence.

Lastly, the learned Judge observed that our criminal process has safeguards to ensure that accused persons are afforded a fair trial and appellate process; and that in addition, there was an avenue for compensation for malicious prosecution.

[**38**] The learned judge concluded thus:

> ***"Having considered the issues raised in this application, I am not satisfied that based on the material before me that the applicants will not receive a fair trial before the trial court more so as no allegations have been made against the court…"***

The appellants contend that the trial judge failed to apply the broad principles of law on the scope and operation of remedy of judicial review; failed to adequately analyse and evaluate the evidence; treated the evidence superficially; and misdirected himself in holding that the interested party did not initiate criminal proceedings with intent to force the appellants to settle the civil dispute. The appellants' counsel submitted *inter alia*, that by finding that the appellants should have adduced credible evidence that they

would not get a fair trial, the learned judge breached the principle that judicial review is concerned with decision making process and not with its merits; that the appellants went into great lengths to demonstrate through evidence that the criminal proceeding was an abuse of court process and a violation of the rights of the appellants; that the holding of the judge was inconsistent with his later holding in **Ronald Leposo Musengi v Director of Public Prosecutions & 3 others – Constitutional Petition No. 436 of 2014 [2015] eKLR;** that material placed before the High Court demonstrated that the file was re-opened for the reason that immense pressure was piled on DPP by the 5th respondent; and that the prosecution was intended to force the appellants to settle claims of the 5th respondent.

In her brief written submissions, Doris Githua on behalf of 1st and 3rd respondents submitted, in essence that, the criminal investigations and proceedings were outside their constitutional mandate, that the appellants are challenging the decision of the High Court on the merits and that DPP was not in breach of his duty.

The DPP also made brief written submissions through Phillip Kaguda, to the effect that the grounds of appeal reveal a thinly disguised attempt by appellants to avoid prosecution, that allowing the appeal would curtail the office of the DPP from discharging its functions, that there is no limitation for prosecution of criminal acts and that, it is in public interest that serious crimes are thoroughly investigated and the perpetrators prosecuted and punished.

Learned senior counsel Mr. Ahmednasir for the 5th respondent made extensive submissions citing authorities the essence of which are that

(i) Appellants are asking the court to look into the merits of the decision to prosecute them yet judicial review is concerned with process rather than the merits of the challenged decision.

(ii) Courts ought not to usurp the constitutional mandate of the DPP conferred by Article 157(6)(a).

(iii) Powers to quash criminal proceedings should be exercised very sparingly and with circumspection in rare circumstances.

(iv) Courts cannot weigh whether there is evidence that discloses criminal prosecution or charges and appellants will be afforded an opportunity to cross-examine witnesses and adduce evidence.

(v) It is not a mere delay in prosecuting charges that would warrant the halting of criminal proceedings but rather the effect of the delay and other appropriate remedies.

(vi) Courts can only interfere with the discretion of the DPP if the appellants' fundamental rights and freedoms are being contravened by the prosecution.

(vii) Under section 193A of Criminal Procedure Act, there is no bar to exercise of concurrent criminal and civil jurisdiction.

[**39**] The proceedings instituted by the appellants in the High Court specifically questioned the exercise of DPP's constitutional discretionary power to re-open a previous decision to prosecute the appellants. The question necessarily involves the application of Article 157(11) and the relevant constitutional principles including the national values and the Bill of Rights in the circumstances of this case.

Article 10(1) provides that national values bind, *inter alia*, all state officers whenever any one of them applies or interprets the Constitution. Further, the Constitution in Article 259(1) incorporates the principles to be employed in its interpretation which includes the promotion of its purposes, values and principles, human rights and fundamental freedoms in the Bill of Rights.

[**40**] In **Matalulu and Another v DPP (**Supra**),** the Supreme Court of Fiji in reference to principles in which occasion for judicial review may arise stated at page 785 f-g:

"These would have regard to the great width of the DPP's discretion and the polycentric character of official decision making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits. This approach subsumes concerns about separation of powers."

[**41**] Thus, the exercise of prosecutorial discretion enjoys some measure of judicial deference and as numerous authorities establish, the courts will interfere with the exercise of discretion sparingly and in the exceptional and clearest of cases. However, as the Privy Council said in **Mohit v Director of Public Prosecutions of Mauritius [2006] 5LRC 234**:

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

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

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

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

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

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

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

(Article 35(8) of the Constitution gives Attorney General of Singapore power exercisable at his discretion to institute, conduct or discontinue any proceedings for any offence).

The application was based on the broad grounds of abuse of power by DPP by re-opening the closed file and abuse of criminal process.

[**43**] In **Jago v District Court (NSW**) 168 LLR 23, 87 ALR 57) Brennan J said in part at p. 47-48-

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

[**44**] The categories of abuse of process are not closed. Whether or not an abuse of power of criminal

process has occurred ultimately depends on the circumstances of each case. One of the important factors at common law which underlie a prosecutorial decision is whether the available evidence discloses a realistic prospect of a conviction. In **Walton v Gardener [**1993] 177 CLR 378, the High Court of Australia said at para 23 –

> ***"The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all categories of cases in which the process and procedures of the court which exist to administer justice with fairness and impartibility may be converted into instruments of injustice and unfairness. Thus, it has long been established that regardless of the person responsible for their institution and maintenance, proceedings will constitute an abuse of process if they can be seen clearly to be foredoomed to fail…, if that court is in all circumstances of the particular case a clearly inappropriate forum to entertain them…, if, notwithstanding that circumstances do not give rise to an estoppel their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate a case which has already been disposed of by earlier proceedings."***

[**45**] In considering the evidential test, the court should only be satisfied that the evidence collected by the investigative agency upon which DPP's decision is made establishes a prima facie case necessitating prosecution. At this stage, the courts should not hold a fully-fledged inquiry to find if evidence would end in conviction or acquittal. That is the function of the trial court. However, a proper scrutiny of facts and circumstances of the case are absolutely imperative. **State of Maharashtra Ors v Arun Gulab Gawall & Ors – Supreme Court of India – Criminal Appeal No. 590 of 2007** para 18 and 24**, Meixner & Another v Attorney General [2005] 2 KLR 189**.

[**46**] In **William v Spautz [1993] 2 LRC 659,** the court distinguished the duty of the court to prevent a prosecution which will result in an abuse of process and a prosecution which will result in a trial which is unfair, and said at p.667 c – e as follows:

> ***"If a permanent stay is sought to prevent the accused from being subjected to unfair trial, it is only natural that the court should refrain from granting a stay unless it is satisfied that unfair trial will ensue unless the prosecution is stayed. In other words, the court must be satisfied that there are no other available means, such as directions to be given by the trial judge of bringing about a fair trial…., If, however, a stay is sought to stop a prosecution which has been instituted and maintained for an improper purpose, it by no means follows that it is necessary, before granting a stay for the court to satisfy itself in such a case that an unfair trial will ensue unless the prosecution is stopped."***

Later at page 659 para h, the court said –

> ***"In our view, the power must extend to the prevention of an abuse of process resulting in oppression, even if the moving party has a prima facie case or must be assumed to have a prima facie case***."

The case of **Jago** (supra) **Martin V Tauranga, District Court [1995] 2 LRC 788 Sanderson v Attorney General – Eastern Cape [1988] 2 S.A 38** which concerned abuse of process by denial of speedy trial, fall in the first category, in the above quotation, also in the same category is the case of **Githunguri v Republic [1986] KLR 1**.

[**47**] Lastly, as the authorities show, unreasonable delay is not confined to cases where the effect of delay would cause prejudice to the accused by rendering the trial unfair. Delay in itself if sufficiently prolonged would if itself be so unfairly and unjustifiably oppressive as to amount to an abuse of the process of the court. However, the court should not create any form of artificial limitation period for criminal process unless there is evidence that the criminal court is being used improperly to harass a citizen - (**Walton v. Gardner** (supra), **Jago** (supra).

In **Githunguri v Republic** (supra), the court said at page 1 para. 30 that there is no time limit to the

prosecution of serious crimes except where a limitation is imposed by a statute. However, those decisions must be read in light of Article 259(8) of the Constitution which provides that if a particular time is not prescribed by the Constitution for performing a required act, the act shall be done without unreasonable delay and also Article 47 which gives a right, inter alia, to an expeditious administrative action.

[**48**] From the above analsyis of jurisprudence and upon considerations of the findings of the High Court and the relevant grounds of appeal, we are satisfied that the learned judge, in broad terms, misdirected himself in several respects.

[**49**] Firstly, the learned judge failed to adequately appreciate the nature of the appellants' case. We emphasize that the appellants' case was based on two main grounds; improper exercise of discretion by the DPP by reviewing a decision not to prosecute and abuse of criminal process by the 5th respondent. The improper exercise of discretion was allegedly by failure by the DPP to apply the constitutional criteria prescribed by Article 157(11). The abuse of criminal process was based on the allegation that the complaint by the 5th respondent was not made in the interest of administration of justice – to achieve the purpose that it is designed to serve but in continuation of alien purposes of settling a family property dispute.

The society has an interest in both the lawful exercise of prosecutorial powers and in employing a fair procedure that does not amount to oppression and persecution. The Constitution envisions a just society. It would not be consistent with the values of the society as reflected in the Constitution if power is abused or unfair administration of justice is resorted to. Both would shock the conscience of the society and would result in the loss of confidence in the institution of the DPP and in the integrity of the judicial process.

The exercise of prosecutorial discretion in such a manner would be in contravention of the Constitution and the court has power to intervene regardless of the seriousness of the alleged offence or the merits of the case. As Article 2(4) provides an act or omission in contravention of the Constitution is invalid.

[**50**] The tenor of the judgment of the High Court shows that the focus was on the abuse of the process which prejudices an accused person by subjecting him to unfair trial. That is why the learned judge said in respect of the delay of 20 years that appellants had not proved that a fair trial would not be possible nor that appellants stood to suffer prejudice. That is also the basis of the finding of the learned judge that some of the allegations made would be addressed at the trial. In this connection, the 5th respondent submitted that appellants would be afforded an opportunity to cross-examine witnesses and adduce evidence.

As the authorities show, where the abuse of process is based on the ground that the applicant would not get a fair trial, the court has discretion to grant an alternative remedy in the public interest that would guarantee a fair trial.

In laying emphasis on the personal prejudice that appellants would suffer and on the fairness of the trial rather than on the constitutional issues raised, the learned judge misapprehended the appellants' case and applied the wrong test.

[**51**] Secondly, the learned judge failed to appreciate that abuse of process as alleged by the appellants was an integral whole comprising of several elements including abuse of investigative powers, collateral purpose, unjust delay and unjustifiable review of the decision not to prosecute. It is evident from the judgment that the learned judge looked at each of the elements separately and on its own merits and failed to consider the cumulative effect of those elements in public interest; the interest of administration of justice, public confidence in the administration of justice and the integrity of judicial process. It is only after assessing the qualitative and the combined effect of the elements constituting the abuse of process that a proper determination on whether or not the constitutional threshold for prosecution had been met could be made.

[**52**] Thirdly, and more importantly, the learned judge did not consider the whole spectrum of the

appellants' case from the time the alleged offences were committed up to the time the decision to review the decision not to prosecute was made.

According to the appellants' counsel, the learned judge had a duty to analyse and evaluate the evidence which he failed to discharge. However, the 1st, 3rd and 5th respondents contend that judicial review is concerned with the process of decision making and not with the merits of the decision and that the appellants are questioning the merits of the decision to prosecute them.

In our view, the appellants are questioning the lawfulness of the exercise of the discretion to prosecute viewed against the constitutional threshold. That is within the sphere of judicial review. They are not questioning the correctness or the merits of the decision made lawfully. That would be outside the sphere of judicial review.

[**53**] The main pillar of the appellants' case was that the decision to prosecute and the prosecution itself was to achieve a collateral purpose of putting pressure on the appellants to settle claims which were the subject of civil litigation. The learned judge dismissively held that he was not convinced that the purpose of criminal proceedings was to achieve a collateral purpose without considering the nature of the suits in relation to the criminal charges framed and without appreciating that the interested party had exerted immense pressure on the investigating agencies.

[**54**] Further, the learned judge erroneously failed to consider the events preceding the impugned decision particularly the previous decision of the Director of CID, Justice Ringera, Prof. Lumumba and the Attorney General respectively. Those previous decisions were relevant to the determination of the question whether the prosecution would be an abuse of process of court.

[**55**] As an appellate court, we have a duty to re-appraise the relevant circumstances and reach our independent conclusion. We propose to consider the main elements of the abuse of process relied on by the appellants albeit briefly

[**56**] The elements of abuse of investigative powers and the use of the criminal process for an alien purpose are intertwined. They relate to the alleged fraudulent transfer of assets and business of the first company – Atta (1974) Limited to the appellants with collusion of two directors of Samvir – Diamond Jamal and Azim Virjee; the filing of two suits and the subsequent criminal investigation. After the second suit, **HCCC No. 189 of 1998** was allegedly struck out on a technicality, the 5th respondent and his two brothers filed **Civil Appeal No. 3 of 2003**. At the hearing of the judicial review application in the High Court, Jane Githinji the counsel for the appellants stated in her oral submission that the appeal was heard on 27th May 2014 and that judgment had been reserved for 18th July 2014. For completeness of the record, we have established that the Court of Appeal indeed delivered the judgment on the scheduled date dismissing the appeal contrary to the appellants' claim that the High Court had struck out the suit. The judgment which is a public document shows that the High Court had merely struck out the names of the 5th respondent and his two brothers from the suit on the legal ground that they, being majority shareholders of Atta (1974) Limited had no capacity to bring a suit jointly with the company complaining of transgressions against the company as the proper plaintiff was the company itself. The Court of Appeal affirmed that legal position with the result that the suit by the company was left intact, the company being the sole plaintiff.

[**57**] The 5th respondent in his letter of 16th August 2003 formally lodging a complaint of criminal fraudulent conduct by the appellants and the directors Samvir stated in the last two paragraphs thus:

> ***"Since my complaints are not being heard in the courts as some of the defendants seem determined to block the hearing of the cases, I have initiated this complaint to your office for investigation into the matter so that the truth can be unearthed and justice followed.***
>
> ***In the premises therefore I kindly request your office to commence urgent investigations to bring the perpetrators of fraud to book."***

After the investigations yielded no positive result the 5th respondent requested KACC to institute fresh investigations alleging that the CID investigators may have been compromised. This complaint resulted in a fresh joint investigation by CID and KACC.

As already shown in paragraph 11 above, the preliminary investigation report was very revealing. It referred to the setbacks that the interested party has suffered in the court; the possibility of recovery of assets from the 5th respondent after the conclusion of the criminal trial; and the possibility that the appellants might recover compensation if the investigations were re-opened.

The second investigation did not also yield positive result as the Attorney General acting on the recommendation of Justice Ringera that criminal prosecution would face difficulties, advised that the file be closed.

The 5th respondent was still not satisfied and subsequently requested the new director of KACC, Prof. Lumumba to undertake a review. Prof. Lumumba indicates in his letter dated 27th July 2010 that he did so after which he reached a decision that the previous decision could not be re-opened or further investigation continued in the absence of additional overwhelming piece of information or evidence. The 5th respondent immediately protested saying that he did not agree with the recommendation that a prosecution cannot be successful. Apparently, his view remained unheeded. However, after the promulgation of the current Constitution on 27th August, 2010, and after a spell of slightly over one year, the 5th respondent instructed the firm of Mugambi & Imanyara Advocates who successfully petitioned the new office of DPP to re-evaluate the matter afresh leading to the impugned decision.

[**58**] The pleadings in HCC No. 189 of 1998, the report of Justice Ringera and the framed charges show that the issue of fraudulent sale of the assets and business of the company was broadly centred on the validity of the resolution of the Board of Directors to sell the company and the subsequent resolution to sell the assets and business of the company to the 2nd appellant herein and the justification for the sale. Justice Ringera's report shows that the elements of criminality detected after investigations included lack of capacity by directors to make a resolution to sell the assets and business of the company in the absence of prior shareholders resolution; failure by the purchaser (2nd appellant) to declare his interest at the time the resolution was made and selling the assets and business of the company when the company was operating profitably and before the valuation of the assets.

Azim Jamal Virjee – a director of Samvir who was exonerated from any criminal liability had told the investigators that there were a number of disputes amongst the directors and as a result it was agreed in principle that the disputes be resolved by way of sale of company assets to any interested shareholder.

[**59**] Section 193A of the Criminal Procedure Act provides:

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

In **Kuria & 3 Others v Attorney General [2002] eKLR 69**, the High Court held, *inter alia*, that the machinery of criminal justice is not to be allowed to become a pawn in personal feuds and individual vendetta. In **Republic v Chief Magistrate's Court at Mombasa – ex parte Ganijee & Another [2012] 2 KLR 703**, the High Court again held, amongst other things, that it is not the purpose of criminal investigation or a criminal charge or prosecution to help individuals in the advancement or frustration of their civil cases.

The learned judge in the instant case correctly appreciated that in spite of the provisions of section 193A aforesaid, a commencement of criminal proceedings for a collateral purpose meant to force a person to submit to a civil claim would constitute an abuse of process but held that the predominant purpose of the commencement of the criminal proceedings was not to achieve a collateral purpose.

[**60**] The totality of the circumstances considered above looked at objectively show that:

(i) The 5th respondent resorted to criminal process 12 years after the alleged commission of the criminal offences.

(ii) The 5th respondent set in motion criminal investigations after he encountered frustrations in the prosecution of the previously instituted civil suits.

(iii) The 5th respondent exerted unusual and excessive pressure to the investigative agencies and even to other relevant administrative authorities to ensure that the appellants were ultimately prosecuted.

(iv) The fraud for which the appellants were subjected to investigations and two reviews was fundamentally a commercial dispute between three brothers on one side and two brothers on the other, over the assets and business of a private family company which was already the subject of civil litigation.

(v) The predominant motive of the 5th respondent and the second investigation in the preliminary report, disclosed that it was to repeatedly put pressure on the appellants to settle the family dispute or vendetta and to secure restitution of assets and business after a successful prosecution.

(vi) The preliminary report stated that the investigation involved complex corporate and legal issues.

It is apparent from the nature of the dispute that the criminal court would be required to examine family agreements, family constitution, memorandum and articles of association of the first company, minutes, books of accounts and various documents executed by the 5th respondent and allegedly left blank, nature of the assets and their market values in order to determine the validity of the resolution to sell the assets and business of the company and the validity of the ultimate sale. The court would of necessity be called upon to interpret and apply company law to facts in dispute.

It is apparent that the criminal court is not the appropriate forum for investigation of the complaints reported to CID and to KACC by the 5th respondent.

[**61**] The element of culpable delay as a component of abuse of process as the recommendations of Justice Ringera and Prof. Lumumba show, was an insuperable factor in the prosecution as it would affect the quality of evidence. Due to lapse of time, the original file of the first company could not be traced, the company books of accounts were missing and a potential witness – Ismael whose evidence was necessary to ascertain whether there was a quorum when the impugned resolutions of the company was made, had died.

Thus, contrary to the finding of the learned judge, the 20 year delay would cause prejudice to the appellants by rendering the trial unfair.

In view of the fact that the 5th respondent set in motion the criminal investigations twelve years after the commission of the alleged offences, and after encountering difficulties in the prosecution of the suits, the delay itself would, in the circumstances of the case be prolonged delay rendering the prosecution unfair and unjustifiably oppressive to the appellants and thus amounting to abuse of process.

[**62**] As regards the element of alleged improper exercise of discretion by DPP to review the decision not to prosecute, the DPP in his decision letter of 23rd February 2012 said in part:

"…I have come to the conclusion that the facts that the events which are the subject matter of this inquiry occurred way back between 1991 and June 1992, is not a sufficient ground to warrant closure of the inquiry file when, as confirmed by the commission, there is sufficient

evidence to support the proposed charges."

The appellants averred, *inter alia*, that the decision to review in the absence of new and important matters and without informing the appellants of the right to be heard was an abuse of power, unfair, oppressive and an abuse of criminal process.

The 4th respondent relied in the High Court, amongst other authorities on the case of **Carlin v Director of Public Prosecutions [2010] 1 ESC 14,** a decision of the Supreme Court of Ireland for the proposition that the DPP is entitled to change his decision not to prosecute even without new evidence. However, **Denharm J**. said in that case at para.7 thus:

> ***"The prosecutor must not only be independent but must be seen to be independent. If the Director is seen to change his decision where there are no new factors but simply after presentations by a victim or his family, it raises issues as to integrity of the initial decision and the process and thus may impinge on the confidence in the system. It is important that a prosecutor retain the confidence of society in the process of decision making."***

In the present appeal, the decision to review the earlier decision not to prosecute was made after three years. The appellants relied on a later decision of the same judge (**Odunga, J**.) in **Ronald Leposo Musenga v Director of Public Prosecutions & three Others – [2015] eKLR** in which he said in para 97;

> ***"Nevertheless in this case there is no factual foundation upon which the facts which three years ago were deemed insufficient to sustain criminal charge have had life breathed into them so as to be a basis of the subject matter of criminal proceedings."***

That dictum is not directly applicable to the circumstances of this case. It refers to the evidential test which we have not been called upon to adjudicate. Furthermore, the DPP has acknowledged that there were no new circumstances or evidence which informed the decision to review. Moreover, Article 259(8) provides that if a particular time is not prescribed by the Constitution for performing a required act, the act can be done without unreasonable delay, and as often as occasion arises. Thus review could be done without unreasonable delay so long as it is done in accordance with the principles of the Constitution.

[**64**] The DPP was required to consider the constitutional threshold for prosecution and the other relevant constitutional principles to which we have repeatedly referred, before making the impugned decision. Although a suspect has no right not to be prosecuted, he has by Article 47, a right, amongst other things, to administrative action which is lawful, reasonable and procedurally fair.

The DPP is bound by several constitutional principles including requirements of fairness and fair procedure. It is apparent in this case that the only substantial matter to be considered is delay in relation to sufficiency of evidence. The reasons that the DPP gave for review is that where there is sufficient evidence, long delay does not warrant closure of an inquiry file.

In so deciding, the DPP, with due respect went against the weight of principles that delay in itself if, sufficiently prolonged can amount to abuse of process and that if a party instituting proceedings does so for purposes alien to the purpose which the proceedings are designed to serve, the proceedings are an abuse of process, whether or not they are well founded in fact and law - **Wiliam v. Spauz** (supra), **Walton v Gardener** (supra).

[**65**] Going by the decision letter, the DPP did not specifically consider the long history of the dispute and the recommendations of Justice Ringera which the Attorney General and the DPP, while acting in a different capacity had accepted and the latter decision of Prof. Lumumba. Both Justice Ringera and Prof. Lumumba were not only holding office in the investigative agency at different times but are also eminent jurists. The view of Justice Ringera that the long delay had occasioned loss of vital evidence on both sides and a vital witness and that it was not prudent to proceed with the criminal prosecution was accepted by the Attorney General and later affirmed by Prof. Lumumba upon review.

[**66**] The DPP did not in the affidavit filed in the High Court justify the decision to re-open other than relying on his broad discretion under the Constitution. He did not say that there was any error or oversight in the previous decision not to prosecute nor contend that a successful prosecution was possible despite the loss of vital evidence and a witness. The question of fairness of the prosecution and oppression in the light of the history of the dispute should also have been considered.

On the question of fair procedures, the learned judge said at para 126:

> ***"..It is my view that before re-opening an investigation resulting from discovery of new evidence the people sought to be charged ought to be given an opportunity to comment on the fresh evidence. In this case, however, the 2nd and 4th respondents' position was that there was no fresh investigation and that the 2nd respondent only reviewed the existing evidence and on that basis arrived at the decision to charge the applicants. That being the position and as this court cannot, based on the material on record, decide either way, the alleged breach of rules of natural justice does not arise."***

We respectfully agree with the view of the learned judge that where the re-opening of a decision not to prosecute or to prosecute is based on discovery of new evidence, the persons sought to be charged should be given an opportunity to comment on the fresh evidence by any appropriate means as a matter of fair procedure.

We also appreciate that the function of the DPP is to direct investigations and prosecute and not to adjudicate on the rights of the parties. To that extent, the function of the DPP is administrative and not judicial or quasi-judicial. Thus, as the learned judge correctly stated, the rules of natural justice do not strictly apply to his decision. However, that does not exonerate him from employing a fair procedure. Given that the DPP was being asked to re-open the decision three years after the initial decision and without any new evidence or new factors, the DPP should have informed the appellants of the fresh representations, given a copy of the letter of Mugamgi Imanyara, Advocate to the appellants and given them an opportunity to comment on the representations before the decision was ultimately made. This is so because the DPP, before reaching his decision, is required to take into account the interest of the State, the interest of the victim and the interest of the suspect, all at the same time.

[**67**] Finally, the DPP should have considered whether any substantial public interest, other than the interest of 5th respondent to the protection of the law, would be advanced by continuing with the prosecution. As we have endevoured to show, this was a commercial dispute between brothers arising from transactions in a private company. It was not a case involving abuse of public office or loss of public funds or assets. In our view, there was no strong public interest in the institution of the criminal proceedings.

[**68**] In conclusion, had the learned judge considered the elements of abuse of criminal process and directed himself properly, he would have come to the conclusion, for the reasons stated, that the appellants had established an egregious abuse of criminal process by the 5th respondent which the DPP should have prevented by refusing to re-open the decision not to prosecute. However, we hasten to add that it has not been established that the DPP in reaching his decision, acted in bad faith or dishonestly.

[**69**] The last ground of appeal relate to the finding of the learned judge, in essence that, since he had struck out the prayer to quash the decision of DPP and, to prohibit the magistrate from proceeding with the criminal proceedings, the remaining prayer to prohibit the DPP and other agencies from charging or prosecuting the appellants would not be efficacious, taking into account that the charges had already been laid against the appellants. The learned judge concluded that granting the prayer of prohibition would leave the trial court and the proceedings rudderless.

Earlier at paragraph 103, the learned judge had stated that where a decision has been made, a party cannot seek to prohibit the same without having the same quashed. The Judge, however, qualified that statement by holding at paragraph 104, in essence, that, a prohibition can issue to prohibit the continuation of a prosecution without the decision being quashed.

In this case, the DPP had not embarked on the prosecution. He had only filed the charges in the magistrate's court. The appellants had not taken plea. The remedy of prohibition is prospective and not retrospective. In **Republic v. Chief Magistrate's Court at Mombasa, ex parte Ganijee & Another** (supra) the court said in relation to the remedy of prohibition at p.708 para 15-20:

> ***"If there is anything that remains to be done in those proceedings however, the order of prohibition will issue to stop further proceedings."***

[**70**] That dictum is supported by ample authority which is not necessary to cite. The remedy of prohibition is normally given to stay criminal proceedings which are an abuse of the process of the court. The order sought by the appellants before the amendment of the statement to prohibit the continuation of the criminal prosecution was in itself efficacious. If granted, it would have the effect of stopping the DPP from prosecuting with the result that the DPP would have no alternative but to withdraw the charges. Even without an order of prohibition directed to the trial magistrate, the proceedings would not continue without a prosecution. The finding of the learned judge that an order of prohibition as sought would not be efficacious was erroneous. However, in view of his earlier finding that the appellants had not proved their case, the decision, contrary to what the appellants now contend, could not have been different.

[**71**] In the light of the foregoing combined findings, we are satisfied that the appellants proved their case and that the learned judge erred in withholding an order of certiorari and prohibition. However, as the application essentially related to criminal prosecution, the Attorney General and EACC were improperly joined.

Accordingly, the appeal is allowed, the decision of the High Court is set aside. The orders of certiorari and prohibition are granted in terms of prayer 1 and 2 of the amended notice of motion.

The High Court while dismissing the application declined to make an order as to the costs on the grounds that the matter pits family members against one another and that there was delay in the commencement of prosecution. Although the conduct of the 5th respondent is lamentable, justice will be served if costs are not awarded. Accordingly, the appeal is allowed with no order as to costs.

Delivered at Nairobi this 19th day of January, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR