REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

JR MISC. APPLICATION NO. 21 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE BY THE APPLICANTS HEREIN TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS FOR THE PREROGATIVE ORDERS OF PROHIBITION AND CERTIORARI AGAINST THE RESPONDENTS

-AND-

IN THE MATTER OF ARTICLES 10, 27, 40, 47, 48, 50, 51, 157 (11), 159 (2) (C) (D) (E), AND 232 OF THE CONSTITUTION OF KENYA, 2010

-AND-

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT

-AND-

IN THE MATTER OF THE ENERGY ACT

-AND-

IN THE MATTER OF THE PETROLEUM ACT

-BETWEEN-

TALIB ZEIN SALIMIN.....1ST APPLICANT

MUSA ABDULLAHI ALI.....2ND APPLICANT

-VERSUS-

ENERGY & PETROLEUM

REGULATORY AUTHORITY.....1ST RESPONDENT

ANTI COUNTERFEIT AGENCY.....2ND RESPONDENT

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

-AND-

DANIEL GICHUHI.....1ST INTERESTED PARTY

EVANSON GITAU.....2ND INTERESTED PARTY

PROTO ENERGY LIMITED.....3RD INTERESTED PARTY

JUDGEMENT

Introduction

1. By a Motion on Notice dated 21st February, 2020, the *ex parte* applicant herein seeks the following orders:

a) THAT this Honorable Court be pleased grant the judicial review orders of certiorari to bring before this court for purposes of being quashed the 1st and 2nd Respondents' decision made on the 20th December, 2019 to charge the Ex Parte Applicants and the Interested Parties herein in Criminal Case Number 995 of 2019 with various offences under the Petroleum Act.

b) THAT this Honorable Court be pleased to grant the judicial review order of prohibition prohibiting the Respondents herein from arresting, prosecuting or in any manner harassing the Applicants herein in relation to the raid carried out on the Applicants' Company go – downs along Mombasa Road by the Respondents on the 29th November, 2019.

c) THAT the cost of this application be provided for.

Applicant's Case

2. The Notice of Motion was supported by the statement of facts and the verifying affidavit sworn by the applicant in support of the application for leave on 18th February, 2020 and a further affidavit sworn by **Talib Zein Salimin**, the applicant on 16th February, 2021.

3. According to the applicants, they are the directors of Swift Gas Distributors Limited – "the Company"- which is a duly registered dealer in the storage, filling and distribution of Liquefied Petroleum Gas (LPG) Cylinders pursuant to the license granted to it by the 1st Respondent on the 19th June, 2019. It was averred that on the 29th November, 2019 a group of around thirteen (13) people invaded the premises of the Company along Mombasa Road and harassed it staff and customers before carrying away assorted gas cylinders from the Company's premises. This information was relayed to the deponent on the morning of the 29th November, 2019 and upon his arrival at the premises at around 7:00 am in the morning, he found people, some of whom identified themselves as the employees of the 1st and 2nd Respondents, in the premises loading some cylinders into the 2nd Interested Party's vehicle. Upon inquiry, the deponent was informed by the officers that they were members of the Multi-Agency Task Force after which they asked him to accompany them to Pangani Police Station.

4. According to the deponent, while at Pangani Police Station he was informed that the 1st and 2nd Respondents intended to charge him with several offences under the provisions of both the ***Anti-Counterfeit Act*** and the ***Petroleum Act*** and as the investigations were still going on, he was released on a cash bail of Kshs. 20,000/= and directed to report back on the 20th December, 2019 to be advised on the next course of action. In the meantime, on the 9th December, 2019 the Respondent served him with a letter dated 4th December, 2019 purporting to suspend the Company's license on the grounds that the company had allegedly violated several provisions of the ***Petroleum Act*** and the Regulations made thereunder.

5. Upon receipt of the same letter, the deponent immediately upon receipt of the said letter, instructed his advocates to challenge the decision of the 1st Respondent suspending the company's license before the Energy and Petroleum Tribunal pursuant to Section 36 of the ***Energy Act***.

6. It was deposed that on the 20th December, 2019 the deponent went back to Pangani Police Station where he was informed that the

1st Respondent had decided to charge him with several offences under the provisions of the ***Petroleum Act*** pursuant to the raid carried out on the companies premises on the 29th November, 2019. However, the officer of the 1st Respondent who served him with the charge sheet informed him that the dispute could be resolved, either judicially or administratively and that if he opted to have the issue resolved administratively the intended charges against the applicant would be withdrawn and the suspension of the Company's license lifted.

7. Pursuant to the foregoing and keen to have the matter resolved through Alternative Dispute Resolution, the deponent immediately entered into elaborate negotiations with the 1st Respondent culminating into the issuance of a warning letter in which the 1st Respondent cautioned the deponent that sanctions would be taken against the deponent under the provisions of the ***Petroleum Act*** if he did not adhere to the terms of the warning letter. At the resolution of the dispute, the suspension of the Company's license was lifted, the cash bail returned to him and he continued with his business in the honest and sincere belief that the dispute had been amicably resolved.

8. However, the deponent was shocked when officers of the 1st Respondent served him with the Notice dated 24th January, 2020 to attend court on the 24th February, 2020 for the purposes of taking plea in Criminal Case Number 995 of 2019. It was then that it dawned on him that despite its express and repeated assurance that the dispute arising from the raid that had been carried out on the 29th November, 2019 had been amicably resolved, the 1st Respondent had in fact reneged on the agreement and was instead now proceeding with Criminal Case Number 995 of 2019.

9. In the deponent's view, the Respondents had in violation of his constitutional right to fair administrative action, proceeded to disregard the express agreement entered into and instead of upholding the administrative decision they had made, opted to proceed with the criminal prosecution without any prior notice or giving any reason why it had changed its mind. It was the deponent's case that the 1st Respondent by its action, undermined the confidence in it as a statutory body by violating Chapter 10 of the Constitution and failing to adhere to the code of conduct expected of a state officer and or institution under Article 232 of the Constitution. To the deponent, the of the 1st Respondent's decision, examined within the context of the discussion and the agreement with and it, is so unreasonable that no reasonable public officer or institution would have arrived at the same decision if it had been faced with similar facts.

10. The deponent doubted whether the 1st Respondent disclosed to the 3rd Respondent that it had given the deponent a warning on the outcome of the raid conducted in the premises of the Company on the 29th November, 2019 because it is highly unlikely that the 3rd Respondent would have allowed the prosecution had these facts been disclosed it. It was reiterated that the 2nd Respondent who was part of the multi-agency task force which invaded the Company's premises, decided not to proceed with any action against the applicant partly because of the agreement and understanding between the applicant and the 1st Respondent.

11. It was contended that the intended prosecution if allowed to proceed would be in violation of the applicant's legitimate expectation that all public institutions and officers would act in the public interest by upholding integrity and complying with all the provisions of the Constitution and statutes governing their operations.

12. By a further affidavit, the deponent pointed out that that none of the Respondents addressed the issue of the agreed alternative dispute resolution in which the 1st and 3rd Respondents agreed to withdraw the charges against the Applicants herein and the 1st and 2nd Interested Parties and substitute the same with an enforcement action that included a warning and a 60 day moratorium in furtherance of the 1st Respondents letter and 20th December, 2020. Similarly, the 1st Respondent is completely quiet on the contents if its letter dated 20th December 2020 in which it informed the Applicants of its decision to substitute the intended charges against the Applicants and 1st and 2nd Interested Party with an enforcement notice and a warning.

13. It was disclosed that the proceedings before the Chief Magistrates Court Mavoko in Criminal Case No. 995 of 2019 demonstrate that the 3rd Respondent in fact made an application to withdraw the said case on the ground that the 1st Respondent had opted to withdraw the charges and instead issue the applicants with an enforcement notice and a warning in consultation with the 3rd Respondent.

14. It was therefore the applicants' position that it is a demonstration of lack of good faith and transparency on the part of the 1st and 3rd Respondents for them to purport to Respond to the Motion without addressing the issue of their decision to withdraw the charges against the applicant and instead issue a warning and enforcement notice, which as the proceedings herein demonstrate, is at the core of this dispute.

15. According to the Applicants, since the 1st and 3rd Respondents have therefore failed to explain to this court why they changed their minds on the said decision, the decision to proceed with Criminal Case No. 995 of 2019 was made on the instructions of and at the behest of the 3rd Interested Party. In the applicants' view, the 3rd Respondent succumbed to the pressure from the 3rd Interested Party to have the applicants charged in violation of the independence required of his office under both the Constitution and the ***Office of the Director of Public Prosecutions Act.*** As the Applicants were not part of the consent between the 1st and 2nd Interested Party and 1st Respondent, it was contended that it is in bad faith for the 1st Respondent to purport to use the proceedings in Petition No. 28 of 2020 to demonstrate the applicants' guilt in a matter which is pending before court.

16. It was reiterated that the negotiations the applicants entered into with the Respondents were done in good faith and it is wrong and unlawful for the Respondent to purport to use the information it obtained from the parties during the negotiation to demonstrate their guilt and culpability without the benefit of a trial.

Applicant's Submissions

17. It was submitted on behalf of the Applicants that the following issues fall for determination:

(i) Did the 3rd Respondent's second decision to continue with the prosecution of the Applicants after the Respondents had initially opted for an out of court settlement by issuing them with a warning and a sixty (60) day moratorium in furtherance of the 1st Respondent's letter to the Applicants dated 20th December 2019 on the same"

(ii) Can the 3rd Interested Party as a registered limited liability company qualify as a victim under the Victims Protection Act"

(iii) Can the 1st and 3rd Respondent institute and sustain criminal prosecutions on the basis of evidence gathered and investigations carried out by a private citizen"

(iv) Does the second decision to proceed with Applicants prosecution in Criminal Case No. 995 of 2019 violates the Applicants' and the 1st and 2nd Interested Party's right to fair administrative action under Article 47 of the Constitution as read together with Section 4 of the ***Fair Administrative Actions Act***"

(v) Did the 3rd Respondent's second decision to continue with the prosecution of the Applicants after the Respondents had initially opted for an out of court settlement by issuing them with a warning and a sixty (60) day moratorium in furtherance of the 1st Respondent's letter to the Applicants dated 20th December 2019 on the same"

18. It was submitted that the by its decision of 24th January 2020, the 1st and 3rd Respondents reneged on their earlier decision to withdraw the charges and issue the Applicants with a warning instead. According to the applicants, this second decision was clearly based on the 3rd Interested Party's advocate's letter dated 23rd January 2020. The 1st and 3rd Respondents were therefore making the important decision to renege on their agreement to withdraw the charges against the Applicants and the Interested Parties and issue them with a warning letter instead, on the instructions of the 3rd Interested Party.

19. According to the Applicants, the office of the 3rd Respondent is established as an independent constitutional office under the provisions of Article 157 of the Constitution. Indeed, Article 157(10) of the Constitution provides that the Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority. Pursuant to the Provisions of Article 157(12) of the Constitution, Parliament enacted the ***Office of the Director of Public Prosecutions Act.*** In support of this submission, the Applicants relied on the case of **Republic vs. Chief Magistrates Court at Milimani Law Courts; Director of Public Prosecutions & 2 Others (Interested Parties); Ex parte Applicant: Pravin Galot [2002] eKLR,** where **Mativo, J** held as follows;

"The DPP must serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law. A clear reading of the architecture of Article 157 of the Constitution leaves no doubt that the DPP is required to not only act independently, but to remain fiercely so. The second Interested Party cannot be seen to be the one pushing the DPP to mount a prosecution without offending Article 157 (10) of the Constitution. All that a complainant is required to do is to present his evidence to the investigating officers, and leave it to the DPP to independently evaluate the evidence and make a decision whether or not to mount the

prosecution.

77. The second Interested Party suggests that he has submitted ample evidence and that the DPP has refused to act. It is not for the second Interested Party or even this court to decide the sufficiency or otherwise of the evidence before the prosecution is mounted. It is for the DPP to decide independently and act accordingly. This is a constitutional imperative. It is consistent with the constitutional dictates safeguarding the independence of the DPP and fair trial process. It is also important to mention that under Article 245 (4) (a) of the Constitution, "no person may give a direction to the Inspector General with respect to the investigation of any offence or offences." Just like the constitutionally guaranteed independence of the DPP, this provision is aimed at ensuring that investigations are undertaken independently."

20. According to the Applicants, all that the 3rd Interested Party was required to do as a complainant is to present his complaint to the 1st Respondent who in turn would present the evidence to the 3rd Respondent to independently make his decision to prosecute or not prosecute under Article 157(10) of the Constitution as read together with Section 6 of the ***Office of the Director of Public Prosecutions Act***. However, in this case, the 3rd Interested Party expressly instructed both 1st and 3rd Respondent through its advocates to proceed and prosecute the Applicants and the Interested Parties on the basis of "the weighty evidence, painstakingly gathered by the diligent labour of our Client, enough to secure a conviction".

21. It was submitted that in a shocking capitulation of the duty and the independence required of its office by the Constitution, the 3rd Respondent cowardly submitted to the demands of the 3rd Interested Party in their letters dated 24th January 2020 and 27th January 2020 respectively without even mentioning their earlier decision to withdraw the charges against the Applicants and the Interested Parties and to instead issued them with a warning and sixty (60) day moratorium. In this regard, the Applicants cited the case of **Republic vs. William Macharia Murathe [2016] eKLR** where the court held that;

"The above provisions require the DPP to not only act independently in the exercise of his functions, but also ought not to be perceived to be acting under the direction of instructions or instigation of any other person. The admission by the applicant that the proceedings were procured by the complainant and delivered to their offices raises genuine doubts as to whether or not the decision to file the appeal was instigated by the complainant. This suspicion is strengthened by the fact that there is nothing to show that the DPP had taken any steps to institute the appeal before the proceedings were availed by the complainant as admitted. The decision to institute or not institute court proceedings is a high calling imposed upon the DPP by the law and must be exercised in a manner that leaves no doubt that the decision was made by the DPP independently. Where the decision is surrounded by doubt or even mere reasonable suspicion as in the present case, such a decision cannot be allowed to stand…The decision whether or not to prosecute is very important. It can be very upsetting for a person to be prosecuted even if later found not guilty. However, a decision not to prosecute can cause great stress and upset to a victim of crime. Therefore, the DPP must carefully consider whether or not to prosecute or whether or not to institute an appeal. This decision must be seen to have been arrived at by the DPP independently. Under no circumstances should the DPP appear to have been prompted by another person to institute any proceedings. Such a scenario, even if it is mere reasonable suspicion would amount to a violation of article 157 (10) of the Constitution and Section 6 of the Office of the Director of Public Prosecutions Act [8] cited above. The prosecutor should remain fiercely independent, fair and courageous. The responsibilities entrusted to the Director of Public Prosecutions, and thereby to State Counsel and police and public prosecutors, demand nothing less. D.A. Bellemare, M.S.M, Q.C put best the often difficult course for the prosecutor when he said:-

"It is not easy to be a prosecutor. It is often a lonely journey. It tests character. It requires inner strength and self-confidence. It requires personal integrity and solid moral compass. It requires humility and willingness, where to appropriate, to recognize mistakes and take appropriate steps to correct them. Prosecutors must be passionate about issues, but compassionate in their approach, always guided by fairness and common sense."[9]

In order to advance the rule of law, and in particular to protect the principle that all are equally subject to the law, the DPP (and therefore his officers) must be independent. The Constitutional provision in Article 157 (10) of the Constitution 2010 ensures that the DPP has complete independence in his decision making processes. This is vital to protect the integrity of the criminal justice system because it guarantees that any decision to prosecute a person is made free of any external influences. In the words of John Kelly TD, the prosecution system "should not only be impartial but should be seen to be so and that it should not only be free from outside influence but should be manifestly so."[10]

The following observations are useful to bear in mind:-

"...the use of prosecutorial discretion should be exercised independently and free from ANY interference. Prosecutors are required to carry out their duties without fear, favour or prejudice–impartially, with objectivity, unaffected by individual or sectional interests and public or media pressures, fairly, having regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect and make all necessary and reasonable enquiries and disclose the results of those enquiries, regardless of whether they point to the guilt or innocence of the suspect ...That is a role which, I fear, is not well understood in the community. It may not be a popular position but it is a very valuable and important one."[11]

The role of the prosecutor excludes any notion of winning or losing; it is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.[12] **It is said that the prosecutor acts in the general public interest and so it must be. That is where he prosecutor's ultimate loyalty and responsibility lie. Mere or reasonable suspicion that the DPP did not act independently is in my view sufficient to taint the proceedings. The upshot is that my answer to issue number two is in the negative."**

22. It was noted that the basis of the 3rd Interested Party's complaint and objection to the agreed alternative dispute resolution mechanism between the Applicants and the Respondents is its belief that it is a victim of the Applicants alleged crimes and is therefore entitled to have say and even direct both the manner in which the investigations are being done and the decision to prosecute. This belief, it was submitted, if founded on the provisions of Section 4 of the ***Victims Protection Act*** is mistaken and is not based on any law. While in appropriate cases the investigative agencies can take the views of a complainant into account, in the Applicant's view, a complainant is not the same as a victim in law since Section 2 of the ***Victims Protection Act*** of 2014 defines a Victim as follows;

"Means <u>any natural person</u>, who suffers injury, loss or damage as a consequence of an offence".

23. In this case it was contended that the 3rd Interested Party by its own admission and as confirmed by the registration documents annexed to its replying affidavit, is a limited liability company and not a natural person. It cannot therefore be a victim as understood and defined under Section 2 of the ***Victims Protection Act*** and therefore cannot invoke and rely on the provisions of the Victim Protection Act to question and seek the revision of the independent decision of the 3rd Respondent on the ground that it is a victim of the Applicants alleged crimes because it is not a victim under the law. Accordingly, to the extent that the second decision to prosecute the Applicants and the 1st and 2nd Interested Parties relied on the 3rd Interested Party's false and misleading assertion that it is a victim under the ***Victim Protection Act***, the same is contra statute and should be quashed *in limine.*

24. It was submitted that the second decision to charge and prosecute the Applicants and the Interested Parties was prompted by the 3rd Interested Party's letter dated 23rd January 2020 in which the 3rd Interested Party was of the view that there was no justification for the negotiated settlement because, the 3rd Interested Party had ***"painstakingly gathered enough evidence***" which in its view was enough to secure a conviction and handed the same to the 1st Respondent who in turn passed the evidence to the 3rd Respondent to institute the prosecution of the Applicants and the Interested Party. According to the Applicants, the law does not envisage a situation where a private company conducts investigations and turns over the evidence to state investigative agencies who are then expected to merely arrest and prosecute the alleged offender on the instructions of and at the behest of the said private citizen.

25. The Applicants cited the functions and powers of the 1st Respondent as provided under Sections 10 and 11 of the ***Energy Act***. They also relied on Section 22(i) of the ***Anti Counterfeit Act***, which permits the 2nd Respondent to appoint such inspectors as the Board may consider appropriate and that such appointed inspectors have full police powers in the exercise of their duties. Since Article 245 (4) (a) of the Constitution as read with Section 24(e) of the National Police Service Act vests the power to investigate any particular offence or offences on Inspector General of Police, it was submitted that there is therefore no provision under both the constitution and the statutes that establish both the 1st and 2nd Respondent which allow them to rely on or prosecute a citizen of this country based on the investigations carried by a private citizen.

26. According to the Applicants, since the 3rd Interested Party is a player in the energy sector and therefore the Applicants' competitor, it is therefore conceivable that the 3rd Interested Party is using the criminal proceedings to harass a competitor. The Applicants held the view that the 3rd Interested Party, if aggrieved by the conduct of the Applicant and the Interested Party, should report the allegation to police and any other body authorized to do investigations and let independent statutory bodies conduct the investigations. The 3rd Respondent will, under the law review the evidence and make its own determination on whether the evidence

can secure a conviction. To the Applicants, the 3rd Interested Party cannot therefore purport to be a complainant, an investigator and a prosecutor all rolled into one and the Respondent should therefore not allow or create the impression that the investigations, the evidence gathered and the decision to prosecute were all made at the behest of and the insistence of the 3rd Interested Party as that would be an abuse of the court process and any decision arrived at through such an illegal process should be stopped by the courts. This submission was based on the decision of the Court of Appeal in the case of **Commissioner of Police & the Director of Criminal Investigation Department & Another vs. Kenya Commercial Bank & 4 Others (2012) eKLR** for the holding that:

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

It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See Ndarua V. R. [2002] 1EA 205. See also Kuria & 3 Others V. Attorney General [2002] 2KLR 69."

27. It was therefore submitted that to the extent that second decision to prosecute the Appellants was based on the investigations and evidence gathered by the 3rd Interested Party, the same is unconstitutional and the court should put a stop to the illegal process by quashing the decision to prosecute the Applicants and the Interested Parties.

28. According to the Applicants, since the Respondents made a conscious decision to withdraw the charges against the Applicants and the 1st and 2nd Interested Parties and issue them with a warning instead which decision was communicated to both the accused persons and the trial court, it would amount to an abuse of the court process for the Respondents to reverse their decision without giving any reason or justification for the change of mind. This submission was based on Article 47 of the Constitution as read with Section 4 of the ***Fair Administrative Actions Act.*** According to the Applicants, the decision to withdraw the charges and served the Applicants with a warning is an administrative decision made by both the 1st and 3rd Respondents which must comply with the constitutional principles outlined under Article 47 of the Constitution as read together with Section 4 of the ***Fair Administrative Actions Act*** and reference was made to the case of **Kenya Human Rights Commission & Another vs. Non-Governmental Organizations Co-ordination Board & another [2018] eKLR.** It was contended that the decision to charge and then decide to withdraw the charges and issue a warning and proceed to communicate the decision of the Applicants and then two days later reverse the decision cannot qualify as a reasonable decision under Article 47 of the Constitution. In the Applicants' view, even if the Respondents believed that they had the right to flip flop on the decision to prosecute the Applicants, they had an obligation to give the Applicants written reasons on why they decided to reverse the agreement they had made with the Applicants. According to the Applicants, it smacks of cynical attempt to bait the Applicants into admission of a crime and then switch the goal posts once the purported confession has been obtained to use the same confession in this matter and the Criminal Case No. 995 of 2019 to claim that the Applicant have admitted to wrong doing and therefore do not deserve the prayers they are seeking herein.

29. Based on the foregoing, the Court was urged to allow the application as prayed.

1st Respondent's Case

30. In response to the Application, the 1st Respondent (hereinafter referred to as "the Authority") contended that it is established as the successor to the Energy Regulatory Commission (ERC) under the ***Energy Act***, 2019 and is responsible for the economic and technical regulation of the electric power, renewable and petroleum sub-sectors. Specifically, in relation to the instant suit, the Authority is further mandated to license all Liquefied Petroleum Gas dealers and regulate the trade and distribution of liquefied petroleum gas in Kenya.

31. It was averred on behalf of the authority that on the 29th of November 2019, the 1st Respondent, in conjunction with the 2nd Respondent and the Directorate of Criminal Investigations, raided a facility in Syokimau, Mavoko Sub-County, owned by Swift Energy Distributors Limited following a complaint by a licensed LPG dealer, Pro Gas Limited, the third interested party herein,

concerning illegal refilling of LPG cylinders at the said premises owned by Swift Energy Limited whose directors are the applicants herein. During the said raid and investigations, it was established that there were illegally filled assorted LPG cylinders in the facility, which illegality arose since the filling was done without the authority of brand owners contrary to Section 99(1) (m) of the ***Petroleum Act 2019*** and Regulation 13 (1) and 14 (a) of the ***Petroleum (Liquefied Petroleum Gas) Regulations 2019***. According to the Authority, it was further established during the raid and investigations that motor vehicles in the premises, being motor vehicles registration no. KCB 597S and KBG 141V owned by the 2nd and 1st Interested Parties respectively, were not in possession of the requisite licenses for transporting LPG cylinders as required under Section 74 (1) of the ***Petroleum Act 2019*** and Regulation 17 of the Petroleum (Liquefied Petroleum Gas) Regulations 2019. The Respondent's investigators further established that the vehicles in the premises, were not compliant with disaster preparedness and response regulations, as was evidenced by lack of portable fire extinguishers as required by Section 17(4) of the ***Energy (Liquefied Petroleum Gas) Regulation 2019***.

32. It was contended that as a result of these infractions, the 1st Respondent cordoned-off the entire facility as a crime scene, confiscated all the LPG cylinders and motor vehicles found at the scene and proceeded to prepare criminal charges against the Petitioner and other parties found at the stated facility in Syokimau. At the same time, the 1st Respondent, having established that the Ex-parte Applicants had breached various regulations as concerns the filling and distribution of LPG cylinders, proceeded to suspend their trading license and liaised with the 3rd Respondent to prepare criminal charges against the Ex-parte Applicants and Interested Parties.

33. Thereafter, the 2nd Interested Party filed a constitutional Petition at Nairobi, seeking orders for the release of his motor vehicle registration number KCB 597S. In the said suit, the 2nd Interested Party basically admitted undertaking transportation of LPG cylinders without a license, and entered into a consent for release of his vehicle by the 1st Respondent on the following terms;

1. That the Petitioner (*the 2nd Interested Party herein*) takes plea in criminal case number 995 of 2019 at the Mavoko Law Courts, on charges brought under the ***Energy Act***;

2. That upon taking plea, the Investigating Officer in the said criminal case issues an express approval for the release of motor vehicle registration no. KCB 597S to the Petitioner;

3. That the Petitioner applies for and is granted a License for the transportation of LPG cylinders by EPRA as provided for under Section 74 (1) of the Petroleum Act and Regulation 17 of the Petroleum (LPG) Regulations 2019.

34. According to the Authority, the prayer for an order for Certiorari and Prohibition as indicated in the main motion cannot be granted at this juncture, or at all, for the following reasons;

(a) The Ex-parte Applicants have admitted being in breach of Section 99(1) (m) of the ***Petroleum Act 2019*** and ***Regulation 13 (1) and 14 (a) of the Petroleum (Liquefied Petroleum Gas) Regulations 2019***, which involve trading in/refilling LPG cylinders without authority from brand owners. The Ex-parte Applicants' actions are illegal and criminal, with resulting prosecution thereof being the natural order of events for parties found undertaking illegal activities. Allowing the orders sought herein would therefore only amount to this court encouraging criminal action as opposed to curbing it at all costs.

(b) The 2nd Interested Party, for instance, has not only admitted participating in the illegal transportation of LPG cylinders in separate proceedings, but also executed a Consent undertaking to take plea in Criminal Case no. 995 of 2019 and to further apply for a License from the 1st Respondent. The same party now approaches this court and seeks orders not to be criminally prosecuted, which is a blatant abuse of the court's process and breach of a consent order issued by the Constitutional court in Nairobi.

(c) At no point did the 1st Respondent undertake not to prosecute the Ex-parte Applicants or withdraw criminal charges against them. The decision to prosecute the Ex-parte Applicants was made jointly by the Respondents after undertaking thorough investigations into the illegal gas refilling operations of the Applicants and therefore cannot simply withdraw the intended charges without a credible reason. The mandate to prosecute criminal offences is further bestowed on the 3rd Respondent, which is a constitutional mandate that cannot be taken lightly and further should not be interfered with by suspects such as the Applicants.

35. The Authority averred that in the instant proceedings, the Ex-parte Applicants have not shown how the intended criminal proceedings are contrary to rules of natural justice or contrary to laid down laws; that the Ex-parte Applicants and Interested Parties have all but admitted having been arrested while undertaking criminal activities and as such, cannot purport to be innocent victims

of oppression and that it has not been alleged that the 3rd Respondent in prosecuting the Applicants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution.

36. It was averred that whilst the 1st Respondent has the discretion to pardon the Ex-parte Applicants, whether unconditionally or on specific terms, depending on various factors such as the nature of offences and the steps taken by the culprits to remedy the relevant infractions, the 1st Respondent, however, cannot be compelled to apply this discretion to any party, which is what these entire proceedings are meant to do.

37. It was the Authority's position that no valid grounds have been provided by the Ex-parte Applicants to warrant this Court to issue the orders sought and as such, the instant motion should fail and should be dismissed with costs to the Respondents.

38. On behalf of the 1st Respondent, it was submitted that the Ex-parte Applicants have not shown how the intended criminal proceedings are contrary to rules of natural justice or contrary to laid down laws and that no allegations or proof of breaches of natural justice or oppression are highlighted against the Respondents, in which absence an order for Prohibition should not be granted. According to the 1st Respondent, judicial review is a judicial invention to ensure that a decision by the executive or a public body was made according to law, even if the decision does not otherwise involve an actionable wrong. Judicial review is a means to hold those who exercise public power accountable for the manner of its exercise, especially when decisions lie outside the effective control of the political process. The primary role of the Courts is to uphold the fundamental and enduring values that constitute the rule of law. As with any other form of governmental authority, discretionary exercise of public power is subject to the Courts supervision in order to ensure the supremacy of the law. The 1st Respondent asserted that judicial review applications do not deal with the merits of the decision and relied on **Republic vs. Attorney General & 4 Others Ex-Parte Diamond Hashim Lalji and Ahmed Hasham Lalji.**

39. In the absence of any allegation that the Respondents acted outside the perimeters of their powers, it was submitted that since the 3rd Respondent is not subject to the control of any other person or authority in exercising its discretion, the High Court cannot interfere with the exercise if the 3rd Respondent is acting lawfully, unless the 3rd Respondent, in prosecuting the Applicants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution, which allegations have not been made. It was therefore urged that in the absence such infractions based on illegal or malicious or oppressive intentions, the intended criminal prosecutions should be allowed to proceed.

40. It was further submitted that an order for certiorari or prohibition in such prevailing circumstances is granted where the court deems the intended criminal proceedings as being oppressive or an abuse of the court's process. In the instant proceedings, the Ex-parte Applicants and Interested Parties have all but admitted having been arrested while undertaking criminal activities and as such, cannot purport to be innocent victims of oppression. In that regard, the Applicants relied on **Nelson Kinyua Wambutu vs. County Government of Nyeri & Another [2016] eKLR.**

41. In the instant case, it was submitted that the Applicants have failed to prove that the 1st Respondent acted ultra vires in locking their premises and arresting their officials and that the decision to present criminal charges is the natural sequence of events, especially noting that there is a level of admission of culpability by the Ex-parte Applicants. The averment that the 1st Respondent had "*promised"* to withdraw the charges is therefore a non-starter and, in any event, can be raised by the Ex-parte Applicants in their defense once charged in the criminal court. Based on the foregoing arguments and in the absence of the Ex-parte Applicants adducing evidence to the effect that the Respondents, in preferring criminal charges, are acting illegally, ultra vires, maliciously and/or oppressively, the decision to impose criminal charges should not be interfered with. In the Applicants' view, should the orders sought by the Ex-parte applicants be granted, this court would effectively allow suspects to walk free from criminal prosecution, where there is proof of a criminal act being performed.

42. While admitting that the 1st Respondent indeed has the discretion to pardon the Ex-parte Applicants, whether unconditionally or on specific terms, depending on various factors such as the nature of offences and the steps taken by the culprits to remedy the relevant infractions, it was submitted that the 1st Respondent, however, cannot be compelled to apply this discretion to any party, which is what these entire proceedings are meant to do. It was therefore the 1st Respondent's position that no valid grounds have been provided by the Ex-parte Applicants to warrant this court to issue orders of certiorari or prohibition and, as such, the instant motion should fail. Since the Ex-parte applicants are admittedly in breach of the law, which breaches attract criminal prosecution, any withdrawal of the intended criminal action can therefore only be by way of consent of parties or discretion of the Respondents, unless it is proven that the later are acting illegally, oppressively, unreasonably or maliciously.

43. The 1st Respondent submitted that the instant motion is misguided, has no merit, has been brought in bad faith and should be dismissed with costs to the Respondents.

3rd Respondent's Case

44. On its part the 3rd Respondent filed the following grounds of opposition:

a) THAT the application is inept, misconceived and amounts to abuse of the court process,

b) THAT the application is intended to delay and derail the delivery of justice to victims of crime,

c) THAT the application lacks merit,

d) THAT the application is not filed in good faith,

e) THAT the Respondent prays that the same be dismissed,

f) THAT the applicants have not demonstrated any peculiar or exceptional circumstances that warrant grant f the orders sought.

45. Apart from the grounds he relied on an affidavits sworn by **Felister Njeru** and **PC Edward Mulongo.**

46. According to **Felister Njeru,** a Prosecution Counsel in the Office of the Director of Public Prosecutions the charges against the applicants have been brought in good faith and the process is not malicious or meant to harass the applicants in any way as criminal case No. 995/2019 at the Mavoko Law Court is well before court.

47. It was averred that the 3rd Respondent received the investigation file containing the investigations carried out by the 1st and 2nd Respondents in conjunction with the DCIO and upon perusal was satisfied with the evidence gathered. Based thereon, the 3rd Respondent was satisfied there was sufficient evidence to prove the charges levelled against the applicants who have been charged jointly with the 1st and 2nd ex-parte applicants.

48. It was her view that the applicants are trying to prosecute the case that is before the lower court before this court, which is contrary to the laid down procedures. It was averred that the 3rd Respondent is governed by Section 157 of the Constitution in making decisions to charge and that the 3rd Respondent complied with the said provision when making the decision to charge the applicants. As a result of the failure by the applicants to appear in court for plea, it was disclosed that a warrant of arrest had been issued indicating the applicants' intention to delay and derail the delivery of justice to victims of crime.

49. It was contended that the application herein lacks merit, it's an abuse of the criminal process calculated to hoodwink this Court into a ploy by the applicants herein to defeat justice and should be dismissed summarily.

50. According to **PC Edward Mulongo,** he is a police officer currently attached at EPRA Nairobi performing enforcement and consumer protection duties and the investigating officer in Mavoko CM Cr. No. 995 of 2019, on 6th December, 2019. He was assigned investigation duties to investigate a case of trading with liquefied petroleum gas cylinders of another licencee for gain without prior written consent from the brand owner in respect to Swift Energy Distributors Limited, a petroleum handling facility situated at Mlolongo along Mombasa road and adjacent to Soham Petrol Station. Upon finalization of investigations the file was forwarded to the 3rd Respondent to charge the applicants based on the overwhelming evidence gathered and based on the constitutional powers vested on the 3rd Respondent under Article 157 of the Constitution of Kenya 2010.

51. In his view, the criminal justice system and public interest requires that people accused of violations of the law should be tried in accordance with the law from the time of discovery of the offence. It was his case that the charges against the applicants are known in law and the applicants will be accorded a fair trial as envisaged in the Constitution and they should not vent their defence through this court but before the trial court. The deponent was of the view that the applicants' trial is not malicious, since the evidence on record clearly shows violation of the law.

52. On behalf of the 3rd Respondent, it was submitted that that the 3rd respondent complied wholly with its powers vested under Article 157 of the Constitution of Kenya in regard to the charging decision after an evaluation of the available evidence once the investigations were concluded and that there is enough evidence to sustain the charge against the applicants in Mavoko Chief Magistrate No. 995 of 2019. The submissions were grounded on Article 157 6(a) of the Constitution as read with Section 10 of the ***Office of the Director of Public Prosecutions Act*** and the case of **Florence Dorothy and 2 Others vs. DPP and 3 Others High Court Petition no. 341 of 2012** at paragraph 35 and it was submitted that nothing has been presented before this court to show the constitutional rights of the applicants were violated.

53. According to the 3rd Respondent, the 1st and 2nd respondents carried out investigations procedurally and remitted their investigations to Director of Criminal Investigations. The DCI represented by No. 82667 – **PC Edward Mulongo** finalized the investigations and forwarded the file to the 3rd respondent to peruse and make the decision to charge or not and upon being convinced the 3rd respondent charged as per the provision of the law.

54. It was therefore the 3rd Respondent's position that the 1st, 2nd and 3rd respondents have sufficient evidence to sustain the charges against the applicants and interested parties and this will be adduced before the trial court where the applicants and interested parties will have the opportunity to cross-examine and also defend themselves.

55. The 3rd Respondent therefore prayed that this court dismisses this application and directs that 1st and 2nd applicants together with the 1st and 2nd interested parties present themselves at the Mavoko Chief Magistrates Court on a date given by this court to take plea.

3rd Interested Party's Case

56. The Motion was similarly opposed by an affidavit sworn by Proto Energy **Major (Rtd) Samuel Ole Tolu**, Proto Energy Limited's Chief Security Officer.

57. According to the deponent, Proto Energy Limited is a limited liability company incorporated in Kenya under the provisions of the ***Companies Act***, Chapter 486 and is engaged in the business of supply of liquefied petroleum gas (LPG) in bulk and also in cylinders and other related businesses in Nairobi and elsewhere and is duly licensed by the Authority. Its business of marketing LPG in cylinders, is governed by the Kenya Standard KS 9-4: 2010 on the Gas Cylinders: Refillable Welded Low Carbon Steel Cylinders for Liquefied Petroleum Gas (LPG) exceeding 1.5 Litre Water Capacity; Part 4 Requalification and Inspection on the strength of which the interested party has invested heavily in manufacturing, marketing and branding of its unique brand of cylinders and protected its trademark and goodwill therein by registering its intellectual property thereto.

58. However, sometime in the years 2018 and 2019 Proto Energy Limited came to the realization that unscrupulous operators where unlawfully and illegally refilling its branded cylinders and passing them off to unsuspecting consumers as though they were filled and marketed by Proto Energy Limited. The deponent therefore commissioned a market survey in his capacity as the Chief Security Officer of Proto Energy Limited and it led him to conclude that the 1st and 2nd Applicants through their company Swift Energy Distributors Limited were major players in the illegal and unlawful refilling of Proto Energy Limited Branded Cylinders. Armed with this information Proto Energy Limited elected to make a complaint to the 1st and 2nd Respondents who have the statutory mandate to regulate the activities of Applicants and enforce the relevant laws and the 2nd Respondent acting on the 3rd Interested Party's Complaint obtained search warrants in Miscellaneous Criminal Case No. 4388 of 2019 Anti Counterfeit Agency vs. Soham Go Downs and on 29th November 2019 executed the said warrants. Both the 1st and 2nd Respondent's officers attended the Applicants' premises and collected valuable evidence of the Applicants' breaches of various laws relating to counterfeiting and dealing in illicit goods and on or about 4th December 2019 the 1st Respondent completed their investigations and issued a report to that effect. On the strength of the aforementioned report, the 1st Respondent provisionally suspended the license of Swift Energy Distributors Limited.

59. It was averred that some time in December 2019 the 1st and 2nd Respondents wrote to Proto Energy Limited and other companies requesting for information as to whether the Applicants and their company Swift Energy Distributors Limited were authorized to trade in the Proto Energy and other third-party cylinders and Proto Energy Limited and the Petroleum Institute of East Africa denied ever authorising the Applicants and Swift Energy Distributors Limited to trade or deal with their branded cylinders. Subsequently, the deponent became aware of the decision by the 1st Respondent to Charge the Applicants and the 1st and 2nd Interested Parties with offences under the ***Petroleum Act*** and was also informed by the 2nd Respondent that they were still conducting their investigations and tabulating their evidence and would in due course prefer criminal charges on the Applicants and the Interested Parties. However, on 16th January 2020 the Criminal Case Number 995 of 2019 came up at the Chief Magistrates Court in Mavoko and was

adjourned to 23rd January 2020 presumably because the Applicants and the Interested Parties had not been served with summons to attend court. On 23rd January 2020 the same case came up at the Chief Magistrates Court in Mavoko when the Applicants and the Interested Party were scheduled to take plea but to the surprise of Proto Energy Limited the 1st Respondent through the Prosecution Counsel applied to withdraw the charges citing a purported letter authored by the 1st Respondent dated 20th December 2019, an application which was objected to by Proto Energy Limited and the hearing thereof was set for 24th January 2020 at the Chief Magistrates Court in Mavoko. Proto Energy Limited through their advocates then wrote a protest letter to the 1st Respondent and copies to the 3rd Respondent and other registering its objections to the attempted withdrawal of the charges against the Applicants and the Interested Parties. Thereafter, the 1st and 3rd Respondents wrote to Proto Energy Limited countermanding the earlier position.

60. According to the deponent, Proto Energy Limited had no knowledge of or been a party to any purported alternative dispute resolution between the Applicants and the Respondents on 20th December 2019 or at all. It was his view that Proto Energy Limited is a victim, within the meaning of the ***Victim Protection Act***, Act. No. 17 of 2014, of the offences perpetrated by the Applicants' in Criminal Case Number 995 of 2019 (Mavoko).

61. Based on legal advice, he averred that the Applicants Notice of Motion dated 21st February 2020 is flagrant attempt by the Applicants to perpetuate a culture of impunity by victimizing the 3rd Interested Party and thereafter concocting secretive, unaccountable and sham alternative dispute resolution procedures and manufacturing consents to the exclusion and detriment of the 3rd Interested Party's legal and proprietary rights.

62. In a further affidavit by the same deponent, it was averred that Proto Energy Limited is the victim of the crime that is the subject of Criminal Case Number 995 of 2019 at the Chief Magistrates Court in Mavoko and is also an intended Interested Party in Petition No. 28 of 2020 (Nairobi) at the High Court of Kenya at Nairobi.

63. On behalf of the 3rd interested party, reliance was placed on **Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR** where the Supreme Court of Kenya found that an instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil and that a party that seeks to rely on the doctrine of legitimate expectation, must show that it has *locus standi* to make a claim on the basis of legitimate expectation. However, the same Court in **Republic vs. Nairobi City County & Another *ex parte* Wainaina Kigathi Mungai [2014] eKLR** while citing the South African case of **South African Veterinary Council vs. Szymanski 2003(4) S.A. 42 (SCA)** held that legitimate expectation cannot override the law since the law does not protect every expectation but only those which are 'legitimate'.

64. The 3rd Interested Party also relied on **Republic vs. Kenya Revenue Authority ex parte Aberdare Freight Services Limited [2004] eKLR** where it was held that a public authority may not vary the scope of its statutory powers and duties because of its own errors or the conduct of others since judicial resort to estoppel in these circumstances may prejudice the interests of third parties. Accordingly, purported authorisation, waiver, acquiescence, and delay do not preclude a public body from reasserting its legal rights or powers against another party if it has no power to sanction the conduct in question or to endow that party with the legal right or inventory that the claim.

65. It was submitted that the 1st Respondent does not have any prosecutorial powers for offences under the ***Petroleum Act*** which power solely resides in the 3rd Respondent. Accordingly, the 1st Respondent cannot promise or establish any expectation, legitimate or otherwise, to the *ex parte* applicant as to the decisions of the 3rd Respondents regarding the prosecution of offences under the ***Petroleum Act*** is the sole mandate of the 3rd Respondent.

66. According to the 3rd Interested Party, the circumstances under which the letter of 20th December 2019 was procured remain shrouded in mystery and secrecy since it was authored on the same day as the proceedings in Criminal Case Number 995 of 2019 (Mavoko) were instituted. It was submitted that the 3rd Interested Party was not invited to make representations before the purported "pardon" of the *ex parte* Applicants was granted in violation of the 3rd Interested Parties rights as a victim and a complainant of the alleged crimes of the *ex parte* Applicants to which they have admitted. In the 3rd interested party's view, this Court will be remiss not to take judicial notice of the inauspicious circumstances under which the author of the letter of 20th December 2019 left the employment of the 3rd Respondent sometime last year.

67. It was submitted that the letter of 20th December 2019 is not the outcome of some alternative dispute resolution mechanism but is at best an unorthodox attempt to short circuit the due administration of justice. It was noted that the 1st Respondent did not have

any of its commercial interests prejudiced by the activities of the *ex parte* Applicants but rather it is the 3rd Interested Party that was victimised and initiated the criminal complaint mechanism. It was submitted that the letter also fails the test established by the Supreme court in **Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 Others [2014] eKLR** as the representation underlying the expectation is not 'clear, unambiguous and devoid of relevant qualification'.

68. According to the 3rd interested party, it is of course a legal person and from a casual reading of section 2 of the ***Victim Protection Act*** it would mean the 3rd Interested Party cannot be a victim of a crime worthy of protection under the said Act. It was submitted that Article 20 of the Constitution of Kenya stipulates that the Bill of Rights applies to every person and that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. Article 260 of the Constitution stipulated that in construing the Constitution unless the context requires otherwise; a person includes a company whether incorporated or unincorporated while Article 24(2)(b) and (c) further provides that, a provision in legislation limiting a right or fundamental freedom shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation and that it shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

69. It was submitted that any attempt to construe section 2 of the ***Victim Protection Act*** as excluding legal person would be unconstitutional because it would be a limitation of the 3rd Interested Parties right to a fair trial under Article 50(9) which is a right from which no derogation is permitted under Article 25(c). Further the *ex parte* Applicants have not offered any justification for this interpretation as required by Article 24(3).

70. It was therefore submitted that the 3rd Interested Party is a Victim within the meaning of the ***Victim Protection Act***, with all rights and freedoms appertaining thereto.

71. According to the 3rd interested party, an order of certiorari is only to the *ex parte* Applicants if the 3rd Interested Party who has the constitutional and statutory mandate to prosecute offences under the ***Petroleum Act*** had made a promise to the *ex parte* Applicants. As has been demonstrated above the ex parte Applicants expectation is founded on a promise made by the 1st Respondent who had no authority to make such promises. Indeed, that promise was in the fullness of time retracted by the 1st Respondent and the 3rd Respondent restated its intentions succinctly to prosecute the ex parte Applicants. The 3rd interested party noted the 3rd Interested Parties letter of 23rd January 2020 was made in due exercise of its rights under Article 37 of the Constitution to present petitions to public authorities. It was not as suggested by the *ex parte* Applicants an instruction to the 3rd Respondent.

72. The 3rd interested party's urged that the Notice of Motion dated 21st February 2020 ought to be dismissed with costs and the proceeding in Magistrates Court Criminal Case No. 995 of 2019 (Mavoko) allowed to proceed to their logical conclusion.

Determination

73. Having considered the application, the affidavits both in support of and in opposition to the application, the submissions for and against the grant of the orders sought and the authorities cited on behalf of the parties thereto, this is the view I form of the matter.

74. The principles which guide the grant of the orders in the nature sought herein are now well crystallised in this jurisdiction. What is important is the application of the same to the facts of each case. It was well put by **Professor Wade** in a passage in his treatise on ***Administrative Law***, 5th Edition at page 362 and approved in the case of the **Boundary Commission [1983] 2 WLR 458, 475**:

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

75. However, according to ***Judicial Review Handbook***, 6th Edition by **Michael Fordham** at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act

lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority or power.

76. Under the current Constitution, this Court is empowered to invoke its judicial review jurisdiction in the proceedings of this nature in order to grant appropriate orders including the orders sought herein. In other words, judicial review jurisdiction has now been fused with the remedies under the Constitution and this is clearly discernible from the remedies crafted under section 11 of the ***Fair Administrative Action, Act, 2015***. As was held by the South African Constitutional Court in **Pharmaceutical Manufacturers Association of South Africa & Another vs. Minister of Health Case CCT 31/99**:

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

77. Since our Constitution is incremental in its language, the grounds for the grant of judicial review relief ought to be developed and expounded and expanded so as to meet the changing needs of our society so as to achieve fairness and secure human dignity.

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

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

79. Proceedings of this nature, ordinarily, do not deal with the merits of the case but only with the process. In other words, these proceedings determine, *inter alia*, whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made, whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters, whether the decision to commence the criminal charges go contrary to the applicant's legitimate expectation, whether the respondents' decision to charge the applicant is irrational. It follows that where an applicant brings such proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction to determine such a matter and will leave the parties to resort to the usual forums where such matters ought to be resolved. In other words, such proceedings are not the proper forum in which the innocence or otherwise of the applicants is to be determined and a party ought not to institute such proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in these kinds of proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and whether such proceedings amount to a violation of his rights and fundamental freedoms and once the Court is satisfied that that is not the case, the High Court ought not to usurp the jurisdiction of the trial Court

and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution's evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.

80. Therefore, the determination of this case must be seen in light of the foregoing decisions. However, it is upon the *ex parte* applicant to satisfy the Court that the discretion given to the Respondent to investigate and prosecute ought to be interfered with.

81. In this case the applicants contend that keen to have the matter resolved through Alternative Dispute Resolution, elaborate negotiations were entered into with the 1st Respondent culminating into the issuance of a warning letter in which the 1st Respondent cautioned that sanctions would be taken against the Applicants under the provisions of the ***Petroleum Act*** if they did not adhere to the terms of the warning letter. At the resolution of the dispute, the suspension of the Company's license was lifted, the cash bail returned and the Applicants continued with their business in the honest and sincere belief that the dispute had been amicably resolved.

82. However, and to their dismay, officers of the 1st Respondent served the deponent with the Notice dated 24th January, 2020 to attend court on the 24th February, 2020 for the purposes of taking plea in Criminal Case Number 995 of 2019. It was then that it dawned on him that despite its express and repeated assurance that the dispute arising from the raid that had been carried out on the 29th November, 2019 had been amicably resolved, the 1st Respondent had in fact reneged on the agreement and was instead now proceeding with Criminal Case Number 995 of 2019.

83. The 1st Respondent while not denying the existence of such agreement, is of the view that the Applicants having admitted the commission of an offence cannot now seek orders prohibiting their prosecution particularly as the 1st interested party in Petition No. consented to participation in the said criminal proceedings. Whilst the 1st Respondent admitted that it has the discretion to pardon the Ex-parte Applicants, whether unconditionally or on specific terms, depending on various factors such as the nature of offences and the steps taken by the culprits to remedy the relevant infractions, the 1st Respondent, however, cannot be compelled to apply this discretion to any party, which is what these entire proceedings are meant to do.

84. On their part, the 3rd Respondent's case is that investigations having been conducted which revealed the commission of a criminal offence, this Court should not interfere with the discretion given to the 3rd Respondent to carry out the prosecution.

85. The 3rd Interested Party's Case, was that being the victim in the case, it ought to have been consulted before the agreement between the Applicants and the 1st interested party was entered into.

86. The issue before this Court is not whether or not the 3rd Respondent's power to prosecute are being improperly or unlawfully exercised. The Applicants' case, as I understand it, is that they legitimately expected that the said Agreement would be adhered to by the 1st Respondent.

87. That a prosecutor has the power to review an earlier decision on whether or not to prosecute is not in doubt. Under section 5(4)(e) of the ***Office of the Director of Public Prosecution Act***, the DPP is mandated to review a decision to prosecute, or not to prosecute, any criminal offence. In saying so, I find myself in agreement with the observation by the Supreme Court of Ireland **(Denham, J)** in the case of **Carlin vs. DPP Appeal No. 105/2008; [2010] (IESC) 14** that:

"7. The Director is an important independent office in the State and independent in the performance of his functions: Prosecution of Offences Act, 1974. A clear policy of non-intervention by the courts in the exercise of the discretion of the prosecutor, except in particular circumstances, has been stated in cases over the last few decades. An independent prosecutor is an important part of the fabric of a fair justice system. The prosecutor must not only be independent but be seen to be independent. If the Director is seen to change his decision where there are no new factors but simply after representations by a victim or his family, it raises issues as to the integrity of the initial decision and the process, and thus may impinge on confidence in the system. It is important that a prosecutor retain the confidence of society in his process of decision making.

8. It is entirely appropriate that the Director have a process wherein he may review an earlier decision. The fact that he may review his decision is now a matter in the public domain.

9. It is essential that the Director remain independent. However, he is subject to the constitutional requirement of fair procedures. While the fair procedures appropriate at the investigation stage of a prosecution are not equivalent to those at trial in a court of law the process requires to be constitutionally firm.''

88. In a document titled: ***Reconsidering a Prosecution Decision: Legal Guidance,*** the Crown Prosecution Service on its website (www.cps.uk – 8th February, 2016) states that the reasons for review of a decision not to prosecute as set out at Section 10.2 of the Code for Crown Prosecutors include:

"a) cases where a new look at the original decision shows that it was wrong and, in order to maintain confidence in the criminal justice system, a prosecution should be brought despite the earlier decision;

b). cases which are stopped so that more evidence which is likely to become available in the fairly near future can be collected and prepared. In these cases, the prosecutor will tell the defendant that the prosecution may well start again;

c). **cases which are stopped because of a lack of evidence but where more significant evidence is discovered later; and**

d). **cases involving a death in which a review following the findings of an inquest concludes that a prosecution should be brought, notwithstanding any earlier decision not to prosecute."**

89. Where the DPP has made a decision to prosecute, a person who is dissatisfied with such a decision can challenge it through judicial review proceedings and that is exactly what the applicant has done in this case. With respect to legitimate expectation, **B. N. Pandey** in his article "**Doctrine of Legitimate Expectation**" restated the dictum of **Lord Denning M. R** in **Sehmidt vs. Secretary of Home Affairs [1969] 2 Ch 149; (1969) 1.AllE.R. 904** that:

"The speeches in Ridge v Baldwin show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest or I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say …"

90. In **CCSU vs. Minister for the Civil Service [1984] 3 All ER, 935 Lord Diplock** stated, at page 949 that:

"To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn." (Emphasis supplied)

91. According to **De Smith, Woolf & Jowell,*"Judicial Review of Administrative Action"*** 6thEdn. Sweet & Maxwell page 609;

"A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public."

92. In this case, the existence of the said agreement is not denied. It is also not denied that the 1st Respondent has the power to enter into such an agreement. In fact, the 1st Respondent has expressly admitted that fact. Accordingly, I find that there was a legitimate expectation created in the Applicant's mind that he would not be prosecuted if he complied with the terms of the Agreement. In those circumstances, as was noted in **R vs. Devon County Council ex parte P Baker [1955] 1 All ER**:

"...expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognises that the interest cannot

properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision."

93. In **Republic vs. Kenya Revenue Authority Ex-Parte Yaya Towers Limited [2008] eKLR**, in which **Nyamu, J** (as he then was) relied on the House of Lords in the case of **Council of Civil Service Unions and Others vs. Minister for the Civil Service [1924] 3 All ER 935** at p. 936, where it was held that:-

"An aggrieved person was entitled to revoke judicial review if he showed that a decision of a public authority affected him by depriving him of some benefit or advantage which in the past he had been permitted to continue to enjoy either until he was given reasons for its withdrawal and the opportunity to comment on those reasons or because he had received an assurance that it would not be withdrawn before he had been given the opportunity of making representations against the withdrawal. The appellants' legitimate expectation arising from the existence of a regular practice of consultation which the appellants could reasonably expect to continue gave rise to an implied limitation on the minister's exercise of the power contained in act 4 of the 1982 order; namely an obligation to act fairly by consulting GCHQ staff before withdrawing the benefit of trade union membership. The minister's failure to consult prima fade entitled the appellants to judicial review of the minister's instruction".

94. It is therefore clear that while the Respondents could properly reverse the decision made to enter into the said Agreement, he could only do so lawfully. He was under a constitutional obligation to comply with the provisions of Article 47 of the Constitution which states that:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

95. I associate myself with the opinion of **Githinji, JA** in **Judicial Service Comission vs. Mbalu Mutava [2015] eKLR at para 23** that:

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

Order

96. Consequently, I find that the decision to unilaterally ignore the Agreement entered into between the Applicants and the 1st Respondent without giving the Applicants written reasons for so doing amounted to unfair administrative action since "administrative action" is defined in Section 2 of the ***Fair Administrative Action Act*** to include:

(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

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

97. In the premises the order that commends itself to me and which I hereby issue is an order of prohibition directed at the Respondents prohibiting them from prosecuting or continuing with the prosecution against the Applicants in Chief Magistrates Court Mavoko in Criminal Case No. 995 of 2019 unless and until the Respondents lawfully rescinds the said Agreement.

98. There will be no order as to costs and it is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 2ND JUNE, 2021

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mbaji for Mr Ngugi for the 1st Respondent

Miss Okeyo for Mr Omollo for the 3rd Interested Party

Mr Ngetich for the 3rd Respondent

CA Geoffrey