REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
(Coram: Koome; CJ & P, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

PETITION NO. 6 (E007) OF 2022
(CONSOLIDATED WITH PETITION NOs. 4 (E005) & 8 (E010) OF 2022)

BETWEEN

EDWIN HAROLD DAYAN DANDE.....1ST APPELLANT
ELIZABETH NAILANTEI NKUKUU.....2ND APPELLANT
PATRICIA NJERI WANJAMA.....3RD APPELLANT
CYTONN INVESTMENTS MANAGEMENT LIMIITED.....4TH APPELLANT

AND

THE INSPECTOR GENERAL, NATIONAL POLICE SERVICE.....1ST RESPONDENT
THE DIRECTOR, THE DIRECTORATE OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT
BRITISH AMERICAN ASSET MANAGERS LIMITED.....3RD RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTIONS.....4TH RESPONDENT
THE CHIEF MAGISTRATE'S COURT AT NAIROBI.....5TH RESPONDENT
BRITISH AMERICAN INVESTMENTS CO. (K) LTD.....6TH RESPONDENT

(Being an Appeal from Judgments of the Court of Appeal at Nairobi (Makhandia, Ngugi & Nyamweya JJA) in Civil Appeal Nos. 246 of 2016, 378 of 2018, and 147 of 2019 delivered on 18th February 2022, 4th February 2022, and 4th March 2022 respectively)

Representation:

Prof. Ojienda SC & Ms. Awuor for the appellants

(Prof. Tom Ojienda & Associates)

Ms. Mwanza & Ms. Ngalyuka for the 1st, 2nd & 4th respondents

(Office of the Director of Public Prosecutions)

Mr. Ngatia SC for the 3rd & 6th respondents

(Ngatia & Associates Advocates)

The 5th respondent did not appear and was not represented

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] The Appellants filed three petitions of appeal before this Court dated 24th March 2022, 9th March 2022 and 12th April 2022 pursuant to the provisions of Article 163 (4) (a) of the Constitution, Section 15 (2) of the Supreme Court Act No. 7 of 2011 and Rules 3(5), 31 & 32 of the Supreme Court Rules, 2020. The appeals arise out of the Judgments of the Court of Appeal at Nairobi *(Makhandia, Ngugi & Nyamweya JJA)* in ***Civil Appeal Nos. 246 of 2016, 378 of 2018***, and ***147 of 2019*** delivered on 18th February 2022, 4th February 2022, and 4th March 2022, respectively.

B. BACKGROUND

[2] The 1st - 3rd appellants were senior employees of British American Asset Managers Limited (BAAM), a subsidiary of British American Asset Managers Company (K) Ltd (Britam), responsible for Unit Trusts, Discretionary Portfolios, Cash Management Solutions, and Alternative Investments. At all material times, the 1st appellant was the Chief Executive Officer, the 2nd appellant was the Senior Portfolio Manager and the 3rd appellant was the Assistant Company Secretary.

[3] Sometime in 2013 and during the course of the appellants' employment, BAAM entered into a joint-venture project with Acorn Group Limited (Acorn) for the development of real estate and other business ventures, within Nairobi County and elsewhere. Acorn was to be responsible for the real estate development activities while BAAM was to be responsible for real estate finance and exit activities. It was also a term in the agreement that BAAM would acquire a 25% stake in Acorn with two seats on the Board and committee membership for oversight purposes. Thus, Acorn and BAAM became the special purpose vehicles for the sole purpose of executing specific projects.

[4] Following the joint-venture agreement, BAAM successfully carried out several investments and even launched the BAAM Cash Management System. However, when it attempted to launch the real estate business, the same was allegedly not received well by Dr. Wairegi, the then Managing Director of Britam, who thought that the real estate should have been launched by Britam and not BAAM. In several instances therefore, Britam communicated its misgivings about BAAM's cooperation with Acorn alleging among other things that, Acorn was not an expert in real estate.

[5] Soon thereafter, a dispute arose between Britam and the appellants. The main issue in contention was whether the 1st - 3rd appellants, as managers of BAAM, could commence any real estate project and sign agreements directly with BAAM clients without any benefit to Britam shareholders. As a result of the dispute, the 1st - 3rd appellants resigned from Britam on various dates between August and September 2014. Subsequently, the 1st - 3rd appellants formed a rival company, Cytonn Investments Limited (the 4th respondent).

[6] As a consequence, BAAM instituted various civil suits against the appellants and Acorn on or about October 2014, seeking restitution of funds allegedly

fraudulently transferred by the 1st - 3rd appellants to Acorn and its affiliates without BAAM's approval under the guise of investing in real estate as part of the joint venture aforesaid. BAAM also lodged complaints against the appellants with various professional bodies to which they belonged, namely the Advocates Disciplinary Committee, the Certified Financial Analyst Institute (CFA) and the Institute of Certified Public Accountants (ICPAK). In addition, criminal proceedings against the appellants were instituted upon complaints lodged by BAAM.

i. Proceedings at the High Court

[7] Aggrieved, the appellants filed two judicial review applications and a constitutional petition at the High Court in Nairobi. The suits were subsequently determined separately. The details of those suits are set out hereunder.

a. ***Judicial Misc. Case No. 435 of 2014, Republic v. Director of Criminal Investigation Department & 4 others Ex-Parte Edwin Harold Dayan Dande & 4 others***.

[8] The appellants sought an order of prohibition to prohibit the Inspector General of the Police National Police Service (Inspector General) and Director of Criminal Investigation Department (DCI) from arresting, harassing, and or otherwise interfering with their liberty and property. They also sought an order of *mandamus* to compel the Inspector General and DCI to return cell phones impounded from them. The remedies sought were premised on *inter alia* grounds that the Inspector General and DCI had ulterior motives in arresting them which amounted to abuse of power by the latter and that the manner in which they were handled during arrest, interrogation, and process leading to the decision to charge them by the Director of Public Prosecution (DPP) was discriminatory, unfair and irrational.

[9] In a judgment dated **14th September 2016**, *Odunga J (as he then was)*, declined to grant the reliefs sought by the appellants stating that it would be pre-emptive and presumptuous to do so as the DPP was yet to make any decision on the matter. The court, furthermore, while declining to grant the orders in the manner sought by the appellants nonetheless issued an order prohibiting the Inspector General and DCI from taking any action in the nature of criminal proceedings until the DPP had determined whether to charge the appellants or not.

[10] Subsequently, on or about 4th November 2016, the DPP decided to institute criminal proceedings in ***Nairobi Chief Magistrates Criminal Case No. 1735 of 2016 Republic v. Edwin Harold Dande, Elizabeth Nailantei Nkukuu, Patricia Njeri Wanjama & Shiv Anoop Arora*** in which the appellants were charged with two counts of theft by servant under Section 281 of the Penal Code in the sums of Kshs.1,161,465,388 and Kshs. 10,132,368.50.

[11] Consequent to the above action and pursuant to leave granted on 1st February 2017, the 1st - 3rd appellants filed another judicial review application as below.

b. Judicial Review Application No. 8 of 2017, Republic v. Director of Public Prosecutions & 2 Others Ex Parte Edwin Harold Dayan Dande & 3 Others

[12] In the above application, the 1st - 3rd appellants applied for orders of *certiorari* to quash the decision of the DPP to institute criminal proceedings against them as well as the resultant proceedings in ***Criminal case No. 1735 of 2016 Republic vs Edwin Harold Dayan Dande & 3 Others***, and *prohibition* barring the Chief Magistrate's court from hearing and determining the criminal case. These prayers were premised on *inter alia* grounds of abuse of power and unreasonableness by the DPP. They also claimed that the decision by the DPP to prosecute them was in contravention of the order made by the High Court in

Judicial Review Application No. 435 of 2014 on 1st November 2016 staying their arrest and prosecution pending the determination of their application for stay of execution.

[13] In a judgment delivered on **11th September 2018,** *Mativo J (as he then was)***,** dismissed the appellants' case. While underscoring the point that the power to quash criminal proceedings amounted to the exoneration of a suspect before trial, the learned judge stated that such power should only be exercised in exceptional cases where there was clear evidence of abuse of power, abuse of discretion, or absence of any and obvious factual basis to mount the prosecution. The court also held that, determining the veracity of evidence against accused persons was a preserve of the trial court and that the High Court's intervention could only be invoked if there were clear constitutional violations. The court further observed that the appellants' pursuit of two applications in two separate courts seeking the same reliefs constituted an abuse of the court process. It also held that the appellants had not demonstrated that the DPP did not act independently and that there was no evidence or factual basis to justify a prosecution.

[14] Correspondingly, after the institution of ***Criminal case No. 1735 of 2016 Republic v Edwin Harold Dayan Dande & 3 Others***, the appellants' advocates requested for copies of a forensic audit carried out by KPMG and legal audit by Messrs Coulson Harney, Advocates, together with settlement agreements between the respondents and Acorn Group Limited which were recorded in ***HCCC Nos. 352, 353, 354, 361, and 362 of 2014***. They stated that they required the information to exonerate themselves in the criminal proceedings instituted by the DPP. The letter did not solicit any response. Unrelenting, the appellants filed a constitutional petition at the High Court in a bid to obtain that information.

c. ***Petition No. 539 of 2016, Edwin Harold Dayan Dande & 3 others v British American Investments Co (K) Ltd & another***

[15] The 1st -3rd appellants in the above petition prayed for a declaration that the respondents violated their right to access information under Article 35(1)(b) of the Constitution and Section 4(1)(b) of the Access to Information Act No.31 of 2016; an order compelling the respondents to provide them with the settlement agreement entered into between the 3rd respondent and Acorn in ***HCCC Nos. 352, 353, 354, 361, and 362 of 2014*** which formed the basis of the court orders given on 22nd October 2015 by *Mbogholi Msagha, J*; the forensic audit performed by KPMG on the books of the 3rd respondent as was mentioned in paragraph 5 of Ms. Carol Akinyi Ouko-Misiko's witness statement sworn on 27th October 2014 and filed in ***HCCC. No. 354 of 2014***; and the legal audit performed by Messrs Coulson Harney, Advocates, of all transactions handled by the appellants referred to in paragraph 17 of Jude Anyiko's affidavit sworn on 27th October 2016 and filed in ***HCCC. No. 354 of 2014.***

[16] The prayers were premised on the grounds *inter alia* that the information and documents sought were for the vindication of the appellants' rights to human dignity under Article 28 of the Constitution and for the correction or deletion of untrue or misleading information affecting them under Article 35(2) of the Constitution. The appellants further averred that the charges brought against them in ***Criminal Cause No. 1735 of 2016*** related to the very sums that the respondents claimed in the civil suits, and that without access to the information, they could not adequately prepare their defence thus denying them a reasonable opportunity to a fair hearing.

[17] Vide a judgment dated **22nd February 2019,** *Mwita, J* held that the appellants' rights to access information under Article 35(1)(b) of the Constitution as read with Section 4(1)(b) of the Access to Information Act No. 31 of 2016 were

violated and issued an order compelling the respondents to provide them with the documents sought plus costs of the petition. The learned judge in doing so, held that the appellants were entitled to know the outcomes of the audits, and the terms of the settlement agreement having been co-defendants in the civil suits. He further found that BAAM and the 6th respondents had failed to identify the commercial interests and prejudice to be suffered if the information was disclosed noting that the dispute was, in any event, already in the public domain.

ii. Proceedings at the Court of Appeal

[18] The three decisions of the High Court triggered the same number of appeals at the Court of Appeal. Their details are set out below.

a) ***Civil Appeal No. 246 of 2016, Edwin Harold Dayan Dande & 4 others v Inspector General, National Police Service & 2 others***

[19] The appellants filed an appeal, ***Civil Appeal No. 246 of 2016***, against the Judgment of *Odunga J (as he then was) in* ***Judicial Review Misc. Application No. 435 of* 2014** seeking that the judgment of the High Court at Nairobi be reversed and that the appellants' Notice of Motion dated 14th November 2014 be allowed with costs.

[20] In a judgment delivered on **18th February 2022**, the Court of Appeal dismissed the appeal with no orders as to costs. In doing so, the Court of Appeal agreed with the findings of the High Court that the settled standards of judicial review known to our realm limit a judicial review court's intervention in any application for a merit review. In addition, it determined that, since no decision had at that point in time been made to charge the appellants, any such findings by the High Court would not only have been prejudicial but also in direct

contravention of the constitutional provisions on the independence of the Inspector General and DCI in the investigation of crimes.

b) ***Civil Appeal No. 378 of 2018, Edwin Harold Dayan Dande & 3 others v Director of Public Prosecutions & 2 others***

[21] Likewise, the appellants challenged the judgment of *Mativo, J (as he then was) in* ***Judicial Review Application No. 8 of 2017*** vide ***Civil Appeal No. 378 of 2018.*** They raised seventeen grounds of appeal which the Court of Appeal collapsed into one issue; *whether the appellants were deserving of the orders of certiorari and prohibition as sought in their substantive Motion before the High Court.*

[22] The Court of Appeal, in a judgment delivered on **4th February 2022**, held that the appeal was devoid of merit and dismissed it with costs on the main ground that there was no order of stay by any court directed at the DPP barring or prohibiting him from instituting a criminal case against the appellants as at the time he decided to charge them on 4th November 2016. The court further observed that the order by *Odunga, J* in ***Judicial Review Application No. 435 of 2014*** was specifically directed at the Inspector General and the DCI. Further, the order was limited in its application and was rendered otiose when the DPP decided to charge the appellants. Therefore, it could not be said that the DPP was bound by the order.

[23] The Court of Appeal also observed that even though no party pleaded abuse of the court process, the trial court's attention was drawn to ***Judicial Review Application No. 435 of 2014,*** therefore, the trial court could not be faulted for holding that the proceedings before it was an abuse of the court process. The Court of Appeal also upheld the High Court's decision that there was no evidence demonstrating that the DPP had been influenced or pressured by BAAM.

Moreover, there was no evidence that criminal proceedings were instituted to compel the settlement of the civil suits. The Court of Appeal, in addition, underscored the provisions of Article 157(10) and (11) of the Constitution on the independence of the office of DPP in the exercise of its functions and ultimately found that the appellants were not deserving of the orders of *certiorari* and prohibition sought in their substantive Motion.

c) ***Civil Appeal No. 147 of 2019, British American Investments Co. (K) Ltd & Another v. Edwin Harold Dayan Dande & 3 others***

[24] BAAM and the 6th respondent also filed ***Civil Appeal No. 147 of 2019*** seeking that the judgment and decree of the High Court at Nairobi *(Mwita, J)* delivered on 22nd February 2019 in ***Petition No. 539 of 2016*** be set aside and substituted with an order dismissing the appellants' petition with costs on *inter alia* the grounds that the Court of Appeal erred by failing to distinguish between the right to access to information held by a public body vis-a-vis a private person and in considering that a "*positive obligation existed"* on the part of both a public and private body to release information and not appreciating that no credible evidence was tendered to demonstrate that the intended prosecution of the appellants was as a consequence of any material in the privileged reports or that any exculpatory material was in the privileged reports.

[25] The Court of Appeal in its judgment delivered on **4th March 2022,** allowed the appeal with costs holding that the trial court erred in granting the orders sought. The court framed only one issue for determination; *whether the trial court erred in its determination of the extent and scope of Article 35(1)(b) of the Constitution and whether the petition at the High Court met the threshold set out therein*.

[26] In that regard, the court observed that a party seeking information from a private entity needs to show the right he seeks to exercise or protect, the information which is required in order to exercise or protect the right, and how that information would assist him in exercising or protecting the right. The Court of Appeal further observed that a party requesting information from a private person must place before the court a demonstrable and sufficient link between the right sought to be exercised or protected and the information requested. Once this is done, the onus is on the private person from whom information is requested to show why such information should not be disclosed. It thus held that the pleadings before the trial court did not meet the standard set for a request for information held by a private person and there was no demonstrable or sufficient connection between the requested information and the exercise or protection of the rights under Articles 28, 32(2), 48 and 50 of the Constitution. It further observed that the civil suits in which the appellants were parties had been settled and the claims against them withdrawn by the time the request for information was made. There was therefore no sufficient link between the documents sought and the exercise or protection of rights with respect to the civil suits.

iii. Proceedings at the Supreme Court

[27] Dissatisfied by the judgments of the Court of Appeal, three appeals were filed before the Supreme Court namely: ***Petition No. 6 (E007) of 2022*** dated 24th March 2022 and filed on 31st March 2022; ***Petition No. 4 (E005) of 2022*** dated 9th March 2022 and filed on 11th March 2022 ***and Petition No. 8 (E010) of 2022*** dated 12th April 2022 and was filed on 14th April 2022**.** The appeals therein raised several grounds and seek various reliefs from this Court.

[28] At the hearing of the appeal on 2nd February 2023, the Court consolidated the three appeals designating ***Petition No. 6 (E007) of 2022*** as the lead file. The 4th appellant was also granted leave to withdraw from the petitions of appeal.

[29] The appellants seek the following reliefs in the consolidated appeal:

i. *The Petitions of appeal be allowed.*
ii. *The judgments of the High Court in* ***Judicial Review Misc. Application No. 435 of 2014*** *and* ***Judicial Review Application No. 8 of 2017*** *be set aside.*
iii. *The judgment of the High Court in* ***High Court Petition No. 539 of 2016*** *be reinstated.*
iv. *Judgments in* ***Civil Appeal No. 378 of 2018***, ***Civil Appeal No. 246 of 2016***, *and* ***Civil Appeal No. 147 of 2019*** *be set aside.*
v. *A permanent injunction does issue restraining the 1st and 2nd respondents from arresting, harassing, and in any other manner interfering with the Petitioners with respect to the complaint lodged against them for theft by servant by BAAM;*
vi. *An Order to quash the charges against the appellants and the entire criminal proceedings in* ***Nairobi Chief Magistrates Criminal Case Number 1735 of 2016 Republic vs Edwin Harold Dayan Dande, Elizabeth Nailantei Nkukuu, Patricia Njeri Wanjama, and Shiv Anoop Arora***;
vii. *A permanent injunction restraining the DPP from charging, harassing, and prosecuting the Petitioners* ***in Nairobi Chief Magistrates Criminal Case Number 1735 of 2016 Republic vs Edwin Harold Dayan Dande, Elizabeth Nailantei Nkukuu, Patricia Njeri Wanjama, and Shiv Anoop Arora****;*
viii. *An order of mandamus compelling the respondents to provide the appellants with:*
    a. *The settlement agreement entered into between BAAM and Acorn Group Limited in* ***HCCC No. 352,353,354,361 and 362 of 2014***

which formed the basis of the court orders given on 22nd October 2015 by Honourable Mbogholi Msagha;

b. *The forensic audit performed by KPMG on the books of BAAM as mentioned in paragraph 5 of Ms. Carol Akinyi Ouko-Misiko's witness statement sworn on 27th October 2014 and filed in* ***HCCC No. 354 of 2014****; and*

c. *The legal audit performed by Messrs. Coulson Harney of all transactions handled by the appellants as referred to in paragraphs 17 of Mr. Jude Anyiko's affidavit sworn on 27th October 2016 and filed in* ***HCCC No. 354 of 2014****.*

iv. *Costs of the suit and the interest.*

v. *Any other or further relief that this Court may deem fit to grant.*

[30] In opposing the appeal, BAAM filed three replying affidavits sworn by Jude Anyiko on 4th May 2022, 18th March 2022, and 8th June 2022. It also filed two Preliminary Objections dated 18th March 2022 and 11th May 2022. The Preliminary Objections were based on the grounds that there was no issue involving the interpretation or application of the Constitution both at the High Court and Court of Appeal and no certification had been granted by either the Court of Appeal or this Court pointing to any matter of general public importance that this court should resolve.

[31] The 4th respondent also filed a replying affidavit sworn by Peter Mailanyi on 23rd March 2022 wherein he averred that the DPP independently reviewed the files as forwarded by the DCI and was satisfied that the evidence presented to him was sufficient to sustain a prosecution.

[32] This Court, in a ruling dated **19th May 2022** rendered itself on BAAM's Notice of Preliminary Objection dated 18th March 2022 and stated that the matter

involved the interpretation of Article 157 of the Constitution and therefore the Court has jurisdiction to determine the same. We shall determine BAAM's Preliminary Objection dated 11th May 2022 in this judgment.

C. PARTIES SUBMISSIONS

i)The appellants' submissions

[33] The 1st - 3rd appellants' submissions are dated 15th August 2022, 13th July 2022, and 12th April 2022. It was their joint case that this Court is clothed with jurisdiction to entertain their appeal under Article 163 (4) (a) of the Constitution as it involves the interpretation and application of the Constitution and that they had challenged the constitutional powers of the Inspector General and DCI under Article 245(4) of the Constitution before the superior courts below which issue is still live before this Court.

[34] The appellants also submitted that, Article 47 of the Constitution as well as the Fair Administrative Actions Act, 2015 have widened the scope of judicial review and that courts can now apply the hard look doctrine and consider the merits of the administration's action or decision forming the subject of the judicial review proceedings. They argued that despite the Court of Appeal noting the advancements in judicial review cases, it adopted a contrary view and held that the High Court had no basis to reconsider the evidence obtained from investigations in clear violation of Articles 22, 23(3) (f), 47, 165 (3) (b) and 165 (d) of the Constitution. To support this assertion, they cited ***Judicial Service Commission & another v Lucy Muthoni Njora [2021] eKLR*** and ***Njuguna S. Ndung'u vs Ethics & Anti-Corruption Commission (EACC) & 3 others [2018] eKLR.***

[35] They also faulted the Court of Appeal's finding that, since no decision to charge had been made by the time they filed the first judicial review Motion, then the appellants could not get any redress for the threatened violation of their rights under Articles 22, 23, 47, and 165 of the Constitution. Instead, they submitted that the Court of Appeal abdicated its role as a temple of justice and in effect closed the doors of the court to the appellants' contrary to the holding of the Supreme Court in India in ***Arnab Rajan Goswami v Union of India,*** (2020) 14 SCC 12 cited with approval in ***Mohammed Zubair v State of Nct of Delhi***, Writ Petition (Criminal) No. 279 of 2022. They thus asserted that, the respondents cannot violate the Constitution and still plead independence in their actions.

[36] The appellants went on to submit that, the investigations, arrest, and institution of criminal proceedings against them were an abuse of power and in violation of Articles 245 (4) and 157 of the Constitution. In addition, they argued that there was no factual basis for the prosecution because the complaint was based on fictitious and non-existent conclusions allegedly made in the KPMG Report and the Legal Audit by Messrs Coulson Harney, Advocates, aforesaid. Furthermore, they argued that the disbursements of monies leading to the criminal charges against them, were made in the ordinary course of duty upon approval and they were singled out for arrest and prosecution yet, they were not the only signatories with respect to the impugned disbursements. They also submitted that the disbursements were under the direct control of BAAM jointly with Acorn and that there was no money stolen by them. It was also their case that there were several checkpoints in so far as the disbursements were concerned and since the appellants had no stake whatsoever in Acorn, their prosecution was malicious and discriminatory.

[37] They further submitted that the institution of criminal proceedings also amounted to an abuse of the prosecutorial powers of the Director of Public

Prosecution. They cited this Court's decision in ***Jirongo v Soy Developers Ltd & 9 others*** (Petition 38 of 2019) [2021] KESC 32 (KLR) (16 July 2021) (Judgment***), (Jirongo case)*** to support this assertion. In addition**,** they urged that the machinery of criminal justice was being deployed as a tool in the personal dispute between BAAM as an employer and the appellants as its former employees.

[38] It was the appellants' other contention that the Court of Appeal adopted a narrow, artificial, rigid, and pedantic interpretation of the right to access to information held by a private body. They relied on the Court of Appeal's decision in ***Attorney General vs Kituo cha Sheria & 7 others [2017]eKLR*** to argue that, courts are commanded to be creative and proactive so that the Bill of Rights may have the broadest sweep, the deepest reach, and highest claims. They also cited the decision in ***Mercy Nyawade vs Banking Fraud Investigations Department & 2 others [2017] eKLR*** where the court held that Article 35 of the Constitution must not be constrained by a narrow interpretation.

[39] They also posited that the only test to be met under Article 35 is for a person to demonstrate that the information is required for the exercise or protection of a right or fundamental freedom under the Constitution. They argued in that context that the civil suits and the criminal charges against them were based on a forensic audit conducted by KPMG and a legal audit by Messrs Coulson Harney, Advocates, which audits revealed that the appellants had allegedly participated in fraudulent activities. Therefore, the information sought was necessary and a prerequisite for the realization of the right to dignity which is the foundation of other rights. They cited ***Martha Kerubo Moracha v University of Nairobi*** [2016] Eklr, ***Brummer v Minister for Social Development and Other***s (CCT 25/09) [2009] ZACC21;2009 to buttress this point.

[40] Additionally, they submitted that the information sought was necessary for the exercise of the right to access to justice under Article 48 of the Constitution and that they required the information to enable them to approach the High Court to quash the criminal investigations and the intended prosecution which according to them had no factual basis. They cited the decision in ***Republic vs Director of Public Prosecutions & 2 others; Evanson Muriuki Kariuki (Interested Party) Ex parte James M. Kahumbura [2019]eKLR*** to support this contention.

[41] They further submitted that the information they were seeking was necessary for the protection of the right to a fair hearing and fair trial. They cited the case of ***Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohamad & 3 others [2018] eKLR*** in that regard where it was held that the right to a fair hearing is broad and includes the concept of the right to a fair trial and that a litigant should not be denied the opportunity to present his case effectively before a court. Furthermore, they faulted the Court of Appeal for failure to address itself to the connection between the protection of the right to a fair hearing and the information requested. In conclusion, they urged the Court to allow the appeal as prayed.

ii)The 1st, 2nd and 4th respondents' submissions

[42] The office of the DPP filed submissions on its behalf and on behalf of the Inspector General and DCI dated 25th March 2022, 27th June 2022, and 7th July 2022. They submitted that no proper case had been made before the courts to enable them to interfere or intervene in the exercise of powers of review of a decision to charge by the DPP. They argued that a court should only interfere with the decision of the DPP if it is in the opinion that grave violations of the rights of the suspects were occasioned during the investigation process. They relied on the case of ***Maina & 4 others v Director of Public Prosecutions*** (Constitutional Petition E106 & 160 of 2021) (Consolidated)) [2022] KEHC 15 (KLR)

(Constitutional and Human Rights) (27 January 2022) (Judgment) to support that contention.

[43] It was also urged that, the powers of the office of DPP to prosecute are anchored in Article 157 of the Constitution which provides for its independence in the exercise of its duties, and that Article 157 (11) enjoins the DPP to have regard to the public interest, the interest of the administration of justice and the need to prevent abuse of the legal process even though the decision to institute criminal proceedings is discretionary. Furthermore, they submitted that the Court of Appeal correctly held that the appellants did not demonstrate that the DPP had acted *ultra vires* in making the decision to charge nor was the DPP's decision-making process demonstrated to be at variance with Article 157(10) of the Constitution. They cited the ***Jirongo case*** to support this assertion and emphasized that the DPP's decision to institute charges is rarely interfered with unless actuated by dishonesty, bad faith, or exceptional circumstance as espoused in the case of ***Regina v. Director of Public Prosecutions Ex Parte Kebeline and Others (1999)4 ALLER 801***

[44] They also argued that the Judicial Review Court was not the proper forum to adjudicate the appellants' issues as that would require the court to interrogate the facts and evidence gathered by the Inspector General and DCI during investigations. They urged in that context that the appellants failed to demonstrate to the Court of Appeal that the Inspector General and DCI's investigations were blatantly illegal and an abuse of their constitutional power to warrant the court's intervention. To support this contention, they relied on the decisions in ***Meixner & Another vs The Attorney General*** (2005)1KLR189 and ***Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others***, (2016) KLR.

[45] They submitted, in addition, that the investigation and eventual arrest of the appellants arose from a complaint lodged by BAAM with respect to their previous relationship as employer and employee and did not amount to an abuse of power. They further submitted that the appellants failed to demonstrate that the Inspector General and DCI did not act independently and that they were working at the behest of BAAM to necessitate this Court's intervention.

[46] It was their other submissions that the appellants have not demonstrated that it was unreasonable or discriminative for the Inspector General and DCI to arrest and investigate them or that the criminal proceedings were undertaken against them as a result of business rivalry. In addition, the DPP submitted that the choice of persons who should face prosecution is at its discretion. It further argued that the appellants have not demonstrated that it was unreasonable for the DPP to prefer charges against them and that the process was not discriminatory and that the burden of proving violation or threat of violation is upon the appellants as espoused in ***Anarita Karimi Njeru v Republic***, Misc. Criminal Application No. 4 of 1979; [1979] eKLR.

[47] In supporting the findings by the Court of Appeal, the DPP reiterated the point that the Court of Appeal did not make a pronouncement of guilt and factual holdings as alleged but only made a finding on whether the appellants ought to have been charged or not. He urged in that regard that, the court merely discharged its duty as the first appellate court and that the appellants themselves are inviting this Court to delve into the realm of the trial court by making submissions on the roles they played and giving reasons as to why they ought not to be charged. It was the DPP's argument to the contrary that, consideration of the sufficiency of the evidence is a duty of the trial court and cited the decision in ***Meixner & Another vs The Attorney General (2005)1KLR189*** to support that submission.

[48] In conclusion, the DPP submitted that the appellants' rights to a fair trial were not infringed and that this contention to the contrary is speculative since the said right is guaranteed and no evidence was presented to prove its violation.

iii)The 3rd and 6th respondents' submissions

[49] BAAM and the 6th respondents filed submissions dated 29th December 2022, 9th May 2022, and 17th July 2022. They submitted that the appeal did not concern the interpretation or application of the Constitution before the superior courts and that the appellants only referred to constitutional provisions during submissions at the bar and that mere references to constitutional provisions do not confer the right to appeal under Article 163 (4) (a) of the Constitution.

[50] Regarding the *scope of judicial review*, they submitted that the Court of Appeal correctly interpreted the scope of judicial review consistent with Article 47 of the Constitution and the Fair Administrative Actions Act, 2015. They argued that contrary to the law, the appellants had invited the superior courts as well as this Court to usurp the DPP's power of deciding whether or not the appellants should have been charged.

[51] They further argued that the Court of Appeal did not find any proof that the investigations, arrest, and prosecution of the appellants were an abuse of power, vexatious, oppressive, or motivated by ill motive. Instead, the court found that the arrest and investigation were based on complaints made by BAAM and correctly appreciated the mandate of the Police to investigate criminal complaints including those made by BAAM without undue interference. They cited the case of ***Republic v Commissioner of Police and Another ex parte Michael Monari & Another*** [2012] eKLR to support this claim.

[52] It was also their case that the Court of Appeal correctly interpreted Article 35(1)(b) guided by Article 259 of the Constitution in a manner that balances the burdens of disclosure of private information with the right to privacy and that, under Article 35(1)(b) of the Constitution, a citizen is entitled to information held by another person where that information is required for the exercise and protection of any right or fundamental freedom. Further, the extent of the disclosure of information held by an entity is provided under Section 6(1) of the Access to Information Act, 2016 which states that pursuant to Article 24 of the Constitution the right to access to information shall be limited in respect to information whose disclosure is likely to, amongst other considerations, involve unwarranted invasion of privacy and substantially prejudice the commercial interests of an entity.

[53] They contended that the appellants did not at the trial court or at the Court of Appeal demonstrate what right they wished to exercise or protect and how that information would assist them in exercising or protecting that right, and that bare references to constitutional rights did not automatically guarantee the appellants the right to access information. Furthermore, they submitted that the appellants did not meet the threshold to access privately held information under Article 35(1)(b) of the Constitution. They argued that a citizen must not only show that the information is held by the person from whom it is claimed but fulfil three ingredients; to state what right he seeks to protect; what information is required for that purpose, and how the information sought will assist him in enforcing that right or freedom. To support this argument, they relied on the decisions in ***Benson Wachira Muthiga vs Nairobi City County Public Service Board & another [2015] eKLR, Nairobi Law Monthly Company Ltd vs Kenya Electricity Generating Company & 2 Others [2013] eKLR*** and ***Cape Metropolitan Council vs Metro Inspection Services Western Cape CC and others (10/99)(2001)ZASCA.***

[54] Furthermore, they submitted that whereas the appellants had claimed that they were seeking the information for the protection of their right to dignity and access to justice, their case is predominantly hinged on the protection of a right to a fair trial as they had stated that the information was required to help them determine the basis of the respondents' complaint on misappropriation of funds and prepare their defence in **Criminal Case No.1735 of 2016** yet at the time of filing the petition at the High Court, the appellants had not taken plea as the DPP had not made a determination on whether or not to prosecute them. Therefore their claim for information is unwarranted and is neither factually nor legally sustainable.

[55] In addition to the above, BAAM and 6th respondent submitted that the appellants obtained stay orders from the High Court upon filing Judicial Review proceedings which proceedings are now the subject of ***Supreme Court Petition No. 4 and 6 of 2022,*** and they were, for that reason, not arraigned in court, charged, or directed to take plea. Since the appellants had therefore not subjected themselves to a trial, they could not demonstrate which right they intended to protect and how the requested information would assist in protecting the said right. To support this assertion, they relied on the decision of this Court in ***Hussein Khalid & 16 Others vs Attorney General & 2 others [2019] eKLR*** to state that the right to a fair trial under Article 50(2)(j) of the Constitution accrues to an accused person and not an arrested person.

[56] On disclosure of information held by private entities, they submitted that being private entities, they had no obligation to release the requested information given the prejudice they will suffer, and the Court of Appeal rightly held that there is no general duty on private persons to give a requester access to information. They added that to qualify for access to information from a private person, a person must establish and demonstrate a sufficient connection between the right sought

to be exercised or protected and the information requested. It is only once this is done that the burden shifts to the private person to show why such information should not be disclosed.

[57] Lastly, they submitted that despite the appellants citing several rights that they sought to protect using the information, they failed to demonstrate any nexus between the information sought and the rights to be protected. They thus urged that they had discharged their burden by proving that the information sought was privileged and whose disclosure would be injurious to the respondents' commercial interests and customers. The information was therefore protected from arbitrary disclosure where no foundation had been laid and prayed that the appeal be dismissed with costs.

D. ANALYSIS AND DETERMINATION

[58] Having considered the respective parties' pleadings and submissions in the appeal before us, the following issues emerge for determination;

i) *Whether the appellants have properly invoked this Court's jurisdiction under Article 163(4) (a) of the Constitution.*
ii) *Whether the appeal, or any part of it, is moot, leaving no live controversy requiring adjudication.*
iii) *Whether the scope of judicial review has evolved to include merit review of an administrative decision or other action complained of.*
iv) *Whether the decision to investigate, arrest and prosecute the appellants constituted an abuse of power by the 1st and 2nd respondents.*
v) *Whether the appellants are entitled to the right to access to information under Article 35(1) (b) of the Constitution.*
vi) *What relief is available to parties?*

i. Whether the appellants have properly invoked this Court's jurisdiction under Article 163 (4) (a) of the Constitution.

[59] It was the appellants' case that this Court has jurisdiction to entertain the appeal under Article 163 (4) (a) of the Constitution as it involves the interpretation and application of the Constitution. Particularly, the appellants contended that they challenged the constitutional powers of the Inspector General and DCI under Articles 157(6) and 245(4) of the Constitution and therefore the matter before the superior courts involved the interpretation and application of the Constitution.

[60] BAAM on its part emphasized that, although the appeal is brought under Article 163 (4) (a) of the Constitution, no issues requiring constitutional interpretation and application were raised in the High Court and the Court of Appeal. They also argued that since the appeal does not meet the threshold for admission under Article 163 (4) (a) of the Constitution then the only other option available to the appellants was to invoke this Court's jurisdiction under Article 163 (4) (b) of the Constitution. It was their case in that context that, having failed to secure certification, there is no basis for the Court to find that the appeal raises cardinal issues of law or jurisprudential moment and should strike out the appeal as consolidated.

[61] This Court has time and again determined the question of whether a litigant has properly invoked its jurisdiction under Article 163 (4) (a) of the Constitution. We set the guiding principles in the case of ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others***, SC Petition No. 10 of 2013; [2014]eKLR and ***Erad Suppliers & General Contractors Ltd v National Cereals & Produce Board*** SC Petition No.5 of 2012; [2012]eKLR where we stated that an appeal lies to this Court under Article 163(4)(a) if the issues placed before it revolved around the interpretation and application of the Constitution and that the interpretation or application of the Constitution had formed the basis for the

determinations at the superior Courts below this Court and the same issue had therefore progressed through the normal appellate mechanism to reach this Court.

[62] In addition in ***Lawrence Nduttu & 6000 others vs. Kenya Breweries Ltd & another,*** SC Petition No. 3 of 2012 [2012] eKLR we stated:

> *"(28) The appeal must originate from a court of appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words,* ***an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation.*** *Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163 (4) (a)." [emphasis added]*

[63] A perusal of the record reveals that the issues before the superior courts revolved around the interpretation and application of the Constitution. In particular, the superior courts rendered themselves on the role of the DPP under Article 157 (4) (10) and (11) of the Constitution. The superior courts also addressed the role of the Inspector General as provided for under Article 245 (4) of the Constitution. In this regard, the High Court in ***Judicial Review Application 8 of 2017 Republic v. Director of Public Prosecutions & 2 Others Ex Parte Edwin Harold Dayan Dande & 3 Others,*** observed as follows:

> *"39. A reading of Article* ***157*** *of the Constitution leaves no doubt that the* ***DPP*** *is required to not only act independently, but to remain fiercely so. It is also important to mention that Article* ***245 (4) (a)*** *of the Constitution provides that: "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."*

[64] Similarly, the ***Court of Appeal in Civil Appeal No. 378 of 2018 Edwin Harold Dayan Dande & 3 others v Director of Public Prosecutions & 2 others*** stated as follows:

"The gist of this appeal really revolves around the exercise of powers bestowed on the 1st respondent by the Constitution and whether the trial court failed in its duty to protect the appellants from skewed and malicious prosecution. The question is simply this; did the 1st respondent act independently in instituting the criminal case against the appellants or was it orchestrated by ulterior motives?"

[65] From the above, we are satisfied that the basis of the superior courts' decisions revolved around the interpretation and application of the Constitution, and therefore, the appellants have properly invoked the jurisdiction of this Court under Article 163 (4) (a) of the Constitution.

ii. Whether the appeal or any part of it is moot.

[66] Albeit not raised by the parties, it is imperative for this Court to pronounce itself on the issue of mootness of some aspects of this appeal. The doctrine of mootness requires that controversy must exist throughout judicial proceedings including at the appellate level. An appeal or an issue is moot when a decision will not have the effect of resolving a live controversy affecting or potentially affecting the rights of parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. The doctrine of mootness is therefore based on the notion that judicial resources ought to be utilized efficiently and should not be dedicated to an abstract

proposition of law and that courts should avoid deciding on matters that are abstract, academic, or hypothetical.

[67] This Court in ***Institute for Social Accountability & another v National Assembly & 3 Others*** (Petition 1 of 2018) [2022] KESC 39 (KLR) (8 August 2022) (Judgment) in addressing mootness stated that:

> *"...a matter is moot when it has no practical significance or when the decision will not have the effect of resolving the controversy affecting the rights of the parties before it. If a decision of a court will have no such practical effect on the rights of the parties, a court will decline to decide on the case. Accordingly,* ***there has to be a live controversy between the parties at all stages of the case when a court is rendering its decision. If after the commencement of the proceedings, events occur changing the facts or the law which deprive the parties of the pursued outcome or relief then, the matter becomes moot****."* [emphasis added]

[68] Similarly, Lenaola SCJ in the case of ***Attorney General & 3 Others vs. David Ndii & 73 Others*****: *Prof. Rosalind Dixon & 7 others (Amicus Curiae)*** (SC Petition 12, 11 & 13 of 2021 (Consolidated) [2022] KESCA 8 (KLR) (Constitutional and Human Rights) (31 March 2022) (Judgment) (with dissent), quoted with approval the decision of the High Court of South Africa in ***Afriform NPC and others v Eskom Holdings SOC Limited and others*** 3 All SA 663 (GP) where it stated:

> *"The mootness barrier therefore usually arises from events arising or* ***occurring after an adverse decision has been taken*** *or a lawsuit has got underway, usually involving a change in the facts or the law, which allegedly deprive the litigant of the necessary stake in the pursued outcome or relief.* ***The doctrine requires that an actual controversy must***

be extant at all stages of review and not merely at the time the impugned decision is taken or the review application is made." [Emphasis added]

[69] The instances in which a dispute is rendered moot were also discussed by the Supreme Court of Canada in ***Borowski v Canada (Attorney General)*** [1989] 1 SCR 342, where it stated that a repeal of a by-law being challenged; an undertaking to pay damages regardless of the outcome of an appeal; non-applicability of a statute to the party challenging the legislation; or the end of a strike for which a prohibitory injunction was obtained were some of the circumstances that render an appeal moot. The court further opined that determining whether an appeal is moot or not requires a two-step analysis. A court is first required to determine whether the requisite tangible and concrete dispute has disappeared rendering the issues academic. If so, it is then necessary to decide if the court should exercise its discretion to hear the case.

[70] Noting the above expressions of the law, with which we agree, is there a tangible and concrete dispute concerning the prayer by the appellants seeking to restrain the Inspector General, DCI and DPP from arresting and charging them? A perusal of the record reveals that at the time of filing ***Judicial Misc. Application No. 435 of 2014, Republic v. & 2 Other Ex-Parte Edwin Harold Dayan Dande & 4 others*** on 17th November 2014**,** there was an imminent threat of arrest and charging of the appellants, therefore, it was necessary on their part to seek an injunction restraining the Inspector General, DCI and DPP from arresting and charging them. However, on 4th November 2016 when the DPP instituted criminal proceedings against the appellants, the issue of restraining the Inspector General, DCI and DPP from arresting and charging the appellants became moot as this was no longer a live controversy.

[71] It is our considered view that the above explains why at the time the appellants were filing ***Judicial Review Application No. 8 of 2017, Republic v. Director of Public Prosecutions & 2 Others Ex Parte Edwin Harold Dayan Dande & 3 Others*** they did not seek an order restraining the Inspector General, DCI and DPP from arresting and charging but they sought orders of *certiorari* to quash the decision to institute criminal proceedings against them and a prohibition against the hearing and determination of ***Criminal Case No. 1735 of 2016***.

[72] Thus, it is our finding that there exists no live controversy on the question of restraining the Inspector General, DCI and DPP from arresting and charging the appellants as the adverse decision to prosecute the appellants has already taken place and on the existing facts, there is no imminent threat to arrest or charge the appellant again.

iii. Whether the scope of judicial review has evolved to include determinations of merit review of an administrative decision.

[73] The appellants faulted the Court of Appeal for holding that the High Court had no basis to reconsider the evidence obtained from investigations in the Judicial review proceedings yet it noted that there have been advancements in judicial review allowing courts to do merit review of decisions in administrative or other actions.

[74] The Black's Law Dictionary, 9th Edition defines judicial review as:

> *"A court's power to review the actions of other branches or levels of government; esp., the court's power to invalidate legislative and executive actions as being unconstitutional. 2. The constitutional doctrine providing for this power. 3. A court's review of a lower courts or an administrative body's factual or legal findings".*

[75] *Mark Ryan*, in his book, '*Unlocking Constitutional and Administrative Law'*, (3rd ed Routledge/Taylor & Francis Group, 2014) on page 506 defines Judicial Review as:

> *"The constitutionally justified as a legal control on the misuse of public law powers, including both statutory and common law prerogative powers."*

[76] We note that judicial review was introduced to Kenya from England in 1956 through Sections 8 and 9 of the Law Reform Act, Cap 26. The jurisdiction to hear and determine judicial review was then vested in the High Court of Kenya. Under this system, the High Court could issue orders of *mandamus*, prohibition, and *certiorari*. The grounds for the issuance of such orders were borrowed from common law.

[77] Prior to the promulgation of the Constitution in 2010 there were two legal foundations for the exercise of the judicial review jurisdiction by the Kenyan Courts found in Sections 8 and 9 of the Law Reform Act Cap 26, which constituted the substantive basis for judicial review of administrative actions on the one hand, and, Order 53 of the Civil Procedure Rules which was the procedural basis of judicial review of administrative actions, on the other hand.

[78] However, the entrenchment of judicial review under the Constitution of Kenya 2010 elevated it to a substantive and justiciable right under the Constitution. Accordingly, judicial review is no longer a strict administrative law remedy but also a constitutional fundamental right enshrined in the Constitution. Thus, Article 47 provides that *"every person has a right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair*.

[79] Furthermore, Section 7 of the Fair Administrative Actions Act provides that:

(1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to–

(a) a court in accordance with section 8; or

(b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law.

[80] Fundamentally also, Article 23 (3) of the Constitution provides that*:*

(3) In any proceedings brought under Article 2, a court may grant appropriate relief, including-

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.

[81] The entrenchment of judicial review in the Constitution has led to the emergence of divergent views on the scope of judicial review. The first group postulates that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself while the second group opine that under the current constitutional dispensation, courts could delve into both procedural and merit review in resolving disputes.

[82] In ***Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*** S.C Petition No. 14 Consolidated with 14A, 14B, & 14C of 2014 [2014] eKLR this court in resolving the controversy stated as follows:

*"**[355]** However, notwithstanding our findings based on the common law principles of estoppel and res- judicata, we remain keenly aware that the Constitution of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law.* ***By clothing their grievance as a constitutional question, the 1st, 2nd and 3rd respondents were seeking the intervention of the High Court in the firm belief that, their fundamental right had been violated by a state organ. Indeed, this is what must have informed the Court of Appeal's view to the effect that the appellants (respondents herein) were entitled to approach the Court and have their grievance resolved on the basis of Articles 22 and 23 of the Constitution." [emphasis added]***

[83] Also, this Court in ***SGS Kenya Limited v Energy Regulatory Commission & 2 others*** SC Petition No. 2 of 2019 [2020] eKLR observed as follows:

"[40] The petitioner ***approached the High Court by way of the prescribed procedures under Judicial Review, which revolve around the paths followed in decision-making. Such a course, as the Appellate Court properly held, is not concerned with the merits of the decision in question****. The law in this regard, which falls under the umbrella of basic "Administrative Law", is clear enough, and it is unnecessary to belabour the point…*

We have, however, observed that the Appellate Court was right in its finding that the High Court should not have gone to the merits of the Review Board decision as if it was an appeal, nor granted the Order of Mandamus, since the 1st respondent did not owe any delimited statutory duty to the petitioner."

[84] More recently in ***Praxedes Saisi & 7 others v Director of Public Prosecutions & 2 others*** (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment) ***Praxedes Saisi case*** this Court stated that:

> *"It is our considered opinion that the framers of the Constitution when* ***codifying judicial review to a constitutional right****, the intention was to elevate the right to fair administrative action as a constitutional imperative not just for state bodies, but for any person, body or authority."*

[85] It is clear from the above decisions that when a party approaches a court under the provisions of the Constitution then the court ought to carry out a merit review of the case. However, if a party files a suit under the provisions of Order 53 of the Civil Procedure Rules and does not claim any violation of rights or even violation of the Constitution, then the Court can only limit itself to the process and manner in which the decision complained of was reached or action taken and following our decision in ***SGS Kenya Ltd*** and not the merits of the decision per se.

[86] Turning back to the instant case, we note that the appellants invoked the judicial review jurisdiction of the High Court alleging that their rights to among others, fair administrative action under Article 47 were violated, and applied for judicial review orders under Article 23 of the Constitution. In that context, the Court of Appeal in ***Civil Appeal No. 246 of 2016*** stated as follows:

> *"28. While this may have been relevant and pertinent information, the question that arises is whether the judicial review Court was the proper forum to determine and direct the information and evidence that was gathered during the investigations, and the manner of its collection by the 1st and 2nd Respondents. In our view, it was not, in light of the standards of*

review which limit a judicial review court's intervention in merit review. It was emphasized by this Court in ***Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others,*** *(2016) KLR that while Article 47 of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, the reviewing court has no mandate to substitute its own decision for that of the administrator."*

[87] With utmost respect to the learned Judges of the Court of Appeal, we disagree with the above reasoning and find that the appellants had clothed their grievances as constitutional questions believing that their fundamental rights had been violated. Therefore, this required the superior courts to conduct a merit review of the questions before them and dismissal of their plea as one requiring no merit review was misguided. A court cannot issue judicial review orders under the Constitution if it limits itself to the traditional review known to common law and codified in Order 53 of the Civil Procedure Rules. The dual approach to judicial review does exist as we have stated above but that approach must be determined based on the pleadings and procedure adopted by parties at the inception of proceedings. Our decision in the ***Jirongo*** and ***Praxedes Saisi cases*** speaks succinctly to this issue. That is also why, the question below is pertinent to the present appeal.

iv. Whether the decision to investigate, arrest and prosecute the appellants constituted an abuse of power by the 1st, 2nd, and 4th respondents.

[88] The crux of the appellants' claim is that their investigations, arrest, and prosecution by the Inspector General, DCI, and the DPP amounted to an abuse of power bestowed upon them by the Constitution. First, they contended that the

investigations leading to their arrest as well as the arrest itself were an abuse of the investigative powers of the DCI and the Inspector General under Article 245 of the Constitution. Second, they argued that the institution of criminal proceedings against them amounted to an abuse of prosecutorial powers by the DPP. We will proceed to deal with the two issues separately.

a) Abuse of investigative and arrest powers by the 1st and 2nd respondents.

[89] The office of the Inspector General of the National Police is established under Article 245 (1) of the Constitution. The power to investigate crimes is vested in the Inspector General by dint of Article 245 (4) of the Constitution which provides that:

> *"(4) The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service,* ***but no person may give a direction to the Inspector-General with respect to-***
>
> ***(a) the investigation of any particular offence or offences;***
>
> *(b) the enforcement of the law against any particular person or persons; or*
>
> *(c) the employment, assignment, promotion, suspension, or dismissal of any member of the National Police Service." [Emphasis added]*

[90] Also, Article 243 (1) of the Constitution establishes the National Police Service, and the National Police Service Act gives full effect to this Article. Thus, Section 28 of the National Police Service Act, No. 11 of 2011 provides that *'There is*

established the Directorate of Criminal Investigations which shall be under the direction, command, and control of the Inspector-General.'

[91] A review of the constitutional and statutory provisions herein shows without any doubt that the Inspector General and the Director, DCI have the mandate to perform multi-faceted functions as provided under Articles 244 and 245 of the Constitution. Accordingly, Article 244 provides for the objects and functions of the National Police Services and Article 244(c) in particular requires the National Police Services to comply with constitutional standards of human rights and fundamental freedoms in the discharge of its mandate. This is important because human rights and fundamental freedoms and the rule of law are founding values in our Constitution.

[92] A court should only interfere with the powers granted to the Inspector General and the DCI under Articles 244 and 245 of the Constitution and under the provisions of the National Police Service Act if the constitutional and statutory provisions are not adhered to or if the actions are illegal and unlawful. The questions that beg answers in the present appeal are whether the Inspector General and the DCI acted within their constitutional mandate and whether their actions amounted to an abuse of office.

[93] The Court of Appeal had this to say in that regard:

> *"The 1st and 2nd Respondent have in this respect demonstrated and it is not disputed that they acted pursuant to a complaint received from the 3rd Respondent, and they have detailed the evidence they gathered in this respect. The basis of the complaint arose from the previous relationship between the Appellants and 3rd Respondent of employee/employer which is not disputed, and from transactions that took place during the period of such employment. The Appellants did not provide any evidence of the*

3rd Respondent's influence or control to support their claim that the 1st and 2nd Respondents acted under the aegis of the 3rd Respondent, over and above the 3rd Respondent's action of making a complaint as an aggrieved person. We are therefore constrained to find that the arrest and investigations of the Appellants were not proved to be an abuse of power, vexatious, oppressive or motivated by ill motive in the circumstances."

[94] The appellants' claim of abuse of power by the Inspector General and DCI is based on the allegation that there was no factual basis for the arrest as the same was solely based on a complaint by BAAM and that there was no independent review on the part of the two offices aforesaid. The appellants also alleged that the complaint was based on fictitious and non-existent conclusions made in a KPMG Report and Legal Audit by Messrs Coulson Harney, Advocates and that the disbursements of monies to third parties were made in the ordinary course of duty after approval by relevant offices within BAAM. That therefore they are innocent of the charges against them and the same should be terminated by order of this Court.

[95] A perusal of the record confirms that even though the appellants alleged abuse of power by the Inspector General and DCI, no evidence was brought forth to prove that they actually acted beyond their constitutional mandate or that their actions amounted to an abuse of office. The claim that they acted at the behest of BAAM was merely speculative and the appellants failed to discharge the burden of proving that allegation. In fact, it is instructive that in the appeal before us, one of the prayers is release of the report and audit to them which they also claim to be evidence that the Inspector General and DCI acted on instructions of BAAM. If they do not have the report and audit, how can they also claim that the two documents are the source of their troubles? Without saying more, we are inclined to agree with the decision of the Court of Appeal that the appellants did not prove

that the Inspector General and DCI abused their investigative or arrest powers as conferred by the Constitution and statute.

b) Abuse of prosecutorial powers by the DPP

[96] The office of Director of Public Prosecution is established under Article 157 (1) of the Constitution. The functions of the Director of Public Prosecution are provided for under Article 157 (6) of the Constitution which states that:

> *(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—*
>
> > *(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;*
> >
> > *(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and*
> >
> > *(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).*

[97] The Constitution, as can be seen above, provides an inbuilt limitation on the powers of the DPP under Article 157 (11) of the Constitution which provides that; '***In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.'***

[98] Furthermore, Article 157 (10) of the Constitution anticipates the independence of the office of DPP in the performance of its constitutional obligation, providing that in the exercise of its powers or functions, it shall not be under the direction or control of any person. This is important as it protects the integrity of a criminal process.

[99] This Court, in the ***Jirongo case***, expounding on the above provision stated as follows:

> *"82. Although the DPP is thus not bound by any directions, control or recommendations made by any institution or body, being an independent public offence,* ***where it is shown that the expectations of article 157(11) have not been met, then the High Court under article 165(3)(d)(ii) can properly interrogate any question arising therefrom and make appropriate orders."*** *[emphasis added]*

[100] Furthermore, in the same case, we were persuaded by the reasoning of the Supreme Court of India in ***RP Kapur v State of Punjab*** AIR 1960 SC 866 which laid down the following guidelines to be considered by courts when reviewing prosecutorial powers as follows:

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

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

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

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

[101] Noting the above guidelines, which we also adopt, did the appellants prove that the expectations of Article 157 (11) of the Constitution were not met? It was the appellants' case in that context that their prosecution was instituted without any factual basis and that a prosecution should not be commenced or continued unless there is admissible, substantial, and reliable evidence that a criminal offence known to law has been committed by the accused persons. The appellants also alleged that the complaint was based on fictitious and non-existent conclusions made by a KPMG Report and Legal Audit by Messrs Coulson Harney, Advocates and that the disbursements were made in the ordinary course of duty after approval. The appellants also claimed that, when they resigned from BAAM, the latter instituted several civil suits being ***HCCC Nos. 352, 353, 354, 361, and 362 of 2014*** which were amicably settled to their exclusion.

[102] We have no hesitation in holding that the record reveals that the appellants did not provide any evidence to prove that the office of DPP did not meet the expectations required of it under Article 157 (11) of the Constitution or that the action to prosecute them amounted to abuse of the process of the court. It is also clear to us that, at the time of instituting the criminal proceedings, there was no legal bar preventing them from prosecuting the appellants. The charges the accused are facing constitute offences under the laws of Kenya and therefore, it is proper that they be subjected to the due process of the law. Their innocence is intact and there is no apparent risk that they will not face a fair trial where the duty lies on the DPP to prove their culpability.

[103] The appellants also claimed that the civil suits aforesaid were settled to their exclusion meaning that they were not parties to the suits. If so, what is the prejudice to them? And if the settlement is relevant to their innocence, what better forum is there than the trial court to raise that issue? Furthermore, Section 193A of the Criminal Procedure Code provides as follows:

> *"193A. Concurrent criminal and civil proceedings*
>
> *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."*

[104] The conclusion we draw from the above provision is that both civil and criminal jurisdictions can run parallel to each other and that neither can stand in the way of the other unless either of them is being employed to perpetuate ulterior motives or generally to abuse of the process of the court in whatever manner.

[105] Despite our conclusion above, we are alive to the fact that in the ***Jirongo case*** we held as follows:

> *"We respectfully agree and adopt this position in this case but must add that where it is obvious to a court, as it is to us and was to the learned Judge of the High Court, that a prosecution is being mounted to aid proof of matters before a civil court or where the hand of a suspect is being forced by the sword of criminal proceedings to compromise pending civil proceedings, then section 193A of the Criminal Procedure Code cannot be invoked to aid that unlawful course of action. Criminal proceedings, whether accompanied by civil proceedings or not, cannot and should never be used in the manner that the 2nd and 3rd respondents have done. It is indeed advisable for parties to pursue civil proceedings initially and with*

firm findings by the civil court on any alleged fraud, proceed to institute criminal proceedings to bring any culprit to book."

[106] We note that the circumstances in the ***Jirongo case*** are different from the current case. In ***Jirongo***, it was proved to our satisfaction that the criminal case was instituted to force the accused person's hand to compromise the civil case between him and the complainant. Such unlawful action should not and could not be tolerated. However, in the present case, we reiterate our earlier finding that the appellants did not prove that the same was perpetuated for ulterior motives or amounted to an abuse of the court process or office.

v. Whether the appellants were entitled to the right to access to information as stipulated under Article 35(1) (b) of the Constitution.

[107] The appellants faulted the Court of Appeal for allegedly adopting a narrow, artificial, and rigid interpretation of the right to access to information held by a private body. It was their case that the only test to satisfy in seeking to enforce the right to access to information, is for a person to demonstrate that the information is required for the exercise or protection of a fundamental freedom under the Constitution. In their case, they argued that they needed the information to exercise their right to access to justice under Article 48 of the Constitution to enable them approach the High Court to quash the criminal investigation and the intended prosecution which according to them had no factual basis. They also argued that the information was necessary for the protection of their rights to human dignity, fair hearing and fair trial.

[108] The right to access to information is a fundamental right upon which other rights guaranteed in the Bill of Rights can be realized. This right encompasses the right to seek and receive information and is guaranteed to every citizen.

[109] Traditionally, the right to access to information has been utilized to render public authorities accountable and to promote transparency in the public sector. However, there has been a paradigm shift in substantial measures from the demand for information from public bodies to private bodies and this is an important guard against abuses, mismanagement, and corruption. Therefore, the codification of the right to information from private bodies in the Constitution of Kenya 2010 is one of the major milestones in the protection of the right to access to information.

[110] Accordingly, Article 35 of the Constitution provides for the right to access to information in the following terms:

> *"35. (1) Every citizen has the right of access to-*
>
> *a. Information held by the state; and*
>
> ***b. Information held by another person and required for the exercise or protection of any right or fundamental freedom.***
>
> *(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.*
>
> *(3) The state shall publish and publicize any important information affecting the nation."*

[111] Similarly, Section 4 of the Access to Information Act, No. 31 of 2016 which was enacted to give effect to the rights under Article 35 of the Constitution provides for the right of access to information held by the State and information held by another person and is required for the exercise or protection of any right or fundamental freedom.

[112] The right to access to information is also contained in several international conventions and treaties ratified by Kenya. Article 19 (2) of the International Covenant on Civil and Political Rights (ICCPR) for example makes the right to information imperative when it states that "*Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regard less of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*"

[113] The right to access to information is also stipulated under Article 9 (1) of the African Charter on Human and Peoples Rights which states that "'***every individual has the right to receive information.***"

[114] The Access to Information Act proceeds to define 'public body' as *"any public office, as defined in Article 260 of the Constitution; or (b) any entity performing a function within a commission, office, agency or other body established under the Constitution.*

[115] It also defines 'private body' as a body which:

> *(a) receives public resources and benefits, utilizes public funds, engages in public functions, provides public services, has exclusive contracts to exploit natural resources (with regard to said funds, functions, services, or resources); or*
>
> (b) *is in possession of information which is of significant public interest due to its relation to the protection of human rights, the environment, or public health and safety, or to exposure of corruption or illegal actions* ***or where the release of the information may assist in exercising or protecting any right".*** [Emphasis added]

[116] In the instant case, we are concerned about the information held by a private body-BAAM-and which the appellants seek allegedly for the protection of rights enshrined under the Constitution. In that context, we must note that under Article 35(1) (b) of the Constitution, the right to access to information is not unlimited because a requester must, as a prerequisite, establish that he or she wishes to exercise or protect a right and that access to the record is required in order to exercise or protect that right.

[117] This was the position taken by the court in ***Rev. Timothy Njoya v. Attorney General & Another*** [2014] eKLR where the learned judge stated as follows:

> *"While it is crystal clear to me that one would enforce the provisions of Article 35(1) (b] where such information is required for the exercise or protection of a fundamental right and freedom, in the present Petition, the Petitioner has not stated what fundamental right or freedom he intends to protect or exercise were he to be given the information he is seeking."*

[118] Further, in ***M&G Media Ltd and Others v 2010 FIFA World Cup Organising Committee South Africa Ltd and Another*** 2011 (5) SA 163 (GSJ) the South Gauteng High Court observed as follows:

> *"[145] Following the dualistic scheme in s. 32(1)(a) and (b) of the Constitution, PAIA provides that if access is sought to a record held by a public body, access must be provided as a matter of right, unless a valid ground of refusal is advanced.*
>
> *[146] By contrast, if access is sought to a record held* ***by a private body, the requester must establish that he or she requires access to the record in order to exercise or protect a right****. Once this has been*

shown, the requester has a right of access to the records, which may be defeated by a valid ground of refusal."

[119] Section 32 of the Constitution of South Africa is in *pari materia* with Article 35 of our Constitution and we are also persuaded by the decision ***Cape Metropolitan Council v Metro Inspection Services Western Cape and Others*** (2001) ZASCA 56 the Court stated as follows:

"Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information…

An applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required, and how that information would assist him in exercising or protecting that right." *[Emphasis added]*

[120] In summary, a requester seeking to enforce his right under Article 35 (1) (b) needs to demonstrate:

a. The right that seeks to be protected; and
b. That access to the information is required to exercise or protect that right.

[121] In that context, the appellants' arguments were that the information sought was necessary for the exercise of the right to access to justice under Article 48 of the Constitution and that they had sought the information to enable them approach the High Court to quash the criminal investigation and the intended prosecution which according to them had no factual basis. They also submitted that the information was necessary for the protection of the right to a fair hearing and fair trial under Article 50 of the Constitution. Without belabouring the point, we are satisfied that the appellants properly identified the rights that they sought

to protect. The next and more fundamental question for us to determine is whether the information they were seeking was required to exercise or protect the identified rights.

[122] The Court of Appeal in the instant matter observed that a party requesting information from a private person must place before the court a demonstrable and sufficient link between the right sought to be exercised or protected and the information requested. Once this is done, the onus is on the private person from whom information is requested to show why such information should not be disclosed. Having examined the pleadings and submissions, the appellate court held that the pleadings before the trial court did not meet the standard set for a request for information held by a private person and there was no demonstrable or sufficient connection between the requested information and the exercise or protection of the rights under Articles 28, 32(2), 48 and 50 of the Constitution.

[123] On our part, we are inclined to agree with the Court of Appeal that the appellants did not establish a demonstrable link between the rights they intended to exercise or protected and the information requested. We have reached that conclusion because firstly, the right to access to information is not an absolute right. Thus, Section 6 of the Access to Information Act provides that:

> "*(1) Pursuant to Article 24 of the Constitution, the right of access to information under Article 35 of the Constitution shall be limited in respect of information whose disclosure is likely to:*
>
> *(a) undermine the national security of Kenya;*
>
> *(b) impede the due process of law;*
>
> *(c) endanger the safety, health, or life of any person;*

(d) involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;

(e) substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;

(f) cause substantial harm to the ability of the Government to manage the economy of Kenya;

(g) significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;

(h) damage a public entity's position in any actual or contemplated legal proceedings; or

(i) infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession." [emphasis added]

[124] Secondly, looking at the submissions by the appellants, while on one hand they have identified the information required and the sources thereof, they have gone ahead to reach the incredible conclusion that the said information contains information that is adverse to them and is the sole basis for their arrest and prosecution. If that be so, of what benefit would an order of release be since they already purportedly know the contents of the KPMG report and the Legal Audit by Messrs Coulson, Harney, Advocates?

[125] Thirdly, the Court needs to balance the appellants' enjoyment of Article 35 rights and the 3rd and 6th respondents' right to privacy under Article 31 of the Constitution. Internal working documents, particularly internal investigation reports which may affect the rights of parties not involved in litigation such as BAAM's and Britam's clients cannot be wished away in granting access to information held by those parties. More fundamentally, failure by the appellants to establish the connection between the rights to be exercised or protected and the information requested connotes that if they were to be granted that information, unwarranted invasion of the privacy of the BAAM and Britam would be unduly occasioned and may cause substantial prejudice to their commercial interests.

[126] Fourthly and lastly, we reiterate that, at the trial court, the appellants will have the opportunity to interrogate all and any documents to be produced by the DPP. If those documents include the documents they now desire to have, they will have ample opportunity to study them and challenge their veracity. As it is, their request is misconceived and we have no hesitation in finding that the appellants were and are not entitled to the right to access to information under Article 35 (1) (b) of the Constitution.

vi)Relief available to parties

[127] We have said enough to show that the appellants' appeal is one for dismissal and the proper path for them to follow is to face the charges at the Chief Magistrate's Court and let that court determine their innocence or guilt. They have not persuaded us that they are entitled to any relief and we so find.

[128] Regarding costs, the leading authority on that subject is ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others***, SC. Petition No. 4 of 2012; [2013] eKLR where we stated that costs follow the event but the court may in appropriate cases exercise discretion and with good reason, order otherwise.

Since the appellants have pursued the matter from the High Court to this court and the respondents who appeared before us have incurred costs, it would only be fair that the appellants bear the costs of the consolidated appeal.

E. ORDERS

[129] Consequently, we issue orders as follows:

1. ***The appeal is moot in regard to the issue of prohibition of the 1st and 2nd respondents from arresting and charging the appellants.***
2. ***Appeal No. 6 (E007) of 2022 dated 24th March 2022 is disallowed save for a declaration that judicial review proceedings brought under the provisions of the Constitution must involve a review of merits.***
3. ***Appeal No. 4 (E005) of 2022 dated 9th March 2022 is disallowed.***
4. ***Appeal No. 8 (E010) of 2022 dated 12th April 2022 is disallowed.***
5. ***The appellants shall bear the costs of all the three appeals to be paid to the 1st, 2nd, 3rd, 4th and 6th respondents.***
6. ***We hereby direct that the sum of Kshs. 6000/- deposited as security for costs in each of the appeals herein be refunded to the appellants.***

[130] It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **16th** Day of **June** 2023.

.....

M.K KOOME

CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

.....	**.....**
S.C WANJALA	**NJOKI NDUNGU**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	.....
I. LENAOLA	**W. OUKO**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA