Case Number:	Judicial Miscellaneous Civil Application 75 of 2015
Date Delivered:	16 Dec 2015
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	George Vincent Odunga
Citation:	Republic v Director of Criminal Investigation Department& 4 others Ex- Parte Oduor Henry John [2015] eKLR
Advocates:	Mr Odhiambo for Mr Achila for the Applicant
Case Summary:	-
Court Division:	Judicial Review
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Notice of Motion dismissed
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL MISCELLANEOUS CIVIL APPLICATION NO. 75 OF 2015

IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION, SECTION 8 & 9 OF THE LAW REFORM ACT ORDER 53 RULE 1 OF THE CIVIL PROCEDURE ACT

AND

IN THE MATTER OF THE ALLEGATIONS BY ASPHALT CONCRETE LIMITED

AND

IN THE MATTER OF NAIROBI CHIEF MAGISTRATE'S COURT AT MILIMANI LAW COURTS CRIMINAL CASE NO. 455 OF 2015

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW AGAINST THE DECISION TO CHARGE AND PROSECUTE THE APPLICANT

BETWEEN

REPUBLIC ....…………………………………….......…… APPLICANT

VERSUS

THE DIRECTOR OF CRIMINAL INVESTIGATION DEPARTMENT ……..… 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION ….……………..............… 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL .... 3RD RESPONDENT

THE CHIEF MAGISTRATE'S COURT ....4TH RESPONDENT

ASPHALT CONCRETE ……….. INTERESTED PARTY

AND

ODUOR HENRY JOHN …………….............….... EX- PARTE APLLICANT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 15th April, 2015, the *ex parte* applicant herein, **Oduor Henry John,** seeks the following orders:

1. An order of *Certiorari* to remove into this Honourable court and quash the decision of the 1st , 2nd and 3rd Respondents of prosecuting the Applicant as contained in the charge sheet presented on 11th March 2015 to the 4th Respondent for the offence of defrauding ASPHALT CONCRETE LTD as depicted on the charge sheet.

2. An order of Prohibition to prohibit the Respondents jointly and severally from prosecuting the Applicant on the same factual and evidentiary basis of the charge sheet presented to the 4th Respondent on 11th March 2015.

3. That this Honourable Court be pleased to grant any other order suitable in the circumstances.

4. That the cost of this Application be provided for.

Applicant's Case

2. According to the applicant, the decision and action of the 1st, 2nd and 3rd Respondents with its agents to charge him in the circumstances of this case are ultra vires and the misuse of them by the Interested Party.

3. The basis for asserting so was that the Applicant acted as an Advocate in E.L.C No. 639 of 2014 at Nairobi High Court (hereinafter referred to as "the civil case") in filing an Application under certificate of agency on behalf of his client **Bamaho Self Help Group** against **Nyoro Construction Ltd**. In so doing the applicant relied on the documents presented to him and the instructions given by his client to file the said case which case was not against the interested party herein. It was therefore the applicant's contention that the interested party ought to have filed an Application to be enjoined (sic) in the suit.

4. To the applicant, the charges as framed are ***ultra vires*** given that the civil case was filed by the Applicant as an Advocate who had received instruction and in the response thereto, the Respondent in the said civil case raised no allegations of conspiracy to defraud. Whereas the Interested Party herein filed E.L.C No. 820 of 2014 at Nairobi High Court on 23rd June 2014, similarly no allegations of conspiracy to defraud the interested party by the Applicant herein were raised therein. In any case the charge sheet reads that the Applicant colluded with others already in court between 21st day of May 2014 and 19th day of June 2014 without making allegations of conspiracy to defraud the interested party.

5. It was therefore contended that the decision to charge and prosecute the Applicant is oppressive and vexatious in that the Applicant only acted on the documents presented to him by his client and is not the author of the exhibits relied by him when filing the suit E.L.C No. 639 of 2014 which is still pending determination on the issue of ownership. To the Applicant, if the criminal trial is allowed to proceed it will create a bad precedent whereby Advocates will be prosecuted for filing civil suits relying on the documents given to them by their clients and documents which they are not the author of. Further, it would achieve nothing more than to embarrass the Applicant herein and put him to unnecessary expense and agony.

6. It was averred that the said prosecution is for extraneous purpose to wit to intimidate, frustrate and kill the source of lively hood of the Applicant whereby the Applicant only acted on the instructions of his client and documents presented to him by his client. It was the Applicant's case that at the time of filing E.L.C No. 639 of 2014 at Nairobi High Court he was not aware of the existence of the Interested Party herein thus he could not have colluded and or conspired to defraud an entity whose existence he was unaware of.

7. The Applicant therefore contended that the court process is not fairly being invoked and therefore amounts to abuse of its criminal process.

8. It was disclosed that though the Interested Party who is a complainant in the criminal case, moved the court in E.L.C. No 820 OF 2014 on the issue of ownership of Land No. 6826/4 ex-parte, he was never granted any orders but was told to serve and the Applicant herein who is not a party to that suit as he was never made a party thereto.

9. It was averred that the prosecution of the Applicant is bashful, a persecution in excess hence the framing of the charge sheet and would amount to abuse of the process of the law and executing the Applicant in a matter he represented a client under the documents delivered to him and instruction to file a civil suit under certificate of urgency hence the orders sought herein.

10. The Applicant further averred that the 1st, 2nd, and 3rd Respondents in collusion with the Interested Party herein have abused their power of prosecution by preferring the charges herein without any proper basis and thus have acted with improper motive and in bad faith since the purpose of filing of the proceedings was not to transfer ownership as the court was the one to determine the issue of ownership. After drafting the documents to be filed in court, it was the Applicant's case that he left the same with the clerk **Martin Otieno** to ensure the client signed the relevant Affidavits and to file the same. However, the said clerk deserted work when the issue of commissioning arose and has never reported to work. To the Applicant, even if the foresaid supporting affidavit was not commissioned by the commissioner for oath as per the stamp the same cannot amount to the charges as framed in the charge sheet and if the Interested party who is the complainant felt that the affidavits were not properly commissioned it can apply to be enjoined (sic) in the E.L.C No. 639 of 2014 and make an Application for the suit to be struck out.

11. It was the Applicant's case that the 1st, 2nd and 3rd Respondents' decision and action of preferring the criminal charges against the Applicant was in light of the material facts known to the them outrageous and unreasonable in the circumstances as the Applicant only filed a suit in court with the documents provided by the client which is still pending determination of the rightful. To the Applicant, the said action is outrageous and is in defiance of logic and /or of accepted moral standards to be reasonably applied when exercising their powers of prosecution before deciding to prefer the charges and that the 1st, 2nd and 3rd Respondents under the instigation of the Interested Party have acted in breach of the principles of proportionality and have failed to strike a fair balance between the adverse effects their decision and action of preferring the criminal charges against the Applicant would have upon his rights of practicing as an Advocate and generally to the whole profession of law practicing Advocates in the Administration of justice.

1st and 2nd Respondent's Case

12. In response to the application, the 1st and 2nd respondents contended that on the 19th day of June 2014 a complaint was made by one **Asphat Concrete Limited** that his (sic) parcel of land **LR No. 6827/4** situated at **Kayole ,Mihango Location** was invaded by unknown persons who claimed to be the owner of the said land prompting investigations and filing of charges at Milimani Law court.

13. The Complainant, it was further contended, alleged that the said person had moved to the High Court in Nairobi and fraudulently obtained orders vesting the property to themselves as the owners of the said land.

14. However the investigations revealed that the said parcel of land whose original No. is LR 6826/4 was

originally granted to **Samson Nathan Mwathi** and on 6th February 1990 the said **Samson Nathan Mwathi** transferred the said land to **Gopal Vishram Patel** and **Karsam Vishram Patel.** Later on 14th April 2003 the said land was transferred to the present owner **Asphalt Concrete Limited**. However, a letter of consent dated 24th September 2001 was used by the fraudsters to acquire the land which fraud was confirmed by the opinion given by the Document Examiners report.

15. It was averred the non-existence self-help group by the name of **Bamaho Development Group** was used in an attempt to acquire the land as the registration certificate of the group was proved to be fake by the document Examiners report. However, the applicant **Henry Oduor John** on the 21st day of 2014 made a verifying Affidavit with forged signatures and forged stamp impressions of his fellow advocate one **Omondi B.A** purporting it to be genuine and this as well was disputed by **Omondi B.A** in his statement.

16. Consequently, criminal charges were preferred against the said **Mr. Henry Oduor John** vide Chief Magistrates Court at Milimani Court Criminal case *No.* 455 OF 2015.

17. To the 1st and 2nd respondents, the Application herein has been filed in bad faith, misconceived and abuse of the court process and meant to defeat the cause of justice.

18. It was their case that the Directorate of Criminal investigations' is established under section 28 of the ***National Police Service Act*** under the direction, command and control of the Inspector General of the National Police Service objects and functions are set out in Article 244 of the Constitution of the Republic of Kenya and the National Police service. To them, the Applicant has not demonstrated that in undertaking investigations in the complaint lodged with the National Police Service and in making the decision to prefer Criminal charges against them, either the Director of Public Prosecution or any member of staff of the office of the Director of Public Prosecution or the National Police Service acted without or in excess of the power conferred upon them by the law or have infringed ,violated, contravened or in any other manner failed to comply or respect and observe the foregoing provisions of the Constitution of Kenya 2010 or any other provisions thereof or any other provisions of the law. To the contrary, the Director of Public Prosecutions (DPP) independently reviewed and analysed the evidence contained in the investigations file compiled by the Directorate of Criminal Investigations including the witness statements, documentary exhibits and statements of the Applicant as required by the law and it was on the basis of the said review and analysis that the DPP gave instructions to prosecute the Applicant. Accordingly, the decision to charge the Applicant was informed by the sufficiency of evidence on record and the public interest and not on any other considerations.

19. To the 1st and 2nd respondents, the accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of evidence gathered and properly adduced in support charges. To them, the contention by the Applicant that the case against him is oppressive and malicious and amounts to an abuse of court process is unfounded and bad in law in that State powers of prosecution are exercised by the Director of Public Prosecution personally or by persons under his control and directions; in the exercise of such powers, the Director of Public Prosecutions is subject only to the constitution and the law, does not require the consent of any person or authority and is independent and not subject to the direction or control of any person or authority; and the High Court would be crossing into the line of the independence of the DPP to descend into the arena of finding whether there is prima facie case against the Applicant; the Applicant has not demonstrated that the DPP has not acted independently or has acted capriciously, in bad faith or has abused the process in a manner to trigger the high court's intervention; and the Applicant has failed to demonstrate that the DPP lacked the requisite authority acted in excess jurisdiction or departed from the rules of natural justice in directing that the Applicant be

charged with offences disclosed by the evidence gathered.

20. It was therefore the 1st and 2nd respondents' case that the Application has been filed in bad faith and is an attempt to defeat justice.

21. In their submissions the 1st and 2nd respondents reiterated the foregoing and cited authorities in support thereof.

3rd and 4th Respondent's Case

22. On the part of the 3rd and 4th Respondents, the following grounds of opposition were filed:

1) THAT the Notice of motion application has no merit and is based on a misconception of the law.

2) THAT by dint of article 157 of the constitution, the 3rd respondent has no role in prosecution of criminal proceedings, therefore the orders sought against him are untenable.

3) THAT the decision to charge the ex-parte applicant was a culmination of thorough and extensive investigations and which decision was done within the provisions of the law.

4) THAT the ex-parte applicant has not made out a case for judicial review proceedings as all the evidence are subject to the trial court for examination and determination and not for a judicial review court.

5) THAT there is no proof of an element of illegality, *ultra-vires*, bias, excess of jurisdiction and ulterior motives by the 3rd& 4th respondents hence the proceedings are proper and the applicant will have his day in Court where he can raise his contentions.

6) THAT the ex-parte applicant will have his day in court and the trial Court is in a better position to scrutinize the evidence presented before it in determining whether such evidence prove the accused's guilt or innocence.

7) THAT the 1st respondent is constitutionally mandated to independently exercise state powers of prosecution with respect to criminal proceedings and to prohibit him will interfere with or curtail the aforesaid constitutional powers.

23. He however clarified that the firm and the Company had not abandoned their rights to claim for the refund of the said deposit from the 2nd Applicant through the civil process in another forum, notwithstanding the fact that he is set to be prosecuted for his criminal act. He nevertheless reiterated that the 2nd Applicant having committed a criminal act, he has to face the due process of law and is undeserving of the protection that he seeks from this Honourable Court and their application should be dismissed with costs to the Respondents.

Determination

24. I have 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 this is the view I form of the matter.

25. It is always important to remember that in these kinds of proceedings, the Court ought not to usurp

the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution and that the mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review. This is so because judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.

26. 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 the 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."

27. In **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69**, the High Court held:

"The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform....A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious....The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far that which the courts indeed the entire system is constitutionally mandated to administer....In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute. It is further alleged that the criminal prosecution is an abuse of the court process epitomised by what is termed as selective prosecution by the Attorney General. It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been be argued that because a

decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit....The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law....In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed....There is nothing which can stop the from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made....Under section 77(5) of the Constitution it is a constitutional right that no person who has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of the offence. What is clear from this constitutional right is that it prevents the re-prosecution of a criminal case, which has been determined in one way or another...."

28. I also associate myself with the decision in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** that:

"A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable".

29. Whereas 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, Article 157(11) provides:

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.

30. Apart from that, section 4 of the ***Office of Public Prosecutions Act***, No. 2 of 2013 provides:

In fulfilling its mandate, the Office shall be guided by the Constitution and the following fundamental principles—

(a) the diversity of the people of Kenya;

(b) impartiality and gender equity;

(c) the rules of natural justice;

(d) promotion of public confidence in the integrity of the Office;

(e) the need to discharge the functions of the Office on behalf of the people of Kenya;

(f) the need to serve the cause of justice, prevent abuse of the legal process and public interest;

(g) protection of the sovereignty of the people;

(h) secure the observance of democratic values and principles; and

(i) promotion of constitutionalism.

31. It is therefore clear that the terrain under the current prosecutorial regime has changed and that the discretion given to the DPP is not absolute but must be exercised within certain laid down standards provided under the Constitution and the ***Office of the Director of Public Prosecutions Act***. Where it is alleged that these standards have not been adhered to, it behoves this Court to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, the Constitution itself. I associate myself with the sentiments expressed in **Nakusa vs. Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565** to the effect that :

"the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system…... In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of *Domnic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003* is that interpretation of the Constitution has to be progressive and in the words of Prof M V Plyee in his book, *Constitution of the World*: "The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time……... In our role as "sentinels" of fundamental rights and freedoms of the citizen which are founded on laisez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent "sentinels" of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right."

32. Where therefore it is clear that the discretion is being exercised with a view to achieving certain

extraneous goals other than those legally recognised under the Constitution and the ***Office of the Director of Public Prosecutions Act***, that would, in my view, constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion. As was held by **Wendoh, J** in **Koinange vs. Attorney General and Others [2007] 2 EA 256**:

"Under section 26 of the Constitution the Attorney General has unfettered discretion to undertake investigations and prosecute. The Attorney Generals inherent powers to investigate and prosecute may be exercised through other offices in accordance with the Constitution or any other law. But, if the Attorney General exercises that power in breach of the constitutional provisions or any other law by acting maliciously, capriciously, abusing the court process or contrary to public policy the Court would intervene under section 123(8) of the Constitution and in considering what constitutes an abuse of the court process the following principles are relevant: (i) Whether the criminal prosecution is instituted for a purpose other than the purpose for which it is properly designed; (ii) Whether the person against whom the criminal proceedings are commenced has been deprived of his fundamental right of a fair trial envisaged in the provisions of the constitution; (iii) Whether the prosecution is against public policy."

33. It is now clear that even in the exercise of what may appear to be *prima facie* absolute discretion conferred on the executive the Court may interfere. The Court can only intervene in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**

34. In exercising their discretion to charge a person both the police and the DPP's office must take into account and must exercise the discretion on the evidence of sound legal principles. As was held by **Ojwang, J** (as he then was) in **Nairobi HCCC No. 1729 of 2001 – Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another**:

"....policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense....I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State's prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes".

35. Therefore the police are expected to be professional in the conduct of their investigations and ought not to be driven by malice or other collateral considerations. Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution. A prosecution can either be mounted based on an offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officers or agencies. However, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a

mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. I say ordinarily because the mere fact that the version of one of the parties is not considered is not necessarily fatal to the prosecution. However, where exculpatory evidence is presented to the police in the course of investigation and for some reasons known to them, they deliberately decide to ignore the same one can only conclude that the police are driven by collateral considerations other than genuine vindication of the criminal judicial process. Neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of malice and hence abuse of discretion and power.

36. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the DPP to investigate and prosecute ought to be interfered with. In **East African Community vs. Railways African Union (Kenya) And Others (No. 2) Civil Appeal No. 41 of 1974 [1974] EA 425**, it was held by the East African Court of Appeal that the onus lies on a person seeking the grant of a prerogative order to establish that it is essential for it to issue since these are not orders that are lightly made. Judicial review or prerogative writs as they were known in the past, it has been held are orders of serious nature and cannot and should not be granted lightly. They should only be granted where there are concrete grounds for their issuance. It is not enough to simply state that grounds for their issuance exist; there is a need to lay basis for alleging that there exist grounds which justify the grant of the said orders. This was the position in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** where it was held:

"…just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial...."

37. I associate myself with the holding in **Republic vs. Kenya Power & Lighting Company Limited & Another [2013] eKLR** to the effect that:

"It is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted."

38. As was aptly put in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR**:

"the police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene".

39. In this case the applicant contends that there is a civil matter filed by the complainant in the ELC Court in which the subject matter of the criminal case is the same subject matter and though the applicant is not a party thereto, the Court directed that he be served. The law however is that the mere fact that the facts constituting the basis of a criminal proceeding are similarly the basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, *ipso facto*, constitute an abuse of the process of the court unless the commencement of the criminal

proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. Section 193A of the ***Criminal Procedure Code*** on this issue provides:

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

40. However caution ought to be exercised and as was held by the Court of Appeal in **Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others Nairobi Civil Appeal No. 56 of 2012 [2013]eKLR**:

"While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith…It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court."

41. In this case the applicant contends that the Respondents are abusing their power of prosecution by preferring the charges herein without any proper basis and thus have acted with improper motive and in bad faith and that the said prosecution is for extraneous purpose to wit to intimidate, frustrate and kill the source of lively hood of the Applicant. The applicant has however not shown what is ulterior motives are intended to be achieved by the said prosecution. From the applicant's own averments, the complainant is a stranger to him. He has not averred that the prosecution is meant to settle some personal scores between him and the complainant. He is not a party to any of the pending civil cases and so it cannot be said that the commencing of the criminal proceedings is meant to either force him to admit to concede liability or abandon his claims in the civil claims.

42. The applicant's application is further based on the fact that if the criminal trial is allowed to proceed, it would achieve nothing more than to embarrass the Applicant herein and put him to unnecessary expense and agony. However as was held in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69**:

"The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence......"

43. I am also in agreement with the sentiments expressed in **Dream Camp Kenya Ltd vs. Mohammed Eltaff and 3 Others Civil Appeal No. 170 of 2012** that:

"Every litigation is inconvenient to every litigant in one-way or another. Also no one in his right senses enjoys being sued and ipso facto no one cherishes litigation of any nature unless it is absolutely necessary. With respect, we accept litigation is expensive and no litigant would enjoy the rigours of trial. The aftermath of vexatious and frivolous litigations is normally taken care of by way of costs. The discomfort of litigation would not certainly render the success of the intended appeal nugatory if we do not grant the application sought. If the learned Judge is

eventually found wrong on appeal, and the applicant succeeds in its intended appeal, then the orders so made by the learned Judge would be quashed and the applicant would be compensated for in costs."

44. As was held in **Jago vs. District Court (NSW) 106**:

"...it cannot be said that a trial is not capable of serving its true purpose when some unfairness has been occasioned by circumstances outside the court's control unless it be said that an accused person's liability to conviction is discharged by such unfairness. This is a lofty aspiration but it is not the law."

45. Therefore the mere fact that the prosecution will expose the applicant to embarrassment is not *per se* a ground for halting a trial where the prosecution has shown that based on the material before him he has a prosecutable case.

46. It was averred that the said prosecution is for extraneous purpose to wit to intimidate, frustrate and kill the source of lively hood of the Applicant whereby the Applicant only acted on the instructions of his client and documents presented to him by his client. It was the Applicant's case that at the time of filing E.L.C No. 639 of 2014 at Nairobi High Court he was not aware of the existence of the Interested Party herein thus he could not have colluded and or conspired to defraud an entity whose existence he was unaware of. To him, it will create a bad precedent whereby Advocates will be prosecuted for filing civil suits relying on the documents given to them by their clients and documents which they are not the author of. If I understand this line of submission the applicant contends that he was innocent in the whole saga and therefore ought not to be prosecuted. However, that the applicant has what in his view is a good defence to the criminal case is not necessarily the basis upon which the criminal proceedings are to be halted. Those are matters which ought to be presented before the Court. In other words, an applicant who alleges that he has a good defence in the criminal process ought to advance that defence in a criminal trial rather than to base his application for judicial review thereon. This reasoning is based on the fact that Constitutional or Statutory Commissions and bodies ought to be given space to carry out their constitutional and statutory mandate and the Court ought only to step in to ensure that their mandate is carried out in accordance with the law and that the due process is followed in the process. In **Meixner & Another vs. Attorney General [2005] 2 KLR 189,** the same Court expressed itself as hereunder:

"The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion if acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, 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....Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power. Having regard to the law, the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision is correct."

47. In this case, it is the applicant's case that he prepared the pleadings based on the instructions given by his client, **Bamaho Self Help Group** against **Nyoro Construction Ltd**. The respondents however contended that the non-existence self-help group by the name of **Bamaho Development Group** was used in an attempt to acquire the land as the registration certificate of the group was proved to be fake by the document examiners report. There is no affidavit before me sworn by the instructing client that it indeed instructed the ex parte applicant herein to file the suit.

48. Apart from that it was contended that, the applicant on the 21st day of 2014 made a verifying Affidavit with forged signatures and forged stamp impressions of his fellow advocate one **Omondi B.A** purporting it to be genuine. In answer to this contention the applicant stated that after drafting the documents to be filed in court, he left the same with the clerk **Martin Otieno** to ensure the client signed the relevant Affidavits and to file the same. However, the said clerk deserted work when the issue of commissioning arose and has never reported to work. It was therefore not disputed by the applicant that the said documents were not commissioned before the purported Commissioner for Oaths. However, the applicant retorted that even if the said affidavit was not commissioned by the commissioner for oath as per the stamp the same cannot amount to the charges as framed in the charge sheet. That in my view is a matter for the trail Court to decide.

49. This Court cannot state with certainty that notwithstanding the fact that **Bamaho Development Group,** was non-existence, the institution of proceedings to claim he subject land would not constitute an offence of conspiracy to defraud if the applicant knew of that fact. That would be a matter for the trial Court more so in the light of the evidence from the examiner that even the Certificate of Incorporation of the said entity may itself not be genuine.

50. This Court appreciates that a distinction must be made between situations where what is alleged is insufficiency of evidence as opposed to where the evidence to be adduced does not disclose an offence. In the former, the right forum to deal with the matter is the trial Court. In the latter, it would amount to an abuse of the criminal process to subject the applicant to such a process. Criminal process ought to be invoked only where the prosecutor has a conviction that he has a prosecutable case. Whereas he does not have to have a full proof case, he ought to have in his possession such evidence which if believable might reasonably lead to a conviction. He does not have to have evidence which disclose a *prima facie* case under section 210 of the ***Criminal Procedure Code*** since a decision as to whether a prima facie case is disclosed is a jurisdiction reserved for the trial Court. He however must have evidence which satisfy him that his is a case which ought to be presented before a trial Court. He must therefore consider both incriminating and exculpatory evidence in arriving at a discretion to charge the accused. Unless this standard is met, the Court may well be entitled to interfere with the discretion of the prosecutor since that discretion, as stated hereinabove, is not absolute.

51. If I understand the applicant's case correctly, the evidence in possession of the Respondent cannot sustain a conviction. That may be so, however, the material placed before me disclose a conflict of view with respect to the roles played by the applicant in the absence of any word coming from his alleged client. It is contended that the case being advanced by the Respondent cannot possibly be true on the basis of the material to be placed before the Court. It is not positively averred that the case being advanced by the Respondents, even if true, cannot sustain a conviction. Accordingly, I do not agree with the applicants that the mere fact that the Respondent's case is hopeless and bound to fail is necessarily a basis for halting the criminal proceedings. I however, cannot, in fact I am not permitted to examine minutely and in details the parties' respective cases in order to determine where the truth lies.

52. As was appreciated in **Kuria & 3 Others vs. Attorney General,** (supra):

"A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution....There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an "abuse of process", is a "manipulation", "amounts to selective prosecution" or such other processes, or even supposing that the applicants might not get a fair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts"

53. In this case it is my view that the decision in **Kuria & 3 Others vs. Attorney General,** (supra) rings true. In that case the Court held:

"In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names."

Order

54. In the result the Notice of Motion dated 15th April, 2015 fails and is dismissed with costs to the Respondents.

Dated at Nairobi this 16th day of December, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Odhiambo for Mr Achila for the Applicant

Cc Mutisya

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