Oeri v Directorate of Criminal Investigations & 2 others; Republic (Exparte) (Judicial Review Miscellaneous Application E01 of 2021) [2022] KEHC 11278 (KLR) (30 May 2022) (Judgment)

Neutral citation: [2022] KEHC 11278 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E01 OF 2021

GV ODUNGA, J

MAY 30, 2022

IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE ACT

AND

IN THE MATTER OF INFRINGEMENT OF CONSTITUTION RIGHTS UNDER ARTICLE 27,28 29,31,47,48,50

BETWEEN

ALICE NYOMENDA OERI ..... APPLICANT

AND

DIRECTORATE OF CRIMINAL INVESTIGATIONS ..... 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE ..... 2ND RESPONDENT

GEOFFREY CHUNGULI MUDANYA ..... 3RD RESPONDENT

AND

REPUBLIC ..... EXPARTE

JUDGMENT

1. By an Amended Notice of Motion dated 16th April, 2021, the applicant herein, Alice Nyomenda Oeri, seeks the following orders:

    1. An order of certiorari to bring into this Honourable Court and quash the decision by the Inspector General Police and the Directorate Of Criminal Investigations office from intimidating, harassing and threatening to arrest at Home or place of work on matters touching the conduct of Nairobi ELRC No. 2446 of 2012 .

2. An order of prohibition to issue against the 1st and 2nd respondent prohibiting the office of the Inspector General of Police and the Directorate of Criminal Investigations from intimidating, harassing and threatening to arrest at Home or place of work on matters touching the conduct of Nairobi ELRC No. 2446 of 2012 .

3. An order of declaration that the decision of the Inspector General to keep issuing summons or sending Police officers to harass and intimidate, and threaten to arrest the applicant causing mayhem at her office or elsewhere in the excuse of conducting investigations on matters touching or related to Nairobi ELRC No. 2446 of 2012 is unlawful, ultra vires conducted in bad faith and the procedures used are bias against the applicant.

4. that costs of this application be provided for.

Ex Parte Applicant's Case

2. According to the ex parte applicant, on the diverse dates January 2017, one Geoffrey Chunguli Mudanya, the 3rd Respondent, (hereinafter referred to as the complainant) sought the legal services of the firm seeking compensation against Panari Hotel for unlawful termination. Equipped with proper instructions by the said Geoffrey Chunguli Mudanya, the Applicant filed a notice of change of Advocates and upon receipt of the claimant's file from his previous advocates on record, they discussed and tentatively agreed to review the claim.

3. It was averred that prior to the filing of the application to amend the claim, they also discussed at length and agreed that the Applicant's legal fees would be based at a percentage (30%) upon completion of the matter. On 6th July 2017 the complainant signed the application for amendment and the agreement for legal fees.

4. According to the Applicant, other than ELRC 2446 of 2012 she also represented the complainant in ELRC Cause No. 2080 of 2016, ELRC No. 2463 of 2019 and ELRC No. 2464 of 2019 all of which are pending before court.

5. It was deposed that the subject matter was heard and judgement delivered on the September 28, 2018 where the claimant was awarded Kenya Shillings Two Million and Eighty Thousand (Kshs. 2,080,000/=) together with costs and interests. Upon delivery of the aforesaid judgement, the Respondent proceeded to file an application to set aside the judgement which application was canvassed and a ruling delivered by on the November 29, 2019 dismissing the respondent's application. Upon the applicant applying for the decree the same was duly issued on the January 28, 2020 but was picked by the complainant behind the applicant's back and the Applicant's concerted efforts to trace the original decree hit a snag as the claimant/complainant kept denying that he was having the same yet the court records showed that he had picked the same.

6. The Applicant then instructed the firm Kiriiyu Merchants Auctioneers to follow up on the matter by obtaining the decree and warrants of attachment of the judgement debtor's goods for failing to pay. However, in the process of following up the execution process the Applicant realized that the claimant had gone behind her back and negotiated with the judgement debtor and was in the process of being paid directly without the Applicant's involvement as counsel on record. In the said agreement, signed between the claimant and the judgement debtor, the judgement debtor was allowed to liquidate the decretal sum in five (5) equal instalments until payment in full.

7. As a result of the foregoing, the Applicant wrote a letter to counsel for the judgment debtor, requesting him to intervene and stop the issuance of cheques on the claimant given that the Applicant was still on record for the complainant, a request which counsel for the judgment debtor obliged and advised

his client accordingly and the post-dated cheques were re-issued in the Applicant's name given that the claimant had defaced the cheques that had been issued in the Applicant's name.

8. The Applicant averred that despite the fact that they have engaged in back and forth communication about the subject case and the other cases that she is handling for the Complainant, her concerted efforts to have this matter amicably settled has failed given that the claimant has reneged the agreement for the files and legal fees for the four (4) other matters that she was handling for him resulting into filing of application to cease acting and the bill of costs. It was disclosed that the claimant severally sent his children and other family members to the Applicant's office to cause mayhem and harass and/or intimidate her to pay but to no avail given that they were yet to agree on her fees.

9. The Applicant therefore denied that she had refused to remit the claimant's money as alluded, the truth of the matter being that they must reach a consensus or have the court make a determination on how much she is entitled to as legal fees given that they mutually signed an agreement allowing her to retain 30% excluding costs.

10. It was averred that as a sign of good faith the Applicant issued a cheque of Kenya Shillings Three Hundred and Fifty thousand (Kshs. 350,000/=) to the claimant on the November 30, 2020 as part payment despite the fact that the claimant owed her more than Kenya Shillings Two Million (Kshs. 2,000,000/=) as legal fees for all the files that she had handled for him.

11. It was further averred that on diverse dates in the month of January 2021 the complainant reported the Applicant to Law Society of Kenya (LSK) to which complaint the Applicant responded on January 22, 2021. However, while awaiting further directions from Law Society of Kenya (LSK) the complainant also moved to Central Police Station Nairobi as a result of which the police have been harassing the Applicant day in day out.

12. The Applicant insisted that the matter was handled in a very professional manner taking into account the complainant's best interest hence the complainant's allegation are malicious and meant to taint the Advocate's good name. The Applicant lamented that the 1st and 2nd respondents have taken the role of the investigators, prosecutors and judiciary to find her guilty of frivolous allegations by the said complainant. It was further averred that the office of the 1st and 2nd respondent has been acting in bad faith and bias against her in its conduct while exercising its statutory powers despite writing to them and explaining what transpired between the Applicant and the complainant. The Applicant disclosed that the 1st and 2nd respondents have been calling her through her private phone issuing threats that unless she appears at their offices they will have no option but to arrest her at their own convenience. She averred that despite recording her statement with the 1st and 2nd Respondents they have discredited her rights and instead have continued to apply illegal procedures covering the truth to oppress her in the circumstances.

13. The Applicant explained that the filing of this case at Machakos was necessitated by the fact that the judicial review division Milimani High Court had closed for some time due to cases of Covid 19 making it impossible to seek urgent legal redress given the constant harassment by the 1st and 2nd Respondents and the Complainant.

14. The Applicant proceeded to detail occasions when she was summoned by the police in respect of the said matter and that prior to the issuance of the orders in force, the 1st and 2nd Respondents visited her office threatening to arrest her in the presence of her clients.

15. It was averred that in good faith the Applicant has since paid Kenya Shillings Three Hundred and Fifty Thousand (Kshs. 350,000/=) to the Respondent and the balance of the money is being held as lien

for her unpaid legal fees in respect to the cases that she handled on behalf of the Complainant which are pending taxation.

16. The Applicant insisted that the Complainant's strategy is to put pressure on her using the police and unscrupulous people to subdue her into paying the money without taking into consideration her interest and this is demonstrated by sending unpleasant messages to her staff while the matter is in court.

17. On behalf of the Applicant, it was submitted that actions and procedures applied against the applicant herein are unwarranted and unsupported by the law governing the respondents and such actions can only be termed as barbaric breaching the applicant's right to privacy, limiting her freedom of movement and most importantly depriving her of peace.

18. The applicant was apprehensive of the respondents' actions to constantly threaten her through phone calls and to arrest her without any justifiable reasons and this made her live in fear and uncertainties. In support of her case the Applicant relied on *Pastoli vs. Kabale District Local Government Council & others*, (2008) 2 EA 300 at pages 303 to 304.

19. It was noted that despite being served the 1st and 2nd Respondents failed to appear to defend themselves against this claim . The Court was therefore urged to determine the matter in favour of the Applicant and grant the orders sought as prayed.

3–rd Respondent/Complainant's Case

20. The third Respondent in his replying affidavit deposed that since the cause of action arose in Nairobi, the said Amended Notice of Motion Application is scandalous as the parties herein reside and conduct business in Nairobi, hence the decision of the Exparte Applicant to file the suit in Machakos is mischevious, suspect and scandalous since the matter was reported at the Central Police Station in Nairobi.

21. According to the Complainant, he obtained a judgment in his favour in ELRC NO. 2446 of 2012 after unlawful termination of his contract by his former employers Panari Center Limited where he was awarded Ksh 2,331,557/= as damages vide cheque number 000348 dated September 18, 2020.

22. He denied that the Exparte Applicant has been intimatidated, harrased or threatened and averred that since after he lodged the complaint all the parties were summoned at the Station to state their case. He explained that he lodged a complaint on 8/03/2021 at the DCI Central Police Station disputing a forged agreement between himself and his former advocate, the Applicant herein. It was his case that the forged documents were provided to him by the Law Society of Kenya as part of her response to the LSK in relation to his complaint about the Applicant's conduct for withholding his monies after conclusion of my case.

23. He expounded that the DCI officer in charge of the matter, Mr. Gitonga, summoned the Applicant at their offices to answer to the complaint and that at the said meeting on 12/03/2021, the Complainant was accompanied by his lawyer and his spouse while the Applicant was also accompanied by her lawyer. At the meeting the Applicant only produced a photocopy of the said agreement stating that she had forgotten the original in the file at her office and it was agreed that another meeting be rescheduled in two days to Wednesday 16th March 2021, to enable her produce the original agreement.

24. According to the Complainant, his attempts to get appraised of the progress of the matter from the officer in charge revealed that the Applicant has been busy and hence it was difficult to schedule another meeting. The officer however confirmed the Applicant had not produced the original document to the police as alluded for further forensic audit despite various reminders and lawful instructions to

do so. The Complainant averred that upon various follow ups with the investigating officer on the current state of the matter, the officer confirmed that the advocate had neglected/failed to provide the original document despite various reminders to do so and that the matter would proceed to the next level without further delay. The Complainant was therefore shocked on April 26, 2021 when he called by the officer in charge who told him that he was unable to proceed with the investigation since there was an order from the court stopping the said investigation.

25. It was the Complainant's position that this Application is frivolous, vexatious and an abuse of the court process in that it is meant to stop investigation on the issue of forged document and hence denying him justice as his signature was forged and the Exparte Applicant is using the said basis to withhold his money after a judgment was entered in ELRC no. 2446 of 2012 and the judgment paid by the Respondent.

26. According to the Complainant, the agreement between the parties was that the Applicant would be charge Kshs 100,000 for the whole suit. Upon the determination of the case the Complainant was awarded Kshs (2,080,000) with costs and interests. A decree was subsequently issued and the Complainant explained to the applicant that she was not able to extract the decree for execution of the judgment owing to the disruption caused by COVID-19 and contacted the registry with a view of settling the matter expeditiously. He therefore averred that the extraction of the decree was done with express instructions of the applicant who told him that she was having challenges in extracting the decree and requested the Complainant to assist her to do the same.

27. The Complainant denied any agreement between him and the advocate dated July 6, 2017. The Complainant refuted the allegation that he went behind the Applicant's her back and presented the decree to Panari for payment. The Complainant also denied that he negotiated the amount downwards and accepted to be paid in instalments and contends that the judgment amount was subjected to mandatory statutory deductions which reduced the amount downwards, developments which the applicant was well aware of having been informed by the Complainant.

28. The Complainant insisted that there was a valid retainer agreement of Kshs 100,000 which was agreed between the parties but after the court had awarded the judgments of Kshs 2,080,000 the exparte applicant reneged on the agreement and presented a forged agreement purporting that the Complainant signed the 30% agreement, an agreement which the Complainant only came aware of when she presented to the forged agreement to the Law Society where he had presented his complaint.

29. It was further averred by the Complainant that the judicial review section in Nairobi Milimani was open and she has not provided any documentation to prove that the court was closed

30. It was deposed that the Complainant instructed the firm of Morara Ngisa and Company Advocates to be his advocates on the matter, the firm which was previously managed by the applicant and her husband who are now practicing separately.

31. In the complainant's view, the Applicant breached the advocate-client relationship and also committed a criminal act by forging my signature. According to the complainant, the applicant has created the current stalemate in order to avoid the paying him and to delay further.

32. While acknowledging receipt of Kshs 350,000.00 the Complainant averred that the applicant was not doing him a favour by paying the same since is judgment that he was awarded after he was unfairly terminated from employment and the continuing withholding the money has exposed him to further suffering.

33. On behalf of the Complainant, it was submitted there is no evidence tendered to demonstrate that the 1st and the 2nd respondents have been sending their officers to the applicant's offices in the name of

conducting investigations of subject matter that is alleged to have been pending at the Law Society of Kenya. Instead, the officers summoned the Ex-parte applicant once at the DCI Central with a view of explaining the issue of a forged signature which the Complainant had complained to the police as being used by the Complainant to withhold his money. The nature of the complaint, it was submitted, was to ensure that the DCI subject the said document to a handwriting expert to determine the authenticity of the said documents. It was noted that the ex-parte applicant did not provide the details as to when the officers visited her offices, their names and also the time when they visited her offices. Further, the ex-parte applicant has not provided the call logs to show when she was called, nor has she provided any evidence to show that her phone was tapped. Consequently, there is no infringement of the applicant's constitutional rights as provided under article 31, 47 and 50 and that the officers have not acted ultra-vires. It was submitted that the procedure used by the 1st and the 2nd respondents met the constitutional threshold and the exparte-applicant has completely refused to subject herself to the due process of law as expected. She has completely refused to answer to the complaint of the forged agreement when she purports that the Complainants signed arguing that the matter was pending at the Law Society of Kenya while she is well aware that the LSK does not have the power to conduct investigations a matter which falls under the purview of the Director of the Criminal Investigations.

34. It was urged that the 1st and the 2nd respondents should be allowed to proceed to conduct the investigations as there no way that they have conducted themselves with impunity. Instead, they are just discharging their constitutional mandate of conducting investigations and the applicant has not shown any way that she would be prejudiced if they are allowed to conduct investigations to determine whether the said agreement is genuine.

35. It was submitted that the office of Inspector General of Police is a constitutional office and so is that of the Director of Criminal Investigations, charged with the mandate of enforcing the law and detecting and preventing crime. The Inspector General is empowered to investigate complaints and to take appropriate action of advising the Director of Public Prosecutions to mount a prosecution of a suspect where the Director of Public Prosecution is satisfied that there is sufficient evidence to mount a prosecution.

36. According to the Complainant, the Inspector General of Police has the power to investigate any suspected crime and the application herein is an attempt to curtail the said powers yet the investigations are ongoing and no arrest has been effected against the applicant. It was contended that the police only need to establish reasonable suspicion to prefer charges against a suspect and submit their recommendations to the Director of Public Prosecutions who directs the prosecution and the rest is left to the trial court to determine the guilt of the suspect. It was argued that this court ought not to usurp powers or constitutional mandate of the police in investigating allegations or complaints that a crime has been committed. In that regard reliance was placed on the case of *Republic vs Commissioner of Police and Another Exparte Michael Monari and Another* [2012] eKLR.

37. It was submitted that this court in Judicial Review proceedings is not concerned with the merits of the case which is being investigated into as that entirely falls in the discretion of the police once investigations are over, to decide whether there is sufficient evidence gathered to mount a prosecution by the DPP. This court is concerned with the process and conduct or motivation of the respondents and therefore determine whether the persons affected by the decision to investigate them are given a fair treatment. The court is also concerned with whether the decision maker had the necessary jurisdiction to make such a decision and whether it acted within that jurisdiction; or whether it took into account relevant matters or did take into account irrelevant considerations. Therefore, determination of this matter must be seen in light of the above consideration.

38. The Complainant opined that the existence of a pending complaint at the Laws Society of Kenya does not preclude the Complainant from commencing criminal proceedings against the applicant. Further, the Respondents aver that the applicant cannot be allowed to assert her rights at the detriment of the Complainant rights. It was the Complainant's case that the applicant has not demonstrated that the Respondents have acted unreasonably or illegally to warrant stay of the investigations. According to him, the police are only discharging their constitutional and statutory mandate to investigate an alleged crime and pursuant to article 245 of *the Constitution* in conducting their investigations the police are independent and cannot be directed by any authority. The police can only be inhibited from continuing an investigation if they are found to have not acted ultra vires which is not the position in this case.

39. In relation to the purported intended arrest of the applicant without a warrant, it was submitted that arrest without a warrant is completely legal and allowed by law. The court cannot meddle in the affairs of the 1st and 2nd Respondents by deciding whether the applicant is to be charged with any offence, and cannot usurp the constitutional powers of the police to investigate a crime.

40. It was further submitted that investigation of a crime is not a violation of the applicant's rights. Systems have been put in place to ensure that the 1st and 2nd Respondents carry out their investigations within the framework of the law and if they do so they cannot be faulted for doing their job. If anything, the 1st and 2nd Respondents would be failing in their constitutional mandate if they failed to carry out investigations when complaints are made or when there is need to.

41. It was the Complainant's view that the respondents should be allowed to carry out the investigations regarding the purported forgery. If they do find that there is sufficient evidence to bring criminal charges against the applicant, then the same should be in accordance with the law. It was noted that criminal and civil proceedings may run concurrently unless a party feel prejudiced by the concurrence of the proceedings and prays for the stay of one pending the determination of the other. In this case it was the Complainant's submission that the applicant has not demonstrated that the investigations are being carried out with ulterior motive so as to invite the court to intervene and that once the investigations are complete, the same will be forwarded to the Director of Public Prosecutions to determine whether the evidence is sufficient to sustain a prosecution.

42. It was further noted that the police have not sent the file to the Director of Public Prosecutions to determine whether there is a case for prosecution. That if the applicant has an issue with the current investigating officer, she should have written to DCI to appoint an independent investigator. Counsel urged the court to dismiss the motion as there is no evidence of breach of the law, irrationality or bad motive established on the part of the respondents and reliance was placed on Pastoli vs. Kabale District Local Government Council and Others[2008] 2 EA 300, in which the court cited *Council of Civil Unions V Minister for the Civil Service* [1985] A.C 2 and *Re Bukoba Gymkhana Club* [1963] EA 478 at 479.

43. It was submitted that the question, therefore is, whether the conduct of the Director of Criminal Investigations in the investigation relating to the alleged forgery of the 30% agreement is; is illegal, irrational and or laced with procedural impropriety and therefore deserving of this court's intervention. There must be proof that the investigations are being carried out in excess of the mandate of the police or that the police have no such mandate to investigate the said complaint; or that there is breach of the rules of natural justice and or that there is abuse of power which the exparte applicant has failed to demonstrate.

Determination

44. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions made herein.

45. The circumstances under which the court will grant stay of a criminal process in these kinds of proceedings is now well settled. 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. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for halting those proceedings by way of judicial review since 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. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a 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.

46. However as was held in *R vs. Attorney General exp Kipngeno Arap Ngeny* High Court Civil Application No. 406 of 2001:

> "Although the state's interest and indeed the constitutional and statutory powers to prosecute is recognised, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious...A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds."

47. 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."

48. 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 is 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. The other grounds, which the appellants claim were ignored ultimately, raise the question whether the evidence gathered by the prosecution is sufficient to support the charge. The criminal trial process is regulated by statutes, particularly the Criminal Procedure Code and the *Evidence Act*. There are also constitutional safeguards stipulated in section 77 of *the Constitution* to be observed in respect of both criminal prosecutions and during trials. It is the trial court, which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence and that is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court."

49. 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 fact that it has not been argued before however does not mean that the law stops dead at its tracks. An order of prohibition looks to the future and not to the past; it is concerned with the happenings of future events and little, if any, of past events. Where a decision has been made, there is little that the court can do by an order of prohibition to actually stop the decision from being made, because simply that which is sought to stop has already been done. However in such circumstances, the power of judicial review is not limited to the other orders of judicial review other than prohibition. With respect to civil proceedings prohibition lies not only for the excess of jurisdiction but also from a departure of the rules of natural justice...So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions...This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover

new areas where they fit. 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. However, it does not mean that a civil suit and a criminal case cannot co-exist at any one particular time. This is because the section envisages the re-prosecution of a criminal case substantially dealt with either in fact or law, a case in which issues have been laid to rest. There is no mention in the section that the simultaneous existence of a civil and criminal case is constituting double jeopardy. The courts have, however stated that the power to issue an order of prohibition to stop a criminal prosecution does not endow a court to say that no criminal prosecution should be instituted or continued side by side with a civil suit based on the same or related facts, or to say that a person should never be prosecuted in criminal proceedings when he has a civil suit against him relating to matters in the criminal proceedings...The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution...."

50. In *Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & another* [2002] 2 KLR 703, it was held:

> "It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in

the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth... When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court... In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in... In this case it is asked to step in to grant an order of prohibition. Prohibition looks into the future and can only stop what has not been done. It is certiorari that would be efficacious in quashing that which has been done but it is not prayed for in this matter. There was no order granted for stay of further proceedings when leave was granted and it is possible that the private prosecution has proceeded either to its conclusion or to some extent. In the former event an order of prohibition has no efficacy and the court would be acting in vain to grant one. What is done will have been done. If there is anything that remains to be done in those proceedings, however, the order of prohibition will issue to stop further proceedings."

51. In *Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another* [2012] eKLR, it was held:

> " 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...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."

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

such proceedings amount to a violation of his rights and fundamental freedoms and once the Court is satisfied that that is not the case, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution's evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.

53. Whereas an applicant may well be correct that there are several factors which go to show his innocence, these are not the proper proceedings in which the correctness of the evidence or the truthfulness of the witnesses is to be gauged. That task is solely reserved for the trial Court which is constitutionally bound to determine the proceedings in accordance with the law. Accordingly, the mere fact that the applicants view the evidence to be presented against them as patently false, concocted and/or misleading does not warrant this Court in interfering with the criminal process since that is an allegation which goes to the sufficiency and veracity of the evidence and the innocence of the Applicants, matters which are not within the province of this Court.

54. In *Thuita Mwangi & Anor vs. The Ethics and Anti-Corruption Commission & 3 others* Petition No. 153 & 369 of 2013, it was held:

> " ... I am afraid that the High Court at this point is not the right forum to tender justifications concerning the subject transaction let alone test the nature and veracity of these allegations. In... the Court held that "It is the trial Court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. It would be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court". Similarly...Lenaola J., captured this balance as follows; "(22). The point being made above is that the DPP though not subject to control in exercise of his powers to prosecute criminal offences, must exercise that power on reasonable grounds. Reasonable grounds, it must be noted, cannot amount to the DPP being asked to prove the charge against an accused person at the commencement of the trial but merely show a prima facie case before mounting a prosecution. The proof of the charge is made at trial."

55. As was held by Mumbi Ngugi, J in *Kipoki Oreu Tasur vs. Inspector General of Police & 5 Ors* (2014) eKLR:

> " The criminal justice system is a critical pillar of our society. It is underpinned by *the Constitution*, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior Courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated."

56. In this case the gist of applicant's case is that the Complainant has reneged upon the agreement entered between herself and the Complainant as regards the payment of her fees. Ordinarily, such disputes ought not to be elevated to criminal offence where an advocate, in the exercise of her right to lien, withholds the payment to the client pending the determination of her fees. It is in that light that section 60 of the *Advocates Act* provides as hereunder:

> " Any person who, being an advocate, is entrusted in his professional capacity with any money, valuable security or other property to retain it in safe custody with instructions to pay or

apply it for any purpose in connection with his duty as an advocate fails to pay, apply or account for the same after due completion of the purpose for which it was given, shall be guilty of an offence: Provided that no prosecution for an offence under this section shall be instituted unless a report has been made to the Attorney-General by the Tribunal under subsection (3) of section 61."

57. In order for this provision to be successfully invoked, it must be satisfactorily proved that the Applicant herein was entrusted in her professional capacity with the sum in question to retain it in safe custody but with instructions to pay or apply it for a particular purpose in connection with her duty as an advocate but that she failed to pay, apply or account for the same after due completion of the purpose for which it was given. It may well be argued that in this case the disputed sum was entrusted to the Applicant in her professional capacity to retain it in safe custody but with instructions to pay it to the Complainant and that she has failed to pay, apply or account for the same after due completion of the purpose for which it was given.

58. In this case, however, the issue at the centre of the dispute is whether there was an agreement between the Applicant and the Complainant regarding the mode of payment. The Applicant relies on a document which allegedly permitted her to retain 30% of the amount recovered as her fees while the Complainant contends that the agreement was for a sum of Kshs 100,000.00. It is the signature on the document relied upon by the Applicant that the Complainant contends is a forgery.

59. In my view the issue in dispute herein does not fall squarely within the ambit of section 60 of the *Advocates Act* since it is not an issue that is capable of being resolved under the said Act. A reading of the said provision is clear that what is prohibited is a prosecution under the said section 80 of the *Advocates Act*. In this case it is not alleged that the Respondents intend to prosecute the applicant thereunder for the Respondents to be barred from doing so unless a report has been made to the Attorney-General by the Tribunal under subsection (3) of section 61. It is therefore m view that the said section cannot be successfully invoked in these proceedings.

60. The law in these kind of matters is that it is upon the applicant to satisfy the Court that the discretion given to the DPP to investigate and prosecute is being abused and ought to be interfered with and this burden and standard was expounded in Kuria & 3 Others vs. Attorney General (supra) where it was held:

> "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...In the instant case there is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even of manipulation of court process so as to seriously deprecate the likelihood that the applicants might not get a fair trial as provided under section 77 of *the Constitution*.."

61. As is stated in *Halsbury's Laws of England* 4th Edn. Vol. 1(1) para 12 page 270:

> "The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)...are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief

the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief."

62. In my view the issue of the validity of the signature on the alleged agreement ought to be determined and that cannot be done unless investigations are conducted which is what the 1st and 2nd Respondents are doing. In this case the effect of the grant of the orders sought would be to restrain the police from undertaking their investigatory powers. In my view the decision by a Court to halt investigations from being conducted ought to be exercised very cautiously and in very clear cases where the applicant demonstrates that the investigations that the Respondents intend to carry out constitute an abuse of process. This is because investigations must be carried out independently and must be carried out in good faith without malice or for the purpose of achieving some collateral goal divorced from the purpose for which the investigatory powers are given to the Respondents.

63. The word "investigate" is defined in the Black's Law Dictionary 9th Edition as: "To inquire into a matter systematically; to make an official inquiry." An inquiry in my view involves a consideration of both the complainant's version and that of the person against whom the complaint is made. Barring the existence of exceptional circumstances, the rules of natural justice dictate that the applicants herein make her statement for consideration by the investigators in order for the investigators to arrive at an informed determination.

64. It is trite that the Court ought not to usurp the Constitutional and statutory mandate of the police to investigate any matter that, in the view of the police raises suspicion of the occurrence or imminent occurrence of a crime. Just like in cases of prosecution, the mere fact that the allegations made are likely to be found worthless, is not a ground for halting investigations into the complaints made or brought to the attention of the police since the purpose of a criminal investigations conducted bona fide is to consider both incriminating and exculpatory material and not just to collect evidence on the basis of which a criminal charge may be laid. That an applicant has a good defence to the complaint 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 to bring to the attention of the investigators in the course of the conduct of the investigations.

65. It was in recognition of this fact that the House of Lords in *Director of Public Prosecutions vs. Humphreys* [1976] 2 All ER 497 at 511 cautioned that:

> " A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval...If there is a power...to stop a prosecution on indictment in limine, it is in my view a power that should only be exercised in the most exceptional circumstances."

66. In this case, the criminal process complained of is still in its infancy. The police are yet to complete their investigations. Even after completing the same, the decision to charge the applicant, if at all, will depend on the ultimate decision of the Director of Public Prosecution. To find that the police will carry out their threats to arraign the applicants in this case, in the circumstances would be to overlook an important stage in the prosecutorial process. Such a decision would be based on speculation and conjecture and that cannot be a basis for stalling investigations of a criminal offence. At this stage there is no evidence that at the conclusion of the said investigations the applicant will face criminal charges.

67. In the premises I am not satisfied that this is a proper case in which the court ought to bring the criminal investigations to a halt.

68. Accordingly, I find that the amended notice of motion dated April 16, 2021 is unmerited, the same fails and is hereby dismissed but with no order as to costs as the Applicant's fees are yet to be determined.

69. Orders accordingly.

JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 30TH DAY OF MAY, 2022.

G V ODUNGA

JUDGE

In the presence of:

Mr Onduso for Mr Ndungu for the Applicant

Mr Mutonyi for the 3rd Respondent

CA Susan