Mulwa v Director of Criminal Investigations & another; Muindi & another (Interested Parties) (Petition E025 of 2021) [2022] KEHC 9924 (KLR) (25 July 2022) (Judgment)

Neutral citation: [2022] KEHC 9924 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

PETITION E025 OF 2021

GV ODUNGA, J

JULY 25, 2022

BETWEEN

FRANCIS MWANZA MULWA ..... PETITIONER

AND

DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS ..... 2ND RESPONDENT

AND

MARGARET NTHUKA MUINDI ..... INTERESTED PARTY

LAW SOCIETY OF KENYA ..... INTERESTED PARTY

JUDGMENT

1. Vide Petition dated 30th December 2021, the Petitioner sought the following orders from this Court;

    a. A declaration that the facts and circumstances herein described do not disclose any criminal liability and that any trial under the circumstances would be incompetent and in violation of the Petitioner's rights and fundamental freedom and thus unconstitutional.

    b. An order of Certiorari to issue to bring to this Honourable Court for the purpose of being quashed and to forthwith quash the decision of Inspector Judith Karambu to charge the Petitioner with the offence stealing contrary to Section 284 of the Criminal Procedure Code

    c. An order of Prohibition prohibiting the Chief Magistrate, Milimani or any other magistrate from entertaining the prosecution of the Petitioner with the offence of stealing contemplated in the charge and caution hereinbefore mentioned

    d. Any other relief and/or directions that this Honourable Court may deem fit to grant in the circumstances.

2. The Petitioner, an advocate of the High Court of Kenya averred that during the lifetime of the late Francis Alexander Kimangi Muindi (hereinafter referred to as "the deceased"), the deceased had instructed him to help him conduct and finance the cost of High Court Civil Case No 2630 of 1981 at Machakos which had stalled for years. It was agreed between them that in consideration of taking up the matter, financing all the aspects of the case including meeting the costs of arbitration, the payment to the deceased of the sum of Kshs 1,500,000 and accommodating the deceased with an office space and facilities, the Petitioner would retain the remainder of the funds recovered from the defendant, the defunct Municipal Council of Machakos.

3. In further consideration, they agreed that the Petitioner would set off the sum of Kshs 3,450,000 owed by the deceased to the Petitioner for professional services rendered with respect to HCCC No. 241 of 1993, Francis Kimangi Muindi & Another vs James Muli Kioko.

4. The Petitioner contended that he then conducted the case to its conclusion, including proceeding to the High Court in Machakos, concluding the arbitration proceedings and an appeal in the Court of Appeal Nairobi. They settled their accounts with regards to the case on 14th December 2016 but unfortunately the deceased passed away on 24th February 2017. Before his death, however, the deceased was satisfied with the arrangement and did not query the same.

5. After his demise, the 1st interested Party, a daughter of the deceased, took out letters if administration at Kangundo Senior Principal Magistrate's court on 22nd October 2018 which, according to the Petitioner, were confirmed in less than the statutory 6 months which reflected inter alia, decretal sum of Kshs 7,815,680 awarded in Meru HCC No. 2630 of 1981, Francis Kimangi Muindi vs. Municipal Council of Machakos. In the Petitioner's view, he had nothing to do with a case in Meru High Court and the sum of Kshs 7,815,650 was yet to become free property of the deceased so as to be included in the grant as an asset of the deceased.

6. The Petitioner averred that the 1st Interested party sued the Petitioner at Chief Magistrate's Court at Milimani in Civil Case No E4995 of 2020 claiming the sum of Kshs 14,440,016.20 which was dismissed in his favour on 28th January 2021. The 1st Interested party then proceeded to lodge a complaint with the Advocates Complaints Commission on or about April 2021 to which he responded but was yet to be invited for a hearing. The 1st Interested party then lodged a complaint with DCI Nairobi which culminated into the Petitioner being charged and cautioned for allegedly stealing over Kshs 17 Million from the deceased and the Petitioner was bail-bonded to appear before court for arraignment and prosecution.

7. According to the Petitioner, the complaint lodged is incompetent having been purportedly lodged by a deceased person who cannot be availed for cross examination to test the credibility of the complainant and for which reason, he may not be accorded a fair hearing in terms of Article 50 of *the Constitution*. It was averred that the deceased, during his life time, never initiated any complaint against the Petitioner and that their interaction never resulted into any disagreement or dispute.

8. The Petitioner contended that his arrest, charge, caution and the intended arraignment and prosecution were actuated by malice, spite, ill will or other ulterior and improper motive thus a blatant violation and infringement of his rights and fundamental freedom enshrined in *the Constitution*. In his view, the imminent arraignment an intended prosecution was bad in law ab initio and the intervention of the court is justified. According to him, the 1st interested party's track record of inter alia generating a falsified grant of letters of representation put the Petitioner into a reasonable apprehension that he was likely to be oppressed through falsehoods and unfair treatment. It was his case that the facts

and circumstances points out to a plain victimization of the Petitioner in the cause of his duty as an advocates.

Responses

9. The 2nd Respondent filed Grounds of Opposition in which it was contended that;

    a. The instant Petition is misconceived, frivolous, vexatious, incompetent and an open abuse of the court process.

    b. Under Section 193A of the Criminal Procedure Code, Cap 75 of the Laws of Kenya, the fact that any matter in issue in any criminal proceedings is also directly substantially in issue in any civil proceedings is also shall not be a ground for any stay, prohibition or delay of criminal proceedings.

    c. The 2nd Respondent has mandate under Article 157(6) of *the Constitution* to exercise state powers of prosecution and may institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed, therefore an order of certiorari cannot issue while exercising constitutional and statutory mandate

    d. Under Article 157 (10) of *the Constitution* the Director of Public Prosecutions does not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of the powers or functions, and is not under the direction or control of any person or authority.

    e. The issues raised by the Petitioner herein are issues are issues of evidence that should be raised before the subordinate court seized with the matter

    f. The matters raised by the Petitioner in the pleadings filed herein form the basis of his defence which should be raised before the trial court and as such cannot be raised before the High court in the manner proposed herein.

    g. The Laws of Kenya provide essential safeguards for a fair trial which is also entrenched in *the Constitution* of Kenya 2020. It has not been demonstrated that the Petitioner will not be accorded a fair trial before the subordinate court to warrant the granting of the orders sought.

    h. The High Court has no jurisdiction to determine whether or not the applicants are guilty or not.

    i. The High Court has no jurisdiction to determine whether or not any criminal offence was committed by the Petitioner in relation to the matters the subject of the pleadings herein.

    j. An order of Certiorari cannot issue in the circumstances of this case as the 2nd Respondent is carrying out its constitutional and statutory mandate of conducting criminal trials.

    k. It is in the public interest that police investigate any alleged crimes committed and perpetrators of crimes are prosecuted.

    l. The petitioner has not met the prerequisite requirements for the grant of the orders sought.

    m. The Petitioner has not demonstrated how the 2nd Respondent overstepped its mandate or acted in excess of its statutory powers while discharging his duties.

10. The 1st Interested Party, Margaret Nthuka Muindi, filed a replying affidavit in opposition of the Petition and stated that she is the sole administrator and beneficiary of the estate of the later Francis

Kimangi Muindi pursuant to a certificate of Confirmation of Grant dated 27th March 2019. She deposed that her late father died on 24th February 2017. Before his death, he had instituted civil proceedings against the Municipal Council of Machakos vide High Court Civil Case No 2630 of 1981 whereby judgement was entered against the council for a total sum of Kshs 7,815,680 vide a decree dated 23rd December 2011.

11. Subsequently, she averred, a Judicial Review Application, Machakos High Court Misc. Case No 23 of 2012 was instituted against the Machakos County Government which took over all the assets and liabilities of the Municipal Council of Machakos to compel the payment of the decretal sum and upon perusal of the said file, she found that the matter was marked as fully settled on 28th May 2019 and the file closed.

12. However, she deposed that the Petitioner only paid Kshs. 1,500,00 to the estate though the Petitioner acknowledged that as at 24th October 2019, the Petitioner had received of a total of Kshs. 12,729,519 and by then, a balance of Kshs. 3,846,763.00 plus interest was due and owing. Further, she contended that since 11th April 2019 despite her demands and several visits to the Petitioner's office, the Petitioner ignored and refused to pay out the outstanding balance of Kshs. 15,854,118.70 to the estate or to account for the same. Upon her inquiries at the Machakos County Government, she was informed by the Chief Legal Officer that the County Government had disbursed to the Petitioner a total of Kshs 17,354,118.70 in full settlement of the decree.

13. The 1st Interested Party therefore lodged a criminal complaint with the police vide letter dated 16th June 2020 occasioned by the conduct of the Petitioner which, according to her, amounted to stealing contrary to section 268 as read with section 275 of the *Penal Code* as well as stealing by agent contrary to section 283 (c)of the Penal Code. Further the conduct also disclosed the offence of intermeddling with the property of the deceased person contrary to section 45 of the *Law of Succession Act*.

14. She also instituted a civil suit for recovery of the monies held by the Petitioner vide Nairobi Chief Magistrate's Civil Case No E4995 of 2020 - Margaret Nthuka Muindi vs. Francis Mwanza Mulwa which was dismissed on a technicality that the court lacked territorial jurisdiction pursuant to Section 15 of the *Civil Procedure Act*, the suit ought to have been filed where the defendant resided.

15. In further response to the Petition, she deposed that there was no agreement on fees for professional services between the Petitioner and her late further. That pursuant to section 45 of the *Advocates Act*, and advocate- client remuneration agreement must be signed by the client in order for it to be valid, therefore the fee note that has been annexed is invalid. According to her, the Petitioner who may have been entitled to fees could have filed a bill of costs and had the same taxed and a certificate of costs issued pursuant to section 51(2) of the *Advocates Act*.

16. She deposed that she did not falsify the Certificate of Confirmation of Grant and the allegations of fraud have not been particularized; the nature and extent of fraud nor evidence of the same. She contended that the allegation is scandalous, frivolous and vexatious. Further, she contended that a grant may be confirmed before lapse of six months pursuant to section 71(1) and (3) of the *Law of Succession Act* which was the case in Kangundo Succession Cause 106 of 2018 - Estate of Francis Kimangi Muindi as it was expedient in the circumstances of the case.

17. According to her, the decretal sum of Kshs 7,815,680 vested in and became the property of her late father by virtue of the judgement delivered on 29th June 2011 in Machakos Civil Case number 2630 of 1981 and was therefore free property within the meaning of section 2 of the *Law of Succession Act*.

18. She contended that she is entitled to several avenues of seeking redress against the conduct and wrongs committed including lodging a criminal complaint and subsequently causing the institution

of criminal proceedings, institution of civil proceedings for recovery, institution of proceedings at the Advocates Complaints commission pursuant to section 53(4) of the *Advocates Act* and institution of proceedings at the Advocates Disciplinary Tribunal pursuant to section 60 of the *Advocates Act*. Further, that section 193A of the Criminal Procedure Code envisages and allows for concurrent criminal and civil proceedings.

19. She explained that she lawfully lodged the complaint as an administrator pursuant to Section 79 of the *Law of Succession Act*, since all the property of her late father vested in her as the personal representative, pursuant to section 82 (a) of the *Law of Succession Act*, she possess the power to enforce by suit or otherwise, all causes of action which by virtue of any law survive her late father and she bears the duty to get in all free property of the deceased including debts owing to him. Thus, the Petitioner's averment that the complaint is incompetent for being lodged by a deceased person is baseless and misleading and the arrest and charge was not actuated by malice or spite.

20. She deposed that as a victim of the wrongful conduct of the Petitioner, she is entitled under Article 50(1) of *the Constitution* to have a complaint lodged against the Petitioner prosecuted and decided before the criminal court. Further, she averred that the Petitioner has alleged violation of his constitutional rights but woefully failed to plead with reasonable precision in regard to the manner and extent in which there has been such violation and has failed to enumerate the sub articles of *the Constitution* which have allegedly been violated.

21. She urged the court to dismiss the Petition as it lacks merit, is incompetent and is calculated by the petitioner to delay and avoid being held responsible for his actions by the criminal court.

22. The Petition was disposed of by way of written submissions.

Petitioner's Submissions

23. In his petition, the Petitioner relied on the case of *Timany vs. Republic* (2006) eKLR where the court stated inter alia that where the complainant in the lower court dies without prosecuting the private prosecution, the complaint abates.

24. It was submitted that the confirmation of grant was obtained for an ulterior purpose of prosecuting the Petitioner. According to the Petitioner, the 1st Interested party's signature is not consistent with her known signature as appears in her letter annexed to her replying affidavit and is reminiscent of the falsified grant upon which her complaint to the 1st Respondent was based.

25. It was also submitted that if the Petitioner is prosecuted, he may not have a fair trial as he will not have an opportunity to cross examine the purported owner of the property alleged to have been stolen. He contended that the decision to prosecute him ought to be quashed and the prosecution prohibited.

26. The Respondents and the 2nd Interested party did not submit.

27. The 1st Interested party filed submissions in which she reiterated the contents of the replying affidavit and further submitted that she has the right and the power to lodge a criminal complaint against the petitioner in her capacity as the administrator and/or personal representative of the estate of her late father pursuant to the grant of letters of administration issued on 21st September 2018. As such, the arrest and charge of the Petitioner was not actuated by malice or spite as alleged. It was submitted that as a victim of the wrongful conduct of the Petitioner, she is entitled, under Article 50(1) of *the Constitution*, to have the complaint against the Petitioner prosecuted and decided before the criminal court.

28. It was submitted that there was no valid agreement on fees for professional services between the petitioner and 1st interested party's late father. That pursuant to section 45 of the *Advocates Act*, an advocate-client remuneration agreement must be signed by the client in order for it to be valid and binding on the parties. Accordingly, the fee note annexed is invalid and unenforceable for lack of execution by the deceased. Reliance was placed on the case of *Kakuta Maimai Hamise vs. Peris Pesi Tobiko, Independent Electoral and Boundary Commission & Returning Officer Kajiado East Constituency* [2013] eKLR.

29. Whereas the Petitioner may have been entitled to his fees, it was her case that he could only recover such fees by filing a by filling a bill of costs and having the same taxed and a certificate of costs issued pursuant to section 51 (2) of the *Advocates Act*.

30. It was further submitted the petition as pleaded did not disclose violation of the petitioner's constitutional rights with reasonable precision yet it is a trite rule that in constitutional litigation, a party that alleges violation of his or her rights must plead with reasonable precision in regard to the manner in which there has been such alleged violation. Reliance was placed on the *David Gathu Thuo vs. Attorney General & another* [2021] eKLR. In this case it was submitted that the Petitioner failed to precisely enumerate the sub-articles of *the constitution* which have been allegedly violated other than invoking the otherwise extensive Article 50. To the Interested Party, the Petitioner failed to show by way of evidence the manner in which the alleged violations were committed and to what extent. Therefore, it was submitted the Petition lacks merit, is incompetent and calculated by the Petitioner to delay and avoid being held responsible for his actions by the criminal court.

Determination

31. I have considered the issues raised herein.

32. It is always important to remember that in these kinds of proceedings, the Court ought not to usurp the mandates of the Police and 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.

33. 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 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."

34. 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."

35. However, 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...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*...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 affair 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. 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. However, 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... 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."

36. 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."

37. 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.

38. 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.

39. 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."

40. 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."

41. It is now clear that even in the exercise of what may appear to be prima facie absolute discretion conferred on the Director of Public Prosecution (the DPP) 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.

42. 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.

43. In this case, it is the Petitioner's case was that he entered into an agreement with the deceased herein in which it was agreed that the Petitioner would offer the deceased legal services in consideration of certain payment which was to be offset from the proceeds of the deceased's claim against the County Government of Machakos. According to the Petitioner, upon successfully claiming on behalf of the deceased Kshs 1,500,000.00 he was to offset the fees due to him from the balance. The 1st Interested Party has admitted that the Petitioner did pay to the deceased the sum of Kshs 1,500,000.00.

44. In this case, it is clear that the whole dispute between the Petitioner and the Estate of the deceased revolves around the sum, if any, due and owing from the Petitioner to the Estate of the deceased arising from an advocate/client relationship. While that does not necessarily warrant the order barring the Respondents from instituting criminal proceedings against the Petitioner, where the evidence is that the criminal process is being instigated with a view to achieving ulterior or collateral objectives, the Respondents will not be allowed to proceed along that perilous voyage. In my view, criminal charges are simply meant to force a person to settle a disputed debt or cause him undue embarrassment.

45. In *Mohammed Gulam Hussein Fazal Karmali & Another vs. Chief Magistrate's Court Nairobi & Another* #2006# eKLR Nyamu, J examined the policy considerations for halting criminal proceedings, noting that the court has two fundamental policy considerations to take into account which were enunciated in the case of *M. Devao vs. Department of Labour* (190) in sur 464 at 481 as:

> " The first is that the public interests in the administration of justice require that the court protects its ability to function as a court of law, by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court processes may lend themselves to oppression and injustice...the court grants a permanent stay in order to prevent the criminal process from being used for purposes alien to the administration of criminal justice under the law. It may intervene in this way if it concludes that the court processes are being employed for ulterior purposes or in such a way as to cause improper vexation and oppression."

46. The circumstances which the Court takes into consideration in deciding whether or not to halt a criminal process were set out by Musinga, J (as he then was) in *Paul Stuart Imison Another vs. The Attorney General & 2 Others* Petition No. 57 of 2009, in the following manner:

> "The instances in which a court can declare a prosecution to be improper were well considered in *Macharia & Another –vs- Attorney General & Another* (2001) KLR 448. A prosecution is improper if:

a. It is for a purpose other than upholding the criminal law;

b. It is meant to bring pressure to bear upon the applicant/accused to settle a civil dispute;

c. It is an abuse of the criminal process of the court;

d. It amounts to harassment and is contrary to public policy;

e. It is in contravention of the applicant's constitutional right to freedom.

47. In this case, the 1st Interested Party contended that she is entitled to several avenues of seeking redress against the conduct and wrongs committed including lodging a criminal complaint and subsequently causing the institution of criminal proceedings, institution of civil proceedings for recovery, institution of proceedings at the Advocates Complaints commission pursuant to section 53(4) of the *Advocates Act* and institution of proceedings at the Advocates Disciplinary Tribunal pursuant to section 60 of the *Advocates Act*. Further, that section 193A of the Criminal Procedure Code envisages and allows for concurrent criminal and civil proceedings. With due respect to the 1st interested party, a person should pursue the course most beneficial to him/her. He/She ought not to open up several fronts in order to achieve one objective. Where that is done, it may well be deemed to playing lottery with the judicial process and that amounts to an abuse of the due process. As held in Mitchell and Others vs. Director of Public Prosecutions and Another (1987) LRC (const) 128:

> "....the circumstance in which abuse of process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes extrinsic evidence only. But if and when it is shown it happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instance...[T]here is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop proceedings, or put an end to it."

48. Majanja, J in Petition No. 461 of 2012 – *Francis Kirima M'ikunyua & Others vs. Director of Public Prosecutions*, when dealing with situations where there exist criminal and civil proceedings arising from the same facts pronounced himself as follows:

> "It is very clear that the criminal process and the resultant court proceedings are being used to settle what is otherwise civil dispute which has been the subject of several court cases and indeed decisions. It is clear to me that the contending parties wish to use the criminal process to score points against each side in order to assert the rights of ownership. The use of the criminal process in this manner is not uncommon within this jurisdiction to find that intractable land disputes mutate into criminal matters. It is not difficult to see why. In criminal cases the State's coercive power is brought to bear upon the individual and where we have an inefficient system to settle civil claims, a person who can tie his opponent in the

criminal justice system and ultimately secure a conviction will no doubt have an advantage over his opponent."

49. Kuloba, J in the case of *Vincent Kibiego Saina vs. The Attorney General* H.C Misc Appl. 839 and 1088/99 also expressed himself as hereunder:

> "So, it is not the purpose of a criminal investigation or a criminal charge or prosecution, to help individuals in the advancement of frustration 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 and 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. 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 court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth."

50. In Mohammed Gulam Hussein Fazal Karmali & Another vs. Chief Magistrate's Court Nairobi & Another #2006# eKLR Nyamu, J examined the policy considerations for halting criminal proceedings, noting that the court has two fundamental policy considerations to take into account which were enunciated in the case of M. Devao vs. Department of Labour (190) in sur 464 at 481 as:

> "The first is that the public interests in the administration of justice require that the court protects its ability to function as a court of law, by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court processes may lend themselves to oppression and injustice...the court grants a permanent stay in order to prevent the criminal process from being used for purposes alien to the administration of criminal justice under the law. It may intervene in this way if it concludes that the court processes are being employed for ulterior purposes or in such a way as to cause improper vexation and oppression."

51. According to *Bennett vs. Horseferry Magistrates' Court* (1993) 3 All E.R. 138, 151, HL, an abuse of process justifying the stay of a prosecution could arise in the following circumstances:

a. where it would be impossible to give the accused a fair trial; or

b. Where it would amount to a misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.

52. I therefore agree with Mumbi Ngugi, J's opinion in *Francis Anyango Juma vs. Director of Public Prosecutions & Another* (2012) eKLR that:

> "Clearly, the intention under *the Constitution* was to enable the Director of Public Prosecutions to carry out his constitutional mandate without interference from any party. This court cannot direct or interfere with the exercise by the DPP of his power under *the Constitution* or direct him on the way he should conduct his constitutional mandate, unless

there was clear evidence of violation of a party's rights under *the Constitution*, or violation of *the Constitution* itself."

53. In other words, where the constitutional right to a fair hearing as decreed under Article 50 of *the Constitution* is violated or threatened with violation, this Court without necessarily pronouncing itself on the innocence or otherwise of the applicant is entitled to and has a duty to step in and it does not have to wait until the applicant's rights are actually violated before doing so. Any efficient legal system must put in place a machinery where equality of arms applies to both the complainant and the accused without placing one of the parties to an unwarranted disadvantage.

54. Taking into account the circumstances of the case including the fact that there are in fact disciplinary proceedings against the Petitioner, one can only conclude that the invocation of the criminal justice system was meant to coerce the Petitioner into settling a disputed claim rather than for the vindication of a crime suspected to have been committed and that is not the purpose of the criminal justice system and to do so would be contrary to the mandate of the Director of the Public Prosecutions.

55. It is now clear that the mere fact that an applicant will be subject to a criminal process where he will get an opportunity to defend himself is not reason for allowing a clearly flawed, unlawful and unfair trial to run its course. As was appreciated in *R vs. Attorney General exp Kipngeno Arap Ngeny* High Court Civil Application No. 406 of 2001:

> "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."

56. In my view, to charge an advocate in respect of a dispute arising from an advocate/client relationship with a view to simply compelling him to throw in the towel and settle a matter which in his view is contested ought not to be countenanced. Whereas there is nothing inherently untoward in pursuing both criminal and civil proceedings simultaneously, to do so as a means of harassment with a view to pressurise a person into capitulating is what would be frowned upon.

57. Accordingly, it is my view and I so hold that the levying of criminal charges against the Petitioner was ill motivated, malicious and an abuse of both investigatory and prosecutorial powers.

58. Having considered the issues raised herein I am satisfied that this Petition is merited.

Order

59. In the result I hereby declare that the commencement of the criminal proceedings against the Petitioner in the manner intended by the Respondent amounted to an abuse of the judicial process and was untenable

60. There will be no order as to costs.

JUDGMENT READ AND SIGNED AT MACHAKOS THIS 25TH DAY OF JULY, 2022.

G.V ODUNGA

JUDGE

Delivered in the presence of:

Mr Langalanga for the Petitioner

Mr Jamsumba for the 2nd Respondent

Mr Gitonga for the 2nd Interested Party

CA Susan