



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 349 OF 2019

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION.....1<sup>ST</sup> RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATION....2<sup>ND</sup> RESPONDENT

ENKARE HOTEL LIMITED.....3<sup>RD</sup> RESPONDENT

EX PARTE APPLICANT: PETER MUTUA MUTISO

JUDGMENT

### The Application

1. The *ex parte* Applicant herein, Peter Mutua Mutiso, is an adult Kenyan citizen. He has filed an application by way of a Notice of Motion dated 16<sup>th</sup> December 2019, seeking judicial review orders against the Director of Public Prosecutions (the 1<sup>st</sup> Respondent herein), the Director of Criminal Investigations (the 2<sup>nd</sup> Respondent herein) and Enkare Hotel Limited (the 3<sup>rd</sup> Respondent herein). The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are constitutional and statutory offices in charge of criminal investigation and prosecution, while the 3<sup>rd</sup> Respondent is a limited liability company incorporated in Kenya under the provisions of the Companies Act.

2. The *ex parte* Applicant is seeking the following orders in his application:

**a. An order of prohibition to prohibit the Respondents from charging and/or proceeding with any criminal process against the applicant in regard to the dispute between the applicant and the 3<sup>rd</sup> Respondent regarding premises known as L.R. 209/3788 Moktar Daddah Street Nairobi.**

**b. An order of certiorari to quash the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's decision to charge the applicant in regard to the events of 14<sup>th</sup> January, 2019 concerning the dispute between the applicant and the 3<sup>rd</sup> Respondent over L.R. 209/3788 Moktar Daddah Street Nairobi.**

**c. The costs of this application be provided for.**

3. The application is supported by a statutory statement dated 16<sup>th</sup> December 2019 and a verifying affidavit sworn on the same date by the *ex parte* Applicant. In response to the application, Chief Inspector Eunice Njue, a Directorate Criminal Investigation Officer attached to Central Criminal Investigations Office (CCIO) Nairobi, swore a replying affidavit dated 11<sup>th</sup> June 2020 on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, while Charles Njenga Kariuki, a director of the 3<sup>rd</sup> Respondent, swore a replying affidavit dated and filed on 17<sup>th</sup> February, 2020, on behalf of the 3<sup>rd</sup> Respondent. This Court directed that the application be canvassed by way of written submissions, which the counsel for parties orally highlighted at a virtual hearing. A summary of the parties' respective cases as stated in their pleadings now follows.

## **The ex parte Applicant's case**

4. The *ex parte* Applicant deponed that he is a Director of Muchewa Limited, a limited liability Company incorporated in Kenya under the provisions of the Companies Act, and which was the landlord of the 3<sup>rd</sup> Respondent at premises known as L.R. 209/3788 Moktar Daddah, Nairobi pursuant to a lease dated 22<sup>nd</sup> February 2016. Further, that following default in payment of rent in 2017, Muchewa Limited moved to levy distress against the 3<sup>rd</sup> Respondent. Consequently, that the 3<sup>rd</sup> Respondent filed an application in the Business Premises Tribunal, being BPRT No. 168 of 2016, and obtained restraining orders, and that on 13<sup>th</sup> October, 2017, the said Tribunal discharged the said injunction and directed the 3<sup>rd</sup> Respondent to pay rent to Muchewa Limited as from November 2017. However, that the 3<sup>rd</sup> Respondent proceeded to file another case namely CMCC No. 1198 of 2018 to restrain the threatened distress for rent and obtained orders.

5. The *ex parte* Applicant explained that the said orders were discharged by Eboso J. in a judgment delivered in ELCA No. 26 of 2018 on 18<sup>th</sup> December, 2018, and that subsequently, on 14<sup>th</sup> January 2019 Muchewa Limited levied distress against the 3<sup>rd</sup> Respondent pursuant to the orders given in CMCC Misc. No. 447 of 2018, which had not yet been set aside. Further, that on 16<sup>th</sup> January, 2019, the 3<sup>rd</sup> Respondent filed another application in the Business Premises Tribunal in BPRT No. 168 of 2016 seeking to restrain the distress for rent, and the said Tribunal declined to issue the orders of injunction. In addition, that the 3<sup>rd</sup> Respondent proceeded to file a similar application in CMCC No. 759 of 2019, which application and suit was struck out as an abuse of the court process. Furthermore, that during the pendency of CMCC No. 759 of 2019, the 3<sup>rd</sup> Respondent filed a similar application in ELC Appeal No. 20 of 2019 which was declined.

6. It was contended that on 29<sup>th</sup> November 2019, the Directorate of Criminal Investigations Officer (DCIO) at the Nairobi Provincial Office arrested the *ex parte* Applicant, and sought to arraign him in court on 2<sup>nd</sup> December 2019 for the offence of stealing the goods that had been the subject of all the aforesaid civil proceedings. It was the *ex parte* Applicant's case that the charges as framed are clearly an abuse of the court process, and that the conduct of the Respondents is for an ulterior motive, namely to use criminal process to achieve what they failed to achieve in civil courts. He further contended that the filing of multiplicity of suits and the invocation of criminal process was unjust and intended to malign and destroy his career, and to exact revenge and besmirch his reputation as a law-abiding citizen.

7. The *ex parte* Applicant also alleged that the DCIO at Central Police Station within the area of jurisdiction of the subject dispute had declined to intervene as this was a civil dispute, and that using undue influence, the 3<sup>rd</sup> Respondent went to the Provincial DCIO Office to cause the *ex parte* Applicant to be arrested. In addition, that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent did not undertake any investigation and did not record a statement from the *ex parte* Applicant, who was being charged in his capacity as a director of Muchewa Limited, the 3<sup>rd</sup> Respondent's landlord. Therefore, that the invocation of criminal proceedings was exceedingly unjust against any reasonable expectation and violation of his constitutional rights to freedom.

8. Lastly, the *ex parte* Applicant averred that on 25<sup>th</sup> May, 2018, Muchewa Limited effected a notice of termination of tenancy on the 3<sup>rd</sup> Respondent, a copy of which was annexed, and which the 3<sup>rd</sup> Respondent never opposed as required under the provisions of section 12 (4) of Landlord & Tenants, (Shops, Hotels & Catering Establishments) Act.

9. The *ex parte* Applicant annexed copies of the lease dated 22<sup>nd</sup> February 2016 entered into between Muchewa Limited and the 3<sup>rd</sup> Respondent with respect to the premises known as L.R. 209/3788 Moktar Daddah, Nairobi; the pleadings filed in and orders granted by the Business Premises Rent Tribunal in BPRT No. 168 of 2016; the judgment delivered on 18<sup>th</sup> December 2018 in ELC Appeal No. 26 of 2018; the pleadings filed and orders made in CMCC Misc. No. 447/2018, CMCC No. 759 of 2019 and ELC Appeal No. 20 of 2019; and the charges brought against him.

## **The Respondents' Cases**

### **The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Case**

10. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents contended that Criminal Case No. 660 of 2019 against the *ex parte* Applicant that is pending before Milimani Chief Magistrate Court is a case of stealing contrary to Section 268(1) as read with Section 275, and forcible entry contrary to Section 90 of the Penal Code. Further, that the *ex parte* Applicant was a Director of Muchewa Ltd, which was the landlord of the 3<sup>rd</sup> Respondent who through its directors lodged a complaint at Central Police Station whereupon no action was taken, and then went to CPIO Nairobi Area to complain about the inaction of Central Police Station vide OB No. 03/01/09/2019.

11. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents explained that sometimes in 2016, there was a rent payment tussle between Muchewa Ltd and Adder Limited, and that on 28<sup>th</sup> May, 2018, Muchewa Ltd through the *ex parte* Applicant who was a Director, obtained proclamation. Further, that on 14<sup>th</sup> January, 2019, Muchewa Ltd sought the escort of police and executed an earlier order of February, 2018 and evicted the 3<sup>rd</sup> Respondent from the premises.

12. It is the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's case that the *ex parte* Applicant in total disregard of the court orders dated 12<sup>th</sup> February, 2019, took away goods worth Kenya Shillings 40,000,000= and evicted the 3<sup>rd</sup> Respondent. Further that the *ex parte* Applicant and one David Thuo went to Central Police Station and gave false information that he was a licensed auctioneer with a court order to be enforced, and were granted police security and took the goods illegally without the presence of any licensed auctioneer. According to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the Directors of the 3<sup>rd</sup> Respondent were illegally evicted from their rented hotel by the *ex parte* Applicant and the said George Thuo, and that the Court order that was used was specific that it was distress attachment of assets for rent recovery, but not an eviction order as was performed by Muchewa Ltd.

13. In conclusion, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents averred that the *ex parte* Applicant had failed to demonstrate an ulterior purpose of instituting

criminal proceedings, and that in any event, the *ex parte* Applicant and his co-accused persons would be afforded an opportunity to defend themselves, cross-examine witnesses and adduce evidence in support of their case in the criminal matter, which was the proper course to take in the circumstances of the case. Further, that the accuracy and correctness of the evidence or facts gathered in an investigation could only be assessed and tested by the trial court which was best equipped to deal with the quality and sufficiency of evidence gathered and properly adduced in support of the charges.

### **The 3<sup>rd</sup> Respondent's Case**

14. The 3<sup>rd</sup> Respondent confirmed that it was a tenant of a Muchewa Limited in premises known as LR. No. 209/3788 wherein it operated a restaurant and hotel business thereon since December 2015, and that the *ex parte* Applicant was a Director of the said Muchewa Limited. It was averred that the 3<sup>rd</sup> Respondent and Muchewa Limited had several civil matters in courts relating to the said tenancy and rent, and that on 14<sup>th</sup> January 2019, the *ex parte* Applicant went to the 3<sup>rd</sup> Respondent's hotel accompanied by several policemen, and removed all the 3<sup>rd</sup> Respondent's goods therein allegedly attached in distress to recover arrears of rent. Further, that in the purported distress, the *ex parte* Applicant was accompanied by a person claiming to be Steven Nganga T/A Gladsom Auctioneers.

15. However, that on 15<sup>th</sup> January, 2019, the 3<sup>rd</sup> Respondent learnt from the actual Steven Nganga that he was not the one who had attached and carried away the goods. The 3<sup>rd</sup> Respondent annexed an affidavit to this effect sworn by the said Steven Nganga, and of the alleged forged distress for rent, and averred that after the Steven Nganga discovered that the *ex parte* Applicant had illegally used his name in carrying out the attachment of the 3<sup>rd</sup> Respondent's goods, he made an official complaint to the Directorate of Criminal Investigations (DCI), a copy of which was also attached.

16. Lastly, it was contended that to date, the 3<sup>rd</sup> Respondent's goods had never been traced and there was no evidence of the goods having been sold in a public auction to recover the alleged arrears of rent. He deponed that the criminal case which the *ex parte* Applicant was seeking to quash related to the goods which the directors of Muchewa Limited stole from the 3<sup>rd</sup> Respondent, and the same was therefore properly before court, as it was about the illegal attachment and impersonation of the auctioneer by the accused persons.

### **The Determination**

17. The *ex-parte* Applicant's Advocates on record, R.M. Mutiso Advocate filed written submissions dated 31<sup>st</sup> January, 2020 and submissions in reply dated 15<sup>th</sup> June, 2020, while the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' written submissions dated 11<sup>th</sup> June, 2020 were submitted by Chrissy Mwenda, a prosecution counsel in the office of the 2<sup>nd</sup> Respondent. Njenga Muchai & Associates Advocates for the 3<sup>rd</sup> Respondent filed submissions dated 17<sup>th</sup> February 2020. The main issues for determination in the instant application are firstly, whether the prosecution brought against the *ex parte* Applicant is in abuse of the process of Court, and secondly whether the *ex parte* Applicant merits the relief sought.

18. The *ex parte* Applicant submitted that the prosecution was a clear contravention of Article 29 (a) of the Kenyan Constitution which states that "every person has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause" and that the 3<sup>rd</sup> Respondent caused the *ex parte* Applicant to be arrested on the premise of a civil dispute between the parties. The *ex parte* Applicant reiterated the details of the multiple civil suits invoked by the 3<sup>rd</sup> Respondent, and submitted that its report to the DCI on 29<sup>th</sup> November, 2019 more than 9 months after distress for rent took place was clearly an afterthought. Further, that the 3<sup>rd</sup> Respondent accused the *ex parte* Applicant for the offence of stealing goods that had been the subject of the above-mentioned civil proceedings.

19. While submitting that the actions of the 3<sup>rd</sup> Respondent amounted to an abuse of the court process, the *ex parte* Applicant cited the decisions in **Stephen Muregi Chege vs Inspector General of Police & 3 Others [2018] eKLR**, **Director of Public Prosecutions vs Martin Maina & 4 Others [2017] eKLR**, **Lalchand Fulchand Shah vs Investments & Mortgages Bank Limited & 5 Others [2018] eKLR** and **Commissioner of Police & the Director of Criminal Investigation Department & Another vs Kenya Commercial Bank Ltd & 4 others [2013] eKLR** to contend that the 3<sup>rd</sup> Respondent having failed to achieve the desired result in civil proceedings, proceeded to weaponized the criminal process for the sole purpose of score-settling.

20. According to the *ex parte* Applicant, the Respondents' submissions were wholly on the merits of the impugned decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, and that the 3<sup>rd</sup> Respondent had not denied that it filed different cases concerning the substratum of this matter in different courts. It was further contended that in abuse of the court process, whenever the 3<sup>rd</sup> Respondent filed proceedings in one forum, it did not disclose that it had filed similar proceedings in another forum and that it took the court's own intervention to notice the 3<sup>rd</sup> Respondent's pattern of filing different cases on this issue. Lastly, the *ex parte* Applicant submitted that the 1<sup>st</sup> Respondent ought not be under the direction of any person or institution in its decision to charge, and that there is a clear indication of that undue influence was brought out by the fact that the criminal proceedings were commenced not by Nairobi Central Police Station which is the area of jurisdiction but by officers of Kilimanjaro Police Station.

21. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the Director of Public Prosecutions is empowered by the Constitution under Article 157(6) to institute, undertake and take over prosecutions of all criminal proceedings, and Article 157(10) precludes the Director of Public Prosecutions from requiring consent of any person or authority to commence criminal proceedings and reiterates that the Director shall not be under the direction or control of any person or authority. Reliance was placed on the decision in the case of **Matalulu vs DPP (2003) 4 LRC 712** on the grounds upon which the powers of the Director of Public Prosecutions may be subject to review. It was submitted in this regard that the *ex parte* Applicant had failed to demonstrate that the DPP lacked the requisite authority, acted in excess of jurisdiction or departed from the rules of natural justice in directing that the *ex parte* Applicant be charged with the offences disclosed by the evidence gathered.

22. It was also submitted that abuse of process was defined by the High Court **Stephen Oyugi Okero vs Milimani Chief Magistrate's Court & DCI, Petition No. 537 of 2017**, and that in the present case, there was no evidence of misuse of power or contravention of rules of natural justice. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents contended that the *ex parte* Applicant had not demonstrated that in undertaking investigations into the complaint lodged with them, and in making the decision to prefer criminal charges against them, neither the National Police Service nor the Office of the Director of Public Prosecutions acted without or in excess of the powers conferred upon them by the law, or have infringed, violated, contravened or in any other manner failed to comply with or respect and observe the provisions of the Constitution or relevant laws.

23. It was further contended that the Director of Public Prosecutions independently reviewed and analyzed the evidence contained in the investigations file compiled by the Directorate of Criminal Investigations including the witness statements, documentary exhibits and statement of the *ex parte* Applicant as required by law, before giving directions to prosecute the *ex parte* Applicant. In conclusion, it was submitted that the *ex parte* Applicant has not shown nor adduced evidence to show that the 1<sup>st</sup> Respondent's intention to institute criminal proceedings was done in bad faith and an abuse of process.

24. The 3<sup>rd</sup> Respondent on its part admitted that there are several civil matters pending between it and Muchewa Limited, which it submitted do not relate to the current decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents decision to charge the *ex parte* Applicant. The 3<sup>rd</sup> Respondent contended that the gist of the complaint laid before the 2<sup>nd</sup> Respondent by the 3<sup>rd</sup> Respondent originated from the events that took place on the 14<sup>th</sup> January, 2019, when as admitted by the *ex parte* Applicant, Muchewa Limited proceeded to levy distress for rent against the goods of the 3<sup>rd</sup> Respondent herein. Therefore, that the decision to prefer charges against the *ex parte* Applicant was founded on cogent findings after investigations were carried out by the 2<sup>nd</sup> Respondent after the goods of the 3<sup>rd</sup> Respondent were carted away on the 14<sup>th</sup> January 2019 by persons not licensed to undertake such process, and without strict adherence to the law.

25. According to the 3<sup>rd</sup> Respondent, there is no bar to exercise of concurrent criminal and civil jurisdiction and relied on the provisions of sections 193A of the Criminal Procedure Code in this regard, and on the decision in **Diamond Hasham Lalji & Another vs The Attorney General, The Director Of Public Prosecutions & 3 Others, Civil Appeal No. 274 Of 2014** for the submission that there was no abuse of the prosecutorial powers granted to the 1<sup>st</sup> Respondent, and that the Court ought not to usurp the Constitutional mandate of the 1<sup>st</sup> Respondent conferred to it by dint of Article 157(6)(a) of the Constitution. Lastly, that the *ex parte* Applicant would have be accorded a fair trial, and would have an opportunity of cross-examining the witnesses and also be able to adduce his own evidence.

26. Before determination of the issues before the Court, it is necessary to restate the parameters of judicial review jurisdiction, as stated in the Ugandan case of **Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300** thus:

**“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, miscellaneous application number 643 of 2005 (UR)*.**

**Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....**

**Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.**

**Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”**

27. Judicial review is now entrenched as a constitutional principle pursuant to the provisions of Article 47 of the Constitution, which provides for the right to fair administrative action, and section 7 of the Fair Administrative Action Act in this regard provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision. In addition, it was emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR that Article 47 of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, even though the reviewing court has no mandate to substitute its own decision for that of the administrator.**

28. Lastly, Article 165(6) of the Constitution also provides that this Court has supervisory jurisdiction over any person, body or authority that exercises a quasi-judicial function or a function that is likely to affect a person's rights.

#### **On whether there was Abuse of Prosecutorial Powers**

29. On the issue of abuse of prosecutorial powers, it is important to first deal with the applicable principles and circumstances under which the Court will grant order prohibiting the commencement or continuation of a criminal trial process. In this respect, 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 merits of the case, and particularly whether the criminal proceedings have a likelihood of success, or that the Applicant has a good defence is also not a ground for halting criminal proceedings by way of judicial review, in light of the purpose and limits of judicial review explained in the foregoing.

30. However, if an applicant demonstrates that the criminal proceedings constitute an illegality or abuse of process, this Court will not hesitate in putting a halt to such proceedings, as that fall squarely within its mandate as a judicial review Court. The cases of **Peter Ngunjiri Maina v DPP & 2 Others (2017) eKLR**, and **R v DPP & 2 Others Ex parte Nomoni Saisi (2016) eKLR** identified various scenarios that would require interrogation to warrant a review of the unfettered discretion of the Director of Public Prosecutions as follows:

- a. Where there is an abuse of discretion;
- b. Where the decision-maker exercises discretion for an improper purpose;
- c. Whether decision-maker is in breach of the duty to act fairly;
- d. Whether decision-maker has failed to exercise statutory discretion reasonably;
- e. Where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power;
- f. Where the decision-maker fetters the discretion given;
- g. Where the decision-maker fails to exercise discretion;
- h. Where the decision-maker is irrational and unreasonable.”

31. In this regard, the concurrent existence of the criminal proceedings and civil proceedings would not, *ipso facto*, constitute an abuse of the process of the court as recognised by section 193A of the Criminal Procedure Code, 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.

32. These principles have been restated in various judicial decisions. The role of the different players in the criminal process was recognised in **Republic vs Commissioner of Police and Another ex parte Michael Monari & Another, [2012] eKLR** where it was held that:

**“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”.**

33. In **Joram Mwenda Guantai vs The Chief Magistrate, [2007] 2 EA 170**, the Court of Appeal explained the applicable principles as follows:

**“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 **Johnson Kamau Njuguna & Another vs Director of Public Prosecutions (2018) eKLR**, the court also restated the said principles thus:

**“It is settled law that the role of the court in a judicial review application of this nature is to ensure that an applicant is not dragged willy-nilly into court on criminal charges when there is no substantial evidence to sustain an indictment. The DPP has the authority and discretion to decide who, when and how to prosecute within the bounds of legal reasonableness. That role cannot be usurped by the court. If the DPP acts outside the bounds of legal reasonableness, however, he acts ultra vires and the court can intervene, because it is the court’s high responsibility and inherent power to secure fair treatment for all persons brought before the court, and to prevent an abuse of the court’s process.”**

35. The Court of Appeal in **Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others, [2013] eKLR** also held as follows on concurrent criminal a civil proceedings on the same issues:

**“While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal**

proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court. This is case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations”

36. The circumstances when a Court can intervene in a criminal prosecution was also the subject of the decision in **R vs. Attorney General exp Kipngeno Arap Ngeny, High Court Civil Application No. 406 of 2001** wherein it was held that:

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

37. The question that therefore need to be answered by this Court is whether the criminal proceedings against the *ex parte* Applicant were brought in abuse of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent’s powers, were unreasonable or were motivated by improper motives. In this respect, it is not disputed that there were various civil cases filed by the 3<sup>rd</sup> Respondent against the *ex parte* Applicant’s company over the subject matter of the prosecution, which is the alleged illegal distress of rent by the *ex parte* Applicant.

38. It is also notable that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent did not bring any evidence of the basis of their prosecution of the *ex parte* Applicant, and in particular, they did not bring any evidence of the orders granted on 12<sup>th</sup> February 2019, which they averred illustrate the illegality of the *ex parte* Applicant’s actions, nor of any complaint or statements made against the *ex parte* Applicant. It is thus proper and justified in the circumstances to conclude that the prosecution of the *ex parte* Applicant was made without any basis, and was thus not only in abuse of prosecutorial powers but also unreasonable.

30. In addition, the *ex parte* Applicant brought evidence of the various rulings and orders given by various Court as regards attempts made by the 3<sup>rd</sup> Respondent to retrain the distress of rent, and allowing it to distress for rent. The prosecution by the Respondents on the ground that the distress of rent was illegally undertaken was in clear abuse of process of Court, as it was a collateral attack on various court orders on the same subject matter. In addition, there was an existing forum to challenge the propriety of the distress of rent and secure the appropriate remedies if any, namely the Court that had granted the orders of distress in the first instance. It is also notable in this regard that supervisory jurisdiction of any decisions or actions in relation to title, use and occupation of land now fall within the exclusive jurisdiction of the Environment and Land Court, pursuant to Articles 162(2) (b) and 165(5) of the Constitution, and section 13 of the Environment and Land Court Act.

40. The prosecution of the *ex parte* Applicant was therefore evidently undertaken for the improper purpose and ulterior motive of unprocedurally circumventing and overturning orders of other courts of competent jurisdiction.

#### **Whether the orders sought are merited**

41. On the last issue as regards the relief sought, the *ex parte* Applicant has sought orders of certiorari and prohibition. The Court of Appeal held in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** *inter alia* as follows as regards the nature of the two judicial review orders:

**“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...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 for 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....Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”**

42. The prosecution of the *ex parte* Applicant by the Respondents has been found by this Court to be in abuse of the process of Court, unreasonable and for improper purposes and ulterior motives. The order sought of certiorari to quash the said prosecution is thus merited. Consequently, an order of prohibition stopping any further prosecution of the *ex parte* Applicant in the said criminal case is also merited, to ensure that this Court does not act in vain.

43. In the premises, I find that the *ex parte* Applicant’s Notice of Motion dated 16<sup>th</sup> December 2019 is merited to the extent of the following orders:

**I. An order of Certiorari be and is hereby issued to bring into the High Court for purposes of being quashed the the 1<sup>st</sup> and 2<sup>nd</sup> Respondent’s decision to charge the *ex parte* Applicant in Criminal Case No. 660 of 2019 or any other criminal**

proceedings arising from the distress of rent undertaken by the *ex parte* Applicant on 14<sup>th</sup> January 2019 and tenancy dispute between the *ex parte* Applicant and the 3<sup>rd</sup> Respondent over L.R. 209/3788 Moktar Daddah Street Nairobi.

II. An order of Prohibition be and is hereby issued prohibiting the Respondents from charging and/or proceeding with any criminal process against the *ex parte* Applicant in regard to the distress of rent undertaken by the *ex parte* Applicant on 14<sup>th</sup> January, 2019 and from the tenancy dispute between the *ex parte* Applicant and the 3<sup>rd</sup> Respondent over L.R. 209/3788 Moktar Daddah Street Nairobi.

III. The Respondents shall meet the *ex parte* Applicant's costs of the Notice of Motion dated 16<sup>th</sup> December 2019.

44. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 31<sup>ST</sup> DAY OF MARCH 2021

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS JUDGMENT

In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this judgment will be delivered electronically by transmission to the email addresses of the *ex parte* Applicants' and Respondents' Advocates on record.

P. NYAMWEYA

JUDGE