



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

JUDICIAL REVIEW APPLICATION NO. E022 OF 2021

IN THE MATTER OF: AN APPLICATION BY STEPHENS KITHI NGOMBO, ADVOCATE, FOR LEAVE TO APPLY FOR ORDERS OF JUDICIAL REVIEW;

IN THE MATTER OF: THE LAW REFORM ACT & ARTICLE 165(3)(a),165(6) & 165(7) OF THE CONSTITUTION OF KENYA (2010);

IN THE MATTER OF: IMPENDING ARRAIGNMENT BEFORE THE MOMBASA CHIEF MAGISTRATE’S COURT OF STEPHENS KITHI NGOMBO, TO ANSWER CHARGES OF ATTEMPTING TO OBTAIN BY FALSE PRETENSES AND OBTAINING MONEY BY FALSE PRETENSES;

IN THE MATTER OF: MOMBASA HC MISC. CRIM. APPLICATION NO. E001 OF 2020, AN APPLICATION BY STEPHENS KITHI NGOMBO, FOR BAIL PENDING ARREST AND ORDERS GRANTED ON 29TH SEPTEMBER, 2020;

IN THE MATTER OF: ON-GOING PROCEEDINGS BEFORE THE MOMBASA HIGH COURT, MOMBASA HIGH COURT CIVIL SUIT NO: 89 OF 2019, CHINA WU YI (KENYA) COMPANY LIMITED VS STEPHENS KITHI NGOMBO T/A STEVE KITHI & CO., ADVOCATES AND IN THE COUNTERCLAIM STEPHENS KITHI NGOMBO & PROPKEN (MAURITIUS) LIMITED –VS- CHINA WU YI (KENYA) COMPANY LIMITED;

REPUBLIC OF KENYA.....APPLICANT

-VERSUS-

- 1. NOORDIN HAJI, OGW, CBS,**
- 2. OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**
- 3. GEORGE KINOTI, CBS**
- 4. OFFICE OF THE DIRECTOR OF CRIMINAL INVESTIGATIONS**
- 5. THE PROSECUTING COUNSEL IN CHARGE**

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS, MOMBASA

- 6. CHIEF INSPECTOR MUUO MAITHYA, SERVICE NO: 235100**
- 7. THE OFFICER IN CHARGE OF STATION (OCS)**

CENTRAL POLICE STATION, MOMBASA

- 8. THE INSPECTOR GENERAL OF POLICE.....RESPONDENTS**

AND

- 1. XIONG KAI HUA**

2. CHINA WU YI (KENYA) COMPANY LIMITED.....INTERESTED PARTIES

STEPHENS KITHI NGOMBO.....EX PARTE APPLICANT

JUDGMENT

1. Pursuant to leave granted on 26/04/2021, the Applicant herein filed the Notice of motion 28/04/2021 and seeks the following orders:

1. **That** this Honourable Court be pleased to bring up the Charge Sheet dated **20th April, 2021** intended for arraignment of the APPLICANT before the Mombasa Chief Magistrate in Mombasa Chief Magistrates' Criminal Case No: E989 of 2021, Republic versus Stephens Kithi Ngombo (hereinafter the "**Intended Criminal Case**") And that this Honourable Court do issue an Order of *Certiorari* to Quash forthwith the said Charge Sheet;

2. **That** this Honourable Court be pleased to bring up And to Quash forthwith the following Decisions made by the 4th Respondent, to wit, the Decision:

(a) to press against the APPLICANT, Criminal Charges arising from the same set of facts as those which gave rise to Mombasa High Court Misc. Criminal Application No: E001 of 2020, In Re: An Application by Stephens Kithi Ngombo for Bail Pending Arrest (hereinafter the "**Bail Application**");

(b) to press against the APPLICANT, Criminal Charges arising from the same set of facts as those which gave rise to Mombasa High Court Civil Case No: 89 of 2019, China Wu Yi (Kenya) Limited –vs- Stephens Kithi Ngombo T/a “Steve Kithi & Co., Advocates”, And In the Counterclaim: Stephens Kithi Ngombo T/a “Steve Kithi & Co., Advocates” & PropKen (Mauritius) Limited –vs- China Wu Yi (Kenya) Limited (hereinafter the "**Civil Suit**");

(c) to press against the APPLICANT, the Criminal Charges set out in the Charge Sheet dated 20th April, 2021 Despite appearing before the Hon. Lady Justice Onginjo on **3rd November, 2020** and asking the Hon. Judge to mark the **Bail Application** as “Settled” on an Undertaking that the 4th Respondent had decided NOT to press any criminal charges against the APPLICANT arising out of the same set of facts as those giving rise to the Civil Suit;

(d) to Rescind, without any Notice to the Court or the Applicant, the decision earlier formally notified to the Hon. Lady Justice Onginjo on **3rd November, 2020**, that the 4th Respondent would NOT press against the APPLICANT, any Criminal Charges arising out of the same set of facts as those giving rise to the Civil Suit;

(e) to delegate to the 6th, 7th and 8th Respondents the Decision to press Criminal Charges against the APPLICANT as set out in the Charge Sheet dated 20th April, 2021, contrary to **Article 157(6)(a)** of the Constitution of Kenya (2010);

(f) to delegate to the 6th, 7th and 8th Respondents responsibility for preparation of the Charge Sheet dated 20th April, 2021, Despite these Officers NOT qualifying as “Subordinate Officers” to whom the 4th Respondent is allowed to delegate his powers under **Article 157(9)** of the Constitution of Kenya (2010);

(g) to delegate to the 6th, 7th and 8th Respondents responsibility for preparation of the Charge Sheet dated 20th April, 2021, Despite these Officers NOT qualifying as “Prosecution Counsel” to whom the 4th Respondent is allowed to delegate his powers under **Sections 2(1) and 19** of the Office of Director of Public Prosecutions Act (No:2 of 2013);

And

(h) to omit, neglect and/or refuse to direct the Investigations purportedly conducted by the 6th, 7th and 8th Respondents prior to preparation of the Charge Sheet dated 20th April, 2021, contrary to **Article 157(4)** of the Constitution of Kenya (2010);

3. **That** this Honourable Court do issue an Order of Prohibition against the Respondents herein prohibiting them forthwith from pressing against the APPLICANT, any Criminal Charges arising from the same set of facts as those which gave rise to Civil Suit and/or the Bail Application; Unless upon the discovery of new evidence not available heretofor And tending to suggest criminal intention on the part of the APPLICANT;

4. **That** this Honourable Court do issue an Order of Prohibition against the 3rd, 6th, 7th, and 8th Respondents herein prohibiting them forthwith from re-opening any Investigation of the Criminal Charges as set out in the Charge Sheet dated 20th April, 2021 Unless upon express Written Instructions from the 4th Respondent following the discovery of new evidence not available heretofor And tending to suggest criminal intention on the part of the APPLICANT;

5. **That** the costs of this application be awarded to the Applicant.

Applicants' Case

2. The Applicants' case may be gathered from the Affidavit sworn in support of the Application by **Stephens Kithi Ngombo (herein the**

Applicant). The applicant avers that on 20/4/2021, he received a phone call from the 6th Respondent informing him that there was an intention to have court summons served upon him. The ex-pate Applicant further avers that since he was unavailable at the time, he promised to be available on the 21/04/2021 at the Mombasa High Court, so that service could be effected upon him. The said court summons were indeed served upon him and they required him to take a plea on criminal charges that had not been disclosed to him, on 22/04/2021.

3. The Applicant avers that after inquiries at the Criminal Registry, he obtained a copy of a charge sheet dated 20/04/2021 wherein the complainant was China Wu Yi (Kenya) Limited and the charges were “Attempting to obtain money by False Pretences and “Obtaining Money by False Pretences.

4. The Applicant avers that he was extremely shocked since in the course of last year 2020, he had received a requisition to compel attendance to record a statement in what was said to be investigations. He was interviewed and recorded his statement and even showed large volume of documents to demonstrate to the 6th Respondent that the dispute was purely a civil conveyancing transaction that is currently being litigated before the High Court. However, the Applicant avers that he formed the impression that a decision had already been made to charge him with criminal offences. Therefore, he proceeded to file Mombasa High Court Misc. Crim Application No. E001 of 2020 wherein he sought anticipatory bail pending arrest, in respect to the alleged criminal offences then still under investigations. Thereafter, the Applicant vide letter 29/09/2020 to the Director of Criminal Investigation copied to the Office of the Director of Public Prosecutions(ODPP), unsuccessfully requested the conformity with his Constitutional rights guaranteed under Article 47 of the Constitution.

5. The Applicant avers that on 3/11/2020 when the Anticipatory Bail Application came up for hearing, a representative from the ODPP requested that the application to be marked settled because the ODPP had decided not to press criminal charges against him. Therefore, on the strength of that undertaking, the application for anticipatory bail was marked as settled.

6. It is the Applicant’s case that diligence exercise of prosecutorial discretion and the adherence to the mandatory requirements for a fair administrative action should not be waived and/or ousted just because there is no bar to concurrent civil and criminal proceedings.

7. The Applicant avers that ever since the subject conveyancing transaction, which was the subject of the concluded civil suit, several attempts have been made on his life, and he is apprehensive that his incarceration will have an adverse effect to his health since he is currently on diabetes and high blood pressure medication, which requires a special diet. Therefore, his life will be in danger should the police put him in custody owing to the large sums of money due from the complainants, *inter alia*, but also due to cases reported in the press in recent times of persons in police custody unexpectedly “committing suicide” despite having no history of depression.

8. It is the Applicant’s case that the alleged “complaint” by the interested parties and the criminal investigations is a bald-faced attempt to intimidate him from vigorously prosecuting the counterclaim in the **Mombasa High Court Civil Case Number 89 of 2019 China Wu Yi (Kenya) VS. Stephens Kithi Ngombo t/a Steve Kithi & Co. Advocates** and to prevent him from arguing the upcoming Notice of Motion Application slated for hearing on 5/05/2021.

The Respondents’ Case

9. 1st - 7th Respondents opposed the motion vide replying affidavit sworn on 19/05/2021 by **PC. Isaac Ogutu** who is an officer working with the Directorate of Criminal Investigations. He avers that on 26/06/2020, the directorate of Criminal Investigations received a complaint from **China Wu Yi (Kenya) Company Limited** via their advocate Wambugu & Muriuki Advocates against the Applicant on claims of attempting to obtain a sum of Kshs. 121,780,000,000 and obtaining Kshs. 20,000,000/= by falsely pretending that he was in a position to sell them property LR. No. Mombasa/Block/XXV/169 owned by Tourism Development Corporation formerly known as Kenya Tourism Development Corporation and the matter herein was assigned to him and PC. Eric Gitonga for investigations.

10. The deponent avers that in the course of investigations, several statements were recorded including that of the Applicant who unfortunately refused to cooperate with the investigating officers, but opted to record his own statement which he scanned and forwarded to the investigating officers through e-mail, and upon completion of investigations and evidence compilation from various documents recovered, the file was forwarded to the ODPP for perusal and advice and upon perusal, the ODPP was satisfied with the evidence therein and recommended for charges against the Applicant. However, since the Applicant had already sought and obtained anticipatory bail in **HC Misc. App. No. E001 of 2020** barring the 6th Respondent from arresting him, on 21/04/2021, the prosecution moved Mombasa Chief Magistrate Court to apply for summons for the Applicant to appear in court for plea taking.

11. It is the 1st -7th Respondents’ case that Section 193 A of the Criminal Procedure Code allows civil proceedings to be heard concurrently with any criminal proceeding as their end game is different and that an anticipatory bail is not a bar for institution of criminal proceedings. Consequently, the Applicant ought not to drag his civil matter into a criminal trial, since the charges against him were well drafted within the provision of Section 134 -137 of the Criminal Procedure Code.

12. It is also the 1st-7th Respondents’ case that the mere presence of a signature by the OCS Central Police Station cannot satisfy the test of delegation of powers or authority to the OCS to execute summons, warrants, and court orders. Therefore, the instant application ought to be dismissed for being an abuse of the court process and is meant to defeat the cause of justice.

13. The Interested Parties opposed the motion vide replying affidavit sworn on 13/05/2021 by the **Luo Zicheng** who is a director of the 2nd Interested Party and authorized by the 1st interested party and his fellow directors in the 1st Interested party. He avers that the motion in court has no grounds in support thereof and is not supported by any evidence and therefore, he is at loss as to how he will respond thereto. It is his view that the motion is defective, bad in law and is liable for dismissal for failure to annex grounds in support thereof contrary to the provisions of Order 51 rule 4 of the Civil Procedure Rules.

14. The deponent avers that the Applicant was on 29/04/2021 arraigned in court and took plea on two counts of attempting to obtain money

from the Interested Party and for obtaining Kshs. 20,000,000/- from the interested party. Consequently, his prayer seeking to quash the intended arraignment has been overtaken by events upon the application for anticipatory bail. The deponent avers that the same was spent since the application only asked for a single prayer which was granted and the same had lapsed. Therefore, there was never any rescission of any decision whatsoever as at no point was it ever communicated to court of any decision not to charge the Applicant and further if at all such notification exists then the same is illegal, and void as it violates the 2nd interested party's right to a fair administrative action and due process.

15. The deponent avers that if the court grants the prayers sought in the motion, then it will be usurping the original jurisdiction of the trial Chief Magistrate Court from taking evidence and trying the Applicant, and the same will deny the Interested Parties an opportunity to have their case dispensed with by the trial court as well as exercising their right of appeal.

16. The deponent avers that there is no proof whatsoever that the 2nd Respondent has delegated prosecutorial powers as prayed. Further the purported delegation of duties to prepare a charge sheet have equally not been proved. Therefore, this court ought not to venture into conjecture.

17. It is the Interested Parties' case that the lack of form in a Charge Sheet does not in itself defeat the criminal trial, since the court only needs to be persuaded by the consideration of whether such defect occasioned an injustice, and further, Article 159 of the Constitution enjoins the court not to venture into procedural technicalities.

18. The deponent avers that the Applicant's affidavit sworn on 23/04/2021 in support of the application for leave served upon them did not contain annexures referred therein and therefore, without the said annexures being furnished to the Interested Parties, they are in no position to respond thereto and also lack any ability whatsoever to depone to any facts contained therein. Therefore, the same ought to be disregarded in making a determination in the main motion.

19. The deponent avers that the Applicant obtained Kshs. 20,000,000/= in pretext that he was in a position to obtain vacant possession of government land without any legal authority and soon after receiving the same he abandoned the claim and purported to transfer the interests therein to a Mauritian Company Propken (Mauritius) limited, a company owned and controlled by the Applicant and which is now defunct. Further, the deponent avers that the Applicant utilized the obtained amount of Kshs. 20,000,000/= towards his personal projects, which indicates that the land transaction was a fraudulent scheme, which, upon discovery of inculpatory evidence by the investigative agencies, the ODPP was called upon to make a decision of whether charges could be preferred against the Applicant even when civil proceedings are pending and which arise out of the same transaction or set of facts.

20. The deponent avers that the decision to charge is made by the 2nd Respondent and not the 6th Respondent. Therefore, the purported requisition to attend and the recording of a statement is a procedural process which cannot be implied to mean that the investigative agencies had formed their mind to charge the Applicant.

21. It is the interested parties' case that the allegations of attempts on the Applicant's life are sensationalist, aimed at whipping up emotions and sympathy from this court, and deliberately intended to sway the court away from the substratum of the suit, which is that the Applicant committed a suspected criminal offence.

22. The Applicant in opposing the Replying affidavit dated 19/5/2021 filed a Notice of Preliminary Objection dated 19/05/2021 based on the following grounds:

a) That the Replying Affidavit dated 19/05/2021 is incompetent having been sworn by a police officer who has not deponed that he is an Advocate of the High Court of Kenya, it purports to be a reply for and on behalf of the Office of the Director of Public Prosecutions.

b) The Replying affidavit dated 19th May, 2021 has been filed without any substantive Notice showing that the deponent PC Isaac Ogotu has been appointed either as an advocate for the Office of the Director of Public Prosecutions or as a duly authorized representative.

c) That Office of the Director of Public Prosecution cannot be represented in court by a purported Police Officer in defending its constitutional and statutory duties.

d) The Replying affidavit dated 19th May, 2021 is incompetent as a substantive response to the key issues in question before the Honourable Court namely the fairness of the administrative action taken by the 2nd Respondent.

23. The 1st to 7th Respondents opposed the Notice of preliminary Objection dated 19/05/2021 vide Grounds of Opposition to the dated 24/05/2021, as follows.

a) That the preliminary objection does not raise any question of law.

b) That the Replying affidavit dated 19/05/2021 complied with order 19 and order 51 rule 14 of the civil procedure code and Rule 15 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and the Oath and Statutory Act Cap.

c) That the investigating officer is conversant with the facts of Cr. 989 /2021 and therefore he is competent to represent the interest of the 1st to 7th Respondents.

Submissions

24. On this Court's directions, the Notice of Preliminary Objection and the Application were dispensed with by way of written submissions. The Applicant **Mr. Kithi** filed his submission to the Preliminary Objection on 19/05/2021 and 2/06/2021, **Mr. Fedha** learned counsel for the 1st- 7th Respondents filed submission on 25/5/2021 while **Mr. Eredi** learned counsel for the Interested Parties filed submission 24/06/2021.

The Determination

25. I have considered the **Preliminary Objection**. I have also considered the instant application, the rival written submissions, the cited authorities, and the relevant provisions of law. I will first endeavour to determine whether what has been raised by the Applicant falls within the definition of a '**Preliminary Objection**' as stated in the case of **Mukisa Biscuits Manufacturers Ltd. ...Vs...West End Distributors Ltd. [1969] E.A. 696**, where the Court held that: -

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

Further **Sir Charles Newbold** in the same case stated as follows:

“The first matter relates to the increasing practices of raising points which should be argued in the normal manner quite improperly by way of Preliminary Objection. A preliminary Objection is in the nature of what used to be a demurrer. It raises pure points of law, which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained and if what is sought is the exercise of Judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but to unnecessarily increase costs and on occasion confuse the issue. The improper procedure should stop.”

26. **Ojwang, J** (as he then was) in **Oraro -vs- Mbaja [2005] KLR 141** after quoting the statement of Law, JA. In the **Mukisa Biscuits**, case (supra) went on to state that: -

“A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...”

Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

27. In the instant suit, the Applicant has raised several points, which will require evidence to authenticate what the Applicant has alleged. For instance, whereas the Applicant alleges that the Replying Affidavit dated 19/05/2021 is incompetent having been sworn by a police officer who has not deposed to be an Advocate, and purports to reply on behalf of the Office of the Director of Public Prosecutions, the 2nd Respondent alleges that the investigating officer is conversant with the facts of Cr. 989 /2021 and therefore he is competent to represent the interest of the 1st to 7th Respondent. This will require both parties to adduce evidence so that the court can arrive at the truth.

28. *Prima facie* therefore, the Preliminary Objection does not meet the threshold required in law and I have no hesitation dismissing the same. Accordingly, I dismiss the Preliminary Objection with no order as to costs.

29. The remaining issues for determination, which have also been echoed by the Applicant in his submission, are:

a) What are the Constitutional and statutory basis for criminal investigations and prosecution?

b) Whether due process was followed by the Respondents in conduct of the investigations.

(a) What are the Constitutional and statutory basis for criminal investigations and prosecution?

30. Institutions created by or under the Constitution have individual mandate spelt out by the Constitution. Courts will not interfere easily with the exercise of the power and discretion enjoyed by such government agencies unless the agency is acting beyond its mandate or its actions violate the law or the Constitution, rights, or freedoms of persons guaranteed under the Constitution. In this instant, the 1st and 2nd Respondents are on the spot being accused for alleged violation of Article 10 of the Constitution.

31. Under Article 157 (6), (7), (8), (10) & (11) of the Constitution, it stipulated as follows:

“(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—

(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

(7) If the discontinuance of any proceedings under clause (6) (c) takes place after the close of the prosecution's case, the defendant shall be acquitted.

(8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.

...

(10) 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.

(11) 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."

32. The *Office of the Director of Public Prosecutions Act, No.2 of 2013*, which in Sections 5 and 25 provide that:

"[the DPP may] discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions"

AND

"The Director may, with permission of the court discontinue prosecution commenced by the Director, any person, or authority at any stage before delivery of judgement."

33. Section 6 of the Office of the Director of Public Prosecutions Act states as follows:

"6. Pursuant to Article 157(10) of the Constitution, the Director shall—

(a) not require the consent of any person or authority for the commencement of criminal proceedings;

(b) not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution, this Act or any other written law; and

(c) be subject only to the Constitution and the law."

34. Article 245(4), (a) of the Constitution provides that:

(4) The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to—

(a) the investigation of any particular offence or offences;

(b) the enforcement of the law against any particular person or persons;

(c) ...

35. To give effect to the Constitutional mandate of investigation of crimes under the aforesaid Articles, the National Police Service Act under Section 24 provides for the functions of the Police to include investigation of crimes and apprehension of offenders as follows: -

Functions of the Kenya Police Service

The functions of the Kenya Police Service shall be the—

(a) ...

(e) investigation of crimes;

36. The Directorate of Criminal Investigations, which is headed by the DCI, is established under Section 28 of the National Police Service Act, 2011, and is placed under the direction, command, and control of the Inspector General of the National Police Service. The functions of the Directorate, as provided for under Section 35 of the National Police Service Act, include:

(a) *collect and provide criminal intelligence;*

(b) *undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime among others;*

(c) *maintain law and order*

(d) *detect and prevent crime;*

37. Further, Section 52 (1) of the National Police Service Act grants a police officer power to summon any person believed to have information, which may assist in investigation to appear before the police in police station. The said Section reads as follows:

“(1) A police officer may, in writing, require any person whom the police officer has reason to believe has information which may assist in the investigation of an alleged offence to attend before him at a police station or police office in the county in which that person resides or for the time being is.”

(b) Whether due process was followed by the Respondents in conduct of the investigations

38. **Mr. Kithi** submitted that the process leading up to the prosecution and the decision to prosecute did not adhere to the requirements of a fair administrative action guaranteed under Article 47 of the Constitution. This is because the evidence by PC Isaac Ogutu is contradictory since he avers that the Applicant’s statement was recorded during investigation process. However, at paragraphs 7 and 16, the same deponent avers that the Applicant was summoned for interview and statement, but he refused to cooperate with the investigating officer. Therefore, the contradictions by the investigators are an impediment to a fair administrative action or a fair decision taken by the 2nd Respondent. Counsel further avers that there is no explanation as to why the complaint was recorded at the directorate of Criminal Investigations (DCI) in Kiambu instead where the Agreement for sale was signed which is in Mombasa and where the suit property is situate and it has not been explained how the Central Police Station Mombasa came to be involved in preparing the Charge sheet and why approval of the charge was made in Mombasa rather than in Nairobi where the investigations were initiated.

39. **Mr. Fedha**, the learned prosecutor for the 1st to 7th Respondents submitted that the High Court was not the right forum to tender justifications as to the allegations in the charge sheet and such evidence to be relied on by the prosecution. Therefore, the issues raised by the Applicant do not satisfy the basic tenets of judicial review orders for certiorari since the Applicant has to satisfy the court that the 2nd Respondent’s actions were ultra vires and a breach of the Applicant’s right to natural justice, and that the 2nd Respondent erred in law.

40. **Mr. Eredi** learned counsel for the 2nd Interested Party submitted that the culpability of the Applicant should be determined by the trial court and not this court since the decision to charge has already been made and this court is as a result *functus officio*.

41. In rejoinder, **Mr. Kithi** submitted that on the date of plea, the investigations were not complete, there was no proper file, and therefore the decision to charge was arrived at prematurely.

42. The principles that govern the issuance of the orders sought are now settled. Several decisions have been made that, in my opinion, correctly set out the law relating to circumstances in which the Court would be entitled to prohibit, halt, or quash criminal proceedings. It is noteworthy, however, that in these types of proceedings, the Court should be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings. The Court should not usurp the 2nd Respondent’s mandate to investigate and prosecute in the exercise of the discretion conferred on that office by Article 157 of the Constitution and that **the mere fact that intended or ongoing criminal proceedings are in all likelihood doomed to failure, is no reason to suspend them through** judicial review. This is because judicial review procedures are concerned with the decision-making process rather than the merits. 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 in good faith since that defence is open to the Applicant in those proceedings. However, if the complainant establishes that the criminal proceeding against the Applicant are an abuse of procedure, the court will not hesitate to halt such proceedings.

43. Judicial Review, as is well established, does not delve into the correctness of a decision. That should be the function of an appellate body. Judicial Review intervenes in the following circumstances;

(a) *Illegality or unlawfulness;*

(b) *Irrationality or unreasonableness;*

(c) *Procedural impropriety or unfairness.*

44. **Illegality** may arise when the body either lacks jurisdiction or acts in excess of jurisdiction. It may also arise where there was an error of law or an error of fact. **Irrationality** may arise when the decision is so outrageous in its defiance of logic or of standards that no sensible person who applied his mind to the question decided could have arrived at it. In such a situation, the decision-maker may have abused his power or may have taken into account irrelevant considerations when making the decision and **Procedural impropriety** is the failure to observe procedural rules laid out in the legislative instrument. Such failure bespeaks lack of fairness.

45. In this case, the Applicant appears to suggest that the Respondents are guilty of irrationality and procedural impropriety. The reasoning is that the Respondents have refused to appreciate the existence of **Mombasa High Court Civil Suit No: 89 of 2019, China Wu Yi (Kenya) Company Limited vs Stephens Kithi Ngombo T/a Steve Kithi & Co., Advocates and In the Counterclaim Stephens Kithi Ngombo & PropKen (Mauritius) Limited –vs- China Wu Yi (Kenya) Company Limited** being litigated in the High Court and that despite furnishing the 6th Respondent with the relevant document relating to the said case, it appeared that a decision had already been made to charge him with criminal offences. Further, the Applicant avers that his requests for information from the 4th Respondent were ignored.

46. The Respondents on the other hand have maintained through **PC Isaac Ogutu** that they acted on a complaint from the 2nd interested party and after their investigations they forwarded their file to the 2nd Respondent for perusal and advice, and that after perusal charges were recommended against the Applicant. Further, that Section 193A of the Criminal Procedure Code mandates civil proceeding to be heard concurrently with criminal proceedings.

47. The 4th Respondent is expected to conduct professional investigations that are not motivated by malice or other collateral considerations, and the mere filing of a complaint does not justify the institution of a criminal prosecution. Before charging a person suspected of committing an offence, law enforcement agencies must conduct an independent investigation into the complaint. In other words, the police or any other public prosecution agencies are not merely a conduit for complainants. Upon receiving a complaint, the police must act impartially and independently, and they are expected to conduct thorough investigations, which would normally entail taking into account the version of the complainant and the suspect. Ordinarily, the absence of one of the parties' versions is not necessarily fatal to the prosecution. However, because it is alleged in this case that exculpatory evidence was provided to the police in the course of the investigation and they deliberately decide to ignore it for reasons unknown to them, one can only conclude that the police are motivated by collateral considerations rather than genuine vindication of the criminal judicial process. Failure to make reasonable use of the available sources of information prior to instituting proceedings would be evidence of malice and thus abuse of discretion and power.

48. In the case of **Republic v Commissioner of Police and Another ex parte Michael Monari and Another [2012] eKLR Warsame J (as he then was)** declined to stop criminal proceedings against the Applicants in the absence of evidence to demonstrate bad faith and abuse of the court process by the Respondents. The court did not find fault with the commencement of criminal proceedings for alleged forgery on an issue which was already the subject of pending civil proceedings. The court held, *inter alia*, that:

“...There is no bar to concurrent criminal and civil jurisdiction and that the evidence available discloses criminal acts and omissions which must be investigated, prosecuted, and determined by a court of competent jurisdiction”.

49. The Applicant has presented what appears to be a formidable defense to the criminal charges against him. However, this is not sufficient in these types of proceedings because this is not the trial court where the merits of the Applicant's case are to be determined. It would be up to the prosecution to demonstrate at trial that the Applicant's mentioned defence is not available to him. However, in these proceedings, the rules are reversed, and it is up to the Applicant to demonstrate that there is no prosecutable case against him, a burden that is undeniably heavy given the consequences if determined in favour of the Applicant, since the Respondents will be barred from carrying out their Constitutional and statutory mandate. Has the Applicant proved to the required standard that the document he furnished to the 4th Respondent was exculpatory evidence? In **East African Community vs. Railways African Union (Kenya) and Others (No. 2) Civil Appeal No. 41 of 1974 [1974] EA 425**, it was held by the East African Court of Appeal that the onus lies on a person seeking the grant of a prerogative order to establish that it is essential for it to issue since these are not orders that are lightly made. Judicial review or prerogative writs as they were known in the past, it has been held, are orders of serious nature, and cannot and should not be granted lightly. They should only be granted where there are concrete grounds for their issuance. It is not enough to simply state that grounds for their issuance exist; there is a need to lay basis for alleging that there exist grounds which justify the grant of the said orders.

50 In **Republic vs. Kenya Power & Lighting Company Limited & Another [2013] eKLR** it was observed that:

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

51. In this case, the Applicant has not discharged his burden of proof. The Applicant ought to have pinpointed at express actions on the part of the Respondents that show the Respondents' actions are driven by other motives other than a genuine desire to vindicate the commission of a crime. In other words, it does not suffice to simply believe that the decision to charge him is a tactic by the Respondents to intimidate, harass and threaten him into giving up on the counter claim he has filed in **Mombasa High Court Civil Suit No: 89 of 2019, China Wu Yi (Kenya) Company Limited vs Stephens Kithi Ngombo T/a Steve Kithi & Co., Advocates**. Further the allegations that the 2nd Respondent has delegated to the 6th, 7th and 8th Respondent the decision to press charges against the Applicant and the drafting of the Charge Sheet dated 20/04/2021 contrary to Article 157(6) (a) and 157(9) of the Constitution and Section 2(1) and 19 of the Office of Director of Public Prosecution Act (No.2 of 2013) have not been proved and the same remained mere allegations, since in response to the Applicant's allegations of delegations of the decision to press charges and drafting of charges, the Respondents maintained that the charges against the Applicant were in compliance with Section 134- 137 and the said charges were approved by the Prosecution Counsel duly appointed by the 2nd Respondent by affixing a stamp on the charge sheet with the words “approved”. Since there was no rebuttal from the Applicant in relation to the issue of delegation of the 2nd Respondent's powers to the 6th, 7th and 8th Respondents, I find and hold that the Applicant did not prove the delegation of the 2nd Respondent powers to the required standard. There ought to be a basis or foundation for such a belief, in order for the Court to gauge whether that motive is the paramount one.

52. In **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** it was held that:

“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 a fair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts.”

53. The Constitutional provision in Article 157 (10) and (11) ensures that the DPP has complete independence in his decision-making processes, which is vital to protect the integrity of the criminal justice system because it guarantees that any decision to prosecute is made free of any external influences. This Court respects this Constitutional imperative and will hesitate to interfere with the functions of the DPP unless there is clear evidence of breach of the Constitution or abuse of discretion to prosecute.

54. Article 157

(10) 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.

(11) 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.

55. In the case of **Michael Monari & Another [2012] eKLR** Warsame J held, *inter alia*, that:

“Under Article 157(4) of the Constitution, the Director shall have power to direct the police to investigate any information or allegation of criminal conduct and it is mandatory for the police to comply with any directions given by the Director of Public Prosecutions. Under Article 157 (10), the Director of Public Prosecutions shall not require the consent of any person or authority for commencement of criminal proceedings and shall not be under the directions or control of any person. It is clear in my mind 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 need only establish reasonable suspicion before preferring the charges. The rest is for the trial court ...”

56. Applying the legal tests above to the facts and circumstances of this case, I find and hold that there is nothing to show that the prosecution of the Applicant is irrational or is unprocedural and/or otherwise an abuse of court process or abuse of police powers or judicial process. There is no material before this Court to demonstrate that the prosecution has no proper factual foundation.

57. It is common ground, and noteworthy, that the Applicant herein was arraigned on 29/04/2021 after his attempt to stay his plea taking flopped. The Applicant then pleaded not guilty to two counts of attempting to obtain money from the Interested Parties and for obtaining Kshs. 20,000,000/- from the Interested Parties. Therefore, from the foregoing, the prayer one in the Notice of Motion dated 28/04/2021 has been overtaken by events since it sought to quash the Applicants intended arraignment.

58. I have also carefully looked at proceedings before my sister **Ong’injo J** in Criminal case no. E001 of 2020, wherein the Applicant sought Anticipatory Bail against the Respondent herein. I am in consonance with the 2nd Interested party’s submission that it is not true that the 4th Respondent had indicated to the court that it was not pressing criminal charges against the Applicant. Therefore, the Applicant misled this court by stating that the 4th Respondent had decided not to press charges against him. Therefore, prayers 2(a) (c) and (d) of the Notice of Motion dated 28/04/2021 also fail.

59. For the foregoing reasons, the Notice of Motion dated 28/04/2021 seeking orders of certiorari and prohibition against the Respondents fails. Accordingly, the same is hereby dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED IN MOMBASA THIS 29TH DAY OF SEPTEMBER, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Mr. Kithi the Applicant

Mr. Gichuki holding brief Eredi for Respondents

Ms. Peris Court Assistant