



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 64 OF 2018**

**IN THE MATTER OF ARTICLE 22 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 19,20,21,22,23,24,27,28,160,232,249,2931,40,47 AND 50(4) OF THE CONSTITUTION OF KENYA**

**CHRISTOPHER OGANDA NYARURI.....PETITIONER**

**-VERSUS-**

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

**DIRECTOR OF CRIMINAL INVESTIGATIONS.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Petition is brought pursuant of Articles 22 (1), 23 (1), 19 (1), 19 (2) (a) and (c), 19 (3) (a), 20 (1) and (3), 21 (1), 24 (1), 27, 28, 10 and 232, 249 (1) and (2), and 160 (5) of the Constitution of Kenya 2010. The Petitioner is the director of Korari Agencies Ltd and alleges that the dispute arises from the transfer of L.R. No. 3734/28 from Esquire Investment Ltd to Korari Agencies Ltd. The two companies have been engaged in a dispute over the ownership of the suit property before the ELC Court, namely **ELC No.952 of 2016: Esquire Investment Ltd vs Attorney General, Chief Land Registrar, National Land Commission & Korari Agencies Ltd.**

2. The Petitioner avers that the matter is still before the ELC which has ordered that there be maintenance of the status quo with respect to the possession of the land pending the hearing and determination of the suit. However, he claims that the police have been harassing him and other directors of Korari Agencies Ltd and want to arrest, detain and charge him with a criminal offence on the grounds that Esquire Investment Ltd is the rightful owner of the land.

3. The Petitioner argues that a decision by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to interrogate, arrest and charge him over the land dispute would be unlawful and unconstitutional. That his rights and freedoms are under threat of infringement. It is stated that these rights and freedoms are: the right to freedom of security of the person under Article 29; right to privacy under Article 31; right to own property under Article 40; right to fair administrative action under Article 47; and right to a fair trial under 50 (4).

4. The Petitioner avers that the decision to charge him with a criminal offence over a land ownership matter is unconstitutional and unlawful as such a dispute is better suited for determination by the ELC court. Additionally, the Petitioner avers that the actions proposed by the Respondents are not in the public's interest, in the interests of the administration of justice. Furthermore, the Petitioner urge that the actions by the Respondents to charge the Petitioner with a criminal offense before the ELC determines the legal owner of the land is an attempt to intimidate the petitioner.

5. The Petitioner in the petition seeks the following orders:-

a. A declaration that the Petitioner's rights are being violated or are threatened by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

b. An order of prohibition to issue restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's from arresting, detaining, charging, questioning, investigating and/or prosecuting the Petitioner in relation to land reference Nos. 3734/1411 & 3734/1412 or L.R. No. 3734/28

c. Costs of the Petition.

### **Respondents' Response**

6. The Respondents aver the police received a complaint from one of the Directors of Esquire Investment Limited claiming that some unknown people forged transfer documents transferring their property known as **L.R No. 3734/28**, by purporting to be the directors of Esquire Investment Limited. The suit property was transferred to Korari Agencies Ltd without the knowledge or approval of the directors of Esquire Investment limited.

7. The Respondents urge that they were provided with a transfer document by Mr. John Mugo one of the directors of Korari Agencies Ltd. The transfer document purported that the directors of Esquire Investment Limited and those who transferred the suit property are Nyaruri Oganda Christopher and Owuoth Edward. This raised alarms for the Respondents as the investigation at the Registrar of Companies revealed that the Directors of Esquire Investment Ltd are Ramji Devji, Maghbai Devji and Mayur Ramji; while the Directors of Korari Agencies Ltd are John Mugo and Christopher Oganda.

8. The registered directors of Esquire Investment Ltd as listed above deny ever signing a transfer document transferring the suit property to Korari Agencies Ltd or having entered into any agreement to sell the suit property to any party. The Respondent additionally puts forward the written statement of the Land Registrar who states that the last entry on the Charge Title was Esquire Investment Ltd as per the land register and she has never signed an entry to Korari Agencies Ltd.

9. The Respondents urge that they only became aware of the suit upon reviewing the Petition, however they contend that according to Section 193A of the Criminal Procedure Code, criminal and civil proceedings can run concurrently. Additionally, they assert that they acted within their respective mandated and independently discharged their duties to conduct thorough investigations as mandated by Article 244 of the Constitution of Kenya 2010 and the National Police Service Act Section 24 and 35.

10. The Respondents further state that the Petitioner has failed to demonstrate that they acted in bad faith or abused the legal process. It is further asserted that the Petitioner has failed to show how his rights will be infringed and violated or the damages he is likely to suffer as a result of the police investigation.

### **Petitioner's Response**

11. In response, the Petitioner asserts that he had never purported to act as a director of Esquire Investment Ltd as alleged by the Respondents, and that the annexure marked "**JC2**" which is the alleged Transfer document is a manipulation of the real transfer dated 14<sup>th</sup> April 2009 marked "**CON-SA1**". He also alleges that John Mugo is not the origin of the purported transfer submitted by the Respondents, and John Mugo has not been involved with any advocate to forward the transfer marked "**CON-SA1**".

### **Parties Submissions**

12. The Petitioner filed submissions dated 8<sup>th</sup> June 2018, in which it is averred that the issues to be determined on are whether the Petitioner's rights are being violated or are threatened by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, and whether the Petitioner has established a case meriting the issue of an order of prohibition restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from arresting, detaining, charging, questioning, investigating and/ or prosecuting the Petitioner.

13. The Petitioner submits that although the Respondents are mandated under law (*Section 24 and 49 of the National Police Service Act; and Article 157 of the Constitution*) they have exceeded their mandate by submitting the Petitioner to the criminal justice system where the matter could sufficiently be determined as a civil dispute. The Petitioner relies on the cases of **Republic vs. Director of Criminal Investigations Exparte Harrison Nyota Ngunyi [2017] eKLR; and Republic v Director of Public Prosecution & 2 others Ex-parte Francis Njakwe Maina & another [2015] eKLR**.

14. On the same point, the Petitioner assert that because the police complaint was made 3 years after the institution of the civil suit was filed, it is indicative of the attempt by Esquire Investment Limited to force the directors in Korari Agencies Ltd to submit a concession of the civil dispute. The Petitioner relied on the cases of **Republic vs Commissioner of Police of Kenya & Director of Criminal Investigation Department Exparte John Bundi Ng'ala [2006] eKLR; Republic vs Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703; and Kuria & 3 others v Attorney General [2002] 2 KLR 69**.

15. The Petitioner alleges that the investigation by the Respondents is neither impartial, independent nor in good faith and was brought with the aim of achieving extraneous goals other than those legally recognised in the Constitution and the National Police Service Act. It is submitted that the actions of the Respondents are an abuse of the legal process and the Court is urged to intervene and prohibit the wrongful exercise of discretion.

16. The Respondents filed their Submission in response dated 22<sup>nd</sup> June 2018. On the issue of the violation of the Petitioner's rights, the Respondents refer to the case of **Anarita Karimi Njeru vs The Republic [1976-1980] KLR 1272** to establish that the Petitioner has failed to demonstrate specifically how each of their rights was infringed by the Respondent while the officers were carrying out a statutory duty.

17. The Respondents clarify that they only requested to question the Petitioner on the allegations and complaints made against him and at no point was he arrested or charged with any criminal offence. The Respondents relied on the case of **Wilson Olal & 5 others vs. Attorney**

**General & 2 others [2017] eKLR.** On this the Respondents submit that the decision to prosecute is yet to be made and the petition is premature.

18. On the matter of whether the Respondents acted in bad faith and or abused the court process, the Respondent's rely to the case of **Republic vs. Commissioner of Police and another ex parte Michael Monari & another [2012] eKLR; Nairobi Misc No. 249 of 2012 Republic v DPP Ex. P Victory Welding Works and another; Republic vs. Director of Public Prosecution & Chief Magistrate's Court, Mililani [2017] eKLR;** and **Republic vs. Commissioner of Police and another ex parte Michael Monari and another [2012] eKLR.**

19. On the issue of whether two proceedings can run concurrently in which there is a similar subject matter, the Respondent directs that Court to Section 193 A of the Criminal Procedure Code Cap 75 Laws of Kenya. The Respondent additionally relies on the case of **Stephen Mburu Ndiba vs. Ethics & Anti-corruption Commission & another [2015] eKLR.**

20. On the issue of whether an order of prohibition is tenable as against the respondents, it is submitted that such an order is only applied where a body or official has acted in excess of their powers. They relied on the following cases: **High Court Case Misc Civil Application No. 179 of 2012, Republic vs. Chief Magistrate, Milimani and 2 others Ex p Tusker Matters Ltd and 3 others; and Kenya National Examination Counsel vs Republic ex parte Geoffrey Gathenji Njoroge and 9 others.** They assert that the petitioner has not demonstrated any contravention of the law, or any illegality, irrationality, or procedural impropriety of the Respondent's decision. Furthermore, there is no evidence that the actions of the Respondents amount to a breach of their respective mandates. There is there no justification to involve the court.

21. On the last issue as to whether the 1<sup>st</sup> Respondent has violated the Petitioner's right to necessitate court's intervention, the Respondent asserts that the court cannot direct it on how to exercise its constitutional powers, but can intervene in cases where it is proven that those powers were exercised unfairly, improperly or unjustly. On this point reference was made to the case of **Douglas Maina Mwangi v Kenya Revenue Authority and another High Court Constitutional Petition No. 528 of 2013.** They claim that the Petitioner has failed to prove that any of these things have happened.

22. I have very carefully considered the petitioners petition, affidavit in support and annexures, the Respondents grounds of opposition and Replying affidavit and parties rival submissions and from the above the issues arising for determination can be summed up as follows:-

**a. Whether the Respondents have violated any of the petitioner's Rights?**

**b. Whether the Respondents acted in bad faith and/or abused the court process?**

**c. Whether two proceedings can run concurrently in which there is a similar subject matter?**

**d. Whether the petitioner has established a case meriting issuance of the orders sought in the petition?**

**A. Whether the Respondents have violated any of the petitioners Rights?**

23. The petitioner contend that section 24 of the National Police Service Act mandates the police to investigate, present and detect crimes while section 49 contains the general powers of police officers. It is further urged in exercising its functions, the 2<sup>nd</sup> respondent is mandated by Article 157 of the constitution to have regard to the public interest, the interests of fair administrative of justice and the need to prevent and avoid abuse of the legal process when instituting and/or undertaking criminal proceedings against any person. It is further urged Article 10 and 232 of the constitution provide for National values and principles of public service which bind all organs, officers and public servants; which include the rule of law, equality and human rights contained in the Bill of Rights, high standards professional ethics, accountability for administrative acts and effective, responsive, prompt, impartial and equitable provision of services.

24. The petitioner relies on the case of **Republic vs Director of Criminal Investigations Ex-parte Harrison Nyota Ngunyi [2017] eKLR,** the Court quoted the case of **Republic vs. Inspector General of Police & another exparte Patrick Macharia Nderitu (2015) eKLR,** where the court opined that whereas the discretion given to the respondents to investigate criminal offences is not to be lightly interfered with, that discretion must be properly exercised. In **Republic vs Director of Public Prosecutions & 2 others ex-parte Francis Njakwe Maina & another (2015) eKLR** it was stated that where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt.

25. It is petitioners assertion that the investigations mounted by the police, at the prompting of the complainant directors of Esquire Investment Limited are accentuated by malice as the police are being used by Esquire in a purely civil dispute with the aim of submitting the petitioner to the criminal justice system, to leverage and cow the petitioner and Korori Agencies Limited hence the police herein are exceeding their mandated.

26. The petitioner further urges that in 2016, Esquire instituted **ELC No. 952 of 2016: Esquire Investment Ltd vs The Attorney General, Chief Land Registrar, National Land Commission & Korari Agencies Ltd.** In 2017, the Hon. Justice Obaga ordered that status quo be maintained thus Korari Agencies Limited remained in possession of the suit property. In January 2018, the same Esquire report a complaint to the police against the Petitioner and other directors of Korari Agencies Limited based on the same grounds as are contained in their plaint. Both Esquire and Korari claim ownership in the suit property, have serious allegation against each other and this dispute is before a court of competent jurisdiction.

27. It is further submitted by the petitioner that for directors of Esquire to make a complaint to police, three years after institution of the suit, and eight years after the act complained of, is clearly an attempt to force the directors of Korari to submit to a concession of the civil dispute. Unfortunately, the police have failed to exercise their discretion fairly and judiciously and have thus fallen into Esquire's hands, and are

conducting their investigations to achieve a collateral purpose that is not geared towards the vindication of the commission of a criminal offence but to settle the ownership dispute. This is illegal and unconstitutional and the Court is called upon to halt such abuse of power.

28. It is trite that where a party alleges a breach of fundamental rights and freedoms, he/she must state and identify the rights with precision and how the same have been or will be infringed in respect of him. In the case of **Anarita Karimi Njeru vs The Republic 1976-(1980) KLR 1272** the principle are stated as follows:-

- **“Constitutional Violations must be pleaded with a reasonable degree of precision.**
- **The Articles of the constitution which entitles rights to the petitioner must be precisely enumerated and how one is entitled to the same.**
- **The violations must be particularised in precise manner.**
- **The manner in which the alleged violations were committed and to what extent.”**

29. Further under **Article 24(1) of the constitution** it is clearly provided that a right or fundamental freedom in the Bill of Rights shall not be limited except by law and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity equality and freedom, taking into account all relevant factors.

30. It is clear that the Respondents in acting as complained of by the petitioner; they were carrying out a statutory duty. The petitioner has failed to demonstrate specifically how each of its rights have been violated by the Respondents while the officers were carrying out a statutory duty. It is petitioner’s contention that rights provided under Article 50(4) of the constitution as one of the rights that has been breached by the Respondents. It is no doubt that one of the mandate of the police is to question any person over an alleged offence or complaint. The petitioner in the instant petition was merely requested to answer to allegations that had been made against him. The police are mandated on receipt of complaint to investigate the complaint and in doing so no breach can be alleged against them unless they act contrary to the law or abuse their mandate. The petitioner had at no time been arrested or charged with any criminal offence.

**31. Article 157 of the constitution** sets out the functions of the Director of public prosecution (**DPP**) in criminal proceedings except in the court martial. It is clear in the petition that the investigative agency is yet to forward a file for consideration by the 1<sup>st</sup> Respondent. The **DPP** in exercise of his mandate is not required to have anyone’s consent or authority for commencement of criminal proceedings, and in exercise of his/her powers or function. The function of police to carry out investigations are clearly tabulated and spelled out under Article 244 of the constitution and under **section 24 of the National Police Service Act**. It is the duty of the Director of Public Prosecution who has constitutional mandate to institute and undertake criminal proceedings against any person.

32. From the above it is clear that when the 1<sup>st</sup> Respondent decides to charge and prosecute, his decision will be based on the evidence placed before him by the investigating authority. The decision whether to prosecute or not is crucial and should be made bearing in mind the rule of law, provisions of the constitution and any statute in force. In **Wilson Olal & 5 others vs Attorney General & others (2017) eKLR** the court stated thus:-

**“In every case great care must be taken in the interests of the victim, the suspected offender and the community at large to ensure that the right decision is made. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, tends to undermine the confidence of the community in the criminal justice system.”**

33. From the above I find the petitioner has failed to demonstrate which rights have been violated, how and in what manner. The petitioner other than stating the alleged violated articles he has not stated in what manner the Respondents have violated or have threatened the petitioner with violation. I further find if the **DPP** has not received evidence from investigating authority and no decision has been made to charge or not charge the petitioner’s petition is premature as the investigations are still being carried out.

#### **B. Whether the Respondents acted in bad faith and/or abused the court process?**

34. The petitioner contention is that the directors of Esquire complaint to police, after 3 years after the suit and 8 years after the act complained of, is clearly an attempt to force the directors of Korari to submit a concession of the civil dispute. It is urged the police have failed to exercise their discretion fairly and judiciously and has thus fallen into Esquires’ hand and are conducting their investigation to achieve a collateral purpose that is not geared towards the vindication of the commission of a criminal offence but to settle the ownership dispute. It is petitioner’s contention that this is illegal, unconstitutional and court is called upon to halt such abuse of power.

35. It is clear from the above, the petitioner implies that the police have in acting in bad faith decided to arrest and charge the petitioner following the police having been compromised by **M/s Esquire Investment Ltd**. It is therefore petitioners’ position that the police are abusing their powers. The police have however a duty upon receipt of a complaint to investigate and by failing to do so would be failing in discharging their constitutional mandate. The **DPP** in exercising the powers conferred by the constitution is under duty to have regard to public interest, to see complaints investigated and culprits apprehended and arraigned before court. It is also the duty of the **DPP** to have regard to the interest of administration of justice and the need to prevent and avoid abuse of the legal process.

36. It is petitioner’s argument that his intended arrest arising out of the land dispute which is pending in court being **ELC No. 952 of 2016 Esquire Investment Ltd vs Attorney General, Chief Land Registrar, National Land Commission and Korari Agencies Ltd** is unconstitutional, null and void and as such the same amounts to an abuse of the process of court. It is on the other hand 1<sup>st</sup> Respondents contention that investigation is still on going and no decision has been made as to whether to charge or not to charge the petitioner. The 1<sup>st</sup> Respondent is an independent constitutional office that is not subject to control, direction and influence by any other person and only subject to control of the court based on the principles of illegality, irrationality and procedural impropriety.

37. Under **section 6 of the office of the Director of Public Prosecution Act No. 2 of 2013**, on investigative agency forwarding a file to the 1<sup>st</sup> Respondent for consideration it remains the absolute discretion of the 1<sup>st</sup> Respondent to decide whether or not to commence proceedings. It therefore follows that a mere fact that a complaint has been lodged does not justify the institution of a criminal prosecution. The law enforcement agency do not merely act on a complaint because it is made but are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. The police or any other prosecution arm of Government is not a mere conduit for complainants. They are supposed to act impartially and independently on receipt of a complaint and are expected to carry out thorough investigation which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. The burden of proof that the Respondent acted in bad faith and/or abused the court process lies with the petitioner in this petition. The petitioner herein other than alleging has not revealed and proved any mischievous acts or misdoings by the Respondents to warrant this petition. It is alleged that the investigation are being carried out in bad faith. It should be noted to prove bad faith, it requires a high degree of proof by demonstrating the specific acts that shows malice.

38. In the case of **Republic vs Commissioner of police and another ex-parte Michael Monari and another (2012) eKLR** Warsame J. stated 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.”**

39. Upon considering the petitioner’s case herein I have no doubt to state that the petitioner has not shown the respondents acted contrary to their constitutional mandate and/or breached the rules of natural justice or considered extraneous matters or in the discharge of their mandate they acted maliciously. No facts has been put forward to demonstrate acts of bad faith or abuse of court process.

### **C. Whether two proceedings can run concurrently in which there is a similar subject matter?**

40. The petitioner aver that the Respondents decision to charge him with a criminal offence arising out of an unresolved dispute between the companies over land ownership is unconstitutional, unlawful and not in the public interest or in the interest of administration of justice and thus there is need to prevent and avoid abuse of the legal process. It is further contended that the decision before the **ELC** court will determine who the legal owner of suit property is between the two companies. It is urged that Respondents are intended to intimidate the petitioner to abandon his company’s rightful claim for the benefit of the rival company. It is urged the police have been compromised by **Esquire Investment Ltd** to support it in its suit, which the petitioner urge is a misuse of the police power and which is an abuse of the court process.

41. The petitioner in support of this proposition sought to rely in the case of **Kuria & 3 others vs Attorney General (2002) 2 KLR 69**, where the 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.”**

42. The Respondents contention on the other hand is that the two proceeding thus the civil and criminal proceedings can run concurrently against an individual or company in which there is a similar subject matter. To buttress this the Respondents rely on the provisions of **section 193A of the Criminal Procedure Code (Cap 75) Laws of Kenya** which provided thus:-

**“Notwithstanding the provisions of any written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.” My lady this provision envisioned a situation where two concurrent proceedings have been instituted both in the criminal court and the civil court.”**

43. The petitioner argues that as there is a case in the **ELC Court No. 952 of 2016**, no other proceedings should be brought against him due to the existence of the court’s order for maintenance of the status quo in the company’s favour. It is further urged charging the petitioner with a criminal offence arising out of the un-resolved dispute between the two companies over the land ownership is unconstitutional, unlawful and not in public interest.

44. The Respondents in opposing the petitioner’s contention referred to the case of **Stephen Mburu Ndiva vs. Ethics & Anti-Corruption Commission and another (2016) eKLR** where the court addressed itself thus:-

**“It is beyond peradventure then that the existence of a civil suit per se cannot be a bar to criminal proceedings simply because the subject matter in the criminal proceedings is directly in issue or substantially in issue in the pending civil suit. Where civil proceedings exist side by side with criminal proceedings, the latter would only be stayed or terminated altogether if there is every indication that they were initiated to bring pressure to bear upon a party to settle the civil suit; in that regard, the criminal proceedings are for ulterior motives and not for the purpose of which they are meant, which is, upholding criminal law.”**

45. The petitioner has in the instant petition not demonstrated that the investigation being carried out by the 1<sup>st</sup> Respondent is not impartial, independent nor is it not in good faith and is infact brought with malice at the instigation of the directions of Esquire Investment Ltd. Further

there is no demonstration that the criminal proceeding, are being used to put pressure on any of the parties to the civil suit and at any event from the **ELC Case No.952 of 2016**; it is clear the Respondents and the said Esquire Investment Ltd are not parties to the civil suit and that the Respondents were only made aware of the matter when the petitioner filed this petition while the investigations began before the Respondents were served with the petition. I find it has not been shown the discretion of the 1<sup>st</sup> Respondent is being exercised with a view to achieving extraneous goals other than those legally recognised in the constitution and the National Police Service Act. There is therefore no abuse of legal process hence this court cannot intervene as there is no demonstration of wrongful exercise of the discretion.

**D. Whether the petitioner has established a case meriting issuance of the orders sought in the petitioner?**

46. The petitioner argue that the petitioner’s fundamental rights and freedom under the constitution are under threat including the right to freedom and security of person; the right to privacy; the right to own property; the right to administrative actions that is expeditious, efficient, lawful, reasonable and procedurally fair (*under Article 4*) and the right to a fair trial under **Article 50(4) of the constitution**.

47. The petitioner seeks an order of prohibition which order is discretionary and only tenable where a public body or official acted in excess of their powers and as such the order requires the public body to cease from performing a certain act. In the **Hc Misc Civil Application No. 179 of 2012 Republic vs the Chief Magistrate, Milimani and 2 others, ex-parte Tusker Mattress Ltd & others** it has held that:-

**“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.”**

48. The Respondent in discharging of its constitutional mandate do not require consent of any one or authority and is not supposed to be under the direction or control of any person or authority. It therefore follows it is not an obligation of the court to supervise how investigation are conducted by the Respondents so long as are not in contravention of any law. In this petition the petitioner has not managed to show an illegality, irrationally or any procedural impropriety of the decision by the Respondents to warrant intervention by this court. The applicant is facing charges known in law and the criminal proceedings will be conducted within the ambit of the law as safeguarded by the constitution. I find further the petitioner has not shown that the police acted illegally or contravened any code of regulation while independently discharging their duties as provided under section 24 and 35 of the relevant Act, that *inter-alia*, mandates the police with the investigations of crimes and apprehension of the offenders. It is not denied that the Respondents acted within their mandate under the relevant established legislation and as such their actions were not in breach of the mandate vested upon them.

49. The jurisdiction of courts to interfere with the exercise of the discretion of the Respondents in making prosecutorial decisions should in my view be sparingly exercised and in the clearest and most obvious ceases. It is not the duty of the court to direct the Respondents on how to exercise its constitutional powers though the court can intervene in cases where the power is proved to have been unfairly, improperly or unjustly exercised. It is further the duty of the court to check the abuse of the prosecutorial powers where evidence is presented to the court. It should be clear in court’s mind that the merits of the Respondents decision are not a concern for the courts.

50. In the case of **Douglas Maina Mwangi vs Kenya Revenue Authority & another Hc Pet. No. 528 of 2013** Hon. Justice D.S. Majaja held that:-

**“When dealing with the decision as to whether or not to prosecute the office of DPP exercises independent judgment and the court cannot interfere unless it is shown that the exercise is contrary to the constitution, in bad faith or amounts to an abuse of process... I do not find any reason or ground to intervene in that decision nor is it the obligation of the court to supervise the minutiae of investigation and prosecution.”**

51. From the above it is my view that judicial intervention should be limited to acts that are manifestly in breach of the law or in cases where the court is satisfied that the decision maker reached a wrong decision influenced by other considerations other than the law, evidence and the duty to serve public interest, the interest of administration of justice and the need to prevent and avoid abuse of the legal process. Upon consideration of the evidence on record, I find the petitioner has failed to prove that the Respondents acted in bad faith, contrary to the constitution and statute and considered other extraneous matters to reach its decision in carrying out investigations against the petitioner. Indeed I cannot find otherwise other than the investigation was carried out in good faith and in an effect to establish the veracity of the complaint made to the police. I find the petitioner is intended to circumvent the criminal justice system and intended to prevent the Respondents from discharging their constitutional mandate.

52. To the extent of my findings herein above, I find that the petition is without merit and the same is accordingly dismissed with costs to the Respondents.

**Dated at Nairobi this 2<sup>nd</sup> day of April, 2020.**

**Delivered on 29<sup>th</sup> day of April 2020.**

.....

**J .A. MAKAU**

**JUDGE**