REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIME DIVISION

ACEC CIVIL SUIT NO. 11 OF 2020

IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010 ARTICLE 23(3)(F)

AND

IN THE MATTER OF: THE LAW REFORM ACT, CAP 26, SECTION 8 & 9

IN THE MATTER OF: THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ACT, NO. 2 OF 2013

AND

IN THE MATTER OF: THE FAIR ADMNISTRATIVE ACTION ACT NO. 4 OF 2015 SECTION 4 & 7

AND

IN THE MATTER OF: THE ADVOCATES ACT

AND

IN THE MATTER OF: THE CIVIL PROCEDURE RULES, 2010 ORDER 53

AND

IN THE MATTER OF: AN APPLICATION BY CHARLES MBUGUA NJUGUNA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIRARI ABD PROHIBITION

AND

IN THE MATTER OF: THE ARRAIGNMENT, CHARGE AND ONGOING PROSECUTION OF CHARLES MBUGUA NJUGUAN IN CHIEF MAGISTRATE'S ANTI CORRUPTION CASE NO. 28 OF 2019

BETWEEN

CHARLES MBUGUA NJUGUNA .....APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 1ST RESPONDENT

THE ETHICS & ANTI-CORRUPTION COMMISSION.....2ND RESPONDENT

THE INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE .....3RD RESPONDENT

THE CHIEF MAGISTRATE ANTI-CORRUPTION COURT MILIMANI.....4TH RESPONDENT

THE ATTORNEY GENERAL .....5TH RESPONDENT

RULING

INTRODUCTION

1. The Applicant is an Advocate of the High Court of Kenya practicing as such in the style of NJUGUNA & PARTNERS wherein he is a senior partner.

2. 1st Respondent in the independent prosecutorial authority established by Article 157 of the Constitution of Kenya to conduct criminal prosecution in the Republic of Kenya

3. The 2nd Respondent is a public body established under Section 13(1) of the Ethics and Anti-Corruption Act, 2011 mandated to combat and prevent corruption, economic crimes and unethical conduct in Kenya, while the 3rd Respondent is established under Article 245 of the Constitution with powers given under the National Police Service Act 2011 and the National Police Commission Act, 2011.

4. The 4th Respondent is established under Article 169 (a) of the Constitution while the 5th Respondent is the Principal Legal Adviser of the Government of Kenya.

5. The Petitioner was charged and is currently facing trial on charges of money laundering in the Chief Magistrate's Court Anti-Corruption Case No. 28 of 2019 which case is ongoing, the prosecution of which the petitioner is dissatisfied with.

6. By an exparte chamber summons under certificate of urgency dated 21/4/2020, the petitioner moved the Judicial Review Division of the High Court at Nairobi being JR No. 89/2020 in which he sought the following reliefs:

> ***a) An order of prohibition, prohibiting the 1st, 2nd and 3rd Respondents from prosecuting or aiding/facilitating the prosecution of the applicant in the Chief Magistrate Anti-Corruption Case No. 28 of 2019 on the charges of money laundering and/or any other related charges based on the same fact.***
>
> ***b) An order of certiorari to move this Honourable court to quash the decision of the Director of Public Prosecution, the 1st Respondent herein, made on or about 22nd October, 2019 to institute criminal proceedings against the applicant in the Chief Magistrate Anti-Corruption Case No. 28 of 2019 and to quash the charges of money laundering as per the charge sheet presented in the Chief Magistrate's Anti-Corruption Case No. 28 of 2019 on 22nd October, 2019 made against the applicant.***
>
> ***c) Leave so granted to operate as a stay of the impugned proceedings in the Magistrate court against the applicant.***
>
> ***d) Cost of the application to be provided for.***

7. The said Judicial Review application was by an order of Nyamweya J issued on 22nd May, 2020 transferred to this Division for trial and determination, where directions were issued by Onyiego J, that the application be heard and determined by way of written submissions, having on 12/8/2020 declined to grant an order of stay.

APPLICANT'S CASE

8. The applicant's case is set out in the statutory statement dated 21/4/2020 to the effect that in November, 2013 one of his firm's client **MARS TECHNOLOGIES ASSOCIATES LTD** instructed it to claim some funds owed to them from **OSI KENYA LTD** after rendering their professional services, the firm was thereafter advised that the matter had been settled and that the funds owed were to be channeled through the firm, amounting to Kshs.39,089,966/= which was duly done.

9. The applicant acting on the said instructions, disbursed the funds upon instruction to various parties retaining a sum of Kshs. 231,000/- in settlement of the legal fees. He was later requested by the 2nd Respondent to write a statement on the funds received on the instruction of his client, which he did, having obtained permission from his client due to the Advocate client privilege on confidentiality under Section 134 of the Evidence Act.

10. It was contended that the applicant was not aware of the source of the funds remitted to his firm by OSI LTD and/or any illegality as regards them, which was confirmed by the 2nd Respondent vide its report dated 16/12/2016 and that when the 1st Respondent approved prosecution of several people on 3rd February, 2017, the applicant was not included therein, until 18/10/2019 when he was without notice, arrested and subsequently charged, therefore the decision to charge him must have been made as an afterthought.

2nd RESPONDENT'S CASE

11. The 2nd Respondent replied to the application herein, through the affidavit of **CATHERINE NGARE**, wherein it was deposed that they commence investigation following an allegation of corruption in the office of the Auditor General, involving irregular procurement and purchase of Audit Vault software at a cost of Kshs. 100 million against an estimated cost of 18 million, which sum of money was paid out to **OSI KENYA LTD** and thereafter distributed to various people including officers in the office of the Auditor General and their relatives through the applicant's bank account.

12. It was contended that at no one point in the process of investigations, was the applicant promised, that he will be a witness and not a

suspect and therefore cannot allege that his legitimate expectation of being a prosecution witness were violated.

SUBMISSIONS

13. Directions were issued on the matter to be heard by way of written submissions, which have duly been filed. On behalf of the applicant, it was submitted that this Honourable court has jurisdiction under the provisions of Articles 23 and 47 of the Constitution on the issue of the determination of questions of Administrative decisions and Article 165 of the Constitution as stated in **REPUBLIC v PRINCIPAL SECRETARY MINISTRY OF MINING exparte AIRBUS HELICOPETERS SOCIETIES AFRICA (PTY) LTD [2017] eKLR**

14. It was submitted that the 1st Respondent, in charging the applicant, breached his discretion under Article 157(11) of the Constitution for which the court ought to invoke its powers under Article 165 (3) to tell it that he has acted contrary to the powers conferred by the Constitution, in failing to have regard to the interest of the administration of justice and the need to prevent and avoid abuse of the legal process. It was contended that the decision to charge the applicant was contrary to various prohibitions in Section 7(2) of the Fair Administrative Actions Act, which provides for the instances where the court may review an administrative decisions or actions as stated by Prof. Ngugi J in **PETER NGUNJIRI MAINA v DPP & 2 OTHERS [2017] eKLR**

15. It was submitted further that the 1st respondent was responsible for abusing his powers in criminalizing the professional work undertaken for purposes extraneous to the criminal justice system which decision goes against the Basic principles on the Role of Lawyers (Adopted by the United Nations Congress on the Protection of Crime and the treatment of offenders Havana cuba 27 August to 7 September, 1990) and as stated by Ngugi J in **RICHARD MALEBE v DIRECTOR OF PUBLIC PROSECUTIONS & 2 OTHERS [2020]eKLR** where the Judge agreed that Advocates were not immune to prosecution if they commit acts which are criminal in nature in the course of their professional duties but stated that the net should not be cast wide to catch those who only perform their professional duties.

16. It was contended that where the DPP has breached his discretion under Article 157(11), then the High Court must invoke its power under Article 165 (3) (d) (ii) to tell him that he has acted contrary to the powers conferred by the constitution, in support of which the cases of **JUSTUS MWENDA KATHENGE V DPP & 2 OTHERS [2014] eKLR** and **WILFRED MASINDE WANYONYI v DPP & ANOTHER [2015] eKLR** were submitted.

17. It was submitted that the evidence presented before the 1st respondent by the 2nd respondent working with the 3rd respondent did not meet the test required under the DPP's Guidelines on the Decision to Charge 2019, which tests are evidential test and public interest test, as the applicant was charged based on activities he conducted under his professional capacity as an advocate of the High Court.

18. It was contended that the decision was against requirement of Fair Administrative Actions Act and was procedurally unfair therefore done in breach of the duty to act fairly, as the applicant was not given a reasonable opportunity to state his case before being converted from a witness to a suspect. It was contended further that the decision to charge the applicant was taken with an ulterior motive or purpose, calculated to prejudice his legal rights contrary to Article 27 of the Constitution, for which the case of **DIAMOND HASHAM LAIJI & ANOTHER VERSUS AG & 4 OTHERS [2018] eKLR** was tendered in support.

19. It was finally submitted that the decision to charge the applicant violated his legitimate expectation as stated in the cases of **KEROCHE INDUSTRIES LTD v KRA & 5 OTHERS [2007] eKLR** and **JON CARDON WAGNER v REPUBLIC & 2 OTHERS**. It was therefore contended that the applicant had made up a case for the grant of the orders sought which should therefore be granted.

20. On behalf of the 1st respondent, it was submitted that the decision to charge the applicant was based on sufficiency of evidence and in line with Article 157 of the Constitution, the 4th respondent having reviewed its file and forwarded fresh statutory report under Section 35 of ACECA 2003. It was contended that the applicant had been granted the right to be heard under Article 47 of the Constitution and of the provisions of Fair Administrative Action Act, 2015. It was therefore submitted that on the authority of **JOSEPHAT KOLI NANOK & ANOTHER v ETHICS & ANTI-CORRUPTION COMMISISON [2019] eKLR** The court should not interfere in the exercise of the investigative mandate of the agencies by prescribing a straight jacket of investigation procedures.

21. It was submitted further that the decision to charge the applicant was lawful and not an abuse of the process or power and was therefore not irregular for which the case of **PHILOMENA MBETE MWILU v DPP & 3 OTHERS [2019]** was submitted in support. It was contended that the applicant had failed to demonstrate that DPP's decision to charge him was bias and that the decision to charge him were made outside the requirement of Section 80 of the Advocates Act.

22. These submissions were highlighted by Mr. Kanjama, for the applicant, whose submissions were that the same received the funds, the subject matter the lower court, in the course of his duties as an advocate and that during the course of investigations the 2nd Respondent through a letter signed by its vice chair, dated 16/12/2016 indicated that there was no basis upon which the applicant should be charged. It was submitted that upon receipt of the said letter, the former holder of the office of DPP made recommendations to charge several people but exclude the applicant who was discharging his duties as an Advocate.

23. Mr. Kanjama, as regards the report from the 2nd Respondent, which the DPP submitted was a nullity, distinguished the position from the holding in the case of **MICHAEL KAMAU v EACC & 4 OTHERS [2017] eKLR** on the ground that when the said report was filed, the commission was properly constituted. Mr. Akula for the 1st respondent submitted that the EACC forwarded a fresh report to the DPP under the provision of Section 35 and that he was not bound by the earlier report. He submitted that the purpose of judicial review is not to check on the merit of the decision and submitted that there was evidence that the applicant was not acting in the ordinary course of his duties as an Advocate when he received the funds, the subject matter his prosecution, as there was no instructions placed before this court.

24. It was contended by Mr. Akula that the applicant was accorded fair administrative action and that fair hearing is only applicable at the trial. It was submitted that before the report was made, the applicant was accorded fair hearing. On behalf of the 2nd Respondent, Miss

Ngethe, submitted that Judicial Review is only applicable where the alleged decision was coloured with illegality, bias and unreasonableness, for which the case of **REPUBLIC v REGISTRAR OF TITLES & 3 Others exparte DAVID MURIITHI** was tendered in support.

25. It was contended further that the applicant had not proved any of the grounds on bad faith in the investigation and that the applicant was inviting the court to examine the evidence, which will support the charge in the Anti-Corruption Case No. 29/2019, whereas the issue of admissibility of evidence are matters for the trial court which is best equipped to deal with the same, as was stated in the case of **THUITA MWANGI & 2 OTHERS v EACC.**

26. It was submitted further that the applicant's legitimate expectation was not violated since no promise was given to him by the respondent that he would be a witness, for which the case of **REPUBLIC v EXPARTE JOHNSON MUTHAMA** was tendered in support.

27. It was finally submitted that there was no error in recommending the charging of the applicant with the offence, since the same was based on two reports from EACC to the DPP and therefore there was no breach of trust.

DETERMINATION

28. I have looked at chamber summons, supporting affidavit and annextures thereto, together with the response to the same. I have taken into account the submissions by the parties Advocates and the authorities in support of their position in full.

29. The undisputed facts herein is that the applicant is an Advocate of the High Court of Kenya and that certain funds were received through his law firm, which he disbursed to various parties who are now charged together with him on various counts of money laundering, under the Proceeds of Crime and Anti Money Laundering Act 2009 at the Chief Magistrate Court Anti-Corruption Case No. 28 of 2019 which is on-going.

30. From the submissions by the applicant, it is also clear that the same is questioning the decision by the DPP to charge him with the offence of money laundering while he was willing to be a witness for the prosecution on account that he only attended to his professional duty as an Advocate and that there was an earlier report by the 2nd respondent to the DPP, which had recommended that he should not be charged and that in charging him, the Respondent violated his constitutional and statutory right to fair Administrative Act.

31. The prosecutorial powers of DPP are constitutionally and statutory provided for under Article 157 (10) of the Constitution and Section 4 of the Office of the Director of Public Prosecution Act No. 2 of 2013, which provides that the DPP does not require the consent of any person or authority to commence any criminal proceedings and in exercise of his/her powers and functions, shall not be under the direction or control of any person or authority.

32. The exercise of that power is however subject to Subsection (11) of Article 157 and Section 4 of the DPP Act, which provides that in exercise of the said power, the DPP shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of legal process.

33. In the case **of DIAMOND HASHAM LALJI & ANOTHER v A.G. & 4 others [2018] eKLR** the Court of Appeal had this to say on the right of the High Court under Article 165(2)(d)(1) to reverse the said powers thus:-

> ***"[34] It is also indubitable that the constitutional prosecutorial power of DPP is reviewable by the High Court as Article 165(2)(d)(ii) of the Constitution ordains. However, the doctrine of separation of powers should be respected and the courts should not unjustifiably interfere with the exercise of discretion by DPP unless it is exercised unlawfully by, inter alia, failing to exercise his/her own independent discretion; by acting under the control and direction of another person; failing to take into account public interest or interest of the administration of justice in all their manifestations; abusing the legal process; and by acting in breach of fundamental rights and freedoms of an individual.***
>
> ***The DPP is entitled to make errors within his constitutional jurisdiction and the decision will not be reviewed solely on the ground that it was based on misapprehension of facts and the law. (Matululu and Anor v. DPP [2003] 4 LRC 712). Further, authority show that courts are generally reluctant to interfere with prosecutorial decisions made within jurisdiction."***

34. The Court will therefore only interfere with the decision of the DPP to charge any person, if it is proved that the same was done in violation of the principles set out in Article 157(11) of the Constitution and as was stated by the Court in the case of **GEORGE JOSHUA OKUNGU & ANOTHER v THE CHIEF MAGISTRATES COURT, NAIROBI & ANOTHER [2014] eKLR** where the grounds upon which the court may interfere with the exercise of the discretion of the DPP in the following terms: -

> ***50. The law is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions or the authority charged with the prosecution of criminal offences to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings. That a petitioner has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is always open to the Petitioner in those proceedings. However, if the Petitioner demonstrates that the intended or ongoing criminal proceedings constitute an abuse of process and are being carried out in breach of or threatened breach of the Petitioner's Constitutional rights, the Court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the Petitioner 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. In the exercise of the discretion on whether or not to grant an order of prohibition, the court takes into account the needs of good administration. See R vs. Monopolies and Mergers Commission Ex Parte Argyll Group Plc [1986] 1 WLR 763 *and* ***Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK).***

51. In Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170, the Court of Appeal held:

"……..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 an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court."

52. In Meixner & Another vs. Attorney General [2005] 2 KLR 189, the same Court expressed itself as hereunder:

"The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion if acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution... Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power. Having regard to the law, the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision is correct. The other grounds, which the appellants claim were ignored ultimately, raise the question whether the evidence gathered by the prosecution is sufficient to support the charge. The criminal trial process is regulated by statutes, particularly the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court, which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence and that is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court."

53. In ***Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69,*** *the High Court held:*

"The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform... A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious... The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far that which the courts indeed the entire system is constitutionally mandated to administer... In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely to bear pressure on the applicants in order to settle the civil dispute. It is further alleged that the criminal prosecution is an abuse of the court process epitomised by what is termed as selective prosecution by the Attorney General. It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been be argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit... The fact that it has not been argued before however does not mean that the law stops dead at its tracks. An order of prohibition looks to the future and not to the past; it is concerned with the happenings of future events and little, if any, of past events. Where a decision has been made, there is little that the court can do by an order of prohibition to actually stop the decision from being made, because simply that which is sought to stop has already been done. However in such circumstances, the power of judicial review is not limited to the other orders of judicial review other than prohibition. With respect to civil proceedings prohibition lies not only for the excess of jurisdiction but also from a departure of the rules of natural justice... So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions... This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit. The intrusion of

judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law... In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed... There is nothing which can stop the court from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made... Under section 77(5) of the Constitution it is a constitutional right that no person who has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of the offence. What is clear from this constitutional right is that it prevents the re-prosecution of a criminal case, which has been determined in one way or another. However, it does not mean that a civil suit and a criminal case cannot co-exist at any one particular time. This is because the section envisages the re-prosecution of a criminal case substantially dealt with either in fact or law, a case in which issues have been laid to rest. There is no mention in the section that the simultaneous existence of a civil and criminal cases is constituting double jeopardy. The courts have, however stated that the power to issue an order of prohibition to stop a criminal prosecution does not endow a court to say that no criminal prosecution should be instituted or continued side by side with a civil suit based on the same or related facts, or to say that a person should never be prosecuted in criminal proceedings when he has a civil suit against him relating to matters in the criminal proceedings... The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution... 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. It is not enough to simply state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an "abuse of process", is a "manipulation", "amounts to selective prosecution" or such other processes, or even supposing that the applicants might not get affair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts. The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial... In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names."

……

58. It is therefore clear that whereas the discretion to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and 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. Similarly where the commencement or continuation of the criminal prosecution will result in abrogation of the Petitioner's rights and freedoms enshrined in the Constitution, the Court is under a duty to bring such proceedings to a halt. In so doing, it must be emphasised that the Court is not concerned about the innocence or otherwise of the Petitioner. The Court's duty is only to ensure that the Petitioner's rights and freedoms as enshrined in the Constitution are protected and upheld. As was held Wendoh, J in Koinange vs. Attorney General and Others [2007] 2 EA 256, the jurisdiction of the Court in Constitutional matters is limited to inquiring into the allegations of violation of fundamental rights as alleged by the applicant and what remedies, if any, the court can grant.

59. As was stated in the case of Githunguri vs. Republic KLR [1986] 1:

"We speak in the knowledge that rights cannot be absolute. They must be balanced against other rights and freedoms and the general welfare of the community. We believe we are speaking correctly and not for the sake of being self laudatory when we say the Republic of Kenya is praised and admired by other people and other systems for the independent manner in which justice is dispensed by the courts of this country. We also speak knowing that it is our duty to ask ourselves what is the use of having a Constitution if it is not honoured and respected by the people. The people will lose faith in the constitution if it fails to give effective protection to the fundamental rights. The people know and believe that to destroy the rule of law you destroy justice thereby also destroying the society."

35. It is therefore clear that the court will be very reluctant to interfere with the decision of the DPP to prefer charges and to decide on whom to charge or not to charge based upon the evidence available. It is further clear that the DPP has the constitutional mandate to decide on who to call as witnesses in support of its case and it is not for the court to decide for him whom to call as a witness.

36. Having thus stated the above legal position, I now turn to the applicant's complaint before the court; - it is his position that he should have been a prosecution witness and not an accused person, but it is clear to the court that the decision of who to charge and whom to call as a witness lies solely with the DPP. The issue as to whether or not the applicant only acted as an Advocate to the parties to the transaction, the subject matter of his prosecution before the Lower Court, is an issue which is based on evidence and from the material placed before me, that is an issue which is bast left to the trial court, as the complaint raised by the Applicant will form his suitable defence at the ongoing trial. The Court will be usurping the powers and the mandate of the trial court, should I make a pronouncement on the evidence which shall be presented thereat without the same being subjected to cross examination.

37. The applicant's case is distinguishable to that of **RICHARD MALEBE v DPP & 2 OTHERS** (Supra) where the only role played by the applicant was to incorporate the company which was the subject of the prosecution and no more and the case of **JOSEPH KARANJA KANYI T/a KINYI J & CO. ADVOCATES v DPP & 2 OTHERS,** where the subject matter in dispute was also subject of the civil proceedings wherein consent had been entered into. In this case the trial court will have to decide whether or not the applicant's role was purely that of an Advocate or whether he facilitated the crime of money laundering of which he has been charged with.

38. Judicial review applications do not deal with the merit of the case but only with the process, where the court ought to inquire whether the decision maker had jurisdiction, whether the offended person was heard and whether in making the decision the maker took into account relevant mattes and did not take irrelevant matters or breached legitimate expectation of the aggrieved person.

39. In this matter, there is the contested matter of fact as to whether the Respondent had promised the Applicant that he will not be charged or whether he will be a witness for the prosecution. There is also the contested fact as to whether the Respondent relied upon the earlier report or on the report forwarded to him after the 2nd Respondent reviewed the earlier report. These are disputed issues of fact.

40. It is an acceptable legal principle that where an applicant, as in this case, sets out to have a determination on contested matters of fact, and urges the court to determine the merits of two or more different versions presented by the parties, the court will not have jurisdiction in a Judicial Review proceedings to determine such a matter.

41. In this matter, the Applicant contends that his legitimate expectations were not honoured by the Respondent, while the Respondent on the other hand contended that there was no promise made to the applicant that he will not be charged and that the decision to charge him was purely based upon the evidence obtained through investigation. The Applicant has further confirmed that he had been in communication with the 1st and 2nd Respondent throughout the period of investigation and therefore his complaint that he was not accorded rights under Fair Administration Action are not justifiable.

42. The Respondent through the affidavit evidence placed before me, are of the view that there is a possibility of the applicant's involvement in a criminal conduct, the subject matter of his trial, while the applicant has placed before the court through affidavit, what would amount to his probable valid defence, which evidence I am of the considered view would be best interrogated by the trial court, subjected to cross examination to enable the same exercise its judicial mind thereon where the innocence or otherwise of the applicant will be resolved.

43. I am therefore not satisfied that the applicant has placed any material before me in support of his contention that the decision to charge him was made against the requirement of fair administrative action, procedurally unfair thus done in breach of duty to act fairly. The Applicant has further failed to establish that the Respondent had given him an express promise that he will not be charged or that he would be made a witness for the prosecution.

44. Whereas criminal prosecutions should not be taken lightly, it must also be pointed out that where the DPP has reasonable grounds to prefer a charge against any person based upon evidence available, the court ought not to interfere with this discretion unless it is proved that the prosecution is being undertaken with ulterior motive or in breach of the Applicant's constitutional rights, including but not limited to the right to free and fair trial under the provisions of our Constitution.

45. In this, I find support in the case of **KIPOKI OREU TASUR v INSPECTOR GENERAL OF POLICE & 5 OTHERS [2014] eKLR** :-

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

46. I therefore find no merit on the application herein which I hereby dismiss with no order as to cost. I therefore decline to issue an order of prohibition against prosecution of the applicant and/or an order of certiorari quashing the charge against him. I have taken note that the applicant moved this court to secure the protection of his fundamental rights under the constitution, a right which is provided for under the Constitution regardless of whether or not a party succeeds at litigation.

Dated, signed and delivered at Nairobi virtually

this 17th day of December, 2020

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J. WAKIAGA

JUDGE