REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 84 OF 2018

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

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACT

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT

BETWEEN

REPUBLIC...APPLICANT

VERSUS

THE INSPECTOR GENERAL OF POLICE...............1ST RESPONDENT

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

THE CHIEF MAGISTRATE COURT AT NYERI......3RD RESPONDENT

EX PARTE : JIMI RICHARD WANJIGI

JUDGMENT

The Application

1. The *ex parte* Applicant herein (hereinafter the Applicant), is Jimi Richard Wanjigi, and he is an adult male residing in Muthaiga within Nairobi County. He has filed an application for judicial review orders against the Inspector General of Police (the 1st Respondent herein), which is a state Office established under Article 245(1) of the Constitution, and also the office in charge of the National Police Service including the Directorate of Criminal Investigation.

2. The Director of Public Prosecution, which is an independent office created under Article 157 (1) of the Constitution, and which is in charge of public prosecutions and directing of criminal investigations, is sued as the 2nd Respondent. The 3rd and last Respondent is the Chief Magistrate's Court in Nyeri, which is established under Article 169 of the Constitution and the Magistrates Act No. 26 of 2015.

3. The Applicant filed an application by way of a Notice of Motion dated the 9th March 2018, seeking the following orders:

> **1. An order of certiorari to remove into the High Court and quash the Summons Requiring Attendance dated 27th February, 2018, notifying that the Applicant is required to appear before the Chief Magistrates Court at Nyeri on 1st March, 2018, to take a plea in Criminal Case No 251 of 2018, and to quash any charge sheet registered against the Applicant before the said Court any criminal proceedings pursuant thereto.**

2. An order of Prohibition to prohibit the Respondents from commencing or proceeding with any criminal proceedings wheresoever instituted in the Republic of Kenya against the Applicant, without compliance with or in disregard of the proceedings and Orders made by the High Court in Petition No 520 of 2017- Jimi Wanjigi vs Inspector General of Police & 3 others and Misc Cr Application No 58 of 2018 - James Aggrey Orengo & 11 Others v Director of Public Prosecutions & 2 others.

4. The application was supported by a statutory statement by the Applicant's Advocates dated 1st March 2018, a verifying affidavit of Willis Evans Otieno, the Applicant's Advocate, sworn on the 1st March 2018, and a certificate of electronic records by the Applicant certified on 8th March 2018. The deponent of the said verifying affidavit stated that he was dully authorised to swear the affidavit on behalf of the Applicant.

5. The Applicant narrated the events giving rise to the said application as follows. The Applicant instituted **Petition No 520 of 2017 - Jimi Wanjigi v Inspector General of Police & 3 Others** to remedy the unlawful raid and destruction of his property, and vindicate his violated constitutional rights. That the High Court issued an order on the 17th October 2017 in the said petition, granting him cash bail and restraining the 1st Respondent from trespassing, breaking into, entering and interfering with the Applicant's private residence, and the said petition is pending hearing and determination. That the 1st and 2nd Respondents also lost a quest to vary the bail terms granted to the Applicant in the said petition.

6. That another order was issued on 6th February 2018 in **Misc. Criminal Application No 58 of 2018 - James Aggrey Orengo & 11 others vS Director of Public Prosecutions & 2 Others,** granting the Applicant and others free bond, and further directing that the Applicant be questioned at the Directorate of Criminal Investigations (DCI) headquarters on the 8th February 2018, and not to be arrested and detained until further orders of the court.

7. It was his case that after this order was made, the 1st Respondent in its twitter handle notified the public that the Applicant was not required for investigations in respect to any criminal offences, and that he should not attend the DCI headquarters as ordered by the Court. That none the less, the Applicant attended the DCI headquarters where he was informed he was not required.

8. The Applicant narrated that on the 28th February 2018, at about 4:30 pm, he was pursued and way laid by over thirty armed men, who sought to seize him from his vehicle. That after a two-hour stand-off and intervention of the members of the public, the men identified themselves as police officers and put summons on the windshield of the Applicant's vehicle, which required him to make attendance before the Chief Magistrates Court in Nyeri on 1st March 2018 to take plea in Criminal Case No 251 of 2018. Further, that the Applicant's Advocate came to his rescue, and the officers left upon the Advocate's arrival. Further, that the DCI thereafter communicated on their twitter handle that the Applicant is required to appear before the Chief Magistrates Court at Nyeri, on 1st March 2018 to take a plea in Criminal Case No 251 of 2018.

9. The Applicant averred that he lives in Muthaiga in Nairobi County and has not been in Nyeri in over a year, and could not and has not committed any offense there, to warrant being arraigned before the Chief Magistrate Court in Nyeri. Further, that he has not been summoned or questioned by the 1st Respondent in respect of any criminal investigations. In any event, that the High Court has made orders in **Petition No 520 of 2017 - Jimi Wanjigi vs Inspector General of Police & 3 Others** and in **Misc. Criminal Application No 58 of 2018 - James Aggrey Orengo & 11 Others vs Director of Public Prosecutions & 2 Others,** granting him anticipatory bail and directing the manner in which the 1st Respondent should summon the Applicant for questioning. Therefore, that the summons requiring the Applicant's attendance before the Chief Magistrates Court in Nyeri for purposes of taking a plea sought by the 1st and 2nd Respondent, and issued by the 3rd Respondent, were in excess of jurisdiction or power.

10. The Applicant thus contends that the said summons were sought by the 1st and 2nd Respondent before compliance with a mandatory and material procedure, were procedurally unfair, and were undertaken without compliance of the directions of the High Court and therefore erroneous and unlawful. Further, that the summons were taken with an ulterior motive or purpose calculated to prejudice his legal rights, in bad faith, and violates his legitimate expectations and is taken in or made in abuse of the Respondents' powers. The Applicant also stated that given the past actions of the 1st Respondent in relation to one Miguna Miguna, he was apprehensive that the said summons are intended to seize him for purposes of detention, torture and harassment. He annexed rulings by the High Court in Misc Criminal Application No. 57 of 2018 and in Constitutional Petition No. 51 of 2018 with regarding suits against the 1st Respondent by the said Miguna Miguna.

11. Lastly, the Applicant also annexed copies of the pleadings and orders given in **Petition No 520 of 2017 - Jimi Wanjigi vs Inspector General of Police & 3 Others** and in **Misc. Criminal Application No 58 of 2018 - James Aggrey Orengo & 11 Others vs Director of Public Prosecutions & 2 Others**; copies of photographs, and of a video of his encounter with the 1st Respondent's officers; and of the tweets by the DCI.

The Responses

12. The application was opposed by the 1stand 2nd Respondents through a replying affidavit sworn on 28th March 2018 by Inspector Maxwell Otieno, a police officer attached to the Directorate of Criminal Investigations and one of the investigating officers in the matter of the Applicant. It was his case that on 15th March 2018, the police received information that illegal firearms were kept at the residence of the Applicant in Muthaiga. That the police thereupon proceeded to the Applicant's residence on the 16th March 2018 with a view of interviewing him, but on arrival they were denied access arousing suspicion that there could be firearms hidden in the premises.

13. Consequently, that the DCI filed Miscellaneous Application No 3352 of 2017 on 17th October 2017 before the Chief Magistrates Court in Milimani for a search warrant which was granted, and that they proceeded to the premises of the Applicant, introduced themselves, and

served it upon the Applicant's spouse in the presence of the Applicant's advocate. Further, that acting on the relevant provision of the Criminal Procedure Code and the National Police Service Act, the 1st Respondent applied reasonable force to gain entry in order to execute the warrants.

14. They thereafter embarked on a search of the premises and found several firearms, namely a Glock Pistol serial No UAB 630, an Assault Rifle Mini Archer serial No 2013 IM 111, an Assault Rifle CQ serial No CNOO5433-13, a Glock Pistol serial no UAB 632, a Smith and Wesson SW99 serial No SAE 0332,a Glock Pistol serial No URG 798, a Glock Pistol serial No UAB 646 and 688 rounds of ammunition. That after the search an inventory was prepared and signed by the police officers as well as the counsel for the Applicant's spouse, a copy of which was annexed.

15. It was the 1st and 2nd Respondent's case that some of the firearms that were recovered from the Applicant's residence are categorised as prohibited weapons under the Fire Arms Act, because of their lethal and devastating effect. Further, that the said firearms and ammunition were found concealed and hidden in the kitchen ceiling, which is not a safe place for storage, and section 18 of the Act stipulates the manner in which firearms should be stored. The 1st Respondent therefore subsequently commenced investigations to establish whether any crimes had been committed, and gave a history of the times the Applicant's firearms certificate had been revoked, the latest such revocation having been on 30th January 2018. This, according to the 1st and 2nd Respondents, was because the Applicant had a habit of threatening members of the public using the firearm and flouting the law.

16. Further, that subsequent to the recovery, the 1st Respondent subjected the firearms and ammunition to ballistic and forensic examination and obtained relevant information on how the Applicant acquired the same, which formed the basis of the charges brought against him. In addition, that the investigators obtained information that the Applicant either moved or caused firearms to be moved to his rural home in Nyeri County, and on that basis they needed to extend the investigations to cover the rural home. After the conclusion of the investigations, charges were preferred against the Applicant in Nyeri in Criminal Case No 251 of 2018 with respect to offences related to the possession of firearms under the Firearms Act, arising from the firearms that were recovered from the Applicant and others which were neither recovered or surrendered after the revocation of his firearms licence. The 1st and 2nd Respondents averred that the investigators thereupon obtained summons requiring the attendance of the Applicant before the said Chief Magistrate's Court on 1st March 2018 which were served on him.

17. It was in this respect denied by the 1st Respondent that its officers sought to arrest or apprehend the Applicant on 27th February 2018, and that they only sought to serve the summons. In addition, it was stated that there is no requirement that a suspect or an accused person must be summoned and questioned by investigators before plea taking takes place, or before the issue of service of summons requiring attendance in court.

18. The 1st and 2nd Respondents also contended that the Chief Magistrate's Court in Nyeri has jurisdiction to hear the pending criminal case against the Applicant, as the Applicant's rural home falls within the jurisdiction of the said court. Further, that the High Court in **High Court Petition No 520 of 2017** did not prohibit the Respondents from requiring the attendance of, or summoning and prosecuting the Applicant, and that the Respondents have complied with all the orders issued in the said Petition, neither has it been demonstrated how they have flouted the same. It was also averred there is no nexus between the Applicant's political connections and the charges against him, as the basis of the said charges has been demonstrated.

19. The 1st and 2nd Respondents elaborated on the function and duties of the Directorate of Criminal Investigations both in the Constitution and in the National Police Service Act, and of the Office of the Director of Public Prosecutions, and averred that when executing their functions they are bound by and observe the constitutional provisions. Further, that the police under the Constitution have the mandate and power to investigate any crime, while the Office of the Director of Public Prosecutions is empowered to undertake state powers of prosecution. They asserted that the Applicant has not demonstrated that in carrying out their functions in investigations and charging him, they have acted without or in excess of powers conferred on them, or infringed or violated any law.

20. It was their case that the decision to prosecute the Applicant was based on reliable information for the commission of an offense; was made on the basis of evidence and the public interest; and that it would be improper and inappropriate for the Court to prohibit or stop the Respondents from discharging their legal mandate under the Constitution and other enabling legislation. Lastly, that it is imperative and just that the investigators recover the firearms and ammunition not recovered during the search of the Applicant's house, nor surrendered pursuant to the revocation of the Applicant's firearms licence on 30th January 2018. The 1st Respondent therefore sought leave of the Court to continue and conclude investigations on the whereabouts of the unaccounted firearms.

21. The 2nd Respondent consequently filed an application by way of a Notice of Motion dated 12th March 2018, seeking orders that the Court sets aside the orders that were granted on 1st March 2018 granting leave to the Applicant to apply for orders of certiorari and prohibition, and that the said leave operates as a stay of the enforcement of the summons, charge sheet or taking plea in Criminal Case No. 251 of 2018. Further, that the Court strikes out and dismisses the Applicant's application, statement and verifying affidavit sworn on 1st March 2018. The grounds for the application were that the said orders were issued on the basis of non-disclosure of material facts, and that the 1st Respondent is investigating the Applicant for the offences of possession of firearms. This Court directed that the said application be considered and determined together with the Applicant's application.

22. The 3rd Respondent on its part opposed the application in Grounds of Opposition filed on 25th October 2018, wherein it was stated that the application is unmerited and an abuse of the due process of the Court, as it is intended to curtail the statutory obligations and duties of the Respondents. Further, that the Court would be usurping the statutory mandate of the 1st and 2nd Respondents if it were to take up the role as proposed by the Applicant. In addition, that should the Applicant be charged, he has an opportunity before the trial court to prove and demonstrate innocence, and has not demonstrated any prejudice that he will suffer by honouring requisitions that seek their respective attendance made pursuant to the law.

The Determination

23. The Application was canvassed by way of written submissions. The Applicant's Advocates on record, Havi & Company Advocates, filed submissions dated 7th May 2018, while Chrisy Mwenda, a prosecution counsel, filed submissions on behalf of the Respondents' dated 21st September 2018. The said submissions were orally highlighted by Dr. Khaminwa SC for the Applicant and Mr. Muteti for the Respondents at hearings held on 25th October 2018 and 3rd December 2018.

24. The Applicant cited various judicial authorities for his submission that the Court has power to quash criminal proceedings, and that the decision to prosecute the Applicant in Criminal Case No 251 of 2018 was taken with an ulterior motive; in bad faith; in abuse of power; amounted to an abuse of the court process; and was intended to harass and persecute the Applicant. These decisions included the ones in **Republic vs CS in Charge of Internal Security & 3 others Ex-parte Jean Eleanor Margaritis Otto (2015) eKLR, Kuria and 3 others v Attorney General, [2002] 2 KLR 69, Republic vs Director of CID & Another Ex-parte Ronald Morara Ngisa, (2018) eKLR** and **Macharia & Another vs Attorney General & Another (2001) KLR 448.**

25. The Applicant's contention was that the summons requiring attendance on the 27th February 2018 was intended to enable the 1st Respondent ambush and seize him on the road for detention, torture and harassment; and that by instituting the proceedings in Nyeri, the intention of the 1st and 2nd Respondent was to infringe upon his freedom of movement. Further, that the intended prosecution of the Applicant in **Nyeri Criminal Case no 251 of 2018** demonstrates a clear intention to misuse the court process for ulterior motives as he was charged in Nyeri for an offense that was allegedly committed in Nairobi. Therefore that this clearly shows malice, bad faith and abuse of power on the part of the 1st and 2nd Respondents, and was done to punish the Applicant for his political connections.

26. The Applicant further submitted that the action to charge him in Nyeri was in breach of the anticipatory bail orders made in **Petition No 520 of 2017,** and therefore the institution of **Nyeri Criminal Case No 251 of 2018** was done in total disregard of court orders. Moreover, that the 1st Respondent had indicated that it was not investigating the Applicant and did not require his attendance in court, and the Applicant therefore had a legitimate expectation that he would not be arrested and prosecuted, that was breached. He relied on the case of **Stanley Munga Githunguri vs Republic, (1986) eKLR,** and where the court quashed the proceedings on account of it being an abuse of the court process as the Attorney General had promised he would not institute criminal proceedings.

27. Furthermore, that section 92 of the criminal Procedure Code does not permit service of summons in the manner done by the 1st Respondent, as the 1st and 2nd Respondent were aware of the residence and place of business of the Applicant, which were the two locations he ought to have been served. In addition, the firearms that are the subject matter of the charges in Nyeri Criminal Case No. 251 of 2018, are all licensed in favour the Applicant. Furthermore, that there is a pending matter, being **Petition No. 520 of 2017 - Jimi Wanjigi vs Inspector General of Police & 3 Others,** where the Applicant has sought the return of his firearms among other remedies.

28. Relying on the cases of **Thuita Mwangi & 2 Others vs Ethics & Anti-Corruption Commission & 3 Others, (2013) eKLR** and **Bitange Ndemo vs Director of Public Prosecutions & 4 Others (2016) eKLR,** the Applicant pointed out that the power and discretion of the Director Of Public Prosecutions to prosecute is not an open cheque, and as such must be exercised within the four corners of the Constitution, and that the court will intervene where the decision is shown to be unreasonable and irrational.

29. It was also the Applicant's submission that the Magistrates Court in Nyeri was devoid of territorial jurisdiction to charge the Applicant with an offence that was allegedly committed in Nairobi as shown in the particulars of the offences. Furthermore, that the explanation given by the Respondent as to why the Applicant was being charged in Nyeri lacks merit, as only the Courts in Nairobi were seized with jurisdiction to try the offences. Reliance was placed on section 6 of the Magistrates Court Act which is to the effect that the criminal jurisdiction of the Magistrate Courts is to be exercised as conferred by the Criminal Procedure Code. That sections 67 and 72 of the Criminal Procedure Code in this regard provide that a person accused of an offense may be tried by a court within the district or local limits where the act giving rise to the offence or the consequences occurred. The Applicant contended that the offence was not committed in Nyeri, neither were any of the consequences of the offence felt in Nyeri.

30. It was thus the Applicant's submission that the burden lies on the 1st and 2nd Respondents to demonstrate that his intended prosecution in **Nyeri Criminal Case No. 251 of 2018** was based on factual evidence, and that there was reasonable and probable cause for institution of the criminal proceedings in Nyeri, which they have failed to do.

31. The Respondents on their part submitted that the 2nd Respondent has power to institute, undertake and take over prosecutions in all criminal proceedings under Article 157(6) of the Constitution. Further, that under Article 157 (10), the 2nd Respondent does not require consent from any person to commence criminal proceedings, and shall not be under the direction and control of any person or authority. It was also their submission that it is only the 2nd Respondent who can direct the Inspector General to inspect a matter under Article 157(4) and Article 245(5) of the Constitution.

32. The Respondents cited the case of **Matalulu vs DPP (2003) 4 LRC 712**, for the grounds upon which the powers of the 2nd Respondent may be subject to review. They submitted that the Applicant had failed to demonstrate that the 2nd Respondent lacked the requisite authority, acted in excess of jurisdiction or departed from the rules of natural justice in directing that the Applicant be charged with the offences disclosed by the evidence. Relying on **Thuita Mwangi & Another vs the Ethics and Anti-Corruption Commission & 3 Others (supra),** the Respondents reiterated that the acts of the 2nd Respondent can only be interfered with by Court where its proved that the same has been exercised in excess of jurisdiction resulting in abuse of office. Reliance was also placed on the definition of abuse of process in **Nicholas Mwaniki Wawere & Another vs Attorney General & DPP, Petition No. 394 of 2016** as something so unfair and wrong with the prosecution, that the court should not allow a prosecutor to proceed with what is in all other respects a perfectly supportable case.

33. Mr. Muteti in his oral submissions contended that other than the fact that the charges were filed in Nyeri, there is no evidence to show unreasonableness or malice in reaching the decision to prosecute the Applicant. Further, that the Applicant had not demonstrated the prejudice that would be caused if the matter were to proceed in Nyeri, and that under Article 157 of the Constitution, the 2nd Respondent can commence proceedings before any Court in the country. Further, that there are statutory provisions including section 81 of the Criminal

Procedure Code which can be resorted to challenge the geographical jurisdiction of a court, which option has not been exercised by the Applicant. Reliance was in this respect placed on the decision in **Director of Public Prosecutions vs Perry Mansukh Kansagara & 8 Others, (2018) e KLR**.

34. The Respondents in addition submitted that the application has not met the requisite threshold, and the matter raised therein form the basis of the Applicant's defences before the trial Court, and cannot be raised before the High Court. It was their submission that the High Court has no jurisdiction to decide whether or not the Applicant has a *prima facie* case, or whether there is sufficient evidence against the Applicant. They relied on the case of **Eunice Khalwali Miima vs Director of Public Prosecutions & 2 Others ,(2017) e KLR** for the proposition that the judicial review orders are discretionary, and in closing submitted that the application is premature, misconceived, and in abuse of the court process.

35. I have considered the parties' pleadings and submissions, and three issues arise for determination. The first is whether the 1st and 2nd Respondents' decisions to investigate and prosecute the Applicant was in abuse of their powers, and/or motivated by extraneous considerations. The second is whether the 3rd Respondent has jurisdiction to hear and determine **Nyeri Criminal Case No 251 of 2018.** Lastly, whether the Applicant is entitled to the relief sought.

36. On the first issue, I have considered it necessary to lay down the applicable principles of law at the outset, to illustrate the fine line that exists between the unfettered exercise of the prosecutor's powers, and countenancing abuses of these powers by way of judicial review of charging decisions. As far back as 1935, the Supreme Court of the United States of America in **Berger vs United States, 295 U.S. 78 (1935** did point out the balance to be maintained in this regard when it asserted that the government's interest in a criminal prosecution "is not that it shall win a case, but that justice shall be done," and that it is therefore a prosecutor's duty "to refrain from improper methods calculated to produce a wrongful conviction even as it is to use every legitimate means to bring about a just one."

37. This duty of prosecutors as stated in **Berger vs United States (supra)** furnishes the basis for courts to intervene when investigating, prosecuting and adjudicating agencies in the criminal justice system cross the line between proper and improper methods, as the courts cannot avoid and abdicate their authority to oversee the fairness of such an important process, and to review prosecutorial charging decisions in circumstances when there is abuse of prosecutorial powers.

38. The traditional grounds on which this Court will exercise its judicial review jurisdiction were laid down in the case of **Pastoli vs Kabale District Local Government Council & Others [2008] 2 EA 300** at pages 303 to 304 thus:

> **"In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).**
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> **Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality…..**
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> **Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph "E".**
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> **Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876)."**

39. In addition, it was also emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR that** *Article 47* **of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action.**

40. Specifically, with respect to the review of decisions to charge and to prosecute in criminal cases, it was held as follows in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69,**:

> **"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, by whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far from that**

which the courts indeed the entire system is constitutionally mandated to administer... In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute".

41. The Court went further to hold that:

> **"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...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...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."**

42. In the case of **R vs. Attorney General Ex Parte Kipgneno Arap Ngeny, High Court Misc. Civil Application No.406 of 2001**, the Court observed as follows on this ground:

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

43. Lastly, in **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003, [2007] 2 EA 170,** the Court of Appeal held as follows as regards review of proceedings in subordinate courts proceedings:

> **"It is trite that an Order of Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court."**

44. What this Court cannot do in exercise of its judicial review powers over criminal proceedings, is to usurp the constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the power and discretion conferred upon that office under Article 157 of the Constitution. In the case of **Republic vs Commissioner of Police & Another Ex-Parte Michael Monari & Another, (2012) e KLR** Warsame J. (as he then was) observed as follows in this regard:

> **"It is also clear in my mind that the police have a duty to investigate on any complaint once a complaint is made. In deed the police would be failing in their constitutional mandate to detect and prevent crime. The Police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said not to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene."**

45. Similar sentiments were expressed 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 is 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."

46. Likewise, it is also not the duty of the judicial review Court to engage in an examination of the merit or otherwise of the charges to be preferred.The sufficiency or otherwise of the charges or evidence is left to the trial Court if the same does reach there.

47. Coming to the facts of the present case, it is common ground that the 1st Respondent did search and seize several firearms from the Applicant's residence in Muthaiga in Nairobi County between 16th and 17th October 2017. It is also common ground that the constitutionality and legality of the said search and seizure is the subject of **Petition No 520 of 2017 - Jimi Wanjigi vs Inspector General of Police & 3 Others** that was filed in the Nairobi High Court on 17th October 2017. The following relief is sought by the Applicant in the said Petition, copies of which he annexed to his application:

"(i) A declaration be and is hereby issued that the 1st, 2nd and 3rd Respondents have breached and continued to be in breach of the Petitioner's fundamental rights under Articles 10(1), 10(2), 26(3), 27(1), (2), (4) & (5), 28, 29, 31(a) & (b), 32(1), 33(1), 38(1), 39, 45(1), 47(1), & (2), 48, 49, 50 and 51 of the Constitution of Kenya, 2010.

(ii) A declaration be and is hereby issued that the 1st, 2nd and 3rd Respondents' conduct and actions which are complained of in the Petition, jointly and/or severally, singularly and/or cumulatively against the Petitioners are oppressive, unfair, unreasonable, irrational , illegal and an abuse of power and the criminal justice system and process.

(iii) A declaration be and is hereby issued that the 1st, 2nd and 3rd Respondents' breach of the Petitioners' fundamental rights singularly and cumulatively has caused loss and damage to the Petitioners.

(iv) A declaration be and is hereby issued that the Petitioners are entitled to pecuniary compensation for such loss and damage as they have suffered on account of the Respondents' violations of their fundamental rights.

(v) General damages for the violation/contravention of the Petitioners' rights and fundamental freedoms.

(vi) General damages for the malicious, wanton and reckless destruction of the Petitioners' property.

(vii) A further declaration be and is hereby issued that the Petitioners are entitled to exemplary and aggravated damage in view of the 1st, 2nd and 3rd Respondents' conduct and actions and breach of the Petitioners' fundamental rights and freedoms.

(viii) An Award of exemplary and aggravated damages to be quantified by the court.

(ix) An order directing the 1st, 2nd and 3rd Respondents to forthwith restore and/return to the 1st Petitioner all firearms, ammunition and items taken from the Petitioners' private residence and in particular the following:

a. One pistol make Smith and Wesson serial Number SW 99:

b. One Glock pistol serial Number UAB 630:

c. One assault rifle make mini Archer serial number 2013/MIII attached with a laser serial number W3043907:

d. One Glock 19 pistol serial No. UAB 646:

e. One assault rifle make serial M4CQ serial number CN 005433/13:

f. One Glock 19 Pistol serial number URG 798:

g. One Glock 19 pistol serial number UAB 632

(x) <u>Any other relief or such other orders as this honourable court shall deem fit and just to grant to the Petitioners.</u>

(xi) <u>Costs of this Petition be awarded to the Petitioners."</u>

48. The Applicant annexed Court orders granted on 17th October 2017 by Odunga J. pursuant to an application filed in **Petition No 520 of 2017 - <u>Jimi Wanjigi v Inspector General of Police & 3 Others</u>**, granting him anticipatory bail, as well as conservatory orders retraining the 1st and 2nd Respondents from breaking or entering into or further interference with his private residence. The charges in **Nyeri Criminal Case No 251 of 2018.** are on the other hand shown to have been registered with the Chief Magistrates Court in Nyeri on 27th February 2018.

49. The said charges are follows:

"COUNT I

CHARGE: BEING IN POSSESSION OF PROHIBITED FIREARMS CONTRARY TO SECTION 4A (1) (a) OF THE FIREARMS ACT CAP 114 OF THE LAWS OF KENYA

PARTICULARS OF OFFENCE: JIMI RICHARD WANJIGI

JIMI RICHARD WANJIGI: On the 17th day of October, 2017 at Muthiaga Estate house number 44 in Nairobi within Nairobi County, without lawful justification, was found in possession of a semi-automatic self-loading military assault rifle caliber 5.56mm make Mini Archer serial No. IM 111 which is a prohibited firearm.

COUNT 11

CHARGE: BEING IN POSSESSION OF PROHIBITED FIREARMS CONTRARY TO SECTION 4A (1) (a) OF THE FIREARMS ACT CAP 114 OF THE LAWS OF KENYA

JIMI RICHARD WANJIGI: On the 17th day of October, 2017 at Muthiaga Estate house number 44 in Nairobi within Nairobi County, without lawful justification, was found in possession of a semi automatic self loading military assault rifle caliber 5.56mm make CQ serial No. CN 005433-13 which is a prohibited firearm.

COUNT 111

CHARGE: BEING IN POSSESSION OF PROHIBITED AMMUNITIONS CONTRARY TO SECTION 4A (1) (a) OF THE FIREARMS ACT CAP 114 OF THE LAWS OF KENYA

JIMI RICHARD WANJIGI: On the 17th day of October, 2017 at Muthiaga Estate house number 44 in Nairobi within Nairobi County, without lawful justification, was found in possession of 451 live rounds of caliber which is a prohibited firearm

COUNT IV

CHARGE: BEING IN POSSESSION OF FIREARMS WITHOUT A FIREARM CERTIFICATE CONTRARY TO SECTION 4 (2) (a) OF THE FIREARMS ACT CAP 114 OF THE LAWS OF KENYA

JIMI RICHARD WANJIGI: On the 17th day of October, 2017 at Muthiaga Estate house number 44 in Nairobi within Nairobi County, unlawfully had in your possession a firearm make Glock 19 pistol serial No. UAB 632 without holding a firearm certificate at the time.

COUNT V

CHARGE: BEING IN POSSESSION OF FIREARMS WITHOUT A FIREARM CERTIFICATE CONTRARY TO SECTION 4 (2) (a) OF THE FIREARMS ACT CAP 114 OF THE LAWS OF KENYA

JIMI RICHARD WANJIGI: On the 17th day of October, 2017 at Muthiaga Estate house number 44 in Nairobi within Nairobi County, unlawfully had in your possession a firearm make Glock 19 pistol serial No. URG 798 without holding a firearm certificate at the time.

COUNT V1

CHARGE: BEING IN POSSESSION OF PROHIBITED AMMUNITIONS CONTRARY TO SECTION 4A (1) (a) OF THE FIREARMS ACT CAP 114 OF THE LAWS OF KENYA

JIMI RICHARD WANJIGI: On the 6th day of February, 2018 within the Republic of Kenya, without lawful justification you had in your possession and continue to be is possession of a semi automatic self loading military assault rifle caliber

5.56mm make CQ serial No. CN 005433-13 which is a prohibited firearm.

COUNT V11

CHARGE: BEING IN POSSESSION OF FIREARMS WITHOUT A FIREARM CERTIFICATE CONTRARY TO SECTION 4 (2) (a) OF THE FIREARMS ACT CAP 114 OF THE LAWS OF KENYA

JIMI RICHARD WANJIGI: On the 6th day of February, 2018 within the Republic of Kenya, without lawful justification you had in your possession and continue to be is possession of a firearm make Ceska serial number P3299 without holding a firearm certificate at the time.

COUNT V111

CHARGE: BEING IN POSSESSION OF FIREARMS WITHOUT A FIREARM CERTIFICATE CONTRARY TO SECTION 4 (2) (a) OF THE FIREARMS ACT CAP 114 OF THE LAWS OF KENYA

JIMI RICHARD WANJIGI: On the 6th day of February, 2018 within the Republic of Kenya, without lawful justification you had in your possession and continue to be is possession of a firearm make serial number A 128120 without holding a firearm certificate at the time.

COUNT IX

CHARGE: BEING IN POSSESSION OF FIREARMS WITHOUT A FIREARM CERTIFICATE CONTRARY TO SECTION 4 (2) (a) OF THE FIREARMS ACT CAP 114 OF THE LAWS OF KENYA

JIMI RICHARD WANJIGI: On the 6th day of February, 2018 within the Republic of Kenya, without lawful justification you had in your possession and continue to be is possession of a firearm make Shot gun serial number Y052741L/TM67441L without holding a firearm certificate at the time.

COUNT X

CHARGE: BEING IN POSSESSION OF FIREARMS WITHOUT A FIREARM CERTIFICATE CONTRARY TO SECTION 4 (2) (a) OF THE FIREARMS ACT CAP 114 OF THE LAWS OF KENYA

JIMI RICHARD WANJIGI: On the 6th day of February, 2018 at Luedecke & Co. Ltd situated at Uganda House in Nairobi, within Nairobi County, unlawfully owned a firearm make Glock 19 serial number DFG 941 which firearm you had deposited at Luedecke & Co. Ltd for disposal by way of sale without holding a firearm certificate at the time.

COUNT XI

CHARGE: BEING IN POSSESSION OF FIREARMS WITHOUT A FIREARM CERTIFICATE CONTRARY TO SECTION 4 (2) (a) OF THE FIREARMS ACT CAP 114 OF THE LAWS OF KENYA

JIMI RICHARD WANJIGI: On the 9th day of February, 2018 at Armament Kenya Ltd situated at Utali House in Nairobi, within Nairobi County, unlawfully owned a firearm make Ceska serial number BS 102 which firearm you had deposited at Armatech Kenya Ltd for disposal by way of sale without holding a firearm certificate at the time. "

50. A perusal of the charge sheet shows that the firearms that are the subject matter of in Counts I, II, III, IV, V and VI are also the subject matter of **Petition No 520 of 2017 - <u>Jimi Wanjigi v Inspector General of Police & 3 Others.</u>** . It is trite law that facts constituting the basis of a civil suit may similarly be a basis for criminal offence and proceedings. In addition, the concurrent existence of the criminal proceedings and civil proceedings does not , *ipso facto*, constitute an abuse of the process of the court, unless the commencement of the criminal proceedings is meant to force an applicant to submit to the civil claim. See in this regard the decisions in **<u>Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another</u>, [2002] 2 KLR 703** and **<u>Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others,</u> Nairobi Civil Appeal No. 56 of 2012 [2013] eKLR.**

51. In the present case, however, the legality of the 1st Respondent's access to the firearms giving rise to the said charges in **Nyeri Criminal Case No 251 of 2018** was the subject of a pending constitutional case in the High Court in Nairobi, in which there are specific prayers for return for the said firearms to the Applicant. If the constitutional case is decided in the Applicant's favour, the said charges will be rendered redundant. Therefore, by bringing the charges against the Applicant in **Nyeri Criminal Case No 251 of 2018.**, the 1st and 2nd Respondent were seeking to preempt and force the High Court's hand in **Petition No 520 of 2017 - <u>Jimi Wanjigi v Inspector General of Police & 3 Others.</u>** The said charges and proceedings in **Nyeri Criminal Case No 251 of 2018** would also as to render whatever decision may be made by the High Court in favour of the Applicant nugatory, by mounting a collateral challenge with respect to the said firearms. This in my view is clear evidence of bad faith and malice on the part of the 1st and 2nd Respondents, who also clearly acted in abuse of the Court process and therefore acted unfairly, unreasonably and abused their prosecutorial powers.

52. In addition, the 1st and 2nd Respondents in their response to the instant application stated that the remaining counts VII TO XI brought against the Applicant in the charge sheet in **Nyeri Criminal Case No 251 of 2018** arose from letter of cancellation of the Applicant's

Firearms Licence on 30th January 2018 and were demanded by the in the said letter, which read as follows:

"FLB/NBI/WANJIGI/J.R/129 30th January, 2018

MR. Jimi R. Wanjigi

P.O. Box 79699

NAIROBI

RE: REVOCATION OF FIREARM CERTIFICATE NO. 9522

I wish to notify you in accordance with the Provisions of the Firearms Act. Cap. 114 Laws of Kenya that your Firearm Certificate No. 9522 issued to you on 12th June 2014 is with effect from the date of this notice, revoked as the Firearms Lincensing Board is satisfied that the revocation is warranted under Section 3 (5) (b) and Section 5 (7) of the above mentioned Act for reasons that you are unfit to be untrusted with a firearm anymore.

Following the revocation, I require you to surrender immediately to me the said Firearm Certificate.

I would also remind you that in view of this revocation, you are now illegally in possession of the following firearms and ammunition thereof:-

(i) Glock Pistol S/No. UAB 646

(ii) Glock Pistol S/No. WGD 666

(iii) Glock Pistol S/No. URG 792

(iv) Glock Pistol S/No. URG 798

(v) .223 Rifle S/A Mini Archer S/No. IM 111

(v) .223 Rifle CQ S/No. CN 005433-13

(v) .223 Rifle Gilboa S/No.20104011 CN 05435-13

The said firearms and ammunition should be surrendered alongside the Certificate latest by 1st February 2018.

(SAMWEL C. KIMARU) OGW

SECRETARY, FIREARMS LICENSING BOARD"

53. The 1st Respondent also annexed a bundle of documents which they claim show that the Applicant did purchase the firearms that were the subject of Counts VII to XI.

54. It is notable that as regards the firearms whose return was demanded in the letter of 30th January 2018, the 1st Respondent in its replying affidavit sworn on 28th March 2018 by IP Maxwell Otieno did indicate that a majority of the said firearms were actually recovered from the search of the Applicant's premises on 17th October 2017. Moreover, these firearms are also the subject of **Petition No 520 of 2017 - Jimi Wanjigi v Inspector General of Police & 3 Others** . More fundamentally however, from the said affidavit, it is indicated that the said letter of 30th January 2018 was a culmination of investigation carried out after the seizure of the Applicant's firearms, while the 1st and 2nd Respondents were well aware that the legality of that seizure was the subject of a court case.

55. Lastly, this Court also takes judicial notice of the fact that the letter of revocation of the *Applicant's Firearm referenced* **FLB/NBI/WANJIGI/J.R/129** *dated* **30th** *January, 2018 was quashed by this Court (Mativo J.) in a judgment delivered on 17th January 2019* in **Republic vs Firearms Licensing Board & Another ex parte Jimi Wanjigi, [2019] eKLR.** *In effect the charges* in Counts VII to XI *of the charge sheet have no legs to stand on so to speak, which also underscores this Court's findings as to the undesirability and inherent risk of abuse in basing a criminal charge on an act whose legality is being contested in a court of competent jurisdiction.*

56. Coming to the incident that gave rise to the present application that took place on 28th February 2018, the 1st and 2nd Respondent's deny that their intention was to arrest and detain the Applicant, and that they only intended to serve the summons on him. The Applicant provided evidence of photographs of the 1st Respondents officers who he claimed were about thirty in number, who apprehended him on the material date. He also provided electronic evidence in the form of a video, whose contents were however not viewed in open Court, and which cannot therefore be relied on by this Court. The 1st Respondent nevertheless does not dispute that there were a multitude of its officers seeking to serve the said summons on the Applicant as alleged.

57. Sections 92 to 94 of the Criminal Procedure Code provide as follows as regards service of summons in the criminal process:

> **"92. Service of summons**
>
> **(1) Every summons shall be served either by a police officer, an officer of the court issuing it or by such other person as the court may direct, and shall, if practicable, be served personally on the person summoned by delivering or tendering to him one of the duplicates of the summons.**
>
> **(2) Every person on whom a summons is so served shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.**
>
> **93. Service when person summoned cannot be found**
>
> **Where a person summoned cannot by the exercise of due diligence be found, the summons may be served by leaving one of the duplicates for him with an adult member of his family or with his servant residing with him or with his employer; and the person with whom the summons is so left shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.**
>
> **94. Procedure when service cannot be effected as before provided**
>
> **If service in the manner provided by sections 92 and 93 cannot by the exercise of due diligence be effected, the serving officer shall affix one of the duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned ordinarily resides and thereupon the summons shall be deemed to have been duly served."**

58. The procedure as shown in the said provisions does not require personal service of summons at all costs, and more so by more than one officer. Alternatives are provided for in the event that the person sought to be served cannot be found. The procedure therefore employed by the 1st Respondent to serve the Applicant with the said summons was not only unwarranted, and the use of excessive force during the process was also in abuse of due process and of their powers. Given that the incident of 28th February 2018 and breach of due process was also a culmination of events that unfolded from the search and seizure of the Applicant's firearms, and the revocation of his firearms certificate, it raises an inference that the 1st Respondent were motivated by extraneous considerations in their manner of service of the summons on the Applicant, and in particular, that the said mode of service was intended to harass and intimidate the Applicant.

59. On the second issue as regards the jurisdiction of the 3rd Respondent to hear and determine **Nyeri Criminal Case No 251 of 2018**, the Magistrates Courts Act in section 6 provides that magistrates courts shall have and exercise such criminal jurisdiction as may be conferred on it by the Criminal Procedure Code or any other written law. Sections 66 and 67 of the Criminal Procedure Code in this regard provides for the authority of Courts to try accused persons within their limits of jurisdiction as follows:

> **"66. General authority of courts**
>
> **Every court has authority to cause to be brought before it any person who is within the local limits of its jurisdiction and is charged with an offence committed within Kenya, or which according to law may be dealt with as if it had been committed within Kenya, and to deal with the accused person according to its jurisdiction.**
>
> **67. Accused person to be sent to district where offence committed**
>
> **Where a person accused of having committed an offence within Kenya has escaped or removed from the province or district within which the offence was committed and is found within another province or district, the court within whose jurisdiction he is found shall cause him to be brought before it, and shall, unless authorized to proceed in the case, send him in custody to the court within whose jurisdiction the offence is alleged to have been committed or require him to give security for his surrender to that court there to answer the charge and to be dealt with according to law."**

60. Section 72 of the Criminal Procedure Code specifically provides as follows as regards the place of trial of a criminal case:

> **"When a person is accused of the commission of an offence by reason of anything which has been done or of any consequence which has ensued, the offence may be tried by a court within the local limits of whose jurisdiction the thing has been done or the consequence has ensued".**

The place of commission within a court's local limits of the relevant action giving rise to a charge is thus a condition precedent for the exercise of territorial jurisdiction by a magistrates courts. In the present case the actions giving rise to the charges against the Applicant are indicated in the particulars of the counts that were brought against him in **Nyeri Criminal Case No 251 of 2018**. These were being in unlawful possession of firearms on 17th October, 2017 at Muthiaga Estate in Nairobi within Nairobi County, and being in possession of unauthorized firearms in Nairobi and undisclosed locations in Kenya.

61. While section 72 of the Criminal Procedure Code gives discretion as to the place of trial, it must be borne that Article 50(2) of the Constitution provides certain constitutional safeguards as regards criminal trials, including the right to have a trial begin and conclude without unreasonable delay, to be present when being tried and to adduce and challenge evidence. These constitutional provisions inform the requirement that the trial should be held at a venue which is easily accessible by the Accused person and the witnesses, and are the

justification for the territorial limits of courts jurisdiction in criminal cases.

62. I am in this regard persuaded by and in agreement with the Supreme Court of Philippines in the case of **Union Bank of The Philippines and Desi Tomas** vs **People of The Philippines, G.R. No. 192565** where it was held as follows:

> **"Venue is an essential element of jurisdiction in criminal cases. It determines not only the place where the criminal action is to be instituted, but also the court that has the jurisdiction to try and hear the case. The reason for this rule is two-fold. *First*, the jurisdiction of trial courts is limited to well-defined territories such that a trial court can only hear and try cases involving crimes committed within its territorial jurisdiction. *Second*, laying the venue in the *locus criminis* is grounded on the necessity and justice of having an accused on trial in the municipality of province where witnesses and other facilities for his defense are available."**

63. The reasons given by the 1st and 2nd Respondents that Nyeri is the Applicant's rural home is not supported by the law on the territorial jurisdiction of magistrates courts in criminal cases, nor the constitutional imperatives of an expeditious trial. This Court acknowledges that there may be factors of the public interest or safety, or even of the Accused's own safety that may necessitate a change of the venue of a trial, some of which are provided in section 81 of the Criminal Procedure Code. However, these factors were neither raised by the Respondents, nor do they apply in the present application.

64. The 1st and 2nd Respondents also alleged that the Applicant has the option of seeking a transfer of the place of trial pursuant to section 81 of the Criminal Procedure Act. In my view this approach is not only abetting an illegality, but would also be prejudicial and unfair to the Applicant as it entails additional expense and inconvenience arising from an act which is not of the Applicant 's making. It is instructive in this respect that the 2nd Respondent is required in exercising its powers to avoid abuse of the legal process under Article 157(11) of the Constitution, and by charging the Applicant in Nyeri Chief Magistrate's Court, it violated the Applicant's legitimate expectation that the Respondents would follow the correct legal process set out by law. The said action of the 2nd Respondent also leads to the inescapable conclusion that the said action was made in bad faith, and intended to prejudice and oppress the Applicant.

65. Lastly, the decision relied upon by the Respondent of **Director of Public Prosecutions vs Perry Mansukh Kansagara & 8 Others (supra)** is distinguished on the grounds that the case involved an application made in the High Court under section 81 of the Criminal Procedure Code for change of venue of a criminal trial which the said Court declined. The trial court in the said case was the properly seized of the matter as the actions giving rise to the trial occurred within its territorial jurisdiction, unlike in the present application.

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

> **"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision…Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings….Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."**

67. I find that as the 1st and 2nd Respondents have been found to have acted in abuse of the Court process and in bad faith, and were motivated by extraneous factors in the decisions made to charge and summon the Applicant, the Applicant is entitled to the order sought of certiorari to quash the impugned summons and charges.

68. However, it is this Courts view that the prayer sought of prohibition is specifically in relation to contravention of orders granted in **Petition No 520 of 2017- Jimi Wanjigi vs Inspector General of Police & 3 others** and in **Misc. Cr Application No 58 of 2018 - James Aggrey Orengo & 11 others v Director of Public Prosecutions & 2 Others.** The remedy of prohibition is thus not an appropriate remedy in the circumstances as regards the enforcement of the said orders, and the Applicant should move the Courts seized with the said matters, in the event of contravention of the said orders.

69. In the premises, the Applicant's Notice of Motion dated 9th March 2018 is substantially merited, and I accordingly order as follows:

> **I. An order of Certiorari be and is hereby issued to remove into this Court for quashing, the Summons Requiring Attendance dated 27th February, 2018, notifying that the Applicant is required to appear before the Chief Magistrates Court at Nyeri on 1st March, 2018, to take a plea in Criminal Case No 251 of 2018, and the charge sheet registered against the Applicant before the said Court in Criminal Case No 251 of 2018.**
>
> **II. The 1st and 2nd Respondents shall meet the Applicant's costs of the Notice of Motion dated 9th March 2018.**

70. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF MARCH 2019

P. NYAMWEYA

JUDGE