REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

PETITION NO. 14 OF 2018

IN THE MATTER OF ARTICLES 22(1), 23, 47 AND 258 (1)

OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF A FUNDAMENTAL

RIGHTS AND FREEDOMS OF THE PETITIONER ENSHRINED

IN THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF WRONGFUL ARREST AND PROSECUTION OF THE PETITIONER

BERNARD MWIKYA MULINGE.....PETITIONER

-VERSUS-

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

SENIOR PRINCIPAL MAGISTRATE, KANGUNDO.....2ND RESPONDENT

MACHAKOS COUNTY SURVEYOR.....3RD RESPONDENT

GEORGE MAUNDU MUTUA.....4TH RESPONDENT

JUDGEMENT

1. The petitioner in this petition, **Bernard Mwikya Mulinge,** avers that on 28th October, 2017, he was arrested and charged before the Senior Resident Magistrate, Kangundo with the offence of malicious damage to property contrary to section 339(1) of the ***Penal Code***, the particulars being that he damaged 20 pieces of sisal which were used for demarcation of the access road to the 4th Respondent's home.

2. It was the petitioner's case that the police investigation is in relation to beacons and/or interfering with a boundary. He however averred that parcel number Matungulu/Sengani/1869 is registered in the name of the 4th Respondent and borders parcel no. Matungulu/Sengani/1871 which is registered in the name of the petitioner's deceased father, whose estate is yet to be issued with Grant of Letters of Administration.

3. According to the petitioner, in their lifetime, both the fathers of the petitioner and the 4th respondent were engaged in protracted litigation over the extent of their parcels of land which culminated into Civil Appeal No. 106 of 1971, a matter which finally determined all the issues relating to their dispute. That appellate decision, it was disclosed, was followed by the adjudication's officers completing the adjudication process and finally fixing the boundaries demarcating the two parcels.

4. It was the petitioner's case that as one of the personal representatives and a beneficiary of the Estate of his father, he has a legal duty to protect the properties of the estate. He averred that vide a letter dated 25th August, 2017 addressed to several persons, the 3rd Respondent put

in motion the process of re-establishing a boundary between, inter alia, the above parcels and despite protestations, the 4th Respondent, purporting to create an access road went ahead and established a boundary inconsistent with that which was fixed by the court and followed by the adjudication officers. Further, the 4th Respondent purporting to provide access road encroached onto parcel no. 1871 by establishing a sisal boundary inside the said parcel an exercise which was plainly and obviously unlawful. The petitioner averred that it was the removal of this boundary that led to the petitioner's arraignment on a charge of malicious damage to property yet the said prosecution is intended to criminalise a purely civil dispute which was nevertheless finalised by a court of competent jurisdiction. It was the petitioner's case that his prosecution is not bona fides, is tainted with ulterior motives and is thus void ab initio and contravened his fundamental rights and freedoms enshrined in the Constitution.

5. The petitioner therefore seeks the following orders:

> **1. A declaration that under the facts and in the circumstances set forth in the petition the arrest, arraignment and prosecution of the Petitioner is void ab initio and thus unlawful.**
>
> **2. An order of Prohibition to issue prohibiting the 1st and 2nd Respondents from continuing with the prosecution of the Petitioner in Kangundo Criminal Case No. 1093 of 2017 or any other case relating to any boundary dispute.**

6. The petition was however opposed by the 4th Respondent.

7. According to the 4th Respondent, the petitioner was charges before the 2nd Respondent after investigations were done in Criminal Case No. 425 of 2017 and 2nd Respondent has the requisite jurisdiction to determine whether a criminal offence has been committed by the Petitioner.

8. It was averred by the 4th Respondent that he is the registered proprietor of land parcel number Matungulu/Sengani/1869 which he acquired through transmission. The said land parcel registration title number Matungulu/Sengani/1869 borders land parcel number Matungulu/Sengani/1871 and served by an access road which touches the said land parcel number Matungulu/Sengani/1871. Further, the official search of land parcel number Matungulu/Sengani 1871, shows that a 6.10 and 12.2 meter roads pass through the said parcel.

9. While conceding that there was a case between his father and the Petitioner's father, the 4th Respondent averred hat this case was determined by the High Court and implemented on the ground and in order for him to access his land he needs to pass through the access road which is properly captured in the map. However, in 2017, the Petitioner started arguing that the access road he was using was not there and the 4th Respondent sought the help of the area chief who referred him to the Land Registrar for help in order to establish where the access road passed. Pursuant thereto, the 3rd Respondent summoned all persons affected by the access road through a letter dated 25.8.2018 and on 12.10.2017 the 3rd respondent visited the site to confirm the boundaries of the access road.

10. The 4th Respondent averred that he was present when the exercise took place and the elder brother to the Petitioner, **Jonathan Mutisya Mulinge**, represented the family of **Isaiah Mulinge Ntheketha** in the exercise after the Petitioner refused to attend even after being called by the area chief. Accordingly, the 3rd Respondent marked the access road and put beacons in place and the 4th Respondent got a copy of the report by the 3rd Respondent which clearly shows he was addressing the issue of access road. Upon the beacons being fixed they were later removed and the 4th Respondent reported the issue at Tala Police Post for investigation. Upon investigations being conducted, the Petitioner was found to be the one who had destroyed uprooted sisal plants which had been put to mark the access road and he was charged with the offence before the 2nd Respondent.

11. It was averred that the case has proceeded before the court with his evidence, the evidence of the surveyor and eye witness having already been taken. The trial court even visited the scene to ascertain and see what exactly happened. At the time of swearing the affidavit, it was averred that the case is at an advanced stage and all key witnesses have tendered their evidence except the investigating officer. To his mind, the criminal case is almost finalized and based on legal counsel, that the 2nd Respondent has the jurisdiction to determine whether the Petitioner committed the offence he is charged with before court and that the 1st Respondent has the constitutional mandate to undertake prosecution in the entire country independently without being fettered by this Court.

12. It was therefore the 4th Respondent's case that this Petition is only meant to scuttle the criminal hearing before the 2nd Respondent which is already at an advanced stage.

Determinations

13. I have considered the parties' respective cases, as contained in their affidavits as well as submissions on record.

14. As has been held time and time again the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions (DPP) to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution. The mere fact therefore that the intended or ongoing criminal proceedings are in all likelihood bound to fail, is not ipso facto a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. An applicant who alleges that he or she has a good defence in the criminal process ought to ventilate that defence before the trial court and ought not to invoke the same to seek the halting of criminal proceedings undertaken *bona fides* since judicial review court is not the correct forum where the defences available in a criminal case ought to be minutely examined and a determination made thereon. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.

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

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

16. 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...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 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..."**

17. In **Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703**, it was held:

> **"It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement or frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth...When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court...In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in..."**

18. I also agree with the decision in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** that:

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

19. Clearly, therefore whereas the discretion given to the 1st respondent to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised in the wider interest of the public. Otherwise if 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, the Court will not hesitate to bring such proceedings to a halt. It is, however upon the ex parte applicant to satisfy the Court that the discretion given to the DPP to investigate and prosecute is being abused and ought to be interfered with.

20. This burden and standard was expounded in **Kuria & 3 Others vs. Attorney General** (supra) where it was held:

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

21. Similarly, in **Republic vs. Attorney General & 4 others Ex-Parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR** this Court expressed itself a follows:

"Before dealing with the issues raised herein, it is my view that the principles guiding the grant of the orders in the nature sought herein ought to be reiterated. Several decisions have been handed down which in my view correctly set out the law relating to circumstances in which the Court would be entitled to prohibit, bring to a halt or quash criminal proceedings. It is however always important to remember that in these types of proceedings the Court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings. As judicial review proceedings are concerned with the process rather than merits of the challenged decision or proceedings the court is not entitled to make definitive findings on matters which go to the merit of the impugned proceedings. In determining the issues raised herein the Court will therefore avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial Court. The Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution. 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 by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings."

22. It must always be remembered that judicial review applications do not deal with the merits of the case but only with the process. In determining the process the Court will inquire into such issues as whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters, whether the decision was irrational or tainted with such other factors as biased and whether the decision breached the legitimate expectations of the aggrieved person. This list is however not exhaustive. It follows that where an applicant sets out to have a determination on contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such issues. In those circumstances the parties are better left to resort to the normal forums where such matters ought to be resolved on their merits. It follows that judicial review proceedings are not the proper legal regime in which the innocence or otherwise of the applicant ought to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise as to do so in my view amounts to abuse of the judicial process. To a judicial review court, what is paramount is the question of fairness to the applicant in the institution and continuation of the criminal proceedings and once the Court is satisfied that the same are *bona fides* and that the same are being conducted in a fair manner, within the legal parameters recognised for the conduct thereof, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the

evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution's evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.

23. A word of caution is however necessary with respect to the exercise of the discretion to prosecute. Whereas Article 157(10) of the Constitution provides that the Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority, Article 157(11) provides:

> **In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.**

24. Apart from that, section 4 of the ***Office of Public Prosecutions Act***, No. 2 of 2013 provides:

> **In fulfilling its mandate, the Office shall be guided by the Constitution and the following fundamental principles—**
>
> **(a) the diversity of the people of Kenya;**
>
> **(b) impartiality and gender equity;**
>
> **(c) the rules of natural justice;**
>
> **(d) promotion of public confidence in the integrity of the Office;**
>
> **(e) the need to discharge the functions of the Office on behalf of the people of Kenya;**
>
> **(f) the need to serve the cause of justice, prevent abuse of the legal process and public interest;**
>
> **(g) protection of the sovereignty of the people;**
>
> **(h) secure the observance of democratic values and principles; and**
>
> **(i) promotion of constitutionalism.**

25. It is therefore clear that the current prosecutorial regime does not grant to the DPP a carte blanche to run amok in the exercise of his prosecutorial powers. Where it is alleged that the standards set out in the Constitution and in the aforesaid Act have not been adhered to, this Court cannot shirk its Constitutional mandate to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, the Constitution itself. I associate myself with the sentiments expressed in **Nakusa vs. Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565** to the effect that:

> **"the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system…In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of *Domnic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003* is that interpretation of the Constitution has to be progressive and in the words of Prof M V Plyee in his book, *Constitution of the World*: "The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time…….. In our role as "sentinels" of fundamental rights and freedoms of the citizen which are founded on laisez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent "sentinels" of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right."**

26. Where therefore it is clear that the discretion is being exercised with a view to achieving certain extraneous goals other than those legally recognised under the Constitution and the ***Office of the Director of Public Prosecutions Act***, that would, in my view, constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion. As was held by **Wendoh, J** in **Koinange vs. Attorney General and Others [2007] 2 EA 256**:

> **"Under section 26 of the Constitution the Attorney General has unfettered discretion to undertake investigations and prosecute. The Attorney Generals inherent powers to investigate and prosecute may be exercised through other offices in accordance with the Constitution or any other law. But, if the Attorney General exercises that power in breach of the constitutional provisions or any other law by acting maliciously, capriciously, abusing the court process or contrary to public policy the Court would intervene under section 123(8) of the Constitution and in considering what constitutes an abuse of the court process the following principles are relevant: (i) Whether the criminal prosecution is instituted for a purpose other than the purpose for which it is properly designed; (ii) Whether the person against whom the criminal proceedings are**

commenced has been deprived of his fundamental right of a fair trial envisaged in the provisions of the constitution; (iii) Whether the prosecution is against public policy."

27. In appropriate circumstances, the Court may properly intervene in the exercise of discretion by the DPP and any other inferior authority for that matter and may justifiably do so in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**

28. As was held in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001**:

"Although the state's interest and indeed the constitutional and statutory powers to prosecute is recognised, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious...A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds."

29. This Court associates itself with the position adopted in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR** to the effect that 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. In that case it was held:

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

30. Where therefore the predominant reason for the institution of the criminal proceedings is not the vindication of the criminal justice such proceedings will be liable to be terminated.

31. As was held in **James Karuga Kiiru vs. Joseph Mwamburi and 3 Others Nrb C.A No. 171 of 2000** to prosecute a person is not *prima facie* tortuous, but to do so dishonestly or unreasonably is, the burden of proving that the prosecutor did not act honestly or reasonably being on the person prosecuted.

32. Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution. A prosecution can either be mounted based on an offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officers or agencies. However, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words, the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. I say ordinarily because the mere fact that the version of one of the parties is not considered does not make the subsequent prosecution malicious. However, where the police deliberately decide not to take into account the version of the suspect and acts on a story that eventually turn out to be improbable and which no ordinary prudent and cautious man would have relied upon that failure may constitute lack of reasonable and probable cause for the purposes of malicious prosecution. On the other hand, it would be obviously absurd to make a defendant liable because matters of which he was not aware put a different complexion upon facts, which in themselves appeared a good case for prosecution. But neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of want of reasonable and probable cause and also malice. It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is a reasonable and probable case for a prosecution. Circumstances may exist in which it is right before charging a man with misconduct to ask for an explanation but no general rule can be laid down.

33. Therefore, the Court would not halt criminal proceedings merely because the applicant's version was never considered though that is a factor which may be considered in determining whether on the totality of the material presented the prosecution is coated with malice.

34. In this case, the ex parte applicant contends that there was a boundary dispute between his father and the father of the 4th Respondent which dispute was resolved through litigation ad the action of the Registrar of Lands. However, the 4th Respondent disregarded the said decisions and proceeded with acts of trespass. According to the ex parte applicant, his action was geared towards the protection of the estate and for ensuring that the court's decision was adhered to. The ex parte applicant however stated that the letters of administration in respect of

his father's estate were yet to be taken. The question that arises is therefore whether the ex parte applicant was justified in taking the action he took. If it turns out that he ought not to have acted in the manner he did, the decision to charge him may well have some basis even if it may not meet the threshold for conviction in criminal proceedings. This court is however not the proper tribunal to conclusively determine the ex parte applicant's culpability. That is a matter that falls squarely within the jurisdiction of the trial court since it goes to the merit of the decision to prosecute as opposed to the processWhether or not there is sufficient evidence to sustain the charge is ordinarily not a ground for halting criminal proceedings. As was held in **Meixner & Another vs. Attorney General [2005] 2 KLR 189:**

> **"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."**

35. On the relevancy of the civil proceedings, section 193A of the ***Criminal Procedure Code*** Chapter 75 Laws of Kenya provides that notwithstanding the provisions of any other written laws, the fact that any matter in issue in any criminal proceedings is also directly and substantially in issue in any civil proceedings shall not be a ground for stay, prohibition or delay in criminal proceedings. However, although under section 193A of the ***Criminal Procedure Code*** the existence of civil proceedings do not act as a bar to the criminal process, where the criminal process has been instituted as a means of hastening the civil process by either forcing the applicants to concede the civil claim or abandon their claim altogether, the commencement of the criminal proceedings are an abuse of the process of the court and on the authority of **Stanley Munga Githunguri vs. Republic Criminal Application No. 271 of 1985**, this Court is obliged to stop such proceedings.

36. This position was confirmed by the Court of Appeal in **Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others Nairobi Civil Appeal No. 56 of 2012 [2013] eKLR** when it held:

> **"While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court. This is case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations."**

37. It is my view however that as opposed to where the prosecution has no evidence at all, in which event an order of prohibition may issue, the court will not halt a prosecution simply because the court is of the view that the evidence would not in all probability lead to a conviction. To do that would, as I have stated hereinabove, amount to this court in a judicial review proceedings stepping into the shoes of the trial court and usurping the powers of the trial court.

38. Similarly, it is not for this Court to stop the DPP in his tracks simply because the Court believes that the DPP ought to have done better. The constitutional discretion given to the DPP ought not to be lightly interfered with especially if on the evidence in his possession if true may well sustain a prosecution. Trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on his defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of an appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words, I am not satisfied based on the material before me that the applicant will not receive a fair trial before the trial court more so as no allegations are made against the 2nd respondent towards that direction. Therefore, the mere insufficiency of evidence does not in my considered view justify the halting of a criminal trial.

39. In these types of proceedings, the Court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings. As these proceedings are concerned with the process rather than merits of the challenged decision or proceedings the court is not entitled to make definitive findings on matters which go to the merit of the impugned proceedings. I associate myself with the decision of **Majanja, J** in HC. Pet. No. 153 of 2013; **Thuita Mwangi and 2 Others vs. the Ethics and Anti-Corruption Commission**, that:

> **"While these arguments are forceful, attractive and cogent, I am afraid that the High Court at this point is not the right forum to tender the justifications concerning the subject transaction let alone test the nature and veracity of these**

allegations. In… the Court held that "It is the trial Court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. It would be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court". Similarly…Lenaola J., captured this balance as follows; "(22). The point being made above is that the DPP though not subject to control in exercise of his powers to prosecute criminal offences, must exercise that power on reasonable grounds. Reasonable grounds, it must be noted, cannot amount to the DPP being asked to prove the charge against an accused person at the commencement of the trial but merely show a prima facie case before mounting a prosecution. The proof of the charge is made at trial."

40. As was held by **Mumbi Ngugi, J** in **Kipoki Oreu Tasur vs. Inspector General of Police & 5 Ors (2014) eKLR:**

"The criminal justice system is a 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 administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior Courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated".

41. In the premises I am not satisfied that this is a proper case in which the court ought to bring the criminal proceedings to a halt. The applicant will be afforded an opportunity to defend himself, cross-examine witnesses and adduce evidence in support of his case and that in my view is the proper course to take in the circumstances of this case.

42. Another issue that has weighed heavily on my mind is the status of the criminal case sought to be quashed. Whereas there is nothing that can bar the Court from terminating pending criminal proceedings at any stage of those proceedings, it must always be remembered that the decision to do so is an exercise of discretionary power and the Court in determining whether or not to grant the relief sought will take into account the delay in making the application and the import and impact of such delay in the administration of justice.

43. This position was similarly appreciated in *Judicial Review Misc. Civil Appl. No. 139 of 2014 between* ***Vania Investments Pool Limited and Capital Markets Authority & Others*** where the learned Judge pronounced himself as hereunder:

"Lord Hope of Craighead in Regina v London Borough of Hammersmith and Fulham (Respondents) and Other Exparte Burkett & Another (FC) (Appellants) ***[2002] UKHL 23 noted the need for the applicant to move the court promptly when he observed that,***

"[64] On the other hand it has repeatedly been acknowledged that applications in such cases should be brought as speedily as possible. Ample support for this approach is to be found in the well-known observations of Lord Diplock in **O'Reilly v Mackman [1983] 2 AC 237, 280-281 to the effect that the public interest in good administration requires that public authorities and third parties should not be kept in suspense for any longer period than is absolutely necessary in fairness to the person affected by the decision…But decisions as to whether a petition should be dismissed on the ground of delay are made in the light of the circumstances in which time was allowed to pass. As Lord President Rodger put it in Swan v Secretary of State for Scotland** ***1998 SC 479, 487:"It is, of course, the case that judicial review proceedings ought normally to be raised promptly and it is also undeniable that the petitioners let some months pass without starting these proceedings. None the less, in considering whether the delay was such that the petitioners should not be allowed to proceed, we take into account the situation in which time was allowed to pass."***

44. Apart from that it is stated in ***Halsbury's Laws of England*** **4thEdn. Vol. 1(1) para 12 page 270:**

"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders."

45. It this case it is contended which contention is not challenged that the criminal case has proceeded with the 4th Respondent testifying as well as two other witnesses one of whom is the surveyor. In deciding whether or not to grant orders sought herein, the Court must consider whether or not the orders sought by the petitioner are the most efficacious remedies in the circumstances. As stated in ***Halsbury's Laws of England 4th Edition Vol. 1(1) paragraph 122***, the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles. Sound legal principles, in my view would dictate that where what is sought to be prohibited has reached a very advanced stage due to the failure by the petitioner to act promptly, it may well be prudent to allow the process to run its course.

46. In the instant case, the Applicant has failed to discharge the burden and must be ready to face his accusers as was stated by **Lenaola, J** (as he then was) in **Daniel Ndungu vs. Director of Public Prosecutions & Another (2013) eKLR**:

> **"In conclusion, the Petitioner ought to face his accusers, prove his innocence or otherwise and submit to the consequences of the Law should he be found culpable".**

47. In the premises I find no merit in this application and to quote **Kuria & 3 Others vs. Attorney General,** (supra):

> **"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."**

Order

48. In the result this petition fails and is dismissed with costs to the 4th Respondent.

49. It is so ordered.

Read, signed and delivered in open Court at Machakos this 26th day of March, 2019.

G V ODUNGA

JUDGE

Delivered the presence of:

Mr F M Mulwa for the Petitioner

Mr Mutia for the 4th Respondent

CA Geoffrey