



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 458 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 NAIROBI.....3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....4TH RESPONDENT

EX PARTE : BRYAN YONGO OTUMBA

JUDGMENT

The Application

1. The *ex parte* Applicant herein (hereinafter the Applicant) is Bryan Yongo Otumba. He has filed an application for judicial review orders against the Inspector General of Police who is sued as the 1st Respondent herein. The 1st Respondent is a Constitutional office established under Article 245 of the Constitution, and is the office in charge of the National Police Service including the Directorate of Criminal Investigation.

2. The Director of Public Prosecution, an independent office created under Article 157 (1) of the Constitution that is in charge of public prosecutions is sued as the 2nd Respondent. The 3rd Respondent is the Chief Magistrate’s Court in Nairobi, which is established under the Magistrates Courts Act, while the 4th and last Respondent is the Attorney General, a Constitutional office established under Article 156 of the Constitution and who is the principal legal adviser to the Government.

3. The Applicant, in his application by way of a Notice of Motion dated the 22nd November 2018 is seeking the following orders from this court:

i. An order of certiorari to remove into this Court for purposes of being quashed the decision of the Respondents to institute, commence, charge and prosecute the Applicant in Milimani Criminal Case No. 2035 of 2018 on 29th October 2018.

ii. An order of prohibition directed against the 4th Respondent, prohibiting the 4th Respondent and or any other officers acting with his authority from hearing of continuing to hear Milimani Criminal Case No. 2035 of 2018 on 29th October 2018.

iii. That the costs of this application be in the cause.

4. The application is supported by Supporting Affidavit sworn by Applicant on 21st November 2018, a statutory statement of even date and a supplementary affidavit the Applicant swore on 11th February 2019.

5. The crux of the Applicant's case is that on or about November 2016, he approached Mwananchi Credit Limited seeking to borrow Kshs. 4,000,000.00/=, which was to be secured by motor vehicle registration number KCH 856A, a Range Rover Sport 2016, which motor vehicle was registered under his company's name, being Wayaga Construction Company Limited. That as is standard practice with lending institutions, Mwananchi Credit Limited, before approving the loan, requested the Applicant to submit all ownership documents in respect of the said motor vehicle to enable them conduct due diligence on the vehicle's ownership status. That, following the due diligence and searches with the relevant authorities, Mwananchi Credit Limited found the documents to be genuine and a true reflection of the records at the National Transport and Safety (NTSA). Subsequently, they gave the Applicant a letter of offer dated 24th November and executed a loan Agreement of even date. It is the Applicant's averment that he deposited the physical motor vehicle (KCH 856A) with Mr. Dennis Mombo, the Managing Director of Mwananchi Credit Limited to bolster the security.

6. The Applicant contends that he borrowed a further sum of Kshs. 1,500,000/= on or about 2nd June 2017 vide Mwananchi Credit's letter of offer dated 2nd June 2017. That this top up facility was secured by the Applicant's motor vehicle registration number KBW 299K, a BMW 7301, which vehicle was similarly physically handed over to Mr. Dennis Mombo. According to the Applicant, he had borrowed money from Mwananchi Credit on several occasions, dutifully repaid the same and collected his motor vehicles.

7. However, that sometime in June 2018, Mr. Dennis Mombo began sending the Applicant abusive texts on the repayment of the loans in question and alleged that the Applicant's log book for the Range Rover was fake. In response, the Applicant denied knowledge of any defect in title to the said motor vehicle, which he stated he had bought from one Mr. Mohammed Yunis for Kshs. 23,000,000/=. Further, that, Mr. Dennis Mombo threatened to report the matter to the police if the Applicant did not pay the alleged loan arrears, and he made good his threat whereupon the Applicant was summoned to record a statement. However, that Mr. Mohammed Yunis, upon being summoned, confirmed that he had sold the Applicant the car in question. That, at this point, Mr. Mombo informed the Applicant that he wished not to pursue this line as Mr. Yunis admission that he sold the Applicant the car meant that the Applicant was an innocent purchaser for value without money, which absolved him of any criminal liability.

8. The Applicant averred that he then paid Mwananchi Credit Limited Kshs. 1,700,000/= in cash. Subsequently, that Mr. Mombo dropped his claim and the same was marked settled, after which he released the Applicant's motor vehicle registration number KBW 299K. According to the Applicant, Mr. Mombo resumed threatening communication via phone calls between the months of August and October 2018, wherein he demanded that the Applicant immediately pays up or else have the criminal complaint against him revived, wherein he would ensure the Applicant was publicly charged and humiliated. Subsequently, the Applicant was summoned under false pretence by officers of the 1st Respondent (flying squad officers) to their offices on 27th October 2018, where he was placed under arrest and denied bond.

9. The Applicant claims that he was subsequently charged before the 4th Respondent with the offences of:

i) Count 1: Forgery contrary to Section 345 as read with Section 349 of the Penal Code;

ii) Count 2: Uttering a false document contrary to Section 353 of the Penal Code;

iii) Count 3: Obtaining money by false pretence contrary to Section 313 of the Penal Code;

iv) Count 4: Being in possession of suspected stolen property contrary to Section 323 of the Penal Code.

10. Furthermore, that Mwananchi Credit Limited filed a civil suit, being **Milimani CMCC No. 10028 Of 2018**, premised on the fact that he had been charged in court and annexed documents emanating from the malicious and illegal charges. This, in the Applicant's view, demonstrates that the criminal investigation, charges and prosecution in court are premised on ulterior motives, malicious intentions and a desire to arm twist him into settling an alleged civil dispute. The Applicant contended that Mr. Yunis had not been charged despite the admission that he sold the subject motor vehicle to the Applicant, yet the Applicant, a victim who deserves the protection of the law had been charged and prosecuted. The Applicant termed this selective prosecution as illegal, unconstitutional and an abuse of prosecutorial powers.

11. It is the Applicant's contention that vague summaries and suspicion do not constitute the minimum degree of reasonable suspicion envisaged in law. That, the Respondents therefore acted *ultra vires* and contrary to law, and in breach of Article 47 of the Constitution which provides for fair administrative action. The Applicant also alleged violation of his rights under Article 19 and 22 of the Constitution.

12. The Applicant faulted the charge sheet and statements exhibited for being in total variance to and contrary to the legal requirement; and not containing sufficient details and statement of facts which are capable of being proven before any magistrate as to arraign the Applicant. This, according to the Applicant, amounts to building a case from an uncertain basis and vendetta. It is the Applicant's contention that there is apparent bias in light of the cumulative lapses, fundamental factual errors and irrelevant consideration. In particular, the Applicant made averments on the witness statements by the complainants in the **Milimani CMCC No. 10028 Of 2018**, and refuted the contents of the charge

sheet to the extent that it contradicted both Dennis Mombo and Anne Mukami Muturi's statements, in which they both stated that the Applicant had left the said motor vehicle alleged to have been stolen in their possession. The Applicant annexed copies of the said statements and the pleadings filed in the commercial suit.

13. It was the Applicant's averment that the contents of the plaint in **Milimani CMCC No. 10028 of 2018** indicate that what is in issue was a purely commercial transaction, and it is telling that the complainants purport to have realized the log book had a problem after 2 years of having the motor vehicle in their possession and engaging in various transactions with the Applicant. He pointed out and detailed the ambiguities with regard to various verification searches conducted on the subject motor vehicle registration numbers by the National Transport and Safety Authority, which he claimed reflect a shoddy investigation process.

The Response

14. The 1st and 2nd Respondents jointly filed Grounds of Opposition dated 4th September 2018 in response to the application. The grounds are as summarized hereafter. The Respondents claim they were acting within the law in that: a) the National Police Service has an investigative mandate over criminal offences and an attempt to stop such execution of mandate would occasion a greater injustice to the justice system; b) the Respondents are not acting under the direction and control of any person or authority; c) the Applicant has not demonstrated that the Respondents in executing their mandate have acted without or in excess of the powers conferred by law, acted maliciously or infringed or failed to comply with the Constitution or any other provision thereof.

15. The said Respondents also state that the Director of Public Prosecutions (DPP) received the investigation file from the Directorate of Criminal Investigations, and based upon independent review of the evidence, was satisfied there was sufficient evidence and accordingly directed that the Applicant be charged with the offences stated in the charge sheet. The 1st and 2nd Respondents contend that the Applicant has not demonstrated that the 2nd Respondent has, in making the decision to charge, abrogated any provision of the Constitution or any written law; or that there has been any breach of the rules of natural justice.

16. The 3rd and 4th Respondents also jointly filed Grounds of Opposition dated 5th February 2019 as their response. The grounds in summary, are that the instant Application is unmerited and hence an abuse of the due process of the Court. It is contended that the instant Application is aimed at curtailing the statutory obligations and duties of the Respondents herein. The 3rd and 4th Respondents argue that the Applicant has opportunity to prove and demonstrate his innocence before the trial court. According to them, the instant application is premised on explanations that are to be made before the requisitioning officer; and this Court would be usurping the statutory mandate of the 1st and 2nd Respondent if it were to assume this role as proposed by the Applicant.

17. The 3rd and 4th Respondents also claim that the Applicant has not demonstrated that he stands to suffer any prejudice by honoring requisitions that seek his attendance made pursuant to the law. The Respondents contend that in any case, the Application is premised on a presumptuous notion that the Applicant has foreknowledge of what the requisitioning officer is looking for in terms of evidence.

The Determination

18. The Application was canvassed by way of written submissions. The Applicant filed submissions dated 7th February 2019, while F.S Ashimosi, an Assistant Director of Public Prosecutions filed submissions on behalf of the 1st and 2nd Respondents' dated 6th March 2019. Annette Nyakora, a Litigation Counsel in the Attorney General's Chambers filed submissions dated 5th February 2019 on behalf of the 3rd and 4th Respondents. I have considered the parties' pleadings and submissions, and two 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 Applicant is entitled to the relief sought.

19. The Applicant reiterated the averments in his statement of facts and affidavits, and cited the case of **Paul Stuart Imison & Another vs The Attorney General & 2 Others, Petition No. 57 of 2009** wherein the circumstances which the court takes into consideration in deciding whether or not to halt a criminal process were set out. The Applicant reiterated that in exercise of the discretion to charge a person both the police and 2nd Respondent must do so on the basis of evidence and sound legal principles, and he relied on the decision by Ojwang J. (as he then was) in the case of **Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another, Nairobi HCCC No. 1729 of 2001** for this proposition.

20. Furthermore, that the mere fact that the Applicant will be subject to a criminal process where he will get an opportunity to defend himself is not reason for allowing a clearly flawed, unlawful and unfair trial to run its course, and the Applicant cited the case of **R vs Attorney General Exp Kipng'eno Arap Ngeny , High Court Civil Application No. 406 of 2001** in this regard. He also submitted that it is unnecessary to seek a criminal remedy for the purpose of enforcement when there are available mechanisms provided elsewhere to seek and enforce a civil remedy, and relied on the Ugandan case of **Kigorogolo vs Ruesherika (1969) EA 426**.

21. The Applicant further submitted that the statutory power of the police to arrest and arraign must not result in either abuse or misuse of power, as was in the instant case where there has been violation of the Applicant's constitutional rights in the attempt to arrest and indict him with trumped up charges arising from a commercial dispute pending in the Chief Magistrate's Court. Therefore, that the Respondents are acting in a capricious and arbitrary manner in breach of the Applicant's rights to dignity and freedom, as well as this right to fair administrative action under Article 47 of the Constitution.

22. It was the Applicant's submission that a Judicial Review Court, unlike a trial or appellate court, is not concerned with the innocence or guilt of the applicant but rather with the fairness of the process which the applicant is subjected to. The Applicant cited **Mexiner & Another vs Attorney General [2005] 2 KLR 189** for this position. In addition, the Applicant submitted that the process of arriving at the decision whether a person has committed a crime must be expeditious, efficient, lawful, reasonable and procedurally fair as provided under Article 47

of the Constitution; not brought after the passage of two years. He reiterated that where an aggrieved party takes long before lodging his complaint with the police, as a result of which crucial evidence is lost and/or witnesses become unavailable, subjecting him to prosecution amounts to nothing but persecution. Further, that the Respondents have shown discriminatory treatment of evidence, factual errors of facts and precedent, including failing to take into account material evidence apparent on the face of the record, which has as a whole resulted in erroneous and biased conclusions.

23. In conclusion, the Applicant submitted that he had demonstrated that his prosecution in the said criminal case is not in good faith, is an abuse of court process, which is discernable from the contents of the pleadings in the civil suit. Accordingly, the Applicant cited the cases of **Francis Kirima M'Ikunyua & Others vs Director of Public Prosecutions, Petition No. 461 of 2012; Re: Kisumu Muslim Association, Kisumu HC Misc. Application No. 280 of 2003; Republic vs. The Anti -Banking Fraud Unit & Others, ex parte Salina Betty Pambe Sande, HC JR Misc. Application No. 289 of 2013 and Investment & Mortgages Bank Ltd (I&M) vs. Commissioner General of Police & Others, (2013) KLR.**

24. The 1st and 2nd Respondents submitted that pursuant to Article 157 (10) of the Constitution as read with Section 6 of the Director of Public Prosecutions Act, the 2nd Respondent in the exercise of its power is not subject to the direction or control by any authority, and that the Court can only interfere with or interrogate its actions where there is contravention of the Constitution, otherwise it would amount to usurping the mandate of the 2nd Respondent. Various judicial decisions were cited for this position including the decisions in **Paul Nganga Nyaga vs Attorney General & 3 Others (2013) e KLR** and **Kenya Commercial Bank Limited & 2 Others vs Commissioner of Police and Another, (2013) e KLR.**

25. Citing the case of **George Joshua Okungu and Another –v- Chief Magistrate Court Anti-Corruption Court at Nairobi and Another (2014) e KLR,** the 1st and 2nd Respondents revisited some of the circumstances under which the Court will grant an order prohibiting the commencement or continuation of criminal proceedings. Further, that it was held in the said case that the concurrent existence of criminal and civil proceedings would not *ipso facto* constitute an abuse of the process unless the criminal proceedings are aimed at forcing the Petitioner to submit to the civil claim.

26. The 3rd and 4th Respondents on their part argued that a finding that an act is unlawful is based on evidence, and particularly on matters of fraud which are complex and require investigation. That, once investigations are complete and there is evidence to charge a person, the trial court will be moved to commence trial. They submitted that the 3rd Respondent is empowered under the Magistrates Act and other enabling laws to conduct trial, and the Applicant has not shown that the 3rd and 4th Respondents acted or will act in excess of jurisdiction. They also cited the cases of **Erick Kibiwott Tarus & 2 Others vs Director of Public Prosecutions & 7 Others, (2014) eKLR** and **Francis Matheka & 10 Others vs Director of Public Prosecutions & Another , (2015) eKLR** for the position that the constitutional discretion given to the 2nd Respondent should not be lightly interfered with, and the Applicant's innocence is an issue for the trial Court.

27. It was their submission that the fact that there exists a civil suit is not a bar to any criminal proceedings as provided for by section 193A of the Criminal Procedure Code. Furthermore, that the Applicant is inviting this Court to determine the merits or demerits of the case based on the available evidence. Lastly, that the process leading to the decision to charge the Applicant was properly arrived at, hence the 3rd Respondent is properly seized of the matter.

28. In determining whether the 1st and 2nd Respondents abused their powers in charging the Applicant, I have considered it necessary to lay down the applicable principles of law at the outset. 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 countenancing abuses of prosecutorial powers by way of judicial review 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."

29. The courts will therefore intervene when investigating, prosecuting and adjudicating agencies in the criminal justice system cross the line between proper and improper methods, and will act to review prosecutorial charging decisions in circumstances when there is such an abuse of prosecutorial powers. 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** which are that courts will intervene when a decision is tainted with illegality, irrationality and procedural impropriety. 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.*

30. Specifically on the 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 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”.

31. 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 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.”

32. In the case of R vs. Attorney General Ex Parte Kipngeno 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.”

33. What this Court cannot and should not 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.”

34. 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.”

35. 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 end up there.

36. Coming to the facts of the present case, it is common ground that the Applicant did take a loan facility from a third party, namely Mwananchi Credit Ltd, and his prosecution arises from complainants made by the said third party to the 1st and 2nd Respondents. What is pertinent for this Court is whether the Applicant has provided any evidence that the said prosecution was made in bad faith or with ulterior motives by the 1st and 2nd Respondents. It is notable in this regard that the Applicant did not join the said third party as a party to this proceedings, and as this Court did not hear the said third party, it is not in a position to make any findings as regards the credibility or otherwise of the Applicant's averments as to what transpired between him and the said third party.

37. For the same reason, this Court, having not heard the third party's side of the story cannot also make any finding as to whether there is credible evidence to charge the Applicant, and the proper forum therefore for the Applicant to ventilate his case is the trial Court, where the third party will also be accorded the opportunity to state its case.

38. What this Court however observes from the averments by the Applicant, is that his prosecution arises from a long standing dispute he has had with the said third party, and it is the said third party who moved the 1st and 2nd Respondents act in accordance with their mandate and duties as set down by the Constitution and the law. In this respect, under Article 157(4) of the Constitution, the Director of Public Prosecutions, who is the 2nd Respondent herein, has the power to direct the Inspector General of Police to investigate any information or allegation of criminal conduct. The Inspector General of Police is required to comply. Further, the power of prosecution under Article 157(6) of the Constitution rests with the 2nd Respondent, and under Article 157(10), he does not require the consent of any person to commence prosecution, and shall be independent in the execution of his or her duties.

39. As explained earlier on in this judgment, Courts 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, unless there is clear evidence that he has acted in abuse of process. In the circumstances of the instant application, this Court finds that since the decisions to investigate and prefer charges against the Applicant by the 1st and 2nd Respondents were made not on their own motion, but at the request of an aggrieved third party, the said decisions were made legally, and were not unreasonable or made with any ulterior motives.

40. It is also common ground that the said third party has instituted a civil claim against the Applicant in **Milimani CMCC No 10028 of 2018**, and the Applicant did annex copies of the pleadings in the said case to his supplementary affidavit. The facts constituting the basis of a civil suit may similarly be a basis for a criminal offence and proceedings, and are not a ground for staying the criminal process. Therefore, the concurrent existence of the criminal proceedings and civil proceedings would not 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. Section 193A of the *Criminal Procedure Code* provides as follows in this respect:

“Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

41. In the present case, two observations are again pertinent. Firstly, the said civil proceedings were commenced on 9th November 2018 after the criminal proceedings had been instituted in 29th October 2018, and it cannot therefore be argued that the criminal proceedings were meant to force the Applicant to submit to the civil claim. Secondly, it is evident that from the pleadings in the civil case that the civil proceedings seek the payment of the amount of money owed by the Applicant, which is a cause of action that can only be appropriately brought through civil and not criminal proceedings.

42. 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 said remedy:

“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.”

43. I find that as the Respondents have not been shown to have acted illegally, or in abuse of their powers, no grounds have been established for the orders of certiorari and prohibition sought by the Applicant. In addition, the Respondents cannot be restrained from undertaking their Constitutional and statutory duties. In the premises, the Applicant's Notice of Motion dated 19th March 2018 is found not to be merited, and is accordingly dismissed with costs to the Respondents.

44. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF APRIL 2019

P. NYAMWEYA

JUDGE