REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

PETITION NUMBER 8 OF 2018

IN THE MATTER OF CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ARTICLES 22, 23, 31, 40 AND 165 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

JOHN NGUNGU NGONZI.....PETITIONER

VERSUS

DIRECTOR OF CRIMINAL INVESTIGATIONS....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

AND

REGINA KANINI MULU.....1ST INTERESTED PARTY

SALOME MBULA.....2ND INTERESTED PARTY

JUDGEMENT

1. According to the petitioner, on diverse dates he acquired plots in Katelembo Athiani Muputi Farming & Ranching Co-operative Society Limited (hereinafter referred to as "the Society") from the original members on a willing seller-willing buyer basis. It was his case that after every purchase, he would also engage the services of the society's surveyor who, after paying the requisite fee would show him the physical location of every plot he bought and would beacon the same.

2. It was however disclosed by the petitioner that at one point there were allegations of mismanagement of the affairs of the society and a special audit was ordered by the Ministry of Co-operative Development and Marketing. Though the said audit encompassed the petitioner's plots, it was contended that the audit cleared the petitioner of any wrongdoing.

3. It was averred by the Petitioner that after acquiring the said properties, he lost some of his ownership documents including the allotment letters and agreements and reported the matter to the police and was issued with a police abstract and also swore an affidavit to that effect.

4. The Petitioner further averred that he was approached by the interested parties who offered to purchase plot nos. 2496, 3458, 3127 and 2079 and following the due process, their names were inserted in the Society's register and since then, they have been utilising the said plots.

5. The petitioner reiterated that he acquired his plots legally and that the same can be confirmed from the Society's records. However, in May. 2018, the Petitioner was summoned by officers from the 3rd Respondent in Machakos who arrested him on claims of obtaining money by false pretences from the interested parties. He was then locked up at Machakos Police Station till the following day when he was released

in what he later learnt was a stratagem by the interested parties to force him to give them other plots. As a result, the petitioner was apprehensive that he might be arrested and charged over extraneous reasons due to his resistance to accede to the interested parties' demands.

6. The petitioner therefore sought the following orders:

(a) A prohibitory order against the respondents, their agents, servants and/or representatives from arresting, detaining and/or prosecuting the petitioner over claims by the interested parties.

(b) An order of declaration that the petitioner's rights under Article 29 of the Constitution of Kenya have been infringed by the 1st and 2nd Respondents.

(c) An order of compensation to the petitioner for unlawful detention.

(d) Any other relief the court deems fit to grant.

1st, and 2nd Respondents' Responses and 1st and 2nd interested parties' response.

7. The petitioner was opposed by the 1st and 2nd respondents and the 1st and 2nd interested parties through a replying affidavit sworn by **Isaiah Mwiranga**, a police officer attached to the Directorate of Criminal Investigations, Machakos County who was the office reinvestigating the subject matter.

8. According to the said Respondents and interested parties, the 1st and 2nd interested parties after discovering fraud reported the matter involving obtaining registration of plot no. 1716 by false pretence and obtaining money by false pretence in sale of plot nos. 3127, 3458, 2496 and 2325 at Machakos Police Station vide OB 37/26/4/2018 and OB 37/3/5/2018.

9. The said respondents and interested parties denied that the petition bought Katelembo plot no. 1716 either through membership allocation or buying from the registered owner. According to them, the said plot initially belonged to the late **Lawrence Kavita Kaindi** and later his son **Martin Mutuku Kaindi**. To the said Respondents, without proof of any sale agreement and in absence of the registered owner, the applicant fraudulently managed to transfer Katelembo Plot No. 1716 into his name and immediately sold it to one **Fransisca Munyiva Mumo**. It was averred that on the 10th June, 2006, the petitioner was a witness during the sale of Katelembo Plot No. 1716 to **Patrick Katua Musembi** and that the petitioner himself drew the sale agreement between the two parties. It was averred that it was the same plot Katelembo 1716 which had been sold to the 2nd interested party, **Salome Mbula** by **Patrick Katua Musembi** that was discovered to have been sold to another person by the Petitioner. According to the deponent, his investigations revealed that the petitioner colluded with some other persons to change the records of the said plot and sold the same to unsuspecting buyer, yet the 2nd interested party paid for the transfer of the same plot.

10. It was averred that when the issue was discovered, the applicant offered to relocate the genuine owner **Salome Mbula** by offering another alternative Katelembo plot number 2079 through the initial owner, **Patrick Katua Musembi**, which plot it turned out, belonged to Ukakwithia Self Help Group and the 2nd interested party was turned away. Upon discovery of the same, the petitioner further offered another vacant plot being number 1761 which, it turned out belonged to another person.

11. It was averred by the deponent that he subjected the petitioner's specimen handwriting to examination whereby it was revealed that a note written to the surveyor to allocate plot number 1761 as alternative to plot number 1716 was in the handwriting of the petitioner.

12. According to the deponent, on 14th August, 2010, the petitioner sold Katelembo Plot No. 3127 and 3458 to the 1st interested party **Regina Kanini Mulu** at the cost of Kshs 160,000.00 each but it turned out that the two plots belonged to different people as a result of which the 1st interested party was evicted therefrom. It was revealed that the petitioner failed to explain to the officials of Katelembo how he came to own the two plots yet the same were not registered in his name.

13. It was averred that plot number 2496 which the petitioner again sold to the 1st interested party is already occupied and the owner resides therein hence the 1st interested party could not have knowingly paid the applicant for a plot which is already developed by another person. According to the deponent, the authenticity of the undated sale agreement for the said plot was found wanting.

14. As regards the audit report, it was contended that the same was only concerned about the irregular acquisition of Katelembo land, sale of the same to non-members and its accounts. It did not delve into fraudulent transfer of Katelembo members plots and the sale thereof to unsuspecting members and obtaining money by false pretence, the subject matter of the investigations.

15. According to the deponent, there is a list of disputed transfer by the petitioner under investigations involving deceased which were effected in their absence and those alive have denied having sold the same.

16. It was therefore the deponent's contention that based on the foregoing, there is ample evidence pointing to the fact that the petitioner fraudulently transferred sold and transferred Katelembo plot 1716 to unsuspecting buyer having witnessed the sale thereof to **Patrick Katua Musembi** who sold the same to the 2nd interested party through **Johnson Tuamu**. Likewise, the petitioner obtained money from the 1st interested party knowing that plot numbers 3127, 3458, 2496 and 2325 were not genuinely registered in his name and does not belong to him. The deponent therefore denied the petitioner's contention that he acquired the Society plots from the original owners as lacking supporting evidence.

17. It was therefore averred by the deponent that pursuant to sections 45 and 49(4) of the Police Service Act, and Article 244 of the Constitution, he formed an opinion that the petitioner fraudulently transferred plot nos. 1716 and 2496 into his name before selling the same and sold plot nos. 3127, 3458 and 2325 which he did not own hence the Directorate of Criminal Investigations ought to be allowed to proceed with the charges against the petitioner instead of the petitioner frustrating it. The court was therefore urged to dismiss the petition.

Determinations

18. I have considered the petition, the affidavits in support thereof, the affidavit in opposition to the petition and the submissions filed.

19. It is bears repeating 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. In a petition such as this the court ought not to transform itself into the trial court. 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.

20. The general rule in these kinds of proceedings is that 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. Therefore, mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, is not, on its own and without more, a ground for halting such 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 contends that he has a good defence in the criminal trial ought to be advised to raise the same in his defence before the criminal trial instead of invoking this Court's jurisdiction with a view to having this Court determine such an issue as long as the criminal process is being conducted bona fides and in a fair and lawful manner. 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.

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

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

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

23. 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...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..."**

24. The Court proceeded:

> **"In the instant case it is... alleged that the criminal prosecution is an abuse of the court process epitomised by what is termed as selective prosecution by the Attorney General. It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been be argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...[W]here the prosecution is an abuse of the process of court...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...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."**

25. The Court was however of the view that:

> **"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."**

26. The duty and mandate of the police was appreciated in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR** where 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."**

27. It is therefore clear that whereas the discretion given to the Respondents to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt. However, it must be emphasised that a constitutional petition challenging prosecution does not deal with the merits of the case but only with the process. The Court in such proceedings is mainly concerned with the question of fairness to the petitioner 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, 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.

28. That this Court can in cases where the threshold is met interfere with a criminal process must now be clear from a strict reading of section 4 of the ***Office of the Director of Public Prosecutions Act***, which provides the factors which the Director of Public Prosecution is required to take into account in making a decision whether or not to embark on a prosecution. The said provision provides that:

> ***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.

29. It follows that the discretion and powers given to the DPP under Article 157 of the Constitution cannot be said to be unfettered. 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."**

30. Similarly, in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001**, it was held:

> "**Although the Attorney General enjoys both constitutional and statutory discretion in the prosecution of criminal cases and in doing so he is not controlled by any other person or authority, this does not mean that he may exercise that discretion arbitrarily. He must exercise the discretion within lawful boundaries...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..."**

31. Therefore, this Court is perfectly entitled in appropriate cases to interfere with the decision of the DPP to commence and proceed with prosecution. Such cases include where the criminal prosecution is being instituted to achieve collateral purposes such as where the officers investigating or prosecuting the matter use the prosecution to extract some personal benefits from the petitioner.

32. In this case, the petiti0ner's case is that the reason for his intended prosecution is a stratagem by the interested parties to force him to give them other plots, grounds which the petitioner deem to be extraneous as far as criminal process is concerned. There is no doubt that the invocation of criminal process for the purposes of achieving extraneous object amounts to an abuse of the prosecution process and power. This Court therefore held in **Republic vs. Director of Public Prosecution & Another Ex Parte Chamanlal Vrajlal Kamani & 2 Others [2015] eKLR** in which the Court expressed itself as hereunder:

> **"In my view, criminal proceedings ought not to be instituted simply to appease the spirits of the public yearning for the blood of its perceived victims. This is a country governed by the rule of law and any action must be rooted in the rule of law rather than on some perceived public policy or dogmas. The former has been branded an unruly horse, and when you get astride it, you never know where it will carry you. See Richardson vs. Mellish (1824) 2 Bing 229."**

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

> **"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".**

34. In the said case, the Court went on:

> **"The function of any judicial system in civilized nations is to uphold the rule of law. To be able to do that, the system must have power to try and decide cases brought before the Courts according to the established law. The process of trial is central to the adjudication of any dispute and it is now a universally accepted principle of law that every person must have his day in court. This means that the judicial system must be available to all...Although the Attorney General enjoys both constitutional**

and statutory discretion in the prosecution of criminal cases and in doing so he is not controlled by any other person or authority, this does not mean that he may exercise that discretion arbitrarily. He must exercise the discretion within lawful boundaries...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...In doing so the Court may be guided by the following principles: (i). Where the criminal prosecution amounts to nothing more than an abuse of the process of the court, the Court will employ its inherent power and common law to stop it. (ii). A prosecution that does not accord with an individual's freedoms and rights under the constitution will be halted: and (iii). A prosecution that is contrary to public policy (or interest) will not be allowed...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."

35. That crimes must be punished and proved criminal must be dealt with expeditiously and decisively is not an option. A judicial system that is so porous that permits criminal to go scot-free is not worthy of its name. However, the process of arriving at the decision whether a person has committed a crime must in the words of Article 47 of the Constitution be expeditious, efficient, lawful, reasonable and procedurally fair. Anything less that that will not do. In **Justus Mwenda Kathenge vs. Director of Public Prosecutions & 2 Others[2014] eKLR**, it was held at para 8 that:

"It is now trite that Courts cannot interfere with the exercise of the above mandate unless it can be shown that under Article 157(11);

(i) he has acted without due regard to public interest,

(ii) he has acted against the interests of the administration of justice,

(iii) he has not taken account of the need to prevent and avoid abuse of Court process.

These considerations are not new and have over time been taken as the only bar to the exercise of discretion on the part of the 1st Respondent. I say so taking into account the following decisions where the issue has been addressed;

Githunguri vs Republic [1986]KLR 1 -

In this case, where a prosecution was commenced long after the alleged offence had been committed and where the Attorney-General *(at the time having powers similar to those of the DPP)* had assured the Applicant that he would not be prosecuted, the Court stated *inter-alia* that;

"A prosecution is not to be made good by what it turns up. It is good or bad when it starts"

Gulam & Anor vs Chief Magistrate's Court & Anor [2006]eKLR where the learned judge held that;

"Whilst the power of the High Court to intervene to stop a criminal prosecution must be exercised sparingly, the High Court must always be ready to intervene to prevent any Prosecution which is vexatious, oppressive, malafides, frivolous or taken up for other improper purpose such as undue harassment of a party or abuse of the process of court."

Further, 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 institution of criminal proceedings, there must be in existence material evidence on which the Prosecution can say with certainty that they have a probable 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."

The learned Judge proceeded to state that;

"Prosecution aimed at securing private vengeance or vindictiveness must be stopped as contrary to public policy and the public interest."

He then concluded thus;

"The rationale for prohibiting such proceedings is that for a man to be harassed and put to the expense of perhaps a long trial and then given an absolute discharge is hardly from any point of view an effective substitute for the exercise by the Court (of its inherent power to prevent abuse of its process). On the score of cost alone, the exercise of the power will protect the accused person from expenditure on a trial on indictment which he or she cannot recoup."

(iii) Peter D'Costa vs AG & Anor, Petition No.83/2010 (U.R.)

where the Court stated thus;

"*The process of the court must be used properly, honestly and in good faith, and must not be abused. This means that the court will not allow its function as a court of law to be misused and will summarily prevent its machinery from being used as a means of vexation or oppression in the process of litigation. It follows that where there is an abuse of the court process, there is a breach of the petitioners' fundamental rights as the petitioner will not receive a fair trial. It is the duty of court to stop such abuse of the justice system."*

Michael Monari & Anor vs Commissioner of Police & 3 Others Miscellaneous Application No.68 of 2011 where Warsame, J. *(as he then was)* stated as follows;

"It is not the duty of the court to go into the merits and demerits of any intended charge to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the Respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment."

The reasoning in all the above cases would lead to only one conclusion; whereas the DPP has the ultimate discretion in determining which complaint should lead to a criminal prosecution, where that power is seen to have been manifestly abused, the High Court can intervene by powers conferred by Articles 165(3)(d)(ii) of the Constitution and stop that abuse, including where the Court system is being used to settle scores and to put an accused person to great expense in a case which is clearly not otherwise prosecutable."

36. As already stated hereinabove, the discretion and powers given to the DPP under Article 157 of the Constitution cannot be said to be unfettered. According to **Prof Sir William Wade in his Book *Administrative Law*:**

"The powers of public authorities are…essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land…regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose…But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them…"

37. In **George Joshua Okungu and Another vs. Chief Magistrate Court Anti Corruption Court at Nairobi and Another (2014) eKLR** the Court held that:

"where the intended or ongoing criminal proceedings constitute an abuse of process and are being carried out in breach of or threatened breach of the...constitutional rights, the Court will not hesitate in putting a halt to such proceedings…It is therefore clear that whereas the discretion to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt. Similarly where the commencement or continuation of the criminal prosecution will result in abrogation of the Petitioner's rights and freedoms enshrined in the Constitution, the Court is under a duty to bring such proceedings to a halt. In so doing, it must be emphasised that the Court is not concerned about the innocence or otherwise of the Petitioner. The Court's duty is only to ensure that the Petitioner's rights and freedoms as enshrined in the Constitution are protected and upheld…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 our 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 in *Koinange vs. Attorney General and Others* (supra):

'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.'"

38. In **R vs. Attorney General ex p Kipngeno Arap Ngeny** which was cited with approval and referred to extensively in the ***George Okungu Case***, it was held that:

> **"a prosecution that is contrary to public policy (or interest) will not be allowed...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."**

39. This position resonates with Article 157(11) which provides that:

> ***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.***

40. It is therefore imperative that the DPP must consider the three interests identified in the said article - the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

41. In my view, in exercising their discretion to charge a person both the police and the DPP's office must take into account and must exercise the discretion on the evidence of sound legal principles. As was held by **Ojwang, J** (as he then was) in **Nairobi HCCC No. 1729 of 2001 – Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another**:

> **"...policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense...I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State's prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes".**

42. Therefore, the police are expected to be professional in the conduct of their investigations and ought not to be driven by malice or other collateral considerations. 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 is not necessarily fatal to the prosecution. However, adopting an equivocal approach to investigations by deliberately denying a suspect an opportunity to put forward his version before a person is arraigned in court surely amounts to maladministration of justice. Similarly, where exculpatory evidence is presented to the police in the course of investigation and for some reasons unknown to them they deliberately decide to ignore the same one may be justified in concluding that the police are driven by collateral considerations other than genuine vindication of the criminal judicial process. Neglect to make a reasonable use of the sources of information available before instituting proceedings may therefore be evidence of malice and hence abuse of discretion and power.

43. This Court appreciates that a distinction must be made between a situation where what is alleged is insufficiency of evidence as opposed to where the evidence to be adduced does not disclose an offence. In the former, the right forum to deal with the matter is the trial Court. In the latter, it would amount to an abuse of the criminal process to subject the applicant to such a process. Criminal process ought to be invoked only where the prosecutor has a conviction that he has a prosecutable case. Whereas he does not have to have a full proof case, he ought to have in his possession such evidence which if believable might reasonably lead to a conviction. He does not have to have evidence which disclose a prima facie case under section 210 of the ***Criminal Procedure Code*** since a decision as to whether a prima facie case is disclosed is a jurisdiction reserved for the trial Court. He however must have evidence which satisfy him that his is a case which ought to be presented before a trial Court. He must therefore consider both incriminating and exculpatory evidence in arriving at a discretion to charge the accused. Unless this standard is met, the Court may well be entitled to interfere with the discretion of the prosecutor since that discretion, as stated hereinabove, is not absolute.

44. As was appreciated in **R vs. Attorney General exp Kipngeno ArapNgeny High Court Civil Application No. 406 of 2001**:

> **"Although the Attorney General enjoys both constitutional and statutory discretion in the prosecution of criminal cases and in doing so he is not controlled by any other person or authority, this does not mean that he may exercise that discretion arbitrarily. He must exercise the discretion within lawful boundaries...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...In doing so the Court may be guided by the following principles: (i). Where the criminal prosecution amounts to nothing more than an abuse of the process of the court, the Court will employ its inherent power and common law to stop it. (ii). A prosecution that does not accord with an individual's freedoms and rights under the constitution will be halted: and (iii). A prosecution that is contrary to public policy (or interest) will not be allowed...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. Evidence of extraneous purposes may also be presumed where a prosecution is mounted after a lengthy delay without any explanation being given for that delay...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...A criminal prosecution that does not accord with an individual's freedoms and rights, such as where it does not afford an individual a fair hearing within a reasonable time by an independent and impartial court, will be the clearest case of an abuse of the process of the Court. Such a prosecution will be halted for contravening the constitutional protection of individual's rights...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."

45. In this case, the investigating officer has given a detailed account of the circumstances under which he formed an opinion that the petitioner could have committed an offence of obtaining by false pretences. He has disclosed the complaint that was lodged by the interested parties, nature of the investigations conducted by himself including the handwriting samples taken and the results of their examination. His case, in summary is that the petitioner purported to sale land to the interested parties when he had no interest therein, the same having been transferred into his name fraudulently. He has detailed the grounds upon which this conclusion was arrived at by himself. Fraud, it has been held time and again, cannot conclusively be determined by way of affidavit evidence and more often than not the same requires viva voce evidence tested in cross-examination due to high standard required to prove that allegation.

46. In this case, if I understand the position of the 1st and 2nd Respondents, they have in their possession sufficient evidence on the basis of which they have an opinion based on reasonable grounds that criminal charges ought to be levied against the petitioner. On the other hand, it is the applicant's view that the respondents and interested parties intend to prefer charges against him in order to compel him to give some plots to the interested parties. It is however my view that the material placed before me cannot at this stage be said to be so frivolous that no reasonable prosecutor can possibly base a prosecution upon. In my view, the mere fact that the Respondent's may fail is not necessarily a basis for halting the criminal proceedings. I however, cannot, in fact I am not permitted, to examine minutely and in details the parties' respective cases in order to determine where the truth lies.

47. In **East African Community vs. Railways African Union (Kenya) and Others (No. 2) Civil Appeal No. 41 of 1974 [1974] EA 425**, it was held by the East African Court of Appeal that the onus lies on a person seeking the grant of a prerogative order to establish that it is essential for it to issue since these are not orders that are lightly made.

48. It was therefore held in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** that:

"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...There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an "abuse of process", is a "manipulation", "amounts to selective prosecution" or such other processes, or even supposing that the applicants might not get affair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts."

49. I associate myself with the holding in **Republic vs. Kenya Power & Lighting Company Limited & Another [2013] eKLR** to the effect that:

"It is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted."

50. This is not the appropriate forum where the merits of a criminal case is to be determined. It will be upon the prosecution to show at the trial that the defences which the applicants have alluded to are not available to him. In these proceedings however, the rules are reversed and it is upon the applicant to show that there possibly cannot be any prosecutable case against them, a burden which is no doubt heavy as it has the result, if determined in favour of the applicants, of barring the Respondent from executing its constitutional and statutory mandate. 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."

51. This Court appreciates that the court should not simply fold its arms and stare at the squabbling litigants/disputants parade themselves before the criminal court in order to show-case dead cases. The seat of justice is a hallowed place and ought to be preserved for those matters in which the protagonists have a conviction and stand a chance of seeing the light of the day. In my view the prosecution ought not to institute criminal cases with a view of obtaining an acquittal. It is against the public interest as encapsulated in section 4 of the ***Office of the Director of Public Prosecutions Act*** to stage-manage criminal proceedings in a manner intended to obtain an acquittal. A criminal trial is neither a show-biz nor a cat-walk.

52. However, it must also be taken into account that our criminal process entails safeguards which are meant to ensure that an accused person is afforded a fair trial and the 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 their 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, unless a petitioner demonstrate that the circumstances of the impugned process render it impossible for the applicant to have a fair trial, the High Court ought not to interfere with the trial simply on the basis that the petitioner's chances of being acquitted are high. In other words, this court ought not to transform itself into a trial court and examine minutely whether or not the prosecution is merited.

53. In the instant case, considering the material placed before me by both the petitioner on one hand and the Respondents and the interested parties on the other, I am not satisfied that this is a proper case to issue the orders sought herein. and 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".**

54. In the premises I find no merit in this petition. As was held in **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."**

55. Consequently, this petition fails and is dismissed but with no order as to costs since none of the parties complied with this court's directions to furnish the soft copies of their pleadings and submissions.

56. Orders accordingly.

Read, signed and delivered in open court at Machakos this 20th day of June, 2019

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Ngatia for Mr Ngolya for the Interested Party

CA Geoffrey