



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 38 OF 2019

IN THE MATTER OF AN APPLICATION FOR ORDERS OF A DECLARATION AND MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

DR. JOSEPH K. NJOROGE.....INTERESTED PARTY

EX PARTE : JUSTUS KIMELI ROTICH

JUDGMENT

Introduction

1. The *ex parte* Applicant herein (hereinafter the Applicant) is Justus Kimeli Rotich, a Kenyan citizen who states that he has brought the instant proceedings in the public interest. He has filed an application for judicial review orders against the Director of Public Prosecution (the Respondent herein), which is an independent office created under Article 157 (1) of the Constitution that is in charge of criminal prosecutions. The Applicant also joined Dr. Joseph K. Njoroge, a former Managing Director of Kenya Power and who is currently the Principal Secretary for Ministry of Energy and Petroleum, as an Interested Party.

2. The Applicant in his application which was brought by way of a Notice of Motion dated the 20th February 2019, is seeking the following orders:

a. A declaration be and is hereby issued that the Respondent's selective omission to investigate or charge, the Interested Party, Dr. Joseph K Njoroge, the current Principal Secretary for Ministry of Energy and Petroleum, who served as Kenya Power Managing Director from June 2007 to May 2013, when some of the offences in Milimani ACC 25 and 26 of 2018 were committed, violates Article 157(11) of the Constitution as read with section 4 of the Office of Public Prosecution Act, 2013; and

b. An order of mandamus be and is hereby issued directing the Respondent to investigate and to charge, the Interested Party, Dr. Joseph K Njoroge in relation to the offences in Milimani ACC 25 and 26 of 2018 within 3 months of the court's order.

3. The application was supported by the Applicant's statutory statement dated 15th February 2019, and a verifying affidavit sworn by the Applicant on the same date. The application was opposed by the Respondent through Grounds of Opposition dated 8th April 2019, and a replying affidavit sworn on 23rd January 2019 by Inspector Misheck Kagera, a police officer attached to the Directorate of Criminal Investigations and one of the investigating officers in the subject matter of this application. The Interested Party also opposed the application in a replying affidavit he swore on 3rd April 2019.

4. The Application was canvassed by way of written submissions which were orally highlighted in a hearing held on 30th September 2019. The Applicant's Advocates on record, Hellen Ngesa & Partners Advocates, filed submissions dated 20th June 2019 which were highlighted by Mr. Ochiel, while Henry Kinyanjui, a Senior Prosecution Counsel, filed and highlighted submissions dated 24th June 2019 on behalf of the Respondents. Waweru Gatonye & Company Advocates filed submissions dated 25th September 2019 on behalf of the Interested Party,

which were highlighted by Mr. Muchiri during the hearing.

The Applicant's Case

5. The Applicant's case briefly is as follows. That on 16th July 2018, the Respondent preferred criminal charges against two former Kenya Power Managing Directors, Dr. Ken Tarus and Dr. Ben Chumo in **Milimani ACC No 25 of 2018 (R vs Ken Tarus and 8 Others)** and **Milimani ACC No 26 of 2018 (R vs Ben Chumo & 14 Others)**, respectively. Further, that they were charged with alleged procurement offences committed between 3rd August, 2012 and 12th June, 2018. According to the Applicant, the Respondent however selectively omitted with no reasonable explanation, to investigate or charge the Interested Party, notwithstanding that he served as Managing Director from June 2007 to May 2013, when some of the alleged procurement offences were committed. It is contended that this amounts to selective prosecution and abuse of prosecutorial discretion.

6. The Applicant cited Article 157(6) of the Constitution under which the Respondent enjoys monopoly of the State powers of prosecution, and may institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed; take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and discontinue at any stage before judgment is delivered any such criminal proceedings. It is however contended that the Respondent's independence and prosecutorial discretion in the discharge of his mandate must be exercised in accordance with the Constitution and the law.

7. The Applicant contended in this respect that the Respondent is bound by the national values and principles of governance under Article 10 of the Constitution when he makes or implements any public prosecution policy decision. That, these values include the rule of law, human dignity, equity, equality, human rights, non-discrimination, good governance, integrity, transparency and accountability. The Applicant contends that under Article 27(1) of the Constitution every person is equal before the law and has the right to equal protection and equal benefit of the law. Further, that Article 35 of the Constitution as read with section 5 of the Access to Information Act, 2016, entitles every person to information held by the Respondent unless withholding the information is reasonable and justifiable in an open and democratic society.

8. It is further contended that Article 157(11) of the Constitution as read with section 4 of the Office of Public Prosecution Act, 2013 binds the Respondent to 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. It is the Applicant's case that the Respondent ignored his request for information on the decision not to charge the Interested Party. The Applicant also made reference to Section 4 of the Office of Director of Public Prosecution Act, 2013 which sets out binding guiding principles namely: impartiality, promotion of public confidence in the integrity of the Office; the need to discharge the functions of the Office on behalf of the people of Kenya; he need to serve the cause of justice, prevent abuse of the legal process and public interest; protection of the sovereignty of the people; observance of democratic values and principles and constitutionalism.

9. The Applicant also cited Article 47 of the Constitution as read with section 4(1) of the Fair Administrative Action Act that guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Hence, that the decision or omission to prosecute is an administrative action which this court has the power to review, and section 7 of the Fair Administrative Action Act empowers this court to review administrative action *inter alia* where the administrator: was biased, or the administrative action was taken with an ulterior motive, or failed to take into account relevant considerations. he Applicant contends that the Respondent's selective omission to investigate or charge the Interested Party despite the close nexus between him and the offences in **Milimani ACC No 25 of 2018** and **Milimani ACC No 26 of 2018** amounts to selective prosecution and abuse of prosecutorial discretion.

The Respondent's Case

10. The Respondent argues in their grounds of opposition that the instant application lacks in merit as the Applicant have failed to present material particulars as to demonstrate any real prejudice occasioned to him if the orders sought are not granted. Further, that the Applicant is a meddlesome interloper seeking orders without any legal and factual basis and has no *locus standi* before this Court. The Respondent also alleges that the Applicant is inviting this Court to descend into the arena of disputants after the hearing of the Prosecution's evidence in **Milimani ACC No 25 and 26 of 2018** have commenced and the adversarial nature of our legal system does not allow the court to venture into the business of assisting parties to make their case.

11. According to the Respondent, he directed the Directorate of Criminal by a letter dated 25th May 2018 to carry out investigation on allegations that companies affiliated to employees of Kenya Power and Lighting Company were awarded multi-billion shillings contract at the Company. Further, that the investigations leading to the charges in **Milimani ACC No 25 of 2018** and **Milimani ACC No 26 of 2018** were done in accordance with the law and upon evaluation of all factors revealed in the investigations, a decision was reached to charge the accused persons in those cases.

12. It was contended that the Interested Party was working at Kenya Power and Lighting Company as the Managing Director from 2007 to 2013, while **Milimani ACC No 25 of 2018** relates to irregular and illegal award of tender for Supply of Labor and Transport Services for the period 2017 to 2018 vide tender number KPI/9AA-2/OT/58/PJT/16-17 during which period the Managing Director of Kenya Power was Dr. Ken Tarus and not the Interested Party. According to the Respondent, investigations revealed that the said Dr. Ken Tarus was involved in the process leading to the irregular award of the said tender. Further, that it was established there was no wrongdoing on the part of the interested party specifically in relation to **Milimani ACC No 25 of 2018**.

13. It was also the Respondent's contention that the investigations leading to **Milimani ACC No 26 of 2018** were in regard to the irregularities in the implementation, cancellations and purported out of Court settlement in regard to Tender No KPI/9AA-3/PT/09/11-12 for supply of Distribution Transformers. That, the process leading to the award of tender was above board, and that the award of the tender was issued to Muwa Trading Company on 17th May 2012 by the then Chief Manager Supplies Stores and Transport Engineer, one John Ombui, who is an accused in **Milimani ACC No 26 of 2018**. Further, that the investigations revealed that the Contract was executed on 3rd August 2012 by the parties, and that the Interested Party thereafter ceased from being the Managing Director of Kenya Power & Lighting Company

with effect from 1st July 2013.

14. According to the Respondent, the investigations in **Milimani ACC No 26 of 2018** centered on the implementation, cancellation and the out of court settlement touching on Muwa Trading Company, which implementation commenced in September 2013, after the Interested had ceased to be the Managing Director of the Company. Further, that the implementation, cancellation and out of court settlement of the tender leading to **Milimani ACC No 26 of 2018** was conducted under the watch of Dr. Ben Chumo and Dr. Ken Tarus who succeeded the Interested Party herein as Kenya Power's Managing Director. It is also averred that the said Interested Party was summoned to Directorate of Criminal Investigations on 15th July 2018 where he recorded his statement indicating among others things that he left Kenya Power in June 2013.

15. The Respondent asserted that the decision to charge the accused persons in **Milimani ACC Nos 25 and 26 of 2018** arose from his directive after careful review of the same and taking into consideration the threshold of evidence availed and in accordance with the National Prosecution Policy. That therefore, the Applicant is inviting this court to unjustly interfere with and usurp the constitutional decision performed pursuant to Article 157 of the Constitution. It is averred that the Applicant has in any case not demonstrated that he has any evidence to support any of the allegations against the Interested Party and as such the purported trial against the interested party cannot stand.

16. Lastly, it was averred that the Applicant has no *locus Standi* to get audience before this Court let alone benefit from the orders being sought as the Respondent exercised their discretion constitutionally with no violation of any of the Applicants rights or breach of public interest. Hence, the application should be dismissed with costs and the criminal trial against the accused persons be allowed to proceed to its logical conclusion.

The Interested Party's Case

17. The Interested Party's deposition was that that the instant Application is frivolous, scandalous, mischievous and an abuse of the court process, and raises no reasonable cause of action against him as the Applicant has not provided any particulars of the laws he has to warrant an investigation and charging. Further, that this Court cannot direct the Respondent to charge anybody. He averred that he was the Managing Director of Kenya Power and Lighting Company Ltd between the years 2007 and 2013, and specifically, that he left in June 2013 upon being appointed the Principal Secretary in the Ministry of Energy.

18. According to the Interested Party, in the year 2011 there was a Tender No. **KPI/9AA-3/PT/09/11-12** that was floated by the Kenya Power and Lighting Company Ltd for supply of distribution transformers, on a long term basis, as approved by the Board of Directors. He avers in this regard that, procurement procedures as outlined in the Public Procurement and Assets Disposal Act were followed by the various technical teams with a view to awarding the tender to successful bidders. That, in this case seven (7) companies were awarded the tender and subsequently, the various contracts were drawn for each of the successful companies and served to the companies for delivery on need basis.

19. The Interested Party further averred that having left Kenya Power and Lighting Company Ltd sometime in June 2013, he was not involved and/or privy to the implementation of the aforementioned contracts. That therefore, the allegations by the Applicant do not concern him as most of them are post 2013. Further, that Applicant has not produced any evidence to demonstrate why the Respondent should investigate and charge him. According to the deponent, the Applicant's act of dragging his name into the instant proceedings is in bad faith, dishonest, unfounded, merely speculative and aimed at tainting his image and misleading the Court. The deponent averred in conclusion, that on 15th July 2018, he recorded a statement at the Director of Criminal Investigations Headquarters in Nairobi, and that the Respondent in exercise of its mandate did not deem it fit to charge him with any offence.

The Determination

20. I have considered the parties' pleadings and submissions, and three issues arise for determination. The first is whether the Applicant has *locus standi* to bring the current application. Second, is whether the Respondent's decisions not to investigate and prosecute the Applicant was illegal and/or in abuse of his powers. Lastly, whether the Applicant is entitled to the relief sought.

On the Applicant's Locus Standi

21. On the first issue on whether the Applicant has *locus standi* in this case, Mr. Oliech in his oral submissions contended that the Applicant has locus under Article 22 and 258 of the Constitution, and this Court has jurisdiction under Articles 23, 47 and 165(3)(d) as the Respondent is a constitutional office and his decision on whether or not to charge a person is an administrative act and is governed by Article 47 of the Constitution as read together with the Fair Administrative Action Act. The Respondent, while conceding that the Constitution of Kenya 2010 expanded *locus standi* beyond the pre-2010 Constitution, cautions that the court must always in appropriate cases address this concern whenever it is raised. It is submitted that the standard guide for *locus standi* must remain the command in Article 258 of the Constitution.

22. According to the Respondent, the instant motion is wrongly premised on Article 23 of the Constitution which provides for remedies that might be granted in the context of bill of rights that a party seeks to enforce under article 22. That, these articles anticipate a grievance that is personal in nature and not a generic ambiguous omnibus claim as the one in this Application. It is submitted that the Applicant does not disclose the basis for his claims and therefore has no legal or factual basis for seeking the orders sought. The Respondent cited the case of **Humphrey Makokha Nyongesa & Another vs Communications Authority of Kenya & 2 Others, [2018] eKLR** where it was held that a person who wishes to enforce the Constitution must fit into one of the categories set out in Articles 23 and 258 of the Constitution, and must specify the capacity in which they have come to court under either of the two constitutional provisions.

23. While citing the decision in **Okiya Omtatah Okoiti & 2 others v Attorney General & 3 Others [2014] eKLR**, the Respondent submitted that parties approaching the court in the name of public interest litigation must demonstrate that they are acting *bona fide* and not for personal gain, private motivation or other oblique considerations, and reiterated the position that public interest litigation cannot be used

for the purposes of vindication of personal grudges or enmity and must be used for legitimate claims based on the Constitution and nothing else but the law.

24. It is now an established principle that Courts have adopted a liberal approach to applicants bringing judicial review applications in the public interest. The Constitution of 2010 in this regard makes generous provisions on *locus standi* as a constitutional principle of public law and for promotion access to justice, over and above sufficient personal interest in the interest of enforcement of public law duties under Articles 22 and 258 of the Constitution. Article 258 of the Constitution provides as follows:

“(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

- (a) a person acting on behalf of another person who cannot act in their own name;**
- (b) a person acting as a member of, or in the interest of, a group or class of persons;**
- (c) a person acting in the public interest; or**
- (d) an association acting in the interest of one or more of its members. “**

25. Similar provisions are found in Article 22 in relation to the enforcement of the Bill of Rights. In judicial review proceedings, the issue of standing was raised in **Ms. Priscilla Nyokabi Kanyua vs. Attorney General & Interim Independent Electoral Commission Nairobi HCCP No. 1 of 2010**, in which the Court expressed itself as follows:

“...Our legal system is intended to give effective remedies and reliefs whenever the Constitution of Kenya is threatened with violation. If an authority which is expected to move to protect the Constitution drags its feet, any person acting in good faith may approach the court to seek judicial intervention to ensure that the sanctity of the Constitution of Kenya is protected and not violated. As part of reasonable, fair and just procedure to uphold the Constitutional guarantees, the right to access to justice entails a liberal approach to the question of *locus standi*. Accordingly in constitutional questions, human right cases, public interest litigation and class actions, the ordinary rules of Anglo-Saxon jurisprudence, that an action can be brought only by a person to whom legal injury is caused, must be departed from. In these types of cases, any person or social action groups, acting in good faith, can approach the court seeking judicial redress for a legal injury caused or threatened to be caused or to a defined class of persons represented, or for a contravention of the Constitution, or injury to the nation. In such cases the court will not assist on such a public-spirited individual or social action group espousing their cause, to show his or their standing to sue in the original Anglo-Saxon conception...”

26. Accordingly, where a person is of the *bona fide* view that a provision of the Constitution has been violated or is threatened, the person is entitled to bring an action to protect the Constitution. In the applicant herein, it is my view, allowed to commence judicial review proceedings as he alleges that there are provisions of the Constitution which have been violated, pursuant to Article 22 and 258 of the Constitution. I therefore find that the Applicant was properly within his rights to institute these proceedings and has standing, as the nature of the claim he is presenting is not in relation to his own private interests, but one of public law and the proper application of the Constitution.

On The Exercise of the Respondent’s Powers

27. On the second issue of whether there was illegality committed or abuse in the exercise of the Respondent’s powers, the Applicant submitted that contrary to Articles 27, 10 and 157(11) of the Constitution; and Section 4 of the Office of the Director of Public Prosecutions Act, 2013, the Respondent selectively omitted the Interested Party from the investigations and charges. The Applicant submits that the decision not to investigate or charge the Interested Party is selective, discriminatory and a misuse or abuse of the Respondent’s constitutional mandate and duty of impartiality. That, there is no reasonable explanation for the omission to investigate or charge the Interested Party in relation to the offences in the charge sheet in **Milimani ACC 26 of 2018** in relation to tender No. KP1/9AA-3/PT/09/11-12.

28. According to the Applicant, the offences in these counts, especially, occurred during part of the period the Interested Party served as Kenya Power Managing Director between 3rd August, 2012 and 12th June, 2018. The Applicant cited the case of **Ekuru Aukot vs Independent Electoral & Boundaries Commission & 3 Others [2017] eKLR** where this court restated the definition of discrimination. According to the Applicant, the charge sheet differentiates between the Interested Party and the persons who preceded him or served under him at the time in question. The Applicant submits that the differentiation is discriminatory and was informed by the Interested Party’s current status as Permanent Secretary for the Ministry of Energy and Petroleum. It is submitted that contrary to Article 24(3) and as affirmed in **Ekuru Aukot vs Independent Electoral & Boundaries Commission & 3 Others [supra]**, the Respondent has not discharged the burden of proving that the discrimination was justified.

29. It was also the Applicant’s submission that Article 35 as read with section 5 of the Access to Information Act, 2016 entitles every person to information held by the Respondent unless withholding the same is reasonable and justifiable in an open and democratic society. It is submitted that the Applicant, vide letter received by the Respondent on 8th February 2019, sought reasons for the Respondent’s decision not to investigate or charge the Interested Party and has not received a response to date. That therefore, the Respondents violated Article 35 of the Constitution.

30. The Respondent's submissions were that from the documents before the Court, the applicant seeks to purely challenge the merits of the said decision whereas judicial review proceedings are concerned with the manner and not the merits of any decision making process. It is submitted that the Respondent has sufficiently explained that due consideration of the Interested party's role was given and his evidence evaluated in accordance with the Constitutional dictates and statutory requirements including the National Prosecution policy and a decision made in that regard. Hence, the Applicant's assertions that the decision of the 1st Respondent was selective are simply not true. That in any case, the Applicant has presented no factual basis for challenging the said decision. Further, that the applicant has not tendered any evidence of how the impugned process was grossly unfair and violates the Bill of Rights so as to warrant the intervention of the court.

31. It was further submitted that there is no evidence of manipulation, abuse, misuse of court process by the Respondent, and no threat or danger to the rights of the applicant to a fair trial before an impartial arbiter. Reference was made to the decisions in Kuria & 3 Others vs Attorney General, (2002) eKLR 69 and Attorney General vs IG, DPP ex parte Thomas Nganga Munene, (2014) eKLR that the court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings. The Respondent also cited the case of Diamond Hasham Lalji & Another vs Attorney General & 4 Others [2018] eKLR for this position

32. The Interested Party on his part submitted that no material evidence has been produced to demonstrate the culpability of the Interested Party with regard to any alleged offences, which would form a basis for the Respondent to prefer charges against him. It was submitted that the law requires he who alleges to prove the allegations by way of evidence that can enable a court of law to arrive at a justiciable determination under section 107 of the Evidence Act. Reference was also made to the case of Anarita Karimi Njeru vs Republic [1979] eKLR, where the High Court held follows:

“We would however again stress that if a person seeking redress from the High Court on a matter which involves a reference to the constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision of which complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”

33. The Interested Party submitted that nowhere in the pleadings filed by the Applicant has any shred of evidence been produced to demonstrate how the Interested Party flouted procurement laws and regulations to warrant a criminal charge by the Respondent. Further, that the Applicant has not drawn any link of involvement of the Interested Party in the alleged offences save for him holding an office at Kenya Power and Lighting Company at the time the alleged offences were committed. It is also submitted that the Applicant has not demonstrated any bias on the part of the Respondent in failing to charge the Interested Party. It is therefore the Interested Party's submission that without any evidence of his impropriety or biased investigations by the Respondent, the instant application lacks reasonable precision, is heavily reliant on speculation and cannot stand.

34. The Interested Party further submitted that this Court has no power to direct the Respondent to investigate and charge him. It was submitted that Article 157 of the Constitution mandates the Respondent to exercise State power of prosecution. That, in exercising this mandate, the Respondent shall not be under the direction or control of any person or authority. Reference was made to the High Court decisions in Francis Anyango Juma vs The Director of Public Prosecutions and Another [2012] eKLR, Kenya Commercial Bank Limited & 2 Others vs Commissioner of Police and Another, [2013] eKLR, and Paul Ng'ang'a Nyaga & 2 others vs Attorney General & 3 Others, [2013] eKLR, for the position that this Court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they acted in contravention of the Constitution.

35. Lastly, it was submitted that the Court's power to interfere with the mandate of the Respondent should be exercised sparingly and in the clearest of cases. Additionally, that prosecutorial decisions should be left to the discretion of the Respondent who is constitutionally mandated to determine the basis of evidence that can sustain a criminal charge.

36. In determining whether the Respondent abused his powers in charging the Applicant, I have considered it necessary to lay down the applicable principles of law. 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.”

37. 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. However, the Court cannot still substitute its decision with that of the Administrator in such circumstances.*

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

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in

personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, by whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far from that which the courts indeed the entire system is constitutionally mandated to administer... In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute”.

39. 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.”

40. In the case of R vs. Attorney General Ex Parte Kipgeno 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.”

41. 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.”

42. 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.”

43. Coming to the facts of the present case, it is not disputed that the investigations leading to the charges in **Milimani ACC 25 of 2018** and **Milimani ACC 26 of 2018** arise from tenders awarded by Kenya Power and Lighting Company. It is also not in dispute that the Interested Party was at one time a Managing Director of the said company. What is in dispute is whether the Interested Party ought to be charged for any irregularities in the said tenders. In this respect, under Article 157(4) of the Constitution, the Director of Public Prosecutions, who is the 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 1st 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.

44. 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 the Respondent has given an explanation of the reasons why they did not charge the Interested Party with any of the offences in **Milimani ACC 25 of 2018** and **Milimani ACC 26 of 2018**, and has also brought evidence of its investigation of the Interested Party and of the statement he recorded with the Directorate of Criminal Investigations in this regard, which was annexed as Annexure “MK7” to its replying affidavit. In the absence of any evidence by the Applicant to controvert the assertions and evidence brought by the Respondent, this Court cannot make a finding that the Respondent’s decisions were made illegally, or in abuse of his powers.

45. 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. Alternatively, the Applicant has the mechanism of private prosecution, in the event that he is of the view that the evidence available merits a prosecution of the Interested Party.

46. Lastly, on the allegations made in respect of violation of the Applicant’s right to access information, I note that the Applicant’s letter to the Respondent annexed as Annexure “JKR 3” to his verifying affidavit requesting the said information was dated 3rd February 2019, and is shown to have been received by the Respondent on 8th February 2019. The Applicant thereupon filed the instant application on 15th February 2019, a week later.

47. It is notable that the procedures for accessing information are set out in section 8 to 11 of the Access to Information Act, which includes an application for access to information by an applicant who shall provide details and sufficient particulars for the public officer or any other official to understand what information is being requested.; the processing of the application by the requested officials with set timelines, the transfer of the application or any part of it, to another public entity or private body, if the information requested is held by that other public entity or private body, and the manner of accessing the information. It is therefore not reasonable to expect the Respondent to have complied with the Applicant’s request by the time of filing this application, and it would thus be premature for this Court to make a finding in this regard.

On the Reliefs Sought

48. On the last issue as regards the relief sought, the Applicant has sought orders of a declaration and mandamus. 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 order of mandamus:

““...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...”

49. The remedy of a declaration is on the other hand normally granted to state authoritatively the lawfulness of a decision, action or failure to act, the consequences that follow from a quashing order, the existence or extent of a body’s powers and duties, and the rights of individuals or the law on a particular issue.

50. I find that as the Respondent has not been shown to have acted illegally, or in abuse of his powers, no grounds have been established for the orders of a declaration and mandamus sought by the Applicant. In addition, the Respondent cannot be restrained from undertaking his Constitutional and statutory duties. In the premises, the Applicant's Notice of Motion dated 20th February 2019 is found not to be merited. However, in light of the public interest nature of the application, I order that each party shall meet its own costs of the application.

51. Orders accordingly.

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

P. NYAMWEYA

JUDGE