



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISC. CIVIL APPLICATION NO. 116 OF 2014

IN THE MATTER OF LAW REFORM ACT, CAP 26, LAWS OF KENYA

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE CRIMINAL PROCEDURE CODE, CAP 75, LAWS OF KENYA

AND

IN THE MATTER OF PENAL CODE, CAP 63, LAWS OF KENYA

IN THE MATTER OF ADVOCATES ACT, CAP 16 LAWS OF KENYA

AND

**IN THE MATTER OF AN APPLICATION BY HESBON ONGETTA MOMANYI FOR LEAVE
TO APPLY FOR ORDERS OF PROHIBITION, CERTIORARI**

BETWEEN

HESBON ONGETTA MOMANYI

T/A O. H. MOMANYI & CO. ADVOCATES.....APPLICANT

VERSUS

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

THE OCS, CENTRAL POLICE STATION NAIROBI...2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

AND

STEPHEN NGARI KAHOME.....INTERESTED PARTY

JUDGEMENT

Introduction

1. By a Notice of Motion dated 18th April, 2014, the *ex parte* applicant herein, **Hesbon Ongetta Momanyi**, wrongly described in the title as the applicant which ought to be the Republic, seeks the following orders:

- a. An order of Certiorari, to remove into this Hon. Court for the purpose of being quashed, and quash, the proceedings and/or the respondents' decision to charge the ex-parte applicant, Hesbon Ongetta Momanyi in relation to L.R. No. 209/11095/39.**
- b. An order of prohibition and /or conservatory, directed at the 1st, 2nd and 3rd Respondents, prohibiting the Director of public prosecutions and/or his agents the 2nd and 3rd respondents from charging or presenting a charge sheet against the ex-parte applicant herein, Hesbon Ongetta Momanyi in any Court with an offence relating to the transaction in, L.R. No. 209/11095/39.**
- c. That costs of this application be provided for.**

Applicant's Case

2. According to the applicant, he diligently and pursuant to the provisions of the sale agreement executed by the parties thereto acted for the vendor of a parcel of land more specifically known as L.R. NO.209/11095/39, as an advocate.

3. It was deposed that it was express provisions of the said Agreement that the completion period would be within ninety (90) days, from the date of execution thereof, and that the purchasers, and/or their lawyers would give a professional undertakings, before the vendor releases completion documents. It was however agreed that the ex-part applicant, would release the deposit to the vendor.

4. According to the applicant, after the execution of the agreement and receipt of the deposit, the purchaser's advocate demanded for custody of the original title deed form ex-parte applicant which the applicant duly transmitted on the 21st February 2014.

5. It was however averred that there was a mutual agreement between the ex parte applicant and the advocate of the interested party herein that the applicant would release a sum of Kshs. 500,000/= to the vendor pending receipt of the completion documents. Accordingly, the ex parte applicant released the said sum of Kshs 500,000/= to the vendor who acknowledged receipt thereof by executing acknowledgement note but the applicant retained the balance of Kshs.340,000/= pending and execution of the transfer.

6. It was however averred that on 7th March 2014, the interested party demanded for the said sum Kshs. 340,000/= which the applicant released to the interested party's advocate by his personal cheque no. 00007 dated 10th March 2014, in favour of Kigen & Associates receipt of which the interested party's advocate acknowledged by executing an acknowledgement note. The applicant however retained Kshs 20,000/= as his legal fees.

7. It was averred that on the 10th March 2014, the applicant was summoned by the 2nd respondent to Central Police Station to give his statement in writing about the transaction which the applicant did the same day. However on the 19th March 2014, the applicant was summoned again by the 1st respondent to his office and on arrival he was informed that a decision to charge him with an offence of obtaining money by false pretenses had been made, unless he paid a sum of Kshs. 500,000/- to the interested party, a demand the applicant refused to meet.

8. It was averred that the 2nd respondent accordingly took the applicant's finger prints and gave him a cash police bond of Kshs 100,000/= and bonded him to appear before the Nairobi Chief Magistrate on the

28th March 2014 to take a plea on charges of obtaining Kshs, 500,000/= from the interested party by false pretenses, a charge the applicant contended was arrived at without regard to the laid down provisions of law, and the stipulations of the sale agreement. According to the applicant, he cannot be charged with an offence of obtaining money by false pretences, contrary to section 313 of the **Penal Code**, Cap 63, Laws of Kenya, without regard the provisions of the sale agreement and in respect of a conveyance relating to L.R. No. 209/11095/39, when he acted as an advocate for the vendor, and strictly pursuant to the sale agreement.

9. The applicant averred that he did not know the complainant against him as he neither acted for him, nor did he act as a seller (vendor) of as L.R. No. 209/11095/39.

10. According to the applicant, the **Advocates Act** Cap16, Laws of Kenya has provided a mechanism on how he should be handled or dealt with, in case of any mischief on his part and not as a criminal suspect. He however disclosed that pursuant to the provisions of the **Advocates Act**, the interested party has threatened to institute disciplinary proceedings.

11. The applicant reiterated that the action and decision of the 1st, 2nd and 3rd respondents, herein, to prefer the charges against him, in the Chief Magistrates Court at Nairobi violates the legal principles of the Constitution of the Republic of Kenya, the **Advocates Act**, and the express provisions of the sale agreement governing the transaction in issue. To him, the intended charges and his intended prosecution is in breach of the 1st, 2nd and 3rd respondents' constitutional duty of the 1st respondent as a public prosecutor and will amount to breach of his fundamental rights and freedom as an officer of this court, and an advocate of High Court of Kenya and therefore calls for this Court's intervention, by way of reviewing the 1st, 2nd and 3rd respondents' said decision. It was his view that the 1st, 2nd and 3rd respondent acted with *mala fides* in deciding to prefer the said charges against him.

12. It was the applicant's case that the decision of the 1st, 2nd and 3rd respondent to charge him is calculated to embarrass, harass, blackmail and/or coerce him to pay the complainant, the deposit, contrary to the provisions of the sale agreement in issue.

13. He therefore asserted that this Court has powers over all quasi judicial bodies, institutions and organizations and it is empowered to stop the respondents from presenting its charge sheet against him in the Chief Magistrate Court at Nairobi or any other Court elsewhere, touching on the matter relating to the transaction in question.

14. It was the applicant's contention that if he is charged with criminal case he would suffer irreparable loss, damages, and reputation as an officer of this court because he would be given a wide negative coverage and publicity by both the print and electronic media and his reputation damaged.

15. It was further averred by the applicant that the interested party filed a complaint against him at the LSK Disciplinary Committee on 4th April, 2014 and that he availed all necessary documents to the police for consideration but the police still proceeded to arrest him. He disclosed that the judgment of the said complaint was delivered and he was found guilty of failing to account for Kshs. 520,000/= money belonging to the interested party a decision against which he filed an appeal vide Appeal No. 698/16 which is pending in the High Court.

16. The applicant however averred that he was unaware of criminal case No. 857/2013.

Respondents' Case

17. The application was opposed by the Respondents.

18. According to them, on 17th February 2013, **Mr. Stephen Ngari Kahome** saw an advertisement on *Daily Nation* about a plot being sold at Kuguru Estate-South C (L.R. No. 209/11095/39) Nairobi for Kshs. Three million (Kshs 3, 000.000) and being interested therein he made a telephone call on the

number provided in the paper being Telephone No. 0733559744 which belonged to one **Mr. Ngugi** the purported agent of the property.

19. It was averred that **Mr. Stephen Ngari Kahome** together with **Mrs. Ngima** visited the site on 23rd January 2014 and he was given a copy of the title deed which they later presented it to the Lands Registry for search, which search was conducted and on 29th January 2014 and the results indicated that the property had a clean title. On the 7th February 2014, **Mr. Stephen Ngari Kahome** was introduced by the owner of the land one **Mr. Joshua Nyawara Otieno** by **Ms. Ngima** and after negotiating the purchase price he agreed to sell the plot at Kshs Two Million Eight Hundred Thousand (Kshs 2.8000.000/=) and pursuant thereto **Mr. Stephen Ngari Kahome** paid him Eight Hundred and Forty Thousand Shillings (Kshs 840,000/= and the remaining balance was to be paid on exchange of an executed transfer.

20. According to the Respondents, the said sum of Kenya Shillings Eight Hundred and Forty Thousand Shillings (Kshs 840,000/=) was transferred to **O.H. Momanyi** the sellers advocate account on the 20th February 2014 after which the said sellers advocate gave one **Kigen** the buyers advocate the original title deed. However, when **Mr. Stephen Ngari Kahome** followed up on the matter he was told that they were waiting for the seller to sign the transfer to effect the same.

21. It was averred that on 6th March 2014 he got a call from the agent one **Mr. Ngugi** informing that he had met the real owner of the plot and **Mr. Stephen Ngari Kahome** made a call to his advocate to **Mr. Kigen** who later got in touch with **Mr. Momanyi** and informed him of the new developers who told him in return that he had already paid Five Hundred Thousand Shillings (Kshs 500,000/=) to the seller **Joshua Nyawara Otieno**.

22. It was averred that **Mr. Stephen Ngari Kahome** later reported the matter to the police since **Mr. Joshua Nyawara Otieno** the purported owner of the land had switched of his phone and subsequently criminal charges were preferred against him vide criminal case No. 857/2012.

23. It was the Respondents' case that this application has been filed in bad faith, misconceived and abuse of the court process and meant to defeat the cause of justice.

24. The Respondents averred that the Directorate of criminal investigations' is established under section 28 of the **National Police Service Act** under the direction, command and control of the Inspector General of National Police Service and that its functions include but are not limited to:

- a) Collecting and providing criminal intelligence.
- b) Undertaking investigations on serious crimes including homicide. Narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime and cyber crime among others;
- c) Maintaining law and order ;
- d) Detecting and preventing crime;
- e) Apprehending offenders ;
- f) Maintaining criminal records;
- g) Conducting forensic analysis;
- h) Executing the directions given to the inspector general by the Director of Public Prosecutions pursuant to Article 157(4) of the Constitution:

i) Co-ordinating country Interpol Affairs;

j) Investigating any matter that may be referred to it by the independent police oversight authority ;and

k) Performing any other functions conferred on it by any other written law.

25. Further, the objects and functions of the National Police Service are set out in Article 244 of the Constitution and section 24 of the **National Police service Act** and in the discharge of their duties and functions, the staff of the National Police Service are bound by, do, respect, observe and uphold *inter alia* the following Constitutional provisions:

a) Regard to public interest, the interests of administration of justice and the need to prevent and avoid abuse of legal process

b) Upholding and defending the Constitution

c) Respecting, observing ,protecting, implementing, promoting and upholding the rights and freedoms in the Bill of Rights enshrined in the Chapter Four

d) Accountability to the public for decisions and actions taken and generally observe of Chapter Six(Leadership and Integrity)

e) Accountability for administrative acts and observance of the values and principles of public service under Chapter Thirteen.

26. It was the Respondents' position that the applicant has not demonstrated that in undertaking investigations in the complaint lodged with the National Police Service and in making the decision to prefer Criminal charges against him, either the Director of Public Prosecution or any member of staff of the office of the Director of Public Prosecution or the National Police Service acted without or in excess of the power conferred upon them by the law or have infringed ,violated, contravened or in any other manner failed to comply or respect and observe the foregoing provisions of the Constitution of Kenya 2010 or any other provisions thereof or any other provisions of the law.

27. It was disclosed that the DPP independently reviewed and analyzed the evidence contained in the investigations file compiled by the Directorate of Criminal Investigations including the witness statements, documentary exhibits and statements of the Petitioner as required by the law and it was on the basis of the said review and analysis that the DPP gave instructions to prosecute the applicant. Therefore the decision to charge the applicant was informed by the sufficiency of evidence on record and the public interest and not on any other considerations. To the Respondents, the accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of evidence gathered and properly adduced in support charges.

28. The Respondents contended that the decision to charge the applicant was informed by the sufficiency of evidence on record and the public interest and not on any other considerations and that the accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of evidence gathered and properly adduced is support charges.

Determinations

29. I have considered the application, the affidavits both in support of and in opposition to the application the submissions for and against the grant of the orders sought and this is the view I form of the matter.

30. Before dealing with the issues raised herein, it is instructive that the ex parte applicant has described

himself in these proceedings as the substantive applicant. The law is trite that in judicial review proceedings, the applicant is the Republic and not the subject.

31. The applicant has relied on section 60 of the *Advocates Act* which provides as hereunder:

“Any person who, being an advocate, is entrusted in his professional capacity with any money, valuable security or other property to retain it in safe custody with instructions to pay or apply it for any purpose in connection with his duty as an advocate fails to pay, apply or account for the same after due completion of the purpose for which it was given, shall be guilty of an offence: Provided that no prosecution for an offence under this section shall be instituted unless a report has been made to the Attorney-General by the Tribunal under subsection (3) of section 61.”

32. A reading of the said provision is clear that what is prohibited is a prosecution under the said section 80 of the *Advocates Act*. In this case it is not alleged that the Respondents intend to prosecute the applicant thereunder for the Respondents to be barred from doing so unless a report has been made to the Attorney-General by the Tribunal under subsection (3) of section 61.

33. It is therefore my view that the said section cannot be successfully invoked in these proceedings.

34. It is always important to remember that in these kinds of proceedings, 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 and that the mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review. This is so because judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.

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

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

36. 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.”

37. However, in Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69, the High Court held:

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society’s senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court’s) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far that which the courts indeed the entire system is constitutionally mandated to administer... 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. It is further 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 argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law...In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of

such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed...There is nothing which can stop the from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made...Under section 77(5) of the Constitution it is a constitutional right that no person who has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of the offence. What is clear from this constitutional right is that it prevents the re-prosecution of a criminal case, which has been determined in one way or another...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 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.”

38. As was aptly put in Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR:

“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”.

39. Whereas Article 157(10) of the Constitution provides that the Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority, Article 157(11) provides:

In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have

regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

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

In fulfilling its mandate, the Office shall be guided by the Constitution and the following fundamental principles—

(a) the diversity of the people of Kenya;

(b) impartiality and gender equity;

(c) the rules of natural justice;

(d) promotion of public confidence in the integrity of the Office;

(e) the need to discharge the functions of the Office on behalf of the people of Kenya;

(f) the need to serve the cause of justice, prevent abuse of the legal process and public interest;

(g) protection of the sovereignty of the people;

(h) secure the observance of democratic values and principles; and

(i) promotion of constitutionalism.

65. It is therefore clear that the terrain under the current prosecutorial regime has changed and that the discretion given to the DPP is not absolute but must be exercised within certain laid down standards provided under the Constitution and the *Office of the Director of Public Prosecutions Act*. Where it is alleged that these standards have not been adhered to, it behoves this Court to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, the Constitution itself. I associate myself with the sentiments expressed in *Nakusa vs. Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565* to the effect that:

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

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

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

42. It is now clear that even in the exercise of what may appear to be *prima facie* absolute discretion conferred on the Director of Public Prosecution (the DPP) the Court may interfere. The Court can only intervene in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**

43. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the DPP to investigate and prosecute ought to be interfered with.

44. In this case, it is the applicant’s case that he was retained to act in a conveyancing transaction and that he was neither the vendor nor the purchaser and carried out his obligations as per his instructions. He therefore was of the view that the intended charges against him for obtaining money by false pretences were baseless.

45. In this case the interested party who is the complainant has not sworn any affidavit to explain the circumstances under which the applicant is alleged to be culpable. The replying affidavit sworn on behalf of the Respondents on the other hand, is largely based on hearsay without disclosing the source of information. As was held in **Kentainers Limited vs. V M Assani and Others Nairobi HCCC No. 1625 of 1996,** affidavits must deal with facts which the deponent can prove of his own knowledge save in interlocutory applications which are applications which do not decide the rights of parties but are only meant for keeping the *status quo* till the rights can be decided or for obtaining directions as to the conduct of the cause. The Court went on to state that since evidence law applies to affidavits the Court will only accept proof of facts on information received if it constitutes admissible hearsay and not otherwise as rules of the Court cannot nullify substantive enactment. It was therefore held that an affidavit which does not disclose whether they are made on knowledge or on information and one that does not disclose the source should not be acted upon and that affidavits should state which facts are on information and which ones are based on knowledge.

46. It is trite that based on **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”.

47. It follows that the burden is on the prosecutor to show by way of admissible evidence that he is in possession of material that disclose the existence of a prosecutable case since as was held in Stanley Munga Githunguri vs. R [1986] eKLR at page 18 and 19 by a three bench High Court constituted of Ag. Chief Justice Madan and Justices Aganyanya and Gicheru:

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

48. In this case, there is simply no basis upon which the Respondents decided to prefer charges against the ex applicant in respect of a conveyancing transaction in which his role was limited to legal representation and in which he was not a party. Whereas it is disclosed that criminal proceedings were commenced against the said vendor, it is not explained why it was later thought wise to also prefer charges against the advocate. In those circumstances the applicant’s contention that the said criminal charges were simply meant to force him to settle a debt not owed by him and to cause him undue embarrassment cannot be without merits.

49. 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”.

50. 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. Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution. A prosecution can either be mounted based on an offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officers or agencies. However, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. I say ordinarily because the mere fact that the version of one of the parties is not considered is not necessarily fatal to the prosecution. However, whereas it is alleged in this case 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 can only conclude 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 would be evidence of malice and hence abuse of discretion and power.

51. That the Respondent, based on the agreement for sale ought to have been aware that the applicant was acting in the said transaction as an advocate for the vendor and not as the vendor is clear from the replying affidavit. He was therefore an agent of a disclosed principal.

52. Taking into account the circumstances of the case including the fact that there were in fact disciplinary proceedings against the ex parte applicant, one can only conclude that the invocation of the criminal justice system was meant to coerce the applicant into refunding the deposit rather than for the vindication of a crime suspected to have been committed and that is not the purpose of the criminal justice system and to do so would be contrary to the mandate of the Director of the Public Prosecutions.

53. In my view, to charge an advocate who was involved in a conveyancing transaction with obtaining money by false pretences when the evidence shows that the advocate was not a party to the transaction in question reeks of malice. This is not to say that an advocate cannot in the course of a conveyancing transaction commit a criminal offence but the offence intended to be preferred against the applicant in the circumstances of this case was clearly inappropriate as it was based on very shoddy investigation.

54. Accordingly, it is my view and I so hold that the levying of criminal charges against the applicant herein is ill motivated, malicious and an abuse of both investigatory and prosecutorial powers.

55. Having considered the issues raised herein I am satisfied that this application is merited.

Order

56. In the result I grant the orders sought in the Notice of Motion dated 18th April, 2014, and issue an order of Certiorari, removing into this Court for the purpose of being quashed, the proceedings and/or the respondents' decision to charge the ex-parte applicant, **Hesbon Ongetta Momanyi** in relation to L.R. No. 209/11095/39 in the manner intended which decision is hereby quashed. Having done so it is no longer necessary to issue any prohibitory order.

57. As the application was improperly intituled and as the applicant appeared in this application in person, there will be no order as to costs.

Dated at Nairobi this 19th day of January, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Makori for the Respondents

CA Ooko