REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI LAW COURTS

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 537 OF 2017

IN THE MATTER OF THE BILL OF RIGHTS (CHAPTER FOUR) OF THE CONSTITUTION OF KENYA,2010

AND

IN THE MATTER OF ARTICLES 22 (1), 23 (1), 27 (1), 28, 29 (D), 47, 50 (1) (2) (E) AND (O)

AND

IN THE MATTER OF RULES 4 (1) AND 23 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICES AND PROCEDURE RULES

AND

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

AND

IN THE MATTER OF ILLEGAL PROSECUTION OF STEPHEN OYUGI OKERO-AN ADVOCATE

AND

IN THE MATTER OF THE JUDGEMENT OF THE COURT ON 10/06/2015 (THE HON. MR. W. KORIR)

AND

IN THE MATTER OF JR MISC APPLICATION NO. 114 OF 2014-NAIROBI AND REPUBLIC VS THE CHIEF MAGISTRATE'S COURT AND ANOTHER

AND

IN THE MATTER OF THE DECISION OF THE DIRECTOR OF PUBLIC PROSECUTIONS MADE ON 5 NOVEMBER 2015

AND

IN THE MATTER OF THE CHIEF MAGISTRATE'S DECISION MADE ON THE 15/08/2017 IN CRIMINAL CASE NO. 338 OF 2015-NAIROBI, REPUBLIC VS STEPHEN OYUGI OKERO

AND

IN THE MATTER OF

STEPHEN OYUGI OKERO..PETITIONER

VS

THE CHIEF MAGISTRATE'S COURT AT MILIMANI

LAW COURTS (CRIMINAL)............................1ST RESPONDENT

THE DIRECTOR OF CRIMINAL

INVESTIGATIONS DEPARTMENT................2ND RESPONDENT

JUDGMENT

The Parties

1. The Petitioner is an Advocate of the High Court of Kenya practising as such in Nairobi in the name and style of Oyugi & Company Advocates.

2. The first Respondent is the Chief Magistrate's presiding over the Chief Magistrates Criminal courts at the Milimani Law Courts, Nairobi while the second Respondent is the Director of Public Prosecutions established under Article **157** of the Constitution with constitutional mandate to *inter alia* 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.[1]

Factual Background

3. The Petitioner avers that he was charged on **5th** March 2014 with the offences of making a document without authority contrary to Section **357 (a)** of the Penal Code,[2] forgery contrary to Section **349** of the Penal Code[3] and uttering a document with intent to defraud contrary to Section **357 (b)** of the Penal Code.[4]

4. The Petitioner avers that in the course of his duties as an Advocate, he was instructed in writing by M/S Right End Properties Limited to receive transfer documents relating to **L.R. No. 1870/X/24 (I.R.No. 70229)** from the firm of **Kipkenda, Lilan and Koech** Advocates and to register the same at the lands Registry, Nairobi in favour of his client at an agreed legal fees of **Ksh. 70,000/=.**

5. The Petitioner further avers that on **31st** January 2011,on the strength of his professional undertaking to release his client's cheque for **Ksh. 500,000/=** to the said Advocates being their legal fees for the work they had done, they released the Transfer documents to him. He also avers that a one **Mr.Madatali Chatur,** a Director of Right End Properties Ltd, introduced to him a one **Mr. Francis Kipkong** and a company called Regional Estate Limited as the agents and he proceeded to pay them by way of cheques **Ksh. 750,000/=** in his presence. Pursuant to the said instructions, he avers that he lodged the Transfer for Registration, and that neither did the said company nor the said Advocate notify him of any existing caveats on the said property.

6. He also avers that he filed J.R. No. **114** of 2014 seeking to quash criminal proceedings against him being Cr Case No. **338** of 2014 premised on alleged forged documents relating to the said transaction. He further avers that the said director, a **Mr.Chatur,** who was named as an interested party in the said Judicial Review proceedings filed a Replying Affidavit in which he disclosed the source of the allegedly forged documents. He states that the learned judge in J.R. No. **114** of 2014 suspended the Criminal proceedings for **90** days to enable the DPP to make a fresh decision in light of **Mr.Chatur's** Affidavit.

7. The petitioner further avers that on **5th** November 2015, the DPP made a decision to charge the Petitioner with the offences of making a false document, namely, the notice of a withdrawal of a caveat, forgery and uttering a false document, which decision the Petitioner avers was made to shield the criminals who had in the said affidavit admitted instructing the petitioner and provided details of the accomplices. The Petitioner avers that the decision to charge him was made in disregard of the court decision referred to above and violates his rights under Article **27** and **28** of the Constitution, and that refusal to terminate the criminal proceedings amounts to subjecting him to a prosecution the high court had found untenable, hence subjecting him to double jeopardy and a violation of Article **50 (2)** of the Constitution. He also avers that the trial began more than **7** years ago and has been detrimental to his legal practice. He seeks the following reliefs:-

> *a. A declaration that the first Respondent is bound by the findings of the High Court i its judgment delivered on 10.6.2015 whereof it held that the trial of the Petitioner was untenable, and that the proceedings in his court should be terminated forthwith.*
>
> *b. A declaration that the decision of the second Respondent made on the 5/11/205 instructing the Director of Criminal Investigations to charge the Petitioner was made in bad and contravenes the Petitioner's right to a fair Administrative action by the second Respondent.*
>
> *c. A declaration that the second Respondent's decision made on 5/11/2015 to charge the Petitioner with the offence of forging and uttering false documents with intent to defraud was malicious and discriminatory in as far as the source of the alleged documents an forgeries was disclosed on oarg and adopted as evidence that assisted the court in JR HCC Misc Application No.114 of 2014 to arrive at its judgement of 10/06/2015.*
>
> *d. A declaration that by their actions the first and second Respondent have subjected the Petitioner to grievous mental torture and agony in continuing to have him prosecuted for an offence committed by a perpetrator whose identity was disclosed on oath.*
>
> *e. A declaration that the Petitioner had a bona fide right to accept the instructions and charge a fee to act on those instructions as*

there was no mens rea on his mind when he undertook to execute the instructions of his client.

f. A declaration that the Petitioner's right to practice law has been impeded by actions of the Respondents and has earning capacity has been adversely affected and diminished.

g. A declaration that the second Respondent has sacrificed the liberties of the Petitioner, causing him great mental torture with the aim of corruptly shielding the disclosed perpetrators of the alleged offences.

h. A declaration that the Petitioner is entitled to reparations and compensation for the mental torture, discrimination, unreasonable and unfair prosecution and the legal costs he has been put to in defending himself.

i. A declaration that the Petitioner in entitled to damages for the defamation he suffered when the agents of the second Respondent invited the press to cover his arrest and subsequent arraignment in court, knowing as the second Respondent did or ought to have known who the perpetrators of the crime he was prosecuting the Petitioner for.

j. A declaration that the Petitioner is entitled to damages for loss of income on all the days that the Petitioner has been made to attend court.

k. A declaration that the Petitioner is entitled to damages for lost business resulting from the flight of his clients after he was arrested and charged in court and the matter widely published in the local dailies.

l. Assessment of damages i all the hearings hereinabove stated by this Honourable court and a declaration that the second Respondent is solely liable for the damages thus assessed.

m. Costs of this suit.

Litigation history

8. I find it appropriate to briefly outline the history of this file. The Petition was filed on **24th** October 2017 accompanied by an application under certificate of urgency seeking orders to stay proceedings in criminal case number **338** of 2014 pending hearing and determination of the Petition. At the *ex-parte* stage, and I certified both the Petition and the application as urgent and directed the Petitioner to serve the Respondent. I fixed the matter for mention *inter partes* on **13th** November 2017. On the said date **Mr. Makori** for the DPP stated that he was yet to receive the Police file, hence required time to file a Response. He also informed the court that he was not opposed to the order of stay being granted pending hearing of the Petition. **Mr. Mwaura** for the Petitioner urged the court to grant the stay since it was not opposed.

9. I recorded that the DPP despite having been served over **10** days prior to the said date was yet to file a response and that the stay was not opposed. I granted the DPP **14** days to file a response, and leave to the Petitioner to file a supplementary Affidavit (if need be) together with submissions. I also granted the DPP **14** days to file their submissions. Further, on account of the fact that the DPP was not opposed to the stay, I granted an order of stay pending hearing and determination of the Petition and fixed the matter for directions on **21st** February 2018. However, on the said date, the DPP had not filed a response. The Petitioners had filed their submissions. I allowed the DPP **10** days to file their response (if they wished) and directed that in default I would proceed to render judgement on the basis of the pleadings filed. I Fixed the matter for mention on **6th** Marcd 2018 but again on the said date the DDPP had not filed a Response. I fixed the matter for judgement for **25th** April 2018 and granted the DPP leave to file their submissions **within 10 days** from the said date. At the expiry of the **10** days, the DPP had not complied. Accordingly, I proceeded to write this judgement on the basis of pleadings filed by the Petitioner and the law.

Issues for determination

10. From the above facts, I find that the following issues fall for determination, namely:-

a. Whether the High Court in J.R. No. 114 of 2014 prohibited proceedings in Cr. Case No. 338 of 2014.

b. Whether this Petition is an abuse of the court process.

c. Whether the Petitioner is entitled to any of the reliefs sought in the Petition.

Whether the High Court in J.R. No. 114 of 2014 prohibited proceedings in Cr. Case No. 338 of 2014.

11. The Petitioner seeks a declaration that the first Respondent is bound by the High Court decision rendered on **10th** June 2015 in which he states that the court held that his trial was untenable and that the proceedings should be terminated. To buttress the above averment the Petitioners' Advocate submitted that the high court in J.R. No. **114** of 2014 held that it was untenable to prosecute the Petitioner with the criminal case in question because the perpetrators of the offence are known.

12. However a close look at the judgement in question reveals the contrary. At paragraph **49**, at the last line the learned judge stated *"the veracity of that evidence can only be tested by way of cross-examination which can only be done in the criminal trial.*" The learned judge was careful and conscious that it was for the trial court to weigh the evidence.

13. Further, at paragraph **50** of the judgement, on the alleged discrimination, premised on the Petitioners allegation that the Directors were

not charged, the learned judge observed *"the decision as to whether or not the directors of the 2nd Interested Party should be charged belongs to the DPP."* Again, here the learned judge was fully conscious of the mandate of the DPP discussed later in this judgment.

14. At paragraph **51** of the Judgment, the learned judge observed that **Mr. Chatur** had sworn an affidavit filed in ELC No. **2315** of 2007 stating that it was his advocate who gave him the fake court order and forged notice of withdrawal. The judge noted that the deponent has revealed the source of the forged document. However, at paragraph **52** of the judgment, the learned judge made his final determination, that is, *"I suspend the criminal proceedings against the applicant for a period of 90 days and refer the matter back to the DPP as the decision maker so that he can make a fresh decision in light of the revelation in the affidavit of Chatur. Failure to make a decision within **90** days will result in the prohibition of the prosecution of the applicant in the criminal case..."*

15. Clearly, the learned judge suspended the criminal proceedings for **90** days from the date of the judgement to enable the DPP to make a decision whether to proceed with the prosecution of not. Annexed to the Petitioners application is letter dated **27th** January 2017 from the DPP addressed to the Deputy Registrar, The Court of Appeal. In the said letter, the DPP states that the period of **90** days was subsequently extended by **60** days on **29th** September 2015 and on **5th** November 2015, the DPP made a decision in compliance with the court orders and directed the Director of Criminal Investigations to charge the Petitioner with the offences in question. He also stated that the fresh decision was communicated to the High Court vide a letter dated **9th** November 2015 and that on **3rd** December 2015 the parties appeared in court and communicated the decision made in compliance of the court judgement and the court marked the file as closed. This development paved way for the criminal case to proceed in the lower court. The DPP also withdrew an appeal they had filed against the said decision for having been overtaken by events.

16. It is evident that it is the DPP's decision to proceed with the said prosecution that triggered this Petition. Also, there is an attempt to impute an incorrect interpretation of the said judgement. The above information extracted from the judgement warrants no elaboration. The high court did not prohibit the criminal trial. The high court only suspended the criminal trial for **90** days for DPP to make a decision in default, the prohibition would issue. The order was complied with since the DPP made a decision to proceed with the criminal case.

17. This court is now being invited to find that the learned judge ruled that the criminal trial was untenable, hence terminate the criminal trial, yet the final orders of the court are very clear as demonstrated above. The court only granted a stay for 90 days for a decision to be made.

18. It is a basic principle is that it is for the prosecution, not the court, to decide whether a prosecution should be commenced and, if commenced, whether it should continue. As Lord Bingham said:-[5] *"... The question of whether or not to prosecute is for the prosecutor..."*

19. **It is also correct that the DPP would be failing in its legal mandate if it fails to act.** Article **157 (10)** of the Constitution requires the DPP to act independently in the discharge of his duties.This position is replicated in Section **6** of the Office of the Director of Public Prosecutions Act.[6] The DPP is not only required to act independently in the exercise of his functions, but also ought not to be perceived to be acting under the direction or instructions or instigation of any other person. There should be no reasonable basis to believe that the prosecution was instigated by another person. The court left it to the DPP to decide.

20. The decision to institute or not institute criminal proceedings is a high calling imposed upon the DPP by the law and must be exercised in a manner that leaves no doubt that the decision was made by the DPP independently. The prosecutor is required to act with diligence and promptness to investigate, litigate, and dispose of criminal charges, consistent with the interests of justice and with due regard for fairness, accuracy, and rights of the accused, victims, and witnesses.

21. It is not for this Court to determine the veracity or to weigh the strength of the evidence or accused persons defence. That is a function for the trial court hearing the criminal trial. This court can only intervene if there are cogent allegations of violation of Constitutional Rights or threat to violation of the Rights or in clear circumstances where it is evident that the accused will not be afforded a fair trial or the right to a Fair Trial has been infringed or threatened.

22. The decision whether or not to prosecute is very important. It can be very upsetting for a person to be prosecuted even if later found not guilty. However, a decision not to prosecute can cause great stress and upset to a victim of crime. Therefore, the DPP must carefully consider whether or not to prosecute. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system. It is therefore essential that the prosecution decision receives careful consideration in a Petition seeking to prohibit the trial. It is in public interest that prosecutions be mounted to up hold law and order and justice for the victims of crime.

23. The enquiry is whether there has been an irregularity or an illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted. [7]

24. My reading of the court judgement relied upon leads me to the irresistible conclusion that the Court did not prohibit the Petitioners prosecution but gave the DPP **90** days to make a decision in default the prosecution of the criminal case would be prohibited. In the circumstances my answer to the issue under consideration is in the negative.

Whether this Petition is an abuse of the court process

25. A fundamental issue that cannot escape the attention of this court is the question whether or not this Petition is an abuse of court process. This Petition is in my view a replica of the Petitioners case in Judicial Review No. **114** of 2014 in which he had sued the same Respondents as in the present Petition. The only difference is that two interested parties were named in the said case who are not named in this Petition. In the said Judicial Review application, the Petitioner herein sought the following Orders:-

> ***a. That, an Order of Prohibition be issued by this Honourable Court directed against the Chief Magistrate's Court, Nairobi from proceeding, conducting the trial, presiding or in any manner dealing with the charges laid or proceedings in criminal case No.***

338 of 2014 between Republic –vs- Stephen Oyugi Okero, the Ex parte Applicant.

b. That, an order of Certiorari be issued by this Honourable Court removing into the High Court and quashing the decision made by the Director of Public Prosecutions in preferring and/or directing the prosecution of Stephen Oyugi Okero, the Ex parte Applicant in the Chief Magistrate's Court, Nairobi in Criminal case No. 338 of 2014 between the Republic –vs- Stephen Oyugi Okero.

3. ***That the costs of this application be provided for.***

26. Upon hearing the Judicial Application, the learned judge rendered the decision referred to above. A careful study of this Petition shows that it is a replica of the J.R. No. **114** of 2014 which challenged the same criminal prosecution. The J.R. Application sought the orders reproduced above the crux of which is to stop the criminal trial. This Petition is grounded on the same set of facts and circumstances and seeks orders whose effect is to stop the same prosecution. The only difference is that now the same complaint it is camouflaged as a constitutional Petition challenging the decision to proceed with the same criminal trial on grounds that the learned judge found the case to be untenable. To me, this is a clever way of getting what the judge did not grant, that is a permanent prohibition of the prosecution, yet the case is premised on the same evidence that was presented before the learned judge who considered it before making the decision in question.

27. It is my view that if the Petitioner is not happy with the outcome of the said case, or the decision taken pursuant to the said case, the proper course of action would have been to appeal against the decision or apply for review instead of camouflaging the same dispute as a constitutional Petition and seek from this court reliefs that have the same effect as those he sought in the Judicial Review Application.

28. The test here is simple. It is that of a reasonable man. The facts relied upon are the same. The criminal case the subject of the two cases is the same. Had the Petitioner succeeded in obtaining the reliefs he sought in the J.R. Application, certainly he would not have filed this Petition. Conversely, if orders sought in this Petition are granted, they will certainly have the same effect as those he sought in the J.R. Application. The said reliefs had one purpose, namely, prohibiting the criminal trial. This Petition if allowed will have the same purpose. It will stay the same proceedings.

29. In my view, this petition is founded on issues that have been dealt with by a competent court as outlined above and to me this Petition is an abuse of court process. It is trite law that the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The black law dictionary defines abuse as "Everything which is contrary to good order established by usage that is a complete departure from reasonable use. An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use.[8]

30. The concept of abuse of court/judicial process is imprecise. It involves circumstances and situations of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.[9]

31. The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

(a) *Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.*

(b) *Instituting different actions between the same parties simultaneously in different court even though on different grounds.*

(c) *Where two similar processes are used in respect of the exercise of the same right....*

(d) *Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.*

(e) *Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.**[10]***

(f) *Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.*

(g) *Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.*

(h) *Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.**[11]***

32. **Oputa J.SC** (as he then was) in the Nigerian case of *Amaefule & other Vs The State**[12]*** he defined abuse of judicial process as:-

> *"A term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. In his words abuse of process can also mean abuse of legal procedure or improper use of the legal process."*

33. In the Nigerian case of *Agwusin vs Ojichie*, Justice Niki Tobi JSC observed:-

> "*that abuse of court process create a factual scenario where appellants are pursuing the same matter by two court process. In other words, the appellants by the two court process were involved in some gamble a game of chance to get the best in the judicial process.''*

34. It's settled law that a litigant has no right to purse *paripasua* two processes which will have the same effect in two courts at the same time with a view of obtaining victory in one of the process or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks.

35. In my humble view, the two processes are in law not available to the petitioner. He ought to have appealed against the above mentioned decision if he was dissatisfied. The petitioner cannot lawfully file this petition and seek similar reliefs relying on substantially the same grounds as in the Judicial Review application referred to above. The pursuit of the second process, that is this petition constitutes and amounts to abuse of court/legal process."[13]

36. Thus, the multiplicity of actions on the same matter between the same parties even where there exist a right to bring the action is regarded as an abuse.[14] The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right *per se*. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interface with the administration of justice[15]or the aim of obtaining a favourable order which he was not able to obtain in the earlier case.

37. Applying the test of a reasonable man discussed above, I find no difficulty in concluding that this petition is based on similar grounds as the Judicial Review application referred to above, hence it is an abuse of court process. Accordingly, my answer to the issue under consideration is in the affirmative.

Whether the Petitioner is entitled to any of the reliefs sought in the Petition.

38. Counsel for the Petitioner submitted that the petitioner being an advocate had no reason to decline his clients written instructions, and argued that the prosecution amounts to harassment, an abuse of process, hence a violation of his rights and a violation of Articles **47 (1)** and **50 (1) (2) (o)** of the Constitution.

39. It is established jurisprudence that a criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motives or improper purpose. It is also true that before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case.

40. Courts have an overriding duty to promote justice and prevent injustice. From this duty there arises an inherent power to 'stay' an indictment (or stop a prosecution) if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court or infringement of the petitioners fundamental rights.

41. The inherent jurisdiction of the court to stop a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances.[16] The essential focus of the doctrine is on preventing unfairness at trial through which the accused is prejudiced in the presentation of his or her case or where there is clear breach of fundamental rights to a fair trial. Courts should first consider whether or not there is anything in the trial to prevent 'a fair trial' and if there is, then the court ought to stop the prosecution.

42. The high court should prohibit or quash prosecutions in cases where it would be **impossible to give the accused a fair trial; or where it would amount to a misuse/manipulation of process** because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.[17]

43. The power to stay or stop a prosecution should only be exercised if exceptional circumstances exist which would result in prejudice to the accused which cannot be remedied in other ways. The enquiry is whether there has been an irregularity or an illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted. [18] A criminal trial premised on unfair and questionable partisan investigations or a decision to charge arrived at unfairly and without any reasonable basis would in my view open the door to an unfair trial.

44. The provisions of the Constitution conferring powers upon the High Court to grant such remedies as certiorari, prohibition, Judicial review, mandamus or permanent stay of proceedings are a device to advance justice and not to frustrate it. In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the Court or that the ends of justice require that the proceeding ought to be quashed.

45. The saving of the High Court's inherent powers, both in civil and criminal matters is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. These powers are wide as they imply the exoneration of the accused even before the proceedings have been culminated by way of trial.

46. Noting the amplitude of these powers and the consequences which they carry, the Supreme Court of India[19] revisited the law on the issue and held that *'these powers should be exercised sparingly and should not carry an effect of frustrating the judicial process.'* The court delineated the law in the following terms:-

> "*The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and in the rarest of rare cases and the Court cannot be justified in embarking upon an inquiry as to the reliability or otherwise of allegations made in the*

*complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at uncalled for stage nor can it 'soft-pedal the course of justice' at a crucial stage of proceedings………………The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of the power of the court, but the more the power, the more due care and caution is to be exercised in invoking these powers"****[20]***

47. The leading case on the application of abuse of process remains *Bennet vs Horseferry Magistrates Court & another*.[21]The court confirmed that an abuse of process justifying the stay of a prosecution could arise in the following circumstances:-

i. Where it would be impossible to give the accused a fair trial; or;

ii. *Where it would amount to a misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.*

48. The above categories are not mutually exclusive and the facts of a particular case may give rise to an application to stay involving more than one alleged form of abuse, and that staying a proceeding is a discretionary remedy and each case will depend on its set of facts and circumstances.

49. **Chris Corns** in his Article entitled *'Judicial Termination of Defective Criminal Prosecutions: Stay Applications"* [22]argues that the grounds upon which a stay will be granted have been variously expressed in the cases. These grounds can be classified under three categories;-

i. When the continuation of the proceedings would constitute an 'abuse of process,'

ii. When any resultant trial would be 'unfair'to the accused, and

iii. When the continuation of the proceedings would tend to undermine the integrity of the criminal justice system.

50. Clearly, there can be significant overlap between these various grounds for the stay; an unfair trial, for example would tend to bring the administration of justice into disrepute. Conversely, in some circumstances the holding of a trial may not be technically unfair to the accused yet still undermine the integrity of the legal system because of some impropriety in the investigation or prosecution of the case. The justification for granting a stay extends beyond any abuse of process and includes circumstances where it would be *'unfair'* to the accused for the proceedings to continue. [23]

51. Criminal proceedings commenced to advance other gains other than promotion of public good are vexatious and ought not to be allowed to stand. The word *"vexatious"* means *"harassment by the process of law,'' "lacking justification"* or with *"intention to harass."* It signifies an action not having sufficient grounds, and which therefore, only seeks to annoy the adversary. The hallmark of a vexatious proceeding is that it has no basis in law (or at least no discernible basis); and that whatever the intention of the proceeding may be, its only effect is to subject the other party to inconvenience, harassment and expense, which is so great, that it is disproportionate to any gain likely to accrue to the claimant; and that it involves an abuse of process of the court.

52. Whether a prosecution is an abuse of court process, unfair, wrong or a breach of fundamental rights, it is for the court to determine on the individual facts of each case. The concept of a fair trial involves fairness to the prosecution and to the public as well as to the accused. [24]

53. Applying the legal principles enumerated above, I find that the Petitioner has not demonstrated that any of the principles or tests enumerated above are present in this case, nor has he demonstrated that his rights to a fair trial have been or will be infringed if the prosecution proceeds nor has he demonstrated that the prosecution will inherently violate his rights to a fair trial as enshrined in the Constitution. Further, he has not been demonstrated that the proceedings were initiated without proper legal or factual basis, or in bad faith nor has he proved that the proceedings are an abuse of process.

54. The Petitioner also seeks a declaration that the decision to prosecute him was discriminatory. This issue was addressed by the court in the Judicial Review Application. The Court as stated earlier correctly noted that whether or to prosecute is a decision within the powers of the DPP. The Petitioner cannot seek a similar relief now on an issue the learned judge pronounced himself. The Petitioner also claims damages for alleged violation of constitutional rights. As stated above, the Petitioner has not proved any violation of rights to warrant the award of damages.

55. In view of my analysis and conclusions herein above, I find and hold that the answer to the issue under consideration is in the negative.

56. Consequently, I find and hold that this Petition has no merits. I also note with great concern that the criminal trial has been stalled for about **8** years now. As a consequence I make the following orders:-

a. ***That*** *this Petition be and is hereby dismissed.*

b. ***That*** *Criminal Case Number* ***338*** *of 2014, Milimani Chief Magistrates Court proceeds for hearing and determination.*

c. ***That*** *the Deputy Registrar of this Court is directed to forward a certified copy of this judgement to the Director of Public*

Prosecutions.

d. No orders as to costs.

Orders accordingly

Signed, Delivered and Dated at Nairobi this 19th day of April 2018.

JOHN M. MATIVO

JUDGE

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[1] Article 157 (6) of the Constitution

[2] Cap 63,Laws of Kenya

[3][3]Ibid

[4] Ibid

[5] In *Environment Agency v Stanford* {1998} C.O.D. 373, DC

[6] Act No. 2 of 2013

[7]Interpreting similar provisions in the constitution of South Africa, the South African Constitutional court (Nicholas AJA), Shabalala & 5 others vs A.G of Transvaal & Another CCT/23/94

[8]Black Law Dictionary, Sixth Edition Black, Henry Campbell, Black Law Dictionary Sixth Edition, Continental Edition 1891- 1991 P 990 P 10-11

[9] Public Drug Co V Breyerke cream Co, 347, Pa 346, 32A 2d 413, 415

[10] Jadesimi V Okotie Eboh (1986) 1NWLR (Pt 16) 264

[11] (2007) 16 NWLR (319) 335.

[12] (1998) 4SCNJ 69 at 87.

[13] Supra note 1

[14]Ibid

[15] Ibid

[16] See Attorney General's Reference (No 1 of 1990) [1992] Q.B. 630, CA; Attorney General's Reference (No 2 of 2001) [2004] 2 A.C. 72, HL.

[17] *See Bennett v Horseferry Road Magistrates' Court and Another [1993] 3 All E.R. 138, 151, HL; see also R v Methyr Tydfil Magistrates' Court and Day ex parte DPP [1989] Crim. L. R. 148.*

[18] Interpreting similar provisions in the constitution of South Africa, the South African Constitutional court (Nicholas AJA), Shabalala & 5 others vs A.G of Transvaal & Another CCT/23/94

[19] See Maharashtra vs Arun Gulab Gawali

[20] See State of West Bengal & Others vsSwapan Kumar Guha& Others, AIR, 1982, SC 949, Pepsi Foods Ltd & Another vs Special Judicial Magistrate & Others AIR 1998, SC 128 & G. ugarSuri&AnoVs State of U.P & Others, AIR 2000 Sc 754

[21] {1993}All E.R 138, 151, House of Lords

[22] Chris Corns, Judicial Termination of Defective Criminal Prosecutions: Stay Applications, 76 University of Tasmania Law Review, Vol 16 No. 1, 1977

[23] Ibid

[24]*DPP v Meakin [2006] EWHC 1067.*