



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

JUDICIAL REVIEW NO 14 OF 2017

FRANCIS MBURU MACHUA.....APPLICANT

VERSUS

1. DIRECTOR OF PUBLIC PROSECUTIONS

2. DIRECTOR OF CRIMINAL INVESTIGATIONS

3. SENIOR PRINCIPAL MAGISTRATES COURT, LIMURU.....RESPONDENTS

AND

FRANCIS MBURU MACHUA.....EX-PARTE APPLICANT

AND

RUTH WANJA OTSYULA.....INTERESTED PARTY

JUDGMENT

1. The subject of these proceedings is a criminal case registered in the Magistrate's court at Limuru, namely, **Cr. Case No. 225/17** wherein five accused persons face several charges. The Accused persons are **Arthur Nduru Githire, Nicholas Kamau Muthee, Francis Mungai Muiruri, Catherine Wanjiku Ngugi, and Francis Mburu Machua.**

2. The latter is an advocate of the High Court of Kenya practicing in the firm known as **Mburu Machua & Co. Advocates.** He and his co-accused are charged with eight counts of Conspiracy to defraud contrary to **Section 317** of the Penal Code, (counts 1 to 8) in connection with the transfer of plot **No. Limuru Township/157** to Nicholas Kamau Muthee and Francis Mungai Muiruri. Counts 9 to 12 relate to Forgery contrary to **Section 349** of the Penal Code, Making a false document contrary to **Section 347 (A)** of the Penal Code, Uttering a false document contrary to **Section 353** of the Penal Code and Abuse of office contrary to **Section 101(2)** as read with **Section 236** of the Penal Code.

3. The 9th to 11th counts of these charges are against **Arthur Nduru Githire** while the 12th count is against **Catherine Wanjiku Ngugi.** The complainants in the criminal case are the beneficiaries of the estate of **Eliud Ngichu Githire** in whose name the Limuru Township Plot No. 157 was registered at the point of his death in July 1992, and was listed in the schedule of the assets of the estate in the subsequent succession cause No. 113 of 1995 (Family Division, Nairobi). The charges arose from the purported sale and transfer in the year 2009, of the Limuru Town Plot No. 157 to **Nicholas Kamau Muthee and Francis Mungai Muiruri,** by the now deceased widow of Eliud Ngichu Githire, namely, **Julia Njoki Ngichu alias Julia Njoki Githire.** The sale agreement and transfer of lease were purportedly drawn and attested/witnessed by the firm of **Mburu Machua.**

4. Pursuant to leave granted by this Court on 10/5/17 one of the Accused persons, **Francis Mburu Machua** the *ex parte* applicant filed a motion on 18/5/17 seeking an order of prohibition against the Respondents to restrain them *"from proceeding with prosecution of Limuru Criminal case No. 225 of 2017."* On grounds that

"a) The Applicant's constitutional rights have been violated.

b) The Respondents have infringed the rules of natural justice.

c) The Respondents will not suffer any prejudice if the orders sought are granted.

d) This application has been made timelessly and without any delay.

e) If orders sought are not granted the Applicant will suffer great prejudice and substantial harm.”

5. In his affidavit supporting the application the *ex parte* Applicant confirmed that he trades in the name of Mburu Machua & Co. Advocates. That he had never dealt with the parties neither signed nor been involved in the transaction regarding the sale agreement in respect of the land parcel **No. Limuru Township/157**. That during the period of the agreement he had engaged an associate who was responsible for running his office in Limuru. Nevertheless he took the position that looking at all the documents related to the transaction, there was no plausible reason to doubt the bonafides of the vendor, Julia Njoki Githire alias Julia Njoki Ngichu. Thus his prosecution over the same was without basis, malicious and intended to bring his name into disrepute.

6. By the further affidavit filed on 5th February 2018 the *ex parte* Applicant asserts that the Office of the DPP has displayed malice by ignoring relevant factors, key among them being the fact that the Applicant was not involved in the sale transaction but rather, one **Gilbert Marube** the associate responsible for the Limuru office. That as an advocate, he has a legitimate expectation not to be prosecuted for carrying out the instructions given by a client albeit he disclaims signing the sale agreement.

7. He reads malice in the fact that the investigator had failed to have the advocate's signature in the offending transactions examined by an expert. Through a supplementary affidavit filed on 15/5/18 the *ex parte* Applicant claims that the DPP had instructed that the inquiry in this matter be closed for insufficiency of evidence.

8. Francis Mungai Muiruri (Francis) and Nicholas Kamau Muthee (Nicholas) who successfully applied to be enjoined in the proceedings filed what they call a replying affidavit. Therein, they swear that the sale transaction was lawfully entered into by themselves under the honest belief that the vendor had a good title, and that the transaction was done in the office of the *ex parte* Applicant. The Interested Party, Ruth Wanja Otsyula swore a lengthy replying affidavit. That affidavit, and the one sworn by C.I. Chemweno the investigating officer, are to the effect that the decision to prosecute the *ex parte* Applicant, Francis and Nicholas was based on evidence and that the *ex parte* Applicant and his co-accused have not demonstrated any malice on the part of the DPP.

9. The Interested Party who is the complainant in the lower court case highlights the following in her affidavit:

a) That the sale transaction was entered into during the pendency of an application to revoke the grant in favour of the vendor and the subsistence of a status quo order in **Nairobi Succession Cause No.113 of 1995**.

b) The purported consent to transfer by the then Municipal Council of Limuru was a forgery and that records at the said office did not reflect a transfer to Francis and Nicholas.

c) The entire transaction of sale and transfer was conducted through the *ex parte* Applicant's firm and witnessed by the *ex parte* Applicant.

d) That the document examiner has queried the authenticity of the vendor's signature on the transfer of lease.

e) That matters raised by the *ex parte* Applicant are contested factual issues to be resolved in the criminal trial.

10. It will be seen from the various affidavits of the *ex parte* Applicant that his grounds have mutated as time went by, so that some of his submissions appear to raise grounds not specifically stated in his motion but rather, relate to matters raised in the cause of the multiple affidavits filed, one of them after the filing of submissions. In my considered view, it is not open to a party to amend his pleadings through the swearing of affidavits which introduce new and unpleaded grounds. For instance, there is no express reference to the violation of the *ex parte* Applicant's legitimate expectation in his motion, the latter which is raised by him in his second affidavit and in submissions. Indeed the *ex parte* Applicant's position in the first instance was that he had no hand in the execution of the sale agreement in question. That said, it is possible to consider the *ex parte* Applicant's complaints under two heads, namely procedural impropriety and violation of his constitutional rights.

Procedural Impropriety

11. The *ex parte* Applicant makes the case that he was not involved in any conspiracy; did not participate in the transaction leading to the charges. Regarding the factual basis of the charges facing him, the *ex parte* Applicant submits that there is no evidence of conspiracy between him and any other party to commit fraud, pointing out that such a charge cannot succeed in the circumstances of this case, and further in absence of expert evidence that the *ex parte* Applicant signed the sale agreement. Thus the charges were brought for an ulterior motive. He relies on the case of **R -v- Attorney General, ex parte Kipngeno Arap Ngeny**. He further opines that this matter revolves around a civil dispute and that the charges constitute an abuse of the court process. For this proposition, he relies on the case of **R -v- Chief Magistrate's Court Mombasa, ex parte Ganijee and Another(2002)KLR 703** as cited in **R -V- Divisional Criminal Investigation Officer Laikipia & another ex parte Gilbert Okero Ombachi [2015] eKLR**.

12. Regarding the public interest test, the *ex parte* Applicant reverts to the "position of trust" held by an advocate and the legitimate expectation by an advocate acting honestly on the instruction of a client. He finally makes the submissions that the DPP's decision is riddled with bias and irrationality.

Violation of the ex parte Applicant's Constitution rights

13. The *ex parte* Applicant argues that his constitutional right to fair administrative action was violated. That as an advocate acting on the instructions of a client who is the apparent owner of property, he cannot be expected to do any deeper investigation of the title. Thus his prosecution violates his legitimate expectation that as an advocate he was not liable to be prosecuted for the actions carried out pursuant to a client's instructions, in this case, the drafting of the sale agreement. It has to be said that the jumbled manner in which the Applicant's submissions were presented makes it difficult to follow the exact arguments made on specific issues.

14. The DPP's submissions hinge on the twin questions whether the DPP has infringed the rules of natural justice, and whether the decision to charge the *ex parte* Applicant contravenes the *ex parte* Applicant's constitutional rights. The DPP's submissions open with a discussion on the nature of judicial review proceedings quoting the celebrated decision in **Municipal Council of Mombasa -V- Republic and Umoja Consultants Ltd.** Restating the DPP's mandate under **Article 157** of the Constitution, the DPP has submitted that the material canvassed by the Applicant cannot justify an order of prohibition for all that the *ex parte* Applicant is seeking is an examination of the evidence by this court in order to pre-empt the prosecution case.

15. On the question of the infringement of the rules of natural justice the DPP submits that the institution of criminal proceedings does not amount to an infringement of any rights in light of the guarantee of innocence and other constitutional fair trial safeguards. The DPP's view is that the *ex parte* Applicant has not challenged the process involved in arriving at the decision to prosecute and he relies on the decision of **Korir J in R -V- Kenya Lighting Co. Ltd and Another (V 2013) eKLR** as to the burden on the part of the Applicant to demonstrate the "actual sins" of a tribunal.

16. Two decisions are cited in support of the submission that an advocate does not enjoy blanket immunity from criminal prosecution in respect of acts done in execution of his client's instructions: **Attorney General -v- Inspector General & Director of Public Prosecutions ex parte Thomas Nganga Munene (2014) eKLR** and **Patrick Ngunjiri Maina -V - Director of Public Prosecutions [2017] eKLR**. Moreover, that the advocate does not occupy a special place with regard to guarantees to constitutional rights. The DPP submits finally that the decision to prosecute the *ex parte* Applicant passes the public interest and evidential tests.

17. The Interested Party reiterated the mandate of the DPP under the Constitution and submitted on the circumstances when an order of prohibition may issue, citing the decision of the Court of Appeal in **Joram Mwendwa Guantai -v- Chief Magistrate & Another [2007] eKLR**.

18. However, the Interested Party submitted, the High court may not usurp the role and mandate of the DPP in prosecuting criminal cases, whether or not such cases may eventually end up unsuccessful, which is a question of merit. The Interested Party points out that the *ex parte* Applicant has failed to demonstrate that the criminal proceedings amount to an abuse of the court process, what constitutional rights have been violated and infringement of the rules of natural justice. The case of **Anarita Karimi Njeru -v- AG [1979] KLR 154; (1979) eKLR** is cited. The record does not contain any submissions by Francis and Nicholas.

Analysis Determination

19. The court has considered all the material canvassed by the respective parties. Certain key facts that form the basis of these proceedings are not in dispute. The *ex parte* Applicant was an advocate of the High Court of Kenya at all material times, practicing in the name and style of **Mburu Machua & Co. Advocates**. In 2014 Francis and Nicholas and one **Arthur Nduru Githire** were arraigned before the Magistrate's Court at Limuru in connection with a sale agreement in respect of **Limuru Township plot No. 157** which property was the subject of the **Nairobi Succession cause No. 115 of 1995** being in respect of the estate of the deceased proprietor, **Eliud Ngichu Githire** who died in July, 1992.

20. Subsequently in 2017, the *ex parte* Applicant alongside **Catherine Wanjiku Ngugi**, Francis and Nicholas were all charged jointly *vide* a consolidated charge sheet with the offences outlined earlier on in this judgment. Through his various affidavits, the *ex parte* Applicant has all but admitted that the sale agreement and transfers were transacted through his firm albeit denying any personal involvement.

21. Two main issues fall to be determined and because they overlap, the court will deal with both simultaneously. These are:

- a) Whether the Respondents have violated the Applicant's constitutional rights.
- b) Whether in regard to the applicants the Respondents have infringed the rules of natural justice.

22. It did appear from the submissions and material presented on both sides that the active litigants in this matter are the *ex parte* Applicant as pitted against the DPP (2nd) Respondent and the Interested Party. The scope of judicial review remains as stated by the **Court of Appeal in Municipal Council of Mombasa -v- Republic & Umoja Consultants Ltd. Civil Appeal No. 185 of 2001 (2002) e KLR:**

"(A)s the court has repeatedly said, judicial review is concerned with the decision – making process, not with the merits of the decision itself

The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision-maker take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of Judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider. Acting as a court of appeal over the decider would involve going into the merits of the decision itself – such as whether there was or there was not sufficient evidence to support the decision."

23. The courts have stated on many occasions that the DPP's exercise of his mandate under **Article 157** of the Constitution and the ODP

Act is not to be lightly interfered with. I associate myself entirely with the sentiments of **Odunga, J** in **Republic v Attorney General & 4 others ex parte Kenneth Kariuki Githii [2014 eKLR]** as reproduced below:

“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. The mere fact that the intended or ongoing proceedings are in all likelihood bound to fail, it has been held time and time again, is not a ground for halting those proceedings by way of judicial review since, judicial review proceedings are not concerned with the merits but 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 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.”

24. Equally, the court will be slow to interfere with police investigations carried out in exercise of their mandate because they are duty bound to investigate any complaint made to them. So long as they act reasonably the High Court will be hesitant to intervene – see **Republic v Commissioner of police & Another ex parte Michael Monari & Another [2012] e KLR**. The duty lies upon the *ex parte* Applicant to demonstrate that there are grounds to justify the court’s interference with the discretion conferred by law upon the DPP and the investigative authorities. The application before the court must be determined with the foregoing in mind.

25. The thrust of the *ex parte* Applicant’s case appears to be that the police and the DPP have wrongly arraigned him in court as he did not participate in drawing and witnessing the sale agreement and other documents related to the transfer of the subject land parcel to Nicholas and Francis. Reviewing the affidavits sworn by the Applicant in support of the motion, it is evident that **Tigoni Police** gave the applicant an opportunity prior to charging him, to answer the complaint raised by the Interested Party. But the Applicant seems to challenge the quality of that process and the outcome.

26. The right to fair administrative action, which includes the right to be heard is entrenched in Article 47 of the Constitution. Under the **Fair Administrative Action Act** which gives effect to this right, the *ex parte* Applicant was entitled, as a party who stood to be affected by the decision to charge him, to be given a chance to respond to the complaint. The *ex parte* Applicant has through his affidavits and submissions canvassed his defence in respect of the charges for which he was eventually arraigned. There is no allegation that the impending criminal trial itself will be conducted in a manner other than as provided under **Article 50** of the Constitution and the Criminal procedure Code, or in violation the safeguards to a fair trial which include the right to be informed of the charges and to prepare and present his defence.

27. The *ex parte* Applicant has singled out the specific right encapsulated in Art 47 which he claims has been violated or that is threatened with violation. Throughout his affidavits and submissions, he makes numerous references to the fact that he is an advocate of the High Court of Kenya, at some point stating that:

“...the continuity of the criminal case completely jeopardizes and negatively impacts his careerimpacts negatively on his rights and liberties as an advocate in the legal profession”(sic).

28. As rightly pointed out in the DPP’s submissions, an advocate does not enjoy a higher standard of rights and fundamental freedoms than other ordinary persons. As stated in **Anarita Karimi Njeru V A G** (supra) and many other decisions after that, a person who approaches the court seeking redress on the basis of a violation of a right must demonstrate the right infringed and the manner of the alleged infringement in relation to him.

29. In this case the *ex parte* Applicant has not identified any specific trial right violated in relation to him, nor is the manner of such alleged violation, stated. What I hear him say is that the charges before the lower court have no basis and that the decision to charge him did not take into account his legitimate expectation as a lawyer executing a client’s instructions. Indeed he submits that:

“It is the *ex parte* Applicant’s submissions that the complainants have no prima facie case as against the *ex parte* Applicant in fact or in law and the criminal case was initiated for ulterior motives”

30. In **Pastoli -v- Kabale District Local Government Council and others (2008) EA 300** the court *inter alia* held that:

“In order to succeed in an application for Judicial review, the applicant has to show that the decision is tainted with illegality, irrationality, and procedural impropriety”

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere to and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision”

31. **Article 47** of the Constitution guarantees the right of every person to administrative action that is *inter alia* reasonable and procedurally fair (see **Section 4** of the Fair Administrative Action Act), while **Section 3** of the Act provides that any person whose rights or fundamental freedoms are likely to be adversely affected by an administrative action is entitled to be heard before the action or decision is taken. Under common law the interests or rights likely to be affected may include privileges or legitimate expectations.

32. **Section 7** of the Act essentially captures the traditional common law grounds upon which a decision or administrative actions may be challenged. The grounds include illegality, bias on the part of the decider, denial of an opportunity to be heard, unreasonableness, violation of legitimate expectations of the affected party, and the like. From these grounds, it is possible to envisage what an administrative action

that is fair ought to look like, and how the attendant process ought to be carried out. In **Dry Associates Limited v Capital Markets Authority & Another Nairobi HC Petition No. 328 of 2011** it was held that the object behind Article 47 was to subject administrative processes to constitutional discipline, and therefore going beyond the traditional common law realm.

33. Concerning the specific elements of procedural fairness **Odunga J** in **Republic v National Police Service Commission Ex parte Daniel Chacha Chacha (2016) eKLR** quoted the holding of the **Supreme Court in Baker v Canada (Minister of Citizenship & Immigration) 2 S.C.R 817 6** to the affect:

“The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions”

34. **Odunga J** reiterated that the requirements of natural justice depend on the context and the function at hand and there were no universally applicable rules as to what is required in every situation so as to be procedurally fair. I therefore associate myself with the further observation by **Odunga J** that:

“Therefore, the principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker “

35. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly that an administrative decision must be based upon logical proof or evidence material. See also **Republic v The Hon. Chief Justice of Kenya and 6 others Ex parte Justice Moiyo Mataiya Ole Keiwua (2010)eKLR**.

36. As indicated earlier on in this judgment, there is evidence that prior to being charged the ex parte applicant was summoned and given an opportunity to respond to the complaint by the Interested Party. Because of the nature of police investigations and the applicable criminal procedure the ex parte applicant could not expect to be accorded a comprehensive hearing akin to a trial at that stage. Besides the Constitution guarantees his right against self - incrimination.

37. With regard to the above, the *ex-parte* Applicant asserts that the Director of Public Prosecutions did not consider his privilege or legitimate expectation as an advocate acting on clients' instructions and that the decision to charge him was not reasonable to the extent that it cannot stand the evidential test, or that the Director of Public Prosecutions failed to consider relevant matters, in particular the fact that he did not participate in preparing and/or witnessing the sale agreement in dispute.

38. On the last aspect, the question of the role played by the ex parte applicant regarding the sale agreement is a disputed matter which the trial court will determine upon full evidence. The Director of Public Prosecutions was not under an obligation to believe the ex parte applicant's version and this court cannot determined the issue on merits. It is a fact that the relationship between a client and his advocate is privileged. However, this privilege is not a shield against suspected criminal activity by either party. The client's instructions and the execution thereof must be lawful. In this case, the vendor is deceased, unfortunately. I believe that the *ex parte* applicant will have an opportunity to explain the circumstances in which he or his assonate prepared the disputed agreement and transfer of lease.

39 The five –Judge bench in **Kalpna H. Rawal V Judicial Service Commission and others (2015) eKLR** had occasion to consider the nature and application of the doctrine of legitimate expectation. Referring to the decision of the Supreme Court in **Communications Commission of Kenya and 5 others v Royal Media Service Limited and 5 others (2014) eKLR (CCK Case)** the said bench stated:

“The Supreme Court, in the **CCK case** dwelt at length on the principle of legitimate expectation stating at paragraphs 264 and 265 that:

“[264] In proceedings for judicial review, legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise.

[265] An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation.”

40. The court further observed that:

The Supreme Court at paragraph 269 then laid down the principles that govern a successful invocation of the doctrine of legitimate expectation as follows:

“[269] The emerging principles may be succinctly set out as follows:

- a. there must be an express, clear and unambiguous promise given by a public authority;**
- b. the expectation itself must be reasonable;**

c. the representation must be one which it was competent and lawful for the decision-maker to make; and

d. there cannot be a legitimate expectation against clear provisions of the law or the Constitution.”

41. Resuming their discussion, the judges stated:

“There are two main reasons why legitimate expectation is protected and has an important role in public law. First, the protection is required by fairness. Abuse of power leads to unfairness and public bodies can only treat people fairly if they are made to keep their promises by a concept that is recognised by the law. Abuse of power can only be rectified by protecting legitimate expectations.

Secondly, legitimate expectations should be protected in order to maintain trust between public bodies and those they are expected to serve. Wade and Forsyth (supra) at page 447 observe: “Good government depends upon trust between the governed and the governor. Unless that trust is sustained and protected officials will not be believed and government becomes a choice between chaos and coercion.”

42. The five-judge bench stated that an expectation whose fulfilment requires the decision maker to make an unlawful decision cannot be legitimate.

The court stated:

“Equally, it is clear that a public agency cannot be stopped from doing what is lawful. The doctrines of estoppel and legitimate expectation can only bear fruit if the promise issues from an authorised office or officer, and the assurance is in compliance with the law. Anything done outside the law cannot receive protection in public law. It would indeed be against public policy to uphold a promise that is in breach of the laws of the land”.

43. In the present case, the *ex parte* applicant merely relies on the fact that he is an advocate of the High Court. While he asserts the legitimate expectation that an advocate lawfully carrying out instructions of a client cannot be prosecuted, he denies any role in the transaction that has given rise to his prosecution. Therefore, factually, he has not established that the advocate who participated in the transaction was lawfully acting out the instruction of a client, or shed any light on the circumstances of the transactions in question.

44. Suffice to say however, that the law does not protect advocates from prosecution where there is material suggesting that they were involved in a criminal enterprise. Nor is there any established practice, or promise by the DPP or investigative bodies upon which the *ex parte* applicant can hinge his alleged legitimate expectation. As a matter of fact, many advocates have been prosecuted on appropriate charges where they have colluded with supposed clients to commit offence. The alleged violation of such expectation has not been demonstrated in this case.

45. The *ex parte* Applicant also challenges the decision of the Director of Public Prosecutions as being unreasonable, that is, without proper backing or evidential basis; that the Director of Public Prosecutions failed to take into account the explanation tendered by the *ex parte* Applicant to the effect that he did not take part in the preparation and execution of the disputed documents. Thus the prosecution of the *ex parte* Applicant is malicious, intended to harm the *ex parte* Applicant’s reputation and constitutes a violation of his rights.

46. Lord Greene’s judgment in *Associated Provincial Picture Houses Limited v Wednesbury Corporation (1948) 1 KB 223*, enunciated the famous Wednesbury principle by stating at page 229:

“It is true the discretion must be exercised reasonably. Now what does that mean? ... it has been frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly on the law. He must call his own attention to the matters he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably”.

Similarly, there may be something so absurd that no sensible person could even dream that it lay within the power of the authority. Warrington LJ in *Short v Poole Corporation (1926) Ch. 66, 90, 91* gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith, and in fact all these things run into one another.”

47. There are two affidavits sworn by the investigating officer and by the Interested Party respectively, which set out the circumstances in which the impugned charges came to be laid. The *ex parte* Applicant has vigorously canvassed his own version, but always denying involvement in the transaction leading to the charges. The mere fact that the Director of Public Prosecutions did not evidently believe the *ex parte* Applicant’s version does not render the DPP’s decision to charge him unreasonable. The *ex parte* Applicant has not demonstrated that a consideration of irrelevant or extraneous factors brought about the decision to charge him. The *ex parte* Applicant position is that the material upon which the decision was based is inadequate, even while admitting that the sale agreement and transfer of lease were prepared in his office.

48. A criminal trial which is commenced without a proper factual basis is, as stated in the *Ngeny case*, “*Suspect for ulterior motive or improper cause*”. Where such a prosecution has not been terminated by the High Court through Judicial review, the accused person will eventually be vindicated by an acquittal and be entitled to bring an action for malicious prosecution. Where, as in this case, the accused person asserts *a priori* that the case facing him has no factual basis that becomes a question of merit to some extent and this court must act

with care so as not to assume the jurisdiction of the criminal court. The court is only interested to see whether the decision can be said to logical basis or proof, not whether the prosecution case will succeed at the trial.

49. The *ex parte* Applicant swore an affidavit after filing his submissions, which annexes a letter from the DCIO Limuru purporting that the Director of Public Prosecutions had by a letter directed that no further action be taken pursuant to the complaint by the Interested Party, allegedly for “lack of sufficient evidence” which would warrant criminal prosecution against any parties involved.

50. The Director of Public Prosecutions’ letter containing the alleged instructions is not attached, and it is not clear why the DCIO’s letter intended for the Interested Party was placed in the hands of the *ex parte* Applicant while this matter was proceeding before the High Court. Moreover, the said letter does not make specific reference to the property which is the subject matter of the initial inquiry and impugned prosecution namely, **Limuru Township plot No. 157**.

51. For my part, I have considered the allegations and counter allegations contained in the various affidavits placed before the court, in light of the charges facing the *ex parte* applicant and his co accused with regard to the subject property. There is no dispute that the transaction leading to the disputed transfer of the property to **Nicholas** and **Francis** was done through the law firm of the *ex parte* Applicant, and secondly, that in the material period there was an existing order of the court in the succession cause prohibiting transactions in respect of the estate assets which, on all accounts were still in the name of the deceased. Indeed the property which is the subject of the criminal case was purportedly sold by the vendor while the title was still registered in the name of the deceased. This court cannot go into the finer details of issues such as the accompanying *mens rea* on the part of the parties and advocates involved and whether there exists adequate evidence to warrant a conviction.

52. The court however can state on the basis of the above facts that there are serious questions raised on both sides for the determination of the criminal court. This court is not in a position, nor should it attempt to answer the question whether the *ex parte* applicant unlawfully drew and signed the disputed sale agreement and allied documents which resulted in the unlawful transfer of the land to **Francis** and **Nicholas**; nor determine whether the transfer of lease was based on a forged consent from the municipality concerned, and ultimately what role any of the accused may have played in the alleged conspiracy to defraud the beneficiaries of **Eliud Ngichu Guthire** of the said asset of the deceased’s estate.

53. Suffice to say that based on the material proffered, this court is not satisfied that the Director of Public Prosecutions acted without due regard to the evidentiary test and that the criminal proceedings before the Limuru court constitute an abuse of the court process.

Article 157(11) provides that:

“In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process”.

54. A party who alleges that the Director of Public Prosecutions has acted outside the scope of this provision ought to clearly demonstrate the departure, and the mere existence of competing evidentiary matters which require determination by the criminal court cannot be adequate demonstration of such fact. It is in the public interest that those suspected of involvement in criminal activities be subjected to the criminal process as prescribed by law, whatever their status in society.

55. In the case of **Kuria and 3 others V Attorney General (2002) 2 KLR 69**, the court considered the balance between public and private interest play in criminal proceedings, observing that:

“It is not enough to simply state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution...The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose on 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 bipolar 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 evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused to have a fair trial”

56. The prescription in article 157 (11) is designed to protect citizens from the arbitrary, whimsical or capricious exercise of the independent mandate of the Director of Public Prosecutions. Ditto for the Office of the Director of Public Prosecutions Act and fair trial guarantees in the Bill of rights. Thus, for the purposes of this case, it may be asserted that the *ex parte* applicant like every other person enjoys a constitutional protection against a prosecution that is brought in outright disregard of the principles in article 157 (11). The prescription regulates the lawful exercise of the Director of Public Prosecution’s mandate so that his discretion is not unfettered.

57. The *ex parte* Applicant has failed to demonstrate that the Director of Public Prosecutions in making his decision to commence the prosecution failed to take into account the matters prescribed in Article 157 (11) or otherwise. Thus, his claims that his constitutional rights however described, have thereby been violated appear tenuous.

58. The conclusion this court has come to upon reviewing the matters placed before it is that, the *ex parte* Applicant, and by extension Francis and Nicholas, have failed to demonstrate that the decision to commence the impugned criminal prosecution was made in violation

of the rules of natural justice and constitutes a violation of the constitutional rights of the Applicants and represents an abuse of the process of the court.

59. There is no merit in the motion filed by the *ex parte* Applicant. The same is dismissed with costs to the Respondents and the Interested Party.

DELIVERED AND SIGNED AT KIAMBU THIS 28TH DAY OF SEPTEMBER, 2018.

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C. MEOLI

JUDGE

In the Presence of:

Mr. Ongira for the DPP

Mr. Kamau holding brief for Ms Gathua for *ex parte* Applicant

Mr. Gichigo for 1st Interested Party

Court clerk - Kevin