REPUBLIC OF KENYA

IN THE HIGH COURT

AT KAJIADO

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 1 OF 2018

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW

ORDERS OF CERTIORARI, MANDAMUS & PROHIBITION

AND

IN THE MATTER OF: SECTION 8 & 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

GRACE WANGARI BUNYI

(Sued as the administrator of the

Estate of the late OBADIAH KUIRA BUNYI).....1ST RESPONDENT

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

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

THE CHIEF MAGISTRATE COURT NGONG.....4TH REPONDENT

THE ATORNEY GENERAL.....5th RESPONDENT

LUCY WAIRIMU NJOGU.....6TH RESPONDENT

ANDREW WAIRIMU NJOGU.....7TH RESPONDENT

BERNARD MUNGAI GATHIMBA.....8TH RESPONDENT

EXPARTE

MOSES KIRRUTI & 28 OTHERS

RULING

1. By an Amended Notice of Motion dated 18th July, 2018, the exparte Applicants herein, ***MOSES KIRRUTI & 28 Others,*** seek the following orders:

> ***a) An order of CERTIORARI to remove to High Court for purposes of quashing and to quash the Charge Sheet dated 1st December 2017 and the ensuing proceedings before the Ng'ong Magistrate Court in Criminal Case Number 587 of 2017, Republic v Moses Kiruti Lepaso***
>
> ***b) An order of PROHIBITION prohibiting the 2nd and 3rd Respondents either by themselves, their servants, agents and /or employees from interrogating, arresting, Charging, prosecuting and/or in a manner whatsoever harassing the Applicants pursuant to their occupancy, and or dealing with all that property originally known as KAJIADO/olooloitikoshi/Kitengela 1957 measuring 42 hectares or their about and/or its subdivisions.***
>
> ***c) An order of MANDAMUS does issue directed at the 1st, 6th, 7th and 8th Respondents to deposit or cause to be deposited with the Deputy Registrar Kajiado High Court Title Deeds and/or any Certificate of Land arising out of the following titles:***
>
> ***i. Kajiado/Kitengela/12922,***
>
> ***ii. Kajiado/Kitengela /12923,***
>
> ***iii. Kajiado/Kitengela/27302,***
>
> ***iv. Kajiado/Kitengela/27303***
>
> ***v. Kajiado/Kitengela/27304***
>
> ***vi. Kajiado/Kitengela/27305***
>
> ***d) The costs of this Application and interest thereon be provided.***
>
> ***e) Any other and further relief that the court may deem fit and just to grant in the circumstances.***

2. The said Notice of Motion Application is predicated upon the verifying Affidavit of ***MOSES KIRRUTI*** filed on 10th January 2018, grounds set forth in the statutory statement filed 10th January 2018, and grounds which were to be adduced during the hearing of the application.

THE APPLICANTS' CASE

3. The crux of the Applicants' case is premised on the aforementioned Verifying Affidavit of MOSES KIRRUTI. According to the said Verifying Affidavit, the 1st exparte Applicant averred that he was initially charged with an offence of forcible detainer contrary to Section 91 of the Penal Code as envisaged in the Charge Sheet dated 1st December 2017 in Ngong Criminal Case No.387 of 2017.

4. He further averred that by a decree issued on 5th July 2011 by the Subordinate Court at Kajiado, the Honourable Court ordered that the 1st exparte Applicant had been and would continue to be on his parcel of land No. Kajiado/Olooloitikoshi/Kitengela/1957 where he had hitherto been. The Court further ordered that the above listed Title were I'll gottenly obtained and must be cancelled and requested the High Court to cancel them unceremoniously as they were obtained fraudulently. (the copy of the degree is annexed to the supporting Affidavit and marked as annexure MKL2).

5. The exparte Applicant further asserted in the Verifying Affidavit that he moved the Nairobi Environment and Land Court via an originating summons dated 8th May 2015 seeking a vesting order and that the application is currently active before Kajiado High Court in ELC No. (Originating summons marked as annexure MKL3).

6. It was the 1st exparte Applicant's position that the title of the Kajiado/Kitengela/33576 being the subject of cancelation proceedings does not confer on the 1st Respondent with any right in law to commence and initiate a criminal charge of forcible detainer against the 1st exparte Applicant, his licensees, agents and servants as he had done.

7. The exparte Applicants having been served with the Respondents' Replying Affidavits in opposition to the application herein. According to the Exparte Applicants, in a nutshell, the Replying Affidavit of No. 68017 PC FRANCIS GITONGA, contained a mere recital of the issues in dispute regarding various competing interest in the various parcels of land and the DPP's position to charge the Exparte Applicant. It was stated that, though the abovementioned Police Officer avers in his Replying Affidavit that the 2nd and 3rd Respondents did not act ultra vires and/or infringe the rights of the Applicants. Through his affidavit PC Gitonga deposes of the decision by the 3rd Respondent to prosecute the Applicants was made based on evidence, in good faith and for public interest. The issue in the criminal court is purely an offence under the Penal Code and not a camouflaged of a Civil Case. The2nd & 3rd Respondents are of the view that the criminal proceedings were not actuated by bad faith to unfairly vex the exparte Applicants and the same ought to continue.

8. The Applicants also pointed out that the ownership of the various parcels of land are matters that are alive in various Environmental and Land Courts Cases at Kajiado as pointed out in paragraph 8,9 and 17 of the Exparte Applicants' Verifying Affidavit.

9. They also responded to the Replying Affidavit of ANDREW MBOGO BUNYI whom in the Applicants view he merely indicated that the subject matter of these proceedings does not fall within the purview of judicial review as he deposed that he does not possess any administrative authority. He further deposed that the matter of the application herein is being dealt with by way of civil suits in Courts. The Applicants termed the same as a total misunderstanding of the exparte Applicants' Case and argued that he failed to appreciate that the exparte Applicants were seeking a judicial review order of CERTIORARI to quash the proceedings in Ngong **Criminal Case No. 587 of 2017 Republic Versus Mosses Kirruti Lepaso.** They further argued that he failed to note that in the judicial review proceedings herein, the exparte Applicants were seeking an order of prohibiting the 2nd and 3rd Respondents form in any manner interrogating, arresting, charging, prosecuting, and/or in any manner whatsoever harassing the Applicants pursuant to their occupancy, and or dealing with all that property originally known as Kajiado/Olooloitikoshi/Kitengela 1957 measuring 42 hectares or their about/or its subdivisions.

10. In addition, the Applicants stated that, by virtue of the fact that the 1st, 6th, 7th and 8th Respondents are claiming ownership of parcels of lands in which the exparte Applicants are similarly seeking ownership, it was prudent to enjoin them in these proceedings so that they could not be condemned unheard.

11. The Applicants respectfully submitted that the single most issue for determination by the Court herein is whether the exparte Applicants have made out a case for the grant of the judicial review orders they are seeking. As regards the parameters of judicial review, the Applicants relied on the Court of Appeal decision in **Republic vs. Kenya National Examination Counsel exparte Gathenji & Others Civil Appeal No. 266 of 1996.** For the grant of the order of CERTIORARI, they relied on **Lady Justice R.E Aburili in the case of Loyfold Kaburu Joseph v Director of Public Prosecutions & 3 Others (2016) eKLR.** The Applicants stated that the situation determined by the Court in Loyfold Kaburu Joseph (supra) is similar to the situation in determination herein. In that respect, the Applicants contended that the decision by the 2rd and 3rd Respondents to invoke the criminal justice system to prefer criminal charges against the exparte applicants in a matter which is purely civil in nature was not only unreasonable but also irrational and irregular. They further contended that the decision by the police and the Director of Public Prosecution to charge the exparte Applicants with forcible detainer was to say the least, unreasonable, unconscionable, arbitrary and oppressive. In the exparte Applicants' statutory statement, they contended that the 1st, 6th, 7th, and 8th Respondents in conjunction with the 2nd and 3rd Respondents are improperly using the criminal justice system to cause improper vexation and oppression of the Applicants herein and the conduct of the 2nd and 3rd Respondents amount to abuse of power.

12. The Applicants argued that since the matters in dispute can be effectively resolved through civil litigation, shifting it to the criminal forum being in the same dispute or matter is to achieve a conviction against them which is not only an abuse of power but also amounts to abuse of the court process. The applicant further aver that it's malafides and more so, unlawful on the part of the Director of Public Prosecutions who ought to seriously peruse files to determine what is criminal and what is not before recommending any prosecution for a criminal offence. The Applicants further argued that the DPP ought not to commence the criminal proceedings owing to the fact that the ownership of the various parcels of the lands are matters that are alive in Kajiado ELC No. 579,577,576, 578 of 2017 just to mention a few.

13. It was the Applicants' view that the civil litigation process exists to provide effective remedies to disputants especially on issues of ownership of the land and where such process has been initiated by the private persons themselves as averred in paragraph 8 and 9 of the Exparte Applicants Verifying Affidavit, the police and the Director of Public Prosecutions have no business to interfere and purport to press criminal charges against the offending parties. The Applicants argued that such conduct subjects the tax payers to unwarranted costs of paying for damages in malicious prosecution claims and which can be avoided.

14. The Applicants therefore urged the court to find that the exparte Applicants have made out a case for the grant of the judicial review order of CERTIORARI and accordingly grant the same moving to the High Court for purposes of quashing and to quash the Charge Sheet dated 1st December 2017 and the ensuing proceedings before the Ngong Magistrate Court in Criminal case no. 587 of 2017.

15. As regards the grant of the order of prohibition, the Applicants relied on ***Pastoli vs Kabale Local Government Counsel and Others (2008) 2 EA 300.*** In that respect, the Applicants reiterated that the decision to charge them was an abuse of the Court process, illegal, irrational, and clouded in procedural impropriety and that the continued trial of the exparte applicants by the Chief Magistrate at Ngong Court will result in manifest injustice hence, the orders sought should be granted to stop the said injustice being done to the applicants. They further argued that the said civil and criminal proceedings going on at the same time will embarrass them will likely to prejudice the exparte applicants in ongoing cases. They place reliance on the case of ***JORAM MWENDA GUANTAI VS. THE CHIEF MAGISTRATE, NAIROBI CIVIL APPEAL NO.228 of 2003(2007) 2EA 170*** in support of their argument.

Further reliance was placed on ***REPUBLIC V CHIEF MAGISTRATE COURT NAIROBI LAW COURTS & OTHERS EX-PARTE SIMON NJOROGE & ANOTHER (2013) eKLR*** were Judge Odunga found criminal proceedings which subject of those judicial review proceedings were an abuse of the criminal justice system. The Exparte Applicants however urged the court to find as such and accordingly grant an order of prohibition as sought.

16. As regards the order of Mandamus, the Exparte Applicants asked the court to issue the same directed at the 1st, 6th, 7th, and 8th Respondents to deposit or cause to be deposited with the Deputy Registrar Kajiado High Court Title Deeds and/or any Certificate of land with the ownership in question. In that regard, contrary to the deposition by Andrew Mbogo Bunyi in his Replying Affidavit that he did not possess any administrative authority, the Applicants contend that judicial review is concept that has been evolving especially post 2010. Further, it was argued that judicial review orders can be granted against private individuals and reliance was placed on the case of ***ERNST YOUNG LLP V CAPITAL MARKETS AUTHORITY & ANOTHER (2017) eKLR***. The Applicants therefore urged the court to grant the order of Mandamus in their favour.

17. Lastly, the Exparte Applicants said that as the useful litigants, the exparte Applicants be awarded the costs of the proceedings herein.

2nd and 3rd Respondents' Case.

18. The 2nd and 3rd Respondents, the Inspector General of Police and the Director of Public Prosecutions, respectively, filed a replying

affidavit dated 13th April 2018, in opposition to the application herein through No. 68017 PC FRANCIS GITONGA and they have also jointly filed submission dated 24th August 2018 in support of their case. It was the 2nd and 3rd Respondents' averment that the applicant in his Petition admitted that the Land title Kajiado/Olooloitikosh/Kitengela/1957 which is non-existent upon several subdivisions being done on the parcel and new titles issued, as such the averments of ownership over that parcel of land is not an issue for this court to consider.

19. They further averred that they have arraigned the 1st Applicant before the Ng'ong Chief Magistrates Court over Land Title Kajiado/Kitengela/33576 which as per paragraph 14(t) by the investigating officer confirms that the same belonged to the deceased (Obadiah Kuira Bunyi) and not the Applicants herein. It was stated that the applicant has wilfully and without any justifiable cause refused to cooperate with the police and has wilfully failed to honour the summons by DCI Ong'ata Rongai for an interview.

20. It was alleged by the 2nd and 3rd Respondents' that the property known as Kajiado/Olooloitikosh/Kitengela/1957 & 33576 as evidenced by the annexure marked as "PG-1 to 17" in the 2nd and 3rd Respondents' Replying Affidavit, were all lawfully registered in the name of Obadiah Kuira Bunyi (deceased) and that the applicant herein is attempting to fraudulently acquire the said land. Further, it was stated that after review was made by the 3rd Respondent in the police file by the 2nd Respondent as per the annexures on the supporting affidavit and preferred the charges facing the based on the law and the constitution of Kenya, 2010. In that respect, the 2nd and 3rd Respondents' contended that the conduct by the Applicants infringes the fundamental rights and freedoms of Estate of Obadiah Kuira Bunyi (deceased) the right to quiet possession and ownership of property under articles 19(3), 20,23,27,28,40,65 and 159 of the Constitution of Kenya, 2010.

21. It was the 2nd and 3rd Respondents' contention that the Applicants herein lacks locus to prosecute the instant application since they are not the legitimate registered owners of land parcel Kajiado/Olooloitikosh/Kitengela/1957 and Kajiado/Olooloitikosh/Kitengela/12922 and that the rightful owner is Obadiah Kuira Bunyi (deceased).

22. Further, it was argued that the instant application is fatally and incurably defective and ought to be struck out for reason that the Applicants herein has not filed a written authority from 2nd to 29th Applicants which is a mandatory requirement in Order 1 Rule 1291 & (2) of the Civil Procedure Rules, 2010 and further that the Applicant has not deponed in his affidavit that he has the authority of the 2nd to 29th Applicants and that he is acting on their behalf.

23. It was also submitted by the 2nd and 3rd Respondents' that the Applicants intend to obstruct or interfere with the Statutory and constitutional mandate of the 2nd and 3rd Respondents'. Reliance was placed on Article 40(6) of the Constitution of Kenya 2010 where the 2nd and 3rd Respondents' argued that the said section does not protect or extend the rights under Article 40 to the Applicants herein as they have fraudulently, unlawfully and illegally acquired Obadiah Kuira Bunyi (deceased)'s land. It was further argued that the actions of the Applicants do not meet the threshold as set out in the Constitution with regard to property ownership such as demonstrated in the 2nd and 3rd Respondents' Replying Affidavit. Further reliance was placed on the case of ***John Kamau Kenneth Mpapale v City Council of Nairobi & 7 (2014)*** eKLR in support of their argument.

24. It was further averred by the 2nd and 3rd Respondents' that the Applicants have not demonstrated that their fundamental rights have been breached by the 2nd and 3rd Respondents'. The 1st Applicant was charged with an offence of forcible retainer of land contrary to section 91 of the Penal Code, Cap 63. According to the 2nd and 3rd Respondents', the forcible detainer of land charges is still valid under the penal code and the same has neither been repealed nor declared unconstitutional. The said charges are criminal in nature and in the 2nd and 3rd Respondents' view, nothing in law prohibits the criminal case from proceeding whether or not the complaint has commenced civil proceedings against the Applicants as provided under section 193A of the Criminal Procedure Code, Cap 75.

25. It was therefore their submission that the 3rd Respondent acted within the requirements of Article 157 of the Constitution, and the 2nd Respondent availed the police file for perusal and did give directions for which the 3rd Respondent directed that the Applicant be charged with the said offence. Further, that the decision to prosecute the 1st Applicant was arrived at based on the availability of sufficient evidence and in the best interest of justice and for public interest.

26. In addition, the 2nd and 3rd Respondents' was of the view that the prayer as regards the order of MANDAMUS cannot be issued since the same is a preserve of the Environment & Lands Court. As the issue of ownership and preservation of the said parcel of land is not a claim in the instant application that granting of such order would be a transgression of the Jurisdiction of this court. Further, the prayer for an order of Prohibition cannot be issued since the same is overtaken by events as the 3rd Respondents has already commenced the said criminal proceedings against the 1st Applicant. It was argued that the orders sought are ambiguous and amount to impeding the constitutional mandate and functions of the 2nd and 3rd Respondents'. Reliance was placed on ***REPUBLIC V DPP & THREE OTHERS EX-PARTE BEDAN MWANGI NDUATI & ANOTHER (2015) eKLR*** to foster their argument.

27. The 2nd and 3rd Respondents' also contented that in prosecuting the Applicant have not violated any rights of the Applicant and the same was done within the confines of the Constitutional provisions. They relied on ***David Ngiali & 2 Others v Directorate of Criminal Investigations & 4 Others (2015) eKLR.*** in their Constructional mandate to detect and prevent crime. Further, it was stated that the police only needed to establish reasonable suspicion before preferring charges and the rest is left to the trial court. As long the prosecution and those charged with the responsibility of making decisions to charge act in a reasonable manner, the high court would be reluctant to intervene. It was therefore, the 2nd and 3rd Respondents' submission that the police in this matter have not only established a reasonable suspicion but have established sufficient and prima facie case against the 1st Applicant and the 3rd Respondent's decision to prosecute was reasonable and in the best interest of justice. They relied on the case of ***Kipoki Oreu Tasur v Inspector General of Police & 5 others (2014) eKLR*** in support of their argument.

In the 2nd and 3rd Respondents' view and submission, that the onus of proving that there exist fundamental breach of the Applicants rights and freedoms by the 2nd & 3rd Respondents' lies with the Applicants and the same never shifts. In the same respect, it was argued that the

Applicants failed to discharge this burden of proof to prove that indeed the intended prosecution has breached the said rights. In that respect, the 2nd and 3rd Respondents' invited this court to follow the court in ***David Ndolo Ngiali & 2 Others v Directorate of Criminal Investigations & 4 Others (2015) eKLR*** while dismissing the Applicants application, the court observed that:

"Having considered the issues raised.....it is in my view that the same are challenges on the merits of the decision to prosecute the Applicants and the exercise of the discretion of the 2nd Respondent. The former can be properly dealt with by the trial court..... ". It was therefore submitted that the trial court is the best arena to canvass and challenge the evidence obtained by the Respondents in order to accord all parties a fair trial. The 2nd and 3rd Respondents' relied on the case of ***REPUBLIC V CHIEF MAGISTRATE'S COURT NAIROBI 73 OTHERS EX-PARTE STEPHEN OYUGI OKERO (2015) eKLR*** to support their argument. It was their humble submission that the issues raised by the Applicant are best dealt with at the trial court and not in this instant application. They therefore urged the court to find the instant application devoid of merit and thereby dismiss it with cost.

1st, 6th, 7th and 8th Respondents submissions.

The abovementioned Respondents in their submissions dated 17th July 2018 and a replying affidavit of ADREW MBOGO BUNYI dated 14th March 2018, contented that judicial review proceedings only brought against public persons or bodies exercising some administrative authority, and reliance was placed on the case of ***Joccinta Wanjiru Raphael v William Nangulu- Divisional Criminal Investigation Officer Makadara & 2 Others (2014)eKLR,*** in support of their proposition that judicial review proceedings are only brought against public bodies as the remedies of mandamus, prohibition, and certiorari are only available against public bodies. The court in making the above assertions followed the decisions in the cases of ***MUREITHI & 2 OTHERS (FOR MBARI YA MURATHIMI CLAN) VS. ATTORNEY- GENERAL & 5 OTHERS*** and ***REPUBLIC VS. KENYA NATIONAL EXAMINATION COUNCIL EX-PARTE GATHENJI & OTHERS (CIVIL APPEAL NO. 266 OF 1996)***

In light of the above mentioned cases, Respondents argued that the orders sought by the Applicants cannot be granted against them as they are private citizens and they do not possess any administrative authority or power to infringe on any rights of another person. It was further stated by the Respondents that it is trite that the Court does not act in vain by issuing orders that cannot be enforced, as the ex-parte applicants are acutely aware, but nonetheless to file a poorly thought out application. They also contended that since the subject matter of this application is being dealt with by way of several pending civil suits that are in Environmental and Land Court at Kajiado hence the judicial review application is merely a time and resource wasting exercise that serves absolutely no other purpose other than to delay the course of justice and in determination of the suits. Lastly, they argued that the application herein is hopelessly misconceived and a severe abuse of court process. It was their prayer that it be dismissed with costs.

ANALYSIS AND DETERMINATION

I have considered the exparte application, the affidavits both in support and in opposition to the exparte application, the submissions made by the all the judicial authorities relied upon by the parties to this suit. The main issue for determination herein is whether the exparte applicants are entitled to the judicial review orders sought.

The court notes that the judicial review remedy is no longer in the domain of the common law remedies but a constitutional remedy espoused in Articles 22, 23, 47 and 50 of the Constitution of Kenya 2010. In the Court of Appeal decision of ***Judicial Services Commission Vs Mbalu Mutuva & Another (2015) eKLR CA 52/2014,*** it was held interalia: -

> ***"Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of rights. The right to fair administrative action is a reflection of some of the national values in Article 10 of the Constitution such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under common law was developed."***

In ***Aburili J. in Batange Ndemo v DPP & Others,*** it was acknowledged that the Criminal Justice System and therefore criminal trial, are a matter of public interest and are conducted in the public interest, to ensure that the Rule of Law, one of the pillars of good governance is protected and prohibited. It is for that reason that the drafters of the Constitution of Kenya 2010 deemed it fit to enshrine therein several state institutions such as the office of the Inspector General of Police and the Director of Public Prosecutions, to be the custodians of the criminal justice system in ensuring that the Rule of Law is protected and promoted.

The circumstances in which the court would be entitled to prohibit, bring to a halt or quash Criminal proceedings are now well settled. In doing the same, the court ought to be extremely cautious in making its determination so as to avoid prejudicing the intended or pending criminal proceedings.

This court is well aware of the discretionary nature of judicial review remedies and the fact that the court would in certain circumstances decline to grant the same even if the same are merited. This position was well appreciated in **Halsbury's Laws of England 4th Edition Vol. 1 (1) paragraph 12 pg. 270:**

> ***"The remedies of quashing orders (formerly known as order of certiorari); prohibition orders (formerly known as orders of prohibition; mandatory orders (formerly known as orders of mandamus) are all discretionary. The court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief, the court will take into account the conduct of the party applying and consider, whether it has not been such as to disentitle him to relief. Undue delay,***

unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. [emphasis added].

Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or further, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question; would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The court has an ultimate discretion whether to set aside the decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow a temporary decision to take their course, considering the compliance and intervening if at all later and in retrospect by declaratory orders."

As regards the prayer for the Judicial Review Remedy of prohibition, the purpose of the same is to the same is to prohibit the body mandated with decision making, from making or taking any further or contemplated steps without jurisdiction or in breach of the rules of natural justice as in the case of ***Kenya Examination Council (supra)*** that:

"What does an order of prohibition do and when will it issue? It 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 for 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."

The Court in exercise of its discretion on whether or not to grant an order of prohibition, it takes into account the needs of good administration***. (See R vs. Monopolies and Mergers Commission Ex Parte Argyll Group Plc [1986] 1 WLR 763 and Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK).)***

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

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

It must be noted that in granting an order of prohibition the Court is not concerned about the innocence or otherwise of the applicant. This recognition was made in ***George Joshua Okungu & another vs. Chief Magistrate's Court Anti-Corruption Court at Nairobi & another [2014] eKLR*** where the Court expressed itself as follows:

"It is therefore clear that whereas the discretion to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt. Similarly, where the commencement or continuation of the criminal prosecution will result in abrogation of the Petitioner's rights and freedoms enshrined in the Constitution, the Court is under a duty to bring such proceedings to a halt. In so doing, it must be emphasized that the Court is not concerned about the innocence or otherwise of the Petitioner. The Court's duty is only to ensure that the Petitioner's rights and freedoms as enshrined in the Constitution are protected and upheld. As was held Wendoh, J in Koinange vs. Attorney General and Others [2007] 2 EA 256, the jurisdiction of the Court in Constitutional matters is limited to inquiring into the allegations of violation of fundamental rights as alleged by the applicant and what remedies, if any, the court can grant. As was stated in the case of Githunguri vs Republic KLR [1986] 1:".

"We speak in the knowledge that rights cannot be absolute. They must be balanced against other rights and freedoms and the general welfare of the community. We believe we are speaking correctly and not for the sake of being self-laudatory when we say the Republic of Kenya is praised and admired by other people and other systems for the independent manner in which justice is dispensed by the courts of this country. We also speak knowing that it is our duty to ask ourselves what is the use of having a Constitution if it is not honoured and respected by the people. The people will lose faith in the constitution if it fails to give effective protection to the fundamental rights. The people know and believe that* **to destroy the rule** *of law you destroy justice thereby also destroying the society."

In respect of judicial review orders of certiorari is a two-part remedy which can be used to either quash or remove the decision of a body, person or authority exercising judicial or quasi-judicial jurisdiction or in excess of jurisdiction, which made in excess of jurisdiction or were the body has failed to apply the rules of Natural Justice of fair administrative action, where the decision is illegal or unreasonable. (See CA 266/1999 KNEC vs REPUBLIC EXPARTE GODFREY GITHINJI). The said remedy can be an order removing official record of impugned decision maker into the superior court issuing the certiorari order or it is an order quashing the impugned decision, and the record thereof.

With respect to the order of mandamus, in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others** (supra) it was held *inter alia* as follows:

> **"The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."**

Similarly, in in **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543** where **Goudie, J** held, *inter alia*, as follows:

> **"*Mandamus* is a prerogative order issued in certain cases to compel the performance of a duty...Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual…In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant *mandamus* to compel the fulfilment…Whereas *mandamus* may be refused where there is another appropriate remedy, there is no discretion to withhold *mandamus* if no other remedy remains. When there is no specific remedy, the court will grant a *mandamus* that justice may be done…In *mandamus* cases it is recognised that when statutory duty is cast upon a Crown servant in his official capacity and the duty is owed not to the Crown but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it."**

The Director of Public Prosecutions exercises power donated by Article 157 of the Constitution and the Office of Director of Public Prosecution Act to among others: -

> ***a) Institute and undertake criminal proceedings against any person before any court (other than a Court Martial) in respect of any offences alleged to have been committed;***
>
> ***b) Take over and continue any criminal proceedings against any person before any court that have been instituted or undertaken by another person or authority, with the permission of the person or authority;***
>
> ***c)With permission of the court, discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecution under paragraph b of Article 157(6) of the Constitution.***

It is important to note that the discretion given to the Director of Public Prosecutions to undertake investigation and prosecute criminal offences is not to be taken for granted or lightly interfered with and must be properly exercised. In the same respect, the court ought not to usurp the constitutional and statutory mandate of the Director of Public Prosecutions. The mere fact that their high chance of success as regards the intended or ongoing criminal proceedings does not count, it not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned merits of the case but to address defects in decision making process by a decision making body. However, the court may only intervene were the said discretion is exercised unlawfully and in bad faith, for instance where it is being abused or being used for achievement of some collateral purpose which are not geared towards the vindication of the commission of a criminal offence and the justice system such as with a view to forcing a party to submit to a concession of a civil dispute, the court will not hesitate to bring such proceedings to a court.

The concurrent existence of both civil and criminal proceedings would not, *ipso facto*, amount to an abuse of court process unless the commencement of the criminal proceedings is intended to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of some collateral purpose other than its legally recognized aim as mentioned above. *(See* ***Republic v Chief Magistrate Criminal Division & Another Exparte Mildred Mbuya Joel (2014) eKLR (Misc. Civil App No.115 of 2013).*** The court acknowledges the fact that it is possible for criminal and civil proceedings touching on the same subject matter and involving the same parties to run concurrently. Section 193A of the *Criminal Procedure Code* Cap 75 Laws of Kenya provides for concurrent civil and criminal proceedings. It stipulates as follows:

> ***193 A. Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.***

The Court of Appeal in **Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others Nairobi Civil Appeal No. 56 of 2012 [2013] eKLR held:**

> ***"While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings" It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court. This is case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations"***

The case at hand touches on a land dispute between the exparte applicants and the 1st Interested Party where the 1st interested party is claiming ownership of the said land. According to the replying affidavit sworn by No. 68017 PC FRANCIS GITONGA on behalf of the 2nd and 3rd interested parties, the 1st interested party Obadiah Kuira Bunyi (deceased) made a complaint at Ong'ata Rongai Police Station over a land transaction wherein the deceased was issued with a title number Kajiado/Olooloitikosh/Kitengela/1957, Kajiado/Kitengela/12922 and Kajiado/Kitengela/33576. Indeed, the said police officer carried out an investigation with regard to the land in dispute after which the Director of Public Prosecutions upon perusing the investigations file and satisfying himself that there was sufficient material and legal basis for mounting a prosecution against the exparte applicants, decided to exercise his constitutional and statutory mandate in preferring chances against the applicants. Annexure MKL1 is the charge sheet which envisages the offence with which the 1st Exparte applicant was charged with. The charge indicated thereon the offence of forcible detainer contrary to section 91 of the Penal Code. The Particulars of the offence is the allegation that on the 6th day of March 2015 at Oloosirkon Location in Kajiado East Sub-County, being in possession of the said parcel of land in a matter likely to cause breach of peace, against Obadiah Kuira Bunyi (deceased) who was the legal owner of the said property.

Section 91 of the Penal Code provides as follows:

> ***"91. Any person who, <u>being in actual possession of land without colour of right</u>, holds possession of it, in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace, <u>against a person entitled by law to the possession of the land</u> is guilty of the misdemeanour termed forcible detainer."***

The exparte applicants' case is that the above charges the decision to charge them by the 1st and 2nd interested respondents' is an abuse of the Court process, illegal, irrational and clouded in procedural impropriety. That the continued trial of the above charges by the Chief Magistrates Court at Ngong will result in manifest injustice and that can only be avoided if this court grants the orders sought to stop the said injustice from being occasioned on the applicants. It was exparte applicants' contention that the criminal and civil proceedings going on at the same time will embarrass them and that will prejudice them in the ongoing civil cases. The exparte applicants laments that the criminal proceedings must be prohibited.

On the other hand, the 2nd and 3rd respondents contend that the instant application is an abuse of the court process and the entire judicial review application is incompetent and lacks merit. It was the 3rd respondent's contention that it is an independent constitutional body mandated in terms of article 157 of the constitution, 2010 to commence, take over and prosecute criminal cases/complaints in Kenya and that it is the exparte applicants' intention to obstruct and interfere with the statutory and constitutional mandate of the 3rd respondent. Basically, the 2nd and 3rd respondent's contention is that their decision to commence criminal proceedings is within the confines of the discretion they are clothed with by the law.

In the foregoing, it is my view that the on pending civil suits do not prevent the 2nd and the 3rd Respondents from exercising their constitutional and statutory mandate to investigate and initiate a prosecution against the ex-parte applicant as the said mandate entrusted upon them in law under 157(6), (10) and (11) of the Constitution and Section 193A of the Criminal Procedure Code. It is incumbent upon the exparte applicants to demonstrate to the satisfaction of the court that the 2nd and 3rd Respondents somehow abused, overstepped or exercised their mandate unlawfully in carrying out the said investigation and preferring or prosecuting the applicants for the alleged crime and by that the same ought to be interfered with by the court.

It is not enough to simply state that the decision by the 2nd and 3rd respondents to undertake an investigation and mounting criminal charges against the 1st applicant constitutes an abuse of court process, irrationality, irregularity and clouded with procedural impropriety are the key elements for judicial review remedies. In my view, the applicants have to demonstrate to the court the same must deemed as such. An action brought before court seeking judicial review orders can not suffice or bring criminal proceedings to an end simply because there are civil proceedings going on touching on the same subject matter. Neither does it suffice to say that because there exist a civil dispute or suit based on the same set of facts as the ones in the criminal proceedings hence the entire criminal proceedings are an abuse of court process.

In this case, the applicants did not demonstrate any unlawful actions, excess or want of authority, evidence of malice, evidence of intimidation or even of manipulation of court process so as to seriously deprecate the likelihood that the applicant might not get a fair trial as provided for under Article 50 of the constitution, and in the absence of such proof, this court is unable to bring the ongoing criminal proceedings at Ngong law Courts to a halt. In that regard the court is unable to quash or to bring the said criminal proceedings to a halt.

It must be noted that criminal proceedings are instituted in the interest of the public and considering the circumstances of the case, this court finds that the evidence of the DPP which informed his decision to institute prosecution against the applicant was not to achieve a collateral purpose or other motives.

In my view, the best platform that parties can use to convince the court as regards the merits of the complaint lodged by the 2nd and 3rd interested party that the exparte applicant forcibly remained in possession of the suit land that ought to have been put in his possession and therefore the sweeping statement by the exparte applicants that the 2nd and 3rd interested parties' actions are irregular, irrational, abuse of

court process and lacks evidential support and holds no water.

In the premises this court is unable to issue an order of mandamus. The applicants failed to satisfy the court that the action they seek to compel the 1st, 6th, 7th and 8th respondents to perform is a duty which the said respondents are obligated to perform whether by statute or any other written law to perform. It is trite that in a case where such duty is absent or is ambiguous to the court that such duty exists, the court ought to be reluctant to grant such an order.

As aforementioned, the orders of certiorari and prohibition cannot be issue in this case for the reason that the prayer for the same lacks evidential support. The same can only be issued where parameters aforementioned are not met.

In the court's view, it is only the Environment and Land Court at Kajiado which has the jurisdiction to determine a dispute regarding ownership of the land in question. The Criminal Court would not be able to consider that issue if raised before it by the 1st Exparte Applicants.

It is only after the dispute as regards the ownership is settled that the criminal court can safely determine the criminal charges levelled against the 1st exparte applicant and thus the criminal court must be given an opportunity to benefit from the outcome of the pending civil proceedings in relation to ownership of the land in question for it to make sound findings thereof. Clearly, if the pending criminal proceeding are stayed, there is very high probability that the prejudice will be occasioned on the 1st exparte Applicant and it would not be said that he was accorded his fundamental rights to a fair trial before a court of competent jurisdiction.

I am of the view that when a dispute a rises touching on the ownership of or title to land said to have been forcibly detained, a criminal charge should not be preferred rather; the complainant should be directed to lodge his complaint with ELC court for the determination of the issue. It is after the issue is laid to rest by this court that a criminal charge can be considered. I'm also of the view that if the said pending criminal proceedings are allowed to proceed, there would be a possibility that the courts determining the concurrent civil and criminal touching on the same sets of fact may come up with conflicting outcomes and for avoidance of the same and for purposes of maintaining the integrity and dignity of the court proceedings, the same ought to be stayed pending determination of the dispute as regards ownership of the land.

Consequently, the Ngo'ng Chief Magistrate Court Criminal Case No.587 of 2017, is hereby stayed pending the hearing and determination of the dispute as regards ownership of the land in question in before the ELC court at Kajiado.

Costs of this application be in the cause.

It is so ordered.

Dated, Signed and Delivered in open court at Kajiado this 22nd day of October, 2018.

.....

R. NYAKUNDI

JUDGE

Representation

Mr. Meroka for the State – present

Mr. Musyoki Mogaka for the Exparte Applicant

Interested Parties - Present