



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**JR. MISC. CIVIL APPLICATION NO. 15 OF 2017**

**IN THE MATTER OF ARTICLE 20, 21, 22(1), 27, 28, 29, 47 AND 239(3) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE CHUKA CHIEF MAGISTRATE'S COURT CRIMINAL CASE NO. 289 OF 2017**

**AND IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES 2010**

**AND**

**IN THE MATTER OF THE LAW REFORM ACT 26 LAWS OF KENYA**

**AND**

**IN THE MATTER OF AN APPLICATION FOR LEAVE BY KENNETH NTWIGA KANGA TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF PROHIBITION AND CERTIORARI**

**BETWEEN**

**KENNETH NTWIGA KANGA.....APPLICANT**

**VERSUS**

**THE DCIO.....1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR PUBLIC PROSECUTIONS.....2<sup>ND</sup> RESPONDENT**

**THE CHIEF MAGISTRATE COURT.....3<sup>RD</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**J U D G M E N T**

1. **KENNETH NTWIGA KANGA**, the ex parte applicant has vide a Notice of Motion dated 18<sup>th</sup> February, 2017 moved this court under **Order 53 Rule 3** of the **Civil Procedure Rule Sections 8 and 9** of the **Law Reform Act Cap 26 Laws of Kenya** for the following orders namely:

(i) That this honourable court be pleased to issue Judicial Review Order of Certiorari to remove into this court for purposes of being quashed the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to prefer criminal charges against the ex parte applicant herein based on the fact contained in the charge sheet dated 15<sup>th</sup> September, 2017 in **Chuka Principal Magistrate Criminal Case No.789/2017 (Republic - vs- Kenneth Ntwiga Kanga and Another)**.

(ii) That this honourable court be pleased to issue the Judicial Review Order of Prohibition directed at the Respondents, prohibiting the Respondents, by themselves their agents, servants and/ or employees or their officers or whomsoever else acting on the Respondents' instructions or behest from proceeding with the criminal prosecution or charges against the ex-parte applicant herein based on the charge sheet or facts contained in the charge sheet dated 15<sup>th</sup> September, 2017 in **Chuka Principal Magistrate's Court Criminal Case No.789/2017 (Republic -vs- Kenneth Ntwiga Kanga & Another)**.

(iii) Costs of this application.

2. The ex parte applicant has listed the following grounds for this application namely:-

**a) That the decision by the Respondent to prosecute him has been made in bad faith.**

**b) That the prosecution against ex-parte applicant has been unfairly instigated with sole aim, - intention and purpose of removing the ex parte applicant from office through the back door using unorthodox means.**

**c) That the prosecution against the ex parte applicant is therefore intended to achieve other purpose other than criminal trial or justice and that the same is a violation of the ex parte's applicant's Constitutional Rights and freedoms.**

**d) That the prosecution against the ex parte applicant is an abuse of the criminal justice system and an abuse of the due process of the law and the court.**

3. The ex parte applicant has supported the ground with the statements facts and a Verifying Affidavit verifying the facts sworn on 18<sup>th</sup> December, 2017.

The ex parte applicant states that he is employed by the Interested Party as Secretary to the County Public Service Board which position he claims he has held since 2013. He has further alleged that on 11<sup>th</sup> September, 2017 when he reported for duty he was confronted by four police officers in the company of County Public Board Chairman Mr. Stephen Nthiga Mitugo, and supervisor and Human Resource Manager Callen Gatune Francis.

4. According to the ex parte applicant the police officers had come to inquire on the use of County Public Board Seal which had been retrieved from the Human Resource Manager's handbag. He has further stated that the officers then accompanied him to his house at Giampampo where a search was conducted and that the officers found no document. He was then asked to accompany the officers to Chuka police station which he obliged.

5. The ex parte applicant also states that on the same date he received a letter from County Secretary and Head of County Public Service sending him on compulsory leave on account of several allegations against him. He further states that on 14<sup>th</sup> September, 2017 he was arrested and arraigned in court on 15<sup>th</sup> September, 2017 and charged with the offence of Abuse of Office contrary to **Section 101** as read with **102 A** of the **Penal code** vide Chuka **Principal Magistrate's Criminal Case No. 789 of 2017** to which he pleaded not guilty and released on bond awaiting trial.

6. The ex parte applicant views the said criminal charges as fabricated and intended to unfairly and unprocedurally remove him from office through back door and without due regard to the law. He further alleges that the criminal charges are a fabrication intended to achieve other purposes other than a criminal trial and therefore an abuse of criminal justice system and due process of the law and the court.

7. The ex parte applicant feels that his constitutional right to freedom have been violated for no good justifiable cause and that his prosecution has also violated his legitimate expectation to the protection of the law.

#### **Ex- parte applicant's case**

8. In his written submissions through Ms Mithiga and Kariuki Advocates, the applicants contends that his prosecution was merely meant to trigger his removal from office solely to settle some political scores. He contends that the letter suspending him was authored and delivered to him on 11<sup>th</sup> September 2017 even before he was arraigned in court on 14<sup>th</sup> September, 2017. He claims that the suspension has since been annulled by the Employment and Labour Relation Court and that the Interested Party upon realizing that the suspension was a goof, is now source for any tangible ground to justify its decision to remove the ex parte applicant by unprocedurally suspending him.

9. The ex parte applicant urges this court to take judicial notice of the fact that the events leading to his removal are suspect as they occurred soon after general election which assured in a new regime which characterized a change of guard and hence bringing into place political considerations as to who were perceived to belong to which political inclination or views perceived to be divergent from those who had ascended to power.

10. The ex parte applicants alleges that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent were largely influenced by the Interested Party to take the decision it did by preferring criminal charges against him. According to the ex parte applicant the statement used by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent in preferring charges is the statement of one Dr. Fredrick Njeru Kamunde the County Secretary. In his view the statement of the cited officer contains unsubstantiated allegations which the 1<sup>st</sup> and 2<sup>nd</sup> Respondent are blindly using to prosecute him.

11. The ex parte applicant contends that the responses by the respondents and the Interested Party lacks direct factual responses to the allegations he has raised in this Judicial Review application and has dismissed them as mere denials and empty protestations. He maintains that contrary to the Interested Party's position, this court in his view has power and jurisdiction to intervene in his case and grant the Judicial Review orders in nature of the prayers sought in this application. He contends that he has raised a proper case for the intervention by this court. In urging this court to grant him the prayers sought, the ex parte applicant has cited the following authorities namely:-

(i) Jotham Mwenda Guantai -vs- Chief Magistrate Nairobi [2007] eKLR where the Court of Appeal sitting in Nairobi High Court held *inter alia* that 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 and the court finds that his prosecution amounts to an abuse of the process of the court, oppressive and vexatious. The court further held that the high court has inherent power and duty to secure fair treatment for all persons brought before court in order to prevent an abuse of the court process.

(ii) ***Republic -vs- Director of Public Prosecution and 2 Others Ex parte Pius Kiprop Chelimo and Another [2017] eKLR*** where the court observed *inter alia* that a criminal prosecution commenced in the absence of proper factual foundation or basis is always suspect for interior motive or improper purpose and that it was incumbent upon a prudent and cautious prosecutor before instituting criminal charges to demonstrate that he has a reasonable and probable cause otherwise the prosecution can be termed malicious and actionable. The court further held that the discretion given to the Director of Public Prosecution is not absolute but must be exercised within the standards provided under **Section 4** of the office of **Public Prosecution Act No. 2 of 2013** and the **Constitution**.

### **Respondent's case.**

12. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have opposed this application through a Replying Affidavit sworn by Reuben Kibet (investigating officer) sworn on 11<sup>th</sup> January, 2018 and the written submissions through James Machirah, the learned Prosecution Counsel from the Director of Public Prosecution. The investigating officer has deposed that County Criminal Investigations officer received instructions from Director of Public Prosecution directing her to conduct investigations involving several fraud cases in Tharaka Nithi County Government and that upon receipt of the said instructions, the Investigating Officer was tasked to carry out investigations which he did after obtaining a court order to facilitate the investigations. He has exhibited an order from the subordinate court as exhibit "**R.K 2**" in his affidavit.

13. The Investigating Officer has deposed that upon carrying out the investigations the investigations revealed that the ex-parte applicant as Secretary to County Public Service Board and being the custodian of all minutes and documents irregularly employed workers to the County Government in various capacities.

14. According to investigating office he recorded statements from various persons including the ex parte applicant and that the decision to charge him with the cited offence known in law was based on evidence and not other extraneous matters. He has denied being influenced by the County Government (Interested Party herein) and has termed the allegations as unfounded. He has exhibited the statements upon which the decision to charge the ex parte applicant was made. He has further deposed that the Director of Public Prosecution exercises its prosecutorial powers and is only subject to the Constitution and the law and does not require consent of any person or authority. In his view this court would be crossing its line of independence if it intervenes by granting the orders sought herein.

15. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents contend that their action to prosecute a duty bestowed upon them under the constitution. They have contended that the ex parte applicant has not demonstrated in making the decision to prefer criminal charges against him, the 2<sup>nd</sup> Respondent has acted without or in excess of the powers conferred upon them by law or have infringed, violated or in any other manner failed to comply with or respect and observe the provisions of the Constitution of Kenya 2010, the Fair Administrative Action Act No.4 of 2015 or any other law. They also contend that the ex parte applicant has failed to demonstrate that the 2<sup>nd</sup> Respondent has not acted independently or has acted capriciously, in bad faith or has abused the legal process in a manner to justify the intervention by this court.

16. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent further content that no evidence of malice, harassment intimidation or even manipulation of court process has been tendered by the ex parte applicant to warrant intervention by this court. They further added that the ex parte applicant has not demonstrated any ground to show likelihood of not getting a fair trial. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent contend that with the independence of courts the applicant shall enjoy equal protection of the law and will not suffer any prejudice in trial and that this application is only aimed an calculated to irregularly shield the ex parte applicant from criminal trial therefore abusing the court processes.

17. In their written submissions the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submit that the ex-parte applicant is charged as 1<sup>st</sup> accused with 4 other persons in ***Chuka Principal Magistrate's Court Criminal Case No. 789 of 2017*** and that the Human Resource Manager one Callen Gatune Francis who was found with County Public Service Board's Seal in her handbag is the 2<sup>nd</sup> accused. They have also submitted that the 4<sup>th</sup> accused Lydia Wangui Gatheru, a Manager at Payroll Department is charged with abuse of office by arbitrarily and irregularly inserting workers to the County Government payroll in abuse of her authority while Jacinta Kathambi Kamwara a clerk in the payroll Department is charged with colluding with 4<sup>th</sup> accused by preparing a payroll used to dispose off the County Government Revenue entrusted to them by virtue of their employment. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents contend that the circumstances of the criminal case is that the offences for which the accused persons are charged arose from one transaction where the 1<sup>st</sup> accused (ex parte applicant) entrusted with the custody of the County Government Public Service Board's Seal normally kept under lock and key, in their view deliberately and irregularly without any authority released the same to the 2<sup>nd</sup> accused with intention of disposing the County Government's revenue to facilitate stamping and sealing the illegally prepared payrolls, the result of which the County Government lost millions of shillings to ghost workers.

18. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have distinguished their case against the ex parte applicant with the cited case of Joram Mwenda Guantai (Supra) contending in the cited case the ex parte applicant had been charged under **Section 101 (1)** of the **Penal Code** for breach of **Regulations 46(1)** of the Exchequer and Audit (Public Procurement) Regulations 2001 regarding awarding of tender by the Hospital Procuring Entity whereas the ex parte applicant was not a member of that body which comprised of 13 members none of whom had been charged. The 1<sup>st</sup> and 2<sup>nd</sup> respondent contend that unlike their present case against the ex parte applicant, the ex parte applicant in the cited authority was not answerable to the actions taken by the procuring entity because he was not a member.

19. They have also distinguished their case against the ex parte applicant with the case in the cited decision of ***Republic -vs- Director of Public Prosecution ex parte Pius Kiprop Chelimo & Another (Supra)*** stating that in the cited case the prosecution charged a person before investigations were complete and therefore prosecution was premature unlike their case where they contend that investigations are complete.

20. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents contend that the ex parte applicant has failed to disclose any ground that lays basis for Judicial Review

intervention. They contend that they reached the decision to charge him independently and fairly without collateral consideration or malice. They have cited the following authorities cited by the Interested Party to buttress their case;

(i) **Republic -vs- Attorney General & 4 Others Exparte Kenneth Kariuki Githii [2014] eKLR**

Where an ex parte applicant, and a Registrar of Lands charged with conspiracy to defraud contrary to **Section 317** of the **Penal Code** and making a false document contrary to **Section 347 (a)** as read with **Section 349** of the **Penal Code**, had filed a Judicial Review asking the High Court to intervene claiming he had been charged unfairly over case that was also a subject of a civil suit where he was not a party and where the issue of ownership was an issue. The court *inter alia* observed that Judicial Review proceedings are concerned with process rather than merits of the challenged decision or proceedings and that courts must be cautious in its findings so as not to prejudice intended or pending criminal proceedings. The court declined to issue Judicial Review order stating that the applicant would be accorded an opportunity to defend himself and that he had also failed to demonstrate that his prosecution intended to achieve a collateral purposes.

(ii) **Wilfred Josiah Manda & Another -vs- Patrick Mukua Muthomi & 2 Others [2016] eKLR**

Where the court observed *inter alia* that Judicial Review concerns itself not with the merits of a decision by a Statutory body or a Public body but defects in the decision making process and that the fact that intended or an ongoing criminal proceedings are in all likelihood bound to fail is not a ground to halt those proceedings by way of Judicial Review.

21. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submit that the case against the Ex- parte applicant and 4 co-accused persons was thoroughly investigated with statements taken from all witnesses including the accused persons and that the statements implicate the ex parte applicant and his Co-accused persons. It is contended that the prayers being sought would infringe on the Constitutional right of the other Co-accused persons as it would delay their trial and in their view the other Co-accused have willingly submitted themselves to the jurisdiction of the lower court to try their case.

**22. Interested Party's Case**

The Interested Party on its part has also opposed this application through the Replying Affidavit sworn on 20<sup>th</sup> January, 2018 by Dr. Fredrick Njeru Kamundi, the County Secretary with the Respondent and the written submissions done through Ms Kamau Kuria & Company Advocate.

23. The Interested Party's opposition mainly is hinged on the contention that the ex parte applicant is trying to have this court try him in the charges levelled against him, a duty the Interested Party contends should be left to trial court. It is contended that the function of Judicial Review is not to carry out an appraisal of the evidence the prosecution intends to rely to determine innocence or otherwise of an accused person. the Interested Party submits the merits of the criminal case pending against the ex-parte applicant should be left to the trial court. The case of **North Wales Police -vs- Evans [1982] 1 WLR 1155** has been cited to support that contention. In that case the court made the following observations:-

***"The purpose of Judicial Review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court."***

24. The Interested Party has also submitted that the ex parte applicant breached the requirement of disclosing all material facts at the time of applying for leave to file an application for Judicial Review. It is contended that the exparte applicant concealed from this court the fact that he had been interdicted over matters that are now a subject of the criminal proceedings pending. In its view this application should fail as per the holding in **O Reilly -vs- Macmann (1982) 3 ALL R** where the court made the following statement.

***"such an affidavit was required to satisfy the requirement of "uberrime fides with the result that failure to make an oath a full candid, disclosure of material facts was itself sought in the substantive application for which leave had been obtained on the strength of the affidavit."***

The Interested Party contends that the applicant should not be granted the relief sought owing to legal maxim that no man shall take advantage of his own wrong.

24. The Interested Party has deposed that the ex parte applicant was qualified and of good professional standing when he was employed as Secretary County Public Service Board Tharaka Nithi County but that he betrayed the trust bestowed upon him by writing letters dated 27<sup>th</sup> April, 2017 and 3<sup>rd</sup> May, 2017 respectively to enable one Joseph Marangu Shem and one Stephen Munene Njagi to obtain enhanced salaries by false pretences. That the decision to offer salary increment were not a decision reached by the County Service Board and that the Employment and Labour Relations Court at Nyeri vide **Employment Cause No. 337 & 342/2017** nullified the appointments. The said decision has been exhibited in the affidavit of Dr. Fredrick Njeru Kamunde as Exhibit **"FNK3"**.

The Interested Party has further faulted the ex parte applicant for failing to disclose that the letters he authored were subject of inquiry by the Employment and Labour Relations Court at Nyeri and by police. The Interested Party contends that the said letters also gave rise to the pending criminal case pending against him. The Interested Party contend that the exparte applicant falsely claimed that the County Service Board is the one which made the appointment and was only communicating the decision of the said Board.

26. The Interested Party has submitted that the facts deposed in its affidavit vide Dr. Fredrick Njeru Kamunde and sworn on 20<sup>th</sup> January, 2018 have not been controverted by the ex parte applicant despite service of the same having been effected on 29<sup>th</sup> January, 2018. The

Interested Party contends that the ex parte applicant should be deemed to have admitted them on this score the Interested Party has relied on the following authorities namely:-

(i) ***Standard Resource Group Ltd -vs- A.G & 2 Others [2016] eKLR*** where the court held that in the absence of a counter affidavit to counter what has been alleged through an affidavit, the averments must be taken to be true.

(ii) ***Kariuki Gathitu -vs- the Attorney General (Petition No.1188 of 2003)*** where **Lenaola J** made the following observations:-

***"It is now trite that although a party alleging a fact has the onus of proof of that fact the opposing party is at the very least expected to file a response to those allegations of fact. Where such a party actually appears in the proceedings but neither in pleadings nor in oral evidence does he answer to those facts then the court can only but take it that those facts are actually uncontested....."***

27. The Interested Party contends that this application has not been made in good faith or for proper purpose as in its view the ex parte application wants this court to try him in a case where he has been charged with a criminal case.

28. The Interested Party has further contended that the role given to ex parte applicant as the Secretary to the County Public Service Board was to communicate decisions of the Board and that pursuant to that role he misused his position and irregularly wrote two letters to the two cited employees who have used the impugned letters in the suit against the Interested Party.

29. The Interested Party has also contended that Ms Callen Gatune Francis a Co-accused of the ex parte applicant has deponed in an affidavit filed in Employment Court in Nyeri (Cause No.502/2017) that the ex parte applicant authorized her to be taking the official County Public Service Board's Seal home, and that the issue of whether or not the ex parte applicant had thereby committed offences should be left to be determined by the criminal court. The case of ***Eunice Khalali Miima -vs- Director of Public Prosecution & 2 Others [2017] eKLR*** has been cited to support Interested Party's proposition that the ex parte's applicant has not satisfied the threshold required for a Judicial Review intervention by this court. It is the Interested Party's contention that the ex parte applicant should raise the issues raised in this application in the criminal Court in his defence to the charges facing him. The Interested Party further submits that the applicant has failed to prove that there are interior motive by the prosecution (1<sup>st</sup> and 2<sup>nd</sup> Respondent) in preferring charges against him in the Criminal Court.

30. The Interested Party has submitted that once the prosecution (1<sup>st</sup> and 2<sup>nd</sup> Respondent) the prosecution establishes prima facie case to institute criminal charges, an order of prohibition should not issue to stop them exercising their Constitutional Mandate.

### **Analysis and Determination**

31. This court has considered this application and the extensive submissions made by all the parties in this application. I have also considered the authorities cited, the issues in this matter can be summarised to 3 namely:-

(i) Whether or the decision by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to prosecute the ex parte applicant can be challenged vide a Judicial Review in this court.

(ii) Whether the prosecution of the ex-parte applicant is a violation of the constitutional rights of the ex parte applicant and an abuse of the court process.

(iii) Whether the ex parte applicant concealed material facts at the leave stage.

### **32. Whether the decision by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to charge the ex parte applicant in a criminal court can be challenged in court.**

In their response to this application the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have contended that the action they took is based on the powers conferred upon the office of the Director of Public Prosecution by the Constitution under **Article 157 (6)** and that in the exercise of those powers the Director of Public Prosecution is only subject to the Constitution and the law and does not require consent of any person or authority. In their view this court would be crossing the line of independence of Director of Public Prosecution if the orders sought by the ex parte applicant are granted.

33. It is true that the office of the Director of Public Prosecution is not subject to the control of any person or authority in exercising their mandate as conferred by the constitution and the law. However the exercise of that power and discretion granted to that office or persons occupying that office must be exercised in accordance with the law. This court can and indeed has in the past stepped in where the Director of Public Prosecution has overstepped its mandate by misusing the powers granted to it owing to extraneous factors to achieve collateral ends which necessarily is not the ends of justice. In ***Kuria -vs- Attorney General [2002]*** the court held or made the following relevant observations;

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

This court does not agree with the Director of Public Prosecution's contention that its decision cannot be challenged through Judicial Review or that by granting orders through Judicial Review this court would be interfering with its independence or mandate. Judicial Review is not only available as a remedy in Judicial Review proceedings but under the new Constitutional dispensation (**Article 23**) Judicial Review is an expanded remedy that ensures that all the bill of rights and fundamental freedoms of persons within Republic of Kenya are enforceable and protected. The intrusion of Judicial Review remedies in criminal proceedings therefore should be viewed in this light as the same is meant for instances where the office of the Director of Public Prosecution is used by the executive or anyone for that matter to abuse the court process in order to achieve collateral purposes other than the one intended by the criminal system in Kenya. (Also see *Macharia & Another -vs- Attorney General & Another [2001] KLR*).

34. This court has considered the Court of Appeal decision in *JORAM MWENDA GUANTAI (Supra)* where the Court of Appeal held as follows:

*".....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 a victim of oppression. It was succinctly out in *STANLEY MUNGA GITHUNGURI -VS- REPUBLIC [1985 KLR 91]* that 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 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. This dictum is now an everyday ideal in courts....."*

It is therefore clear from the forgoing that this court as observed above is mandated and has a duty to intervene whether through Judicial Review proceedings or the Constitutional proceedings where circumstances so require in order to protect against infringement of liberties and Constitutional rights of persons. The big question in this proceedings is whether the ex parte applicant herein has established basis for this court to interfere given that the space for this court to interfere is limited at the same time going by the decision cited by the Interested Party in *WILFRED JOSIAH MANDA & ANOTHER (SUPRA)*. This brings this court to the 2<sup>nd</sup> issue for determination but before I delve into that perhaps it is better to deal with the 3<sup>rd</sup> issue as flowing in this judgment.

**35. Whether the ex parte applicant disclosed all the material facts at leave stage.**

The Interested Party has contended that the ex parte applicant breached the requirement that he makes full disclosure of all material facts at the time of applying for leave to file Judicial Review. The Interested Party submits that the ex parte applicant knew that he had been interdicted over matters that were pending in a criminal court and that he knew he was sent on compulsory leave on 11<sup>th</sup> September, 2017 because of gross misconduct but failed to disclose that fact.

I have however gone through the chamber summons dated 13<sup>th</sup> October, 2017 which was the application by the ex -parte applicant for leave to commence this Judicial Review proceedings. The statements of facts and affidavit verifying the fact disclosed that the ex parte applicant had been forced out on compulsory leave and exhibited a letter from the Interested Party dated 11<sup>th</sup> September 2017 (**KNK 4** in paragraph 9 of the affidavit sworn on 18<sup>th</sup> October, 2017). So while I agree with the Interested Party that the ex parte applicant herein had a duty to reveal all material facts regards his case when applying for leave, I am not satisfied by the Interested Party's allegations that the ex parte applicant is guilty of non concealment of material facts. Granted, the application for leave was filed in this court on 18<sup>th</sup> October, 2017 and upon perusing the application I directed that the Respondents be served which was done. The Interested Party was named in the said application was also served and duly entered appearance and this court allowed them to make their representations which they duly did. This court has been told that the ex parte applicant filed a suit in Employment and Labour Relations Court (No 337 & 342 of 2017) but the question is when was those suits filed and what was relevant in those suits in the Judicial Review proceedings? This court finds that if the exparte applicant's complaint was the manner in which he was treated as an employee by the Interested Party being the employer, it was within his rights to separately channel the complaints to a court of competent jurisdiction to determine the same and I do not find any wrong doing on his part to seek appropriate remedies in the appropriate forum- the Employment and Labour Relations Court.

**36. Whether the prosecution of the ex parte applicant is a violation of his Constitutional rights and an abuse of the court process.**

It is true going by the ex parte both application for leave and the substantive motion that the ex parte has impugned the decision by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to charge him in a criminal court. The grounds listed on the face of his main application in summary questions the merit of the decision by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent and not, as it were, the process itself upon which the decision to charge him was reached.

37. The ex parte applicant has given a chronology of events from the time he found police officers awaiting in his office, the time he was required to accompany them to the station where he recorded his statement to the time he was arraigned in court on 14<sup>th</sup> September, 2017. He has for good measure and perhaps in the spirit of full disclosure exhibited statements upon which the prosecution (1<sup>st</sup> and 2<sup>nd</sup> Respondent) I will be relying on in the criminal trial and for which he innocently believes have little weight on the charges facing him. However the questions posed by the Respondents, the Interested Party and this court is Can Judicial Review competently evaluate the evidence (read statements) presented in a criminal court and determine whether there is a compelling reason to prosecute? Certainly the answer to that question can only be in the negative because the function or purpose of Judicial Review is not to evaluate the evidence or statements of witnesses in a criminal court to see if the prosecution has a prima facie case against a person charged or to be charged. Really that is the function and jurisdiction of a trial court. Its work is actually to assess the evidence pursuant to the provisions of **Sections 210 and 211 of Criminal Procedure Code**.

In *FRANCIS NYAGA NJERU -VS- DPP & 2 OTHERS [2017] eKLR* the court while agreeing with the decision in *Meixner & Another -vs- A.G. [2005] 2KLR* states as follows:-

*"It is the trial court which is best equipped to deal with the quality and sufficiently of the evidence gathered to support the charge."*

37. It is therefore not the business of Judicial Review to evaluate evidence or quality of a prosecution case because to do so would be expanding the jurisdictional limits of Judicial Review to levels that do not serve ends of justice. It is in this context that this court agrees with the school of thought that Judicial Review order particularly when it comes to stopping a criminal trial, should only issue in open and clear cases so that Judicial Review forum is not turned into a criminal trial. In my considered view that would be usurping the role of a trial court which really is an abuse of court process. The focus of Judicial Review remedy in this context is as observed above is not the merit of the decision to charge someone in court but the process of reaching that decision and the underlying consideration should always be, is the decision to charge or prefer criminal charges fair and impartial? Has the person be accorded a fair impartial and legal process or there are other extraneous considerations like witch hunt whether political or other consideration other than the infringement of the law? In Meixner & Another (Supra) the court *inter alia* expressed itself as follows:-

***" Judicial Review concerned with the decision making process and not with the merits of the decision itself. Judicial Review deals with legality of the decision of bodies or persons whose decisions are susceptible to Judicial Review. A decision can be upset through certiorari in a matter of law if on the face of it; it is made without jurisdiction or in consequences of an error of law prohibition restrains abuse or excess of power. Having regard to the law, the finding of the learned Judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not the legality of the decision is correct..... the criminal trial process is regulated by statutes, particularly the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in Section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials it is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the Judicial Review court to embark upon examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence and that is hardly the function of the Judicial Review court. It would indeed be a subversion of the law regulating criminal trials if the Judicial Review court was to usurp the function of a trial court."***

The above decision was of course made before the promulgation of the new Constitution of Kenya 2010 which by and large has expanded rights and liberties to an accused charged in court. The ex parte applicant herein really should have no reason to worry because of the Constitutional safeguard under **Articles 49, 50** and other provisions in the current Constitution.

38. It is apparent from the application herein that, the applicant believes in his innocence in the whole saga and the Constitution presumes that he is innocent until otherwise proved.

However the Judicial Review proceedings cannot and should not as a matter of procedure be used by suspects in criminal proceedings to prove their innocence. In Eunice Khalwali Miima -vs- Director of Public Prosecution & 2 Others [2017] Justice G.V Ondunga held as follows:-

***"Whereas an applicant may well be correct that there are several factors which go to show his innocence, these are not proper proceedings in which correctness of the evidence or the truthfulness of the witness is to be gauged. That task is solely reserved for the trial court which is constitutionally bound to determine the proceedings in accordance with the law. Accordingly, the mere fact that the applicants view the evidence to be presented against them as patently false, concocted and/or misleading does not warrant this court in interfering with the criminal since that is an allegation which goes to the sufficiency and veracity of the evidence and the innocence of the applicants, matters which are not within the province of this court."***

39. In my considered view the observations made in above decision is relevant and reflects the circumstances obtaining in this application. The ex parte applicant believes that his prosecution has been unfairly instigated with the sole aim and purpose to remove him from employment. However the applicant has taken his concerns regarding the manner he was treated by his employer (Interested Party herein) to a proper forum (ELRC) as I have observed above. The question of whether the Interested Party intends to remove the ex parte applicant or has removed him from employment without following the procedure or through the back door and/or using unorthodox means is an issue pending in the E.L.R.C vide the cases in Nyeri cited above. In that regard this court cannot be competently moved at the same to make a finding on the veracity of the ex parte applicant's allegation that his removal from office was through the back door the frontdoor or through unorthodox means.

40. The ex parte applicant by moving this court for a prerogative remedy of prohibition had the burden to establish and prove to the required standard in civil disputes/cases (on a balance of probabilities) that the decision by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to charge him with a criminal charge was not only flawed but arrived at through a flawed process that can only lead to a flawed decision at the criminal trial. This court had considered the response made by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in addition to the chronology of events given by the ex parte applicants and finds that the ex parte applicant was subjected to a fair process. In fact the ex parte applicant has not impugned the process *per se*. His major contention is that his prosecution is in bad faith, as the prosecution only intends to achieve a collateral purpose which in his view relates to his employment. But as I have observed above the establishment of Employment and Labour Relations Court as per **Article 162(2)** and Employment and Labour Relations Court Act (No.20 of 2001 and No.18 of 2014) is meant to determine disputes relating to Employment and Labour Relations and the ex parte applicant has moved to that avenue for redress which is in order. The question as to whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondent has a good case (*prima facie* case) against him should as I have observed above is best left to the trial court in the criminal case to determine. In my view based on what is before me I do not find basis to hold that there is bad faith on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to prefer criminal charges against the ex parte applicant. I also do not find any basis for this court through Judicial Review to intervene and stop the criminal proceedings at the trial court. The applicant has his Constitutional rights as an accused person intact and protected by law. There is no evidence presented before this court that there has been or there is basis for likelihood of any infringements of any of those rights. I am, based on the evidence presented not satisfied by the ex parte allegations that the prosecution or the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have overstepped their mandate or abused the court process. The quality or veracity of those charges preferred against the applicant will be tried and tested at the trial court which as I observed above is constitutionally mandated to do so.

In foregoing and for the reasons advanced this court finds no merit in the exparte Notice of Motion dated 18<sup>th</sup> December, 2017. The same is disallowed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the Interested Party.

**Dated, signed and delivered at Chuka this 17<sup>th</sup> day of December, 2018.**

**R.K. LIMO**

**JUDGE**

**17/12/2018**

Judgment signed, dated and delivered in the open court in the presence of Momanyi holding brief for Dr. Kamau Kuria for Interested Party and Momanyi for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent.

**R.K. LIMO**

**JUDGE**

**17/12/2018**