REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JR MISCELLANEOUS APPLICATION NO. 267 OF 2016

IN THE MATTER OF: AN APPLICATION BY MARGARET MUTHONI MUTAI FOR LEAVE

TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATER OF: ARTICLES 165 (6) & (7), & ARTICLE 23(3) (F) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: SECTION 8 AND 9 OF THE LAW REFORM ACT (CAP 26) OF THE LAWS OF KENYA

AND

BETWEEN

MARGARET MUTHONI MUTAI..APPLICANT

AND

THE INSPECTOR GENERAL OF THE NATIONAL

POLICE SERVICE..1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS (DPP)..........2ND RESPONDENT

THE HON. ATTORNEY GENERAL..3RD RESPONDENT

AND

ONESMUS GITHINJI..1ST INTERESTED PARTY

DANIEL MWANGI MWAI...2ND INTERESTED PARTY

AND

MARGARET MUTHINI MUTAI...EX-PARTE APPLICANT

JUDGEMENT

Introduction

1. The applicant herein, **Margaret Muthini Mutai**, by her Notice of Motion dated 23rd June, 2016, seeks the following Orders:

1. **THAT An Order of CERTIORARI to remove into this Honourable Court and quash the 1st and 2nd Respondents decision to require the appearance of the Applicant at their offices for purposes of an interview and/or the recording of a Statement in regard to the duties and transaction involving L. R. RUIRU KIU BLOCK 2 2 GITHUNGURI/2478.**

2. **THAT An Order of Prohibition directed at the 1st and 2nd Respondent, its officers and any other authority acting on its instructions from prosecuting the Applicant on any purported offence based on information received by the Applicant in her capacity as Land Registrar in dealing with L.R. RUIRU KIU BLOCK 2 GITHUNGURI/2478.**

3. **An Order of CERTIORARI to remove into this Honourable Court and quash the 1st and 2nd Respondents'' decision to require the appearance of the Applicant at their offices for purposes of an interview or the recording of a Statement in regard to information received by the applicant in her capacity as the District Land Register in respect to title issued in favour of the 2nd interested party in L.R. RUIRU KIU GITHUNGURI BLOCK 2/2478 and pending the hearing and determination of Nairobi ELC 640 of 2016.**

4. **An Order of PROHIBITION directed at the 2nd Respondent, its officers and any other authority acting on its instructions from prosecuting the Applicant on any offence based on information received and upon issuing title to the 2nd interested party and subsequent transfer into the 1st interested party.**

5. **THAT the Court be at liberty to make such further and other orders as it deems fit to meet the ends of justice.**

6. **THAT the cost of this application be provided for.**

Applicant's Case

2. According to the applicant, she is a civil servant designated as a district land registrar Thika since 30th January 2014 and her duties were assessment of documents, registration of documents signing of documents and attending to matters of the public among others.

3. The applicant averred that sometime in late February 2014 the 2nd interested party made an application to open a Green Card and resultant title deed in respect of title number L.R. Ruiru Kiu/Githunguri Block 2/2478 (hereinafter referred to as "the suit property"). Pursuant thereto, the applicant perused the records to confirm that there was no other cares in respect to the suit property and confirmed that there was no other green card. She then proceeded to forward the record for the green card to be opened and it was later opened and all entries made and she signed the same in the course of her duties.

4. According to the applicant, upon the opening of the green card, a title deed in respect of the suit property was issued on the 2nd April 2014 in the name of the 2nd interested party. She explained that the procedure for issue of title in respect of the titles for the land buying companies is that a green card is

opened in their name and they execute a transfer and consent to transfer in respect of their member or a purchaser. After the green card is opened it is filed in the binder as the permanent record in respect of the subject parcel and the binder is kept in the archives within the registry.

5. The applicant disclosed that on the 13th June 2016, she received a call from a police constable in Ruiru Police Station by the name M/S Irene and later received another call from the Divisional Criminal Investigating Officer DCIO Ruiru, **Mr. Cheibii**, who summoned her to appear at their offices on the 15th June 2016 for an interview and recording of statement in respect of parcel No. L.R. Ruiru Kiu Githunguri Block 2/2478 which is currently registered in the name of the 1st interested party. Upon inquiring from the police officers the purpose of seeking her to record her statement, officers informed her that it was in respect to parcel known as Ruiru Kiu Githunguri Block 2/2478 and that it had been registered in the name of the 2nd interested party who had sold and transferred it to the 1st interested party. She then sought the phone numbers of the 1st and 2nd interested parties and called them in order to find out what the issue was with their parcel whereupon the 2nd interested party informed the applicant that he had properly acquired the parcel before he transferred it to the 1st interested party. The applicant averred that she received copies of the green card, the title in the name of **Daniel Mwangi Mwai** (the 2nd interested party), transfer from the 2nd interested party to the 1st interested party, a copy of the PIN Certificate for the 1st interested party, consent, identity card for the 1st interested party, application form for consent, PIN Certificate for the 2nd interested party, ballot payment receipts, sale agreement between the 2nd interested party and **Mr. Patrick Mbugua**, PIN Certificate, Identity card for **Patrick Mbuuga**, clearance certificate from Ghithunguri Constituency Ranching Co. Ltd, clearance certificate and payment receipt which she exhibited. According to the applicant she requested the 2nd interested party to give her copies of all the documents that he had which the 2nd interested party did.

6. It was averred by the applicant that on the said 15th June 2016 at around 10:00 o'clock she proceeded to Ruiru Police Station where she met **M/s Irene** and the DCIO, **Mr. Chebii**, and at the said Police Station, the DCIO demanded that she deposits a cash bail of Khs.200,000/- even before asking any question while not admitting that the applicant was under arrest. Failing to receive any explanation from the DCIO, the ex parte applicant proceeded to M/s Irene's office and inquired why she was being asked to make deposit of Kshs.200,000/= even before being was arrested. At this point the ex parte applicant was informed that the police were investigating title issued to the 1st and 2nd interested party and the applicant was showed copies of documents in her possession and asked to write a statement. The applicant demand to peruse the original documents was however unfruitful as she was informed that they were in the custody of the Lands office hence the applicant could not write any statement based on photocopies. The applicant instead sought to be allowed time to go to the lands office and acquire certified copies of my own for my use.

7. The applicant disclosed that she had since obtained certified copies of all the documents in the file for parcel No. Ruiru Kiu Githunguri Block 2/2478. However, by the time she was leaving the police station at around 5:30 p.m. the DCIO informed the applicant to report at the station on 21st June 2016 to be charged in respect of that transaction in respect of the suit property. It was averred by the applicant that she was held at the police Station for almost the whole day without being listened to by either the DCIO or the said M/s Irene.

8. The ex parte applicant's case was that the documents supplied from the lands office appear genuine and valid as the property is still registered in the name of the 1st interested party. The applicant however maintained that there was no illegal transaction over the transfer of the title to the 1st interested party. In her view she was being harassed for performing her duties as the Lands Registrar yet none of the interested parties had complained of any fraudulent transaction over the ownership of the suit property. She therefore contended that she stood to be prejudiced if the Respondents are not stopped from prosecuting her over the shoddy investigations allegedly being conducted by its officers. It was her case that the loss and damage that she would suffer were the Respondents be allowed to proceed with their aforesaid actions would be wholly disproportionate to any purported benefit that the Respondents would

derive from summoning her to record statements as she was not a suspect.

1st Interested Party's Case

9. The 1st Interested Party supported the ex parte applicant's case.

10. According to the 1st Interested Party, on 19th June, 2014 he acquired the suit property from the 2nd Interested Party vide a sale agreement dated 22nd May, 2014. In that transaction he followed all due process in acquisition of the suit property. However sometimes in 2015, a stranger identifying himself as **Simon Kaniaru Gitau** trespassed on the suit property and removed the beacons the 1st interested party had erected thereon claiming ownership of the suit property. The 1st interested party disclosed that the said **Simon Kaniaru Gitau** even produced a copy of his Title Deed to support his allegations. Thereupon, the 1st interested party reported the matter at Ruiru police station and investigations were commenced with the District Criminal Investigating Office (DCIO) summoned he 1st interested party, the 2nd Interested Party and the said **Simon Kaniaru Gitau** to his offices to record statements and to produce original documents supporting claim of ownership but the said **Simon Kaniaru Gitonga** failed to attend without reason.

11. It was averred that on or about 13th June 2016, the 1st interested party together with the 2nd Interested Party were requested by the Applicant to provide documents pertaining to the ownership of the suit property and the 1st interested party availed the requisite documents to the Applicant who after close examination confirmed that the 1st Interested Party's documents including his Title Deed appeared to be genuine and valid. The 1st interested party then presented to the Applicant a copy of the green card search of the suit property indicating that the said **Simon Kaniaru Gitau** was the registered proprietor and the applicant confirmed that the registry does not have any record whatsoever indicating that the **Simon Kaniaru Gitau** had any interest whatsoever with the suit property and dismissed the documents as forgeries and fraudulent. In spite of the foregoing it was averred that an official search of the suit property indicates that the suit property has double registration in two different names hence the 1st interested party was unable to effect any dealing on the suit property as no such dealing would be approved by the relevant authority.

12. To the 1st interested party, it was instructive that the respondents had not opposed this application hence an admission that the 1st respondent was harassing the applicant (registrar) in a bid to protect the said **Simon Kaniaru Gitau** and further that the 1st Respondent had not conducted thorough investigations but was on a mission to vex an innocent officer of Lands.

13. Whereas the applicant has furnished the 1st Respondent with all requisite documentation, the 1st respondent had not even bothered to state which offence they intended to charge the applicant with.

14. The 1st interested party averred that he was an Advocate of the High Court of Kenya of 34 years standing, and in his view, the 1st Respondents have either been compromised in their investigations and/or are conducting their investigations in a skewed manner so as to shield the said **Simon Kaniaru Gitau** from forgery and fraud charges. It was disclosed that the said **Simon Kaniaru Gitau** had since gone into hiding and all efforts to trace him had become futile as the 1st Respondent had been of no help whatsoever in trying to locate the said person.

15. It was the 1st interested party's case that this dispute being determination of Land proprietary interests the proper forum would be a civil suit and as such he had since instituted a declaratory suit at the High Court of Kenya Nairobi in the Environment and Land Court division to resolve the matter.

16. The 1st interested party averred that should the this Court be minded to allow the 1st Respondent to proceed with charging the Applicant, it would only be fair if the said **Simon Kanairu Gitau** presented

himself to the 1st Respondents with all proper documentation otherwise it would be foolhardy in broad daylight to charge the Applicant on the 1st interested party's complaint of trespass whereas the 1st interested party was claiming to the registered owner of the suit property, a position verified by the ex parte applicant.

1st and 2nd Respondents' Case

17. In opposition to the application the Respondents averred that a report was made by **Patrick Mbugua Kamau** at Ruiru Police Station vide OB40/30/10/2012. By that complaint, **Patrick Mbugua Kamau**, stated that as a shareholder of Githunguri Constituency Ranching Company, which is a land buying company, he was issued with a clearance certificate to enable him acquire a title deed from Thika Land Office. Accordingly, clearance certificate dated 16th March 2012 and addressed to the Thika Land Registrar was presented in order for the title deed to be issued. However upon arrival at the lands office he was informed that the said parcel of land Ruiru KIU Bloc 2 /Githunguri/2478 had another title deed and hence was advised to seek assistance form the CID in order that the matter could be investigated.

18. It was averred that investigations began and in order to establish who had acquired the title deed a copy of the green card was supplied by Thika Lands Office which showed that the first green card was opened on 27th February 2003 and title deed issued to **Peter Njuguna** who then transferred it to **Makutano Self Help Group** who bought the land parcel & were issued with title deed on 2nd February 2007. The land was thereafter transferred to **Joseph Kimi Gatheca** who was issued with title deed on 6th September 2010 and the land was transferred to **Simon Kaniaru** who was issued with title deed 25th May 2011. According to the said Respondents, it is upon the above findings that Githunguri Constituency Ranching Company was asked to confirm in their records with owner of the land parcel in question and Githunguri Constituency Ranching Company confirmed that the land parcel as per their records is owned by **Mbugua Kimondo** who transferred it to his son **Patrick Kamau Mbugua** who is the complainant.

19. According to the said Respondents, the Chairman of Githunguri Constituency Ranching Company upon noticing that there is another title deed which might have been acquire fraudulently, wrote to Thika Land Office a letter placing restrictions on the parcel of land until investigations were complete. The DCIO Ruiru also placed restriction on the same land parcel vide letter dated 20th November 2012 and the entry was entered by the Registrar **Margaret Muthoni Mutai**, the applicant herein. However, while the investigations were ongoing it was discovered that another new title deed had been issued for the same land parcel in question namely Ruiru KIU Block 2/Githunguri/2478 and sold to another person and that a copy of the green card for the new title deed was acquired from lands office Thika and it showed that the green card was opened on 24th April 2014 and title deed was issued to one **Onesmus Gachuhi Githinji** on 19th June 2014 and was also issued with title deed. According to the said Respondents, the emergence of a new green card raised a lot of questions on how the title deed was issued while the first one had been restricted by the DCIO Ruiru and the entry was done by the ex parte applicant who issued the second title deed. To the said Respondents, the transfer documents were checked and the due process was not duly followed well.

20. It was averred that the lead investigator summoned the applicant to state her side of the story and she asked for time to get documents copies from **Onesmus Gachuhi Githinji** and her own documents as well. On 15th June 2016 she was taken through the documents and was unable to give satisfactory reasons on how the new card was opened and she was given time to avail herself to record a statement and specimen signature for forensic analysis but failed to do so.

21. The said Respondents contended that the applicant had come before this Court with dirty hands having failed to cooperate with law enforcement agencies in their investigations which had further delayed the conclusion of the investigation. They sought that the application be dismissed for lack of merit and the applicant be ordered to cooperate with, law enforcement as is required by law.

Applicant's Rejoinder

22. In her rejoinder, the ex parte applicant averred that it was not in dispute that Githunguri Constituency Ranching Co. Ltd – Ruiru issued a letter of clearance to **Patrick Kamau Mbugua** who sold the property to **Daniel Mwangi Mwai** (The 2nd Interested Party). The latter then sold the parcel to **Onesmus Githinji** – (the 1st interested party).

23. The applicant therefore averred that **Onesmus Githinji** the 1st interested party and complainant acquired a good title from **Daniel Mwangi Mwai** (2nd interested party) hence the person named as **Simon Kanaru Gitau** is a stranger to the applicant and the applicant had neither met him nor had any dealings with him.

24. According to the ex parte applicant, the issue that **Mr. Patrick Mbugua** complained of which made Githunguri Constituency Ranching Co. Ltd write the letter dated 31st October 2013 was settled on the 3rd August 2007 when **Makutano Women Group** entered into an agreement with **Stanely Kirubi Kareri** and confirmed that they had illegally encroached **Patrick Mbugua's** land thinking that it was theirs.

25. The ex parte applicant insisted that she fully co-operated with the police by going to the station twice without her statement being taken or being advised on the way forward. To her, at the time she dealt with the suit property as the District Land Registrar there was no restriction on the file and she relied on original documents and on the clearance from Githunguri Constituency Ranching Co. Ltd to open the file and effect registration and transfers in favour of the interested parties hence the 1st interested party acquired a genuine and good or clean title and should not be heard to complain.

Determination

26. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions on record.

27. By this application, the applicant is in effect seeking an order barring the Respondents from conducting or concluding investigations with respect to the alleged fraud on the ground that she was not party to the transactions that led to the commission of the alleged offence.

28. According to the Respondents, investigations are still ongoing and the applicant was required to attend the investigators, record her statement and furnish them with samples of her handwriting when the applicant commenced these proceedings before doing so.

29. Section 24 of the ***National Police Service Act*** **No 11 A of 2011** sets out functions of the Kenya Police Service as being the—

> ***(a) Provision of assistance to the public when in need;***
>
> ***(b) Maintenance of law and order;***
>
> ***(c) Preservation of peace;***
>
> ***(d) Protection of life and property;***
>
> ***(e) Investigation of crimes;***
>
> ***(f) Collection of criminal intelligence;***
>
> ***(g) Prevention and detection of crime;***
>
> ***(h) Apprehension of offenders;***
>
> ***(i) Enforcement of all laws and regulations with which it is charged; and***

(j) Performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.

30. The word **"investigate**" is defined in the ***Black's Law Dictionary*** **9th Edition as:** ***"To inquire into a matter systematically; to make an official inquiry."***

31. In **Republic vs. Chief Magistrate Milimani & Another Ex-parte Tusker Mattresses Ltd & 3 Others [2013] eKLR** this Court expressed itself as follows:

> **"The Court must in such circumstances take care not to trespass into the jurisdiction of the investigators or the Court which may eventually be called upon to determine the issues hence the Court ought not to make determinations which may affect the investigations or the yet to be conducted trial. That this Court has power to quash impugned warrants cannot be doubted. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the police to investigate allegations of commission of a criminal offence ought to be interfered with. It is not enough to simply inform the Court that the intended trial is bound to fail or that the complaints constitute both criminal offence as well civil liability. The High Court ought not to interfere with the investigative powers conferred upon the police or the Director of Public Prosecution unless cogent reasons are given for doing so...The warrants were issued to enable the allegations be investigated. Whether or not the investigations will unearth material which will be a basis upon which a decision will be made to commence prosecution of the ex parte applicants or any of them is a matter which is premature at this stage to dwell on."**

32. It is trite that the Court ought not to usurp the Constitutional mandate of the Respondents to investigate any matter that, in the Respondents' view raises suspicion of the occurrence or imminent occurrence of a crime. Just like in cases of prosecution, the mere fact that the allegations made are likely to be found worthless, is not a ground for halting investigations into the complaints made or brought to the attention of the Respondents since the purpose of a criminal investigations conducted *bona fide* is to consider both incriminating and exculpatory material and not just to collect evidence on the basis of which a criminal charge may be laid.

33. It must always be noted that judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence to the complaint is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is open to the applicant to bring to the attention of the investigators in the course of the conduct of the investigations.

34. However, if the applicant demonstrates that the investigations that the investigators intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such investigations since investigations must be carried out independently and must be carried out in good faith without malice or for the purpose of achieving some collateral goal divorced from the purpose for which the investigatory powers are conferred.

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

> **"It is trite that an order of prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings..."**

36. In **Meixner & Another vs. Attorney General [2005] 2 KLR 189,** the same Court expressed itself as hereunder:

“The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion is acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution...Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power. Having regard to the law, the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision is correct. The other grounds, which the appellants claim were ignored ultimately, raise the question whether the evidence gathered by the prosecution is sufficient to support the charge. 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.”

37. The duty and mandate of the police was appreciated in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR** where it was held:

“The police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene”.

38. It is therefore clear that whereas the discretion given to the respondents to investigate 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, the Court will not hesitate to bring such proceedings to a halt. However, it must be emphasised that judicial review applications do not deal with the merits of the case but only with the process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and once the Court is satisfied that the same are *bona fides* and that the same are being conducted in a fair manner, the High Court ought not to usurp the powers of the police by halting otherwise proper complaints made before them.

39. In this case, it is contended that by the time of the issuance of the titles by the ex parte applicant, the transfers respecting the suit property had been restricted. The applicant contends that there was in fact no such restriction. This Court cannot, based on the material placed before me, which are in form of affidavits, make a conclusive finding that there is no basis at all for conducting investigations.

40. To grant the orders sought in this application in my view would be both pre-emptive and

presumptuous in light of the fact that the DPP's decision to prosecute, if that stage will ever be reached is a matter of conjecture. This Court ordinarily does not interfere with the exercise of constitutional and statutory power of executive authorities unless there exist grounds for doing so. I am afraid that at this stage there are no sufficient material on the basis of which I can find that upon the completion of the investigations, the applicant will be found to have been a party to the transactions giving rise to two titles to the suit property and even if that happens that the DPP will necessarily concur with that view.

41. Under Article 157(4) of the Constitution, the Director of Public Prosecution is empowered to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General is obliged to comply with any such direction. In other words the DPP is not bound by the actions undertaken by the police in preventing crime or bringing criminals to book. He is, however, under Article 157(11) of the Constitution, enjoined to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. In other words the DPP ought not to exercise his/her constitutional mandate arbitrarily.

42. The independence of the DPP is anchored both in the Constitution and in the legislation under Article 157(10) of the Constitution and section 6 of the ***Office of the Director of Public Prosecutions Act, 2013.*** Article 157(10) provide as follows:

The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

43. Section 6 of the ***Office of the Director of Public Prosecutions Act, 2013*** provides that:

> ***Pursuant to Article 157(10) of the Constitution, the Director shall–***
>
> *a.* ***Not require the consent of any person or authority for the commencement of criminal proceedings;***
>
> *b.* ***Not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution, this Act or any other written law; and***
>
> *c.* ***Be subject only to the Constitution and the law.***

44. In my view, the mere fact that the Directorate of Criminal Investigations (hereinafter referred to as the DCI) has conducted its own independent investigations, and based thereon, arrived at a decision does not necessarily preclude the DPP from undertaking its mandate under the foregoing provisions. Conversely, the DPP is not bound to prosecute simply because the DCI has formed an opinion that a prosecution ought to be undertaken. The ultimate decision of what steps ought to be taken to enforce the criminal law is placed on the officer in charge of prosecution and it is not the rule, and hopefully it will never be, that suspected criminal offences must automatically be the subject of prosecution since public interest must, under our Constitution, be considered in deciding whether or not to institute prosecution. See ***The International and Comparative Law Quarterly*** Vol. 22 (1973).

45. A reading of Article 157(4) of the Constitution leads me to associate myself with the decision of the High Court of Uganda in the case of **Uganda vs. Jackline Uwera Nsenga Criminal Session Case No. 0312 of 2013**, to the effect that:

> **"...the DPP is mandated by the Constitution (See Art. 120(3)(a)) to direct the police to investigate any information of a criminal nature and report to him or her expeditiously… Only the DPP, and nobody else, enjoys the powers to decide what the charges in each file forwarded to him or her should be. Although the police may advise on the possible charges while forwarding the file to DPP…such opinion is merely advisory and not binding on the DPP (See Article 120(6) Constitution). Unless invited as witness or amicus curiae (friend of Court), the role of the police generally ends at the point the file is forwarded to the DPP."**

46. This position was similarly appreciated in **Charles Okello Mwanda vs. Ethics and Anti-Corruption Commission & 3 Others (2014) eKLR** in which **Mumbi Ngugi, J** held that:

> **"I would also agree with the 4th Respondent (DPP) that the Constitutional mandate under 2010 Constitution with respect to prosecution lies with the 4th Respondent, and that the 1st Respondent has no power to 'absolve' a party and thereby stop the 4th Respondent from carrying out his constitutional mandate. Article 157(10) is clear…However, in my view, taking into account the clear constitutional provisions with regard to the exercise of prosecution powers by the 4th Respondent set out in Article 157(10) set out above, the 1st respondent (EACC) has no authority to 'absolve' a person from criminal liability…so long as there is sufficient evidence on the basis of which criminal prosecution can proceed against a person, the final word with regard to the prosecution lies with the 4th Respondent (DPP) …"**.

47. It was pursuant to the foregoing that **Majanja, J** expressed himself in **Thuita Mwangi & Anor vs. The Ethics and Anti-Corruption Commission & 3 Others Petition No. 153 & 369 of 2013** as hereunder:

> **"The decision to institute criminal proceedings by the DPP is discretionary. Such exercise of power is not subject to the direction or control by any authority as Article 157(10)…These provisions are also replicated under Section 6 of the Office of the Director Public Prosecutions Act, No. 2 of 2013…In the case of Githunguri –vs- Republic (Supra at p.100), the Court observed…The Attorney General of Kenya…is given unfettered discretion to institute and undertake criminal proceedings against any person "in any case in which he considers it desirable so to do…this discretion should be exercised in a quasi-judicial way. That is, it should not be exercised arbitrarily, oppressively or contrary to public policy…"**

48. In my view, the discretion to be exercised by the DPP is not to be based on recommendations made by the investigative bodies. Therefore, the mere fact that the DPP's decision differs from the opinion formed by the investigators is not a reason for interfering with the constitutional and statutory mandate of the DPP as long as he/she believes that he/she has in his/her possession evidence on the basis of which a prosecutable case may be mounted and as long as he takes into account the provisions of Article 157(11) of the Constitution as read with section 4 of the ***Office of Public Prosecutions Act***, No. 2 of 2013.

49. Conversely, the mere fact that the investigators believe that there is a prosecutable case does not necessarily bind the DPP. As is rightly recognised by **Sir Elwyn Jones** in ***Cambridge Law Journal* –** April 1969 at page 49:

> **"The decision when to prosecute, as you may imagine is not an easy one. It is by no means in every case where a law officer considers that a conviction might be obtained that it is desirable to prosecute. Sometimes there are reasons of public policy which make it undesirable to prosecute the case. Perhaps the wrongdoer has already suffered enough. Perhaps the prosecution would enable him present himself as a martyr. Or perhaps he is too ill to stand trial without great risk to his health or even to his life. All these factors enter into consideration."**

50. It is however my view that the police are clearly mandated to investigate the commission of criminal offences and in so doing they have powers *inter alia* to take statements and conduct forensic investigations. In order for the applicant to succeed she must show that not only are the investigations which were being done by the police are being carried out with ulterior motives but that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the predominant purpose is to further some other ulterior purpose and as long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.

51. In this case the effect of the grant of the orders sought would be to restrain the police from undertaking their investigatory powers. In my view the decision by a Court to halt investigations from being conducted ought to be exercised very cautiously and in very clear cases. It is upon the ex parte applicant to satisfy the Court that the discretion given to the relevant authorities to investigate allegations of commission a criminal offence ought to be interfered with. Dealing with the burden and standard in judicial review applications, it was held in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** that:

> **"A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution...In the instant case there is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even of manipulation of court process so as to seriously deprecate the likelihood that the applicants might not get a fair trial as provided under section 77 of the Constitution. It is not enough to simply state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an "abuse of process", is a "manipulation", "amounts to selective prosecution" or such other processes, or even supposing that the applicants might not get a fair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts. The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial...In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names."**

52. Accordingly, unless and until a decision to charge a person is made by the Police or the prosecutor, it is only in exceptional circumstances where the Court would prohibit, a decision being taken either way by them.

53. In this case the applicant has made bare allegations as to the motives behind the investigations without disclosing cogent grounds upon which this Court can convincingly find that there exist exceptional circumstances that would warrant the taking of the draconian step of countermanding investigations. In my view the issues which the ex parte applicant wishes this Court to be determined are premature.

54. I have said enough to show that this application has no merit. To paraphrase the decision in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69,** in the circumstances of this case it would be in the interest of the applicant, the respondents, the complainant, and the public at large that the criminal investigations be continued with and concluded quickly in order to know where the truth lies and set the issues to rest, giving the applicant the chance to clear her names.

55. Consequently the Notice of Motion dated 23rd June, 2016 fails and is dismissed but with no order as

to costs as there was no affidavit sworn by the complainant to support the position adopted by the investigators.

56. It is so ordered.

Dated at Nairobi this 23rd day of May, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nyaberi for the Applicant

CA Gitonga