REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

J R MISC. CIVIL APPLICATION NO. 35 OF 2015

BETWEEN

REPUBLIC……..…….…….....….……APPLICANT

VERSUS-

THE MAKADARA CHIEF MAGISTRATE..…….....…1ST RESPONDENT

THE KAYOLE DIVISIONAL CID OFFICER…….....2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE SERVICE….3RD RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....4TH RESPONDENT

EX PARTE: WILBERFORCE NYAMBOGA MARIARIA

JUDGMENT

Introduction

1. By a Notice of Motion dated 12th February, 2015, the *ex parte* applicant herein, **Wilberforce Nyamboga Mariaria**, seeks the following orders:

> **a. An order of *Certiorari*, to remove into this honourable court for the purposes of being quashed, and quash, the charge sheet, dated 5th December, 2014, by the 2nd 3rd and 4th Respondents, in the Makadara Chief Magistrate's Court, Criminal Case No. 5703 of 2014 – Republic versus Wilberforce Nyamboga Mariaria.**
>
> **b. An order of *prohibition* directed at the 2nd, 3rd and 4th prohibiting the Director of Public Prosecutions and/or his agents, from prosecuting or further prosecuting the charges contained in the said charge sheet dated 5th December, 2014 and/or amended charge sheet thereto by the 2nd 3rd and 4th Respondents, in the Makadara Chief Magistrate's Court, Criminal Case No. 5703 of 2014 – Republic versus Wilberforce Nyamboga Mariaria or any variation thereof or any charge or charges akin to it, or arising from the same transaction of LR No. Nairobi Block 157/944, and/or, prohibiting the 1st Respondent and/or any other magistrate, in the Republic of Kenya, from hearing, or further hearing, for determination of the charges contained in the said Charge sheet in Criminal Case No. 5703of 2014 – Republic**

versus Wilberforce Nyamboga Mariaria or any variation thereof or any charge or charges akin to it, or arising from the same transaction.

c. THAT costs of this application be provided for.

Applicant's Case

2. According to the applicant, the charges the subject of this application arose from a sale transaction in respect of land parcel **LR No. Nairobi Block 157/944** (hereinafter referred to as "the suit property") in which the applicant acted as the vendor's advocate. According to the applicant, he was not the registered proprietor of the suit property and has never posed as the seller thereof. He disclosed that the vendor deposited the title documents with him and that the purchase price was Kshs 800,000/- which was to be paid by the purchaser to the vendor upon execution of the agreement. Upon the execution thereof, the applicant averred that the purchaser, who was the complainant in **Makadara Chief Magistrate's Court, Criminal Case No. 5703 of 2014 – Republic versus Wilberforce Nyamboga Mariaria** (hereinafter referred to as "the criminal case") deposited the said purchase price which the applicant forthwith released to the vendor and the applicant transmitted the title documents to the purchaser's advocate upon the purchaser's request.

3. It was averred that sometimes in early 2014 police officers from the Respondents' offices visited him and recorded his statement in respect of the transaction touching on the suit property and on 4th December, 2014, the 2nd Respondent arrested the applicant, locked him in custody and released him on a bond of Kshs 70,000/- and was bonded to appear before the 1st Respondent where he was charged with the offences of conspiracy to commit a misdemeanour, contrary to section 394 and obtaining money by false pretences contrary to section 313 of the ***Penal Code***. The applicant averred that the Respondents intended to consolidate his case with the one facing his client being criminal case no. 5703 of 2014.

4. According to the applicant, he did not know the complainant against him and had never acted for him, nor did he act as a seller (vendor) of the suit property. In his view, the ***Advocates Act***, Cap 16, Laws of Kenya has provided a mechanism on how he should be handled or dealt with in case of any mischief on his part and not as a criminal suspect. It was therefore his case that the action and the decision of the Respondents to prefer the charges against him violates the legal principles of the Constitution of the Republic of Kenya, ***The Advocates Act***, Cap 16 laws of Kenya and the express provisions of the sale agreement governing the transaction in issue. He further deposed that the intended charges against him is in breach of the 2nd, 3rd and 4th Respondents' constitutional duty and obligations, to act in good faith in the interest of the public and justice to all, a duty of the 4th Respondent as a public prosecutor.

5. The applicant contended that the intended charges against him would amount to breach of his fundamental rights and freedoms as an officer of this court and an advocate of High court of Kenya and therefore calls for this honourable court's intervention by way of reviewing the 2nd, 3rd and 4th Respondents' decision to charge him with the said criminal offences. He reiterated that the 2nd, 3rd and 4th Respondents in their actions failed to appreciate the provisions of the constitution and the *Advocates Act* Chapter 16, Laws of Kenya and the sale agreement and that they acted with *malafide* in deciding to prefer the said charges against him. To him, the 4th Respondent by himself and/or his agents, the Kenya Police abused the prosecutorial powers bestowed upon him by the Constitution of the Republic of Kenya as the director of Public Prosecutions, to undertake all criminal proceedings against any person offending written law, any court, other than the court martial while adhering to fairness and the principals of Law and honour and that it is an established principle of law that the 1st Respondent and/or his agents should not be allowed to exercise the prosecutorial powers bestowed on him by the constitution in an unlawful manner or in any other manner that will frustrate the control of the public of criminal proceedings and the administration of justice in our Kenyan court by acting illegally. To the applicant, the decision of the 1st, 2nd and 3rd Respondents to charge him with criminal charges is calculated to embarrass, harass, blackmail him.

6. It was the applicant's case that it was unreasonable and an abuse of the process of the Court to charge him with the said offences arising from the said transaction and that this Court has supervisory powers over the Respondents.

1st Respondent's Case.

7. In opposition to the application the 1st Respondent filed grounds of opposition in which it averred that the Motion as filed was defective, unmerited and based on misconception of the law; and that the decision to charge the applicant was based on thorough and extensive investigations within the law and that the applicant would have opportunity to defend himself at the trial.

2nd, 3rd an 4th Respondents' Case

8. In opposition to the application the 2nd, 3rd and 4th Respondents averred that on 20th January, 2013, **James Nyaga Kamau** and **Stephen Onyino Mukobe** approached the Kayole Embakasi DCIO's office with a complaint in respect of the suit property which they both claimed ownership of. Upon investigations, it was found that **Stephen Onyino Mukobe** had documents indicating that the suit property was sold to him by a person who posed as **James Nyaga Kamau**, who had lost the title documents to the suit property had reported the said loss.

9. It was averred that the said **Stephen Onyino** who was desirous of purchasing the suit property was referred to the applicant by **Simon Mburu Waititu** and **John Gatitu Macharia**. The said **Stephen Onyino** proceeded to the applicant's office where the applicant furnished him with copies of the alleged title documents for the purposes of a search which they did and confirmed ownership thereof. However efforts to meet the vendor were thwarted by the applicant who assured the said **Stephen Onyino** that the seller was a good friend of the applicant and a long term client and based on trust the said **Stephen Onyino** proceeded to enter into the said transaction. By transferring the said purchase price to the applicant's account which sum investigations revealed was withdrawn the following day.

10. It was averred that the sale agreement was entered into between **Stephen Onyino Mukobe** and **James Nayaga Kamau** and the purchaser paid a further sum of Kshs 100,000/- which was shared amongst the witnesses to the transaction. However, though the transaction was between **Stephen Onyino Mukobe** and **James Nayaga Kamau** the purchaser never met the vendor who turned out to have been an imposter.

11. It was averred that the applicant in his statement did not identify the vendor or avail information relating to him. It was averted that upon an analysis of the evidence on record, a decision was made to charge the applicant herein with the subject offences. It was the said Respondents' case that they conducted their constitutional duty and mandate within the law in charging the applicant in the said criminal case which decision was purely based on the evidence availed to the Respondents. To the said Respondents, an advocate is not exempt from criminal process if found that in carrying out his business he is culpable.

Applicant's Rejoinder

12. In his rejoinder, the applicant averred that the case of the complainant as presented by the Respondent contradicted the statement which the complainant gave to the police.

Determination

13. I have considered the application, the affidavits in support of and in opposition to the application as well as the submissions made and authorities relied upon.

14. The principle that runs across the proceedings in the nature instituted by the applicant herein is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under

Article 157 of the Constitution and that the mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review. The principle behind this reasoning is that judicial review proceedings are not concerned with the merits but with the decision making process. Therefore the mere fact an applicant has a good defence in the criminal process is not a basis for halting criminal proceedings undertaken *bona fides* since the purpose of a criminal trial is to determine the guilt or otherwise of an accused person and therefore where an accused has a defence to the offence with which he is charged, that defence is open to the accused in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.

15. 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 the 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."**

16. 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 if 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."**

17. However, in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69,** the High Court held:

> **"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 a 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 of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or**

vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far that which the courts indeed the entire system is constitutionally mandated to administer... In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute. It is further alleged that the criminal prosecution is an abuse of the court process epitomised by what is termed as selective prosecution by the Attorney General. It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been be argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law...In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed...There is nothing which can stop the from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made...Under section 77(5) of the Constitution it is a constitutional right that no person who has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of the offence. What is clear from this constitutional right is that it prevents the re-prosecution of a criminal case, which has been determined in one way or another...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...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 affair 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."

18. I also associate myself with the decision in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** that:

"A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable".

19. As was aptly put in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR**:

"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".

20. While it is appreciated that under Article 157(10) of the Constitution the Director of Public Prosecutions does not require the consent of any person or authority in order to commence criminal proceedings and that in the exercise of his or her powers or functions, he is not be under the direction or control of any person or authority, Article 157(11) provides:

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

21. Similarly, section 4 of the ***Office of Public Prosecutions Act***, No. 2 of 2013 provides:

In fulfilling its mandate, the Office shall be guided by the Constitution and the following fundamental principles—

(a) the diversity of the people of Kenya;

(b) impartiality and gender equity;

(c) the rules of natural justice;

(d) promotion of public confidence in the integrity of the Office;

(e) the need to discharge the functions of the Office on behalf of the people of Kenya;

(f) the need to serve the cause of justice, prevent abuse of the legal process and public interest;

(g) protection of the sovereignty of the people;

(h) secure the observance of democratic values and principles; and

(i) promotion of constitutionalism.

22. What comes out clearly from the foregoing provisions is that the discretion given to the DPP is not absolute but must be exercised within certain laid down standards provided under the Constitution and the ***Office of the Director of Public Prosecutions Act***. Unless these provisions are adhered to, this Court would be entitled to interfere with the exercise of discretion by the DPP. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, the Constitution itself. This was the position adopted in **Nakusa vs. Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565** in which it was held:

> **"the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system…In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of *Domnic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003* is that interpretation of the Constitution has to be progressive and in the words of Prof M V Plyee in his book, *Constitution of the World*: "The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time…In our role as "sentinels" of fundamental rights and freedoms of the citizen which are founded on laisez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent "sentinels" of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right."**

23. Where therefore it is clear that the discretion is being exercised with a view to achieving certain extraneous goals other than those legally recognised under the Constitution and the ***Office of the Director of Public Prosecutions Act***, that would, in my view, constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion. As was held by **Wendoh, J** in **Koinange vs. Attorney General and Others [2007] 2 EA 256**:

> **"Under section 26 of the Constitution the Attorney General has unfettered discretion to undertake investigations and prosecute. The Attorney Generals inherent powers to investigate and prosecute may be exercised through other offices in accordance with the Constitution or any other law. But, if the Attorney General exercises that power in breach of the constitutional provisions or any other law by acting maliciously, capriciously, abusing the court process or contrary to public policy the Court would intervene under section 123(8) of**

the Constitution and in considering what constitutes an abuse of the court process the following principles are relevant: (i) Whether the criminal prosecution is instituted for a purpose other than the purpose for which it is properly designed; (ii) Whether the person against whom the criminal proceedings are commenced has been deprived of his fundamental right of a fair trial envisaged in the provisions of the constitution; (iii) Whether the prosecution is against public policy."

24. It is now clear that even in the exercise of what may appear to be prima facie absolute discretion conferred on the executive the Court may interfere. The Court may intervene in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**

25. It is, however, upon the ex parte applicant to satisfy the Court that the discretion given to the DPP ought to be interfered with.

26. In this case it is the applicant's case that the facts of the case do not constitute an offence. in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** it was held that:

"The function of any judicial system in civilized nations is to uphold the rule of law. To be able to do that, the system must have power to try and decide cases brought before the Courts according to the established law. The process of trial is central to the adjudication of any dispute and it is now a universally accepted principle of law that every person must have his day in court. This means that the judicial system must be available to all...Although the Attorney General enjoys both constitutional and statutory discretion in the prosecution of criminal cases and in doing so he is not controlled by any other person or authority, this does not mean that he may exercise that discretion arbitrarily. He must exercise the discretion within lawful boundaries...Although the state's interest and indeed the constitutional and statutory powers to prosecute is recognised, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious...In doing so the Court may be guided by the following principles: (i). Where the criminal prosecution amounts to nothing more than an abuse of the process of the court, the Court will employ its inherent power and common law to stop it. (ii). A prosecution that does not accord with an individual's freedoms and rights under the constitution will be halted: and (iii). A prosecution that is contrary to public policy (or interest) will not be allowed...A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case. Evidence of extraneous purposes may also be presumed where a prosecution is mounted after a lengthy delay without any explanation being given for that delay...A criminal prosecution will also be halted if the charge sheet does not disclose the

commission of a criminal offence...A criminal prosecution that does not accord with an individual's freedoms and rights, such as where it does not afford an individual a fair hearing within a reasonable time by an independent and impartial court, will be the clearest case of an abuse of the process of the Court. Such a prosecution will be halted for contravening the constitutional protection of individual's rights...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds."

27. That said, judicial review applications, however, do not deal with the merits of the case but only with the process. In other words judicial review determines, *inter alia*, whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial 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 jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution's evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.

28. In exercising their discretion to charge a person both the police and the DPP's office must take into account and must exercise the discretion on the evidence of sound legal principles. As was held by **Ojwang, J** (as he then was) in **Nairobi HCCC No. 1729 of 2001 – Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another**:

"...policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense...I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State's prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes".

29. Therefore the police are expected to be professional in the conduct of their investigations and ought not to be driven by malice or other collateral considerations. Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution. A prosecution can either be mounted based on an offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officers or agencies. However, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking

into account the versions presented by both the complainant and the suspect. I say ordinarily because the mere fact that the version of one of the parties is not considered is not necessarily fatal to the prosecution. However, where as it is alleged in this case exculpatory evidence is presented to the police in the course of investigation and for some reasons only known to them they deliberately decide to ignore the same one can only conclude that the police are driven by collateral considerations other than genuine vindication of the criminal judicial process. Neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of malice and hence abuse of discretion and power.

30. In this case, it is the applicant's case that he was retained to act in a conveyancing transaction and that he was neither the vendor nor the seller and carried out his obligations as per the terms of the agreement for sale. He therefore was of the view that the intended charges against him for issuing a bad cheque were completely baseless.

31. The 2nd, 3rd and 4th Respondents have however a presented a case whose effect is that the complainant in the criminal case never met the alleged vendor of the suit property and that all transactions were conducted by the applicant who was acting on behalf of the vendor.

32. However in the statement given to the police whose contents have not been controverted, it is clear that the complainant was fully aware of the identity of the vendor and entered into the sale transaction with the said vendor.

33. For the Respondents to present a case which is clearly incorrect in order to justify the levying of criminal charges against the applicant can only be termed as mischievous and in bad faith. Such action can only be deemed to have been meant to achieve collateral purposes. Whereas Article 157(10) of the Constitution provides that 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, Article 157(11) provides:

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

34. Apart from that, section 4 of the ***Office of Director of Public Prosecutions Act***, No. 2 of 2013 provides:

> ***In fulfilling its mandate, the Office shall be guided by the Constitution and the following fundamental principles—***
>
> ***(a) the diversity of the people of Kenya;***
>
> ***(b) impartiality and gender equity;***
>
> ***(c) the rules of natural justice;***
>
> ***(d) promotion of public confidence in the integrity of the Office;***
>
> ***(e) the need to discharge the functions of the Office on behalf of the people of Kenya;***
>
> ***(f) the need to serve the cause of justice, prevent abuse of the legal process and public interest;***
>
> ***(g) protection of the sovereignty of the people;***
>
> ***(h) secure the observance of democratic values and principles; and***
>
> ***(i) promotion of constitutionalism.***

35. It is therefore clear that the terrain under the current prosecutorial regime has changed and that the discretion given to the DPP is not absolute but must be exercised within certain laid down standards provided under the Constitution and the ***Office of the Director of Public Prosecutions Act***. Where it is alleged that these standards have not been adhered to, it behoves this Court to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, the Constitution itself. I associate myself with the sentiments expressed in **Nakusa vs. Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565** to the effect that :

> **"the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system….. In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of *Domnic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003* is that interpretation of the Constitution has to be progressive and in the words of Prof M V Plyee in his book, *Constitution of the World*: "The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time…….. In our role as "sentinels" of fundamental rights and freedoms of the citizen which are founded on laisez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent "sentinels" of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right."**

36. Whereas this is not the forum to determine the applicant's innocence or culpability, the DPP owes this Court a duty of placing before this Court material upon which this Court can feel that he is justified in mounting the prosecution. Where therefore it is clear that the discretion is being exercised with a view to achieving certain extraneous goals other than those legally recognised under the Constitution and the ***Office of the Director of Public Prosecutions Act***, that would, in my view, constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion. As was held by **Wendoh, J** in **Koinange vs. Attorney General and Others [2007] 2 EA 256**:

> **"Under section 26 of the Constitution the Attorney General has unfettered discretion to undertake investigations and prosecute. The Attorney Generals inherent powers to investigate and prosecute may be exercised through other offices in accordance with the Constitution or any other law. But, if the Attorney General exercises that power in breach of the constitutional provisions or any other law by acting maliciously, capriciously, abusing the court process or contrary to public policy the Court would intervene under section 123(8) of the Constitution and in considering what constitutes an abuse of the court process the following principles are relevant: (i) Whether the criminal prosecution is instituted for a purpose other than the purpose for which it is properly designed; (ii) Whether the person against whom the criminal proceedings are commenced has been deprived of his fundamental right of a fair trial envisaged in the provisions of the constitution; (iii) Whether the prosecution is against public policy."**

37. It is now clear that even in the exercise of what may appear to be *prima facie* absolute discretion conferred on the executive the Court may interfere. The Court can only intervene in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the

discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**

38. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the DPP to investigate and prosecute ought to be interfered with. It is clear that in exercising their discretion to charge a person both the police and the DPP's office must take into account and must exercise the discretion on the evidence of sound legal principles. As was held by **Ojwang, J** (as he then was) in **Nairobi HCCC No. 1729 of 2001 – Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another**:

> **"...policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense...I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State's prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes".**

39. Therefore the police are expected to be professional in the conduct of their investigations and ought not to be driven by malice or other collateral considerations. Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution. A prosecution can either be mounted based on an offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officers or agencies. However, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. I say ordinarily because the mere fact that the version of one of the parties is not considered is not necessarily fatal to the prosecution. However, whereas it is alleged in this case exculpatory evidence is presented to the police in the course of investigation and for some reasons unknown to them they deliberately decide to ignore the same one can only conclude that the police are driven by collateral considerations other than genuine vindication of the criminal judicial process. Neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of malice and hence abuse of discretion and power.

40. In my view, the correct prosecution policy is the one expounded in ***Code for Prosecutors of the Crown Prosecution Service of the United Kingdom*** ("the Code") as reflected in our own prosecution policy, ***The National Prosecution Policy***, revised in 2015 which was relied upon by the Petitioners herein. The ***Code***, provides, *inter alia* that:

> ***4.4 Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.***
>
> ***4.5 The finding that there is a realistic prospect of conviction is based on the prosecutor's objective assessment of the evidence, including the impact of any defence and any other information that the suspect has put forward or on which he or she might rely. It means that an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged. This is a different test from the one that the criminal courts themselves must apply. A court may only convict if it is sure that the defendant is guilty."***

41. ***The National Prosecution Policy***, revised in 2015 on the other hand provides at page 5 that:-

> ***2. Public Prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction. In other words, Public Prosecutors should ask themselves; would an impartial tribunal convict on the basis of the evidence available?"...***.

42. In **Githunguri vs. Republic [1986] KLR 1** at page 18 and 19 a three Judge bench High Court constituted of Ag. Chief **Justice Madan** and **Justices Aganyanya** and **Gicheru** expressed themselves as follows:

> **"But from early times… the Court had inherently its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing – the Court had the right to protect itself against such an abuse…The power seemed to be inherent in the jurisdiction of every Court of Justice to protect itself from the abuse of its own procedure...every Court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the Court…Mr Chunga argued that to grant the application would be tantamount to curtailing or interfering with the powers of the Attorney-General under section 26 of the Constitution. This argument of his compels us to say that he kept freewheeling for a long time before us because perhaps he did not understand the real purport of the application. No one has made any challenge to the powers of the Attorney-General, nor would any one succeed if he were to say that the Attorney-General's powers under section 26 can be interfered with. What this application is questioning is the mode (emphasis ours) of exercising those powers…No one will succeed in convincing us that the Court does not have inherent powers to exercise supervisory jurisdiction over tribunals and individuals acting in administrative or quasi-judicial capacity…A prosecution is not to be made good by what it turns up. It is good or bad when it starts. The long and short of it is that in our opinion it is not right to prosecute the applicant as proposed."**

43. Similarly, in **Mohammed Gulam Hussein Fazal Karmali & Another vs. Chief Magistrate's Court Nairobi & Another [2006] eKLR** where **Nyamu, J** examined the policy considerations for halting criminal proceedings, noting that the court has two fundamental policy considerations to take into account which were enunciated in the case of **M. Devao vs. Department of Labour (190) in sur 464** at 481 as:

> **"The first is that the public interests in the administration of justice require that the court protects its ability to function as a court of law, by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court processes may lend themselves to oppression and injustice…the court grants a permanent stay in order to prevent the criminal process from being used for purposes alien to the administration of criminal justice under the law. It may intervene in this way if it concludes that the court processes are being employed for ulterior purposes or in such a way as to cause improper vexation and oppression."**

44. I also associate myself with the decision in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** that:

> **"A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable".**

45. The said policy further states that:

Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.

The finding that there is a realistic prospect of conviction is based on the prosecutor's objective assessment of the evidence, including the impact of any defence and any other information that the suspect has put forward or on which he or she might rely. It means that an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged. This is a different test from the one that the criminal courts themselves must apply. A court may only convict if it is sure that the defendant is guilty.

46. It must be appreciated that the investigatory and prosecutorial agencies may have to consider a lot of factors in deciding whether or not a prosecution is prudent as long as the said factors are relevant. In the course of making such a decision there may even be differences in opinion between the investigatory agencies and the prosecutorial agencies. However, 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. 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 t 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."

47. I 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."

48. In my view, the exercise of discretion though quasy-judicial, the 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):

49. However, it is upon the DPP to consider those factors and not upon this Court to determine for him/her when such factors militate against the institution of criminal proceedings.

50. 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) …"

51. Having considered the issues raised herein I am satisfied that the 2nd, 3rd and 4th respondents have set out to concoct a case which is not supported by the complaint lodged before them hence sought through a contrived course to sustain a case other than the one which was presented before them. That in my view amounts to abuse of both investigative and prosecutorial powers and ought not to be sustained.

Order

52. In the result I find merit in the Notice of Motion dated 12th February, 2015 and grant the following orders:

a. An order of *Certiorari,* removing into this Court, for the purposes of being quashed, and quashing the charge sheet, dated 5th December, 2014, by the 2nd 3rd and 4th Respondents, in the Makadara Chief Magistrate's Court, Criminal Case No. 5703 of 2014 – Republic versus Wilberforce Nyamboga Mariaria..

b. An order of *prohibition* prohibiting the Director of Public Prosecutions and/or his agents, from prosecuting or further prosecuting the charges contained in the said charge sheet dated 5th December, 2014 and/or amended charge sheet thereto by the 2nd 3rd and 4th Respondents, in the Makadara Chief Magistrate's Court, Criminal Case No. 5703 of 2014 – Republic versus Wilberforce Nyamboga Mariaria or any variation thereof or any charge or charges akin to it, or arising from the same transaction of LR No. Nairobi Block 157/944, and/or, prohibiting the 1st Respondent and/or any other magistrate, in the Republic of Kenya, from hearing, or further hearing, for determination of the charges contained in the said Charge sheet in Criminal Case No. 5703of 2014 – Republic versus Wilberforce Nyamboga Mariaria or any variation thereof or any charge or charges akin to it, or arising from the same transaction.

c.The costs of this application are awarded to the ex parte applicant herein to be borne by the 2nd, 3rd and 4th Respondents.

53. Orders accordingly

Dated at Nairobi this 18th day of May, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Lugano for Mr Ondieki for the Applicant

CA Mwangi