



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI CIVIL COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO 560 OF 2016

**IN THE MATTER OF AN APPLICATION BY GEOFFREY MAYIEKA BOGONKO FOR
LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND
PROHIBITION AGAINST THE RESPONDENTS HEREIN**

AND

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT (CAP 26 OF THE
LAWS OF KENYA) AND ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010**

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

MILIMANI CHIEF MAGISTRATES COURT.....2ND RESPONDENT

AND

HONDA MOTOR CYCLES KENYA LTD.....INTERESTED PARTY

EX PARTE: GEOFFREY MAYAKA BOGONKO

JUDGEMENT

Introduction

1. By a Notice of Motion dated 28th November, 2016, the applicant herein, **Geoffrey Mayaka Bogonko**, seeks the following orders:

a. An order of Certiorari to remove to this honourable court to be quashed the decision of the Director of Public Prosecution, the 1st respondent herein, to charge the Ex parte Applicant with the offence of obtaining goods by false pretences contrary to Section 312 as read with Section 313 of the Penal Code vide Nairobi Criminal Case No. 1790 of 2016; Republic v. Geoffrey Mayieka Bogonko before the 2nd Respondent

b. An order of Prohibition prohibiting the Respondent herein from by themselves, their agents/and or assigns acting jointly and/or severally from proceeding with Nairobi Criminal Case No. 1790 of 2016; Republic v. Geoffrey Mayieka Bogonko.

c. The Respondents herein be ordered to pay the Applicant's costs of this application.

Applicant's Case

2. According to the applicant, all material times relevant to this suit, he was the Director of **Gerick (Kenya) Limited**, a Company duly registered within the Republic of Kenya (hereinafter referred to as "the Company"). It was averred that the Company entered into a Non-Exclusive Dealership Agreement (hereinafter referred to as "the Agreement") with **Honda Motor Cycles Kenya Limited** (hereinafter referred to as "Honda"), as far back as 5th January 2015 in which it was provided that the Company would sell products, parts and offer services for users of the products as supplied by Honda in the geographical area known as Kisii, which parts and Products would be delivered upon payment to be confirmed by Honda.

3. It was averred that in the course of the business relationship between the Honda and the Company, the latter was required to make payments for parts and products which payments were made vide RTGS and cheque payments. According to the applicant with regard to the aforesaid payments, Honda duly furnished the Company with invoices as proof of payment. The applicant disclosed that in the course of the working relationship between the parties, Honda began extending credit facilities to the Company by supplying products for later payment through the same business model that previously existed.

4. The applicant averred that as is the normal course of business transactions, the Company defaulted in the payment of several consignments, which payments it still remained willing to do. However despite the foregoing commercial venture, the DPP herein has purported to prefer criminal charges against the applicant with the offence of obtaining goods by false pretence contrary to section 312 as read together with section 313 of the **Penal Code** notwithstanding copious protests and discussions with the DPP.

5. It was the applicant's case that the DPP's decision to prefer criminal charges against him was merely for purposes of using the criminal justice system as a tool to oppress the Ex parte applicant over a civil disagreement.

6. The applicant asserted that the Agreement as duly drafted by Honda herein duly provides for an Honour Clause which provides that all the disputes, controversies or differences which may arise between the parties out of or in relation to or in connection with the agreement or any other agreement entered into between the parties shall be settled through arbitration by an arbitrator appointed by the Chairman of the Chartered Institute of Arbitrators(Kenya branch) whose award shall bind the parties. It was therefore the applicant's case that the 2nd Respondent herein does not have the jurisdiction to entertain criminal proceedings against the applicant with regard to the aforesaid facts.

7. The ex parte applicant further took the view that since the said Agreement was entered into between Gerick (Kenya) Limited and Honda herein, it was extremely malicious for the DPP to single out one Director for criminal prosecution, yet there is nothing that directly links him to the said criminal offence.

8. The applicant averred that whereas the DPP intended to prefer criminal charges against its said director for obtaining goods by false pretence as from 20th April 2016, the Company made payments to Honda as late as the 5th of July 2016, amounting to Kenya Shillings One Million, Thirty-Nine Thousand and Four Hundred (Kshs. 1,039,400.00).

9. The applicant's case was that since the decision to supply it with parts and products on credit was solely made by Honda, it was grossly punitive and an abuse of the Court process for Honda to use the Court process to score a personal vendetta.

10. It was revealed by the applicant that it had on several occasions attempted to have this matter referred to arbitration on account of the difference of opinion on the sum owed but Honda has been able to use his influence to burden the Ex parte applicant with criminal proceedings.

11. It was therefore contended that the Respondent's decision to prefer criminal charges against the applicant was made devoid of fairness, without taking into consideration all the relevant facts and for purposes of subverting justice hence the orders sought herein ought to be granted.

1st Respondent's Case

12. The application was opposed by the DPP, the Director of Public Prosecution (hereinafter referred to as "the DPP").

13. According to the DPP, following investigations carried out by the Director of Criminal Investigations into allegations that the applicant obtained assorted Honda motorcycles and spare parts on diverse dates between 20th April, 2016 and 24th August, 2016 by false pretences and having been satisfied about the sufficiency of the evidence incriminating the Applicant herein for obtaining goods by false pretences, the DPP in the exercise of his powers under Article 157 of the Constitution made the decision to charge and prosecute the applicant herein. The applicant was subsequently charged in Criminal Case No. 1790 of 2016 with the offences more specifically set out in the charge sheet.

14. According to the DPP, the offences with which the applicant is charged are clearly spelt out in the respective statutes and the penalties thereof specified. It was its case that upon consideration of the evidence contained in the investigations file submitted by the Director of Criminal Investigations to the 1st Respondent, the 1st Respondent was satisfied that the applicant had indeed made orders of delivery of the motorcycles and spare parts using copies of RTGS slips which were sent to Honda through a mobile phone application known as WhatsApp which actually never featured in the company account with intent to deceive that the deliveries have actually been paid for.

15. It was therefore the DPP's case that the decision to charge and prosecute the applicant is based on the sufficiency of the evidence contained in the investigation file submitted to the DPP. To the DPP, It is manifestly clear from the evidence obtained during investigations that the applicant obtained assorted goods through several invoices from Honda, invoices numbers **3581, 3777, 3900, 4044, 4107, 4201, 4225, 4309, 4375, 4559 and 4707** on diverse dates between 17th March, 2016 to 24th August, 2016.

16. The DPP's position was that the issues raised by the applicant herein were all matters of fact and evidence for consideration by the trial court during the full trial and on the basis of which the guilt or otherwise of the applicant would be determined by the court. In his view, the prosecution of the applicant does not in any way violate any of its constitutional and fundamental rights or freedoms as alleged or at all in order to warrant the granting of the orders sought in the application herein.

17. According to the DPP:

- a) Under section 193A of the ***Criminal Procedure Code***, Cap 75, Laws of Kenya, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of criminal proceedings;

b) Under Article 157(6) of the Constitution of Kenya 2010, the Director of Public Prosecutions exercises State powers of prosecution and in that capacity, may institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed;

c) The applicant has not demonstrated that the DPP abused his powers neither has he demonstrated how he is being discriminated against nor that the charges against him are for ulterior motives.

d) It is in the public interest that criminal and or corruption cases are prosecuted to their logical conclusion.

e) Under Article 157(10) of the Constitution of Kenya 2010, as replicated in section 6 of the *Office of the Director of Public Prosecutions Act, 2013*, the Director of Public Prosecution does not require the consent of any person or authority for the commencement of criminal proceedings. Further, and in the exercise of his powers or functions, the Director of Public Prosecutions does not act under the direction or control of any person or authority. The decision to institute criminal proceedings by the DPP is therefore discretionary.

f) In view of the foregoing, the court should exercise extreme care and caution not to interfere with the Constitutional powers of the DPP to institute and undertake criminal proceedings and should only interfere with the independent judgement of the DPP if it is shown that the exercise of his powers is contrary to the Constitution, is in bad faith or amounts to an abuse of process. The applicants have failed to satisfy this requirement.

18. In response to legitimate expectation and oppression it was averred that:

a) The applicant has not disputed that he ordered and received goods from the interested party.

b) Every case is determined on its own merit and no one case is similar to another;

c) Criminal responsibility is individual in nature.

d) The facts relied on by the applicant in alleging oppression are matters of evidence which form the basis of his defence in the criminal proceedings currently underway. The High Court cannot decide whether or not the ex parte applicant is guilty or not in an application for Judicial Review.

e) The DPP has the discretion to prefer charges against any party in respect of whom he finds sufficient evidence to prefer charges.

2nd Respondent's Case

19. On its part, the 2nd Respondent filed the following grounds of opposition:

1. The 2nd Respondent has the Jurisdiction and competence to hear and determine the case before it.

2. That there is no allegation of procedural or substantive impropriety on the part of the 2nd Respondent.

3. That there is no allegation of perceived bias made against the 2nd Respondent.

4. The Order of Prohibition may not be issued after events have taken place.

Interested Party's Case

20. The interested party similarly opposed the application.

21. According to it, the Ex Parte Applicant is the Managing Director of Gerick Kenya Limited and the representatives of Honda Motorcycle Kenya Limited were dealing with him in such capacity. It was averred that Gerick Kenya Limited entered into a Non-Exclusive Dealership Agreement with the Interested Party which Agreement provided that all payments for motorcycles would be made in advance. It was its case that the said Agreement was not amended by conduct or in writing to provide for the Ex Parte Applicant being supplied with motorcycles on credit.

22. The interested party explained that in order to secure delivery of motorcycles the Applicant would submit to the managers of the Interested Party copies of payment slips through electronic means as evidence of payments. The interested party exhibited a copy of a payment slip dated 13th May 2016 provided by the Applicant as evidence of payment for 10 motorcycles which bore the name and signature of the Ex- parte Applicant on the basis of which 10 motorcycles were released to Gerick Kenya Limited on 16th May 2016.

23. The interested party averred that after the auditing of the bank statement of Honda Motorcycle Kenya Limited, it was confirmed that this payment was never received. It was disclosed that this is the similar pattern for all other transactions that the Ex-parte Applicant stands accused of. It was disclosed that the electronic evidence of the forged and or fake copies of bank payment slips sent to the representatives of Honda Motorcycle Kenya Limited by the Ex Parte Applicant have been surrendered to the police.

24. The interested party's case was therefore that the Applicant obtained the motorcycles fraudulently and or under false pretenses. Based on legal advice it was Honda's case that the fact that the transactions subject of these proceedings also bear elements of civil or contract law is not a bar to the criminal proceedings. It was asserted that since the Ex-parte Applicant committed a crime, the criminal proceedings ought to be allowed to continue and to take its course.

25. Honda averred that it lost Motorcycles, their value, the expected profit from their sale, and attendant costs by reason of the conduct of the Ex Parte Applicant. It denied that there was malice or mala fides on its part in filing a criminal complaint against the Ex Parte Applicant with the police.

Determinations

26. The circumstances under which the Court will grant stay of a criminal process in these kinds of proceedings is now well settled. The Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is open to the applicant 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. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, *ipso facto*, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim.

27. However as was held in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001:**

“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...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...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...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."

28. 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."

29. 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.”

30. 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 fact that it has not been argued before however does not mean that the law stops dead at its tracks. An order of prohibition looks to the future and not to the past; it is concerned with the happenings of future events and little, if any, of past events. Where a decision has been made, there is little that the court can do by an order of prohibition to actually stop the decision from being made, because simply that which is sought to stop has already been done. However in such circumstances, the power of judicial review is not limited to the other orders of judicial review other than prohibition. With respect to civil proceedings prohibition lies not only for the excess of jurisdiction but also from a departure of the rules of natural justice...So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions...This therefore implies that the limits of

judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit. 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. However, it does not mean that a civil suit and a criminal case cannot co-exist at any one particular time. This is because the section envisages the re-prosecution of a criminal case substantially dealt with either in fact or law, a case in which issues have been laid to rest. There is no mention in the section that the simultaneous existence of a civil and criminal case is constituting double jeopardy. The courts have, however stated that the power to issue an order of prohibition to stop a criminal prosecution does not endow a court to say that no criminal prosecution should be instituted or continued side by side with a civil suit based on the same or related facts, or to say that a person should never be prosecuted in criminal proceedings when he has a civil suit against him relating to matters in the criminal proceedings...The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution....”

31. In Republic vs. Chief Magistrate’s Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703, it was held:

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal

proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth... When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court... In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in... In this case it is asked to step in to grant an order of prohibition. Prohibition looks into the future and can only stop what has not been done. It is certiorari that would be efficacious in quashing that which has been done but it is not prayed for in this matter. There was no order granted for stay of further proceedings when leave was granted and it is possible that the private prosecution has proceeded either to its conclusion or to some extent. In the former event an order of prohibition has no efficacy and the court would be acting in vain to grant one. What is done will have been done. If there is anything that remains to be done in those proceedings, however, the order of prohibition will issue to stop further proceedings.”

32. In this case the ex parte applicants' case is that though there was default in the payment of the goods advanced to the Company by Honda, such default does not give rise to criminal liability more so as the decision to offer the goods on credit was Honda's. Honda's position is however that in order to show that payments had been made, the applicant remitted electronic evidence of the forged and or fake copies of bank payment slips to the representatives of Honda. In **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR**, 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...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”.

33. Proceedings of this nature, ordinarily, do not deal with the merits of the case but only with the process. In other words these proceedings determine, *inter alia*, whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made, whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters, whether the decision to commence the criminal charges go contrary to the applicant's legitimate expectation, whether the respondents' decision to charge the applicant is irrational. It follows that where an applicant brings such 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 to determine such a matter and will leave the parties to resort to the usual forums where such matters ought to be resolved. In other words, such proceedings are not the proper forum in which the innocence or otherwise of the applicants is to be determined and a party ought not to institute such 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 these kinds of proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and whether such proceedings amount to a violation of his rights and fundamental freedoms and once the Court is satisfied that that is not the case, 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.

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

35. In Thuita Mwangi & Anor vs. The Ethics and Anti-Corruption Commission & 3 Others Petition No. 153 & 369 of 2013, it was held:

“ ... I am afraid that the High Court at this point is not the right forum to tender justifications concerning the subject transaction let alone test the nature and veracity of these allegations. In... the Court held that “It is the trial Court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. It would be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court”. Similarly...Lenaola J., captured this balance as follows; “(22). The point being made above is that the DPP though not subject to control in exercise of his powers to prosecute criminal offences, must exercise that power on reasonable grounds. Reasonable grounds, it must be noted, cannot amount to the DPP being asked to prove the charge against an accused person at the commencement of the trial but merely show a prima facie case before mounting a prosecution. The proof of the charge is made at trial.”

36. As was held by Mumbi Ngugi, J in Kipoki Oreu Tasur vs. Inspector General of Police & 5 Ors (2014) eKLR:

“The criminal justice system is a critical pillar of our society. It is underpinned by the Constitution, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior Courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated”.

37. In this case the fact of non-payment of goods delivered to the Company by Honda is not in dispute. What is in dispute are the circumstances leading to the said default. Whereas a purely civil matter ought not to be transmuted into a criminal offence, where there is an allegation that the civil liability has been compounded by acts which tend to prove deceit and forgery, one cannot say that the matter is purely civil in nature. That seems to be the case presented by Honda to the DPP and the basis upon which the subject criminal proceedings were instituted. As to whether that position is correct or warranted is not for this Court to determine. However this case cannot say with certainty that in light of such conflicting versions there cannot possibly be a commission of a criminal offence.

38. The applicant contended that since the Agreement between the parties contained an arbitral clause, the Court had no jurisdiction to entertain the criminal proceedings. In Oyugi vs. Law Society Of Kenya & Another [2005] 1 KLR 463, it was held that:

“Arbitration issues are essentially contractual matters – disputes over things, in respect of which the parties may compromise on their interests; matters which in legal thinking, belong to the sphere of compromises and bargains among those affected. As the law in such a private domain and a judicial policy, that the parties in dispute be accorded wide opportunities for seeking solutions outside the restrictive procedures of judicial process. There is no doubt that such is a wise policy; but it is also true that the main sphere in which arbitration applies is contract. It does not, for example, and ought not to apply, in the sphere of criminal law for the beacons of crime have been strictly defined by law, and entrusted to the courts to adjudicate upon. The beacons of the law of tort – and this includes negligence and defamation – are also

firmly set, and the task of adjudicating upon them rests with the Courts. [Emphasis added].

39. It is therefore clear that an arbitral clause in an agreement does not preclude the commencement of criminal proceedings where the facts disclose that a crime has been committed.

40. It was further contended that since the default was purportedly made by the Company in which the applicant herein was a director, criminal proceedings ought not to have been commenced against the applicant in his capacity as such director. However section 23 of the **Penal Code**, provides as follows:

Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission.

41. In this case the applicant admits that he was a director of **Gerick (Kenya) Limited**. He has not contended that he was not charged with, or concerned or acting in, the control or management of **Gerick (Kenya) Limited**. To the contrary the interested party has exhibited a copy of an application for funds transfer which bears the applicant's name. The applicant has not disputed on oath the authenticity of this document. Prima facie, it cannot be determined at this stage that the applicant was not charged with, or concerned or acting in, the control or management of **Gerick (Kenya) Limited** in order for him not to come under section 23 of the **Penal Code**. However it will be upon the applicant to show that through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission in which case the trial Court may well return a verdict of not guilty. That is however a bridge which cannot be crossed at this stage as the decision as to whether the applicant is guilty or not is for the trial court.

42. It is therefore my view that it is premature at this stage to make findings that the criminal proceedings ought to be quashed. The issues raised by the applicant herein, it is my view amount to a defence which the applicant ought to pursue before the trial Court. It is upon the applicants to satisfy the Court that the discretion given to the DPP to investigate and prosecute is being abused and ought to be interfered with and this burden and standard was expounded in **Kuria & 3 Others vs. Attorney General** (supra) where it was held:

“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..”

43. As was held by **Lenaola, J** in the case of **Daniel Ndungu vs. Director of Public Prosecutions & Another (2013) eKLR**:

“In conclusion, the Petitioner ought to face his accusers, prove his innocence or otherwise and submit to the consequences of the Law should he be found culpable”.

44. As was expressed in **Kuria & 3 Others vs. Attorney General** (supra):

“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.”

45. In the premises I am not satisfied that this is a proper case in which the court ought to bring the criminal proceedings to a halt. The applicant will be afforded an opportunity to defend himself, cross-examine witnesses and adduce evidence in support of his case and that in my view is the proper course to take in the circumstances of this case.

Order

46. Accordingly, I find that the Notice of Motion dated 28th November, 2016 is unmerited, the same fails and is hereby dismissed with costs to the Respondents and the interested party.

47. Orders accordingly.

Dated at Nairobi this 28th day of September, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Welukwe for the applicant

Miss Kethi Kilonzo for the interested party

CA Ooko