



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. APPL. NO. 54 OF 2017

**IN THE MATTER OF THE JUDICATURE ACT CAP. 8, ARTICLE 23 OF THE
CONSTITUTION OF KENYA, SECTIONS 60, 70, 72, 76, 77, 123(1) & (8) OF THE CRIMINAL
PROCEDURE CODE.**

AND

**IN THE MATTER OF THE DIRECTIONS GIVEN BY THE DIRECTOR OF PUBLIC
PROSECUTIONS TO THE DIRECTOR OF CRIMINAL INVESTIGATIONS CONTAINED IN
THE LETTER DATED 9TH, NOVEMBER 2016.**

BETWEEN

REPUBLIC.....APPLICANT

AND

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

THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

EX PARTE: ZACHARIAH W. BARAZA

JUDGEMENT

Introduction

1. In his Motion brought on Notice of Motion dated 17th February 2017, the *ex parte* applicant herein, **Zachariah W. Baraza**, seeks the following orders:

1. That the Honourable Court be pleased to certify this application urgent and to hear the same *ex parte* in the first instance due to the said urgency.
2. That the Honourable Court be pleased to issue an order of prohibition directed against the 1st, and 2nd Respondents prohibiting either or both of them from arresting, detaining or prosecuting Zachariah W. Baraza in respect of the execution of the court order in Nairobi CMCC NO. 6798 of 2016.
3. That the Honourable Court be pleased to issue an order of mandamus directed against the

1st, and 2nd Respondent compelling either or both of them not to act on the decision of the 1st Respondent contained in a letter dated 9th, November 2016 to, arrest, investigate, detain, or prosecute Zachariah W. Baraza in respect of the court order he executed in Nairobi CMCC No. 6798 OF 2016.

4. That the Honourable Court be pleased to issue an order of certiorari in respect of the decision of the 1st Respondent, contained in a letter to the 2nd Respondent dated 9th, July 2015, requiring the 2nd Respondent to investigate, arrest, detain or charge Zacharia W. Baraza with regard to his execution of the court order in Nairobi CMCC No. 6798 OF 2016 and to remove the said decision to the High Court for the purposes of quashing the decision.

5. That the costs of this application be provided for.

Ex Parte Applicant's Case

2. According to the Applicant, he is a duly appointed and licenced auctioneer trading in the name and style of ***Siama Auctioneers*** of Nairobi, charged with execution of court orders and warrants. He explained that Court work is allocated to him by the court, on application or request of advocates for the various parties, whose warrants or orders he is required to execute.

3. According to him, in the course of carrying out such duties, he is, for the purposes of Section 6 of the ***Judicature Act***, an officer of the court insulated from criminal or civil liability where he honestly legally, and lawfully execute the said mandate.

4. The applicant averred that he was allocated and executed a court order in Milimani CMCC No. 6798 OF 2016: **Josephat Gacheru Rugiri vs. Amos Kibata Gicheru** by the court on application by J.S. Khakula & Co. Advocates. The said order required that he evicts the defendant therein from premises which were to be pointed out by the plaintiff and which were land reference No. Kabete/L. Kabete/3162, 3163 and 3164. The applicant averred that as execution is usually resisted, he engaged the services of the Kingero Police Station under the supervision of the OCS as was required under clause 5 of the said court order. In his view, the execution was lawfully and properly carried out on the 22nd October, 2016 in the presence and with the help of the said OCS and several police officers after which he handed over the said property to the plaintiff, **Josephat Gachru Rugiri**, in vacant possession on the same day and he was paid his charges and closed his file.

5. However, in the month of 16th, November 2016 he received a letter from the Auctioneers Licencing Board dated 15th, November 2016, responding to a complaint from the Director of Public Prosecutions alleging unlawful and forceful eviction and destruction of land allegedly done by the applicant. The applicant however denied that the eviction was unlawful as the same was a lawful execution of a court order, and done in the presence and with the help of the police and that the eviction was not forceful as the defendant was allowed to carry away the goods from the house under the supervision of the police.

6. The applicant disclosed that based on information from the plaintiff's counsel, the matter went on appeal and there is in force an order of the High Court in the said appeal, maintaining the status quo in favour of the plaintiff and the matter was scheduled for inter partes hearing on the 15th March, 2017.

7. It was deposed by the applicant that on the 29th January, 2017 a Sunday, at around 11.00 a.m. one **D. Cheruiyot**, a police officer at the C.I.D. Headquarters, serious crimes, telephoned him, using telephone No. 0720-780024, and ordered the applicant to appear before him on the Monday 31st January, 2017 for the purposes of recording a statement and for arraignment in court relating to his execution of the court order in Milimani CMCC No. 6798 of 2016. Despite attempts by the applicant to explain that his was merely executing a valid court order, and according to the law, he did not commit any offence, the officer insisted that the applicant ought to tell that to the Magistrate who would be hearing the case. The applicant's pleas that the execution was supervised by the police did not convince him. Being apprehensive over the said threats the applicant instructed his advocate to liaise with the said officer over

the threat to his liberty and rights but the said officer was adamant that the applicant should be charged over the said execution.

8. According to the applicant, from the tone of the documents attached, the language and insistency of the said C.I.D. officer, he was apprehensive that the police wanted to unlawfully arrest, detain him and charge him with a criminal offence, which charge is clearly unlawful and unconstitutional. To him his rights are being violated, or threatened to be violated, unless this Honourable court steps in to protect him as per the Constitution.

9. In his submission the ex parte applicant relied on section 6 of the *Judicature Act*.

10. According to the applicant, the ex parte applicant as a person bona (sic) to execute a lawful court order he is insulated by the said section from any civil or criminal proceedings charges. In this regard the applicant relied on Satnam Singh Bahra vs. Joseph Mungai Gikonyo T/A Garam Investments [2011] eKLR for the holding that:

“In this court’s view it has been said on all three sides that the defendant was executing a court order, namely, to serve warrants of attachment and sale regarding the decree issued in HCCC 240/00, following a default judgement. In that regard section 6 of the Judicature Act (Cap 8) applies...The above legal and statutory protection for judicial officers and officers of the court while in good faith, they execute judicial duties or an order of judicial officers is clearly stated and no elaboration is required. It is for the officers’ protection to facilitate running and administration of justice. If left exposed such officers would fear and refrain from executing court orders. Such would stall or put a brake on the wheels of justice. The officers of the court include auctioneers, process servers, bailiffs and all such. They are duty-bound to execute court orders...”

11. In support of his case the applicant relied on Republic vs. Director of Public Prosecution & Another ex parte Job Kigen Kangogo (supra) [2016] eKLR.

12. According to the applicant, any effort by him to explain his side was met by the response that he will tell that to the magistrate during trial. He has not been afforded an opportunity to be heard, which offends the rules natural justice and procedural fairness. He referred to Republic v Director of Public Prosecution & another ex parte Job Kigen Kangogo [2016] eKLR which quoted the case of R. vs. The Judicial Commission into the Goldenberg Affair and 2 Others exp Saitoti HC Misc Appl. 102 of 2006, wherein it was stated:

“It is not good for the DPP to argue that the Applicant should be arrested and charged so that he can raise whatever defences he has in a trial court. The Court has a constitutional duty to ensure that a flawed threatened trial is stopped in its tracks if it is likely to violate any of the applicants’ fundamental rights.”

13. The applicant submitted that as the Respondents are being used by one party in the civil case to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence, this Court has the jurisdiction to prohibit malicious investigations which are being conducted with the aim of achieving an ulterior motive and not intended to achieve justice and he relied on Article 157 (4) and (11) of the Constitution of Kenya, and Zachariah Baraza t/a Siuma Traders vs. Director of Public Prosecutions & another [2017] eKLR, where **Mativo, J** stated:

“...in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in my view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain

abuse of power that may lead to harassment or persecution.

In my view, it would be a travesty to justice, a sad day for justice if police investigations are allowed to be manipulated, abused and or misused. It should never be argued that because a decision to investigate a person has been arrived at, the court should simply as it were fold its arms. The intrusion of judicial review remedies in criminal proceedings have the effect of requiring a much broader approach, than envisaged in the law. Where the investigation is clearly an abuse of the law, there is no greater duty for the court than to ensure that it maintains its integrity and the integrity of the judicial process and the system of the administration of justice by staying or quashing or prohibiting such investigations or prosecutions initiated by extraneous considerations. It must be emphasised that the use of police powers for other purposes and illegally charging innocent persons in court amounts to abuse of police powers and also abuse of the court process.”

14. He also relied on the holding in **Republic vs. Attorney General ex-parte Arap Ngeny High Court Civil Application No. 406 of 2001.**

15. In the applicant’s view, the application is well-founded and therefore the court should exercise its discretion in granting the orders sought against the decision of the 1st Respondent and come to the aid of the applicant, whose rights are threatened by granting the orders sought.

1st Respondent’s Case

16. The application was however opposed by the Respondents.

17. According to them, a complaint was made to the office of the Director of Public Prosecution on 22nd October 2016 by one **Nancy Njoki** that an auctioneer in the company of police officers and a group of armed youth were evicting her mother from her house and land using an illegal court order. Upon going to the scene the said officer found the applicant, the group of armed youth and police officers from King’eero Police Station led by the OCS namely **Mr. Silas Nthiga** in the process of evicting one **Rose Gachiku Kinuthia**, an old widow by removing her household goods from her house and throwing them on the nearby road.

18. The officer approached the applicant who introduced himself as **Zachary W. Baraza**, an auctioneer practicing in the name and style of Siuma Auctioneers of Nairobi and the officer in turn introduced himself to him as an officer working with the Office of the Director of Public Prosecutions. Upon inquiry from the applicant why he was carrying out the eviction the applicant showed him a court order dated 21st October 2016 issued in Milimani Commercial Courts Civil Suit No.6798 of 2016, **Josephat Gacheru Rugiri –vs- Amos Kibata Gicheko** which upon perusal the officer noted that although the order authorized the auctioneer to evict the defendant (**Amos Kibata Gicheko**) it did not identify the property from which the defendant was to be evicted. Consequently, he asked the applicant why he was evicting **Rose Gachiku Kinuthia** and he simply said that he was executing a court order. Upon asking the applicant why he was carrying the eviction on a Saturday morning the applicant told him that that is the only time the police were available to supervise the eviction.

19. The said officer was however informed by **Rose Gachiku Kinuthia** that she was not aware of the eviction order as the same had not been served on her though she was aware there was a civil case going on in court between her and **Amos Kibata Gicheko** and the same had not been finalized.

20. It was averred that the officer then talked to the OCS and told him that since **Rose Gachiku Kinuthia** was alleging that the eviction order was illegal as they were not aware of the case in which it had been issued, further eviction should be stopped until **Rose Gachiku Kinuthia** confirmed from the Milimani Court whether the order was genuine a proposal the OCS agreed to and further eviction was stopped after which he left the scene.

21. It was disclosed that on 8th November 2016 the Director of Public Prosecutions (DPP) received a letter of complaint signed by one **Keddy Wanjiru Muchene** on behalf of **Rose Gachiku Kinuthia** in which the complainant stated that she had been evicted from her parcel of land by an auctioneer who was in the company of armed youth and police officers from King'eero Police Station. Upon reviewing the said letter the DPP was satisfied that the complaint raised serious issues of impunity by a licensed auctioneer, commission of possible offences of abuse of office by police officers, contempt of court, perjury, malicious damage to property and forcible entry/detainer. Pursuant to Article 157(4) and section 5(1) (a) of the **Office of the Director of Public Prosecutions (ODPP) Act**, the DPP wrote a letter dated 9th November 2016 in which he directed the Director of Criminal Investigations (2nd Respondent) to investigate the complaint and forward the investigations file to him within twenty one (21) days for his (DPP) further directions.

22. It was however contended that the DPP was yet to receive the investigations file and it was not true that the police wanted to arrest and charge the applicant. To the Respondents, the applicant has deliberately misled this Honourable Court. The eviction order which he executed did not specify the property or the parcel of land and/or reference number or title number that was subject to the execution process. The Plaint in Milimani CMCC No.6798 of 2016 refers to two parcels of land namely LR. No. Kabete/Lower Kabete/3163 & 3164 and not three parcels of land as alleged by the applicant. Therefore, the applicant cannot say that he used the plaint to identify the land parcel on which to conduct the eviction. It was averred that it is these glaring anomalies that the DPP wants addressed by way of investigations so that if it is established that criminal offences were committed then the perpetrators ought to be charged in a court of law.

23. The Respondents averred that the DPP has the Constitutional responsibility to direct the police to commence investigations against any person reasonably suspected of having committed an offence and thereafter decide whether to prefer charges or not depending on the sufficiency of evidence in the investigations file. To them, the investigations directed by the DPP and which are being conducted by the police do not in any way violate or threaten to violate any of the applicant's constitutional or fundamental rights or freedoms as alleged or at all and the applicant has not demonstrated any such violation or likelihood of any such violation in order to warrant the granting of the orders sought in the application.

24. On behalf of the Respondents, it was submitted that the DPP did not direct the 2nd Respondent to arraign any person in court. This is a decision to be made once the DPP perused the completed investigation file and determined the sufficiency or otherwise of the evidence contained there-in. It was disclosed that the 2nd Respondent commenced his investigation by summoning all the parties to this matter, recording their statements and collecting any relevant documentary evidence in their possession. However, to-date the Ex-parte applicant has not recorded any statement.

25. It was submitted that section 23 of the **Auctioneer's Act** provides that a licensed auctioneer has a duty at all times to act in a manner befitting an officer of the court. The complaint made to the DPP is to the effect that the Ex-parte applicant contravened this provision and it is only fair and just that an investigation be conducted into this eviction. In the Respondents' submissions, it is contrary to the law and an abuse of the legal process for the Ex-parte applicant to conduct his duties as a licensed auctioneer in an unlawful manner and there-after argue that under section 6 of the **Judicature Act**, he is insulated from any civil or criminal proceedings. The Respondents relied on Article 157 (11) of the Constitution of Kenya, 2010.

26. According to them, it is in the interests of the administration of justice that proper investigations be carried out into the complaint by **Rose Gachiku Kinuthia**, and the Ex-parte applicant should cooperate with the investigators in order to establish whether the eviction was conducted within the confines of the law.

27. The Respondents' case was that until such investigations are carried out and concluded it would be hypocritical for the Ex-parte applicant to submit that the Respondents have not tendered any evidence proving that the court order authorizing the eviction was invalid, that the eviction was not procedural or

that there was destruction of property. This being a Judicial Review application, the Ex-parte applicant must show that the decision he is complaining about is illegal, irrational and procedurally improper. The Ex-parte applicant has failed to satisfy this critical requirement. He has not shown that the Respondents lacked or acted in excess of their jurisdiction or departed from natural justice in the 1st Respondent directing the 2nd Respondent to carry out investigations and in the 2nd Respondent acting of the directives and summoning the Ex-parte applicant to record a statement in the course of the investigations.

28. It was submitted that the Ex-parte applicant argues that he was executing a valid court order. On the other hand the complaint received by the 1st Respondent alleges that the court order was invalid and was executed against a person who was not party to Milimani CMCC No.6798 of 2016, the suit that gave rise to the said order. There is also an allegation that the Ex-parte applicant committed acts of wanton destruction of property. As stated here-in-above the 1st Respondent is empowered by Article 157 of the Constitution to direct the 2nd Respondent to institute an investigation into this matter so as to get the truth. The 1st Respondent exercised these powers through his letter to the 2nd Respondent dated 9th November 2016. The 1st Respondent cannot be faulted for this as he acted within his jurisdiction. In support of their case the Respondents relied on Civil Appeal No. 266 of 1996 – **Kenya National Examination Council – vs- Republic, Ex-parte Geoffrey Gathenji Njoroge**, and Misc. Application No. 1295 of 2005 – **Teresia Wanjiru Githinji –vs- The Attorney General**.

29. It was the Respondents' case that the 2nd Respondent is not in a position to arraign the Ex-parte applicant in court unless the 1st Respondent gives such directives and they cited Article 157 of the Constitution which grants only the 1st Respondent the mandate to institute and undertake criminal proceedings. In this respect they relied on Criminal Application No.453 of 2003 – **Kinano Kibanya –vs- Republic**, the Court stated that the said powers are exercised by the Attorney General (now the Director of Public Prosecutions) without reference to any person or authority. In making the decision on whether or not to institute such proceedings, the 1st Respondent is guided by the sufficiency of the evidence contained in an investigation file submitted to him by the 2nd Respondent. Therefore, until the investigations are completed by the 2nd Respondent and the 1st Respondent peruses the outcome of those investigations then the Ex-parte applicant, or any other person, cannot be arraigned in court.

30. It was submitted that even if the Ex-parte applicant was executing a valid court order, such execution ought to be inquired into if there is an allegation by a member of the public that it was not conducted legally and procedurally. By seeking an order of mandamus, the Ex-parte applicant is holding himself as being above the law and his actions ought not to be inquired into by the court or any other authority mandated by the Constitution to do so. This is an abuse of the court process and an affront to the rule of law.

31. In support of their case the Respondents cited the Court of Appeal's decision in Civil Appeal No.313 of 2014 – **Ethics & Anti-Corruption Commission –vs- The Chief Magistrate's Court & 4 Others**.

32. The Respondents therefore argued that they should be allowed to execute their mandates by having the complaint by **Rose Gachiku Kinuthia** thoroughly investigated and in the event that any person, including the Ex-parte applicant, is found to have committed any offence to be prosecuted accordingly. Consequently they prayed that the Ex-parte applicant's application be dismissed with costs.

Determinations

33. I have considered the issues raised herein.

34. Section 6 of the **Judicature Act** provides as follows:

No judge or magistrate, and no other person acting judicially, shall be liable to be sued in a civil court for an act done or ordered by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided he, at the time, in good faith believed himself

to have jurisdiction to do or order the act complained of; and no officer of a court or other person bound to execute the lawful warrants, orders or other process of a judge or such person shall be liable to be sued in any court for the execution of a warrant, order or process which he would have been bound to execute if within the jurisdiction of the person issuing it.”

35. This provision was the subject of the decision in Hayo vs. Attorney General & 2 Others Kisumu HCCC No. 80 of 1985 [1992] KLR 200 Khamoni, J stated inter alia:

“The provisions of section 4(5) of the Government Proceedings Act (Cap 40) Laws of Kenya do not shield the defendants respecting the acts or omissions the plaintiff is complaining about in this case. In the same way section 6 of the Judicature Act (Cap 8) does not shield the defendants in this case...To begin with section 6 of the Judicature Act, it states clearly that the officers referred to are protected when “acting judicially”. Those are Judge, magistrate or justice of peace and any other person acting judicially and who at the time of acting he acted in good faith believing he had jurisdiction to act.”

36. In Blassio Simiyu vs. Vincent Wanjala Sinino [1985] KLR 683; 1 KAR 630; [1976-1985] EA 563, Chesoni, JA (as he then was) expressed himself as follows:

“The appellant could and was entitled to sue the respondents for trespass and wrongful attachment to which they were a party. The attachment was not supported by a lawful or any warrant of the court and so the court broker had no authority to levy the attachment. He and those who led him to the appellant’s house to attach the property were trespassers and acted unlawfully. The court broker was, in the absence of a warrant of attachment, not an agent, officer or representative of the court and he was therefore not protected because in view of section 6 of the Judicature Act (Cap 8), there being no order for the claimant to refund any money and no warrant of attachment the court broker was not executing a lawful warrant or order or other process of the court and he and those collaborating with him were liable to be sued for their acts if they resulted into a tort.”

37. A similar issue arose in Bifabusha vs. Turyazooka [2000] 2 EA 330 where the Uganda Court of Appeal held that:

“A court bailiff is only protected under...when he/she acts lawfully...Since it was the contention of the Appellant that the Respondent sold the movable property which the attachment warrant did not authorise him to do, there was need to find out by way of evidence whether the Respondent did so and then the issue of the protection of...of the Judicature Statute would come in.”

38. Similarly the Supreme Court of that country in Obbo vs. Owor and Another [1990-1994] EA 476 held that:

“The Court Broker has the protection of section 46 of the Judicature Act of 1967 but it only protects the lawful actions of a Court Broker. On the assumption that the Court Broker has acted illegally, the Court Broker will have no protection under section 46.”

39. What the above decision show is at the immunity provided under section 6 of the *Judicature Act* is not absolute but depends on whether the action in question was lawfully carried out or not. Considering the rivalling versions of the parties to these proceedings it is not possible for this Court to make a definite finding as to the legality or otherwise of the ex parte applicant’s action.

40. It is also contended by the Respondents that the matter is still under investigations and no decision has been made to charge anybody. If that is so it would mean that by this application, the applicant is in effect seeking an order barring the Respondents from conducting investigation with respect to the alleged complaints of illegality on the part of the ex parte applicant. Section 24 of the *National Police Service Act No 11 A of 2011* sets out functions of the Kenya Police Service as being the—

- (a) Provision of assistance to the public when in need;**
- (b) Maintenance of law and order;**
- (d) Preservation of peace;**
- (d) Protection of life and property;**
- (e) Investigation of crimes;**
- (f) Collection of criminal intelligence;**
- (g) Prevention and detection of crime;**
- (h) Apprehension of offenders;**
- (i) Enforcement of all laws and regulations with which it is charged; and**
- (j) Performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.**

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

42. Apart from the foregoing section 51(1) of the *National Police Service Act* provides as follows:

(1) A police officer shall—

- (a) obey and execute all lawful orders in respect of the execution of the duties of office which he may from time to time receive from his superiors in the Service;**
- (b) obey and execute all orders and warrants lawfully issued;**
- (c) provide assistance to members of the public when they are in need;**
- (d) maintain law and order;**
- (e) protect life and property;**
- (f) preserve and maintain public peace and safety;**
- (g) collect and communicate intelligence affecting law and order;**
- (h) take all steps necessary to prevent the commission of offences and public nuisance;**
- (i) detect offenders and bring them to justice;**
- (j) investigate crime; and**
- (k) apprehend all persons whom he is legally authorized to apprehend and for whose apprehension sufficient ground exists.**

43. Section 52 of the same Act, on the other hand, provides as hereunder:

(1) A police officer may, in writing, require any person whom the police officer has reason to believe has information which may assist in the investigation of an alleged offence to attend

before him at a police station or police office in the county in which that person resides or for the time being is.

(2) A person who without reasonable excuse fails to comply with a requisition under subsection (1), or who, having complied, refuses or fails to give his correct name and address and to answer truthfully all questions that may be Lawfully put to him commits an offence.

(3) A person shall not be required to answer any question under this section if the question tends to expose the person to a criminal charge, penalty or forfeiture.

(4) A police officer shall record any statement made to him by any such person, whether the person is suspected of having committed an offence or not, but, before recording any statement from a person to whom a charge is to be preferred or who has been charged with committing an offence, the police officer shall warn the person that any statement which may be recorded may be used in evidence.

(5) A statement taken in accordance with this section shall be recorded and signed by the person making it after it has been read out to him in a language which the person understands and the person has been invited to make any correction he may wish.

(6) Notwithstanding the other provisions of this section, the powers conferred by this section shall be exercised in accordance with the Criminal Procedure Code (Cap. 75), the Witness Protection Act (Cap. 79) or any other written law.

(7) The failure by a police officer to comply with a requirement of this section in relation to the making of a statement shall render the statement inadmissible in any proceedings in which it is sought to have the statement admitted in evidence.

44. It is therefore clear that the Respondents were properly warranted in commencing investigation into the allegations of the complaints made to them. In **Republic vs. Chief Magistrate Milimani & Another Ex-parte Tusker Mattresses Ltd & 3 Others [2013] eKLR** this Court expressed itself as follows:

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

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

46. It must always be noted that judicial review proceedings are not concerned with the merits but with

the decision making process. That an applicant has a good defence to the complaint is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is open to the applicant to bring to the attention of the investigators in the course of the conduct of the investigations.

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

48. 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...”

49. 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.”

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

“The police have a duty to investigate on any complaint once a complaint is made. Indeed

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

51. It is therefore clear that whereas the discretion given to the respondents to investigate criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence, the Court will not hesitate to bring such proceedings to a halt. However, it must be emphasised that judicial review applications do not deal with the merits of the case but only with the process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and once the Court is satisfied that the same are *bona fides* and that the same are being conducted in a fair manner, the High Court ought not to usurp the powers of the police by halting otherwise proper complaints made before them.

52. In this case, the only reason why the discretion of the Respondents is being challenged is that the Respondents have no power to investigate the actions of the ex parte applicant due to the immunity granted to him by virtue of section 6 of the *Judicature Act*. However based on the material placed before me I cannot hold with finality that the circumstances under which section 6 aforesaid can be successfully invoked have been satisfied. In light of the two conflicting versions placed before me it is not within the powers of this Court based on the material before me to decide whose version is correct.

53. I cannot therefore say that based on the material placed before me there is no basis at all for conducting investigations. Just like in cases of prosecution, the mere fact that the allegations made are likely to be found worthless, is not a ground for halting investigations into the complaints made or brought to the attention of the said authorities since the purpose of a criminal investigations conducted *bona fide* is to consider both incriminating and exculpatory material and not just to collect evidence on the basis of which a criminal charge may be laid.

54. To grant the orders sought in this application in my view would be both pre-emptive and presumptuous in light of the fact that the DPP’s decision to prosecute is yet to materialise. This Court ordinarily does not interfere with the exercise of constitutional and statutory power of executive authorities unless there exist grounds for doing so. I agree with the position in **Ethics & Anti-Corruption Commission –vs- The Chief Magistrate’s Court & 4 Others** (supra) where the Court of Appeal expressed itself as hereunder:

“...we feel that this is a suitable case to reiterate the views of the Supreme Court in the matter of Gender Representation in the National Assembly and Senate, Advisory Opinion No.2 of 2012, where the Court reminded Kenyans of the importance of ensuring that organs bearing primary responsibility under the Constitution are enabled to discharge their obligations as a basis for sustaining the design and purpose of the Constitution. When acting within their powers, such organs must be given space to discharge their mandate without being closeted in a manner that undermines their independence or renders discharge of their mandate virtually impossible. This is particularly the case where the Constitution has guaranteed those institutions autonomy and independence in the performance of their duties. Interference, including by the Courts, should be with great circumspection and only in and unambiguous cases of abuse of the powers of the institution.”

55. I am afraid that there are no sufficient material on the basis of which I can find that the DPP will necessarily agree with the 2nd Respondent in his finding. Under Article 157(4) of the Constitution, the Director of Public Prosecution is empowered to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General is obliged to comply with any such direction. In other words the DPP is not bound by the actions

undertaken by the police in preventing crime or bringing criminals to book. He is, however, under Article 157(11) of the Constitution, enjoined to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. In other words the DPP ought not to exercise his/her constitutional mandate arbitrarily.

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

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

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

Pursuant to Article 157(10) of the Constitution, the Director shall–

a. Not require the consent of any person or authority for the commencement of criminal proceedings;

b. Not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution, this Act or any other written law; and

c. Be subject only to the Constitution and the law.

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

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

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

60. 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) ...”.

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

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

62. In my view, the discretion to be exercised by the DPP is not to be based on recommendations made by the investigative bodies. Therefore, the mere fact that the DPP’s decision differs from the opinion formed by the investigators is not a reason for interfering with the constitutional and statutory mandate of the DPP as long as he/she believes that he/she has in his/her possession evidence on the basis of which a prosecutable case may be mounted and as long as he takes into account the provisions of Article 157(11) of the Constitution as read with section 4 of the *Office of Public Prosecutions Act*, No. 2 of 2013. Conversely, the mere fact that the investigators believe that there is a prosecutable case does not necessarily bind the DPP. As is rightly recognised by **Sir Elwyn Jones** in *Cambridge Law Journal* – April 1969 at page 49:

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

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

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

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

65. Accordingly, unless and until a decision to charge a person is made by the Police or the prosecutor, it is only in exceptional circumstances where the Court would prohibit, a decision being taken either way by them. In this case it is my view that based on the material placed before me it is premature for this Court to make a finding that the investigations by the police are being improperly undertaken.

66. In the circumstances of this case, it is my view that taking into account the fact that the DPP's decision upon review of the file is still pending it would be speculative to deal with the issues which were raised in these proceedings.

Order

67. In the premises whereas I decline to grant the orders in the manner sought by the applicant, I hereby issue an order prohibiting the Respondents from taking any action in the nature of criminal proceedings until the DPP makes a determination on the matter.

68. Each party will bear own costs of these proceedings.

69. It is so ordered.

Dated at Nairobi this 19th day of October, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Motabori for the ex parte applicant

CA Ooko