REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 236 OF 2017

IN THE MATTER OF ARTICLE 22(3), 23, 25, 27, 47, 50, 157 AND

165 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTION 4 & 5 OF THE OFFICE OF THE

DIRECTOR OF PUBLIC PROSECUTION ACT

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE

RULES, 2010

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT

AND

IN THE MATTER OF SECTION 7, 8, 9, 10 AND 11 OF THE FAIR

ADMINISTRATIVE ACTIONS ACT

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS

BETWEEN

FRANCIS NYAGAH NJERU ……..…….....….APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTION.....…1ST RESPONDENT

THE CM'S COURT AT NAIROBI…….....….2ND RESPONDENT

THE DIRECTORATE OF CRIMINAL INVESTIGATIONS….3RD RESPONDENT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 18th May, 2017, the *ex parte* applicant herein, **Francis Nyagah Njeru,** seeks the following orders:

> **1) An Order of Prohibition directed at the 1st and 3rd Respondents, Prohibiting further prosecution of the Applicant before the Second Respondent in Nairobi Chief Magistrates Court Criminal Case Number 1998 of 2016 – Republic v Francis Nyaga Njeru.**
>
> **2) An Order of certiorari at the 1st Respondent, Quashing the decision to institute or continues any criminal prosecution of the Applicant in respect to Claims surrounding the ownership of properties known as Land Reference Numbers 1870/1337 and 1870/1/338.**
>
> **3) A Declaration that the prosecution of the Applicant in in Nairobi Chief Magistrates Court Criminal Case Number 1998 of 2016 – Republic v Francis Nyaga Njeru is a violation of the Applicant's right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**
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> **4) The Order granting leave do operate as a stay of the proceedings in in Nairobi Chief Magistrates Court Criminal Case Number 1998 of 2016 – Republic v Francis Nyaga Njeru. In particular and for avoidance of doubt, First and Second Respondents prosecuting or continuing with the prosecution of the Applicant in in Nairobi Chief Magistrates Court Criminal Case Number 1998 of 2016 – Republic v Francis Nyaga Njeru. Or in any other court in respect to ownership of properties known as Land Reference Number 1870/1/337 and 1870/1/338.**
>
> **5) The costs of the Judicial Review application be provided for.**

Applicants' Case

2. According to the applicant, a company known as **Frank Logistics Limited** (the company) is the registered proprietor of the properties known as Land Reference Numbers 1870/1/337 and 1870/1/338 (the suit properties) and the applicant is one of its directors.

3. It was averred that there is a Court Order issued by this Court on 19th December, 2016 staying all the proceedings by National Lands Commission in Judicial Review No. 638 of 2016.

4. According to the applicant, the company applied for and was allocated the suit properties by the Government of Kenya on 6th January, 2009 and upon meeting the conditions set out in the letters of allotment, the company was issued with leases in relation to the suit properties for execution. Subsequently, the company was issued with certificates of title for the suit properties and it proceeded to take vacant possession of the suit properties in January, 2009 and remained in possession thereon until December, 2016. The company had previously employed security personnel who were previously manning the suit properties.

5. According to the applicant, on 2nd December, 2016 the company received a notice from the Nairobi City County which notice decreed that buildings which had been erected on the suit properties were unfit and required the company to demolish them. The notice cautioned the company that in the event of non-compliance, it risked prosecution and a situation where the Nairobi City County would bring down the

unfit structures at the company's expense. In compliance with the said notices, the company demolished the sad buildings that had been erected on the suit property.

6. The applicant disclosed that the leases over the suit properties were previously held by the petitioner and the plaintiffs in ELC ***Petition Number 1524 of 2016 - Nazmudin Habib Kassam Kurji vs. National Lands Commission & 9 Others*** and ***ELC Civil Case Number 1530 of 2016 - Pyarali Gulamhussein Nanji & 3 Others vs. Frank Logistics & 4 Others.*** (hereinafter referred to as "the civil cases") that are pending before the Environment and Land Court. According to the applicant, it is after their leases expired (without an application for extension) that the company was allocated the suit properties.

7. It was averred that the company as served with the suit papers in respect of the said civil cases in December 2016 in which declaratory orders are sought seeking orders declaring the plaintiffs and the petitioner as the lawful proprietors of the suit property.

8. It was however averred that despite this Court's Order issued on 19th December, 2016 against the National Lands Commission in Judicial Review No. 638 of 2016 staying all the proceedings in that matter, the National Lands Commission continued with the investigation against the Ex-parte Applicant and came up with a Report on the same to be used as evidence in criminal proceedings.

9. It was the applicant's case that the decisions and intended actions of the 1st and 3rd Respondents are unconstitutional, illegal, ultra vires and contravene statutes for the reasons that the criminal charges are being used to further the cause of civil suit. It was further contended that the 1st and 3rd Respondents' decision and the intended use of the report made by the National Lands Commission despite a Court Order, is bad in law, contemptuous and an abuse of the Court process and contravenes the Ex-parte Applicant's legitimate expectations where Orders of the Court must be obeyed. The applicant's case was therefore that the ends of justice demand that the 1st and 3rd Respondents be stopped from prosecuting or continuing with the prosecution of the Applicant in criminal case No. 1998 of 2016 – **Republic vs. Francis Nyaga Njeru**.

10. It was disclosed that the said criminal proceedings had been adjourned severally on account of new evidence, which evidence is the National Land Commission Report that had been barred by this Court on 19th December, 2016 vide a Court Order. The applicant contended that the Prosecution in Criminal Case No. 1998 of 2016 has since intended to use the National Lands Commission's report as evidence despite the Court Order barring the same.

11. The applicant averred that shortly after service of the petition and the plaint upon the company, he was arrested and arraigned in Court and charged in Nairobi Chief Magistrate Criminal Case Number 1998 of 2016 with the offences of forging the title documents, making title documents for the suit properties without authority and other offences that militate upon the ownership of the suit properties. To the said charges, the applicant pleaded not guilty on 9th December, 2016.

12. It was the applicant's case that by a letter dated 13th December, 2016 his advocates requested the Third Respondent to supply them with witness statements and all other materials that they intended to adduce in the criminal case that is now the subject of this application but the said letter did not elicit any response. The request was repeated vide letters dated 30th January 2017 and 23rd February 2017 with the same result. It was averred that it was not until 7th April 2017 that the Third Respondent supplied his advocates with the said witness statements and relevant documents.

13. According to the applicant, the criminal case before the Second Respondent came up for hearing on various occasions when it was adjourned. However upon reviewing the documents supplied to him with the assistance of his advocates, he considered it necessary to make this application with a view to quashing the criminal case which does not have foundation in law. In his view, whereas he was charged with the offences of forging the title documents in relation to the suit properties together with the offence of making the title documents without authority, the Ministry of Lands, Housing and Physical Planning (the Ministry) has confirmed that it processed the title documents held by the company in relation to the

suit property.

14. It was averred that the title documents held by the company have been investigated and examined by the National Police Service Cybercrime Forensic Unit which has concluded that the said title documents are genuine and that they were processed using the lease management system and printed in the office of the Chief Land Registrar at the Ministry. It was further disclosed that the employees of the ministry recorded statements and confirmed that they indeed prepared or signed the title documents held by the company in relation to the suit properties.

15. It was therefore the applicant's case that it is unfair, oppressive and an abuse of state machinery for him to be charged with offences of forgery and making title documents among other related offences when it is evident that the Ministry of Lands, Housing and Physical Planning as well as the National Police Service Cybercrime Forensic Unit have confirmed that the said documents were prepared by the said Ministry.

16. The applicant therefore believed that his arrest was malicious and the charges that he faces in the criminal proceedings are trumped up and ill motivated by ulterior motive on the part of the Plaintiffs and the Petitioner in the two cases that are pending before the Environment and Land Court. The applicant revealed that the said Plaintiffs and Petitioner in the cases that are now pending before the Environment and Land Court have contacted him a number of times, in person and through proxies and informed him that if he conceded the claims in the pending civil cases, they would proceed to withdraw the criminal charges that he face in Nairobi Chief Magistrates Court Criminal Case No. 1998 of 2016.

17. It was therefore the applicant's case that the charges against him are abusive of the criminal justice system and should be quashed since his rights are likely to be infringed if the Order sought are not granted for the reason that the Respondents have extensively placed reliance on criminal case No. 1998 of 2016 which is contrary to the public policy.

18. The applicant insisted that the predominant purpose of instructions and maintenance of the Criminal charges by the Respondents is to pressure on him to relinquish his proprietary rights over the suit property namely L.R No. 1870/1/337 and 1870/1/338 and that he is likely to suffer if the Court does not exercise its supervisory jurisdiction and protection of fundamental rights and freedoms.

19. The applicant maintained that the instructions and maintenance of the criminal charges by the Respondents constitutes a callous abuse of the process of the Chief Magistrate's Court and believed that unless this Court intervenes, his rights to fair administrative actions, equal treatment and benefit of the law, human dignity, security and dignity would be violated.

1st and 3rd Respondents' Case

20. The application was opposed by the 1st and 3rd Respondents.

21. According to the said Respondents, the office of the DCI, received information on 4th December 2016 followed by a letter dated 6th December 2016 from Secretary, Lands requesting investigation into dispute over a property which culminated in demolition of a house within Parklands. They then commenced investigation and established that on the 29th April 1979, Kurji family purchased the then LR No. 1870/1/290 situated within parklands from M & H Limited. Nazmudin Kassam Kurji and his brother Sadrudin applied for subdivision of LR, No. 1870/1/2/290 which subdivision was approved creating LR. NO. 1870/1/337 and LR. No. 1870/1/338 which two parcels were subsequently registered in the names of Nazmudin Kassam LR. No. 1870/1/338 and Sadrudin LR. No. 1870/1/337 respectively with a semi-detached Maisonette.

22. It was averred that the lease of the properties expired and Application for extension was made a position which was confirmed by one **Mr. Onyino Mukobe**, the officer who received the application. According to the said officer, the lease renewal process was underway by the time he left for transfer to

Kisumu. However, the said officer is purported to have signed an allotment letter in the name of Frank Logistics Limited, a fact he disowned, and upon the signature being subjected for analysis, the analysis report clearly indicated that it was a forgery.

23. It was the Respondents' case that while the Applicant claimed that the certificate of titles that he has were printed from Ardhi House and signed by Registrar **Charles Kipkurui Ngetich**, the registrar recorded statement and disowned the signatures, a position supported by examiners report.

24. It was averred that the investigating officers extended investigations to the Surveys of Kenya having recovered a copy of the deed plans from the Applicant. One of the officers, **P.F Njoroge**, who is purported to have signed the plan disowned and indicated that the date 20th October 2016 was a public holiday and he couldn't have been in the office. His signature was subjected for analysis and the report indicated that it was a forgery. It was further averred that another officer at Surveys of Kenya who is charged with the responsibility of verifying Deed Plans one **Mr. Francis Kimani Ngugi** denied having verified the Deed plans in favour of Frank Logistics Ltd. He furnished the officers with verifying register confirming that the same never happened at the surveys office, which position was supported by the examination report indicating that it is a forgery.

25. It was averred that the deed plan numbers 89417 and 89418 which were used to process the certificates of lease were both opined to be forgeries therefore the end products which are the certificates of titles cannot be said to have been genuinely obtained. It was disclosed that during investigations at Ardhi House central registry, the Respondents recorded a statement from one **Keziah Thome** who stated that she handled I.R Nos.176232 and 1762234 for parcels number 13486/258 and 13486/254 which deed plans have been used to create Frank Logistics leases through the lease management systems at Ardhi house. However, these parcels of land situated within Kiambu County belongs to a different person one **Francis Munene Hiram**. It was further averred that another officer **Salome Kirera**, the person in charge of issuance of Inland Registry Numbers (IR.) denied having issued IR. Nos. 176232 and 176234 to Frank Logistics and according to her register the two IRs. were issued to parcels LR. 13486/258 CF. 293839 and LR. 13486/254 CF. 293835 both parcels belonging to **Francis Munene Hiram**.

26. According to the said Respondents, the Ministry of Lands uses a system called Lease Management System (LMS) that was developed by a company called COSEKE. The system is used for processing of lease and certificate of title. However, for the lease in respect to Frank Logistics, it was printed through the system without going through the laid down procedures of data capturing and verification.

27. It was disclosed by the said Respondents that the County Government of Nairobi confirmed through history that the parcels of land belongs to the Kurji family and disowned the enforcement notice used to demolish the property terming it a forgery, which position was further supported by the examiner's report.

28. According to the said Respondents, they arrived at a conclusion that several offences had been committed by the Applicant hence the charging him with 2 counts of forgery, 2 counts of making a false documents, 2 counts of malicious damage to property and 2 counts of obtaining registration by false pretences in Criminal Case No.1998 of 2016 which is pending for hearing before the Chief Magistrates Court in Milimani.

29. It was the Respondents' independent and unfettered opinion that the matter should conclude to its logical conclusion.

30. In their view, the existence of a civil suit is no bar to the criminal case as both can run concurrently as per section 193A of the ***Criminal Procedure Code***. Their case was that the Application has been filed in bad faith and is an attempt to defeat justice.

31. It was contended that the Directorate of Criminal investigations' is established under section 28 of the ***National Police Service Act*** under the direction, command and control of the inspector General of the National Police Service and that its functions include but are not limited to:

a) Collecting and providing criminal intelligence.

b) Undertaking investigations on serious crimes including homicide. Narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime and cyber crime among others;

c) Maintaining law and order ;

d) Detecting and preventing crime;

e) Apprehending offenders ;

f) Maintaining criminal records;

g) Conducting forensic analysis;

h) Executing the directions given to the inspector general by the Director of Public Prosecutions pursuant to Article 157(4) of the Constitution:

i) Co-ordinating country Interpol Affairs;

j) Investigating any matter that may be referred to it by the independent police oversight authority ;and

k) Performing any other functions conferred on it by any other written law.

32. Further, the objects and functions of the National Police Service are set out in Article 244 of the Constitution and section 24 of the ***National Police service Act*** and in the discharge of their duties and functions, the staff of the National Police Service are bound by, do, respect, observe and uphold *inter alia* the following Constitutional provisions:

a) Regard to public interest, the interests of administration of justice. and the need to prevent and avoid abuse of legal process

b) Upholding and defending the Constitution.

c) Respecting, observing, protecting, implementing, promoting and upholding the rights and freedoms in the Bill of Rights enshrined in the Chapter Four.

d) Accountability to the public for decisions and actions taken and generally observe of Chapter Six (Leadership and Integrity).

e) Accountability for administrative acts and observance of the values and principles of public service under Chapter Thirteen.

33. It was the Respondents' position that the applicant has not demonstrated that in undertaking investigations in the complaint lodged with the National Police Service and in making the decision to prefer Criminal charges against him, either the Director of Public Prosecution or any member of staff of the office of the Director of Public Prosecution or the National Police Service acted without or in excess of the power conferred upon them by the law or have infringed ,violated, contravened or in any other manner failed to comply or respect and observe the foregoing provisions of the Constitution of Kenya 2010 or any other provisions thereof or any other provisions of the law.

34. It was disclosed that the DPP independently reviewed and analysed the evidence contained in the investigations file compiled by the Directorate of Criminal Investigations including the witness statements, documentary exhibits and statements of the Petitioner as required by the law and it was on the

basis of the said review and analysis that the DPP gave instructions to prosecute the applicant. Therefore the decision to charge the applicant was informed by the sufficiency of evidence on record and the public interest and not on any other considerations.

35. To the Respondents, the contention by the Applicant that the cases against them are oppressive and malicious and amounts to an abuse of court process is unfounded and bad in law in that:

a. As deposed above, state powers of prosecution are exercised by the Director of Public Prosecution personally or by persons under his control and directions;

b. It the exercise of such powers, the Director of Public Prosecutions:

i. Is subject only to the constitution and the law

ii.Does not require the consent of any person or authority

iii. Is independent and not subject to the direction or control of any person or authority; and

c. The High Court would be crossing into the line of the independence of the DPP to descend into the arena of finding whether there is prima facie case against the Applicant;

d. The Petitioners have not demonstrated that the DPP has not acted independently or has acted capriciously, in bad faith or has abused the process in a manner to trigger the High Court's intervention.

36. It was contend that the Petitioners have failed to demonstrate that the DPP lacked the requisite authority acted in excess jurisdiction or departed from the rules of natural justice in directing that the Applicant be charged with offences disclosed by the evidence gathered. It was prayed that the application be dismissed with costs and the criminal trial against the Applicant be allowed to proceed to its logical and judicial conclusion.

Interested Party's Case

37. The interested party similarly opposed the application.

38. According to him, he is the registered owner of all that parcel of land known as Land Reference Number 1870/1/338 measuring approximately 0.0489 hectares and situated in Parklands along Jalaram Road within Nairobi County (the **Suit Property**) having acquired the same for valuable consideration sometime on or about 29th April, 1971.

39. According to the interested party, on 29th April 1971, **Kurbanali Habib Kassam Kurji**, **Nasirbanu Habib Kurji**, **Kulsum Sadrudin Darvesh**, **Sadrudin Habib Kassam Kurji** and himself purchased the then LR No. 1870/1/290 Parklands, Nairobi for valuable consideration from M & H Corporation Limited. Sometime in September 1986, **Kurbanali Habib Kassam Kurji**, **Nasirbanu Habib Kurji**, and **Kulsum Sadrudin Darvesh** made a gift of their undivided three fifth share in LR No. 1870/1/290 Parklands, Nairobi to his late brother **Mr Sadrudin Habib Kassam Kurji** and himself. Thereafter, the two brothers applied for sub-division of LR No. 1870/1/290 which sub-division was duly approved by all the relevant offices. Subsequent thereto the two brothers were issued with separate Deed plans from the Director of Surveys and the two sub-divisions became Land Reference Nos. 1870/1/337 and 1870/1/338 Parklands, Nairobi.

40. The interested party averred that the Suit Property together with his late brother's title known as Land Reference Number 1870/1/337 (together the Properties) were the subject matter of the proceedings conducted by the National Land Commission (the NLC) on 9th December, 2016 held for the purposes of determining the true owner of the Properties (the NLC Proceedings). The interested party however averred that he had owned the Suit Property for the last four decades and had occupied it with his family

since his tenant moved out sometime in 2008.

41. It was averred that sometime in 2003 the interested party's leasehold interest over the Suit Property expired but due to inadvertent error, the expiry date was never noted or diarised and escaped his and his family's attention. He also did not receive any notice from the Government of the Republic of Kenya either prior to, or after expiry of the said lease though he continued to occupy the Suit Property and paid land rent and rates to the Government and the Nairobi County Government respectively.

42. The interested party averred that it was not until sometime in early 2007 when himself and his family were going through their documents and records that they noticed that the lease to the Suit Property had expired. He immediately went about processing documentation to apply for a renewal and on 2nd April, 2007, applied for the extension of his lease over the Suit Property which application was received by the Commissioner of Lands (the Commissioner). Following receipt of the said application, the Commissioner, on the same date forwarded the application to the Director of Physical Planning, Director of Surveys and Director of City Planning seeking their comments on the application before processing the same. Thereafter, the interested party made several enquiries as to the progress of his application with the defunct Commissioner's office, the Ministry of Land, Housing & Urban Development (the Ministry) and with the Chief Land Registrar (the Registrar) and received several verbal assurances from their officers that the lease would be extended following finalization of administrative processes at the Lands Registry. In the meantime the interested party remained in uninterrupted ownership and occupation (since 2008) of the Suit Property from the date of his application until December 2016 when his family and himself were forcefully evicted from the Suit Property by the Applicant's agents, thugs and goons on threat of death and grievous bodily harm. During the entire period between 2007 and 2016, he continued to diligently pay land rent and rates following receipt of demands from the Registrar and the Nairobi City County (NCC).

43. According to the interested party, sometime in November, 2016, the properties began experiencing unprecedented hostile activity. On 24th November, 2016 the agents of the Applicant forcibly gained entry to the Suit Property and confronted and interrogated the interested party on the ownership of the Suit Property. Being in suspicion that a plot was being hatched to deprive him of this Suit Property, a family member registered a complaint of this visit on the interested party's behalf with the NLC as the interested party was thoroughly distressed by the events occurring in November 2016. Pursuant thereto, the NLC issued a letter to the Registrar requesting the Registrar to endorse restrictions on the Suit Property.

44. It was averred by the interested party that in the early hours of the morning of 4th December, 2016 the agents of the Applicant who were mostly hired thugs and goons forcibly gained entry to the Suit Property, attacked his family, their employees and the interested party and illegally evicted them from the Suit Property. The agents of the Applicant then bulldozed their town house on the Suit Property without allowing his family to salvage their possessions which were looted and some of which are now covered in the debris of the demolished house.

45. The interested party averred that on 6th December, 2016 he filed a Petition in the Environment and Land Court, being Petition No. 1524 of 2016 against the Applicant and his agents as well as other state agencies for the purposes of enforcing and seeking redress for the violation of his constitutional right to property which had been compromised by Frank Logistics Limited (FLL) – the corporate vehicle which the Applicant used to perpetrate the fraud against the Suit Property (the Civil Case). According to the interested party, the Applicant's allegation that FLL is the registered owner of the Suit Property are untruthful and part of a fraudulent land grabbing scheme orchestrated and/or participated in by the Applicant to deprive him of the Suit Property which his family and himself have owned for close to forty (40) years.

46. It was disclosed that on 3rd December, 2016, the interested party received a notice from the NLC summoning him to attend a public hearing on the 9th December, 2016 for the purposes of determining the ownership of the title to the Properties. An agent of FLL who was in hostile occupation of his late brother's adjoining property was also served with a similar notice by the NLC officers. On 9th December,

2016 the NLC conducted the hearing proceedings to investigate the issues surrounding the ownership of the Suit Property and after the hearing concluded, the NLC stood over the proceedings for purposes of making a determination on the evidence that had been presented. The Chairman of the NLC stated that a written determination would be made by the NLC in the week or so following the Proceedings.

47. It was the interested party's case that during the NLC Proceedings, details concerning the manner in which FLL and the Applicant had fraudulently dispossessed the interested party of the Suit Property became apparent. The fact that Frank Logistics Limited (FLL), a company which the Applicant is a director of, had obtained fraudulent title documents with the connivance and compromise of several public officers in the offices of the Ministry, the Registrar and the NCC was confirmed by the testimonies of various individuals indicated on the face of FLL's title documents as having been prepared and executed the title documents. These individuals disowned the title documents as unlawfully and irregularly obtained and claimed that their signatures on the documents had been forged. The proceedings of that day together with these testimonies were recorded verbatim in the NLC's Hansard.

48. It was the interested party's case that it is worth noting the following as revealed in the testimonies given during the NLC Proceedings:

a. the Deed Plan submitted by the Applicant and FLL was improperly and fraudulently obtained due to the fact that it was allegedly issued on 20th October, 2015 which was a public holiday. Further, the licensed surveyor indicated as having undertaken the survey, **Mr Benson Meshack Okumu**, categorically informed the NLC that: he did not survey the Suit Property nor prepare the survey report for the Suit Property. He categorically denied his office's involvement in the preparation of the survey and that he did not forward the Deed Plan to the Director of Surveys for certification;

b. the Director of Surveys, **Mr Peter Njoroge**, (the **Director**) indicated as having allegedly certified the Deed Plan for FLL's title, categorically informed the NLC that he did not handle the Deed Plan and he did not execute it. The Director believed that his signature on the Deed Plan had been forged. According to the Director, the only Deed Plan he was aware of is the one dated the 28th May, 1971 (the **Initial Deed Plan**) submitted with my title documents. Further, the Director confirmed that the Deed Plan was not registered and that the only registered Deed Plan is the Initial Deed Plan;

c. FLL allegedly applied for the allocation of the Suit Property vide an undated letter but received on 18th December, 2008 by the cash office of the Ministry of Lands. FLL was allegedly thereafter issued with a letter of allotment on 6th January, 2009. It was noted that the short period, being under one month, within which FLL obtained the letter of allotment was unusual and not in accordance with standard practice and processes that precede the issuance of such a letter;

d. the Certificate of Title issued to FLL was erroneous as the reference to the 'Original Number – Nil' was used for virgin or undeveloped land. In this case, the Suit Property had been developed and there was a structure on the Suit Property. Further the Original Number for the Suit Property was LR 1870/1/290 not 'Nil';

e. the lands officer, **Mr. Onyino Mukobe**, who received the interested party's application for extension of lease and sought approvals from the various entities on 2nd April, 2007 confirmed to the NLC that the interested party had indeed made such an application. Further, **Mr Mukobe** confirmed that by the time he was being transferred to another station, significant progress had been made with his application and necessary approvals had been obtained. **Mr Mukobe** stated that he had visited the Suit Property to conduct a site inspection in relation to the extension of the lease and what was remaining was the issuance of a new deed plan in respect of the Suit Property. There were no details of such a site inspection having been conducted prior to the issuance of the contrived deed plan to FLL;

f. although **Mr Mukobe** is indicated as having issued the letter of allotment to FLL dated 6th January, 2009, **Mr Mukobe** categorically denied signing the letter of allotment to FLL. **Mr Mukobe** informed the NLC that once an application for renewal of lease has been made by the owner, the land is no longer available for allocation. This clearly demonstrates that the letter of allotment is contrived and was fraudulently obtained as part of the deceptive scheme orchestrated by the Applicant and FLL;

g. the Registrar of Titles, **Mr. Charles Kipkurui Ng'etich**, alleged to have executed and registered the Certificate of Title dated 2nd November, 2016 to FLL categorically informed the NLC that his signature appearing on the Certificate of Title was a forgery. Further, **Mr Ng'etich** informed the NLC that the Certificate of Title did not originate from his office, was not registered with his office and that such registration was not indicated in the internal records kept by his office;

h. **Mr Ng'etich** informed the NLC that the IR Number indicated on the Certificate was also erroneous as this number was allocated for a different property. The IR number allegedly in the name of FLL was erstwhile issued in June 2016 for a property owned by **Francis Munene Hiram** and had no connection to the Applicant, FLL or the Suit Property. **Mr Ng'etich** stated that once an IR Number has been issued, it is not available for allocation in respect of another property or other LR Numbers; and

i. the Nairobi County Government **(NCC)** informed the NLC that the enforcement notice allegedly issued to FLL by the NCC dated 10th November, 2016 was a forgery and did not originate from the NCC. The NCC confirmed that the notice was not registered in its internal records. The NCC stated that prior to the demolition of a structure within its jurisdiction, a meeting of the County Executive Committee would first be held and a report prepared recommending the demolition. In this case, there was no such meeting or report prepared recommending the demolition of the Suit Property. Further, for a demolition to be effected by the NCC, the NCC would use its own equipment or procure the services of the National Youth Service. This was not done in this case.

49. Aware that the testimonies presented before the NLC vindicated his rights over the Suit Property, the interested party averred that FLL moved this Court to apply for orders of judicial review whose effect would be to nullify the entire NLC Proceedings in Miscellaneous Civil Application No 638 of 2016 (the Judicial Review Proceedings) and on 19th December, 2016, the Court granted leave to apply for an order of prohibition against the NLC to prohibit it from proceeding with any further hearing or determination of the complaint and from commencing any other investigating in relation to the ownership of the Properties and for the said leave to apply for an order of certiorari to quash the proceedings, directions and orders made by the NLC during the NLC Proceedings; and for a stay of the Proceedings pending the hearing and determination of the motion or further orders of the Court (the Orders).

50. Following the events of 4th December, 2016 the interested party recorded a statement at Parklands Police Station and sometime on 9th December, 2016, a charge sheet was drawn up and the Applicant charged for the crimes specified therein. The 1st Respondent then commenced the Applicant's prosecution in Nairobi Chief Magistrates Criminal Court Case Number 1998 of 2016 – **Republic vs. Francis Nyagah Njeru** (the Criminal Proceedings) now pending before the 2nd Respondent. On 13th June, 2017, the interested party, averred that he was shocked when he was informed by my Advocates that the Applicant had obtained orders from this Court staying the Criminal Proceedings and the prosecution of the Applicant pending the hearing and determination of the substantive motion in this suit.

51. It was the interested party's case that the application for the allocation of the Suit Property by FLL and eventual allocation of the Suit Property to FLL is questionable at best and indicative of the deceptive land grabbing scheme orchestrated and/or participated in by the Applicant and FLL. It was reiterated that the Certificate exhibited to the Affidavit was obtained illegally, unprocedurally and/or through illegitimate and fraudulent dealings by FLL and the Applicant with the connivance and compromise of public officers in the offices of the NCC, the Ministry and the Registrar. The interested party denied the allegation that FLL took vacant possession of the Suit Property in January 2009 and remained in

possession of the Suit Property until December 2016 and asserted that he and his family have owned the Suit Property for over forty (40) years and have remained in uninterrupted possession of the Suit Property from 2008 to December 2016. During this period, he continued to receive rent and rate demands from the NCC and the Registrar which he duly paid.

52. The interested party further contended that if the Applicant's lies are to be believed that he took possession in 2009, he would be a trespasser and perpetrating an illegality. By his own evidence, the Applicant had not paid the sums set out in the letter of allotment, allegedly until 2015 and he subsequently obtained his title through fraud in 2016. He averred that the alleged possession by the Applicant, if it is to be believed to exist, would be part of a fraudulent enterprise since he had absolutely no legal right to take possession of a property he did not have title over. During the hearing of the criminal case and my civil case, the interested party disclosed that he will present witnesses who will testify to his ownership and possession of the Suit Property for close to four decades to dispel the lies, conjecture and deceitful perjuries perpetrated by the Applicant.

53. It was deposed that an officer of the NCC informed the NLC that the enforcement notice relied upon by FLL to undertake the demolition was a forgery and did not originate from the NCC. Further, any letter from the NCC to demolish the town house on the Suit Property would not have authorised FLL and its agents to wantonly disregard the law, the interested party's constitutional rights and the strict eviction procedures in accordance with Articles 28, 29(c), 29(f), 31(a), 31(b), 40, 43(b), 57(c) of the Constitution and the mandatory procedures set out in sections 152B, 152E and 152G of the ***Land Act, 2012*** which requires that, *inter alia*: notice of at least three months before the date intended for eviction be provided; the eviction is carried out in a manner that respects the dignity, right to life and security of my family and I; special measures be put in place to ensure that there is no arbitrary deprivation of property or possessions as a result of the eviction; and that there are mechanisms to protect property and possessions left behind involuntarily from destruction.

54. It was the interested party's position that the allocation of the Suit Property to FLL is questionable for the reasons set out above. Further, the Suit Property was not available for allocation to FLL. Having attended the offices of the Ministry on several occasions to enquire about the progress of his application and having been assured that his application was being considered, he had a legitimate expectation that his lease would be extended. According to the interested party, the Commissioner in processing his application was exercising an administrative function and therefore subject to the provisions of Article 47 of the Constitution and pursuant to Article 47(2) of the Constitution, he was entitled to be given written reasons by the Commissioner as to why the extension could not be granted. However, not only is there no decision by the Commissioner refusing to extend his lease, there is no communication whatsoever to him that a decision had been taken one way or another. Therefore, he contended the purported allocation to FLL was unjust, unreasonable and in violation of his right to fair administrative action as guaranteed under Article 47 of the Constitution and my legitimate expectation that his lease would be extended. Further, since FLL's alleged lease over the Suit Property was purportedly issued in 2016 when the ***Land Act, 2012*** (the Land Act) was in force, pursuant to section 13 thereof, as the incumbent leaseholder, he had a first priority to any extension or renewal of lease over the Suit Property.

55. The interested party however denied the allegation that the NLC continued with its investigations against the Applicant after the Orders and came up with a Report to be used as evidence in criminal proceedings since in his view, the NLC Proceedings took place on the 9th December, 2016 when the proceedings were adjourned on the same day pending a written determination by the NLC of its decision and the Orders were issued 10 days after the NLC Proceedings were conducted. It was explained that the Report which the Applicant claims to have been prepared by the NLC for the purposes of being used as evidence in the Criminal Proceedings is the Hansard record and a true transcript of the NLC Proceedings of 9th December, 2016 and **NOT** a report being used by investigators as absurdly alleged. The Applicant's allegations that the NLC continued with its investigations after the 19th December, 2016 is untrue, a blatant lie, an abuse of facts and process and is meant to mislead this Honourable Court.

56. The interested party adopted the Respondents' position and reiterated that the fact that criminal proceedings are premised on same facts as a pending civil suit is not a ground for staying the criminal

proceedings. In accordance with section 193A of the ***Criminal Procedure Code***, the institution of civil proceedings does not preclude the 1st Respondent from instituting and maintaining criminal proceedings against the Applicant in relation to the fraudulent violation of his right to the Suit Property which is also directly in issue in the Civil Case. He explained that in the Civil Case, he is claiming compensation for the constitutional violations by several actors, including the Applicant and FLL while in the Criminal Case, the State, through the 1st Respondent is prosecuting the Applicant for forgery of several documents and malicious damage to his property. He was therefore of the view that criminal justice system was designed specifically to safeguard the public by weeding out fraudsters, conmen and the lords of impunity such as the Applicant who believe that they can use bribery and corruption to infringe on the rights of property of innocent citizens.

57. It was the interested party's case that the Applicant failed to provide any evidence that the maintenance of the criminal charges is to pressure the Applicant to relinquish his proprietary rights over the Suit Property. If the Applicant believes that he is innocent, public interest demands that he should present his evidence and or defend himself against the charges before the 2nd Respondent.

58. The interested party therefore averred that no sufficient grounds have been advanced by the Applicant to warrant the grant of the Orders; it is apparent that the application for judicial review is an afterthought after the Applicant reviewed the NLC Proceedings and realised that his corruption schemes were being laid bare for all to see. Further, the Applicant is guilty of material non-disclosure and misleading the court which disentitles him to the Orders including the stay of the Criminal Proceedings.

Determination

59. I have considered the application, the affidavits both in support of and in opposition to the application, the submissions made by the parties and the authorities relied on in support thereto.

60. The principles which guide the grant of the orders in the nature sought are now well settled. Several decisions have been handed down which in my view correctly set out the law relating to circumstances in which the Court would be entitled to prohibit, bring to a halt or quash criminal proceedings. It is however always important to remember that in these types of proceedings the Court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings. The Court ought not to usurp the mandate of the Respondents herein to investigate and undertake prosecution in the exercise of their discretion conferred upon that office under Article 157 of the Constitution and that the mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review. This is so because 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.

61. 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."

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

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

63. In **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** it was held that:

"The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far that which the courts indeed the entire system is constitutionally mandated to administer…In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute. It is further alleged that the criminal prosecution is an abuse of the court process epitomised by what is termed as selective prosecution by the Attorney General. It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been be argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law...In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that

justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed...There is nothing which can stop them 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...”

64. Finally, in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** it was held that:

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

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

65. Whereas Article 157(10) of the Constitution provides that the Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority, Article 157(11) provides:

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

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

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

(a) the diversity of the people of Kenya;

(b) impartiality and gender equity;

(c) the rules of natural justice;

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

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

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

(g) protection of the sovereignty of the people;

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

(i) promotion of constitutionalism.

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

"the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of

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

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

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

69. As was held by **Ojwang, J** (as he then was) in **Nairobi HCCC No. 1729 of 2001 – Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another**:

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

70. Therefore the police are expected to be professional in the conduct of their investigations and ought not to be driven by malice or other collateral considerations and the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the

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

71. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the DPP to investigate and prosecute ought to be interfered with.

72. In this case, it is contended that there is a Court Order issued by this Court on 19th December, 2016 staying all the proceedings by National Lands Commission in Judicial Review No. 638 of 2016. Despite that, the National Lands Commission continued with the investigation against the Ex-parte Applicant and came up with a Report to be used as evidence in criminal proceedings. In other words, it was contended that the said report was prepared in violation of an existing court order.

73. In my view the applicant ought to have moved this Court for an ex press finding that this Court's orders were disregarded by the conduct of the Commission. This must be so in light of the interested party's contention that the Report which the Applicant claims to have been prepared by the NLC for the purposes of being used as evidence in the Criminal Proceedings is the Hansard record and a true transcript of the NLC Proceedings of 9th December, 2016 and not a report being used by investigators as alleged. The interested party contended that the Applicant's allegations that the NLC continued with its investigations after the 19th December, 2016 is untrue, a blatant lie, an abuse of facts and process and is meant to mislead this Honourable Court since the NLC proceedings took place on the 9th December, 2016 when the proceedings were adjourned on the same day pending a written determination by the NLC of its decision and the Orders were issued 10 days after the NLC proceedings were conducted.

74. In my view without a specific finding that part of the evidence sought to be relied upon in the criminal proceedings was obtained in violation of this Court's order, this Court cannot use that as a basis for prohibiting the criminal proceedings.

75. In my view, the mere fact that this Court stays an administrative decision under challenge before it in judicial review proceedings does not necessarily bar criminal proceedings from being commenced where the said proceedings are based on facts other than those for which the stay was granted and where the judicial review proceedings can still proceed without being prejudiced by the criminal proceedings. In this case, the issue that led to the grant of the stay was whether the National Land Commission was seised of jurisdiction to proceed in the manner it was proceeding. The criminal proceedings the subject of this application are however based on alleged forgery of documents that gave rise to title to the subject land. Whereas the land in question is the same, in determining the jurisdiction of the Commission, the Court will not resolve the authenticity of the documents relating to the title in question which is a matter purely within the jurisdiction of the criminal Court. In other words even if the judicial review proceedings are determined in favour of the applicant that does not bar the Respondents from conducting their criminal prosecution.

76. It was further contended that whereas he was charged with the offences of forging the title documents in relation to the suit properties together with the offence of making the title documents without authority, the Ministry of Lands, Housing and Physical Planning (the Ministry) has confirmed that it processed the title documents held by the company in relation to the suit property.

77. It was therefore the applicant's case that it is unfair, oppressive and an abuse of state machinery for him to be charged with offences of forgery and making title documents among other related offences when it is evident that the Ministry of Lands, Housing and Physical Planning as well as the National Police Service Cybercrime Forensic Unit have confirmed that the said documents were prepared by the said Ministry.

78. In other words, the applicant's case is that he is not culpable in respect of the allegations levelled against him in the criminal case. The applicant's case in effect is that the offences with which he is charged cannot, based on the evidence in his possession, be sustained. I however associate myself with the opinion in **Meixner & Another vs. Attorney General** (supra) 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. 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."**

79. It was further contended that his arrest was malicious and the charges that he faces in the criminal proceedings are trumped up and ill motivated by ulterior motive on the part of the Plaintiffs and the Petitioner in the two cases that are pending before the Environment and Land Court. I agree with the decision of the Court of Appeal in **Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others Nairobi Civil Appeal No. 56 of 2012 [2013] eKLR** that**:**

> **"While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court. This is case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations"**

80. This Court however expressed itself in **George Joshua Okungu and Another vs. Chief Magistrate Court Anti Corruption Court at Nairobi and Another (2014) eKLR** thus:

> **"The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defense is always open to the Petitioner in those proceedings. The fact however that the facts constituting the basic 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 petitioner 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 recognized aim".**

81. This position must be so since as was held in **Republic vs. Commissioner of Police and Another exparte Michael Monari & Another (2012) eKLR**:

> **"The police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court…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".**

82. Even before the amendment to the ***Criminal Procedure Code*** which introduced section 193A thereof, it was stated in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** that:

> **"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...."**

83. The applicant has however contended that the said Plaintiffs and Petitioner in the cases that are now pending before the Environment and Land Court have contacted him a number of times, in person and through proxies and informed him that if he conceded the claims in the pending civil cases, they would proceed to withdraw the criminal charges that he face in Nairobi Chief Magistrates Court Criminal Case No. 1998 of 2016. Whereas it is appreciated that if the criminal proceedings are being pressed with a view to forcing the applicant to submit to the civil claim such institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognized aim and the Court would be entitled to bring such misconceived proceedings to an end, it is my view that the applicant needs to show that the prosecutor is himself involved in such a scheme and not just that the complainant have approached him as is the allegation here. In this case, it is not alleged that the prosecutor is part and parcel of the said allegation as the applicant's averments toward that end are directed at the Plaintiffs and Petitioner in the civil cases.

84. In In **Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703**, the Court was of the view that it is when the predominant purpose of the criminal proceedings is to further that ulterior motive that the High Court steps in. In other words where that motive is not the predominant purpose of the criminal proceedings, the High Court may well allow the proceedings to proceed. As this Court held in **Republic vs. Attorney General & 4 Others Ex-Parte Kenneth Kariuki Githii [2014] eKLR**:

> **"In this case it is the applicant's case that the subject of the criminal proceedings is similarly subject of pending civil proceedings in which the ownership of the disputed parcel of land is pending determination. However, as stated hereinabove, the mere fact that the facts disclose both criminal offence as well as civil liability does not entitle the Court in judicial review proceedings to bring to a halt the criminal proceedings**
>
> **I have considered the positions taken by the parties to these proceedings and I am unable to find that there is absolutely no iota of evidence against the applicant in the said criminal proceedings. Whereas the criminal proceedings may well eventually fail that is not the same thing as saying that there is no evidence at all. I am also not convinced that the predominant purpose of mounting the said criminal offence is to achieve some collateral purposes rather than the vindication of a criminal offence. Whereas the facts may well constitute civil liability I am not convinced that under no circumstances would they constitute a criminal offence and that is as far as I am prepared to go."**

85. In this case the position taken by the Respondents is that the office of the DCI, received information on 4th December 2016 followed by a letter dated 6th December 2016 from Secretary, Lands requesting investigation into dispute over a property which culminated in demolition of a house within Parklands. They then commenced investigation and established that on the 29th April 1979, Kurji family purchased the then LR No. 1870/1/290 situated within parklands from M & H Limited. The said investigations revealed that the documents which the applicant relied upon to claim title to the suit property were not genuine and further that the demolition of the structures of the suit parcel was based on a forged document. This evidence was based on the expert opinion of the document examiner as well as the statements recorded from those whom it is alleged authored the said documents.

52. In determining whether criminal proceedings ought to proceed, a distinction must be made between a situation where what is alleged is insufficiency of evidence as opposed to where the evidence to be adduced does not disclose an offence. In the former, the right forum to deal with the matter is the trial Court. In the latter, it would amount to an abuse of the criminal process to subject the applicant to such a process. However a prosecutor is not required to have a full proof case but ought to have in his possession such evidence which if believable might reasonably lead to a conviction. He does not have to have evidence which disclose a *prima facie* case under section 210 of the ***Criminal Procedure Code*** since a decision as to whether a *prima facie* case is disclosed is a jurisdiction reserved for the trial Court. He however must have evidence which satisfy him that his is a case which ought to be presented before a trial Court.

86. In this case the Respondents have according to their version collected both oral and documentary evidence on the basis of which they have formed an opinion that criminal charges ought to be levied against the applicant. On the other hand it is the applicant's view that the evidence in possession of the Respondents cannot sustain a conviction. That may be so, however, the material placed before me cannot at this stage be said to be so frivolous that no reasonable prosecutor can possibly base a prosecution upon. Accordingly, I do not agree with the applicants that the mere fact that the Respondent's case is hopeless and bound to fail is necessarily a basis for halting the criminal proceedings. I however, cannot, in fact I am not permitted to examine minutely and in details the parties' respective cases in order to determine where the truth lies.

87. However in **East African Community vs. Railways African Union (Kenya) and Others (No. 2) Civil Appeal No. 41 of 1974 [1974] EA 425**, it was held by the East African Court of Appeal that the onus lies on a person seeking the grant of a prerogative order to establish that it is essential for it to issue since these are not orders that are lightly made.

88. It was therefore 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...There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an "abuse of process", is a "manipulation", "amounts to selective prosecution" or such other processes, or even supposing that the applicants might not get affair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts."**

89. I associate myself with the holding in **Republic vs. Kenya Power & Lighting Company Limited &**

Another [2013] eKLR to the effect that:

> **"It is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted."**

90. The applicant has, going by his allegations, put forward what appears to him to be a formidable defence to the criminal charges facing him. However, in these kinds of proceedings, it is not sufficient to do so since this is not the Tribunal where the merits of the applicants' case is to be determined. It would be upon the prosecution to show at the trial that the defences which the applicants have alluded to are not available to him. In these proceedings however, the rules are reversed and it is upon the applicant to show that there possibly cannot be any prosecutable case against him, a burden which is no doubt heavy as it has the result, if determined in favour of the applicant, of barring the Respondent from executing its constitutional and statutory mandate. I associate myself with the decision of **Majanja, J** in HC. Pet. No. 153 of 2013; **Thuita Mwangi and 2 Others vs. the Ethics and Anti-Corruption Commission**, that:

> **"While these arguments are forceful, attractive and cogent, I am afraid that the High Court at this point is not the right forum to tender the justifications concerning the subject transaction let alone test the nature and veracity of these allegations."**

91.This Court appreciates that the court should not simply fold its arms and stare at the squabbling litigants/disputants parade themselves before the criminal court in order to show-case dead cases. The seat of justice is a hallowed place and ought to be preserved for those matters in which the protagonists have a conviction and stand a chance of seeing the light of the day. In my view the prosecution ought not to institute criminal cases with a view of obtaining an acquittal. It is against the public interest as encapsulated in section 4 of the ***Office of the Director of Public Prosecutions Act*** to stage-manage criminal proceedings in a manner intended to obtain an acquittal. A criminal trial is neither a show-biz nor a cat-walk.

92. However it must also be taken into account that our criminal process entails safeguards which are meant to ensure that an accused person is afforded a fair trial and the trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of an appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words unless the applicants demonstrate that the circumstances of the impugned process render it impossible for the applicant to have a fair trial, the High Court ought not to interfere with the trial simply on the basis that the applicant's chances of being acquittal are high. In other words a judicial review court ought not to transform itself into a trial court and examine minutely whether or not the prosecution is merited.

93. In the instant case, the Applicant has failed to discharge the burden and must be ready to face his accusers as was stated by **Lenaola, J** (as he then was) in **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".**

94. In the premises I find no merit in this application. As was held 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."**

95. Consequently, the Notice of Motion dated 18th May, 2017 fails and is dismissed with costs to the Respondents and the Interested Party.

96. Orders accordingly.

Dated at Nairobi this 20th day of December, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Osundwa for the Applicant

Mr Ashimosi for the Respondent

Miss Rairi with Mr Esmail for the interested party

CA Ooko