REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 232"A" OF 2017

IN THE MATTER OF AN APPLICATION BY HARRISON NYOTA NGUNYI FOR AN ORDER OF PROHIBITION, MANDAMUS AND CERTIORARI

AND

IN THE MATTER OF AN APPLICATION FOR ENFORCEMENT OF FUNDAMENTAL RIGHTS UNDER ARTICLE 20(1), (2) & (3), ARTICLE 22(1), 3(b) & (4), 165(3) (b) AND ARTICLE 23(1) OF THE CONSTITUTION

AND

IN THE MATTER OF 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 DECISION BY THE DIRECTOR OF CRIMINAL INVESTIGATIONS TO INVESTIGATE, ARREST AND OR CHARGE THE APPLICANT OVER SALE OF MOTOR VEHICLE

BETWEEN

REPUBLIC.....APPLICANT

AND

THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....RESPONDENT

EXPARTE: HARRISON NYOTA NGUNYI

JUDGEMENT

Introduction

1. By a Notice of Motion dated 2nd June, 2017, the applicant herein, **Harrison Nyota Ngunyi,** seeks the following orders:

1) That the Honourable Court be pleased to certify this application urgent and to hear the

same exparte 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 Respondent prohibiting him from arresting, detaining or prosecuting HARRISON NYOTA NGUNYI in respect of motor vehicle number KBB 174H which the Applicant bought from Michael Rakoi Mainko.

3) That the Honourable Court be pleased to issue an order of mandamus directed against the Respondent compelling the Respondent not to act on the decision of the Respondent made in 2017 to, arrest, investigate, detain, or prosecute HARRISON NYOTA NGUNYI in respect of the said motor vehicle.

4) That the Honourable Court be pleased to issue an order of certiorari in respect of the decision by the Respondent, made in 2017 to investigate, arrest, detain and charge HARRISON NYOTA NGUNYI with regard to his purchase of motor vehicle number KBB 174H 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.

Applicant's Case

2. According to the applicant, he is a businessman engaged in the business of buying and selling motor vehicles. The applicant disclosed that he knew one **Michael Rakoi Mainko** also a businessman dealing with buying and selling of vehicles.

3. According to the applicant, sometime in the year 2016, he bought motor vehicle number KBB 174H from the said **Michael Rakoi Mainko** who gave him copies of the logbook of the said motor vehicle and promised to hand over the original logbook to him upon full payment of the said vehicle.

4. According to the applicant, it was confirmed by the said **Michael Rakoi Mainko** that he would release the logbook to his advocate from whom the applicant would get it and pay the balance. The applicant averred that it was a term of the agreement that he would sell the vehicle to any other person as long as he cleared the balance of the purchase price to the said **Michael Rakoi Mainko**. It was the applicant's case that he has been ready and willing to pay the balance but the said **Michael Rakoi Mainko** has not procured and released the logbook to him. He however disclosed that he had sold the said motor vehicle to another person.

5. It was the applicant's case that the said **Michael Rakoi Mainko** has now involved the police in this purely civil matter whom he has instructed to seize the vehicle from the person not in possession.

6. The applicant lamented that the police are clearly mis-using their powers as no criminal offence has been committed in this case.

Respondent's Case

7. The application was opposed by the Respondent by way of the following grounds of opposition:

1) That the prayers sought by the application are unconstitutional as they seek to prevent the Director of Public Prosecutions from exercising its mandate as provided under Article 157 of the Constitution. The prayers if granted would result to a greater injustice in the criminal justice system and public interest.

2) That an order of certiorari only issues to quash a decision which is made without or in excess of jurisdiction or where the rules of natural justice are not complied with (See: Kenya National Examination Council and the Republic, Nairobi, Court of Appeal Civil Appeal

number 266 of 1996.

3) That the DPP is conferred with state powers of prosecution under Article 157 of the Constitution of Kenya 2010 and as such, charges sought to be quashed were preferred pursuant to those powers. It has not been demonstrated that the DPP acted in excess or without powers.

4) In *Penina Nadako Kiliswa vs Independent Electoral & Boundaries Commission (IEBC) & 2 Others (2015) eKLR*, Supreme Court of Kenya held at paragraph 28:

> ***"The well-recognized principle in such cases is that the court's target in judicial review is always no more than the process which conveyed the ultimate decision arrived at. It is not the merits of the decision, but the compliance of the decision-making process with certain established criteria of fairness. Hence, an applicant making a case for judicial review has to show that the decision in question was illegal irrational or procedurally defective."***

5) That the court in the case of *Lameck Okeyo & Another vs Inspector General of Police & 2 others (2016) eKLR*, held at paragraph 19:

> ***"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 complainant 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."***

6) That an order of prohibition is issued to an inferior tribunal by the High Court to forbid the tribunal from continuing proceedings in excess of its jurisdiction or contravention of the laws of the land. It also lies not only for excess of jurisdiction or absence of it but also for departure from the rules of natural justice (See: *Halsbury's Laws of England, 4th Edition, Volume 1 at page 37, paragraph 128*)

7) That under Article 157 sub Article 6; the Director of Public Prosecutions exercises state powers of prosecution and may;

> ***"Institute and undertake criminal proceedings against any person before any court (others than a court martial) in respect of any offence alleged to have been committed."***

8) That from the foregoing provisions, it is apparent that to issue or grant the orders sought would be tantamount to ordering the Director of Public Prosecutions not to discharge his constitutional mandate and functions.

9) That Section 24 of the *National Police Service Act* mandates the police to investigate any complaint brought to their attention in order to determine whether a criminal offence has been committed.

10) That the applicant has not adduced reasonable evidence to show that the investigations are mounted for an ulterior purpose.

11) That the applicant must demonstrate that substantial injustice would otherwise result if the criminal proceedings proceed. The cases are determined on merit.

12) That it is in the public interest that complaints made to the police are investigated and the perpetrators of crimes are charged and prosecuted.

13) That the application is premature as investigations are still ongoing.

Determination

8. I have considered the material presented before the court in the instant application.

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

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

> **"Although the state's interest and indeed the constitutional and statutory powers to prosecute is recognised, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious...A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds."**

11. 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."

12. 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."

13. In **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR**, it was held:

"the police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court...As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene".

14. Proceedings of this nature, ordinarily, do not deal with the merits of the case but only with the process. In other words these proceedings determine, *inter alia*, whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made, whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters, whether the decision to commence the criminal charges go contrary to the applicant's legitimate expectation, whether the respondents' decision to charge the applicant is irrational. It follows that where an applicant brings such proceedings with a view to determining contested matters of facts and

in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction to determine such a matter and will leave the parties to resort to the usual forums where such matters ought to be resolved. In other words, such proceedings are not the proper forum in which the innocence or otherwise of the applicants is to be determined and a party ought not to institute such proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in these kinds of proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and whether such proceedings amount to a violation of his rights and fundamental freedoms and once the Court is satisfied that that is not the case, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution's evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.

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

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

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

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

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

18. In this case the applicant's case is that he bought the subject vehicles from one **Michael Rakoi Mainko** whom he knows is also a businessman dealing with buying and selling vehicles and that though he has been ready and willing to pay the balance of the purchase price in order to have the original log book delivered to him, the said **Michael Rakoi Mainko** has fulfil his side of the bargain. However the said **Michael Rakoi Mainko** has not sought the assistance of the police to compel him to pay the said balance in breach of the agreement between the parties.

19. Whereas the Respondent have filed grounds of opposition, no replying affidavit has been sworn thus rendering the factual averments by the Applicant wholly uncontroverted.

20. As was held by **Lenaola, J** (as he then was) in **Republic vs. Commissioner of Police of Kenya & Director of Criminal Investigation Department Exparte John Bundi N'gala [2006] eKLR:**

> **"…to my knowledge the Criminal Investigation department is not the body to resolve disputes as to ownership of Motor Vehicles! No crime has been alleged which is its role to investigate. It is civil courts that ought to resolve disputes such as this one. It has not been said that the said department qualifies to be a civil court! Where a public agency exceeds its mandate in law and works outside its legal jurisdictions, then this court can call forth the decision leading to such action and quash it. If the decision to impound and or detain the Motor Vehicle is contained in the Police Abstract, I have said that it is an illegal decision and prayer (a) of the Applications is merited."**

21. To my mind the police ought not to be used by parties to a purely civil dispute to put facilitate the resolution of such disputes by using the criminal process as a leverage in order to pin down the parties or one of the parties to settle the dispute. In **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69,** the High Court held:

> **"The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far that which the courts indeed the entire system is constitutionally mandated to administer...In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute. It is further alleged that the criminal prosecution is an abuse of the court process epitomised by what is termed as selective prosecution by the Attorney General. It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been be argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions...This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for**

judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit. The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law...In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed...There is nothing which can stop the Court 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..."

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

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

23. In this case I am satisfied that the police are driven by collateral considerations other than genuine vindication of the criminal judicial process. Therefore criminal process has been invoked for the achievement of some collateral purposes other than the purpose for which it is properly designed.

24. In the premises I find merit in this application.

Order

25. In the result an order of certiorari is hereby issued removing into this Court for the purposes of being quashed the decision by the Respondent, made in 2017 to investigate, arrest, detain and charge **Harrison Nyota Ngunyi** with regard to his purchase of motor vehicle number KBB 174H which decision is hereby quashed. I further issue an order of prohibition prohibiting the Respondent from arresting, detaining or prosecuting **Harrison Nyota Ngunyi** in respect of motor vehicle number KBB 174H which the Applicant bought from **Michael Rakoi Mainko**.

26. As the alleged complainant was not a party to these proceedings, there will be no order as to costs.

27. Orders accordingly.

Dated at Nairobi this 20th day of December, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Motabori for the Applicant

CA Ooko