



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPL. NO. 101 OF 2017

IN THE MATTER OF AN APPLICATION BY HESBON ONGETTA MOMANYI FOR ORDERS
IN THE NATURE OF JUDICIAL REVIEW

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES AND SECTIONS 8
AND 9 OF THE LAWS REFORM ACT

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ADVOCATES ACT, CAP 16 LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

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

THE DCI, OCS, CENTRAL POLICE STATION NAIROBI.....2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

AND

ZEPHANIA KARIUKI NJERU.....INTERESTED PARTY

EXPARTE: HESBON ONGETTA MOMANYI

JUDGEMENT

Introduction

1. By an amended Notice of Motion dated 31st March, 2017, the *ex parte* applicant herein, **Hesbon Ongetta Momanyi**, seeks the following orders:

1. An Order of Certiorari to bring into this Honourable Court and quash the decision of the 1st respondent or officers subordinate to him and or the Kenya Police to charge the applicant with the offence of obtaining money by false pretences in Milimani Chief Magistrate Court Criminal case no 477/17 – Contrary to Section 313 of the Penal Code in relation to conveyancing transaction on LR. 209/11095/197.

2. An Order of Certiorari and/or conservatory directed at the respondents prohibiting the Director of Public prosecution and/or his agents 2nd respondent from charging or presenting a charge sheet or conducting proceeding or carrying on with plea in Milimani Chief Magistrate Court Criminal case no 477/17 against the applicant herein in any Court with any offence relating to the transaction in LR. 209/11095/197.

3. That costs of this application be provided for.

Applicant's Case

2. According to the applicant, in the month of December 2013 the Directors of Kinde Properties approached him for purposes of representing them in a sale of land transaction in respect of LR 209/11095/197 in which they had negotiated sale with the Directors of M/s Zedkey Ltd to purchase in the agreed sum of Kshs 3,500,000.00 (Three Million Five Hundred Thousand) which was to be paid in two instalments as hereunder:-

a. Kshs. 1,500,000/= (One Million Five Hundred Thousand) to be released in exchange with original certificate of title together with executed transfer with photos affixed to it.

b. The balance of one Million Nine Hundred and Fifty Thousand (Kshs. 1,950,000/=) was to be paid immediately upon registration of the property in purchaser's names.

3. It was averred that at the time of the said sale Kenya Shillings Fifty Thousand (Kshs. 50,000/=) had already been spent by the parties prior to the signing of agreement details of which was within their knowledge and that the completion period was within 90 ninety days from the date of execution of the agreement. Accordingly, the applicant drew a draft agreement and forwarded it to the purchaser's Advocates M/s Gathumbi & Co. Advocates as per earlier discussions and who had confirmed that they had done search and the title was okay hence they were to go ahead with the execution of the sale agreement. Pursuant to the amendments suggested by the purchaser's advocates, the applicant averred that he Incorporated the same and the said agreement was executed on 8th January, 2014. Consequently, the purchasers Advocates wrote a letter dated 9th January 2014 enclosing the deposit cheques amounting to Kshs. 1,500,000/= receipt of which the applicant acknowledged. Pursuant thereto, the bearer of the cheques, **Chrispine Omolo**, collected the aforesaid title together with the transfer duly executed and photos affixed in exchange of the cheques which were banked in the applicant's Equity Bank account Harambee Avenue.

4. It was averred that on 15th January 2014 the vendors having been advised by the purchaser to collect their money wrote a letter requesting for cash payment and the applicant duly remitted the same and the same day he was discharged me from any liability.

5. Thereafter, it was averred that the vendor went underground and despite many letters to them, did not respond at all. The applicant was subsequently informed by the purchasers that the title was questionable and they sought for a refund and a meeting was proposed by the purchaser's advocates which meeting was held in the applicant's office on 11th November 2014 at which it was agreed to continue looking for the vendors so that they can be brought to book. However, to the applicant's surprise, on 20th April, 2015 the purchasers filed a civil suit against the applicant being HCCC No. 149/2015- Nairobi. In the

meantime, the applicant continued making efforts to trace the vendors through their known address but all in vain. In the meantime the said civil case was pending in Court until on 1st March 2017 when the applicant was called by the CID to record a statement at Central Police Station where the applicant produced all his documents in the matter but the investigating officer told him that he had to pay the purchasers his money and follow his former client for a refund as they were not interested in interpreting the sale agreement. Accordingly, the applicant's finger prints were taken and a cautionary statement administered after which he paid a cash bail of Kshs. 30,000/= for him to appear in Court on 9th March 2017 for plea taking at Milimani Law Courts in respect of an offence of obtaining money by false pretences contrary to section 313 of the **Penal Code**.

6. The applicant insisted that nowhere did he present himself as vendor or seller and obtain money falsely on the said property but that all he did was to act as an Advocate under instructions from his client whom was now being referred to as a fraudster, yet the initial discussions were held by the parties to the transaction.

7. It was therefore the applicant's case that the decision to institute criminal action against him was malicious and was meant to compel him settle the civil suit pending in Court as the decision is not founded on any evidence available with the police hence this Honourable Court should intervene. It was his case that the intended prosecution was in violation of the provisions of the **Advocates Act** (CAP 16) and the Constitution of Kenya and this Court has unfettered powers to entertain, hear and determine this application and grant the orders being sought herein in the interest of justice.

8. It was asserted that there is a likelihood that he would be exposed to risk of double jeopardy in respect to the similar proceedings given the fact that he is before two jurisdictions over the same subject matter through the instigation of the same complainant.

9. In response to the replying affidavit, the applicant averred that he was not aware that a report was made at Central Police Station on 21st November 2016 because he was never been informed and no exhibit or OB extract has been presented to this Court. He further denied knowledge of the existence of a newspaper of a person by the name **Njaramba**.

10. The applicant reiterated that before the parties approached him for the preparation of sale agreement the purchaser/interested party had paid Kshs. 50,000/= on their own without involving the Advocates.

11. The applicant insisted that his work was just to prepare a sale agreement as agreed by the parties hence it was the duty of the purchaser to investigate the title and ownership hence he cannot be blamed for not seeing them. He further denied that he was the custodian of the deposit of Kshs. 1,500,000/= nor that he was under an obligation to refund the money. Since the were no faulty documents forwarded to the purchaser, it was his case that the allegations contained in the replying affidavit were malicious and investigations shoddy and meant to embarrass him and meant to achieve ulterior motives other than criminal justice.

12. While appreciating the import of the provisions of section 193A of the **Criminal Procedure Code**, it was his position that criminal charges should be presented to Court after proper and factual foundation or basis is established, which had not been done in this case. To the applicant, the discretion given to the DPP is not absolute but must be exercised within certain laid down standards provided under the Constitution and the Office of DPP Act particularly section 4 of the said Act hence it is clear that the respondent acted in bad faith. In his view, the respondents acted irrationally and unreasonably and given the circumstances of this case no criminal element was disclosed by the respondents as the proper procedure for recovery of the money he held as a stakeholder (if that were the case which was clearly noted) is civil process which is ongoing hence these criminal proceedings were meant to embarrass him and force me to admit the civil case pending in Court.

13. The applicant therefore urged the Court to allow his application and reject the allegations contained in the replying affidavit.

Respondents' Case

14. The application was opposed by the Respondents.

15. According to them, on or about the 21st day of November 2016, **Mr. Zephaniah Njeru** (hereinafter referred to as "the Complainant") reported at Central Police Station that he entered into a sale agreement for Land Reference No.209/110995/197 with **Kinde Properties Limited** in the year 2014 after he came across an advertisement in the Nation News Paper dated 17th December 2013. He then called one **Mr. Njaramba** whose number was listed therein who told him to get in touch with his advocate, the applicant herein.

16. It was disclosed that the said parcel of land was located in South C Nairobi and that the vendors were represented by Messrs O.H Momanyi and Company Advocates based in Nairobi. The Complainant then engaged his advocate (Messrs. Gathumbi & Co Advocates) who facilitated the land transaction dealings with the aforesaid advocates of the vendor by which the buyer was to pay a sum total of Kshs.3, 450,000 million Shillings, and he put in a deposit of ten percent of the purchase price which translated to Kshs.1.500,000 by way of banker's cheque by the purchaser's advocate to the vendor's advocate.

17. It was averred that the vendor's advocate was to be the custodian of the said deposit until the transaction between the parties was complete, as per clause 2.1 of the sale agreement. Accordingly, the deposit of Ksh.1,500,000 was deposited by the purchaser on 10th January 2014 and the cheques matured on 14th January 2014 and the applicant immediately withdrew the entire amount on 15th January 2014 from his Equity Bank Account.

18. It was the Respondents' case that the advocate, the applicant herein, is the one who facilitated the sale of the land and that **Mr. Zephaniah Njeru** and his advocates never saw the vendors. Despite the purchaser's advocate Gathumbi and Co Advocates incessantly urging the vendors advocates to fulfil his end of the bargain and see the transaction to its logical conclusion the applicant was not obliging.

19. It was therefore the Respondents' case that the pending charge against the Petitioner is properly before the Court, as the Petitioner was the custodian of the deposit of Kshs.1,500,000 and was to refund the same to the purchasers in case of non-registration caused by the Petitioner's Clients (Kinde Properties Limited), yet he went ahead and forwarded faulty title documents to the Purchasers after payment of deposit in full.

20. The Respondents averred that subsequently and after thorough investigations, criminal charges were preferred against the applicant vide Milimani Chief Magistrate Court Criminal case NO. 477 OF 2017 and the plea was yet to be taken.

21. To the Respondents, 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**. It was therefore the Respondents' case that this application has been filed in bad faith, misconceived and abuse of the court process and meant to defeat the cause of justice.

22. The Respondents asserted 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.

23. 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.

24. 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.

25. It was disclosed that the DPP independently reviewed and analyzed 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. To the Respondents, the accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of evidence gathered and properly adduced in support charges.

26. The Respondents contended that the contention by the applicant that the case against him is

calculated to embarrass, harass and blackmail him amounts to an abuse of court process and 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 Petitioner;
- d) The Petitioner has 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.

27. The Respondent were therefore of the view that the applicant has 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 Petitioner be charged with the offence disclosed by the evidence gathered. Accordingly, the application was filed in bad faith and is an attempt to defeat justice and ought to be dismissed with costs and the criminal trial against the applicant be allowed to proceed to its logical and judicial conclusion.

Determinations

28. I have considered the application, the affidavits both in support of and in opposition to the application the submissions for and against the grant of the orders sought and this is the view I form of the matter.

29. Before dealing with the issues raised herein, it is instructive that the applicant purported to file an amended affidavit with the amended Notice of Motion. It is trite that, unless leave is sought and granted, there is no place for a further affidavit with the substantive Notice of Motion filed pursuant to leave and the only affidavit provided for is the affidavit verifying the facts which ought to be detailed and contain all the facts relied upon by the Applicant. Similarly the statement of fact is filed with the application for leave and not with the Motion. This position was clarified in **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321** where Nyamu, J (as he then was) was of the view which view I associate with that:

“There is no legal requirement that the statement and verifying affidavit or any other supporting affidavits and documents relied on by the applicant be filed together with the Notice of Motion and indeed there is no requirement that the motion be filed simultaneously with any other document. Order 53, rule 4 requires that the Motion be served together with the documents filed at the application or (leave stage) stage and the grounds to be relied on in support of the motion are those set out in the statement filed at leave stage and the facts are as set out in the affidavit verifying the statement. This means that no other documents need be filed with the Motion and the Motion is supported by the statement and the affidavits accompanying the application for leave. However under Order 53, rule 4(2) the applicant can file other or further affidavits, apart from those accompanying the application for leave, in reply to any affidavits filed by the other parties (where they introduce a new matter arising out of the affidavits) and the applicant can do so after sending out a notice to the parties and the procedure for this is clearly outlined in the rules. Where the other parties have not filed any affidavits the applicant would under Order 53 have no legal basis for filing another or

further affidavits. To this extent the applicant’s case is complete at leave stage and practicing advocates are cautioned that the Civil Division Procedure of filing many affidavits to counter the opponent’s case is a hangover, which is not acceptable under the Judicial Review jurisdiction.”

30. Apart from that the law is that an affidavit cannot be amended because an affidavit is evidence. Accordingly, any amended affidavit is thereby rendered defective and is for striking out. The only way to cure a defect in an affidavit is to file a further or supplementary affidavit. See **Simon Kitavo Nduto and Another vs. Owenga Anjere Civil Appeal No. 170 of 1995, The Eastern and Southern African Development Bank vs. African Greenfields Ltd. & 2 Others Nairobi (Milimani) HCCC No. 1189 of 2000, Greenhills Investments Limited vs. China National Complete Plant Export Corporation (Complaint) Now T/A Covec & Another. Nairobi (Milimani) HCCC No. 572 of 2000 [2002] 1 KLR 384 and Frasia Wanjiru Maina vs. Thuku Kithenyi Nakuru Hcca No. 17 of 1991.**

31. Consequently, the purported amended affidavit is incompetent and I will not rely on the same.

32. The applicant has relied on section 60 of the *Advocates Act* which provides as hereunder:

“Any person who, being an advocate, is entrusted in his professional capacity with any money, valuable security or other property to retain it in safe custody with instructions to pay or apply it for any purpose in connection with his duty as an advocate fails to pay, apply or account for the same after due completion of the purpose for which it was given, shall be guilty of an offence: Provided that no prosecution for an offence under this section shall be instituted unless a report has been made to the Attorney-General by the Tribunal under subsection (3) of section 61.”

33. A reading of the said provision is clear that what is prohibited is a prosecution under the said section 80 of the Advocates Act. In this case it is not alleged that the Respondents intend to prosecute the applicant thereunder for the Respondents to be barred from doing so ***unless a report has been made to the Attorney-General by the Tribunal under subsection (3) of section 61.***

34. It is therefore in view that the said section cannot be successfully invoked in these proceedings.

35. It is always important to remember that in these kinds of proceedings, the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution and that the mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review. 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.

36. 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.”

37. 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.”

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

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

ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed...There is nothing which can stop the from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made...Under section 77(5) of the Constitution it is a constitutional right that no person who has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of the offence. What is clear from this constitutional right is that it prevents the re-prosecution of a criminal case, which has been determined in one way or another...A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution.....In the instant case there is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even of manipulation of court process so as to seriously deprecate the likelihood that the applicants might not get a fair trial as provided under section 77 of the Constitution...There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an “abuse of process”, is a “manipulation”, “amounts to selective prosecution” or such other processes, or even supposing that the applicants might not get fair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts. The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial... In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names.”

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

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

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

40. 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.

41. 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.

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

“the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system..... In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of *Domnic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003* is that interpretation of the Constitution has to be progressive and in the words of Prof M V Plyee in

his book, *Constitution of the World*: “The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time..... In our role as “sentinels” of fundamental rights and freedoms of the citizen which are founded on laissez-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.”

42. 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.”

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

44. 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.

45. In this case, it is the applicant’s case that he was retained to act in a conveyancing transaction and that he was neither the vendor nor the purchaser and carried out his obligations as per his instructions. He therefore was of the view that the intended charges against him for obtaining money by false pretences were baseless.

46. In this case the interested party who is the complainant has not sworn any affidavit to explain the circumstances under which the applicant is alleged to be culpable. The replying affidavit sworn on behalf of the Respondents on the other hand, apart from paragraph 4 is largely based on hearsay without disclosing the source of information. As was held in **Kentainers Limited vs. V M Assani and Others Nairobi HCCC No. 1625 of 1996**, affidavits must deal with facts which the deponent can prove of his own knowledge save in interlocutory applications which are applications which do not decide the rights

of parties but are only meant for keeping the *status quo* till the rights can be decided or for obtaining directions as to the conduct of the cause. The Court went on to state that since evidence law applies to affidavits the Court will only accept proof of facts on information received if it constitutes admissible hearsay and not otherwise as rules of the Court cannot nullify substantive enactment. It was therefore held that an affidavit which does not disclose whether affidavits made on knowledge or on information and one that does not disclose the source should not be acted upon and that affidavits should state which facts are on information and which ones are based on knowledge.

47. It is trite that based on **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001:**

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

48. It follows that the burden is on the prosecutor to show by way of admissible evidence that he is in possession of material that disclose the existence of a prosecutable case since as was held in **Stanley Munga Githunguri vs. R [1986] eKLR** at page 18 and 19 by a three bench High Court constituted of Ag. Chief Justice Madan and Justices Aganyanya and Gicheru:

“A prosecution is not to be made good by what it turns up. It is good or bad when it starts.”

49. In this case, the agreement clearly permitted the applicant to release to the vendor the deposit in exchange for the original certificate of title and execute transfer with photos affixed. It is not contended that the said documents were not released to the purchaser’s advocates. The applicant has exhibited copies of the vendor’s identity documents. It is not alleged that the Respondents have taken any steps to trace the vendors in order to authenticate the applicant’s version. In my view when presented with two versions, the investigators, in independently conducting their investigations, as the law requires them to do, ought to probe the two versions in order to find out where the truth lies.

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

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

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

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

52. That the Respondent, based on the agreement for sale ought to have been aware that the applicant was acting in the said transaction as an advocate for the vendor and not as the vendor is clear from the replying affidavit. He was therefore an agent of a disclosed principal. The fact that the title to the property sought to be sold was found to have been forged cannot in the circumstances of this case be held against the applicant. There is nothing in the replying affidavit which even remotely implies that the applicant was aware that the said title was a forgery. No further probe was taken by the Respondents to find out whether the vendors actually existed. The Respondents seems to have simply taken the complaint at face value without more. In my view such a course cannot amount to an investigation which according to ***Black's Law Dictionary*** 9th Edition means ***“To inquire into a matter systematically; to make an official inquiry.”***

53. The applicant has contended that when he appeared before the investigating officer to record his statement at which he produced all his documents in the matter, the investigating officer dismissed his version retorting that he had to pay the purchasers his money and follow his former client for a refund as they were not interested in interpreting the sale agreement. In my view such casual reaction cannot be anything near an independent investigation. It is not what is expected of the police in the present constitutional dispensation in which the police is no longer a “force” but a “service”. This is a clear indictment of the police service that some of the officers serving therein are out of touch with the current dispensation and are still living in the past.

54. Taking into account the circumstances of the case including the fact that there is a civil case pending, one can only conclude that the invocation of the criminal justice system was meant to coerce the applicant into refunding the deposit rather than for the vindication of a crime suspected to have been committed and that is not the purpose of the criminal justice system and to do so would be contrary to the mandate of the Director of the Public Prosecutions.

55. In my view, to charge an advocate who was involved in a conveyancing transaction with obtaining money by false pretences when the evidence shows that the advocate was not a party to the transaction in question reeks of malice. This is not to say that an advocate cannot in the course of a conveyancing transaction commit a criminal offence but the offence intended to be preferred against the applicant in the circumstances of this case was clearly inappropriate as it was based on very shoddy investigation.

56. Accordingly, it is my view and I so hold that the levying of criminal charges against the applicant herein is ill motivated, malicious and an abuse of both investigatory and prosecutorial powers.

57. Having considered the issues raised herein I am satisfied that this application is merited.

Order

58. In the result I grant the orders sought in the amended Notice of Motion dated 31st March, 2017, and issue an order of Certiorari, removing into this Court for the purpose of being quashed, the decision of the 1st respondent or officers subordinate to him and or the Kenya Police to charge the applicant with the offence of obtaining money by false pretences in Milimani Chief Magistrate Court Criminal case no 477/17 – Contrary to section 313 of the *Penal Code* in relation to conveyancing transaction on LR. 209/11095/197 in the manner intended which decision is hereby quashed. Having done so it is no longer necessary to issue any prohibitory order.

59. As the applicant appeared in this application in person, save for disbursements, which I hereby award to the applicant, there will be no order as to further costs.

Dated at Nairobi this 13th day of December, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Momanyi, the applicant in person

CA Ooko