



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**JUDICIAL REVIEW DIVISION**

**MISCELLANEOUS APPLICATION NO.9 OF 2015**

IN THE MATTER OF: ARTICLE 23, 25, 27, 50, 157 AND 165 OF THE CONSTITUTION OF  
KENYA

IN THE MATTER OF: SECTIONS 4 & 5 OF THE OFFICE OF THE DIRECTOR OF PUBLIC  
PROSECUTIONS ACT

AND

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: SECTIONS 8 & 9 OF THE LAW REFORM ACT

AND

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

BETWEEN

PERES NYAKERARIO MOSE.....APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION.....1<sup>ST</sup> RESPONDENT

ETHICS & ANTI-CORRUPTION COMMISSION.....2<sup>ND</sup> RESPONDENT

TRANSITION AUTHORITY.....3<sup>RD</sup> RESPONDENT

NYAMIRA COUNTY PUBLIC SERVICE BOARD.....4<sup>TH</sup> RESPONDENT

**JUDGMENT**

**Introduction:**

1. By a Notice of Motion application dated **7<sup>th</sup> September 2015**, the ex parte applicant herein, **PERES NYAKERARIO MOSE**, seeks the following orders:

- 1) An order of prohibition directed against the 1<sup>st</sup> Respondent, prohibiting him/her and his/her agents, employees and servants from commencing, proceeding with charging, prosecution, and/or preferring any criminal charges against the Applicant before any competent court in Kenya in so far as the same relates to the sourcing of insurance covers for 15 motor vehicles for Nyamira County Government.
- 2) An Order of Certiorari to remove and bring to this Honourable Court for purpose of quashing the decision of the 1<sup>st</sup> Respondent to charge and prosecute the Applicant.
- 3) Costs of this application and the interest thereon be provided for.
- 4) Any other and further relief that this Honourable Court may deem fit and just to grant in the circumstances.

2. The application is supported by the grounds set forth in the statutory statement, Chamber Summons Application dated on **2<sup>nd</sup> September 2015** and the verifying affidavit of the ex-parte applicant dated **2<sup>nd</sup> September 2015**.

**Applicant's Case:**

3. In support of her case, the ex-parte applicant swore a verifying affidavit dated **2<sup>nd</sup> September 2015** in which she stated that in January 2014, the 2<sup>nd</sup> Respondent conducted investigations and probe into the sourcing of insurance covers for 15 vehicles for Nyamira County and that by a decision made on **27<sup>th</sup> August 2015**, the 1<sup>st</sup> Respondent resolved as follows:

**“1) This is an inquiry into allegations that the County Government of Nyamira did not follow the Public Procurement and Disposal Act in the procurement of 15 vehicles costing over Kshs.93 million. It was further alleged that the insurance covers for the vehicles was single sourced and at inflated price.**

**2) EACC investigated the allegation on irregular procurement of motor vehicles and found no sufficient evidence of criminal culpability.**

**3) Upon independent review, I note that this allegation has not been fully investigated. EACC has therefore been directed to undertake separate investigations into these allegations and re-submit the file.**

**4) With regard to the allegations relating to the sourcing of insurance covers for the said vehicles, EACC investigated and from the evidence recommended that Peres Nyakerario be charged.**

**5) Upon independent review of the file, I am satisfied that the evidence is sufficient to sustain the recommended charges.**

**6) I have accordingly directed prosecution to ensue.**

**Caution**

**I wish to emphasize that the suspects directed to be prosecuted are and each of them is presumed innocent and entitled to a fair trial. As such, it would be inappropriate for me to comment on the matters further.”**

4. The ex-parte applicant deponed that she never sat in any of the Evaluation Committee or Tender Committee that approved the insurance covers for the 15 motor vehicles for Nyamira County. She added that she took over office as Nyamira County Head of Supplies Management on **6<sup>th</sup> December 2013** and that according to her, **Section 73, 74 and 75** of the **Public Procurement Act** allowed the process of tendering used by the Tendering Committee of the Nyamira County whose composition is statutorily provided for under the provision of the **Public Procurement and Disposal (County Governments) Regulation, 2013**.

5. In her said verifying affidavit, the ex-parte applicant narrated how the insurance covers were procured following the operationalization of the devolved systems of government that necessitated the issuance of temporary motor vehicle covers for Nyamira County Government. She deponed that the secretariat invited bids from 17 prequalified insurance companies on **7<sup>th</sup> May 2014** and only 7 turned up to obtain tenders from her office and that tenders were opened on **15<sup>th</sup> May 2015** and as such, it was wrong to the respondent to purport that there was single sourcing in the manner in which the tenders were awarded for the Nyamira County motor vehicles.

6. The applicant contended, based on legal advise, that the decision of the Director of Public Prosecution to prefer criminal charges against her for what she did not do and for what is clearly allowed under the provisions of **Public Procurement and Disposal Act**, is unreasonable, amounts to a gross abuse of the court process and is a classic abuse of his powers.

7. The ex-parte applicant deponed that the entire case is based on trumped up charges, inter-clan feuds and the use of the Respondent's power to prosecute for such a collateral purpose is utterly malafides, the applicant added that **Sections 72, 73, 74 and 75** of the **Public Procurement and Disposal Act** allows for both restrictive and direct tendering.

8. The applicant deponed that she was being unfairly prosecuted for an offence that was politically motivated and calculated to undermine her as the entire prosecution was being micro-managed by a powerful Nyamira County Executive Committee member who wanted to intimidate her through a criminal court process.

9. The applicant deponed, based on legal advise, that the intended criminal prosecution, was not intended to attain a conviction or to punish her, but was aimed at frustrating her position as the head of Nyamira County supply Chain management and added that doing a lawful act can never amount to a criminal offence.

10. The applicant prayed that this court takes charge of the matter and stop the intended prosecution against her since the criminal process is oppressive, vexations and illegal *ab initio*.

#### **1<sup>st</sup> Respondent's case:**

11. The 1<sup>st</sup> respondent, in opposition to the application, filed a replying affidavit dated **30<sup>th</sup> September 2015** sworn by **Terry W. Kahoro**, a prosecuting counsel in the 1<sup>st</sup> Respondent's office having the conduct of the case in which she stated that on **27<sup>th</sup> July 2015** the 2<sup>nd</sup> Respondent forwarded to the 1<sup>st</sup> respondent a duplicate inquiry file in respect to the allegations of irregular procurement of insurance covers by the applicant as the head of Supply Chain Management contrary to **Section 35** of the **Economic Crimes Act** together with a report and recommendations.

12. She deponed that the 2<sup>nd</sup> respondent had in its report recommended the applicant's prosecution for the offences of abuse of office and willful failure to comply with the applicable procedures and guidelines relating to procurement and tendering of contracts contrary to **Section 45(2) (b)** and **Section 46** of the **Anti-Corruption and Economic Crimes Act** respectively.

13. She added that the 1<sup>st</sup> Respondent independently and thoroughly reviewed the evidence contained in

the duplicate inquiry file and was in agreement with the recommendations of the 2<sup>nd</sup> respondent and directed that prosecution should ensue since the investigations revealed that the applicant had arbitrarily awarded a contract of insurance cover to UAP Insurance Company for a period of 1 year without following the right procurement procedures as provided for in the **Public Procurement and Disposal Act, 2005**.

14. The 1<sup>st</sup> Respondent's case was that the actions of the applicant led to the Nyamira County being invoiced for the sum of Kshs.3,441,025 by UAP Insurance Company despite the fact that the contract was never executed since a new tender committee recommended retendering.

15. It was the 1<sup>st</sup> respondents' case that it was acting within its mandate as provided for under **Article 157** of the **Constitution** and the office of the **Director of Public Prosecutions Act No.2 of 2013** by considering the evidential test and the public interest test.

16. The 1<sup>st</sup> respondent argued that most of the issues raised in the applicant's affidavit are matters of evidence which should be presented before the trial court and do not under any circumstances provide a prima facie case for the orders of judicial review sought.

17. Furthermore, the 1<sup>st</sup> respondent stated that the applicant had not provided any evidence in support of her allegations that her intended trial was politically instigated or that the 1<sup>st</sup> respondent was guilty of abuse of office or ulterior motives in directing her prosecution and that on the contrary, the 1<sup>st</sup> respondent had considered the sufficiency of the evidence to sustain the prosecution, and public interest in ensuring that corruption is squarely dealt with in line with the rule of law.

18. The 1<sup>st</sup> respondent argued that the **Constitution**, the **Criminal Procedure Code**, and the **Evidence Act** contain enough safeguards to ensure that the applicant is accorded a fair trial in which she will be supplied with all the evidence in the hands of the prosecution as soon as she takes plea to enable her prepare adequately to answer all the charges.

19. The 1<sup>st</sup> respondent concluded by urging this court not to grant the orders sought since Judicial Review orders, especially prohibition, focus into the process of the decision making and not the merits of the case, and in the instant case, the process adopted by the 1<sup>st</sup> and 2<sup>nd</sup> respondents was lawful and full proof.

#### **2<sup>nd</sup> Respondent's affidavit evidence:**

20. The 2<sup>nd</sup> respondent opposed the application through the replying affidavit of **ELIAS KIPYEGO**, a forensic investigator with the 2<sup>nd</sup> respondent commission, sworn on **15<sup>th</sup> September 2015**.

21. According to Mr. Kipyego, the 2<sup>nd</sup> respondent's Western Regional Office received a report in January 2014, on allegations of failure by the Nyamira County Government, to comply with the **Public Procurement and Disposal Act 2005** and **Public Procurement and Disposal Regulations of 2006** in the Procurement of motor vehicles and motor vehicles insurance covers.

22. He deponed that the investigations revealed the following:

**a) That the insurance covers were procured directly by the applicant without any reference to the County Government of Nyamira's Tender Committee contrary to Section 29(3) of the Public Procurement and Disposal Act 2005 that requires the written approval of the tender committee or a recording in writing of the reasons for using alternative procurement procedure.**

**b) That the applicant was at the time of the said procurement the head of supply Chain management of the County Government of Nyamira which fact the applicant admitted in her own verifying affidavit filed before this court.**

23. The 2<sup>nd</sup> respondent contended that no evidence was presented before the court to justify the single sourcing or direct procurement of the said insurance covers or that the **Public Procurement and Disposal Act, 2005** allowed for temporary procurement. The 2<sup>nd</sup> respondent further stated that the applicant had not demonstrated that it acted without legal mandate or that its independence had been interfered with by any person or authority.

24. The 2<sup>nd</sup> respondent's case is that it acted within the confines of the law, completed its investigations after which it forwarded the recommendations to 1<sup>st</sup> respondent for perusal and review of the evidence. The 2<sup>nd</sup> respondent's deponent stated that the 1<sup>st</sup> respondent acted within powers granted to him under **Article 157(6) (a) and (10) of the Constitution** in arriving at the decision to charge the ex-parte applicant and that there was no proof that the 1<sup>st</sup> respondent acted maliciously, oppressively or unfairly in arriving at the decision to commence the prosecution of the ex-parte applicant.

25. The 2<sup>nd</sup> respondent's deponent deposed that on the advice of his lawyers, judicial review does not look at the merits of a decision but at the process of arriving at the decision and therefore, the matters of fact expressed in the ex-parte applicant's verifying affidavit could only be relevant as forming her defence in the criminal proceedings where the trial court could determine if the charges filed and the evidence tendered disclosed an offence.

26. On **2<sup>nd</sup> October 2015** when the application came up for hearing all the parties agreed to canvass the same by way of written submissions which would then be highlighted on 10<sup>th</sup> November 2015. On **10<sup>th</sup> November 2015** only the 2<sup>nd</sup> Respondent had filed its submissions while the applicant sought for at least 2 weeks to file her submission whereupon the judgment date was set for 10<sup>th</sup> December 2015.

#### **Ex-parte applicant's written submissions:**

27. In her submissions filed on 25<sup>th</sup> November 2015, the ex-parte applicant restated her position that she was not a member of the Tender Committee at the time the tenders in question and under investigations were awarded as she had not, then, been employed as the Nyamira County Head of Supplies Management. The ex-parte applicant added that her intended prosecution was ill-motivated and was actuated by inter-clan feuds, and gender chauvinism with the sole intention of oppressing her.

28. The ex-parte applicant relied on the case of **Pastoli vs Kabale District Local Government Council and others [2008] 2 EA 300** in which the court cited, with approval, the case of **Council of Unions vs Minister for Civil Service [1985] AC 2** and an Application by **Bukoba Gymkhana Club (1963) EA 478** at 479 in which it was held that an applicant for judicial review has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.

29. The ex-parte applicant narrowed down the issues for determination as follows:

- “1. Should this Honourable Court issue an order of prohibition?**
- 2. Should this Honourable Court issue an order of certiorari?**
- 3. Who should bear the costs of this application?”**

On Order of Prohibition the ex-parte applicant cited several authorities in which it was held that the High Court has inherent jurisdiction to grant orders of prohibition to a person charged before the lower court that considers himself to be a victim of oppression, or if his prosecution is actuated by extraneous matters and ulterior motive. See **R. vs Monopolies and Mergers PLC [1986] I WLR 763**, **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)**, **Joram Mwenda Guantai vs Chief Magistrate, Nairobi Civil Appeal No.228 of 2003 [2007] 2 EA 170**, **Kuria & 3 others vs Attorney General [2002] 2KLR 69** and **Republic vs Chief Magistrate's Court at Mombasa Ex-parte Ganicee & Another [2002] 2 KLR 703**.

30. On certiorari, the ex-parte applicant submitted that the same could be ordered in instances where there is abuse of discretion, exercise of discretion for an improper purpose, where the decision maker is in breach of duty to act fairly or fails to exercise statutory discretion reasonably, where the decision maker acts in a manner to frustrate the purpose of the Act donating power, or fails to exercise discretion or fetters the discretion given and where the decision is irrational and unreasonable. The ex-parte applicant relied on the celebrated case of **Republic vs Chancellor, Jomo Kenyatta University of Agriculture & Technology ex parte Dr. Cecilia Mwathi & Another (2008) eKLR.**

31. It is the ex-parte applicant's case that the 1<sup>st</sup> respondent has abused his discretion to prosecute, has exercised his discretion for an improper purpose, is in breach of duty to act fairly, has failed to exercise his statutory discretion reasonably and has acted irrationally and unreasonably.

32. On costs the ex parte applicant submitted that she had made out a case for the grant of the judicial review orders and was thus entitled to costs since costs follow the event. The ex-parte applicant relied on the case of **Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & 4 others [2014] e KLR.**

### **2<sup>nd</sup> Respondent's written submissions:**

33. In its submissions, the 2<sup>nd</sup> respondent expounded of the issues it raised in the replying affidavit dated **15<sup>th</sup> September 2015** and listed the issues requiring this court's determination as follows:

**(i) Whether the court can interfere with the 1<sup>st</sup> respondent's discretion to institute and prosecute criminal cases as mandated under Article 157 of the Constitution.**

**(ii) Whether this is a proper case for the court to prohibit the commencement of criminal proceedings against the ex-parte applicant.**

34. On the first issue, the 2<sup>nd</sup> respondent cited numerous authorities that provide for instances when a court can interfere with the discretion granted to the 1<sup>st</sup> respondent under **Article 157** of the **Constitution**, (see **Reg –vs- DPP Ex.P. Kebilene [2000] 2 A.C. 237.**)

35. The 2<sup>nd</sup> respondent submitted that the instant application did not meet the threshold set on instances when the court can interfere with the discretion of the 1<sup>st</sup> applicant to consent to prosecution. Such instances include dishonesty, malafides, exceptional circumstances or in instances where there is an abuse of the process of the law.

36. The 2<sup>nd</sup> respondent submitted that the applicant had not set a prima facie case of any malice, dishonestly, exceptional circumstances or abuse of the process of law by the respondents in the entire process of the investigations and the intended institution of criminal proceedings against her so as to warrant the granting of the prerogative orders sought.

37. The 2<sup>nd</sup> respondent contended that in the absence of such evidence of impropriety on the part of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the ex-parte applicant was inviting the court to substitute its own views with that of the 1<sup>st</sup> respondent as to whether or not to file charges against the applicant which the court has no mandate to do.

38. The 2<sup>nd</sup> respondent added that the evidence placed before the court by the exparte applicant does not justify any interference by the court with the discretion granted to the 1<sup>st</sup> respondent under **Article 157** of the **Constitution** to institute criminal cases.

39. It was further contended by the 2<sup>nd</sup> respondent that the grounds that the applicant relied on to support her application do not bring the matter within the jurisdiction of the Judicial Review taking into account the fact that the nature of Judicial Review is to concern itself with reviewing the decision making process

and not the merits of the decision in respect of which the application for Judicial Review has been made. The 2<sup>nd</sup> respondent relied on inter alia, the case of **Chief Constable of North Wales Police –vs- Evan [1982] 1WLR 155 page 1160 [1982] 3 ALLER, 142** which was cited, with approval in **Republic –vs- National Environment Management authority & Another [2006] eKLR**.

40. The 2<sup>nd</sup> respondent further submitted that it is not within the jurisdiction of this court to determine whether or not the charges facing the ex-parte Applicant in the intended suit disclose an offence as the trial court would be sufficiently empowered to under **Section 89(5)** of the **Criminal Procedure Code** to determine the viability of the charges in which case the applicant will be at liberty to seek the striking out of the charges for being incompetent if she fully believes it to be so.

41. The 2<sup>nd</sup> respondent further submitted that whether or not the exparte applicant was justified in procuring the insurance covers in the manner that she did was an issue of evidence that this Judicial Review court is not concerned with at this juncture and should not entertain as the trial court would be the best forum to deal with the quality and sufficiency of evidence tendered in support of the charge.

42. The 2<sup>nd</sup> respondent added that it was not the duty of this court to delve into the merits and demerits of any intended charge to be preferred against any party as that would be the preserve of the court before which the charge shall be placed and which shall conduct the trial to test the veracity and merit of the evidence tendered against the accused person. According to the 2<sup>nd</sup> respondent, the investigator only needs to establish that there is reasonable suspicion of commission of offence before preferring charges against the suspect and it would thereafter be the trial court to determine whether or not such evidence is sufficient to sustain a conviction. The 2<sup>nd</sup> respondent relied on the case of **Republic –vs- Commissioner of Police & Another** exparte **Michael Mohari & Another [2012] e KLR** in which it was held inter alia that:

**“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 decision to charge act in a reasonable manner, the High Court would be reluctant to intervene.”**

43. The 2<sup>nd</sup> respondent sought the dismissal of the applicant’s Notice of Motion application dated 7<sup>th</sup> September, 2015 with costs.

**Determination:**

44. I have considered the pleadings filed by the parties to this case together with their respective written submissions and the authorities cited.

45. Under **Article 157** of the Constitution, the prosecutorial powers of the State are vested in the Director of Public Prosecution (DPP).

46. **Article 157 (6)** states as follows:

**“(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may**

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

**(b) Take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and**

**(c) Subject to clause (7) and (8), discontinue at any stage before judgment is delivered any**

***criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public prosecutions under paragraph (b).”***

47. The decision to initiate criminal proceedings by the Director of Public Prosecutions is discretionary as the Director of Public Prosecutions is not subject to the direction or control by any authority since **Article 157(10)** states:

***“(10) 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.”***

48. The above provisions are replicated under **Section 6** of the Office of the **Director of Public Prosecutions Act No.2 of 2013** as follows:

***“(6) Pursuant to Article 157 (10) of the Constitution, the Director shall:***

***(a) Not require the consent of any person or authority for the commencement of criminal proceedings;***

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

***(c) Be subject only to the Constitution and the law.”***

49. In the case of **Githunguri –vs- Githunguri [1986] KLR 1**, the court observed the following regarding the Attorney General’s Powers to institute proceedings under the former constitution:

***“The Attorney General in Kenya by Section 26 of the Constitution is given unfettered discretion to institute and undertake criminal proceedings against any person “in any case in which he considers it desirable so to do.” ...this discretion should be exercised in a quasi judicial way. That it should not be exercised arbitrarily, oppressively or contrary to public policy...’ ”***

50. Similarly, the DPP, under the new constitutional dispensation is vested with unfettered discretion to institute and undertake criminal proceedings, however the discretionary powers must be exercised reasonably within the confines of the law and to promote the policies and objects of the law which are set out in **Section 4** of the **Office of the Director of Public Prosecutions Act** which states as follows:

***“(4) 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.”**

51. The court may therefore intervene where it is shown that the impugned criminal proceedings are instituted for other reasons other than the enforcement of criminal law, or are otherwise an abuse of the court process.

52. In **Vincent Kibiego Saina –vs- Attorney General, High Court Misc. Civil Appl. No.839 of 1999** (*unreported*) at pgs 20, 21, Kuloba J, observed:

**“If a criminal prosecution is seen as amounting to an abuse of the process of court the court will interfere and stop it. This power to prevent such prosecutions is of great Constitutional importance. It has never been doubted. It is jealously preserved. It is readily used, and if there are circumstances of abuse of the process of court, the court will unhesitatingly step in to stop it.”**

53. In *ex parte* **Floriculture International Limited, High Court Misc.144 of 1997**, the following statements were made:

**“Proceedings taken in bad faith or circumstances yielding an inference that they were up to no good. Criminal law is not to be used oppressively to punish acts which in truth might be technically a breach of the criminal law, but which contain no real vice and which can only be best handled under a process other than the criminal process namely any of the different systems of civil remedies. The existence of other remedies which have either already been unsuccessfully sought or which may be open and are less drastic and stigmatic than the criminalization of an otherwise civil dispute is indicative of improper and ulterior purposes.**

**...it is an abuse of criminal process for a person to launch criminal proceedings against the other, in civil matters which are genuinely disputed and substantial grounds by that other person and the civil dispute cannot be reasonably ventilated and decided with a fair finality in the criminal process.”**

54. This court has powers and is under a constitutional duty to supervise the exercise of the 1<sup>st</sup> respondent’s mandate whether constitutional or statutory as long as the challenge properly falls within the purview of Judicial Review. In **R –vs- Attorney General exp.Kipngeno Arap Ngeny High Court Civil Application No.406 of 2001**, it was held that:

**“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purposes. 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.”**

55. Turning to the circumstances of the instant case, the *ex-parte* applicant has alleged that her intended prosecution by the 1<sup>st</sup> respondent is based on trumped-up charges, inter-clan feuds and is instigated by powerful malicious political forces who want to intimidate her. The 1<sup>st</sup> respondent has on its part stated that the intended prosecution was as a result of a report and recommendations made by the 2<sup>nd</sup> respondent who conducted the investigations of irregular procurement procedures done by and under the watch of the *ex-parte* applicant. The 1<sup>st</sup> respondent added that it independently and thoroughly reviewed the evidence gathered by the 2<sup>nd</sup> respondent and was in agreement with the recommendations of the 2<sup>nd</sup> respondent that the prosecution should ensue against the *ex-parte* applicant.

56. Apart from the *ex-parte* applicant’s allegations that her intended prosecution was ill-motivated and instigated by powerful political forces, nowhere in her pleadings does she demonstrate that the impugned criminal proceedings are being instituted for any other reason other than the honest enforcement of

criminal law or are otherwise and abuse of the process of court.

57. The 1<sup>st</sup> and 2<sup>nd</sup> respondent are 2 distinct and independent organs created under the Constitution with each performing independent functions and only converge at the prosecution stage of the cases. The applicant has not shown a prima facie case that the two organs/bodies conspired to maliciously prosecute her or that they acted otherwise than in accordance with the law so as to warrant this court's interference with the 1<sup>st</sup> respondent's discretion to institute criminal proceedings.

58. The instances when the court can interfere with the 1<sup>st</sup> respondent's discretion were spelt out in the case of **George Joshua Okungu & Another –vs- Chief Magistrate's Court Anti-Corruption court & others [2014] e KLR** this court cited with approval the holding in **Republic –vs- Minister for Home affairs & Others Ex-parte Sitamze Nairobi HCCC No.1652 of 2004 [2008] 2 EA 323** and held:

**“Whereas we appreciate the fact that the decision whether or not to prosecute the petitioners is an exercise of discretion this Court is empowered to interfere with the exercise of discretion 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...”**

59. The prosecutorial powers are vested in the 1<sup>st</sup> respondent under **Article 157 of the Constitution**. Such powers ought not to be usurped by the court in determining judicial review cases. It is in this respect that the **House of Lords in Director of Public Prosecution –vs- Humphreys [1976] 2 All ER 497 at 511** stated that:

**“A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval...if there is a power...to stop a prosecution on indictment in limine, it is in my view a power that should only be exercised in the most exceptional circumstances.”**

60. The ex-parte applicant went to great lengths to ventilate upon matters of evidence in attempting to explain the circumstances under which the insurance covers, the subject of investigations by the 2<sup>nd</sup> respondent and prosecution by the 1<sup>st</sup> respondent, were procured. The explanations offered by the applicant would form her evidence or defence before the trial court as this court is not at this point seized with hearing the merits of the prosecution's case, but is instead concerned with determining if the process of making the decision to prosecute the applicant was legal or full proof in **Municipal Council of Mombasa –vs- Republic & Umoja Consultants Ltd Civil Appeal No.185 of 2001**. It was held that:

**“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters....The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision... it is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it is a statutory body which can only do what**

**is authorized by the statute creating it and in the manner authorized by statute.”**

61. Similarly, in **Republic –vs- Kenya Revenue Authority Ex-parte Yaya Towers Ltd [2008] e KLR** it was held that the remedy of Judicial Review is concerned with reviewing the decision making process of the decision itself and not the merits of the decision of which the application for Judicial Review itself.

62. Judicial review remedy, by its very nature is to ensure that an individual is given fair treatment by the authority to which he was been subjected and it is not part of that purpose to substitute the opinion of the Judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question.

63. It has been stated that unless the restriction on the power of the court is observed, the court will itself be guilty of usurping power under the guise of preventing abuse of power. See **Halsbury’s Laws of England 4<sup>th</sup> Edition Vol. (1) (I) para.60.**

64. The courts have time and time again held that the mere fact that the ongoing or intended criminal proceeding are likely to fail is not a ground for halting those proceedings through Judicial review since judicial review proceedings are not concerned with the merits, but with the decision making process. In the instant case, if the applicant’s case is that she was justified to procure for insurance covers for the Nyamira County Government motor vehicles in the manner that she did, that is a good defence that would be available to her in the criminal proceedings but ought not to be relied upon by this court to prohibit the institution of the criminal proceedings. Needless to say, the court will only halt the proceedings if the applicant demonstrates that the said criminal proceedings that the 1<sup>st</sup> respondent intends institute constitute abuse of process.

65. In **Joram Mwenda Guantai –vs- 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.”**

66. In **Republic –vs- Commissioner of Police & Another ex-parte Michael Mohari & Another (supra)** the court held that:

**“It is not the duty of the court to go into the merits and demerits of any intended charge to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the Respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment.”**

67. In the instant case, I reiterate that the applicant has not demonstrated that the respondents exceeded

their jurisdiction, breached the law or rules of natural justice or considered extraneous matters or were driven by malice in conducting investigations against the applicant. It shall be the function of the court to which the criminal case shall be filed, to determine the merit and veracity of any evidence to be brought against the applicant.

68. It was incumbent upon the ex parte applicant to satisfy this court that the discretion given to the 1<sup>st</sup> respondent to investigate and institute prosecution proceedings ought to be interfered with. This was not done. Instead, the applicant alluded to matters, which in this court's humble view, were matters of evidence that should be adjudicated upon by the trial court handling the intended criminal case. It has been held that judicial review proceedings are not a forum where the innocence or otherwise of the applicant is to be determined and a party ought not to institute Judicial review proceedings with a view to having the court determine his innocence or otherwise. See **R. -vs- Director of Public Prosecution & another Ex-parte Chamanlal Vrajlal Kamani & 2 others [2015] e KLR.**

The ex-parte applicant has alleged that powerful political forces were behind her intended prosecution. This allegation was however not proved by the exparte applicant. This court notes that it is not uncommon in this country, for suspects, especially those holding public offices, to claim that their enemies and political detractors were behind their woes every time they are under investigations on claims related to abuse of office.

69. I note that the **Constitution**, the **Criminal Procedure Code** and the **Evidence Act** contain enough safety measures that would ensure that the ex parte applicant is accorded a fair trial in the event that she is charged before the court. In such an eventuality, the applicant will be supplied with all the statements and evidence in the custody of the prosecution to enable her defend herself, cross-examine witnesses and adduce evidence in support of her case.

**Order:**

70. In view of the above, the order that commends itself to me is that the Notice of Motion dated 7<sup>th</sup> September 2015 is hereby dismissed with costs to the respondents.

**Dated, signed and delivered in open court this 27<sup>th</sup> day of January 2016**

**HON. W. OKWANY**

**JUDGE**

**In the presence of:**

- M/S. Mogaka for the exparte - Applicant
- M/S. Mbelete for the 1<sup>st</sup> Respondent
- M/S. Wando for the 2<sup>nd</sup> Respondent
- Mr. Omwoyo: ,.Court clerk