REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 225 OF 2014

AND

IN THE MATTER OF BREACH AND/OR CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOM UNDER ARTICLES 159, 165, 19 20, 21, 22, 23, 25 AND 27 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF AN APPLICATION BY THE HONOURABLE THE ATTORNEY GENERAL, FOR AND ON BEHALF OF DR. MARY NJOKI NDIBA (HEREINAFTER REFERRED TO AS THE (SUBJECT) FOR ORDERS OF JUDICIAL REVIEW BY WAY OF PROHIBITION AND CERTIORARI AGAINST THE INSPECTOR GENERAL OF POLICE, THE DIRECTOR OF CID, AND THE HONOURABLE THE DIRECTOR OF PUBLIC PROSECUTIONS TO BRING BEFORE THIS COURT FOR PURPOSES OF BEING QUASHED DECISION BY THE INSPECTOR GENERAL OF POLICE AND THE DIRECTOR OF PUBLIC PROSECUTIONS TO INSTITUTE CRIMINAL PROCEEDINGS AGAINST THE SUBJECT

AND

IN THE MATTER OF THE NATIONAL POLICE ACT

AND

IN THE MATTER OF DECISION MADE BY THE O.C.S. KILELESHWA POLICE STATION ON OR THE 2ND DAY OF MAY 2014 ACTING UNDER THE AUTHORITY OF THE INSPECTOR GENERAL OF POLICE, THE DIRECTOR OF CID, AND THE DIRECTOR OF PUBLIC PROSECUTIONS TO INSTITUTE CRIMINAL PROCEEDINGS AGAINST THE SUBJECT, WITH RESPECT TO THE OWNERSHIP OF MOTOR VEHICLE REGISTRATION NO. KBJ 158M

AND

IN THE MATTER OF THE PEBAL CODE AND CRIMINAL PROCEDURE CODE CAP 63 AND 75 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE LAW REFORM ACT CAP 26, LAWS OF KENYA

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE ACT CAP 21 LAWS OF KENYA, THE CONSTITUTION OF KENYA AND ALL OTHER ENABLING PROVISIONS OF LAW

AND

IN THE MATTER BETWEEN

THE HON. THE ATTORNEY GENERAL…….APPLICANT

VERSUS

THE HON. THE ATTORNEY GENERAL FOR

AND ON BEHALF OF……...……..…….1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

THE DIRECTOR OF CID…....……..…….3RD RESPONDENT

THE DIRECTOR OF PUBLIC

PROSECUTIONS.....4TH RESPONDENT

EX PARTE: MARY NJOKI NDIBA

JUDGEMENT

Introduction

1. By a Notice of Motion dated 21st January, 2015, the applicant herein, expressed to be the Attorney General, seeks the following orders:

> **(a) That this honourable court be pleased to issue Orders of Certiorari directed to the 1st, 2nd and 3rd Respondents, by themselves their servants and/or agents or any other officer acting under their authority to bring before this court for the purpose of being quashed the decision by them made on or about 2nd May 2014 to institute and/or commence criminal proceedings against the subject for any matter regarding the possession, custody and use of motor vehicle Reg. No. KBJ 158M.**
>
> **(b) Orders of Prohibition to be directed to the 5th Respondent, prohibiting the 5th Respondents, his servants and/or agents or any other officers acting with his authority, prohibiting him/her and each one of them from proceeding with the intended institution of criminal proceedings against the Ex parte Applicant for any matters regarding possession, custody and use of the motor vehicle Reg. No. KBJ 158M, pending the full hearing and outcome of the application.**
>
> **(c) That the hon. Court be pleased to issue Conservatory Orders directed against all the Respondents prohibiting them and each one of them from instituting or continuing with any proceedings in the matters herein process as the same constitute an abuse of process, are arbitrary, capricious and brought *mala fides* by the Respondents in abuse of**

the due process of the court and intended to occasion the subject great prejudice.

2. The application was supported by a verifying affidavit sworn by **Wandugi K K Karathe**, the applicant's advocate on 3rd July 2014.

3. According to him, the applicant in the matter s the wife of one **Edward Nganga Kairu** having married the latter on a statutory marriage on the 12th day of December 2007 which marriage broke down leading to commencement of the Matrimonial Cause No. 31 of 2014.According to the deponent, the complainant in the matter is **Edward Nganga Kairu** aforesaid and that the complaint touches on the matrimonial issues.

4. It was contended that during the pendency of the marriage, the said **Edward Nganga Kairu** transferred motor vehicle registration No. KBJ 158M to the Ex parte Applicant on his own volition. However the said complaint lodged a complaint with the police in regard to the motor vehicle despite the ownership thereof and the property therein having passed onto the ex parte applicant on the 1st of September 2009. It was averred that upon registration of the motor vehicle in the ex parte applicants name, the motor vehicle became her sole property to the exclusion of any other matrimonial properties hence the complainant cannot lay claim to the same.

5. It was contended that as a result of the said complaint, the applicant was now threatened with criminal prosecution, a prosecution would be grossly oppressive, in abuse of the process and the same would militate against the interests of justice. To the deponent, the pendency of the said matrimonial dispute does not entitle the said **Edward Nganga Kairu** to instigate the criminal prosecution against the ex parte applicant with regard to property that belongs to her and that such prosecution would be harsh, arbitrary and entirely without justification. While appreciating that the police can investigate and institute criminal proceedings, it was contended that such institutions of criminal proceedings must always be based on reasonable grounds and that no criminal prosecution should be instituted to advance the ulterior interests of a complaint not being based on any reasonable grounds.

6. It was therefore averred that the ex parte applicant is a victim of circumstances, is threatened with unjust prosecution which will expose her to continued hardship and that if only for a sheer want of a reasonable cause, it is mete and just that the respondents herein be prohibited from instituting such proceedings.

Respondent's Case

7. According to the Respondent, investigation into the matter the subject of the application commenced after the said **Edward Ng'ang'a Kairu** filed a report at **Kileleshwa Police Station** on a clear case of forgery and fraud perpetrated by the ex-parte Applicant **Mrs**. **Mary Njoki Ndiba.** To the deponent, **Edward Ng'ang'a Kairu** had never consented or authorized the Transfer nor even executed any Transfer form and further he had never availed to the ex-Parte Applicant his **Pin No. and I/D** to execute the Transfer.

8. It was averred that on examining the Transfer Form exhibited by the Ex-Parte applicant and on questioning **Edward Ng'ang'a Kairu** if the signature that appears on it was his, he denied of the same. To the Respondent, in the original Sale Agreement **Mary Njoki Ndiba** was just a witness and not the buyer of the said motor vehicle and that looking at the original Log Book which bears **Edward Ng'ang'a Kairu's** names, his signature has been consistent. However, a look at the Transfer of ownership form which **Mary Njoki Ndiba** used to transfer the motor vehicle in her name it is clear that the signature of **Edward Ng'ang'a Kairu** has changed and it is not as the one he has executed other documents with. Further, the date that appears on the Co-operative bank KRA Transaction Receipt is 9th January 2014 while the date that appears on the log book with **Mary Njoki Ndiba** names is 10th January 2014. It was further contended that looking at the transfer document she presented in court there is a significant difference in the dates as it show 9th January 2014 yet the transfer document obtained by the police indicated as April 12th 2012 and the previous owner of the said motor vehicle could not be found.

9. To the Respondent, a Transfer and registration of a Log Book cannot be done in a day unless some other unlawful means has been used.

10. It was the Respondent's case that **Mary Njoki Ndiba** is a woman who bears different names with different signatures and it would only be fair for her to co-operate with the police to ascertain the truth with regards to the transfer document. To the Respondent, there was absolutely no evidence by the respondents or that the Respondents are acting outside the confines of laws. In its view, this matter is one of a Criminal Nature that can only be determined by a Trial Court that is equipped to handle such matters and cannot be determined through Civil Process hence **Mary Njoki Ndiba's** should surrender the motor Vehicle Registration No.KBJ 158M to the police Station as she could interfere with the police investigation bearing in mind the current Log book is under her name and she can as well dispose it.

11. It was the Respondent's case that the investigations herein were conducted in good faith, independently and were never influenced in favour of anyone.

Interested Party's Case

12.According to the Interested Party, the ex parte Applicant is his estranged wife in a marriage which is the focus of proceedings in the Divorce Cause No. 31 of 2014. Apart from that the two former lovebirds turned foes are embroiled in another case to wit Civil Case No. 31 of 2014 pending before this Court on matrimonial property.

13.According to the interested party, these proceedings relate motor vehicle registration number KBJ 158 M, Suzuki Vitara which he on 30th September, 2009 in the presence of *ex-parte* applicant using his personal resources and the applicant was a mere witness to the said sale and signed as such witness. He later transferred the said motor vehicle into his name and was issued with its Log Book. However, in consideration of his then natural love and affection for his wife, he put the said motor vehicle for her use so that she could conveniently attend work at various local universities where she was employed as Lecturer, running her administrative work at her NGO known as Eagle Heights Africa [Kenya] and conducting domestic errand but retained the ownership thereof. When the two parties became estranged, they in the company of their respective Advocates met on 15th October, 2013 with the intention of negotiating *inter alia* a divorce settlement discussed at length issues relating to their properties and it was agreed that the interested party would make a written proposal as to how he desired the various properties they jointly owned shared in an amicable divorce settlement. The interested party intimated his intention to give the applicant the said motor vehicle as part of the divorce settlement subject to her acceptance of the other terms of the settlement relating to the jointly held assets.

14.However, during the intervening period while awaiting a consensus as to the division of the properties registered in their joint names he gave the applicant the original Log Book of the said motor vehicle for her to keep it in custody as he had the intention to move out of the matrimonial home to seek peace and harmony. However, the applicant demanded for copies of his PIN Certificate and National I/D which were requisite for her to transfer the said motor vehicle which demand the interested party did not accede to insisting that insisting that the issue of the said motor vehicle would be treated independently and that he would only transfer the said motor vehicle to the *ex-parte* applicant after they resolved the other property issues. Following a breakdown in the settlement, the interested party demanded for the return of the vehicle at which point he was informed that the said motor vehicle had already been transferred into the *ex parte* Applicant's name though he had neither signed any transfer document in favour of the Applicant relating to the said car nor given her a copy of his ID and PIN which she had severally requested in earnest to enable her effect the registration of the Transfer prompting him to instruct his advocates to conduct an urgent search at the registry of motor vehicles who confirmed the same by obtaining a copy of motor vehicle records.

15. Armed with this information, the interested party duly filed a report at Kileleshwa Police Station which matter is now currently under police investigation.

16.To the interested party, the purported signature appearing on the transfer form exhibited by the

applicant is not his but is a forgery.

17. It was averred that whereas the Ex parte Applicant in her originating summons filed in HCCC No. 31 of 2013 seeks for a declaration of ownership of the said motor vehicle registration number KBJ 158M yet on the other hand she contends that the same is validly registered in her name which is a pure contradiction and clear prove that she wants the honourable court to sanitize her fraudulent acts. It was his position that there is a legitimate complaint before the police made by him with overwhelming prima facie evidence against the *Ex parte* Applicant and there is no scintilla or inclination of which hunt on the part if the police. To the contrary his allegations are serious and require a judicial enquiry and determination to ascertain their veracity and the intended or impending criminal proceedings shall offer a judicial forum for the same to be tested and the *ex parte* Applicant shall be given an opportunity to attempt to clear her name since she has constitutional guarantees and assurances to a fair trial and there is no probability that she will not be judged fairly and in any event she has not even alleged so in her application.

Determinations

18.I have considered the application, the affidavits in support thereof, the affidavit in opposition to the application and the submissions filed as well as the authorities relied upon in support thereof.

19.Before dealing with the merits of the application, it has not escaped the Court's attention that the applicant herein is throughout these proceedings indicated as the Attorney General. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486 Ringera, J** (as he then was) expressed himself as follows:

> **"Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled and accordingly, the orders of *Certiorari, Mandamus* or Prohibition are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for *Mandamus* is: -**
>
> **"REPUBLIC……..……..……..APPLICANT**
>
> **V**
>
> **THE ELECTORAL COMMISSION OF KENYA……RESPONDENT.**
>
> **EX PARTE**
>
> **JOTHAM MULATI WELAMONDI"**

20. Apart from the wrong intitulement of the application, the affidavit in support of the application is sworn, not by the applicant but by her legal counsel. That the rules of evidence relating to affidavits generally apply to judicial review proceedings was put beyond doubt in the decision of the East African Court of Appeal in **Life Insurance Corporation of India vs. Panesar [1967] EA 614** in which **Sir Charles Newbold, P** pronounced himself as hereunder:

> **"Affidavits are intended to be probative of the facts which the party filing the affidavit seeks to prove before the court in the particular proceedings in which the affidavits are filed. The accumulated wisdom of the courts over the ages has laid it down that any attempt to prove facts save in accordance with such rules as the experience of the courts has shown to be essential is worthless. That the provisions of the Evidence Act do not apply to affidavits or to arbitration proceedings does not therefore mean that there exist no rules as to what may be set out in the affidavits, other than rule 3 of Order 18, or as to what evidence may be led before an arbitrator. To accept that would be to substitute chaos for order and to permit of any sort of evidence being placed before a court or an arbitrator as probative of the fact**

sought to be proved. Such an astounding position would require the highest authority before…I would accept it…the proposition is so manifestly wrong that no one has had the temerity in the past to advance it. The very provisions of Order 18 rule 3(1), which permit in certain applications statements in affidavits to be based on belief thus relaxing in those circumstances the hearsay rule, shows that rule 3 is based upon the assumption that the normal rules of evidence apply to affidavits. Were it otherwise rule 3 would be a classic example of straining at a gnat but swallowing the camel. Even in relation to rule 3 the court has laid down certain requirements so as to ensure that the relaxation of the hearsay rule is kept within very close confines and that the courts are not asked to act upon evidence which experience has shown to be valueless of any fact…It is clear that the court, even where there is a specific statutory exception to the hearsay rule in evidence tendered by affidavit, will not accept the affidavit as probative of the fact sought to be proved unless there is set out precisely which are the facts based on information and the source of that information. To suggest that the court would have adopted that position if no rules of evidence applied to what could be set out in affidavits is manifestly absurd. Whereas it is true that the Evidence Act does not apply to affidavits tendered to the court, it is also true that the basic rules of evidence nevertheless apply to evidence tendered by affidavit and if those basic rules are not complied with then the evidence is of no probative value whatsoever and should be rejected. It is important to observe that unless there is a specific provision excepting the rule, the contents of affidavits must be confined to such matters as are admissible by the rules of evidence. Unless the rules of evidence are properly adhered to, the whole justification for the use of affidavit evidence instead of oral evidence is destroyed at a blow."

21.One such well known rule is that advocates ought to avoid the temptation to wade into litigation in which they are acting as counsel by embroiling themselves into the murky waters of the dispute in which they appear for their clients. In **Yussuf Abdulgani vs. Fazal Garage (1953) 28 LRK 17** it was held that an advocate should not swear a belief affidavit on information supplied by his client if his client is available to swear of his own. In the case of **Oyugi vs. Law Society of Kenya & Another [2005] 1 KLR 463, Ojwang, J** (as he then was stated as follows:

"It is not competent for a party's advocate to depone (sic) to evidentiary facts at any stage of the suit and by deponing (sic) to such matters the advocate courts an adversarial invitation to step down from his privileged position at the Bar, into the witness box. He is liable to be cross-examined on his depositions and it is impossible and unseemly for an advocate to discharge his duty to the Court and to his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case. Besides that, the counsel's affidavit is defective for the reason that it offends the proviso to order 18, rule 3(1) by failing to disclose who the sources of his information are and the grounds of his beliefs".

22. In this case, the decision to institute criminal proceedings against the applicant ought to stand. The burden is upon the applicant to prove that this is so. This burden, in my view, is not a light one. It cannot be proved based on inadmissible evidence as the applicant is attempting to prove in these proceedings.

23. Whereas there is nothing barring an advocate from swearing an affidavit in appropriate cases, where the matters deposed to are agreed or on purely legal positions, advocates should refrain from the temptation of being the avenue through which disputed facts are proclaimed. The rationale for the said principle is to insulate the advocate, an officer of the court, from the vagaries of litigation which, on occasions may be very unpleasant. By swearing an affidavit on such issues an advocate subjects himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided like plague. In my view, however innocent an averment may be, counsel should desist from the temptation to be the pipe stem through which such an averment is transmitted.

24. It is bears repeating that in these types of proceedings the Court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings. As judicial review

proceedings are concerned with the process rather than merits of the challenged decision or proceedings the court is not entitled to make definitive findings on matters which go to the merit of the impugned proceedings. In determining the issues raised herein the Court will therefore avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial Court.

25. The general rule in these kinds of proceedings is that 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. Therefore mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, is not, on its own and without more, a ground for halting such proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. An applicant who contends that he has a good defence in the criminal trial ought to be advised to raise the same in his defence before the criminal trial instead of invoking this Court's jurisdiction with a view to having this Court determine such an issue as long as the criminal process is being conducted bona fides and in a fair and lawful manner. 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.

26. 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."**

27. 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. The other grounds, which the appellants claim were ignored ultimately, raise the question whether the evidence gathered by the prosecution is sufficient to support the charge. The criminal trial process is regulated by statutes, particularly the Criminal Procedure Code**

and the Evidence Act. There are also constitutional safeguards stipulated in section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court, which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence and that is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court."

28. 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....The invocation of the law, by whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far from that which the courts indeed the entire system is constitutionally mandated to administer..."**

29. The Court proceeded:

> **"In the instant case it is... 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...[W]here the prosecution is an abuse of the process of court...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...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".**

30. The Court was however of the view that:

> **"It is not enough to simply state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an "abuse of process", is a "manipulation", "amounts to selective prosecution" or such other processes, or even supposing that the applicants might not get a fair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts. The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial... In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names."**

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

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

32. It is therefore clear that whereas the discretion given to the Respondents to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt. However, it must be emphasised that judicial review applications do not deal with the merits of the case but only with the process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and once the Court is satisfied that the same are *bona fides* and that the same are being conducted in a fair manner, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution's evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.

33. It was contended that the courts cannot direct the 1st Respondent on how to exercise his powers under Article 157 of the Constitution as that would amount to emasculating the said respondent and

rendering the independence of that office constitutionally irrelevant. With due respect this broad statement cannot be taken to be absolutely correct. In exercising its mandate under section 4 of the ***Office of the Director of Public Prosecutions Act***, the Respondent must take into account the provisions of section of the said Act which 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.***

34. It follows that the discretion and powers given to the DPP under Article 157 of the Constitution cannot be said to be unfettered. 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."**

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

> "**Although the Attorney General enjoys both constitutional and statutory discretion in the prosecution of criminal cases and in doing so he is not controlled by any other person or authority, this does not mean that he may exercise that discretion arbitrarily. He must exercise the discretion within lawful boundaries...Although the state's interest and indeed the constitutional and statutory powers to prosecute is recognised, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters..."**

36. Therefore this Court is perfectly entitled in appropriate cases to interfere with the decision of the DPP to commence and proceed with prosecution.

37. In this case, the ex parte applicant's case is that the offence with which he is charged is maliciously brought since the subject motor vehicle was transferred to her by her now estranged husband who is the complainant. The said husband, the interested party herein, however denies the fact of the said transfer and contends that the purported documents of transfer are in fact forgeries.

38. Allegations of forgery are serious matter that are ordinarily not determined by way of affidavit evidence but ought to be introduced by way of viva voce evidence to be tested by cross-examination. It is therefore not possible based on the old-print affidavits before me to find that the allegation of the forgery is farfetched. Therefore if the complainant's version is true, it may well found a charge based on forgery. In other words it cannot be said at this stage based on the material before the Court that the interested party had no reasonable and probable cause for preferring the said charges against the applicant. As to whether the said charges will succeed is another matter altogether which matter can only be resolved by the trial court after hearing and analysing the evidence to be presented before it.

39. As stated in the above authorities, the mere fact there is no sufficient evidence to sustain a conviction is no ground for halting or terminating a criminal case. The trial Court is usually in a better position to scrutinise the evidence presented before it in determining whether such evidence prove the accused's guilty beyond reasonable doubt. To paraphrase the decision in **Meixner & Another vs. Attorney General** (supra) to set out on that voyage would have the effect of embarking upon an examination and appraisal of the evidence to be adduced before the trial Court with a view to showing the applicants' innocence is hardly the function of the judicial review court.

40. Whereas the applicant may well prove at the trial that the criminal charges cannot be successfully prosecuted and that she is after all innocent, it is not for this court to consider the strength of the prosecution case vis-à-vis the defence and make a determination as to which one has more weight. As opposed to where the prosecution has no evidence at all the court will not halt a prosecution simply because the court is of the view that the evidence would not in all probability lead to a conviction. To do that would amount to this court in a judicial review proceedings stepping into the shoes of the trial court and usurping the powers of the trial court.

41.Having considered the issues raised herein I am not satisfied that the case meets the legal threshold for prohibiting the criminal proceedings from being instituted.

Order

42. Consequently, I find the Notice of Motion dated 21st January, 2015 unmerited and I hereby dismiss the same but taking into account the fact that the applicant and the complainant from the complaint's own evidence shared love and affection, there will be no order as to costs.

Dated at Nairobi this 19th day of January, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kamunya for the Applicant

Miss Kangethe for Mr Wachira for the Interested Party

Cc Patricia