**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW MISC. CIVIL APPL. NO. 4 OF 2016**

**IN THE MATTER OF AN APPLICATION BY BEATRICE WAIRIMU MWAI FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 8 & 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA**

**BETWEEN**

**REPUBLIC…………………………………………… APPLICANT**

**AND**

**THE DIVISION CRIMINAL INVESTIGATION**

**OFFICER LAIKIPIA EAST DIVISION……………..… 1ST RESPONDENT**

**THE CHIEF MAGISTRATE'S COURT**

**AT NANYUKI …………………………………...……… 2ND RESPONDENT**

**AND**

**BEATRICE WAIRIMU MWAI …………………….….. EX-PARTE APPLICANT**

**JUDGMENT**

1. On 23rd February 2016 the ex-parte applicant **Beatrice Wairimu Mwai** was granted leave for file to judicial review orders in respect of the criminal case no. 291 of 2015 where she is the accused. On being granted that leave the court declined to stay the proceedings of that trial.

2. The ex-parte applicant was charged on **17th August 2015** with **3 counts**. On the **first count** she was charged with her co-accused Ndirangu Kaniaru with the **offence of conspiracy to defraud contrary to section 317 of the Penal Code Cap 63**. On the **second count** she was charged alone with the offence of **destroying evidence contrary to section 116 of the Penal**

**Code Cap 63**. On the **third count** she was charged on her own with the **offence of abuse of office contrary to section 171 (1) as read with section 102 of the Penal Code Cap 63**.

3. The background of those charges was set out in the replying affidavit of PC Stephen Ochieng Agutu the investigating officer in the matter. In March 2017 a report was made to the Director of Criminal Investigation headquarters in Nairobi by one Mark Mccloy. Mark Mccloy complained that the property **Laikipia/Nanyuki West/ Timau Block 1/424** had been registered in another person's name without his knowledge. Mark Mccloy informed the police that that property was purchased in **1993** by a company called **Mawe Mingi Limited** which company was owned by him and his father. In the year 2010 Mawe Mingi Limited transferred the title to that land to Mark Mccloy and a title deed was issued on **9th April 2010** in his name. He complained that when he carried out a search at the Nanyuki land registry, on 8th March 2015 he found that the said title had been registered in the name of Ndirangu Kaniaru.

4. On the complaint being made by Mark Mccloy investigations were initiated. Those investigation revealed that indeed as complained by Mark Mccloy the land had been transferred to Ndirangu Kaniaru on 25th February 2015. The investigating officer in carrying out investigations visited the land registry at Nanyuki and on 18th March 2015 where he was supplied with 2 green cards in respect of the said property. He was also supplied with certified copies of presentation book for 2nd November 1993 and 23rd February 2015. He found that one green card had been opened on 1st September 1988 and the entry no. 7 showed that the title deed was issued to Mark Mccloy on 9th April 2010. The other green card showed that Ndirangu Kaniaru had been issued with a title deed on 23rd February 2015. In his investigations he could not find the transaction that supported the transfer of the property into the name of Ndirangu Kaniaru.

5. The investigating officer on 1st April 2015 again visited the land registry at Nanyuki and obtained original documents from the ex-parte applicants. On this occasion however he found that there had been some alterations made on the green card in the name of Ndirangu Kaniaru. The investigating officer sent the documents with the alterations to handwriting expert to be compared with the known signature of the ex-parte applicant. The report from the handwriting expert revealed that the hand writing and the signature of the ex-parte applicant were made by the same person.

6. Further investigations involved the recording of statements by witnesses. The investigating officer confirmed that all the documents he was able to obtain together with the statements of those witnesses revealed that a criminal offence had been committed in the transfer of the subject property from the name of Mark Mccloy into the name of Ndirangu Kaniaru. It is on that ground that he recommended the prosecution of the ex-parte applicant and Ndirangu Kaniaru relating to those transactions.

7. The ex-parte applicant by her substantive notice of motion application dated 26th February 2016 seeks an **order for certiorari** against the respondents for the quashing of their decisions to admit the charges the ex-parte is facing before the Chief Magistrate's Court at Nanyuki. By that application the ex-parte applicant also seeks the issue of **conservatory orders** staying the proceedings before the Chief Magistrate's Court at Nanyuki.

8. The grounds on which the ex-parte applicant seeks the relief in the notice of motion is that she is a former land registrar of Laikipia in Nanyuki and as such she is a civil servant of the Ministry of Lands. In that capacity on 25th of February 2015 she acted on the documents that were presented to her by her co- accused Ndirangu Kaniaru and therefore did not commit any fraud or conspiracy to defraud or destroy evidence or abuse office. She termed those charges against her as baseless. Although the ex-parte applicant was arrested in May 2015 and appeared in court on 15th June 2016 whereby she was charged with the offences before the Chief Magistrate's Court, she waited until February 2016 when she approached this court seeking leave

to file for judicial review orders. She explained her delay in commencing this proceeding before this court on the ground that the prosecution in the criminal trial failed to avail to her relevant documents. She did not elaborate on the relevance of those documents to this judicial review proceeding. The ex-parte applicant termed her prosecution in the criminal trial as speculative, and having irreconcilable facts which cannot stand a criminal trial. In her view what should have been filed was civil claim by Mark Mccloy to determine who is the true owner of the property. She reiterated that her only connection to the transaction was that she was the Land Registrar at Laikipia land registry at Nanyuki at the time her co-accused presented the documents for transfer. She therefore said that the first respondent acted wrongly by following an opinion that criminal proceedings be instituted against her. That that prosecution was not based on fair and impartial investigation. That the prosecution was based on ulterior motives. Again the ex-parte applicant failed to elaborate what constituted the ulterior motive to her prosecution.

9. The application was opposed by the state. The Learned Counsel Ms. Kinyanjui prosecuting counsel in the office of the Director of Public Prosecution (ODPP) opposed the application relying on the deposition of the investigating officer. Further she submitted that the ex-parte applicant had failed to present to this court substantial evidence to show that the decision making process to prosecute her was done without jurisdiction. That she also failed to show that the decision to prosecute her was made without compliance to the law or that the process of her prosecution was done in error. Learned counsel referred to **Article 245** of the Constitution which empowers the Police Service to investigate any offence and to enforce any law against the person who has contravened the same. The Learned Counsel referred also to **Article 157** of the Constitution which empowers the office of the ODPP to direct the police to investigate any matter.

10. Learned Counsel referred the court to the decision of **Republic Vs Attorney General & Four Others Ex-parte Kenneth Kariuki Githii (2014) eKLR.** In relying on that case learned counsel referred to the following:-

> **"The court ought not to usurp the constitutional mandate of the Director of Public Prosecution to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or on-going 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 since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is not a ground that ought not to be relied upon by a court in order to halt criminal process undertaken *bona fides* since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceedings may similarly be a basis for civil suit, is no ground for staying the criminal process if the same can similarly be a basis for criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. In the exercise of the discretion on whether or not to grant an order of prohibition, the court takes into account the needs of good administration. See <u>R vs. Monopolies and Mergers Commission Ex parte Argyll Group Plc (186) 1 WLR 763 and Re Bivac International SA (Bureau Veritas (2005) 2 EEA 43 (HCK)."</u>**

11. Learned Counsel stated that the court interference with criminal trial was also the subject of discussion in the case **Republic vs Director of Public Prosecution & 2 other ex-parte Francis Njakwe Maina & another (2015)eKLR** . In that case the court had this to state:-

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

12. Learned Counsel for the office of the DPP submitted that the complains made by the ex-parte applicant in seeking the orders before this court ought to be raised in her defence at the criminal trial. Learned Counsel also stated that the criminal trial had proceeded for hearing and the prosecution was close to closing its case. She also sought for the refusal for the orders sought.

## ANALYSIS AND DETERMINATION

13. As rightly stated by the Learned Counsel when a party appears seeking judicial review orders what they seek is to challenge the decision making process. This was the discussion in the case **Municipal Council of Mombasa vs Republic & Umoja Consultants Limited Civil Appeal No. 185 of 2001**. In that case he court stated:-

**"Judicial review is concerned with the decision making process and not 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 person 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 the relevant matters ……… the court should not act as a court of appeal or 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."**

14. The ex-parte applicant is challenging the decision by the office of the DPP to prosecutor her before the Chief Magistrate's Court at Nanyuki. The DPP under **Article 157(6)** can exercise state powers of prosecution by institution of criminal proceedings any person before any court other than a court martial; and take over and continue any criminal proceedings commenced in any court other than a court martial and subject to sub article (7) and (8) can discontinue at any stage before judgment is delivered any criminal proceedings. It is important to note that under article 157(10) the office of the DPP does not require the consent or authority of anyone to commence criminal proceedings. Bearing that in mind and as stated before judicial review is only involved in the decision making process I am of the view that the ex-parte applicant failed to show what in the decision to prosecute her was in error or lacked jurisdiction. The investigating officer stated that after carrying out investigations which involved recording statements from witnesses including the statement of the ex-parte applicant he formed the view that offences had been committed and subsequently the office of the DPP preferred the charges against the ex-parte

applicant. The only basis that I can see that the ex-parte applicant brings forward to this court for the court to interfering with the right of DPP to prosecute her is that the acts that she did resulting in the transfer of the title into the name of Ndirangu Kaniaru were acts that were in the normal course of her duties as a land registrar. The prosecuting counsel Miss Kinyanjui is correct to state that that complaint by the ex-parte applicant can only go towards her defence in the criminal trial. I wholly agree with that submission of the state that the ex-parte applicant does not provide sufficient ground for this court to grant the orders of certiorari.

15. The ex-parte applicant waited from August 2015 when her trial began to February 2016 to approach this court seeking judicial review orders. Undoubtedly that was a prolonged delay for which the ex-parte applicant did not sufficiently explain. Delay can defeat the granting of judicial review orders. This was well set out in the case of **Regina vs London Borough of Hammersmith and Fulham (Respondents) and others Ex-Parte Burkett and another (FC (Appellants) (2002) UKHL 23**. which was referred to in the case **Republic vs Registrar of Titles - Nairobi Registry & 4 others (2012) eKLR:**

> **"On the other hand it has repeatedly been acknowledged that applications in such cases should be brought speedily as possible. Ample support for this approach is to be found in the well-known observations of Lord Diplock in *O'Reilly v Mackman* 2AC 237, 280-281 to the effect that the public interest in good administration requires that public authorities and third parties should not be kept in suspense for any longer period than is absolutely necessary in fairness to the person affected by the decision; see also *R v Dairy Produce Quota Tribunal for England and Wales, Ex p Caswell [1990]* 2AC 738. But decisions as to whether a petition should be dismissed on the ground of delay are made in the light of the circumstances in which time was allowed to pass. As Lord President Rodger put it in *Swan v Secretary of State for Scotland 1998* SC 479,487:**
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> **"It is, of course, the case that judicial review proceedings ought normally to be raised promptly and it is also undeniable that the petitioners let some months pass without starting these proceedings. None the less, in considering whether the delay was such that the petitioners should not be allowed to proceed, we take into account the situation in which time was allowed to pass."**
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> **In Ex p Caswell [1990] 2AC 738,749-750 Lord Goff of Chieveley said that he did not think that it would be wise to attempt to formulate any premise definition or description of what constitutes detriment to good administration. As he pointed out, interest in good administration lies essentially in a regular flow of consistent decisions and in citizens knowing where they stand and how they can order their affairs. Matters of particular importance, apart from the length of time itself, would be the extent of the effect of the relevant decision and the impact which would be felt if it were to be reopened."**
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> **I am persuaded by the opinion of Lord Hope of Craighead and I am of the view that where an applicant comes to court too late in the day the court should not exercise its discretion in favour of such an applicant. It is imperative for any applicant to know the decision being challenged does not only affect the applicant but other parties too and those other parties may have acted on the decision."**

16. In the end the **Notice of Motion dated 26th February 2016 is dismissed and the costs are thereof granted to the respondents**.

**DATED AND DELIVERED THIS 8TH DAY OF JUNE 2016**

**MARY KASANGO**

**JUDGE**

**CORAM**

Before Justice Mary Kasango

Court Assistant: Njue

For Ex-parte Applicant ……………………………….

For State ……………………………….

COURT

Judgment read in open court.

**MARY KASANGO**

**JUDGE**