REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTION AND JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 192 OF 2015

IN THE MATTER OF AN APPLICATION BY JOB KIGEN KANGOGO FOR LEAVE TO INSTITUTE A JUDICIAL REVIEW

APPLICATION FOR ORDERS OR PROHIBITION

AND

IN THE MATTER OF NAIROBI CHIEF MAGISTRATE'S CRIMINAL CASE NUMBER 1150 OF 2009

AND

IN THE MATTER OF THE PENAL CODE CHAPTER 63 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE CRIMINAL PROCEDURE CODE CHAPTER 75 OF THE LAWS OF KENYA

REPUBLIC……..……APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION.....…...1st RESPONDENT

NAIROBI CHIEF MAGISTRATE,

MILIMANI COURTS…….…….....……..2ND RESPONDENT

JOB KIGEN KANGOGO……...…..……....…….APPLICANT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 3rd July, 2015, the *ex parte* applicant herein, **Job Kigen Kangogo,** seeks the following orders:

1. An order of prohibition do issue to prohibit the director of Public Prosecutions from presenting the Applicant or continuing the prosecution of the applicant in Nairobi Chief Magistrate Criminal Case No. 1150 of 2009.

2. An order of prohibition do issue to prohibit the Nairobi Chief Magistrate, Milimani Courts from hearing or in any way dealing with Nairobi Chief Magistrate Criminal Case No. 1150 of 2009.

3. The costs of the application be provided for.

Applicants' Case

2. The facts of the case, according to the Applicant, who described himself as a former employee of Kenya Commercial Bank Limited (hereinafter referred to as "the Bank") where his last position was Head of Forex Centre which was in the Operations and Information Technology division thereof and his duties included overall management of the Forex Centre. According to the applicant, the Forex Centre dealt with processing of all foreign trade transactions and under it were swift and trade services. He explained that trade services dealt specifically with Letters of Credit for imports and exports, guarantees in respect of local and foreign trade and clean collections i.e. foreign currency denominated cheques.

3. The applicant averred that the bank had a system of operations that was as follows:-

i. The customer would first lodge a request for discounting of invoices through the relationship Manager.

ii. The Relationship Manager would ascertain the authenticity of the documents supporting the request together with the supporting documents and forward to the Forex Centre with instructions to make payment.

iii. The manager at the Forex Centre would then confirm if all approvals had been granted and hand over instructions to make payment.

iv. The clerk would then process the payment and pass over the documents to the Section Head to verify payment.

v. The Section Head would then forward the same to the manager to authorize payments.

4. It was further disclosed that the above was the process followed in the payments which had to originate from the corporate division through their corporate relationship manager then to the Forex Centre.

5. According to the applicant, in or around May 2008, **Mr. Tony Githuka**, then Director IT Department and **Paul Tikani** who was head of Operations via a verbal request, told him that the Deputy Chief Executive Officer, **Mr. Peter Munyiri**, wanted a manager from the applicant's department to go and head Foreign Trade Department Kenya Commercial Bank, Dar-es-Salam in Tanzania which and they agreed on the applicant's deputy, **Mr. Georfrey Mburu**, to be the one to be posted to Dar-es-Salam. **Mr. Githuku** asked the applicant to re-organize the department so that operations could continue to run smoothly despite the absence of **Mr. Mburu** and the applicant called the personnel in his department and it was agreed that **Mr. Peter Muthungu** be appointed to act in place of **Mr. Mburu** and that they divide tasks between the applicant and him. **Mr. Muthungu** was tasked to deal with letter of credit documentary collections and structured trade finance, under which invoice discount was carried out.

6. It was averred by the applicant that on or about the 10th December, 2008 the director of credit, **Mr. Wilfred Sang**, called to make an inquiry in respect of payments that had been made by the department to a customer known as Triton Petroleum Company Limited totalling to $12 Million, which payments had been authorized by the applicant's deputy, **Peter Muthungu**, but the applicant only came to learn of them when the director of credit made the enquiry. The applicant explained that ideally, the invoices totalling

$12 Million would have ordinarily been referred to him by the manager but this was never done and he later came to have sight of a payments that were made totalling $ 12,241,873.85 in respect to which **Mr. Peter Muthungu** authorized payments on the strength of approvals from **Mr. Patrick Ngare** who was the Relationship Manager and **Mr. Samson Waka** who was Senior Manager of Trade Finance.

7. It was the applicant's case that he never participated in any way in the payment or the processing of these payments and was not aware of these payments being made even though he later came to see emails on 3 of them that were purportedly copied to him alongside other managers for information.

8. It was averred that sometimes on or about the 16th January, 2009 he was summoned by **Chief Inspector Ali Bure Samatar** of Economic and Commercial Crime Unit to record a statement over the above issues and that the inquiry was to the effect that he jointly with others stole $ 12,247,873 from Kenya Commercial Bank between 31st July, 2008 and 1st August, 2008 at KCB Moi Avenue. The applicant deposed that he made a statement and on 16th June, 2009 he was presented before the Court and was charged in Magistrate Criminal Case No. 1150 of 2009 with the offences of Conspiracy to defraud to section 317 of the ***Penal Code***, Stealing contrary to section 275 of the penal code and failing to prevent a felony contrary to Section 392 of the ***Penal Code***. Upon being served with the statements of the witnesses and supporting documents, he realised that there was no evidence therein implicating him in any way as alleged in the charges that he intended to defraud Kenya Commercial Bank by fraudulently discounting Triton Petroleum Limited's named invoices or that he breached the limit approved or conditions imposed by the board of directors of Kenya Commercial Bank. Further there was no evidence in the witness statements or documents presented that alleged or laid blame on him for stealing USD 12,241,873.90 or that he failed to use all reasonable means to prevent the same. According to him there was no positive averment or any accusation by any of the witnesses or any document whatsoever linking him to the payment of the sum of USD 12,247,873 or any other sum thereof.

9. The applicant asserted contended that he was not implicated in the matter of the said payment and that the complainant, Kenya Commercial Bank did write to the Director of Public Prosecution on several occasions requesting that the charges against him be dropped but the said director has not done so.

10. It was the applicant's case that the requirement that he continues appearing before the criminal court to answer the charges was unreasonable and amounted to abuse of prosecutorial powers. In his view, the charges against him should be terminated as his role in the whole case should be as a witness and not an accused person.

1st Respondents' Case

11. In opposing the application the 1st Respondent filed the following grounds of opposition:

1. The application is misconceived, frivolous, vexatious, incompetent, improperly before court and an open abuse of the court process.

2. The application has not met the prerequisite requirements for the grant of the orders sought.

3. The matters raised by the applicant in the pleadings filed herein form the basis of his defences which should be raised before the trial court and as such cannot be raised before the High Court I n the manner proposes herein.

4. No sufficient grounds have been advanced to warrant the grant of the orders sought.

5. The Applicant is guilty of material non-disclosure.

6. The laws of Kenya provide essential safeguards for a fair trial which is also entrenched in the Constitution of Kenya 2010. It has not been demonstrate that the applicant will not be

accorded a fair trial before the subordinate court to warrant the granting of the orders sought.

7. An order of prohibition cannot issue against an action or decision which has been taken or made in execution and discharge of the legal mandate of the Director of Public Prosecutions.

8. An order of prohibition can only issue to forbid a tribunal or statutory body to continue proceedings in excess of its jurisdiction of in contravention of the laws of the land. In making the decision to prosecute the applicant herein, the 1st respondent was acting in exercise of the powers conferred upon him by the constitution Kenya 2010. In the circumstances, the order of prohibition is not available to the ex parte applicant.

9. The institution of criminal proceedings against the applicant cannot be constructed as an abuse of the process, discriminatory or actuated by malice or ulterior motives.

10. The decision by the Director of Public Prosecutions to prosecute the applicant herein was based on the sufficiency of evidence gathered against him.

11. Under Article 157(10) of the Constitution of Kenya 2010, the Director of Public Prosecutions does 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, cannot be under the direction or control of any person or authority. The fact that the complainant has indicated it has no complainant against the ex parte applicant is of no consequence.

12. The office of the Director of Public Prosecutions is an independent office within the meaning ascribed under Articles 157 and 248(1) of the Constitution of Kenya 2010.

13. As stated by the Court of Appeal in Kenya National Examination Council and the Republic, Nairobi Civil Appeal No. 266 of 1996 at page 12, "an order of prohibition is powerless against a decision which has already been made before such an order is issued."

14. No evidence has been adduced to demonstrate that the decision to prosecute the applicant is irrational, unreasonable and malicious.

15. On the subordinate court can make a determination on the culpability of the applicant for the preferred offences.

16. The High Court has no jurisdiction to determine whether or not the applicants are guilty or not.

17. The High Court has no jurisdiction to determine whether or not any criminal offence was committed by the ex parte applicant in relation to the matters the subject of the pleadings herein.

2nd Respondent's Case

12. The 2nd Respondent similarly relied on the following grounds of opposition:

1. The application is misconceived, frivolous, vexatious, incompetent, improperly before court and an open abuse of the court process.

2. The application has not met the prerequisite requirements for the grant of the orders sought.

3. The matters raised by the applicant in the pleadings filed herein form the basis of his

defences which should be raised before the trial court and as such cannot be raised before the High Court I n the manner proposes herein.

4. No sufficient grounds have been advanced to warrant the grant of the orders sought.

5. The Applicant is guilty of material non-disclosure.

6. The laws of Kenya provide essential safeguards for a fair trial which is also entrenched in the Constitution of Kenya 2010. It has not been demonstrate that the applicant will not be accorded a fair trial before the subordinate court to warrant the granting of the orders sought.

7. An order of prohibition cannot issue against an action or decision which has been taken or made in execution and discharge of the legal mandate of the Director of Public Prosecutions.

8. An order of prohibition can only issue to forbid a tribunal or statutory body to continue proceedings in excess of its jurisdiction of in contravention of the laws of the land. In making the decision to prosecute the applicant herein, the 1st respondent was acting in exercise of the powers conferred upon him by the constitution Kenya 2010. In the circumstances, the order of prohibition is not available to the ex parte applicant.

9. The institution of criminal proceedings against the applicant cannot be constructed as an abuse of the process, discriminatory or actuated by malice or ulterior motives.

10. The decision by the Director of Public Prosecutions to prosecute the applicant herein was based on the sufficiency of evidence gathered against him.

11. Under Article 157(10) of the Constitution of Kenya 2010, the Director of Public Prosecutions does 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, cannot be under the direction or control of any person or authority. The fact that the complainant has indicated it has no complainant against the ex parte applicant is of no consequence.

12. The office of the Director of Public Prosecutions is an independent office within the meaning ascribed under Articles 157 and 248(1) of the Constitution of Kenya 2010.

13. As stated by the Court of Appeal in Kenya National Examination Council and the Republic, Nairobi Civil Appeal No. 266 of 1996 at page 12, "an order of prohibition is powerless against a decision which has already been made before such an order is issued."

14. No evidence has been adduced to demonstrate that the decision to prosecute the applicant is irrational, unreasonable and malicious.

15. On the subordinate court can make a determination on the culpability of the applicant for the preferred offences.

16. The High Court has no jurisdiction to determine whether or not the applicants are guilty or not.

17. The High Court has no jurisdiction to determine whether or not any criminal offence was committed by the ex parte applicant in relation to the matters the subject of the pleadings herein.

Determination

13. I have considered the application.

14. It is, in my respectful view, important to understand the principles which guide the grant of the orders in the nature sought herein before applying the same to the circumstances of this case. Several decisions have been handed down which in my view correctly set out the law relating to circumstances in which the Court would be entitled to prohibit, bring to a halt or quash criminal proceedings. It is however always important to remember 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. The Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution and that the mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review. This is so because judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.

15. 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."**

16. 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."**

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

> **"The Court has power and indeed the duty to prohibit the continuation of the criminal**

prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far that which the courts indeed the entire system is constitutionally mandated to administer... In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute. It is further alleged that the criminal prosecution is an abuse of the court process epitomised by what is termed as selective prosecution by the Attorney General. It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been be argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law...In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed...There is nothing which can stop the from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made...Under section 77(5) of the Constitution it is a constitutional right that no person who has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of the offence. What is clear from this constitutional right is that it prevents the re-prosecution of a criminal case, which has been determined in one way or another...A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest

would be best served by the staying of the prosecution.....In the instant case there is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even of manipulation of court process so as to seriously deprecate the likelihood that the applicants might not get a fair trial as provided under section 77 of the Constitution...There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an "abuse of process", is a "manipulation", "amounts to selective prosecution" or such other processes, or even supposing that the applicants might not get affair 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."

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

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

19. Whereas Article 157(10) of the Constitution provides that the Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority, Article 157(11) provides:

In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

20. Apart from that, section 4 of the ***Office of Public Prosecutions Act***, No. 2 of 2013 provides:

In fulfilling its mandate, the Office shall be guided by the Constitution and the following fundamental principles—

(a) the diversity of the people of Kenya;

(b) impartiality and gender equity;

(c) the rules of natural justice;

(d) promotion of public confidence in the integrity of the Office;

(e) the need to discharge the functions of the Office on behalf of the people of Kenya;

(f) the need to serve the cause of justice, prevent abuse of the legal process and public interest;

(g) protection of the sovereignty of the people;

(h) secure the observance of democratic values and principles; and

(i) promotion of constitutionalism.

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

> **"the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system….. In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of *Domnic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003* is that interpretation of the Constitution has to be progressive and in the words of Prof M V Plyee in his book, *Constitution of the World*: "The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time…….. In our role as "sentinels" of fundamental rights and freedoms of the citizen which are founded on laisez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent "sentinels" of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right."**

22. Where therefore it is clear that the discretion is being exercised with a view to achieving certain extraneous goals other than those legally recognised under the Constitution and the ***Office of the Director of Public Prosecutions Act***, that would, in my view, constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion. As was held by **Wendoh, J** in **Koinange vs. Attorney General and Others [2007] 2 EA 256**:

> **"Under section 26 of the Constitution the Attorney General has unfettered discretion to undertake investigations and prosecute. The Attorney Generals inherent powers to investigate and prosecute may be exercised through other offices in accordance with the Constitution or any other law. But, if the Attorney General exercises that power in breach of the constitutional provisions or any other law by acting maliciously, capriciously, abusing the court process or contrary to public policy the Court would intervene under section 123(8) of the Constitution and in considering what constitutes an abuse of the court process the following principles are relevant: (i) Whether the criminal prosecution is instituted for a purpose other than the purpose for which it is properly designed; (ii) Whether the person**

against whom the criminal proceedings are commenced has been deprived of his fundamental right of a fair trial envisaged in the provisions of the constitution; (iii) Whether the prosecution is against public policy."

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

24. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the DPP to investigate and prosecute ought to be interfered with. It is clear that in exercising their discretion to charge a person both the police and the DPP's office must take into account and must exercise the discretion on the evidence of sound legal principles. As was held by **Ojwang, J** (as he then was) in **Nairobi HCCC No. 1729 of 2001 – Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another**:

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

25. Therefore the police are expected to be professional in the conduct of their investigations and ought not to be driven by malice or other collateral considerations. Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution. A prosecution can either be mounted based on an offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officers or agencies. However, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. I say ordinarily because the mere fact that the version of one of the parties is not considered is not necessarily fatal to the prosecution. However, whereas it is alleged in this case exculpatory evidence is presented to the police in the course of investigation and for some reasons unknown to them they deliberately decide to ignore the same one can only conclude that the police are driven by collateral considerations other than genuine vindication of the criminal judicial process. Neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of malice and hence abuse of discretion and power.

26. As the Respondents did not swear any affidavit, the factual averments of the applicant have not been controverted and in absence any other evidence, this Court has no option but to treat the applicant's averments as disclosing the true factual position.

27. In **Githunguri vs. Republic [1986] KLR 1** at page 18 and 19 a three bench High Court constituted of Ag. Chief **Justice Madan** and **Justices Aganyanya** and **Gicheru** expressed themselves as follows:

"But from early times… the Court had inherently its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing – the Court had the right to protect itself against such an abuse…The power seemed to be inherent in the jurisdiction of every Court of Justice to protect itself from the abuse of its own procedure...every Court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the Court…Mr Chunga argued that to grant the application would be tantamount to curtailing or interfering with the powers of the Attorney-General under section 26 of the Constitution. This argument of his compels us to say that he kept freewheeling for a long time before us because perhaps he did not understand the real purport of the application. No one has made any challenge to the powers of the Attorney-General, nor would any one succeed if he were to say that the Attorney-General's powers under section 26 can be interfered with. What this application is questioning is the mode (emphasis ours) of exercising those powers…No one will succeed in convincing us that the Court does not have inherent powers to exercise supervisory jurisdiction over tribunals and individuals acting in administrative or quasi-judicial capacity…A prosecution is not to be made good by what it turns up. It is good or bad when it starts. The long and short of it is that in our opinion it is not right to prosecute the applicant as proposed."

28. Similarly, in **Mohammed Gulam Hussein Fazal Karmali & Another vs. Chief Magistrate's Court Nairobi & Another [2006] eKLR** where **Nyamu, J** examined the policy considerations for halting criminal proceedings, noting that the court has two fundamental policy considerations to take into account which were enunciated in the case of **M. Devao vs. Department of Labour (190) in sur 464** at 481 as:

"The first is that the public interests in the administration of justice require that the court protects its ability to function as a court of law, by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court processes may lend themselves to oppression and injustice…the court grants a permanent stay in order to prevent the criminal process from being used for purposes alien to the administration of criminal justice under the law. It may intervene in this way if it concludes that the court processes are being employed for ulterior purposes or in such a way as to cause improper vexation and oppression."

29. I also associate myself with the decision in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** that:

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

30. In this case the applicant avers that the complainant in the criminal case, the Bank, informed the 1st respondent to drop the charges against the applicant but due to unknown reasons the 1st Respondent decided to soldier on with the same. This damning averment has not been controverted. As was held in **R. vs. The Judicial Commission into the Goldenberg Affair and 2 Others exp Saitoti HC Misc Appl. 102 of 2006**:

"It is not good for the DPP to argue that the Applicant should be arrested and charged so that he can raise whatever defences he has in a trial court. The Court has a constitutional duty to ensure that a flawed threatened trial is stopped in its tracks if it is likely to violate any of the applicants' fundamental rights."

31. Having considered the material on record, it is clear that the 1st Respondent has not laid any basis

upon which it can be concluded by this Court that the 1st Respondent has any prospects of successfully prosecuting the applicant.

32. In the premises, I find merit in the Motion dated 3rd July, 2015, and grant the following orders:

> **1. An order of prohibition prohibiting the Director of Public Prosecutions from presenting the Applicant or continuing the prosecution of the applicant in Nairobi Chief Magistrate Criminal Case No. 1150 of 2009.**
>
> **2. An order of prohibition prohibiting the Nairobi Chief Magistrate, Milimani Courts from hearing or in any way dealing with Nairobi Chief Magistrate Criminal Case No. 1150 of 2009.**

33. The costs of this application are awarded to the applicant against the 1st Respondent.

34. Orders accordingly.

Dated at Nairobi this 31st day of August, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Wangokho for Mr Mungu for the Applicant

Cc Mwangi