



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION
MISC. CIVIL APPLICATION NO. 320 OF 2015

IN THE MATTER OF: AN APPLICATION BY NAIROBI HOUSE LIMITED FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: KIAMBU CHIEF MAGISTRATE’S COURT MISCELLANEOUS CRIMINAL APPLICATION NO. 263 OF 2015; REPUBLIC-VS- NAIROBI HOUSE LIMITED AND DIAMOND TRUST BANK OF KENYA LIMITED

AND

IN THE MATTER OF: ALL THAT PARCEL OF LAND KNOWN AS LAND REFERENCE NUMBER 6863/75 I.R 31722 LAVINGTON, NAIROBI BEING THE PROPERTY OF NAIROBI HOUSE LIMITED

=BETWEEN=

NAIROBI HOUSE LIMITED.....APPLICANT

=AND=

THE CHIEF MAGISTRATE,

KIAMBU LAW COURTS.....1ST RESPONDENT

THE DIRECTOR OF CRIMINAL

INVESTIGATIONS DEPARTMENT.....2ND RESPONDENT

DIAMOND TRUST BANK (KENYA) LIMITED.....INTERESTED PARTY

JUDGEMENT

1. The applicant herein, **Nairobi House Limited**, by its Notice of Motion dated 1st October, 2015, seeks

the following Orders:

1. **THAT** an order of Certiorari do issue to remove to this Honourable Court for the purposes of being quashed the Order issued on 8th September 2015 by the 1st Respondent in **Kiambu Chief Magistrate's Court Miscellaneous Criminal Application No. 263 of 2015; Republic vs. Nairobi House Limited and Diamond Trust Bank of Kenya Limited** and all proceedings related thereto.
2. **THAT** an order of Certiorari do issue to remove to this Honourable Court for the purposes of being quashed the decision of the 2nd Respondent to investigate in any manner whatsoever and particularly carry out a forensic examination on the Applicant's title known as LR No. 6863/75 I.R 31722 Lavington, Nairobi.
3. **THAT** an order of Prohibition do issue Prohibiting the 2nd Respondent by from carrying out any investigations in respect of the Applicant's title known as LR No. 6863/75 I.R 31722 Lavington, Nairobi in **Kiambu Chief Magistrate's Court Miscellaneous Criminal Application No. 263 of 2015; Republic vs. Nairobi House Limited and Diamond Trust Bank of Kenya Limited** or in any other criminal proceedings whatsoever in so far as the same relates to the complaint made to the 2nd Respondent by the Applicant regarding a forged title on the said property being LR. No. 209/7577.
4. **THAT** an order of Prohibition do issue restraining the 1st Respondent or any other Magistrate in the Republic of Kenya or elsewhere from continuing with the hearing, conduct and/or issuing any orders in **Kiambu Chief Magistrate's Court Miscellaneous Criminal Application No. 263 of 2015; Republic vs. Nairobi House Limited and Diamond Trust Bank of Kenya Limited** in any manner whatsoever or any variation thereof.
5. **THAT** this Honourable Court be pleased to issue such further and other reliefs as it may deem just and expedient to grant in the circumstances of this Application.
6. **THAT** the costs for and incidental to this Application be provided for.

Applicant's Case

2. According to the applicants, sometime in a year 2005, it lodged a complainant against one **Lennah Catherine Koinange** for forgery of title documents in respect of the Applicant's parcel of land known as LR No. 6863/75 I.R 31722 Lavington, Nairobi measuring approximately seven (7) acres and valued at **KShs. 2.4 billion (2,400,000,000.00)** which forged title was known as LR No. 209/7577 and purported to be on the same location as that of the Applicant.

3. Pursuant thereto, the 2nd Respondent commenced investigations under Criminal Investigations Department File No. **CID/IB/ECCU/SEC/2/3/1VOL.II/116** and at the conclusion of the investigations, recommended that the said **Lennah Catherine Koinange** arraigned in Court and charged accordingly. A charge sheet was subsequently drawn in that respect and the said **Lennah Catherine Koinange** was to appear in Court in **Kibera Criminal Case No. 121/746/05; Republic vs. Lennah Catherine Koinange** and summons to appear were accordingly issued by the 2nd Respondent to the said accused person. However before a plea could be taken in **Kibera Criminal Case No. 121/746/05; Republic vs. Lennah Catherine Koinange**, the said **Lennah Catherine Koinange** filed a Constitutional Petition in the High Court being **Nairobi HCCC Misc. Civil Appli. No. 1492 of 2005 (OS) Lennah Catherine Koinange vs. The Attorney General, Director of C.I.D and Nairobi House Limited** challenging the said criminal proceedings and the entire investigations and at the first instance obtained *ex-parte* orders staying the criminal proceedings pending hearing and determination of the Petition. The Petition was finally fully argued and the same was dismissed on 23rd February 2007 by the **Honourable Lady Justice Roselyne Wendoh** who directed the said **Lennah Catherine Koinange** to stand trial in the said criminal case thus paving the way for the said criminal proceedings being **Kibera Criminal Case No. 121/746/05; Republic**

vs. Lennah Catherine Koinange to proceed as earlier intended by the 2nd Respondent. However, the said criminal proceedings never took off despite several reminders to the 2nd Respondent by the Applicant and the same have never been activated by the 2nd Respondent to date for unknown reasons, according to the applicant.

4. It was averred that on 30th March 2015, Nairobi City County published a Notice in the Daily Nation in respect of LR No. 6863/75 I.R 31722 Lavington, Nairobi and purported to discredit the Applicant's title which had been sanctified by the High Court of Kenya at Nairobi in various Court cases in which various Rulings were delivered and Orders issued in favour of the Applicant. Being aware that the said advertisement was a scheme by some unscrupulous individuals to discredit and interfere with its title to their advantage and to its detriment, the Applicant responded to Nairobi City County in respect of the said Notice on 2nd April 2005 and further lodged a complaint with the Director of Public Prosecution regarding the stalling of the said Criminal case being **Kibera Criminal Case No. 121/746/05; Republic vs. Lennah Catherine Koinange** for over seven (7) years and demanded action on the part of the 2nd Respondent. Subsequently, the Director of Public Prosecutions in his letter of 15th April 2015 to the 2nd Respondent requested the 2nd Respondent to urgently look into the complaint and forward the relevant file for perusal and advise to the Director of Public Prosecutions.

5. It was averred that since it was the forged title by **Lennah Catherine Koinange** that was under investigations and which relates to the said **Kibera Criminal Case No. 121/746/05; Republic vs. Lennah Catherine Koinange**, the Applicant's understanding and contemplation of the Director of Public Prosecutions request to the 2nd Respondent in the letter of 15th April 2015 was on investigation of LR. No. 209/7577 which was the subject matter of the said criminal proceedings and not the Applicant's title known as LR No. 6863/75 I.R 31722 Lavington, Nairobi which has been examined several times and upheld by Courts of competent jurisdiction. In any event, the Applicant is the complainant in **Kibera Criminal Case No. 121/746/05; Republic vs. Lennah Catherine Koinange** and therefore, there is no justification whatsoever to purport to investigate its title. It is manifestly clear, according to the applicant that the 2nd Respondent has out stepped its mandate and is acting at the instance of other parties so as to collapse the already existing criminal case in the Kibera Law Court.

6. It was the applicant's case that to its dismay, and surprise, on 8th September 2015, the 1st Respondent issued an Order in **Kiambu Chief Magistrate's Court Miscellaneous Criminal Application No. 263 of 2015; Republic vs. Nairobi House Limited and Diamond Trust Bank of Kenya Limited** directing the Interested Party to release the Applicant's title known as LR No. 6863/75 I.R 31722 Lavington, Nairobi to the 2nd Respondent for purposes of forensic examination alleging that the Applicant's title was fraudulently obtained which orders were issued at the instance of an Application by the 2nd Respondent who relied heavily on the letter from the Director of Public Prosecutions in order to obtain the said orders while concealing the most fundamental facts of the matter and thereby deliberately misleading the Chief Magistrate's Court at Kiambu by obtaining the said Order of 8th September 2015.

7. The applicant reiterated that the Order issued on 8th September, 2015 relate to the Applicant's title known as LR No. 6863/75 I.R 31722 Lavington, Nairobi in respect of which several cases have been heard and determined in the High Court of Kenya at Nairobi in favour of the Applicant and the said title sanctified in all respects and as such, the said Order undermines the integrity of the High Court Rulings and Orders and is meant to aid other parties on matters already determined by Courts of competent jurisdiction thereby abusing the criminal justice system. The applicant proceedings to particularise the said cases.

8. It was therefore the applicant's case that in view of the foregoing, it is manifestly clear that the order of 8th September 2015 in **Kiambu Chief Magistrate's Court Miscellaneous Criminal Application No. 263 of 2015; Republic vs. Nairobi House Limited and Diamond Trust Bank of Kenya Limited** has been issued in bad faith and is obviously against the spirit of the Rulings of the High Court aforesaid which is a clear indication of bias, irrationality, unreasonableness, oppressiveness and an abuse of the criminal justice system which decision ought to quashed by this Honourable Court. Further to the foregoing, the

charges and criminal proceedings against the Applicant in **Kiambu Chief Magistrate's Court Miscellaneous Criminal Application No. 263 of 2015; Republic vs. Nairobi House Limited and Diamond Trust Bank of Kenya Limited** have been instituted and/or maintained for extraneous and ulterior purposes other than the sanctification of the criminal justice system. Indeed, the said orders and proceedings in the criminal case aforesaid are meant to undermine the integrity, reputation, status and standing of the said High Court Rulings and Orders aforesaid for ulterior motives and purposes and specifically to aid parties that did not find favour in the many High Court cases aforesaid so as to lay a claim on the Applicant's property and also, to circumvent the pending criminal case against Lennah Catherine Koinange being **Kibera Criminal Case No. 121/746/05; Republic vs. Lennah Catherine Koinange**, so that the proceedings do not take off and thereby permanently stall, contrary to law.

9. It was further contended that the proceedings and orders issued in **Kiambu Chief Magistrate's Court Miscellaneous Criminal Application No. 263 of 2015; Republic vs. Nairobi House Limited and Diamond Trust Bank of Kenya Limited** have been instituted and/or maintained in bad faith, are unfair, biased, oppressive, irrational, unreasonable, discriminatory and the same amount to an abuse of the criminal justice system and are tailored to steal a march on the Applicant in favour of the other parties keen to illegally acquire the Applicant's parcel of land aforesaid through unorthodox means despite the many High Court Orders and Rulings aforesaid which are in full force and effect.

10. It was the applicant's case that the 1st Respondent misdirected itself by taking into account wholly irrelevant and extraneous considerations thereby arriving at an unlawful and legally untenable decision on 8th September 2015 as against the Applicant's title to property contrary to the laid down provisions of law and the said decision ought to be quashed by this Honourable Court forthwith. In addition, the 2nd Respondent acted capriciously, maliciously and in total disregard of the laid down provisions of the law by obtaining the said Order issued on 8th September 2015 against the Applicant's title by deliberately concealing material facts while being well aware that the Applicant is the complainant regarding a different and separate forged title on its parcel of land being LR. No. 209/7577 which title is a forged document. As such, it is only just, fair and in the interest of justice that the Order issued on 8th September 2015 and all the proceedings in **Kiambu Chief Magistrate's Court Miscellaneous Criminal Application No. 263 of 2015; Republic vs. Nairobi House Limited and Diamond Trust Bank of Kenya Limited** be quashed by this Honourable Court and prohibitory orders issued accordingly.

11. It was the applicant's apprehension that unless the orders sought are granted, the 2nd Respondent will proceed to implement the Orders issued by the 1st Respondent without regard to the Applicant's rights to the subject title hence the wider interest of justice will be best served if the orders sought herein are granted.

12. It was the applicant's plea that no prejudice will be suffered by the Respondents if the orders sought herein are granted and that in fact the balance of convenience tilts in favour of granting the orders sought.

13. It was submitted on behalf of the applicant that in view of the history of the dispute concerning the Applicant's parcel of land as set out hereinabove and circumstances surrounding the Applicant's title and parcel of land and in view of the fact that a copy of the same title is now missing at the lands registry as indicated by the Registrar of Lands on 31st December 2014, the Applicant is justifiably apprehensive that the disguised forensic investigations are aimed in assisting adverse parties to tamper with the said title and thereby gain an unfair advantage over the Applicant on its property. The applicant urged the Court to take note that the said forensic examination can only be done by the 2nd Respondent in its headquarters using equipment which cannot be accessed by the Applicant during the exercise thereby exposing the Applicant to grave danger of having the title interfered with. In any event, and if at all the 2nd Respondent is genuine in its intended investigations, it was submitted that there are enough records at the lands office and any investigations on the Applicant's parcel of land should be carried out at the lands office to ascertain the authenticity or otherwise of the Applicant's title which in any event was extensively done in 2005 by the 2nd Respondent.

14. The applicant therefore submitted that the discretion to investigate is being exercised with a view to achieve certain extraneous goals. In support of its submissions, the applicant relied on **Republic vs. Director of Criminal Investigation Department & 4 Others Ex-parte Oduor Henry John (2015) KLR, Koinange vs. Attorney General and Others [2007] 2 EA 256 Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) {2008} 2 EA 323, Republic v Inspector General of Police & another Exparte Patrick Macharia Nderitu [2015] eKLR , Republic v Director of Public Prosecutions & 2 others ex-parte Joseph Gathuku Kamuiru & Another [2014] eKLR Ndarua V. R. [2002] 1EA 205 and Kuria & 3 Others vs.. Attorney General [2002] 2KLR 69** in its submission that the 2nd Respondent's decision to carry out a forensic examination is tainted with bad faith, is irrational, oppressive, vexatious and aimed at achieving ulterior goals and purposes. Based on the foregoing, the applicant urged this Court to allow the Applicant's Application.

1st Respondent's Case

15. In opposition to the application the 1st Respondent filed the following grounds of opposition:

1. THAT the application herein is unmerited and therefore an abuse of the due processes of the Court.

2. THAT the application herein is intended to curtail the statutory obligations and duties of the Respondents.

3. THAT the application is premised on explanations that can and ought to be made before the requisitioning officer and this honourable Court would be usurping the statutory mandate of the said officer if it were to take up that role as proposed by the ex parte applicant.

4. THAT the ex parte applicant has not demonstrated any prejudice that they will suffer by honouring the requisition that its title be investigated.

5. THAT the application in essence seeks that this Honourable Court directs a public officer to exercise his/her statutory discretion in a particular manner hence usurp the said officer's authority.

6. THAT the application is premised on a presumptuous notion that ex parte applicant has foreknowledge of what the requisitioning officer is looking for in terms of evidence.

7. THAT the application herein should be dismissed with costs to the respondents.

16. It was submitted on behalf of the 1st Respondent that any unlawful act is a matter of evidence and that the Police and the Office of the Director of Public Prosecutions have special powers of investigations and if satisfied that there are reasonable grounds for suspecting that an offence has been committed by the person investigated, charge the person concerned.

17. According to the 1st Respondent, matters of forgery are complex and require investigations and where no offence is disclosed the title in issue will be returned to the applicant. It was the 1st Respondent's case that the applicant herein had not proved that there exist grounds for the grant of the orders sought since the applicant had not shown how it stood to be prejudiced if the title is surrendered for forensic investigation.

2nd Respondent's Case

18. On the part of the 2nd Respondent, it was averred that the Director of Public Prosecution's intention was/is to have the matter exhaustively investigated impartially and avoid skewed investigations and therefore the DPP could not have directed investigations on Land reference 209/7577 leaving LR

19. It was averred that Kibera Criminal Case NO. 121/746/05; Republic vs Lenna Koinange never took off and there is no legal justification why further investigations cannot be done to establish how the title held by the applicant was acquired, information that the applicant deliberately failed to provide, for reasons only known to them during the initial investigations. It was disclosed that the former commissioner of land, **Mr. J.R. Njenga**, who is shown as having signed page two of the subject title No. IR 31722 for LR 6863/75 denied having signed the said title hence the reason why his signature on the title should be subjected to forensic examination. Further, two former tenants of the subject parcel of land indicated that they have lived in the same land since 1970s and that the applicant was not their tenant but only came to evict them in 2005 claiming ownership. In addition, the Director of Survey confirmed that LR 6863/75 ceased to exist on record after LR No. 209/7577 was created specifically to accommodate public amenities that include road thereby reducing the original acreage from 3.14 Ha to the current 1.9 Ha as indicated on LR 209.7577 and still, deed plan No. 91751 was a “transfer and surrender” to the government of Kenya and not for issuance of any title or registration.

20. It was deposed that a further statement from the Registrar of Titles, **George Gachihi**, indicated that deed plan No. 91751 for LR 6863/ is shown as “Transfer and surrender” and therefore the deed plan is not eligible to register any kind of a title. Annexed and marked GWK 4 is a copy of a statement of **George Gachihi**.

21. The 2nd Respondent therefore admitted that it proceeded to obtain an order to retrieve the subject title document from the interested party in the chief magistrate Kiambu Misc. application No. 263 of 2015 for the purpose of forensic examination after it emerged that the title was alleged to have been issued through a forged deed plan No. 91751, a deed plan that was clearly marked “Transfer and surrender”. The 2nd respondent averred that Title Number IR 31722 for land reference 6863/75 has never been subjected to any kind of investigation including the intended forensic examination and therefore it is premature for the applicant to claim its sanctity, further the same will not undermine the integrity of the High court rulings and alleged orders. The 2nd respondent contended that it was not party to the proceedings alluded to and therefore not privy to the issues highlighted but never the less none of the said cases seemed to have dealt with issues of forgery on title Ni.IR 31722 which the 2nd respondent seeks to undertake investigations on.

22. It therefore was of the view that the order to retrieve the subject title from the interested party in Miscellaneous Criminal Application No. 263 of 2015; Republic –vs- Nairobi House Limited and Diamond Trust Bank of Kenya was sought and issued in utmost good faith with the sole intention of fairly serving the interest of justice through honest investigations. It denied that the said proceedings were instituted for extraneous and ulterior purposes but with sincere intention to serve justice and there is no intention of circumventing justice but rather to fulfil the interest of the same which seems to have been ignored during the initial investigations where the applicant’s title document was never subjected to both documentary and forensic examination.

23. The 2nd Respondent therefore urged that the prayers sought herein should not be granted as the same would deny it statutory and constitutional mandate to investigate a pure criminal matter to its logical conclusion.

24. It was submitted on behalf of the 2nd Respondent that section 24 of the **Police Service Act** (Cap.84) enumerates the functions of the Police Service, amongst which are investigation of crimes and enforcement of all laws and regulations with which it is charged. To the 2nd Respondent, when the police receive any complaint of a criminal nature they are mandated by statute to investigate and it would fail in its mandate if it fails to investigate especially upon receipt of a complaint. However, the making of a complaint is not the standard basis for the Police Service to launch a complaint. The Cabinet Secretary and the Director of Public Prosecutions can also direct the police to investigate a matter.

25. According to the 2nd Respondent, there are clearly conflicting statements from officials from the Ministry of Lands and Survey Department hence the more reason why the title should be investigated and

settled. It is in furtherance of these investigations that the 2nd respondent sought to have the title held by the petitioner to be subjected to forensic investigation.

26. It was reiterated that the applicant had not demonstrated that the investigations are being carried out in bad faith or that they have been denied the opportunity to state their case regarding the manner in which they acquired the title. In any case the investigations are still on-going.

27. It was contended that the applicant clearly failed to demonstrate that the second respondent acted without jurisdiction and that the investigations are for extraneous purposes. To the contrary, the 2nd respondent demonstrated that there was a complaint made and therefore reasonable cause to investigate the title in question.

28. The Court was urged to find that the 2nd respondent has the duty and mandate to investigate criminal complaints, that the investigations seek to establish the authenticity of the title held by the applicant (no one has yet accused the applicant of any wrong) and that no malice or ulterior motive is attached to the investigations, and that the courts have not determined the issue of ownership of the title in question. It therefore urged the Court to dismiss the application with costs.

Interested Party's Case

29. The interested party herein (hereinafter referred to as "the Bank") in support of the application averred that sometime in the 2003, it advanced a financial facility of Kshs 115,000,000/= to a company known as Transroad (K) Limited and in return for the facility, Nairobi House Limited offered Land Reference No. 6863/97 I.R 31722 Lavington, Nairobi as security. The Bank carefully carried out its due diligence on LR No. 6863/75, and I.R 31722 which title was issued on 18/1/1977 to Nairobi House Limited and having been satisfied that such a property and title existed duly proceeded to accept the same as security for the facilities being advanced.

30. It was disclosed that through a charge dated 25/9/2003, the bank on 21/11/2003 registered the said Charge on LR No. 683/75 I.R 31722 Lavington, Nairobi and proceeded to advance a further financial facility of Kshs 116,000,000/= to Transroad (K) Limited and once again LR No. 6863/75 I.R 31722 Lavington, Nairobi was used as security through a Further Charge dated 8/7/2004 registered on 26/10/2004. The Bank averred that since the year 2003, it has been in possession of the original title to LR No. 6863/75 which apart from the registered charges is the only form of protection that the bank has in respect to the huge sums of monies advanced and it is therefore apprehensive to release the original title to anybody. This apprehension is further capitulated by the fact that the deed file and the parcel file for I.R. 31722 LR No. 6863/75 have been strangely missing from the Lands Registry In Nairobi since the year 2011 which has prevented the bank from registering and further charges on the property. Of further concern is the manner in which the purported investigations being conducted by the 2nd Respondent clearly ignore the pleadings in Nairobi HCCC Misc. Civil Application No. 1492 of 2005 Lennah Catherine Koinange –vs- Attorney General & 2 Others wherein the 2nd Respondent's own Investigating Officer, Mr. Daniel Kirorei through a replying affidavit sworn on 1/11/2005 confirms that L.R. No. 209/7577 I.R No. 94498 is a forgery. It was contended that so far the 2nd respondent has shown no attempts to this honourable court what investigations it has carried out on L.R. No. 209/7577 (I.R. 94498) or it intends to carry out to ascertain the genuineness in the complainants made by the Nairobi County, yet the 2nd respondent avers that the investigations are intended to establish the whole truth regarding the ownership and the real reference plot number.

31. The Bank's view was that the potential bias by the 2nd respondent and the arbitrary manner in which investigations are being carried out contrary to the evidence that has been presented in the several suits quoted by the ex parte applicant is a major concern to the Bank's legitimate expectations.

Determination

32. I have considered the application.

33. The applicant is in effect seeking an order barring the 2nd Respondent from conducting investigation with respect to its title of land on the ground that the applicant is the complainant in the subject criminal case which has been the subject of other civil matter in which the applicant contends substantial investigations were conducted hence there is no need to investigate the same again. According to the applicant, the order of the 1st Respondent in the subject criminal case permitting the 2nd Respondent to undertake forensic investigation is meant to undermine the integrity of the High Court Rulings and Orders and is meant to aid other parties on matters already determined by Courts of competent jurisdiction thereby abusing the criminal justice system.

34. According to the 2nd Respondent, the said investigations were meant to determine the issues the subject of the said criminal case and were not engineered to attain certain goals as alleged by the applicant.

35. Section 24 of the *National Police Service Act No 11 A of 2011* sets out functions of the Kenya Police Service as being the—

- (a) Provision of assistance to the public when in need;*
- (b) Maintenance of law and order;*
- (c) Preservation of peace;*
- (d) Protection of life and property;*
- (e) Investigation of crimes;*
- (f) Collection of criminal intelligence;*
- (g) Prevention and detection of crime;*
- (h) Apprehension of offenders;*
- (i) Enforcement of all laws and regulations with which it is charged; and*
- (j) Performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.*

36. The word “investigate” is defined in the *Black’s Law Dictionary 9th Edition* as: “*To inquire into a matter systematically; to make an official inquiry.*”

37. In *Republic vs. Chief Magistrate Milimani & another Ex-parte Tusker mattresses Ltd & 3 others [2013] eKLR* this Court expressed itself as follows:

“The Court must in such circumstances take care not to trespass into the jurisdiction of the investigators or the Court which may eventually be called upon to determine the issues hence the Court ought not to make determinations which may affect the investigations or the yet to be conducted trial. That this Court has power to quash impugned warrants cannot be doubted. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the police to investigate allegations of commission of a criminal offence ought to be interfered with. It is not enough to simply inform the Court that the intended trial is bound to fail or that the complaints constitute both criminal offence as well civil liability. The High Court ought not to interfere with the investigative powers conferred upon the police or the Director of Public Prosecution unless cogent reasons are given for doing so...The warrants were issued to enable the allegations be investigated. Whether or not the investigations will unearth material which will be a basis upon which a decision will be made to commence

prosecution of the ex parte applicants or any of them is a matter which is premature at this stage to dwell on.”

38. It is trite that the Court ought not to usurp the Constitutional mandate of the 2nd Respondent to investigate any matter that, in the 2nd Respondent’s view raises suspicion of the occurrence or imminent occurrence of a crime. Just like in cases of prosecution, the mere fact that the allegations made are likely to be found worthless, is not a ground for halting investigations into the complaints made or brought to the attention of the 2nd Respondent since the purpose of a criminal investigations conducted *bona fide* is to consider both incriminating and exculpatory material and not just to collect evidence on the basis of which a criminal charge may be laid.

39. It must always be noted that judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence to the complaint 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 to bring to the attention of the investigators in the course of the conduct of the investigations.

40. However, if the applicant demonstrates that the investigations that the 2nd Respondent intends to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such investigations since investigations must be carried out independently and must be carried out in good faith without malice or for the purpose of achieving some collateral goal divorced from the purpose for which the investigatory powers are given to the 2nd Respondent.

41. 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...”

42. 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 is 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.”

43. 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”.

44. It is therefore clear that whereas the discretion given to the 2nd respondent to investigate 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, 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 powers of the police by halting otherwise proper complaints made before them. In this case, it is clear that there is already in existence criminal proceedings in which the applicant herein is the complainant.

45. In my view, the police are clearly mandated to investigate the commission of criminal offences and in so doing they have powers inter alia to take statements and conduct forensic investigations. In order for the applicant to succeed it must show that not only are the investigations which were being done by the police are being carried out with ulterior motives but that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence. Although it was alleged that the criminal investigations the subject of these proceedings have been commenced to undermine the integrity of the High Court Rulings and Orders and to aid other parties on matters already determined by Courts of competent jurisdiction thereby abusing the criminal justice system, the applicant has failed to elaborate on how this scheme is meant to be achieved. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the *predominant* purpose is to further some other ulterior purpose and 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.

46. In this case the effect of the grant of the orders sought would be to restrain the police from undertaking their investigatory powers. In my view the decision by a Court to halt investigations from being conducted ought to be exercised very cautiously and in very clear cases where the Court is satisfied that the continued investigations are likely render the proceedings before it an academic exercise. In other words the Court must in such circumstances take care not to trespass into the jurisdiction of the investigators or the Court which may eventually be called upon to determine the issues hence the Court ought not to make determinations which may affect the investigations or the yet to be conducted trial. It is upon the ex parte applicant to satisfy the Court that the discretion given to the relevant authorities to investigate allegations of commission a criminal offence ought to be interfered with. Dealing with the burden and standard in judicial review applications, it was held in Kuria & 3 Others vs. Attorney

General [2002] 2 KLR 69 that:

“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. 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.”

47. *The National Prosecution Policy*, revised in 2015 on the other hand provides at page 5 that:-

2. Public Prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction. In other words, Public Prosecutors should ask themselves; would an impartial tribunal convict on the basis of the evidence available?”...

48. Therefore, criminal process ought to be invoked only where the prosecutor has a conviction that he has a prosecutable case. Whereas he does not have to have a full proof case, he ought to have in his possession such evidence which, if believable, might reasonably lead to a conviction. He does not have to have evidence which discloses a *prima facie* case under section 210 of the *Criminal Procedure Code* since a decision as to whether a *prima facie* case is disclosed is a jurisdiction reserved for the trial Court. He however, must have evidence which satisfies him that his is a case which ought to be presented before a trial Court. He must therefore consider both incriminating and exculpatory evidence in arriving at a discretion to charge the accused. In other words the prosecution is not a conduit pipe for the complainant. Therefore, the mere fact that the complainant believes that there is a prosecutable case does not necessarily bind the DPP and the Police. As is rightly recognised by **Sir Elwyn Jones** in *Cambridge Law Journal* – April 1969 at page 49:

“The decision when to prosecute, as you may imagine is not an easy one. It is by no means in every case where a law officer considers that a conviction might be obtained that it is desirable to prosecute. Sometimes there are reasons of public policy which make it

undesirable to prosecute the case. Perhaps the wrongdoer has already suffered enough. Perhaps the prosecution would enable him present himself as a martyr. Or perhaps he is too ill to stand trial without great risk to his health or even to his life. All these factors enter into consideration.”

49. The prosecution must therefore exercise its powers independently and where the conduct of the complainant bring into issue certain aspects of the case that themselves require investigations, the prosecution is properly entitled to undertake the same. As to whether that is the case is a matter within the discretion of the prosecution and can only be interfered with where the Court is satisfied that the discretion is not being properly exercised since it is upon the DPP and the Police to consider those factors and not upon this Court to determine for them when such factors militate against investigations.

50. In my view, since the DPP and the Police is entitled to rely on any lawful sources to determine whether or not to commence criminal proceedings, the mere fact that the applicant is the complainant in a criminal case does not bar the prosecutor from undertaking a holistic approach to the investigations in order to ensure that justice is achieved to both the accused and the complainant. In other words there is no bar to the prosecutor investigating the matter and taking any such lawful action as may be appropriate.

51. Accordingly, unless and until a decision to charge a person is made by the Police or the prosecutor, it is only in exceptional circumstances where the Court would prohibit, a decision being taken either way by them.

52. In this case it is my view that based on the material placed before me it is premature for this Court to make a finding that the investigations by the 2nd Respondent as permitted by the 1st Respondent are being improperly undertaken.

53. With respect to the Bank's concerns it is my view that if properly advised the Bank's interests can be appropriately protected notwithstanding the release of the title documents for investigations. The parties may also seek appropriate protective orders in the criminal proceedings without being seen to be a hindrance to the investigations.

54. I have said enough to show that this application has no merit.

55. Consequently the Notice of Motion dated 1st October, 2015 fails and is dismissed but with no order as to costs as the Respondents did not comply with the Court's directions to furnish soft-copies of all the pleadings filed.

Dated at Nairobi this day 30th day of August, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Misati for Mr Nyachoti for the Applicant

Mr Muranga for the Respondents

Cc Mwangi