



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS [JUDICIAL REVIEW DIVISION]**  
**MISC. APPLICATION NO. 210 OF 2016**

**IN THE MATTER OF AN APPLICATION BY ISAAC TUMUNU NJUNGE FOR ORDERS OF  
CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER IN THE MATTER OF SECTIONS 4, 5, 6 & 23 OF THE OFFICE OF THE  
PUBLIC PROSECUTIONS ACT, 2013**

**IN THE MATTER OF SECTIONS 8, 10 AND 24 OF THE NATIONAL POLICE SERVICE ACT  
2011**

**BETWEEN**

**ISAAC TUMUNU NJUNGE.....APPLICANT**

**VERSUS**

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

**THE INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATIONS.....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

**Introduction**

1. The applicant herein, **Isaac Tumunu Njunge**, by its Notice of Motion dated 11<sup>th</sup> May, 2016, 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 respondent's decision to charge the applicant pursuant to the complaint made by Nidaa Darr against the applicant under police case file number 113/56/26**

**2. That an order of prohibition do issue to prohibit the respondents, whether by themselves, their servants, employees, agents and/whomsoever from in any way whatsoever executing**

**and/or enforcing the respondents' decision to arraign in court and/proceeding with any criminal prosecution of the applicant as a consequences of the complainant made Nidaa Darr against the applicant under police case file number 113/56/26**

### **Applicant's Case**

2. According to the applicant, on the 13<sup>th</sup> day of February, 2016 one **Abel Ondima Nyambok**, a friend of his approached him and requested that the applicant allows him deposit the sum of Kenya shillings nine hundred and fifty thousand (Kshs 950,000) into the applicant's account explaining that he had sold his car from the said but that he did not want the proceeds of the sale deposited in his account as he had an overdraft of Kenya shillings one million(Kshs 1,000,000.00) with his bank and he was apprehensively that if the money was banked in his account his bank would utilize the same to pay off the said overdraft in full.

3. The said **Abel Ondima Nyambok** being his social friend the applicant gave him **Account Number 0941091229 Barclays Bank Of Kenya Queensway Branch** in the name of **Alvish General Suppliers** in mutual understanding that when the money reached the account the applicant would withdraw the same and give it to the said friend in cash and he would in return give the applicant the sum of Kenya shillings fifty thousand (Kshs 50,000) as a token of appreciation.

4. The applicant confirmed that on the 17<sup>th</sup> day of February the said sum of Kenya shillings nine hundred and fifty thousand (Kshs 950,000) reached his account and he withdrew Kenya shillings nine hundred thousand (Kshs 900,000) which he gave to his said leaving an outstanding balance of Kenya shillings fifty thousand (Kshs 50,000) as agreed. the applicant

5. Unknown to, a complaint was filed with the criminal investigation department (CID) (B.F.I.D) in the name of **Nidaa Darr** (hereinafter referred to as "the complainant") against the said **Abel Ondima Nyambok** leading to the latter's arrest and subsequently being charged in court in Nairobi chief magistrate criminal case number 335 of 2016, **Republic Verses Abel Ondima Nyambok** for the offence of stealing by servant contrary to section 281 of the **Penal Code** .

6. The applicant averred that since then he has not known peace as the Respondents through one **Corporal Kiplangat** of the B.F.ID have severally summoned him and threatened to arrest and charge him jointly with the said **Abel Ondima Nyambok** despite giving his side of the story to the Respondents through the said **Corporal Kiplangat**. Further, the Respondents have gone ahead and arbitrarily and maliciously frozen his account number 0362193058001 Chase Bank River Road Branch in the name of **Alvish General Suppliers**.

7. It was therefore the applicant's case that

- i. He has been intimidated and oppressed by the Respondents
- ii. The Respondents are abusing their statutory powers
- iii. That he has been subjected to unjustified criminal investigation imminently threatening my liberty.

8. The applicant disclosed that he has been summoned by phone to appear before the said **Corporal Kiplangat** at the B.F.I.D Headquarters to answer to the allegation of stealing and was reasonably and naturally apprehensive that should he appear as summoned, he would be arrested and charged jointly with his said friend for an offence that he knows nothing about it. To him, the investigations against him are frivolous, vexations and intended to achieve a collateral objective divorced from the goals of criminal justice.

9. He therefore contended that the court's duty is to ensure that his rights and freedoms as enshrined in the Constitution and protected and upheld. He however averred that the said investigations have been

actuated by malice and ulterior motive, frivolous and vexatious; that the Respondents are using the criminal process as tool for personal score settling or vilification on issues not pertaining to that which the criminal system was establish to perform; that the Respondents are exercising their discretion oppressively, veraciously and for an improper purpose; that the respondents are in breach of the duty to act fairly towards him; that the respondents have failed to exercise their statutory discretion reasonably; and that the charges violate his legitimate expectations.

10. According to the applicant, despite appearing before the **Corporal Kiplangat** he has received several phone calls from the said officer asking him to appear before him again and again. In his view, considering all the matters stated herein, it is evident that there is no reasonable cause for the institution of criminal proceedings against him and that the lodging of any under the circumstances would be wholly unjustified and unreasonable. Therefore the institution of such criminal proceedings would be arbitrary oppressive and would constitute abuse of the criminal justice system as the same would clearly not be intended to serve the end of justice but instead would be geared towards the attainment of other ulterior motives by the respondents hence in order to protect the due process from abuse, it is just that the Court issues the orders sought.

### **Respondent's Case**

11. In opposition to the application the Respondents averred that on 24<sup>th</sup> February, 2016 the Banking Fraud investigation Department received a fraudulent report from Standard Chartered Bank through their Manager for shared investigative services namely **Nidaa Darr**, that stated a fraudulent transaction had occurred in the account of a **Ms. Mary Angeline Barasa** which fraud had been reported to the aforesaid bank by **Ms. Mary Angeline Barasa** on 18<sup>th</sup> February, 2016 who stated that a withdrawal of Ksh.950,000/ had been done from her account number 015123327900 for Kshs 950,000/- without her authority.

12. According to the Respondents, **Nidaa Darr** made preliminary inquiries and had established that indeed some fraud had occurred in the said bank account and went to to request the assistance of the banking fraud investigation department in the matter. Upon investigations the Banking Fraud Investigation Department recommended charges against **Abel Ondima Nyambok** for stealing by servant contrary to section 281 of the **Penal Code** as it was found from the investigations that **Mr. Nyambok** who was an employee at Standard Chartered Bank did facilitate that transfer of Kshs 950,000/- from the account of **Ms. Mary Angeline Barasa**, account No 015123327900 into the account of **Alvish General Suppliers**.

13. It was averred that the office of the Director of Public Prosecutions agreed with the recommendations and proceeded to prefer charges against **Abel Ondima Nyambok** under criminal case No. 335 of 2016 on 29<sup>th</sup> February, 2016.

14. The Respondents however revealed that presently, the office of the Director of Public Prosecutions had asked the banking fraud investigation department to inquire into the culpability of any other person in the said transaction and to forward their findings to the office for purposes of advice and direction.

15. It was therefore contended that the application by the ex parte applicant is premature as there is no investigation file currently opened that recommends his prosecution. To the Respondents:

- i. The application filed is an abuse of the court process and is an attempt to curtail the respondents from undertaking their constitutional duties and as provided in law.
- ii. No constitutional rights of the applicant have been infringed by merely conducting investigations and summoning them to record statements on a complainant that has been filed.
- iii. The application is premature as investigations are still ongoing and the investigation file is not complete for the 1<sup>st</sup> respondent to advice on whether a criminal offence has been established or not

16. It was the Respondent's position that the applicant should await the results of the investigations and the decision of the 1<sup>st</sup> respondent on the investigations before rushing to court and abusing the court process. To them, if the applicant were apprehensive of their arrest they ought to file anticipatory bail not this application as they have done which is a tactic to intimidate the 2<sup>nd</sup> and 3<sup>rd</sup> respondents from conducting the constitutional duties which are protected by the constitution, laws of Kenya and case law that has developed on the same.

17. In the Respondents' view, there has been no abuse of process by any of the respondents that has been demonstrated.

### **Determination**

18. I have considered the application.

19. By this application, the applicant is in effect seeking an order barring the Respondents from conducting investigation with respect to the alleged fraud on the ground that he was not party to the transactions that led to the commission of the alleged offence.

20. According to the Respondents, investigations are still ongoing and no decision has been made to charge and prosecute the applicant as the results thereof will be subject to the decision of the 1<sup>st</sup> Respondent.

21. 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.*

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

23. 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.”

24. It is trite that the Court ought not to usurp the Constitutional mandate of the Respondents to investigate any matter that, in the Respondents’ 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 Respondents 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.

25. 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.

26. However, if the applicant demonstrates that the investigations that the investigators intend 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 conferred.

27. 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...”**

28. 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.”

29. 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”.**

30. It is therefore clear that whereas the discretion given to the respondents 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.

31. In this case, I cannot say that based on the material placed before me there is no basis at all for conducting investigations. 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 said authorities 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.

32. To grant the orders sought in this application in my view would be both pre-emptive and presumptuous in light of the fact that the DPP’s decision to prosecute, if that stage will ever be reached is a matter of conjecture. This Court ordinarily does not interfere with the exercise of constitutional and statutory power of executive authorities unless there exist grounds for doing so. I am afraid that there are no sufficient material on the basis of which I can find that upon the completion of the investigations, the applicant will be found to have been a party to the transactions undertaken by the said **Abel Ondima Nyambok** and even if that happens that the 1<sup>st</sup> Respondent will necessarily concur with that view.

33. Under Article 157(4) of the Constitution, the Director of Public Prosecution is empowered to direct the Inspector-General of the National Police Service to investigate any information or allegation of

criminal conduct and the Inspector-General is obliged to comply with any such direction. In other words the DPP is not bound by the actions undertaken by the police in preventing crime or bringing criminals to book. He is, however, under Article 157(11) of the Constitution, enjoined to 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. In other words the DPP ought not to exercise his/her constitutional mandate arbitrarily.

34. The independence of the DPP, is anchored both in the Constitution and in the legislation under Article 157(10) of the Constitution and section 6 of the ***Office of the Director of Public Prosecutions Act, 2013***. Article 157(10) provide as follows:

***“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.”***

35. Section 6 of the ***Office of the Director of Public Prosecutions Act, 2013*** provides that:

***Pursuant to Article 157(10) of the Constitution, the Director shall–***

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

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

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

36. In my view, the mere fact that the Directorate of Criminal Investigations has conducted its own independent investigations, and based thereon, arrived at a decision does not necessarily preclude the DPP from undertaking its mandate under the foregoing provisions. Conversely, the DPP is not bound to prosecute simply because the DCI has formed an opinion that a prosecution ought to be undertaken. The ultimate decision of what steps ought to be taken to enforce the criminal law is placed on the officer in charge of prosecution and it is not the rule, and hopefully it will never be, that suspected criminal offences must automatically be the subject of prosecution since public interest must, under our Constitution, be considered in deciding whether or not to institute prosecution. See ***The International and Comparative Law Quarterly*** Vol. 22 (1973).

37. A reading of Article 157(4) of the Constitution leads me to associate myself with the decision of the High Court of Uganda in the case of **Uganda vs. Jackline Uwera Nsenga Criminal Session Case No. 0312 of 2013**, to the effect that:

***“...the DPP is mandated by the Constitution (See Art. 120(3)(a)) to direct the police to investigate any information of a criminal nature and report to him or her expeditiously... Only the DPP, and nobody else, enjoys the powers to decide what the charges in each file forwarded to him or her should be. Although the police may advise on the possible charges while forwarding the file to DPP...such opinion is merely advisory and not binding on the DPP (See Article 120(6) Constitution). Unless invited as witness or amicus curiae (friend of Court), the role of the police generally ends at the point the file is forwarded to the DPP.”***

38. This position was similarly appreciated in **Charles Okello Mwanda vs. Ethics and Anti-Corruption Commission & 3 Others (2014) eKLR** in which Mumbi Ngugi, J held that:

***“I would also agree with the 4<sup>th</sup> Respondent (DPP) that the Constitutional mandate under 2010 Constitution with respect to prosecution lies with the 4<sup>th</sup> Respondent, and that the 1<sup>st</sup> Respondent has no power to ‘absolve’ a party and thereby stop the 4<sup>th</sup> Respondent from carrying out his constitutional mandate. Article 157(10) is clear...However, in my view, taking into account the clear constitutional provisions with regard to the exercise of***

prosecution powers by the 4<sup>th</sup> Respondent set out in Article 157(10) set out above, the 1<sup>st</sup> respondent (EACC) has no authority to ‘absolve’ a person from criminal liability...so long as there is sufficient evidence on the basis of which criminal prosecution can proceed against a person, the final word with regard to the prosecution lies with the 4<sup>th</sup> Respondent (DPP) ...”.

39. It was pursuant to the foregoing that **Majanja, J** expressed himself in **Thuita Mwangi & Anor vs. The Ethics and Anti-Corruption Commission & 3 Others Petition No. 153 & 369 of 2013** as hereunder:

**“The decision to institute criminal proceedings by the DPP is discretionary. Such exercise of power is not subject to the direction or control by any authority as Article 157(10)...These provisions are also replicated under Section 6 of the Office of the Director Public Prosecutions Act, No. 2 of 2013...In the case of Githunguri –vs- Republic (Supra at p.100), the Court observed...The Attorney General of Kenya...is given unfettered discretion to institute and undertake criminal proceedings against any person “in any case in which he considers it desirable so to do... this discretion should be exercised in a quasi-judicial way. That is, it should not be exercised arbitrarily, oppressively or contrary to public policy ...”**

40. In my view, the discretion to be exercised by the DPP is not to be based on recommendations made by the investigative bodies. Therefore, the mere fact that the DPP’s decision differs from the opinion formed by the investigators is not a reason for interfering with the constitutional and statutory mandate of the DPP as long as he/she believes that he/she has in his/her possession evidence on the basis of which a prosecutable case may be mounted and as long as he takes into account the provisions of Article 157(11) of the Constitution as read with section 4 of the ***Office of Public Prosecutions Act***, No. 2 of 2013.

41. Conversely, the mere fact that the investigators believe that there is a prosecutable case does not necessarily bind the DPP. 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.”**

42. It is however my view that 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 he 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. 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.

43. 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. 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.”**

44. 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.

45. 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 police as permitted by the DPP are being improperly undertaken.

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

47. Consequently the Notice of Motion dated 11<sup>th</sup> May, 2016 fails and is dismissed but with no order as to costs since in my view, the affidavit in reply ought to have been sworn by the investigators as opposed to the learned State Counsel.

**Dated at Nairobi this day 14<sup>th</sup> day of October, 2016**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

***Mr. Irungu for Mr Kariuki for the applicant***

*Mr Muranga for the DPP*

*CA Gitonga*