REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 276 OF 2016

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF AN INVESTIGATION OF AN OWNERSHIP DISPUTE OF NAIROBI/UMOJA/BLOCK83/445 BY THE DCIO, BURUBURU POLICE STATION

REPUBLIC………………………….…...……....……..APPLICANT

VERSUS

THE DIVISIONAL CRIMINAL INVESTIGATION OFFICER

(DCIO) BURUBURU POLICE STATION……..…1ST RESPONDENT

THE ATTORNEY GENERAL………………..…..2ND RESPONDENT

AND

WINNIE WANJIRU KURIA………..…………..INTERESTED PARTY

EX PARTE: EMMANUEL KAZUNGU MASHA

JUDGEMENT

Introduction

1. The applicant herein, **Emmanuel Kazungu Masha**, by his Notice of Motion dated 30th June, 2016, seeks the following Orders:

> **1. That this honourable court do issue an order of certiorari o remove and quash the summons to the applicant by the 1st respondent to record a statement in respect of a dispute regarding the ownership of Nairobi/Umoja/Block 83/445 situate at Umoja Innercore in Nairobi.**
>
> **2. That this honourable court do issue an order of prohibition to prohibit the 1st respondent from investigating a dispute regarding the ownership of Nairobi/Umoja/Block 83/445 situate**

at Umoja Innercore in Nairobi or in any other manner interfering with the applicant's ownership, occupation and quiet possession of the same.

3. That the costs of this application be provided for.

Applicant's Case

2. According to the applicant, he is the registered lessee of all that parcel of land known as Nairobi/Umoja/Block83/445 situate at Umoja Innercore in Nairobi (hereinafter referred to as the suit property), having purchased it for valuable consideration from **Joseph Kahu Stephen** in August 2015. Desirous of developing the suit property, the applicant applied for and obtained a letter of authority from the Nairobi City County on 13th May, 2016 to erect a fence and to proceed with the development thereof the premises.

3. The applicant however averred that on or about 9th June, 2016, while he was in the course of erecting a fence on the premises an unknown gentleman approached him claiming that the suit property actually belonged to a lady who resides in the UK. Thereafter it appears that the gentleman reported the matter to the 1st respondent who asked the applicant to present his documents of title at the Buruburu Police Station which he did. However, when the 1st respondent demanded that he records a statement concerning the ownership of the suit property, he declined to do so since according to him land ownership dispute is civil in nature and hence the 1st respondent does not have jurisdiction to determine the rightful owner of the premises. This position, the applicant averred he communicated to the 1st respondent vide his advocates' letter dated 20th June, 2016 which was delivered to said respondent on the morning of 21st Jun, 2016.

4. The applicant averred that on the afternoon of 21st June, 2016, the 1st respondent called him on phone and threatened that if he did not record a statement by Friday 24th June, 2016, he would have his fence demolished and on 23rd June, 2016 at about 6.00 am the applicant received a phone call from his security guard at the premises informing him that a group of goons were at the premises and were in the process of demolishing the fence. Upon rushing to the suit property with a police officer, the applicant found that the fence had been demolished and he was informed by his security guard that the goons had loaded the iron sheets and poles onto a pick-up and driven away. To the applicant the demolition was instigated by the defendant (sic) because it was in line with his threat to him.

5. In the applicant's view, the 1st respondent acted *ultra vires* by purporting to investigate or adjudicate upon a land ownership dispute when that jurisdiction is vested solely in the Environment and Land Court. In addition, he believed the 1st respondent broke the law by instigating trespass upon the applicant's parcel of land, demolishing of his fence, and the theft of his iron-sheets and poles.

6. The applicant asserted that the 1st Respondent will not desist from the acting outside his powers, breaking the law and trying to intimidate him unless he is prohibited by this honourable court.

7. In his supplementary affidavit, the applicant averred that since the interested party resides in the UK the signature on her replying affidavit was a forgery.

8. To the applicant, from the contents of the interested party's affidavit, it was clear that the 1st Respondent continued with the investigation notwithstanding the stay orders issued herein.

Respondents' Case

9. In opposition to the application the Respondents averred that this matter is in reference to their office inquiry No. 4/2016 which was opened after a complainant, the caretaker of plot No. Nairobi/Umoja/BLK 83/445 lodged a complaint that the applicant in this case one **Emmanuel Kazungu** had on 11th June, 2016 with assistance of some administration police officers, illegally occupied his master's plot belonging to **Ms Winnie Wanjiru Kuria** who resides in United Kingdom and erected *mabati* fence thereon.

10. To the Respondents, this application herein has already been overtaken by event since the investigation on a dispute regarding the ownership of Nairobi/Umoja/Block 83/445 situated at Umoja Innercore has already taken place. It was however the Respondents' case that the summons to the applicant to record the statement in respect of a dispute regarding the ownership of Nairobi/Umoja/Block 83/445 was in good faith as that is the procedure required by law once a complainant is lodged for both parties to record their statement at any police station in order to assist in carrying out investigations.

11. The Respondent asserted that since the matter concerns ownership of land this judicial review court does not have the jurisdiction to deliberate on the matter.

Interested Party's Case

12. The application was similarly opposed by the interested party herein, **Winnie Wanjiru Kuria.** The interested party affirmed that the complaint the subject of these proceedings whose investigations had already been concluded, was lodged by herself vide OB No. 70/15/56/2013. The interested party while reiterating the fcat of the conclusion of the said investigations added that a report of the same had been forwarded to her for her reference and records.

13. It was therefore the interested party's view that the prayers in the Motion herein had been overtaken by evets since the Court cannot prohibit an investigation that has already occurred to its logical conclusion. To the interested party since the investigations have been finalised, there is nothing left of the investigation that can be quashed or prohibited.

14. The interested party therefore urged the Court to dismiss the application with costs.

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

16. It was averred by the interested party that she travelled from UK and arrived in Kenya on 16th July, 2016 whereof she proceeded to expend her signature as required. Thus the assertion by the applicant to be effect that the signatures on her affidavits are forged is not true. Moreover, the report which the applicant is replying on to prove that she was in the UK was prepared on 14th July, 2016 which was two days before the day she executed the supporting affidavit. It was therefore her case that the said report cannot be used to substantiate her whereabouts as at 16th July, 2016.

17. It was the interested party's position that if the applicant has any reason to believe that the signatures were forged, then they ought to have reported the issue to the police for investigations. However, it was contended contend that the reason as to why the applicant has failed to report the matter anywhere is because they are persuaded that they cannot sustain any such claim. To the interested party the claims of forgery have not been substantiated, the same have been made in bad faith and the intention to solely to mislead the honourable court.

Determination

18. I have considered the application, the affidavits and the submissions made on behalf of the parties herein.

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 the Respondents have no power to investigate matters touching on ownership of land. Whereas the interested party relied on section 22(1) of the ***Police Act***, Cap 84, Laws of Kenya, with due respect that statute was repealed vide section 130 of the ***National Police Service Act* No 11 A of 2011.**

20. 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.

21. 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."***

22. Apart from the foregoing section 51(1) of the ***National Police Service Act*** provides as follows:

(1) A police of officer shall—

(a) obey and execute all lawful orders in respect of the execution of the duties of office which he may from time to time receive from his superiors in the Service;

(b) obey and execute all orders and warrants lawfully issued;

(c) provide assistance to members of the public when they are in need;

(d) maintain law and order;

(e) protect life and property;

(f) preserve and maintain public peace and safety;

(g) collect and communicate intelligence affecting law and order;

(h) take all steps necessary to prevent the commission of offences and public nuisance;

(i) detect offenders and bring them to justice;

(j) investigate crime; and

(k) apprehend all persons whom he is legally authorized to apprehend and for whose apprehension sufficient ground exists.

23. Section 52 of the same Act, on the other hand, provides as hereunder:

(1)A police officer may, in writing, require any person whom the police officer has reason to believe has information which may assist in the investigation of an alleged offence to attend

before him at a police station or police office in the county in which that person resides or for the time being is.

(2) A person who without reasonable excuse fails to comply with a requisition under subsection (1), or who, having complied, refuses or fails to give his correct name and address and to answer truthfully all questions that may be Lawfully put to him commits an offence.

(3) A person shall not be required to answer any question under this section if the question tends to expose the person to a criminal charge, penalty or forfeiture.

(4) A police officer shall record any statement made to him by any such person, whether the person is suspected of having committed an offence or not, but, before recording any statement from a person to whom a charge is to be preferred or who has been charged with committing an offence, the police officer shall warn the person that any statement which may be recorded may be used in evidence.

(5) A statement taken in accordance with this section shall be recorded and signed by the person making it after it has been read out to him in a language which the person understands and the person has been invited to make any correction he may wish.

(6) Notwithstanding the other provisions of this section, the powers conferred by this section shall be exercised in accordance with the Criminal Procedure Code (Cap. 75), the Witness Protection Act (Cap. 79) or any other written law.

(7) The failure by a police officer to comply with a requirement of this section in relation to the making of a statement shall render the statement inadmissible in any proceedings in which it is sought to have the statement admitted in evidence.

24. It is therefore clear that the 1st Respondent was properly warranted in commencing investigation into the allegations of trespass by the applicant onto the interested party's land.

25. 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."**

26. 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 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.

27. 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.

28. 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.

29. 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..."**

30. 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."**

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

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

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

40. In this case, the only reason why the discretion of the Respondents is being challenged is that the 1st Respondent has no power to investigate issues relating to ownership of land. The Respondents however contend that they were investigating issues relating to trespass to land. It is not within the powers of this Court based on the material before me to decide whose version is correct. If the 1st Respondent was investigating title to land, it was upon the applicant to appear before the 1st Respondent and inform him that he had no jurisdiction to do so. This Court can only restrain a threatened action on the ground of lack of jurisdiction where it is clear that there is want or excess of jurisdiction and where there are conflicting factual versions which must be resolved first before a finding can be arrived at as to whether the authority concerned has no jurisdiction, the Court would not be warranted in holding that there is in fact lack of or excess of jurisdcition. An issue of jurisdiction may arise in one of two instances or both. The first scenario is where the authority has no jurisdiction to embark upon the investigation of the matter before it *ab initio*. The second scenario is where though the authority was seised of jurisdiction at inception, subsequent events or circumstances remove the dispute from the jurisdiction of the concerned authority or body. This clarification was made succinctly by **Madan, J** (as he then was) in **Choitram and Others vs. Mystery Model Hair Saloon Nairobi HCCC No. 1546 of 1971 (HCK) [1972] EA 525** where he held:

"Lack of jurisdiction may arise in various ways. There may be an absence of these formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage while engaged on a proper inquiry the tribunal may depart from the rules of natural justice thereby it would step outside its jurisdiction. What is forbidden is to question the correctness of a decision or determination which it was within the area of their jurisdiction to make…The phrase "to make such order thereon as it deemed fit" giving powers to a statutory tribunal must be strictly construed. Powers must be expressly conferred; they cannot be a matter of implication."

33. Similarly, in **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** it was held that a limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics and that if the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction.

34. In this case, the 1st Respondent clearly has the power to investigate a complaint of occurrence of a criminal offence. As to whether he can investigate title to land would depend on the circumstances of the complaint. Accordingly, this is a matter which falls within the second type of jurisdiction as it cannot be

said that the 1st Respondent has no power from inception to investigate a complaint lodged with him.

35. I cannot therefore 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.

36. 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 is yet to materialise. 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 the DPP will agree with the 1st Respondent in his finding.

37. 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.

38. 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."***

39. 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.***

40. In my view, the mere fact that those entrusted with the powers of investigation have conducted their 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 investigating agencies have 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).

41. 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."

42. 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 4th Respondent (DPP) that the Constitutional mandate under 2010 Constitution with respect to prosecution lies with the 4th Respondent, and that the 1st Respondent has no power to 'absolve' a party and thereby stop the 4th 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 4th Respondent set out in Article 157(10) set out above, the 1st 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 4th Respondent (DPP) …".

43. 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 …"

44. 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.

45. 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."

46. 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 from those who they believe may shed light on the complaint lodged before them. 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.

47. 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."**

48. 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.

49. 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 are being improperly undertaken.

50. With respect to the issue whether this application has been overtaken by events, I only wish to say that the applicant seeks both orders of prohibition and certiorari and even if the prayer for prohibition were to be found to have been overtaken by events that does not bar the Court from granting an order of certiorari.

51. On the competency of the affidavit sworn by the interested party I am unable to find that the same is incompetent due to the conflicting factual averments made by the applicant and the interested party on when the said affidavit was sworn.

52. As regards the issue whether the Respondents disregarded the order of stay issued herein, I am unable to make a finding either way based on the material placed before me. Suffice it to say that in this judgement this Court is not dealing with an application for contempt.

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

54. Consequently the Notice of Motion dated 30th June, 2016 fails and is dismissed with costs.

55. It is so ordered.

Dated at Nairobi this 28th day of November, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mrs Kuria for the ex parte applicant

Miss Mwanzia for the interested party

CA Mwangi