



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW AND CONSTITUTIONAL DIVISION
MISCELLANEOUS APPLICATION NO.428 OF 2015
IN THE MATTER OF CONSTITUTION OF KENYA 2010

BETWEEN

**FRANCIS KIRIMA M'IKUNYUA, FESTUS MUSYOKI, STEPHEN MWANGI, SAMUEL
WACHIRA, JOSEPH MANGO KARANJA,**

**FRANCIS KANYUIRA AND SHADRACK MUSYOKA (suing on their own behalf and as the
officials of Mavoko Informal Settlement Community).....APPLICANTS**

VERSUS

THE INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

AND

EAST AFRICAN PORTLAND

CEMENT CO. LIMITED.....1ST INTERESTED PARTY

SETU VILLAGERS SCHEME.....2ND INTERESTED PARTY

KINANIE SQUATTERS

SETTLEMENT SCHEME.....3RD INTERESTED PARTY

KINANIE SETTLERS SELF

HELP GROUP.....4TH INTERESTED PARTY

JUDGEMENT

Introduction

1. By a Notice of Motion dated 16th December, 2015, the *ex parte* applicants herein seek the following orders:

1. That this honourable court be pleased to issue an order of certiorari to bring before this court and quash the respondents decisions made on the 17/10/2015 and the charge sheet in criminal case number 733 of 2015 to charge the applicants herein with various offences including the offence of trespass in relation to all that parcel of land known as land reference number 10425 (original number 2856/2).

2. That this honourable court be pleased to issue order of prohibition prohibiting the respondents whether by themselves, or any of their officers and or agents from proceedings with criminal cases number 733 of 2015 and or evicting, demolishing houses, arresting, harassing, intimidating, compelling the attendance of, charging interrogating, prosecuting and or instituting and sustaining criminal proceedings against the applicants and their members with any alleged criminal offence in relation to the dispute arising from the ownership of all that parcel of land known as L.R. No, 10425 situate along the Nairobi-Mombasa Road.

3. That the cost of this application be in the cause.

Applicants' Case

2. According to the applicants, who have instituted these proceedings on their own behalf and on behalf of Athi River Informal Settlement Community (hereinafter referred to "the Community"), the community comprises of over five hundred (500) members who live on the parcel of land known as L.R. No. 10425 within Mavoko along the Nairobi-Machakos Highway with their families and have been so living thereon as squatters for the last over twenty (20) years. According to the applicants, the Community, in the course of time, have exercised ownership over the suit property by carrying out numerous activities. It as however disclosed that there are several disputes over the ownership of said parcel of land which are being reviewed by several state agencies, including the National Land Commission.

3. It was however averred that on or about the 17th October, 2015 the respondent and or its officers in the company of hired goons invaded the informal settlement and started indiscriminately demolishing houses and evicting members of the applicants and in the process stabbed, slashed and generally beat up members of the applicant with little or no action being taken by the respondent. As a result several members of the applicant were admitted into various hospitals with grievous bodily harm and are still undergoing treatment.

4. It was further contended that the respondent also resorted to arbitrary arrest and institution of criminal proceedings against the applicants as a means of harassing them and enforcing the illegal evictions and demolitions without any notice for the same being served on the applicants.

5. To the Applicants, the said demolitions are inhuman, unnecessarily brutal and are calculated to cause maximum humiliation and indignity to the applicant and its members.

6. The applicants averred that despite reporting this violation to the respondent, the respondent has taken absolutely no action against the perpetrators.

7. It was the applicants' case that the actions of the respondent are illegal, unconstitutional, inhuman and generally calculated to create to create the most harm and difficulty to the applicants.

8. It was further disclosed that the Interested Party has had a long running dispute with squatters within all the parcel of land known as Land Reference number L.R. No. 10425 within Mavoko and that it is also within the knowledge of the Interested Party that these disputes are the subject of several pending court cases in which most of the squatters are claiming an interest in the suit land under the doctrine of adverse possession and are therefore seeking to be declared to have become entitled to the said parcel of land by

virtue of having had uninterrupted possession of the same for over twelve (12) years.

9. At the core of the applicants adverse claim, therefore, is the fact that time creates title and having had open and uninterrupted possession and control of the suit land for over twelve (12) years, they ought to be declared the legal owners of the suit land under the doctrine of the adverse possession. It was therefore asserted that by deposing that it has attempted to have the applicant's peacefully vacate the premises, the interested party has in fact admitted that the applicants are in fact in possession of the said premises.

10. It was however clarified that these proceedings are not about the applicants claim as squatters or the respondent proprietary interest in and over the suit property, as these are already the subject of pending court cases, but that these proceedings are about the way the respondent had been misusing their powers in arbitrarily arresting and prosecuting the applicants and demolishing the houses of the applicants within the disputed land.

11. To the applicants, the instant application is in fact a graphic illustration and indeed admission by the interested party that it is using influence to activate the coercive powers of the state through the respondents to resolve what is essentially a civil dispute through intimidation, arbitrary arrest and fabricated prosecution hence these judicial review proceedings have been solely instituted to determine if the decision of the respondent to arrest, intimidate and prosecute the applicants is legal, made in good faith, respects the applicants right to a fair hearing and are in compliance with the Constitution.

12. It was the applicants' case that the orders the interested party is seeking in the instant application are designed to pre-empt the outcome of the pending civil cases and undermine the applicants suits on adverse possession as the interested party is seeking the arbitrary arrest and the illegal demolition and eviction of the applicants by way of a summary procedure and without giving the applicants the benefit of full and fair hearing. To that extent, it was averred that the interested parties' application is a unmitigated abuse of the court process and should be struck out in limine without even delving into the merits since the issue of whether the structures are illegal or not can only be determined after the full hearing of the pending court cases on their merits and not by the unfounded claims by the interested party.

13. The applicants contended that they are peaceful Kenyans and are not in anyway a threat to the interested party as alleged, and no evidence has been adduced to prove the alarmist and shrill claims by the interested party that the applicants have erected barricades on the suit land as alleged or at all. In the applicants' view, the issue of whether their occupation amounts to trespass can only be determined after their claim on the suit property under the doctrine of adverse possession has been heard and determined.

14. The applicants asserted that the substantive notice of motion was filed and served within the stipulated time lines and the interested party should instead focus on the hearing of the said motion instead of engaging in side shows and that the applicants have not in any way interfered with the interested party's mining of raw materials because the areas they occupy is barren land in which no mining activity is ongoing. They averred that no evidence has been adduced before this Court to back the alleged interference with the mining of the alleged raw materials.

Respondents' Case

15. In opposing the application, the Respondents averred that the application ought to be dismissed as it fails to address the matters in issue in Criminal case no. 735 of 2015 which was consolidated with Criminal Case no. 733 of 2015 and instead goes into other matters that are not the subject of the criminal proceedings as aforesaid. It was further averred that the application is an abuse of the court process as it seeks to argue matters that are currently being addressed by courts of competent jurisdiction and seeks to have the applicants benefit from Judicial Review applications remedies in order to further their civil claims.

16. The Respondents averred that section 24 of the *National Police Service Act* mandates the police to investigate any complaint brought to their attention in order to determine whether a criminal offence has been committed.

17. It was disclosed that a report was made and registered as OB 27/27/10/2015 where **CPL Peter Macharia, PC Julius Kithiaya, PC Kiti** and driver **Marwa** escorted suspects who had been arrested at Mlolongo in a motor vehicle KAP 628 Q a Toyota Matatu. The report indicated that the motor vehicle was driven by **Simon Maina** with **Joseph Karani, Githinji, Daniel Njoroge, Kelvin Mwangi** as occupants. They were found to be in possession of two *pangas* and they could not explain the purpose for which they had carried the *pangas* and it was suspected to be for purposes of settling dispute arising from land in the Portland area.

18. According to the Respondents, based on evidence by **CPL Peter Macharia**, on 27th October 2015 at about 12.45 pm while on duty and on patrol with **PC Kiti** (driver), **PC Julius Kithiaya** and **PC Dickson Maroa**, he received a call from Deputy OCPD Athi River that there were suspects in Two Toyota *matatus* where the occupants were male and had *pangas* with a purpose to harm people. Information was that the two *matatus* heading towards Nairobi. It was therefore averred that a road block was set up at Mlolongo whereby a search was conducted on several *matatus* whereby *matatu* registration on. KAP 628Q was searched and the travellers found with two new *pangas* were recovered with the following as occupants of the motor vehicle; **Simon Maina** (driver) **Joseph Karani, Kelvin Mwangi, Javan Bukachi**, and **Daniel Njoroge**, who could not all explain where they were coming from and the purpose of the *pangas*.

19. It was revealed that charges were preferred against **Simon Maina, Joseph Lotesiroi, Kelvin Mwangi, Javan Bukachi** and **Daniel Njoroge** in Criminal Case no. 733 of 2015 for the offence of going armed in public contrary to section 88 of the *Penal Code*, which was later amended to preparation to commit a felony contrary to section 308(1) of the *Penal Code* in Criminal Case no. 735 of 2015. According to the Respondents, there have been complaints in the area of people going armed in order to start fights over allocation of plots.

20. It was the Respondents' case that review of the evidence file does not disclose any matters of land dispute and does not disclose other applicants in the Notice of Motion as accused persons. Whereas there may be a dispute as to ownership of land as is being disclosed by the applicants, the Respondents asserted that observance of law and order by all citizens and parties to the dispute is paramount and should not be used as an excuse for impunity or lawlessness and being that there are threats in the area, the 1st respondents is required to act quickly on intelligence reports and apprehend those who intend to commit felonies before they act upon their intent. To the Respondents, although the issues of land may be the cause of dispute among various parties, the same was not in consideration in arresting those charged for carrying offensive weapons namely *pangas* on the material days and so far no plausible reasons have been given by the applicants who have instead sought to bring in other facts into the matter.

21. The Respondents asserted that under section 193A of the *Criminal Procedure Code*, CAP 75 Laws of Kenya, the fact that any matter in issue in any civil proceedings is also directly or substantially in issue in any civil proceedings shall not be a ground for any stay, prohibition or delay of criminal proceedings. In any event, all cases are ultimately determined on merit.

22. It was therefore the Respondents' case that the Ex-parte Applicants have not demonstrated that the Respondents have acted without or in excess of their powers conferred upon them by law or have infringed, violated, contravened or in any other manner failed to comply with or respect the provisions of the Constitution of Kenya or any other provision thereof. Further, it was contended that the Ex-parte Applicant's Application is based on non-disclosure of material facts made with intent to mislead the Court as to the true facts leading to the ongoing investigations and possible charges sought against them.

23. The case for the Respondents was that every case investigated by the police and a decision made by the Director of Public Prosecutions on whether or not to prefer charges is based on whether or not there is sufficient evidence available. To them, the Ex parte Applicants' Application herein has been filed in bad faith, misconceived and abuse of the court's process and meant to defeat the cause of justice since the accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed and tested by the trial court which is equipped to deal with the quality and sufficiency of evidence gathered and properly adduced in support of any criminal charges that is preferred against the applicants.

2nd Interested Parties' Case

24. According to the 2nd interested party, it comprises more than 10,000 people who are paupers and desperate landless persons and that under its umbrella are members of Kenya National Organization of Ethnic Clashes comprising over 3000 people of poor persons displaced in the Ethnic Violence in 1922-1998. According to the 2nd interested party, its group was settled on the piece of land parcel No. 10425 by the government sometimes before the year 2006 and have constructed homes thereon, schools, business premises and reside thereon. Further, they also constructed a police post in the farm for security purposes as well as offices but the 2nd Interested Party (sic) hired goons who violently and razed them to the ground.

25. It was the 2nd interested party's case that the 1st interested party herein, East Africa Portland Cement Co. Ltd, is aware of the 2nd interested party's presence on the said land and that they have several matters in court litigation pending concerning the title for the land. To them, land parcel No. 10425 is not the property of East Africa Portland Cement Co. Ltd but is their land and maintained that they have a title deed to the property which is the subject matter of Machakos HC Misc Case No, 150 of 2009 HC Misc Civil Case No. 217 of 2011 which title was recommended by the Ndung'u Commission of 2004 for revocation of title. The 2nd interested party also disclosed the existence of Gazette Articles No. 2802 of 1991 by which part of L.R. 10425 was acquired compulsorily by the Government and in the year 2011 the government formed a task force to investigate the ownership of several lands in Athi River including lands belonging to the 1st Interested Party at which the 2nd interested party were invited to by the task force to attend interview and its officials and officials of KNOVE also attended but the 2nd interested party protested the lawfulness of the force to investigate the matter relating to the disputed land and thereafter lodged an application in the High Court being Machakos HC JR No. 220 of 2011.

26. According to the 2nd interested party, they have subdivided the entire land and fully allotted the land to their members and settled them therein. It was however asserted that the groups represented by **Francis Kirima M'Ikunyua** as well as Kananie Settlers Self Help Group are violent land grabbers and adherents of the unlawful criminal gangs of Mungiki sect. It was claimed that the said group is dangerously armed with firearms and have been shooting and killing each other in competition.

27. The 2nd interested party disclosed that on 19th October, 2015, the 1st interested party registered a complaint about these groups with police.

Determination

28. Having considered the application, the affidavits on record and the submissions for and against the grant of the orders sought, this is the view I form of the matter.

29. The law in proceedings of this nature is now old hat. It is trite that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, *ipso facto*, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral

purpose other than its legally recognised aim. Section 193A of the *Criminal Procedure Code* on this issue provides:

Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.

30. However caution ought to be exercised and as was held by the Court of Appeal in **Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others Nairobi Civil Appeal No. 56 of 2012 [2013]eKLR**:

“While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court. This is case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations”

31. Therefore, in the exercise of the discretion on whether or not to grant an order of prohibition, the court takes into account the needs of good administration. See **R vs. Monopolies and Mergers Commission Ex Parte Argyll Group Plc [1986] 1 WLR 763** and **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)**.

32. In **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170**, the Court of Appeal held:

“It is trite that an order of prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.”

33. In **Meixner & Another vs. Attorney General [2005] 2 KLR 189**, the same Court expressed itself as hereunder:

“The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion if acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of

the Constitution... Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power. Having regard to the law, the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision is correct. 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.”

34. In Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69, the High Court held:

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society’s senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court’s) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far that which the courts indeed the entire system is constitutionally mandated to administer...In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute. It is further alleged that the criminal prosecution is an abuse of the court process epitomised by what is termed as selective prosecution by the Attorney General. It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been be argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law...In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court

procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed...There is nothing which can stop the from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made...Under section 77(5) of the Constitution it is a constitutional right that no person who has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of the offence. What is clear from this constitutional right is that it prevents the re-prosecution of a criminal case, which has been determined in one way or another. However, it does not mean that a civil suit and a criminal case cannot co-exist at any one particular time. This is because the section envisages the re-prosecution of a criminal case substantially dealt with either in fact or law, a case in which issues have been laid to rest. There is no mention in the section that the simultaneous existence of a civil and criminal cases is constituting double jeopardy. The courts have, however stated that the power to issue an order of prohibition to stop a criminal prosecution does not endow a court to say that no criminal prosecution should be instituted or continued side by side with a civil suit based on the same or related facts, or to say that a person should never be prosecuted in criminal proceedings when he has a civil suit against him relating to matters in the criminal proceedings...The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution...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.”

35. In Republic vs. Chief Magistrate’s Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703, it was held:

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth...When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to overawe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court... In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in...”

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

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

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

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

38. It is therefore clear that whereas the discretion given to the 1st respondent to prosecute 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 such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt.

39. Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial 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 jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution's evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.

40. Therefore the determination of this case must be seen in light of the foregoing decisions. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the DPP to investigate and prosecute ought to be interfered with.

41. In George Joshua Okungu & another vs. Chief Magistrate's Court Anti-Corruption Court At Nairobi & another [2014] eKLR this Court cited with approval the holding in R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001 to the effect that:

“The function of any judicial system in civilized nations is to uphold the rule of law. To be able to do that, the system must have power to try and decide cases brought before the Courts according to the established law. The process of trial is central to the adjudication of any dispute and it is now a universally accepted principle of law that every person must have his day in court. This means that the judicial system must be available to all...Although the Attorney General enjoys both constitutional and statutory discretion in the prosecution of criminal cases and in doing so he is not controlled by any other person or authority, this does not mean that he may exercise that discretion arbitrarily. He must exercise the discretion within lawful boundaries...Although the state's interest and indeed the constitutional and statutory powers to prosecute is recognised, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious...In doing so the Court may be guided by the following principles: (i). Where the criminal prosecution amounts to nothing more than an abuse of the process of the court, the Court will employ its inherent power and common law to stop it. (ii). A prosecution that does not accord with an individual's freedoms and rights under the constitution will be halted: and (iii). A prosecution that is contrary to public policy (or interest) will not be allowed...A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the

material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case. Evidence of extraneous purposes may also be presumed where a prosecution is mounted after a lengthy delay without any explanation being given for that delay...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...A criminal prosecution that does not accord with an individual's freedoms and rights, such as where it does not afford an individual a fair hearing within a reasonable time by an independent and impartial court, will be the clearest case of an abuse of the process of the Court. Such a prosecution will be halted for contravening the constitutional protection of individual's rights...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds."

42. In Okungu's Case (supra) the Court further held while citing Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323:

"Whereas we appreciate the fact that the decision whether or not to prosecute the petitioners is an exercise of discretion this Court is empowered to interfere with the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable... Under Article 47(1) of the Constitution, "every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair." It is therefore imperative that criminal investigations be conducted expeditiously and a decision made either way as soon as possible. Where prosecution is undertaken long after investigations are concluded, the fairness of the process may be brought into question where the Petitioner proves as was the case in *Githunguri vs. Republic Case*, that as a result of the long delay of commencing the prosecution, the Petitioner may not be able to adequately defend himself. Whereas the decision whether or not the action was expeditiously taken must necessarily depend on the circumstances of a particular case, on our part we are not satisfied that the issues forming the subject of the criminal proceedings were so complex that preference of charges arising from the investigations therefrom should take a year after the completion of the investigations. From the charges leveled against the Petitioners, the issues seemed to stem from the failure to follow the laid down regulations and procedures in arriving at the decision to sell the company's idle/surplus non core assets. In our view ordinarily it does not require a year after completion of investigations in such a matter for a decision to prosecute to be made. That notwithstanding, it is not mere delay in preferring the charges that would warrant the halting of the criminal proceedings. Rather, it is the effect of the delay that determines whether or not the proceedings are to be halted. In this case, there is no allegation made by the Petitioners to the effect that the delay has adversely affected their ability to defend themselves. In other words, the Petitioners have to show that the delay has contravened their legitimate expectations to fair trial. The effect of the long delay in prosecuting the applicant was considered in *Githunguri vs. Republic Case*, where the Court expressed itself as follows:

"We are of the opinion that two infeasible reasons make it imperative that this application must succeed. First as a consequence of what has transpired and also being led to believe that there would be no prosecution the applicant may well have destroyed or lost the evidence in

his favour. Secondly, in absence of any fresh evidence, the right to change the decision to prosecute has been lost in this case, the applicant having been publicly informed that he will not be prosecuted and property restored to him. It is for these reasons that the applicant will not receive a square deal as explained and envisaged in section 77(1) of the Constitution. This prosecution will therefore be an abuse of the process of the Court, oppressive and vexatious... If we thought, which we do not, that the applicant by being prosecuted is not being deprived of the protection of any of the fundamental rights given by section 77(1) of the Constitution, we are firmly of the opinion that in that event we ought to invoke our inherent powers to prevent this prosecution in the public interest because otherwise it would similarly be an abuse of the process of the Court, oppressive and vexatious. It follows that we are of the opinion that the application must succeed in either event.....A prosecution is not to be made good by what it turns up. It is good or bad when it starts. The long and short of it is that in our opinion it is not right to prosecute the applicant as proposed. ”

43. In this case, the applicants contend that the respondent and or its officers in the company of hired goons invaded the informal settlement and started indiscriminately demolishing houses and evicting members of the applicants and in the process stabbed, slashed and generally beat up members of the applicant with little or no action being taken by the respondent and that as a result several members of the applicant were admitted into various hospitals with grievous bodily harm and are still undergoing treatment. It was further contended that the respondent also resorted to arbitrary arrest and institution of criminal proceedings against the applicants as a means of harassing them and enforcing the illegal evictions and demolitions without any notice for the same being served on the applicants. The applicants lamented that despite reporting this violation to the respondent, the respondent has taken absolutely no action against the perpetrators.

44. On the part of the Respondents, it was contended that based on intelligence reports made to the place, the police did arrest certain persons who were found armed with weapons as a result of which the said persons have been charged in Court. The Respondents denied that they were aware of any pending land disputes in respect of the suit land and averred that they were simply maintaining law and order.

45. In my view, it is not for this Court to stop the Respondents in their tracks simply because the Court believes that the Respondents ought to have acted in a different manner. The constitutional discretion given to the DPP and the police ought not to be lightly interfered with especially if on the evidence in their possession if true may well sustain a prosecution. In this case it is clear even from the applicants' own case that there exist land disputes between the parties claiming interests in the suit parcel which disputes are yet to be resolved. In the meantime, it is clear that the parties claiming interests therein are clearly antagonistic to one another. In such circumstances, it behoves the police to ensure that the disputing parties do not take the law into their hands. The police have a duty to arrest any imminent threat to law and order and that action cannot be termed as harassment. If this is what the police are doing then this Court cannot interfere with their exercise of otherwise lawful actions.

46. It is however contended that the police are misusing their power to give one of the parties leverage in the land dispute by evicting the applicants therefrom at the behest of the interested parties. I agree that the powers and discretion given to the police ought to be exercised lawfully and in good faith and purely for the vindication of the commission of a criminal offence and the criminal justice system and where the same are being exercised for the achievement of some collateral purpose other than its legally recognised aim, the Court would be entitled to intervene.

47. However as was held in In **East African Community vs. Railways African Union (Kenya) And Others (No. 2) Civil Appeal No. 41 of 1974 [1974] EA 425**, the onus lies on a person seeking the grant of a prerogative order to establish that it is essential for it to issue since these are not orders that are lightly made. Judicial review or prerogative writs as they were known in the past, it has been held are orders of serious nature and cannot and should not be granted lightly. They should only be granted where there are concrete grounds for their issuance. It is not enough to simply state that grounds for their issuance exist; there is a need to lay basis for alleging that there exist grounds which justify the grant of the said orders.

48. I associate myself with the holding in Republic vs. Kenya Power & Lighting Company Limited & Another [2013] eKLR to the effect that:

“It is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted.”

49. In this case, there are clearly factual issues which are irreconcilable. These are in respect of the manner in which those accused were arrested. It is also contended that the applicants herein are not themselves accused persons in the criminal case. In order for this Court to determine whether the Respondents in effecting the arrest of those who were arrested the Respondent was harassing the applicants, this Court would have to determine who those arrested were and whether they have any nexus with the applicant. Further this Court would have to decide whether or not the said persons were arrested with crude weapons. In order to make findings on these issues, evidence thereon would have to be taken in the ordinary manner. That however is not the duty of a judicial review Court.

50. It is however contended that the Respondents intend to evict the applicants from the suit land. Obviously the Respondents have no such power and this Court would have the jurisdiction to stop them. This issue calls for a discourse on the circumstances under which a judicial review relief of prohibition is warranted. In my view where a decision has been made, a party cannot seek to prohibit the same without having the same quashed. However where the decision is in the process of being made and the only decision that was taken was that the action in question be undertaken, I do not see why the Court cannot in those circumstances prohibit the decision from being concluded even without quashing the decision that the same be undertaken. That is my understanding of the decision of the Court of Appeal in Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No 266 of 1996 where the Court expressed itself as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, *where a decision has been made*, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. *Prohibition cannot quash a decision which has already been made*; it can only prevent the making of a contemplated decision...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 for 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...Only an order of *certiorari* can quash a *decision already made* and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”
[Emphasis mine].

51. It is therefore clear that the Court was emphatic that the remedy of prohibition is only lost where a decision has been made and not where the proceedings in question are still continuing. Accordingly, if the Respondents intend to evict the applicants from the suit land while civil proceedings in respect of the ownership thereof are still pending the Court is entitled, where the allegations are credible to bring such action to a halt. In this case, it is contended by the applicants that their course of action is premised on the doctrine of adverse possession. In other words their cause of action depends on their continuous occupation or possession of the suit property hence their eviction may have the consequence of depriving them of the substratum of their said chose in action. That is a matter not the subject of this suit. However a chose in action may well constitute property under Article 40 hence subject to protection against arbitrary deprivation.

52. Having considered the issues herein the order which commends itself to me and which I hereby grant is an order of prohibition prohibiting the respondents whether by themselves, or any of their officers and or agents from evicting or demolishing the applicants' houses, in relation to the dispute arising from the ownership of all that parcel of land known as L.R. No, 10425 situate along the Nairobi-Mombasa Road without an order of a Court of competent jurisdiction.

53. Save for the foregoing, the prayers sought in the Notice of Motion dated 16th December, 2015 are all disallowed.

54. There will be no order as to costs.

55. Orders accordingly.

Dated at Nairobi this 22nd day of November, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Kwega for the 1st interested party

Miss Mburu for Mr Ndeda for the 4th interested party

CA Mwangi