



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

MISC APPLICATION NO. 163 OF 2016

IN THE MATTER OF: BREACH AND/OR CONRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOM UNDER ARTICLES 159, 165, 19, 20, 21, 22, 23, 28, 29, 31, 48, 49, AND 50 OF THE CONSTITUTION OF KENYA.

AND

IN THE MATTER OF: AN APPLICATION BY REHAN KANTILAL SHAH (HEREINAFTER REFERRED TO AS THE (SUBJECT) FOR ORDERS OF JUDICIAL REVIEW BY WAY OF PROHIBITION AND CERTIORARI AGAINST THE INSPECTOR GENERAL OF POLICE, THE DIRECTOR OF CID, AND THE HONOURABLE THE DIRECTOR OF PUBLIC PROSECUTIONS MADE ON 2ND APRIL 2016 TO INVESTIGATE AND POSSIBLY INSTITUTE CRIMINAL PROCEEDINGS AGAINST THE SUBJECT BRING BEFORE THIS COURT FOR PURPOSES OF BEING QUASHED DECISION BY THE INSPECTOR GENERAL OF POLICE AND THE DIRECTOR OF PUBLIC PROSECUTIONS TO INSTITUTE CRIMINAL PROCEEDINGS AGAINST THE SUBJECT.

AND

IN THE MATTER OF: THE NATIONAL POLICE SERVICE ACT

AND

IN THE MATTER OF: DECISION MADE BY THE OFFICER IN CHARGE OF ANTI - NARCOTICS UNIT ON THE 31ST MARCH 2016 ACTING UNDER THE AUTHORITY OF THE INSPECTOR GENERAL OF POLICE, THE DIRECTOR OF CID, AND THE DIRECTOR OF PUBLIC PROSECUTIONS TO INSTITUTE CRIMIAL PROCEEDINGS AGAINST THE SUBJECT, WITH RESPECT TO NARCOTICS ALLEGEDLY RECOVERED ON THE 31ST MARCH 2016 AND FIREARMS RECOVERED ON THE SAME DAY

IN THE MATTER OF: THE FIREARMS ACT 114 AND CRIMINAL PROCEDURE CODE CAP 75 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: THE LAW REFORM ACT CAP 26, LAWS OF KENYA

AND

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE ACT CAP 21 LAWS OF KENYA, THE CONSTITUTION OF KENYA AND ALL OTHER ENABLING PROVISIONS OF LAW.

IN THE MATTER BETWEEN

REHAN KANTILAL SHAH.....APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATION DIVISION.....3RD RESPONDENT

THE OFFICER IN CHARGE ANTI - NARCOTIC POLICE UNIT.....4TH RESPONDENT

JUDGEMENT

Introduction

1. The applicant herein, **Rehan Kantilal Shah**, by its Notice of Motion dated 11th April, 2016, seeks the following Orders:

1) THAT this Honourable Court be pleased to issue Orders of Certiorari directed to the 1st, 2nd, 3rd and 4th Respondents, by themselves, their servants and/ or agents or any other officer acting under their authority to bring before this Court for the purpose of being quashed, the decision by them made on or about 4th April 2014 commanding the Applicant to attend them at the Criminal Investigation Division (C.I.D) Headquarters and proposed intention to commence criminal proceedings against the Applicant regarding recoveries of narcotics made by the 1st Respondent on 1st April 2016 and firearms recovered on the said date.

2) THAT the Orders of Prohibition to be directed to the 1st Respondent prohibiting the 1st Respondent, his servants and/or agents or any other officers acting with his authority, prohibiting him from proceeding with the intended institution of criminal proceeding against the Applicant regarding recovery of the narcotics made at Loresho on 1st April and firearms recovered later on the same day.

3) THAT the Honourable Court be pleased to issue Conservatory Orders directed against all the Respondents prohibiting them and each one of them from instituting or continuing with any proceedings in the matters complained herein or at all against the Applicant as the same constitutes an abuse of Court process, are arbitrary, capricious and brought *mala fides* by the Respondents in abuse of the due process of the court and intended to occasion great prejudice on the Applicant.

Applicant's Case

2. According to the applicant, on 31st March 2016, at around 8.45 pm, police officers who identified themselves as officers of the Directorate of Criminal investigations- Anti Narcotics Unit purporting to investigate alleged possession of narcotics carried out a search in his home at Loresho and then proceeded to his home at Jana Estate off Jogoo Road, House Number 37 where they continued with the search for

the alleged narcotics. Having searched both houses in vain, on 1st April 2016 at around 5.00 am the applicant was arrested by the officers from the Directorate of Criminal Investigations – Anti Narcotics Unit and detained at Parklands Police Station pending investigation.

3. According to the applicant, despite having informed the arresting officers that he was a licensed gun holder, they nonetheless proceeded to confiscate several firearms and rounds of ammunitions from his Jana Estate home and confiscated his Firearm Certificate Book Number 5866 valid until March 2017 from his Loresho home.

4. The applicant averred that following his arrest on 1st April 2016, the same officers from the Directorate of Criminal Investigations - Anti Narcotics Unit also carried out a search at his Loresho home and seized Gold Jewellery worth Kenya Shillings Six Million Only (Kshs. 6,000,000/-); Two Mobile phones; make: Samsung Curve; Fire Arm Book; Fire Arm Certificate No. 5866; Two Kenyan Passports registered under the name **Shifana Reham Shah**; and one Kenyan Passport registered under the name **Rehan Kantilal Shah**.

5. It was contended by the applicant that the said police officers detained him at Parklands Police Station from 1st April 2016 at 5.00 am to around 4.00pm on 2nd April 2016 when he was released on free bond. The applicant lamented that the police officers from the Directorate of Criminal Investigations Anti Narcotic Unit carried away his guns and ammunitions despite having a Civilian Firearm Certificate Number 5866 and having been authorized by the Office of the President under the Kenya Police Central Firearms Bureau and the Chief Licensing officer Kenya Police to import fire arm accessories. The applicant disclosed that on 28th October 2010, he was authorized by the Office of the President under the Chief Licensing Officer Kenya Police Central Fire Arms Bureau to import a firearm while on 12th September 2011, he was authorized by the Chief Licensing Officer Kenya Police through a letter dated 12th September 2011 to import 22 Air Rifle from the United Kingdom. He further revealed that he has been a member of the Bamburi Rifle Club since 31st December 2011 where he engages in sports which include Target shooting, Bird Shooting and Clay Shooting. In addition to the above, from the year 2010, he held a certificate of Bird Game License from the Kenya Wildlife Service to engage in hunting game birds after he had paid all the requisite charges.

6. Based on legal advice, the applicant contended that under the **Firearms Act**, Cap 114 Laws of Kenya, it is only the Chief Licensing Officer who has the power to withdraw guns from a licensed gun holder and not the Directorate of Criminal Investigations – Anti Narcotic Unit.

7. The applicant averred that since his release on 2nd April 2016 on free bond to date no charges have been preferred against him though as a condition for his release from police custody, he was required to appear before the police at the Criminal Investigation Department Head quarters on 14th April 2016 failure to which warrants would be issued for his arrest.

8. The applicant therefore held the view that the said seizure was in violation of his rights to own property under Article 40 of the Constitution of Kenya 2010 and that the said search and seizure was not only illegal but a gross violation to his constitutional rights guaranteed under Article 31(a) and (b) of the same Constitution.

9. The applicant was therefore apprehensive that the police would bring trumped up charges for Drug Trafficking and Possession of illegal Firearms against him if this Court does not grant the orders as prayed.

10. According to the applicant, the Constitution of Kenya under Article 19(2) provides as follows:

The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.

11. Under Article 31 the right to privacy is protected as follows;

Every person has the right to privacy, which includes the right not to have

(a) Their person, home or property searched;

(b) Their possessions seized;

(c) Information relating to their family or private affairs unnecessarily required or revealed;

(d) The privacy of their communications infringed.

12. The applicant further relied on Manfred Walter Schmitt & Another vs. Attorney General & 3 Others [2014] eKLR, in which the High Court expressed itself as follows;

"[18] The authority given to State agencies to conduct searches and seizures is a limitation of the fundamental right to privacy protected under the provisions of Article 31.

[19] Since searches infringe the right to privacy and the right against arbitrary deprivation of property protected under Article 40, searches must be conducted in terms of legislation which must comply with the provisions of Article 24. It has been said that the existence of safeguards to regulate the way in which state officials enter the private domains, which include obtaining information from third parties like banks, of ordinary citizens is one of the features that distinguish a democracy from a police state."

13. Reliance was also sought from the South African Constitutional Court in The Minister of Safety and Security vs. Van Der Merwe & Others 2011(2) SACR 301 (CC) expressed as follows;

"Search and seizure warrants by their very nature implicate at least two constitutional rights, namely the rights to dignity and privacy."

13. According to the applicant, under Article 40(1) the right to own property is protected while under section 5(4) of the *Firearms Act*, Cap 114 Laws of Kenya, (hereinafter referred to as "the Act") it is only the Licensing Officer who has the power to withdraw a firearms certificate from a licensed firearms holder and not as purported by the Directorate of Criminal Investigations – Anti Narcotic Unit.

14. According to the applicant, the 1st, 2nd and 3rd Respondents decision to institute criminal proceedings against the Applicant in the future would be in bad taste following the manner in which the illegal search and seizure of property was conducted and in this respect the applicant relied on the decision of the Supreme Court of Appeal of South Africa in Ivanov vs. North West Gambling Board (312/2011) [2012] ZASCA in which it held as follows:

"[15] Put differently, the lawfulness of the search and seizure is dependent on the legality of the search warrant. This must necessarily be so as the warrant provides the justification for the search and seizure. If the warrant is declared null and void, it means that there was no basis in law for the search and seizure, which were therefore invalid ex tunc. In this case, the police had no authority to seize the appellant's goods, albeit that they acted in good faith and believed that they had the power to search in terms of the warrant."

Respondent's Case

15. In opposition to the application the Respondents averred that the applicant was arrested together with **Zahid Iqbal** on 1st April, 2016 at 0200 hrs at Mukabi Lane within Loresho Area in a house they both live in (extended family setting) owned by **Zahid Iqbal** and **Sifana Rehan's** parents.

16. According to the Respondent, the search was pursuant to information that the residence was used for

trafficking of Narcotic Drugs Contrary to section 4(a) of the *Narcotic Drugs and Psychotropic and Substances Control Act No. 4 of 1994*. To the Respondent, section 60 of the *National Police Service Act, 2011* and section 73(5) of the *Narcotics Drugs and Psychotropic Substances Control Act, 1994*, empowers an officer investigating an alleged offence on reasonable grounds to search premises without a search warrant.

17. The Respondent averred that the applicant introduced himself as the husband of **Sifana Rehan** who is the sister of **Zahid Iqbal** and they all confirmed that they reside in the one house but different rooms. It was deposed that a search was conducted in all rooms and different items found in separate rooms as indicated in the inventories prepared. In the said search it was revealed that the Jewellery from **Sifana's** room was found in a safe together with 50 rounds of ammunition which were recovered for verification and further Police action. However, **Sifana** disowned the ammunition found with the jewellery and indicated that they were for her husband, the applicant in this case.

18. It was averred that the applicant informed the police that he was a licensed firearms holder with firearms certificate book and card and that upon interrogation on possession of the 50 rounds of ammunition, the applicant confirmed to the Police that he had more firearms and ammunition held in another residence at Jana Estate off Jogoo road, house number 37 and that 10 firearms and 2,032 ammunitions of a different calibre were seized from the applicant for purposes of verification in light of the recent security incidents and threats facing the Republic of Kenya.

19. To the Respondent, section 10 of the Act empowers a police officer to request for a firearms certificate or permit which firearm certificate and card were thereafter collected for verification pursuant to section 4 of the Act. In the Respondent's view, upon initial perusal of the firearms certificate as provided by the applicant:-

- a) The firearms confiscated as compared with the firearms certificate did not tally;
- b) The applicant did not further avail any other information to support the need to have the numerous firearms and ammunitions;
- c) That the circumstances raised suspicion taking into account that drugs were confiscated in the same home.

20. It was further disclosed that an inventory was prepared and duly signed and served upon the applicant on property confiscated for verification pursuant to section 57(5) of the *National Police Service Act* and that the applicant was arrested on 1st April, 2016 at 0200 hrs after search of his residence and booked at Parklands Police Station the same day vide OB 23/1/04/2016. To the Respondent, the arrest of the applicant and **Zahid Iqbal** was in accordance with section 80 of the *Narcotic Drugs and Psychotropic and Substances Control Act No. 4 of 1994*, sections 58(c), 59 and 60 of the *National Police Service Act*, and sections 22 and 29 of the *Criminal Procedure Code* respectively. It was clarified that whereas **Zahid Iqbal** was arraigned in Kibera Law Courts on 4th April 2016 to face charges on drugs trafficking, the applicant has never been arraigned in any Court and was accorded all the rights as per articles 49 and 51 of the Constitution and released on 2nd of April, 2016 at 1656 hrs vide OB 48/2/04/2016 on condition that he appears before the Officer in Charge pending completion of investigations. This investigation, it was averred entails confirmation from the Chief Licensing Officer that the confiscated firearms and ammunitions are all registered under the firearms and ammunitions certificate.

21. It was contended that the Chief Licensing Officer vide his letters dated 11th April 2016 and 27th April 2016 revealed the following information:-

- a) That the firearm certificate and book held by the applicant is genuine and valid;
- b) That the applicant has registered approximately 16 firearms with the bureau as itemized in para 7 of his letter dated 27th April 2016;

- c) That the applicant is expected to renew his certificate on a yearly basis;
- d) That out of the 16 firearms 4 of the firearms have been renewed in the year 2016;
- e) That out of the 16 firearms, 6 firearms itemized para 1-6 of the report are not part of the recovered and/or confiscated firearms;
- f) That the whereabouts of the said 6 firearms mentioned hereinabove are yet to be verified and ascertained from the applicant;
- g) That whereas the applicant is required to submit transfer forms (duly filled) of firearms transferred to another in accordance with section 16(1) and 16(2) of the Post Notice of the Act, no such records exist in his file;
- h) That whereas the applicant is further required to notify the Chief Licensing Officer of change of physical residence or permanent address for the firearms in accordance with section 4(2), 5(5) and 5(7) of the Act, this has not been done so.

22. The Respondent contended that while the applicant was required to appear before Officer in Charge on 14th April, 2016 at 1000hrs for an update of investigations, this application herein took precedence.

23. It was the Respondent's case that it is in the interest of justice and security that the investigations are carried out and concluded and that no prejudice is occasioned on the applicant in terms of the investigations carried out and no conclusion has yet been reached in respect of the said investigations to enable a sound decision be made in that respect. The Respondent therefore was of the view that the applicant's allegation that trumped charges are about to be preferred against him is apprehensive, preemptive and anticipatory. To the Respondent, the application is meant to obstruct, prevent, pervert or defeat the course of justice. It was of the view that it is crucial that the *status quo* of the investigations be preserved and protected to enable the same be concluded expeditiously and without interference.

24. The Respondent asserted that:

- i) that under Article 157(6) of the Constitution of Kenya 2010, the respondent exercises the state powers and functions of Prosecution;
- ii) that the said right has not yet been invoked to warrant the orders sought in the application;
- iii) that in addition thereto, the respondents in the discharge of its duties and functions, is required to respect, observe and uphold the following Constitutional provisions, *inter alia*;
 - a) Uphold and defend the Constitution;
 - b) The national values and principles of governance enshrined in Article 10 in the application, interpretation of the Constitution as well in making and implementing the laws and public policy decisions;
 - c) Respect, observe, protect, implement, promote and uphold the rights and freedoms in the Bill of Rights enshrined in Article 21(1);
 - d) To be accountable to the public for decisions and actions taken and generally observance Article 73 (2) (d);
 - e) To be accountable for administrative acts and observance of the values and principles of public service Article 232(e).
- iv) that the applicant has not demonstrated that in making the decision to carry out investigations,

and enforce the requisite laws, that the respondents have acted without or in excess of the powers conferred upon them by law or have infringed, violated, contravened or in any other manner failed to comply with or respect and observe the foregoing provisions of the Constitution or any other provision thereof;

v) that the applicant seeks to curtail the mandate of the criminal justice system actors as enshrined within the Constitution of Kenya;

vi) that the respondent does not act under the direction or control of any person or authority and as such Article 249 (2) of the Constitution, provides that an independent office is subject only to the Constitution and the law and is not subject to the direction or control by any person or authority; and,

v) that the allegation by the applicant is without merit, legal reason or backing.

25. In view of the foregoing, the Court was urged to exercise extreme care and caution not to interfere with the Constitutional powers of the respondents to investigate and subsequently institute and undertake criminal proceedings and should only interfere with the independent judgment of the respondents if it is shown that the exercise of powers is contrary to the Constitution, is in bad faith or amounts to an abuse of process. In this case it was argued that the applicant had failed to demonstrate that the respondents had not acted independently or had acted capriciously, in bad faith or had abused the legal process in a manner to trigger the High Court's intervention. The Respondent therefore prayed that this application be dismissed in its entirety.

26. It was submitted on behalf of the Respondent that though the investigations into this matter have not yet been concluded an offence has been disclosed in terms of failure to notify the Chief Licensing Officer of change of address of the firearms contrary to section 4(2), 5(5) and 5(7) of the Act which failure is an offence punishable in law under section 4(2) thereof. It was submitted that as held in **Court of Appeal in Civil Appeal No. 266 of 1996 – Kenya National Examinations Council – vs – Republic** the applicant failed to discharge their burden as required by law in accordance with section 107 and 109 of the ***Evidence Act, Cap 80*** as the applicant had not demonstrated with sufficiency the manner in which the investigation is instituted for a collateral malicious purpose, rather, the applicant asserts that the decision made to investigate him and compel his attendance in accordance with section 52 of the ***National Police Service Act, 2011*** is in bad faith, unreasonable, unfair and smack abuse of public authority.

27. The Respondents submitted that Article 245(4) (a & b) of the Constitution as read with section 24 of the ***National Police Service Act*** empowers officers under the National Police Service to investigate any particular offence or offences and further enforce the law against any person or persons and that the conduct of investigations include:-

a) Undertaking a search pursuant to information that a particular residence was used for trafficking of Narcotic Drugs Contrary to section 4 (a) of the ***Narcotic Drugs and Psychotropic and Substances Control Act*** No. 4 of 1994, section 60 of the ***National Police Service Act, 2011*** and section 73(5) of the ***Narcotics Drugs and Psychotropic Substances Control Act, 1994***;

b) Request for a firearm certificate in accordance with section 10 of the Act and further verify the same pursuant to section 4 thereof;

c) Prepare an inventory of items confiscated for purposes of verification in accordance with sections 57 (5) and 60 of the ***National Police Service Act***;

d) Causing an arrest of the applicant and **Zahid Iqbal** in accordance with section 80 of the ***Narcotic Drugs and Psychotropic and Substances Control Act*** No. 4 of 1994, sections 58(c), 59 and 60 of the ***National Police Service Act***, sections 22 and 29 of the ***Criminal Procedure Code*** respectively;

e) Power to compel a witness to attend a police station in accordance with section 52 of the ***National Police Service Act*** to enable the police conclude investigations.

28. The Respondent contended that the investigations carried out in this instance are in line with principles and procedures provided under the ***National Police Service Act***, Investigation Policies, Manuals and Standing Orders and relied on **Cape Holdings Limited vs. Attorney General & Another [2012] KLR.**

29. As regards the prayer for an order of Certiorari against the Decision of the Respondent to Prosecute, the respondent submitted that the applicant presumes that a charge will be preferred against him in respect of the recovered narcotics, yet the decision to summon the applicant was more so in respect of investigations related to the recovery and verification of firearms and ammunitions recovered from the applicant himself. However, the decision to summon the applicant to appear before the investigating officer in terms of investigating the firearms and ammunition is within the confines of the law in terms of Articles 244 and 245 of the Constitution and sections 24 and 52 of the ***National Police Service Act***.

30. It was submitted that the decision as to whether to institute criminal proceedings against the applicant will be in accordance with the mandate of the respondents and as such in line with Article 157 of the Constitution and section 4 and 5 of the ***Office of the Director of Public Prosecutions Act, 2013***.

31. It was therefore submitted that the applicant has not demonstrated with sufficiency the manner in which the investigation and intended prosecution against the applicant is in contravention of the respondent's constitutional mandate but instead seek to curtail the institutions empowered to maintain and enforce law and order.

32. The Respondents further submitted that the applicant has not demonstrated that in making the decisions and enforcing the requisite laws, that the respondents have acted without or in excess of the powers conferred upon them by law or have infringed, violated, contravened or in any other manner failed to comply with or respect and observe the foregoing provisions of the Constitution or any other provision thereof to warrant the order sought for. In support of the submissions the Respondent relied on the following decisions:-

i) **Manilal Jamnadas Ramji Gohil –v- Director of Public Prosecution NBI Criminal Appeal (APPL) No. 57 of 2013.**

ii) **In Kuria & 3 Others vs. Attorney General [2002] 2 KLR**

iii) **William S. K Ruto and Another v AG Civil Suit No.1192 of 2005.**

iv) **Republic v Kenya Revenue Authority & 2 others [2013] eKLR, Misc. Appl. JR.186 of 2013.**

v) **Danson Buya Mungatana V Attorney General & 2 Others [2012] E KLR Petition 46 of 2011**

vi) **Michael Monari and Anor v The Commissioner of Police and 3 Others Misc Application 68 of 2011**

vii) **Meixner and Another v AG, (2005) 2KRL.**

viii) **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170,**

ix) **Republic v Director of Public Prosecutions & 3 others Ex-Parte Bedan Mwangi Nduati & another [2015] eKLR, Judicial Review 332 of 2014.**

x) R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001

33. It was submitted that the applicant have failed to show that the exercise of the respondents' powers is contrary to the rules of natural justice, in bad faith, or amounts to an abuse of process to trigger the High Court's intervention for a review of its decision hence the application before this Honourable Court ought to be dismissed with costs and that the interim orders issued be vacated.

Determination

34. I have considered the application.

35. By this application, the applicant is in effect seeking an order barring the Respondents from conducting investigation with respect to the confiscation of firearms found in possession of the applicant. The applicant in effect contends that the search which gave rise to the said action was unlawful as no search warrants were obtained before the said action. Article 50(4) of the Constitution provides as follows:

Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

36. Similarly, section 57(1) of the *National Police Service Act*, provides as follows:

Subject to the Constitution, if a police officer has reasonable cause to believe—

(a) that anything necessary to the investigation of an alleged offence is in any premises and that the delay caused by obtaining a warrant to enter and search those premises would be likely to imperil the success of the investigation; or

(b) that any person in respect of whom a warrant of arrest is in force, or who is reasonably suspected of having committed a cognizable offence, is in any premises, the police officer may demand that the person residing in or in charge of such premises allow him free entry thereto and afford him all reasonable facilities for a search of the premises, and if, after notification of his authority and purpose, entry cannot without unreasonable delay be so obtained, the officer may enter such premises without warrant and conduct the search, and may, if necessary in order to effect entry, break open any outer or inner door or window or other part of such premises.

37. Suffice it to say that evidence obtained in violation of the law is only to be excluded where its admission would render the trial unfair or otherwise detrimental to the administration of justice. In my view it is not the mere fact of the manner in which the evidence is obtained that determines its admissibility and the effect on the fairness of the trial process. That is a matter that can only be determined by the trial Court if and when a determination is made that criminal proceedings be preferred against the applicant. It is at that stage that the Respondent will be hard put to satisfy the trial Court that there existed special circumstances that warranted the search to be carried out even in the absence of the search warrants.

38. Section 52(1) and (4) of the same Act on the other hand provides that:

(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.

(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.

39. Accordingly there is nothing wrong with the police requiring a person to record a statement whether the person is considered a suspect or not. Further there is nothing inherently wrong with the police requiring a person to attend before him at a police station for the purpose of investigations.

40. It is conceded by the Respondents that they set out to investigate a complaint relating to drug trafficking. However in the course of their investigations they came across facts which according to them disclose a possibility of a commission of a criminal offence in the nature of the failure to disclose change of location of firearms. To them the failure to do so constitute the commission of an offence. It is not for this Court sitting as a judicial review Court to make a definite finding on the issue.

41. 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.

42. In my view, if in the course of their investigations the police chance upon an act or omission which in their view reasonably leads them to believe that an offence different from the one being investigated may have been committed, the police in their duty to prevent and detect crime cannot be expected to close their eyes to that fact. If they do this it would amount to abdication of their statutory duty.

43. According to the applicant, under section 5(4) of the ***Firearms Act***, Cap 114 Laws of Kenya, (hereinafter referred to as “the Act”) it is only the Licensing Officer who has the power to withdraw a firearms certificate from a licensed firearms holder and not as purported by the Directorate of Criminal Investigations – Anti Narcotic Unit.

44. However section 10 of the Act provides as follows:

(1) Any police officer, customs officer or licensing officer may demand from any person whom he believes to be in possession of a firearm or ammunition the production of any firearm certificate or of any permit granted under subsection (12) or subsection (13) of section 7 at or before such time, at such place and to such police officer, customs officer or licensing officer as he may specify.

(2) *A demand under this section may be made orally or in writing.*

(3) *If any person upon whom a demand is so made fails to produce any certificate or permit granted to him, or to allow the officer to read it, or to show that he is entitled by virtue of this Act to have the firearm or ammunition in his possession without holding a firearm certificate or permit, the officer may seize and detain the firearm or ammunition, and may require that person to declare to him immediately his name and address.*

(4) *If any person upon whom a demand is so made fails, without reasonable cause, to produce any certificate or permit granted to him, or to allow the officer to read it, or refuses so to declare his name and address, or fails to give his true name and address, he shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings.*

45. From the foregoing it is apparent that certain acts and omissions which constitute criminal offences under the *Firearms Act* may be enforced by police officers.

46. 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.*”

47. 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.”

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

49. 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.

50. 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.

51. 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...”

52. 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.”

53. 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”.

54. 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.

55. In this case, the Respondents contend that they are in the process of investigating certain offences relating to the possession of firearms by the applicant. This Court cannot say that based on the material placed before the Court 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.

56. To grant the orders sought in this application in my view would be both pre-emptive and presumptuous in light of the fact that the DPP's decision to prosecute, if that stage will ever be reached is a matter of conjecture. This Court ordinarily does not interfere with the exercise of constitutional and statutory power of executive authorities unless there exist grounds for doing so. I am afraid that there are no sufficient material on the basis of which I can find that upon the completion of the investigations, the applicant will be found to have committed any offence under the *Firearms Act*. At this point of investigation, the applicant should furnish the Respondents with all relevant materials which would assist the police in arriving at the correct decision.

57. 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.

58. 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.”

59. 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.

60. In my view, the mere fact that the Directorate of Criminal Investigations has conducted its own independent investigations, and based thereon, arrived at a decision does not necessarily preclude the DPP from undertaking its mandate under the foregoing provisions. Conversely, the DPP is not bound to prosecute simply because the DCI has formed an opinion that a prosecution ought to be undertaken. The

ultimate decision of what steps ought to be taken to enforce the criminal law is placed on the officer in charge of prosecution and it is not the rule, and hopefully it will never be, that suspected criminal offences must automatically be the subject of prosecution since public interest must, under our Constitution, be considered in deciding whether or not to institute prosecution. See *The International and Comparative Law Quarterly* Vol. 22 (1973).

61. 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.”

62. 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) ...”

63. 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 ...”

64. 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.

65. To this extent I associate myself with the position adopted in the **Cape Holdings Limited vs. Attorney General & Another [2012] KLR** where it was held that:

“...it is the duty of the police to receive and investigate complaints of criminal offences

brought to it by any member of the public. Such a complaint cannot be made to an arbitrator as an arbitrator has no powers to investigate and determine a criminal offence or to prosecute or hear a criminal complaint...My understanding of the law is that the responsibility to investigate, determine the credibility of the complaint and prosecution is solely left for the police under the direction and control of the Director of Public Prosecution. The predominant factor being that they must act in accordance with the law and so long as they do not exceed the limits, then a court should not prohibit the prosecution of an individual. The investigation of a criminal offence or complaint cannot be easily prohibited or stopped unless there is credible and reasonable evidence to show the same is mounted for an ulterior purposes or objectives.....”

66. 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.”

67. It is however my view that the police are clearly mandated to investigate the commission of criminal offences and in so doing they have powers inter alia to take statements and conduct investigations. In order for the applicant to succeed he must show that not only are the investigations which were being done by the police are being carried out with ulterior motives but that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the *predominant* purpose is to further some other ulterior purpose and as long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.

68. 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.”

69. 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.

70. It was however contended that this Court by its orders issued in the Judicial Review 163 of 2016 curtailed the Respondent’s rights to conduct their investigations. Whereas the Respondents are entitled to conduct investigations into the allegations of the commission of criminal offences, it is however my view that criminal investigations ought to be carried and finalised with expedition and a decision made one way or another as soon as possible so as to avoid subjecting a person to unnecessary anxiety. In **George Joshua Okungu & Another vs. Chief Magistrate’s Court Anti-Corruption Court at Nairobi & another [2014] eKLR** this Court expressed itself as follows:

“The Petitioners further contend that the said charges are being brought after a long period of time after the investigations thereon had been closed. 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.”

71. In this case the Petitioner was arrested on 1st April, 2016. The order of stay was issued on 7th April, 2016. In my view in the circumstances of this case the Respondents cannot be accused of inordinate delay in finalising their investigations and arraigning the Petitioner in Court.

72. 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.

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

74. Consequently the Notice of Motion dated 11th April, 2016 fails and is dismissed with costs.

Dated at Nairobi this 13th day of December, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kimani for the Applicant

Mr Mbugua for the Respondents

CA Mwangi