



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI LAW COURTS)

CONSTITUTIONAL APPLICATION NO. 678 OF 2007

**IN THE MATTER OF AN APPLICATION UNDER SECTIONS 65,6,72,77 AND 82 OF THE
CONSTITUTION OF KENYA**

BETWEEN

JOHN MWANGI WAGAKO.....APPLICANT

-VERSUS-

ATTORNEY GENERAL.....1ST RESPONDENT

STEPHEN KARANJA.....2ND RESPONDENT

GABRIEL MUTURI.....3RD RESPONDENT

JUDGEMENT

Introduction

1. By an Originating Notice of Motion dated 25th June 2007, the applicant herein **John Mwangi Wagako**, seeks the following orders:

1. An order that this honourable court be pleased to supervise the proceedings in the Chief Magistrate's Court Nairobi in Criminal Case No. 11 of 2006, Republic –v- John Mwangi Wagako and Criminal Case No. 720 of 2006, Republic –v- John Mwangi Wagako, and make such orders and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by the subordinate court which is seized of the two criminal cases.

2. An order that this honourable court be pleased to review and set aside the orders made on 24th May 2007 by Chief Magistrate's Court Nairobi in Criminal Case No. 11 of 2006, Republic –v- John Mwangi Wagako and Criminal Case no. 720 of 2006, Republic –v- John Mwangi Wagako, declining the Applicant's application for the consolidation of the two Criminal cases and also declining the Applicant's application for an order that questions of interpretation of Section 26 of the Constitution and contravention of the Applicant's rights under Sections 72, 77 and 82 of the Constitution arising in the course of the proceedings of Criminal Case No. 11 of 2006 be referred to this honourable court under Sections 67 and 84(3) of the

Constitution, for determination.

3. An order that the Chief Magistrate's Court do consolidate Criminal Case No. 11 of 2006, Republic -v- John Mwangi Wagako and Criminal Case No. 720 of 2006 and refer to this honourable court questions of interpretation of Section 26 of the Constitution and contravention of the Applicant's rights under Section 72, 77 and 82 of the Constitution arising in the course of the proceedings in both Criminal Case NO. 11 of 2006 and Criminal Case No. 720 of 2006.

4. As an alternative to prayer 3 above, an order that Criminal Cases Nos. 11 of 2006 and 720 of 2006 be deemed to have been consolidated by the Chief Magistrate's Court and questions of interpretation of Section 26 of the Constitution and contravention of the Applicant's rights under Sections 72, 77 and 82 of the Constitution arising in the course of the proceedings of Criminal Case No. 11 of 2006 referred to this honourable court under Sections 67 and 84(3) of the Constitution, for determination, vide Rules 8 and 25 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court (Practice & Procedure) Rules.

5. An order that further proceedings in the said Chief Magistrate's Court Criminal Case No. 11 of 2006, RRepublic -vs- John Mwangi Wagako and Criminal Case No. 720 of 2006, Republic -v- John Mwangi Wagako be stayed until suit is heard and determined.

6. A declaration that the Proceedings of the Chief Magistrate's Court in Criminal Case No. 11 of 2006, Republic -v- John Mwangi Wagako and Criminal Case No. 720 of 2006, Republic -v- John Mwangi Wagako after 24th May 2007 contravene the Applicant's rights under Sections 72, 77 and 82 of the Constitution to liberty, fair trial, and the right not to be subjected to an arbitrary exercise of power, respectively.

7. A declaration that the 1st Respondent contravened the Applicant's right to liberty under Section 72 of the Constitution by ordering, on 8th June 2007 in Criminal Case No. 720 of 2006, that a warrant for the arrest of the Applicant do issue despite the facts that the Applicant and his counsel had not been notified of the intention to mention his cases on 25th May 2007.

8. A declaration ha the 1st Respondent contravened the Applicant's right to liberty under Section 72 of the Constitution by ordering, on 8th June, 2007 in Criminal Case No. 11 of 2006, that a warrant for the arrest of the Applicant do issue despite the facts that the Applicant had not been notified of the intended mention of this case at the instance of the prosecution on 25th May 2007 and also and on 8th June, 2007, the Applicant's counsel had not been notified of the date of mention as ordered by the court itself on 25th May 2007.

9. A declaration that the 2nd and 3rd Respondents have both authored, and aided and abetted the contravention of the Applicant's rights and are liable for the contraventions of the Applicant's rights under Section 72, 77 and 82 of the Constitution.

10. An order that the warrants of arrest issued by the Chief Magistrates Court in Criminal Case Nos. 11 of 2006 and 720 of 2006 on 8th June 2007 be quashed/lifted forthwith.

11. A declaration that the holding of the Applicant in custody as from 22nd June

2007 in connection with Criminal Case No. 720 of 2006, Republic –v- John Mwangi Wagako is a contravention by the Respondent of the Applicant’s right to liberty under Section 72 of the Constitution.

12. An order that the Applicant’s bail suspended on 22nd June 2007 in connection with Chief Magistrate’s Criminal Case No. 720 of 2006 be restored forthwith or until further orders of this honourable court.

13. An order that the Respondents do pay to the Applicant general and exemplary damages.

14. Costs of this application be provided for.

Applicant’s Case

2. The said Motion was supported by an affidavit sworn by **Mary Wanjiku Mwangi**, the applicant’s wife on 25th June, 2007.

3. According to the deponent, the Applicant had been in remand prison as from 22nd June 2006 when his bail was suspended by the court in Chief Magistrate’s Court at Nairobi Criminal Case No. 720 of 2006 which together with Chief Magistrate’s Court at Nairobi, Criminal Case No. 11 of 2006, had been instituted against the applicant by the 2nd and 3rd Respondents, Step-brothers and fellow directors and shareholders in **Nyakio Investments Ltd**, a family company to force him to accept their formula of sharing their late father’s wealth, in spite the existence of a will. The said father, it was deposed died on 12th June, 2000.

4. According to the deponent, at a secret mention of the criminal case by the court on 8th June 2007 at the request of the prosecution, a warrant of arrest was issued and an order made that the case be mentioned on 22nd June 2007 and the applicant became aware of this fact on 19th June, 2007. It was the deponent’s contention that the secret mention of the criminal case No. 720 of 2006 is one of a number of secret mentions which the prosecution had undertaken since 22nd March 2007 with a view to defeating the course of justice and oppressing the applicant. To expound on this it was averred that at yet another secret mention of the applicant’s Criminal Case No. 11 of 2007 on June 8th 2007 the court on the application of the prosecutor ordered that the applicant who was free on bond be arrested and the matter be mentioned by the court on 29th June 2007.

5. It was the deponent’s view that the prosecutor to whom the Respondent had delegated prosecutorial powers was abusing his powers and turning the court into a tool of the applicant’s fellow directors to prosecute him in what amounted to a persecution.

6. It was further disclosed that the Applicant who married the deponent in the year 2003 had two children with the deponent.

7. Based on the applicant’s legal counsel it was deposed that Chapter 5 of the Kenya Constitution protects the fundamental rights and freedoms of the individual; that the protection of fundamental rights and freedoms provided is against violation by any arm of the state including the judiciary in which the magistrate serve; that the rights protected include those to liberty, a fair trial and not to be subjected to arbitrary exercise of power by any organ of the state; that where a person’s fundamental rights are contravened by the court the proper person to sue is the Attorney-General and not the particular judicial officer concerned; that the constitutional protection is against contravention by any arm of the state including the judiciary; that under Section 65(2) of the constitution this honourable court has power to supervise criminal proceedings pending in the Chief Magistrate’s court like criminal cases No. 11 and 720 of 2006 and make such orders and give such direction it considers appropriate for ensuring that justice is duly administered by the subordinate court; that this honourable court has power to prevent secret mentions of the applicant’s criminal cases Nos. 11 of

2006 and 720 of 2006 and his illegal deprivation of liberty; and that under the same Section i.e. Section 65(2) of the Constitution this honourable court has power to supervise the subordinate court exercise of the referred powers under Section 67 and 84(3) of the constitution through legal Notice No. 6 of 2006.

8. It was further averred that the background to the oppressive and secret mentions of the applicant's said criminal cases is his decision on legal advice to apply on 28th February to the subordinate to refer to this honourable court questions of interpretation of the constitution and contraventions of his fundamental rights. The applicant, it was averred was seeking redress for protection of his fundamental rights to liberty, a fair trial and not to be subjected to an arbitrary exercise of power. It was contended that on 22nd June 2007 the applicant suffered a deprivation of his liberty when he attended a mention of Criminal Case No. 720 of 2006 and that the prosecutors who are prosecuting his criminal cases Chief Magistrate's Criminal Cases Nos. 11 of 2006 and 720 of 2006 have conspired by the majority shareholders to ensure that the applicant remains in custody. To this end, one of them, **Inspector Makonge**, has decided to conveniently shut his eyes and ears to the application made in Criminal Case No. 11 of 2006.

9. It was added that through secret mentions of the applicant's case on May 25th and June 8th 2007 the prosecutors procured irregular and illegal warrants of arrest to be issued and the two cases be mentioned on June 22nd and June 29th 2007, respectively.

10. It was disclosed that in Chief Magistrate's Criminal Case No. 720 of 2006 the applicant is charged with malicious damage to the property of Nyakio Investments Ltd and that after excluding the applicant who is a shareholder and director from its management, the said Nyakio Investments Ltd. is being managed by the 2nd and 3rd Respondents, his step brothers and that in an application which he filed in the Chief Magistrate's Court on March 21, 2007 the applicant explained the genesis of the two criminal cases. To the deponent, in the second criminal case the formal complainant are watchmen whom his said brothers had instructed to exclude him from the company premises but the real complainants are his said two step brothers and in that case, the applicant is charged with assaulting watchmen whom his company as controlled by his stepbrothers had been hired to provide services in Nyakio House which is owned by the said **Nyakio Investments Ltd**.

11. Based on legal advice, it was contended that a company like **Nyakio Investments Ltd**. acts through resolutions passed by its directors; that Honourable **Kombo** has held that the 2nd and 3rd Respondents cannot, in law, make a lawful decision unless a board meeting of Nyakio Investments Ltd has been convened, which the Applicant is entitled, by virtue of being a director and shareholder, to attend; and that the two criminal cases were illegally instituted against the Applicant as the board of director of **Nyakio Investments Ltd** did not authorize their institution.

12. According to the deponent, the court files in respect of the Chief Magistrate's Court Criminal Cases Nos. 11 of 2006 and 720 of 2006 show that Criminal Case No. 11 of 2006 is part-heard before His Honour **Mr. F. M. Kombo**, Senior Resident Magistrate and the hearing began on 5th June, 2006; that the hearing of Criminal Case No. 720 of 2006 has not commenced but has since 2nd March 2007, been mentioned before His Honour **Mr. Tanchu**, Acting Senior Resident Magistrate, on many occasions; that the complainant in Criminal Case No. 720 of 2006 is **Nyakio Investments Ltd** of which the Applicant and 2nd and 3rd Respondents are shareholders and directors; that the complainants in Criminal Case No. 11 of 2006 are two watchmen – **John O. Nyameiyo** and **Josphat M. Ernest** – employed by Hot Bird Security, a security firm hired by **Nyakio Investments Ltd** to guard the company's property on LR No. 209/1496, River Road; that the alleged offences with which the Applicant is charged were, according to the charge sheet, committed in Nyakio House which is owned by **Nyakio Investments Ltd**; that since the cases were preferred against the Applicant, the advocate for **Nyakio Investments Ltd** whose appointment the Applicant did not consent to has been holding a watching brief in the two cases; that until 28th February, 2007, **Mr. Ngata Kamau** Advocate was representing the Applicant in the said two criminal cases and on that day, **Mr. Gibson**

Kamau Kuria was instructed to act for the accused in the place of **Mr. Ngata Kamau**; that on 28th February, 2007, when Criminal Case No. 11 of 2006 came up for hearing, the Applicant's new counsel informed the court that the Applicant intended to apply for that case and Criminal Case No. 720 of 2006 to be consolidated and referred to the High Court for interpretation of Section 26 of the Constitution and for redress of contraventions of fundamental rights and the matter was set down for argument on 21st March 2007 and it was ordered that the court file in respect of Criminal Case No. 720 of 2006 be availed to court; the Court Prosecutor who was prosecuting that case was **Inspector Mutie** and though there was the possibility of his Honour Mr. Kombo and His Honour **Mr. Tanchu** making conflicting decisions in Criminal Cases Nos. 11 of 2006 and 720 of 2006 which appreciated by his Honour **Mr. Tanchu** on 7th March 2007, the prosecutor turned that possibility into an opportunity for persecuting the Applicant; that on 2nd March 2007 when the Criminal Case No. 720 of 2006 was listed before his honour **Mr. Tanchu** Acting Senior Resident Magistrate in the presence of counsel holding brief for the complaint, the prosecutor **Inspector Makonge** in the presence of the Applicant in person informed the court that the court file had been consolidated with court filed for Criminal Case No. 11 of 2006 vide an order made on 28th February 2007, whose existence the Applicant brought to the attention of the court but the Prosecutor insisted on proceeding with the hearing and despite the court being aware of the fact that the applications for consolidation and for reference to this honourable court were to be prosecuted on 21st March 2007 set down Criminal Case No. 720 of 2006 for mention on 21st March 2007; that on 21st March 2007 the two files were placed before his honour **Mr. F. M. Kombo**, Senior Resident Magistrate in the presence of the prosecutor, **Inspector Mutie**, counsel holding brief for **Nyakio Investments Ltd** was present, the Applicant and his counsel, **Mr. Gibson Kamau Kuria** and the latter started prosecuting the applications but the court ordered that a formal application be filed and heard on 3rd April 2007 though Criminal Case No. 720 of 2006 was not mentioned before his honour **Mr. Tanchu**; that despite the fact that there was no order made by his honour **Mr. F. M. Kombo** on 21st March 2007, Criminal Case No. 720 of 2006 was mentioned before his honour **Mr. Tanchu**, Acting Senior Resident Magistrate, in the absence of and without notice to the Applicant and his counsel, **Mr. Kamau Kuria** when **Inspector Makonge** intimated that he wanted to begin prosecution of this case on 7th March 2007 despite the order made in Criminal Case No. 11 of 2006 on 28th February 2007.

13. It was further averred that on 22nd March 2007 when Criminal Case No. 720 of 2006 was mentioned in the absence of the Applicant, His honour **Mr. Tanchu** stated that he had perused the proceedings in Criminal Case No. 11 of 2006 and noted that no order for consolidation of the two cases had been made as yet, but there was an application for consolidation to be heard on 3rd April 2007, he ordered that the file in respect of Criminal Case No. 720 of 2006 do remain in abeyance pending the outcome of the application to be heard on 3rd May 2007 and that nothing else happened in this file until 25th May 2007 when it was mentioned in the absence of the Applicant and his counsel who had not been notified of the intended mention; that on 3rd April 2007, the Applicant's application for consolidation of the two cases and reference to the High Court was prosecuted and the ruling reserved and Criminal Case No. 720 of 2006 was not mentioned before his honour **Mr. Tanchu**; that on 24th May 2007, his honour **Mr. F. M. Kombo** Senior Resident Magistrate, delivered a ruling on the application made on 3rd April 2007 declining the application for the consolidation of the two cases and for the reference of interpretation of Section 26 of the Constitution and contraventions of Sections 72, 77 and 82 of the Constitution, in respect of the proceedings in Criminal Case No. 11 of 2006 but allowing reference from proceedings in respect of Criminal Case No. 720 of 2006 which ruling was read in the presence of the Applicant and an advocate who held brief for **Mr. Gibson Kamau Kuria**; that despite the fact that the court did not order that a mention of either of these two criminal cases takes place the following day, on 25th May 2007, the two criminal cases i.e. No. 11 of 2006 and No. 720 of 2006 were mentioned before his honour **Mr. F. M. Kombo**, Senior Resident Magistrate, in the absence of the Applicant and his counsel who had not been notified of that mention and the court set down the two cases for mention on 8th June 2007 and the ordered that the Applicant's counsel, **Dr. Kuria**, be informed of the date of the mention; that on 8th June 2007, the two criminal cases were mentioned before his honour **Mr. Tanchu** by **Inspector Njeru** who applied for warrants

of arrest to issue in both cases and fixed the mentions on different dates, namely, 22nd June 2007 and 29th June, 2007; and that on 22nd June 2007 Criminal Case No. 720 of 2006 was listed for mention before his honour **Mr. Tanchu** and the Applicant and his counsel appeared before the court and application for setting aside of the warrant issued on 8th June 2007 was made whose ruling was reserved but the applicant ordered to remain in custody.

14. Based on legal advice the applicant deposed that in criminal cases, the court is as a general rule, moved by the prosecutor who institutes the criminal proceedings; that section 72 of the Constitution mandates that every accused be presumed to be innocent until proved guilty, and that the holding of secret mentions, issuance of warrants of arrest on 8th June 2007 and suspension of the Applicant's bail are serious contraventions of his right under Sections 72, 77 and 82 of the Constitution.

15. He reiterated that though Criminal Case No. 11 of 2006 is part heard by his honour **Mr. F. M. Kombo** who often sits in the Chief Magistrates Court which is housed by the City Hall, the hearing of Criminal Case No. 720 of 2006 has not begun. The two cases, it was asserted are an offshoot a very severe family dispute regarding how the late father's wealth is to be inherited by his three surviving widows, their children and spouse of the children and that the suits which have been filed in connection with that struggle are described in a winding up petition which the deponent's husband has filed in the Commercial Division of the High Court at Milimani which suits touch on succession to his property, management of the said family company management of his company and control of the various assets of her late father in law.

16. It was therefore the deponent's position that the prosecution has allowed itself to be misused by her husband's step brothers.

1st Respondent's Case

17. On behalf of the 1st respondent, the following grounds of opposition were filed:

- 1. The prayers sought by the petition are unconstitutional as they seek to prevent the 4th Respondent from exercising its mandate. The prayers if granted would result to a greater injustice in the criminal justice system and public interest.**
- 2. The Applicant has not adduced reasonable evidence to show that criminal proceedings were mounted for an ulterior purpose and have not demonstrated how the 4th Respondent has acted without or in excess of powers conferred upon them by law.**
- 3. The Petitioner must demonstrate that substantial injustice would otherwise result if the criminal proceedings proceed.**
- 4. It is in the public interest that complaints made to the police are investigated and the perpetrators of crimes are charged and prosecuted.**
- 5. The application has been overtaken by events as the criminal cases no longer exist.**
- 6. The application is without merit, an abuse of court process and should therefore be dismissed with costs to the Respondents.**

2nd and 3rd Respondents Case

18. In opposition to the application the 2nd and 3rd Respondents filed a joint replying affidavit on 11th July, 2007.

19. According to them, the application is fatally defective, frivolous, oppressive, vexatious, scandalous

and an abuse of the court process as such ought to be dismissed. In their view, the sole purpose of the application is to pre-empt the hearing of Criminal Case No. 11 of 2006 Nairobi and Criminal Case No. 720 of 2006 which are purely different and from different set of circumstances going by the charge sheets.

20. They deposed that the Constitutional Application No. 678 of 2007 is activated by malice by the Applicant towards them by bringing irrelevant issues independent from Criminal Case Nos. 11 of 2006 and 720 of 2006 and they were unable to understand why the Applicant involved them whilst these criminal cases were initiated by the Republic or the state.

21. It was averred that in Criminal Case No. 11 of 2006 the complainant is **John Okumu Nyameiyo** and **Josphat M. Ernest** and the particulars are different from Criminal Case No. 720 of 2006 hence there can never be consolidation nor has the Applicant's rights been encroached or abused. The said respondents asserted that the subordinate courts where the two cases are going on have conducted the proceedings within the provisions of Section 65, 72, 77 and 82 of the Constitution of Kenya. To them under Section 70 of the Constitution of Kenya fundamental rights and freedom are enjoyed by any person subject to respect for the rights of freedom of others and for the public interest which the Applicant abused in the two criminal cases.

22. In the said respondents' view, apart from charge sheets, other exhibits are irrelevant in this suit and that the purported court proceedings are equally of no legal value purposes as they are not certified by court. To them, the subordinate courts dealing in the two criminal cases are competent courts and that section 85(3) of the Constitution of Kenya is not relevant to this case.

23. It was explained that in Criminal Case No. 720 of 2006 the complainant is **Nyakio Investments Ltd** who lodged the same after the Applicant plus **John Gitahi Wachira** unlawfully damaged the property of the aforesaid company valued at Kshs. 80,000/= on the 23rd April 2006 hence it was clear that the Applicant has no respect of the law and Criminal Case No. 720 of 2006 has to proceed to its logical conclusion either in having a conviction or an acquittal. The said respondents denied that the said cases were connected to the succession and averred that these two are different criminal cases. They further denied that they were involved in misusing the prosecution hence the application is purely meant to stop the Criminal Case Nos. 11 of 2006 and 720 of 2006 from proceeding for hearing.

Determinations

24. I have considered the Originating Notice of Motion herein, the supporting affidavit, the grounds of opposition, the replying affidavit, the submissions and authorities cited.

25. Before dealing with the issues raised in these proceedings it is important to revisit the principles which guide a decision to suspend or interfere with criminal proceedings.

26. 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.”

27. 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.”

28. 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 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.”

29. 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 a 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 over-awe 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...”

30. 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”.

31. 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”.

32. 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.

33. 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.

34. 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 1st Respondent (now bestowed upon the DPP) to investigate and prosecute ought to be interfered with.

35. Since the institution of these proceedings in 2007 a new Constitution was promulgated in August 2010. As a result of the said promulgation, the provisions cited in these proceedings are no longer the same though in my view the issues raised are still relevant. However, it is no longer necessary to apply to the Magistrate’ Court hearing a criminal case to refer the matter to the High Court where a Constitutional issue arises. Therefore where an issue of Constitutional interpretation arises during the course of the criminal proceedings, a party is entitled to institute appropriate proceedings in the High Court by way of a Constitutional Petition and seek conservatory orders therein pursuant to Article 23 of the Constitution.

36. In the premises the only issues that remain for determination before me are:

1) Whether this Court should order consolidation of Chief Magistrate’s Court Criminal Cases Nos. 11 of 2006 and 720 of 2006 between Republic vs. John Mwangi Wagako.

- 2) Whether this Court should declare that the said proceedings contravene the applicant's rights to liberty, fair trial and the right not to be subjected to an arbitrary exercise of power.
- 3) Whether this Court should quash or lift the warrants of arrest.
- 4) Whether to grant to lift the suspension of the applicant's bail.
- 5) Whether to award General Damages
- 6) Costs

37. That the decision whether or not to consolidate criminal cases is an exercise of discretion on the part of the Court is not in doubt. For this Court to interfere with an exercise of that discretion the applicant ought to satisfy the Court that certain factors exist. 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."

38. 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."

39. In the said criminal cases it is clear that the complainants are not the same. The offences are similarly not the same. Whereas the applicant contends that in the second criminal case the formal complainants are watchmen whom his said brothers had instructed to exclude him from the company premises but the real complainants are his said two step brothers, based on the material before the Court and without the Court being in a position to know the nature of the evidence which is intended to be adduced, this Court cannot make a determination that the watchmen are just proxies of the applicant's brothers in the second criminal case. Accordingly, I am not satisfied that the Court ought to interfere with the discretion of the trial Court and order a consolidation of the two criminal cases.

40. The second issue is whether this court should declare that the said criminal proceedings contravene the applicant's rights to liberty, fair trial and the right not to be subjected to an arbitrary exercise of power. The applicant contends that the manner in which the said criminal cases are being conducted is unfair since the mentions of the said cases are erratic and without notice at which certain adverse orders are made against him. This serious allegation has not been seriously controverted by way of affidavit evidence. Article 50(1) of the Constitution provides:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

41. Apart from that Article 50(2)(d) and (f) of the Constitution provides that every accused person has the right to a fair trial, which includes the right to a public trial before a court established under the Constitution and to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed. To conduct criminal proceedings clandestinely in the absence of the accused is clearly inimical to fair trial. In the absence of any controverting evidence and in order that the applicant be accorded fair trial I direct that the applicant's trial ought to and is directed to proceed before any other magistrate with competent jurisdiction other than **Hon. Kombo** or **Hon. Tanchu**. I further direct that the warrants of arrest issued against the applicant be lifted and that the matter be mentioned before the trial Courts as soon as possible for the reconsideration of the issue of bail in accordance with the new Constitution.

42. I am however not satisfied that as the matters are yet to be concluded, the applicant ought to be awarded damages.

43. There will be no order as to costs.

44. It is so ordered.

Dated at Nairobi this 24th day of February, 2015

G V ODUNGA

JUDGE

In the presence of:

Dr Kamau Kuria, SC for the Applicant

Cc Patricia