REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPL. NO. 593 OF 2006

IN THE MATTER OF JUDICIAL REVIEW PROCEEDINGS FOR AN ORDER OF PROHIBITION

AND

IN THE MATTER OF THE TRANSACTION RELATING TO LAND PARCEL NO. 1160/740 KAREN

BETWEEN

REPUBLIC……..……..…..APPLICANT

-VERSUS-

THE COMMISSIONER OF POLICE.....….....…..….1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

HASS PETROLEUM (K) LIMITED.....3RD RESPONDENT

AHMED ISSACK HASSAN, FRED KONDO ATHUOK &

SOSPETER MAGUA NJOROGE T/A IBRAHIM, ISSACK

& COMPANY ADVOCATES.....4TH RESPONDENT

***EX PARTE*:**

M/S KENLINE AGENCIES LTD.....1ST INTERESTED PARTY

BONIFACE NJIRU

T/A NJIRU BONIFACE & CO.....2ND INTERESTED PARTY

JUDGEMENT

Introduction

1. By a Notice of Motion dated 25th October, 2006, the *ex parte* applicants herein, **M/s Kenline Agencis Ltd** and **Boniface Njiru T/A Njiru Boniface & Co.,** seek the following orders:

> **1. This Honourable court be pleased to grant orders of Prohibition to stop the Commissioner of Police from arresting, charging or detaining, or instituting any criminal prosecution against the applicants or any of them, arising out of a complaint to the Police and/or Criminal Investigation Department by the firm of Ibrahim, Isaack & Co. Advocates or any partner thereof or M/s Hass Petroleum arising from the sale of land parcel No. 1160/740 from Kenline Agencies Ltd to M/s Hass Petroleum (K) Ltd.**
>
> **2. Costs of this application be provided for.**

Applicants' Case

2. The application was supported by a verifying affidavit sworn by **Jacinta Wanjiru Kigo**, a Director of Kenline Agencies Ltd, the 1st ex parte applicant which who is wrongly described in the title as the 1st Interested Party on 25th October, 2006.

3. According to the deponent, the 1st ex parte applicant is the registered proprietor of land parcel No. 1160/740 Karen comprising 11 acres (hereinafter referred to as the suit property), charged to M/s Barclays Bank of Kenya Ltd (hereinafter referred to as "the Bank") but which the 1st applicant was for some time trying to sell in order to pay off the loan.

4. Pursuant thereto the 1st applicant in November, 2004 entered into negotiations with Directors of Hass Petroleum (K) Ltd (hereinafter referred to as the Company) concerning the sale thereof in the sum of Kshs 45,600,000.00. It was deposed that the Directors of the Company who were well known to the said Bank promised to assist the 1st applicant. Consequently, the Bank gave the 1st applicant the consent to pay a sum of Kshs 32,600,000 in settlement of the said liabilities.

5. The 1st ex parte applicant therefore instructed the firm of ***Njiru Boniface & Co Advocates,*** wrongly described as the 2nd interested party (hereinafter referred to as the 2nd ex parte applicant) to act for it in the sale transaction while the said Company instructed ***M/s Ibrahim, Issack & Co. Advocates*** (hereinafter referred to as the firm) to act for it. However the Company took too long to instruct its advocates or pay the purchase price and it was not until 21st January, 2005 that the said advocates forwarded the first deposit of Kshs 2,700,000/- and paid the balance of the deposit on 4th March, 2005.

6. According to the deponent it was agreed that the firm was to provide the requisite professional undertaking to enable the 1st applicant obtain the title documents held by the Bank and the Company directors assured the 1st ex parte applicant not to worry about the delay as they had good working relationship with the Bank and would ensure the consent was extended. The 1st applicant accordingly executed the sale agreement and instructed its advocate to proceed and liaise with the firm about the payment of the loan and secure a further Kshs 10 million as agreed with the Company as indicated in the Sale Agreement which according to the deponent the 2nd ex parte applicant did.

7. While awaiting for appointment with the Bank, it was deposed that the 1st *ex parte* applicant received a letter from the firm raising doubts concerning the sale of the suit property. According to her the 1st applicant had been having running battles with some people within the Bank who were interested in selling the suit property at a low price. Accordingly, the 1st applicant instructed its advocates to introduce the Company to the Bank which was done. Although the Bank agreed to extend the period for 21 days, it demanded Kshs 40,000,000/- rather than the original Kshs 32,600,000/= though the same was negotiated at Kshs 35,000,000/= and the Company's Advocates were informed accordingly.

8. The 1st applicant was therefore surprised when it was served with a completion notice on 26th July, 2005 which notice, the deponent believed, was not issued in good faith but was an attempt to pull out of the sale. However as the 1st applicant was willing and ready to finalise the transaction and as the only pending issues were the payment by the Company of the mortgage money or the giving of an appropriate professional undertaking, the 1st applicant instructed the 2nd *ex parte* applicant to issue a completion notice which on being issued precipitated an exchange of correspondences. Further consultations with the Bank yielded a further period of 21 days for payment of the said Kshs 35 million which extension was communicated to the Company's with a demand for immediate release of the purchase price within 7 days.

9. In response, the Company called for a meeting at the firm's offices at which the Company requested for 60 days. Though the 1st applicant was agreeable, the 1st applicant was offended by a letter from the Company's Advocates to the Bank indicating the former's displeasure with the Bank's letter.

10. Consequently, the 1st applicant demanded that the deposit be forfeited to it in accordance with the terms of the Sale Agreement which deposit the 2nd *ex parte* applicant paid the 1st *ex parte* applicant.

11. However on 12th October, 2006, the deponent was informed that the 2nd *ex parte* applicant had been arrested by police from Nairobi PCIO Office on the complaint by the firm that the holding of the said deposit was unlawful. Subsequently the 2nd *ex parte* applicant was bonded to appear at Kibera Law Courts on 17th October, 2006 to be charged with the offence of obtaining money by false pretences.

12.Although the 1st *ex parte* applicant had an interest in the deposit, the deponent averred that she was not invited at the meeting held by the police hence the 1st applicant's apprehension that there will be no fair hearing.

13.It was submitted on behalf of the *ex parte* applicants that the charges constitute a grave and gross abuse of the process of the Court by reason that the police are using the criminal law process to assist the Company or their advocates to recover the forfeited deposit pursuant to the Sale Agreement. As the 2nd *ex parte* applicant was bound by the terms of the Sale Agreement to pay the 1st *ex parte* applicant the deposit, it was contended that his action could not amount to a criminal offence.

14.It was contended that in any case disputes relating to enforcement of professional undertaking by advocates are captured under Order 52 of the ***Civil Procedure Rules*** which provide for an elaborate procedure for enforcement thereof. Further there was an option of challenging the forfeiture through the civil law process.

15. It was therefore submitted that the charges against the applicants were so unreasonable and so unfair as to amount to an abuse of the Court Process and that using the criminal process in this manner amounts to harassment and intimidation, particularly for the 2nd *ex parte* applicant, an advocate representing the vendor and bound by the terms of the Sale Agreement. To them, invoking the Criminal Process in contractual disputes is both oppressive and an abuse of the prosecutorial discretion particularly where as in this case other effective remedies are provided by law.

3rd and 4th Respondent's Case

16.The 3rd and 4th Respondents, who properly speaking ought to have been interested parties instead of respondents, in opposition to the application filed the following grounds of opposition:

> **1. The application as drawn is incurably defective as it does not comply with the mandatory provisions of the Civil Procedure Rules.**

2. The contents of paragraphs 5, 6, 8, 11, 12, 14 and 15 of the Replying Affidavit by Mohamed Gosar do not fall within the ambit of Section 134 through to 137 of the Evidence Act (Cap 80) Laws of Kenya and are in any event allowed by dint of the operation of Section 134 (1) (a) and (b) of the Evidence Act (Cap 80) Laws of Kenya.

3. The 3rd and 4th Defendants have consented to the production of the evidence referred to in paragraphs 5, 6, 8, 11, 12, 14 and 15 of the said replying affidavit by Mohamed Gosar, thereby waiving any privilege that might have otherwise arisen

4. Chapter VII of the Evidence Act (Cap 80) Laws of Kenya protects the Bank officers and does not grant any privilege to the Applicant herein.

5. The application is vexatious, frivolous and an abuse of the court process and ought to be struck out.

17. Apart from that they filed a replying affidavit sworn by **Sospeter Magua Njoroge**, a Partner in the said firm on 30th June, 2008.

18.According to him, they made a complaint with the Criminal Investigations Department for investigations of an offence of obtaining money by false pretences and/or theft by an agent.

19.According to him, sometimes during the month of December 2004, their client the Company instructed the firm to act on its behalf with regards to the purchase of **L. R. NO. 1160/740 – KAREN** (hereinafter referred to as **"the Property"**) from the 1st whose Advocates in respect of the said sale transaction was the 2nd Applicant. Upon receipt of the aforesaid instructions, he wrote to the 2nd Applicant requesting for a copy of the Title to enable him carry out a Search on the Property.

20. However, due to the long absence of one of the Purchaser's Director on a trip abroad who was actively engaged in the pre-contract negotiations with the 1st Applicant, the firm only received instructions from the Purchaser at the end of the month of January 2005 with regards to the terms and conditions that the Purchaser proposed to be incorporated in the Sale Agreement, a fact that was communicated to the 2nd Applicant. The draft Sale Agreement drawn the firm was duly accepted by the 2nd Applicant. He added that due to the nature of the Purchaser's business which entails the supply of Petroleum Products within the East African Region, one of the Purchaser's Directors was out of the country and unavailable to execute the Sale Agreement and due to the foregoing he received several telephone calls from the 2nd Applicant threatening to cancel the transaction and a letter issuing an ultimatum.

21.As a result, he was instructed by one of the Purchaser's Directors to pay part of the sum due towards the deposit on the purchase price to the 2nd Applicant pending the formal execution of the Sale Agreement by the Purchaser upon the other Director's return back to the country, as a sign of the Purchaser's commitment on its part towards the purchase of the Property and pursuant thereto, he forwarded a sum of **Kenya Shillings Two Million Seven Hundred Thousand only (Kshs.2,700,000/=)** to the 2nd Applicant being part of the deposit towards the purchase price to be held by the 2nd Applicant on a stakeholders basis pending completion receipt of which the 2nd applicant acknowledged.

22. He disclosed that the balance of the deposit on the purchase price in the sum **Kenya Shillings One Million Eight Hundred and Sixty Thousand only (Kshs.1,860,000/=)** was paid to the 2nd Applicant by the firm on 4th March 2005 to be held on a stakeholders basis and the Sale Agreement duly executed by the Purchaser was also forwarded**.** Vide a letter dated 7th April, 2006, the 2nd Applicant forwarded the receipt in respect of the balance of the deposit on the purchase price paid as aforesaid as well as the Sale Agreement.

23. According to the deponent due to the good business relationship that existed between the Purchaser and the Chargee **M/s. Barclays Bank of Kenya Ltd** (hereinafter referred to as **"the Chargee"**) the 1st Applicant had requested the Purchaser to follow-up the expeditious redemption of the 1st Applicant's loan with the Chargee, while the 1st Applicant was to embark on negotiating with the Two Purchasers who were laying claims to the two sub-plots, as aforesaid so as to facilitate their pay-off upon a settlement being reached. However, despite prior assurances by the Applicants during the pre-contract negotiations that they had obtained the Chargee's consent to the Sale, the Purchaser's Directors were surprised during their follow up with the Chargee, when they learnt that the Chargee would not accept the firm's undertaking or address the matter, until the 1st Applicant responded to and confirmed the terms that the Chargee had set in its letter dated 11th November, 2004. He then notified the 2nd Applicant of the foregoing developments and protested the non-disclosure by the Applicants of the pendency of Suits relating to the Suit property during the pre-contract negotiations. and sought for the 2nd Applicant's confirmation that the Chargee's consent to the Sale had been obtained but the Applicants were unable to secure the Chargee's consent to the Sale. As a result the deponent received instructions from the Purchaser to issue a completion notice to the 1st Applicant.

24. To the deponent, instead of the 1st Applicant complying with the completion notice aforesaid by remedying the breach thereof, the 1st Applicant purported to issue its own completion notice to the Purchaser dated 9th August 2005 and contended that it was not in breach of the terms of the Sale Agreement, leading to lengthy correspondence being exchanged. Pursuant to a meeting held on 31st August 2005 involving the Parties to the Sale and their Advocates, an understanding was reached to the effect that the Sale be revived and completed as per the original intention of the Parties thereto, whose effect was to render the completion notices issued by the Parties to one another earlier as rescinded and the Purchaser requested for more time to mobilize funds pertaining to the balance of the purchase price, as it had utilized the same upon the maturity of its completion notice. It was further agreed that the Applicants would make presentations to the Chargee and obtain an extension of the redemption period from the Twenty-one (21) days given to Sixty (60) days.

25. He deposed that upon the 1st Applicant's request and due to the Purchaser's cordial business relationship with the Chargee, the Purchaser did write to the Chargee requesting for the extension of the redemption period and despite follow up on the same, no response was forthcoming from the Chargee. Instead, he received correspondence from the two Purchasers who were laying rival Purchaser's claims to two (2) sub-plots forming part of the property whose contents were manifestly clear that they would not forfeit their Purchaser's interests to their sub-plots or allow the 1st Applicant to refund the purchase monies that they had paid. Due to the fact that the Chargee was yet to issue its formal written consent for the Sale of the property to the 1st Applicant, HE wrote to the Chargee's Advocates M/s. Hamilton Harrison & Mathews on 2nd November 2005 requesting for the formal consent and thereafter heated correspondence was exchanged between the firm and the 2nd Applicant as well as the Chargee's Advocates. According to him, appreciation of the Chargee's Advocates letter dated 6th December 2005 was that the Chargee was not consenting to the Sale and was considering exercising its Statutory Power of Sale and despite several scheduled meetings with the Chargee's Advocates, the Applicants failed to turn up for the said meetings so as to make representations with a view to obtaining the Chargee's consent to the Sale.

26. In his view, the Purchaser who was still keen on concluding the purchase decided to give the 1st Applicant more time to put its house in order and conclude the Sale and on 13th March 2006 they wrote to the 2nd Applicant inquiring on the 1st Applicant's readiness to complete but he did not favour us with any response. However due to the 1st Applicant's failure to confirm whether it was ready to complete and or advice on the matter, he received instructions from the Purchaser to issue a completion notice. However, despite the fact that the Sale Agreement stood terminated upon the expiry of the said completion notice whereupon the firm on behalf of the Purchaser was entitled to a refund of the deposit paid, thereafter on several occasions, he met the 2nd Applicant along the Court corridors who kept on requesting him to be patient and reassured him that he and the 1st Applicant

were still negotiating with the Chargee with regards to obtaining its consent to the Sale and that the property was still available for sale to the Purchaser once the said consent was secured.

27. The deponent averred that due to lack of a formal update by the 2nd Applicant on the matter he wrote to him on demanding for the refund of the deposit paid to him which he was meant to hold on a stakeholder's basis but there was no response. Thereafter he met him on another occasion along the Court corridors and raised the issue of the refund of the deposit paid to him as per the firms demand, but he still kept on reassuring the deponent that the Sale would go on as soon as the 1st Applicant settled the pending issues with the Chargee and promised to update the deponent on the same. It therefore came as a surprise to the deponent when sometimes in the middle of the month of September 2006, a property agent went to his offices and showed him a copy of the title to the property which he alleged was on offer for Sale in the property market and he wanted to know whether the deponent had clients who could be interested in the same. Upon the deponent notifying the Company of this development, the Company instructed him to obtain the deposit that had been paid to the 2nd Applicant to be held on a stakeholder's basis. However, despite several telephone calls to the 2nd Applicant's offices when he was always unavailable he did not return the same hence leading the deponent to believe that something sinister had happened. Due to the reason that the deposit in respect of the purchase price had been paid to the 2nd Applicant in a fiduciary capacity to hold on a stakeholder's basis and since he had refused to refund the same, the firm and the Purchaser made a conscious decision to lodge a complaint on the matter with the Criminal Investigations Department (C.I.D) for investigations, as the 2nd Applicant's failure to refund the said deposit amounted to obtaining money by false pretences and/or theft by an agent.

28. He deposed that on 12th October 2006 at around 11:00 a.m. the deponent and his Partner **Mr. Ahmed Issack Hassan** were summoned to the C.I.D offices wherein they met the 2nd Applicant in the presence of **Inspector Boaz Obetto** and **P.C. Mohamed Gosar** who proceeded to question the 2nd Applicant as to why he had not refunded the deposit held by him to the firm and further notified him that they would prefer that the matter was resolved amicably between us as gentlemen. However, the 2nd Applicant purported to allege that the said deposit had been forfeited to his client, due to the Purchaser's failure to complete the purchase of the property a fact that he had never disclosed to the law firm and an allegation which the deponent contended had no basis and which allegation the 2nd Respondent failed to explain alleging that it was privileged information. Thereafter, the C.I.D officers told the 2nd Applicant that their investigations had established that he had withdrawn the deposit that the firm had paid to him to hold on a stakeholders basis, immediately after it was deposited with his bankers in a manner that they described as ***"panic withdrawals"*** to the effect that he had breached his stakeholders obligation and since he was adamant on failing to disclose where he took the deposit and could not justify the alleged forfeiture, they would act on the firm's complaint book him and charge him with a criminal offence for the Court to determine the matter. Thereafter, the 2nd applicant broke down and admitted that he had utilized the said deposit together with the Vendor and he begged for forgiveness and offered to refund the said deposit within a period of Six (6) months, which offer was rejected as it would have amounted to condoning a criminal offence.

29. The deponent disclosed that on 13th October 2006, the 2nd Applicant's brother **Mr. Lawrence Mbaabu Advocate** went to their offices and paid a sum of **Kenya Shillings Fifty Thousand (Kshs.50,000/=)** on behalf of the 2nd Applicant on account toward the refund of the said deposit. It was therefore his view that since the 2nd Applicant did admit that he has misappropriated the said deposit, the Applicants cannot now be heard to allege that there was a forfeiture of the same. Further, the 2nd Applicant's act of misappropriating the said deposit entrusted to him on a fiduciary capacity amounts to a criminal offence and the Applicants cannot be heard to allege that the matter ought to be determined through a civil process. He also believed the Applicant forfeited the money to himself and not to the 1st Applicant as he failed to show how the said deposit was allegedly paid to his client. To the deponent, the 2nd Applicants act of misappropriating the said deposit amounts to theft which is actionable in Criminal Law and as such the applicants cannot be heard to allege that this is a

civil dispute.

30. He however clarified that the firm and the Company had not abandoned their rights to claim for the refund of the said deposit from the 2nd Applicant through the civil process in another forum, notwithstanding the fact that he is set to be prosecuted for his criminal act. He nevertheless reiterated that the 2nd Applicant having committed a criminal act, he has to face the due process of law and is undeserving of the protection that he seeks from this Honourable Court and their application should be dismissed with costs to the Respondents.

Determination

31.I have considered the foregoing.

32.It is trite that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.

33. 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."**

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

> **"The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform.....A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be**

stopped, as in these instances, the goals for their utilisation is far that which the courts indeed the entire system is constitutionally mandated to administer...It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been be argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law...In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed...There is nothing which can stop the from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made...”

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

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth... When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to 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..."

36. It is therefore clear that whereas the discretion given to the 3rd 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, the Court will not hesitate to bring such proceedings to a halt.

37. 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 innocent or otherwise of he 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.

38. Therefore the determination of this case must be seen in light of the foregoing decisions.

39. Whereas Article 157(10) of the Constitution provides that 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, Article 157(11) provides:

In exercising the powers conferred by this Article, the Director of Public Prosecutions shall 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.

40. Apart from that, section 4 of the ***Office of Public Prosecutions Act***, No. 2 of 2013 provides:

In fulfilling its mandate, the Office shall be guided by the Constitution and the

following fundamental principles—

(a) the diversity of the people of Kenya;

(b) impartiality and gender equity;

(c) the rules of natural justice;

(d) promotion of public confidence in the integrity of the Office;

(e) the need to discharge the functions of the Office on behalf of the people of Kenya;

(f) the need to serve the cause of justice, prevent abuse of the legal process and public interest;

(g) protection of the sovereignty of the people;

(h) secure the observance of democratic values and principles; and

(i) promotion of constitutionalism.

65. It is therefore clear that the terrain under the current prosecutorial regime has changed and that the discretion given to the DPP is not absolute but must be exercised within certain laid down standards provided under the Constitution and the ***Office of the Director of Public Prosecutions Act***. Where it is alleged that these standards have not been adhered to, it behoves this Court to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, the Constitution itself. I associate myself with the sentiments expressed in **Nakusa vs. Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565** to the effect that :

"the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system….. In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of *Domnic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003* is that interpretation of the Constitution has to be progressive and in the words of Prof M V Plyee in his book, *Constitution of the World*: "The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time…….. In our role as "sentinels" of fundamental rights and freedoms of the citizen which are founded on laisez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent "sentinels" of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right."

41.Where therefore it is clear that the discretion is being exercised with a view to achieving certain extraneous goals other than those legally recognised under the Constitution and the ***Office of the Director of Public Prosecutions Act***, that would, in my view, constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion. As was held by **Wendoh, J** in **Koinange vs. Attorney General and Others [2007] 2 EA 256**:

"Under section 26 of the Constitution the Attorney General has unfettered discretion to undertake investigations and prosecute. The Attorney Generals inherent powers to investigate and prosecute may be exercised through other offices in accordance with the Constitution or any other law. But, if the Attorney General exercises that power in breach of the constitutional provisions or any other law by acting maliciously, capriciously, abusing the court process or contrary to public policy the Court would intervene under section 123(8) of the Constitution and in considering what constitutes an abuse of the court process the following principles are relevant: (i) Whether the criminal prosecution is instituted for a purpose other than the purpose for which it is properly designed; (ii) Whether the person against whom the criminal proceedings are commenced has been deprived of his

fundamental right of a fair trial envisaged in the provisions of the constitution; (iii) Whether the prosecution is against public policy."

42. It is now clear that even in the exercise of what may appear to be prima facie absolute discretion conferred on the executive the Court may interfere. The Court can only intervene 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. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**

43. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the DPP to investigate and prosecute ought to be interfered with.

44. In this case it is the applicant's case that the criminal charges have been preferred in circumstances which violate the rules of natural justice and in disregard of relevant matters. In exercising their discretion to charge a person both the police and the DPP's office must take into account and must exercise the discretion on the evidence of sound legal principles. As was held by **Ojwang, J** (as he then was) in **Nairobi HCCC No. 1729 of 2001 – Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another**:

"...policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense...I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State's prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes".

45. Therefore the police are expected to be professional in the conduct of their investigations and ought not to be driven by malice or other collateral considerations. Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution. A prosecution can either be mounted based on an offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officers or agencies. However, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. I say ordinarily because the mere fact that the version of one of the parties is not considered is not necessarily fatal to the prosecution. However, where as it is alleged in this case exculpatory evidence is presented to the police in the course of investigation and for some reasons unknown to them they deliberately decide to ignore the same one can only conclude that the police are driven by collateral considerations other than genuine vindication of the criminal judicial process. Neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of malice and hence abuse of discretion and power.

46. In this case, the applicants' case is that the deposit paid by the Company was forfeited by the 1st Applicant pursuant to the provisions of the Sale Agreement. The interested parties' position however is that the allegation of forfeiture has no basis and that the 2nd applicant who was acting as a stakeholder converted the money to his use or to the use of both the applicants.

47. It is however on all fours that the 2nd Applicant's role in the transaction in question was that of an advocate for the 1st Applicant. Therefore it is clear that the 2nd respondent was acting for a disclosed principal and that the 2nd respondent did not hold himself as the vendor of the land in question but even by the interested parties' own case, was a stakeholder in the said transaction. Section 80 of the ***Advocates Act***, Cap 16 Laws of Kenya provides:

> ***Any person who, being an advocate, is entrusted in his professional capacity with any money, valuable security or other property to retain it in safe custody with instructions to pay or apply it for any purpose in connection with his duty as an advocate fails to pay, apply or account for the same after due completion of the purpose for which it was given, shall be guilty of an offence:***
>
> ***Provided that no prosecution for an offence under this section shall be instituted unless a report has been made to the Attorney-General by the Committee under subsection (3) of section 61.***

48. In those circumstances, I find that to charge an advocate who was involved in a conveyancing transaction with obtaining money by false pretences when the evidence shows that the advocate was not a party to the transaction in question reeks of malice. This is not to say that an advocate cannot in the course of a conveyancing transaction commit a criminal offence. To the contrary, an advocate who acts in a manner offensive to section 80 aforesaid may well be culpable of betrayal of trust and may be prosecuted for offences related thereto as long as the proviso to section 80 is complied with. However the offence intended to be preferred against the 2nd applicant in the circumstances of this case was clearly inappropriate. Whereas the said offence may well be sustainable against the 1st applicant, it clearly does not apply to the 2nd applicant. From the evidence, it is unclear to the Court why the interested parties and moreso the firm would have been keen in having the 2nd Applicant charged with the offence yet the 1st Applicant who admits to have received the funds was left alone.

49. The Court appreciates that where the facts of the case may be a basis for both criminal and civil liability, the Court is not entitled to interfere. However, where the offence with which the prosecution intend to charge the applicant based on the material in possession of the prosecution is clearly untenable, to allow the prosecution to continue would amount to abetting abuse of the Court process. I associate myself 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".**

50. As was held in **Githunguri vs. Republic (1985) KLR 91:**

> **"A prosecution is not to be made good by what it turns up. It is good or bad when it starts."**

51. Accordingly, whereas I decline to grant the orders sought in favour of the 1st applicant, it is my view and I so hold that the levying of criminal charges against the 2nd applicant herein in the manner intended is ill motivated, malicious and an abuse of both investigatory and prosecutorial powers.

Order

52. In the result I grant the following orders:

1. **Prohibition stopping the Commissioner of Police or his successor in title from arresting,**

charging or detaining, or instituting any criminal prosecution against the 2nd applicant in respect of the alleged offence of obtaining by false pretence arising out of a complaint to the Police and/or Criminal Investigation Department by the firm of Ibrahim, Isaack & Co. Advocates or any partner thereof or M/s Hass Petroleum arising from the sale of land parcel No. 1160/740 from Kenline Agencies Ltd to M/s Hass Petroleum (K) Ltd.

2. **As the application has not wholly succeeded there will be no order as to costs.**

Dated at Nairobi this 23rd day of April, 2015

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

Cc Patricia