REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC CIVIL CASE NUMBER 417 OF 2014

IN THE MATTER OF AN APPLICATION BY MILDRED MBUYA MULI FOR LEAVE TO COMMENCE PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES AND SECTIONS 8 AND 9 OF THE LAW REFORM ACT

BETWEEN

REPUBLIC……..……..…….……. APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS …… 1ST RESPONDENT

THE CHIEF MAGISTRATE'S COURT, NAIROBI ……2ND RESPONDENT

THE HON. ATTORNEY GENERAL..……...……. 3RD RESPONDENT

AND

JANE WANJIRU NDEGWA ……..…… 1ST INTERESTED PARTY

DAVID MULWA MWANZA……...…….2ND INTERESTED PARTY

JOSEPH KINYUA MWAI……..…….3RD INTERESTED PARTY

EX PARTE MILDRED MBUYA MULI

JUDGEMENT

Introduction

1. By a Notice of Motion dated 10th November, 2014, filed in Court on 11th November, 2014, the *ex parte* applicant herein, **Mildred Mbuya Muli**, seeks the following orders:

    1. That an Order of Certiorari to bring into this Honourable Court and quash the decision of the 1st Respondent or officers subordinate to him, and or the Kenya Police, to

charge the applicants with the offence of Conspiracy to defraud in Milimani Chief Magistrates Criminal Case No. 506 of 2014.

2. That an Order of Prohibition directed at the 1st Respondent in person or through officers subordinate to him prohibiting him from carrying on with the further prosecution of the Applicant in Milimani Chief Magistrate's Criminal case Number 857 of 2012 or any other proceedings that may be instituted on the same basis.

3. That an Order of Prohibition to prohibit the 2nd Respondent from taking evidence, conducting proceedings or carrying on with the trial of the Applicant in Milimani Chief Magistrate's Criminal case No. 857 of 2012 or any other criminal proceedings that may be instituted on the same basis.

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

5. That the Honourable court do grant further or any other order that is would deem fit in the circumstances.

Applicant's Case

2. The application was supported by affidavits sworn by the applicant herein on 5th November, 2014 and 2nd December, 2014.
3. According to the applicant, on 18th June 2012, she was arrested by police officers and charged with three counts of obtaining money by false pretences contrary to Section 313 of the ***Penal Code***. However, by the time the said officers charged her in court they had not taken any statement from her and the interested parties which omission deprived the police of an opportunity to fairly evaluate the case before deciding to charge her in court.
4. The background of the case, according to her, was a conveyancing transaction whereby the interested parties bought same subdivided parcels of land being part of L.R. NO. 12715/324 which parcel of land belonged to one **Martin Kanyonyi Muovya** who had given the applicant's company **Exotic Homes Properties Limited** (hereinafter referred to as "the Company") authority to subdivide and sell the said parcel of land. From the proceeds recovered the said **Martin Kanyonyi Muovya** was duly paid what was due to him but for some strange reasons he failed to execute the transfer documents to the respective purchasers including the three interested parties. It was this refusal by the registered owner as the principal to execute the transfer documents that, according to the applicant provoked the institution of the criminal case the subject of these proceedings.
5. As the applicant has however sought to compel him to do so and filed civil suit No. 258 of 2012 in the High Court at Machakos to restrain him from interfering with the quiet possession of the respective purchasers who include the interested parties, she was of the view that the said action by the police to charge her in the criminal proceedings is an abuse of the court process this matter being purely a civil matter which is still pending before the court of Competent Jurisdiction.
6. According to the applicant, from the evidence available to her following disclosure by the police upon charging her in court, it was apparent that the police decided to ignore all exculpating evidence that was glaring on the face of the statements and documents available to them. She therefore believed that the decision to charge and prosecute her in Milimani Chief Magistrate's Criminal case No. 857 of 2012 was made in breach of sound principles of fair administrative action; that the said decision was made in breach of principles of natural justice that no person should be condemned without a hearing; that the said decision was made without taking into account very relevant considerations; that the said decision as well as the further conduct of proceedings in the case is oppressive; that the said decision to is a gross abuse of the criminal justice process; and that it is just and equitable that the orders sought herein be granted.
7. It was deposed the said sale was done owing to the capacity to transact as agents of the registered owner through the letter of Authority issued by the company known as **Exotic Homes Properties Limited, a sister company** to **Exotic Garden Homes Limited** in which the ex parte applicant is

a director. To her, the said transaction was done in good faith and by disclosure of all material facts and the said **Jane Wanjiru Ndegwa,** the 1st Interested Party herein was aware of their capacity to act on behalf of the said registered owner and who in her statement and evidence in the criminal case admitted that she knew that **Exotic Homes Properties Limited** had authority to transact and did not allude to any wrongdoing on the part of the ex parte applicant acting as a Director of **Exotic Homes Properties Limited** in this transaction.

8. She reiterated that the Title deed to the property was not issued to the 1st Interested Party because the registered owner declined to sign the transfers for no justifiable reason at all and hence the necessity to file civil suit No. 258 of 2012 in Machakos.
9. As for the other interested parties she contended that they had been given ownership documents hence no justification to charge the ex parte applicant with the counts related to them.

Respondent's Case.

10. In response to the application, respondent filed a replying affidavit sworn by **Corporal Amina Thomas**, one of the investigating officers in the criminal case on 17th November, 2014.
11. According to her, on or 3rd May of 2008 the 1st Interested Party **Jane Wanjiru Ndegwa** entered into a Sale Agreement with the Company of which the Applicant **Mildred Mbuya Muli** is one of the Directors in which agreement the said Interested Party was to purchase two plots No. 22 and 27 each measuring an Eighth of a Hectare at the price of One Million One Hundred Thousand (Kshs. 1,100,000/=) for the two plots which plots the Applicant purported were to be found in a parcel of land described as L.R 12715/324 I.R 44727 situated at North –West Arthi River in Machakos District.
12. The said purchase price was paid between 3rd May 2008 and November 2008 and the terms and conditions were that once the purchase price is settled the title deeds were to be issued by the company which did not happen.
13. Further, on 29th may 2008 the company sold four plots no. One (1), Eight (8) Nine (9) and Sixteen (16) measuring an Eighth of a Hectare each to **David Mulwa Mwanza** the 2nd Interested Party for a sum of Two Million Three Hundred Thousand (Ksh.2, 300,000/=) which four plots were purported to be situated at North – West Athi River Machakos District a parcel of land described as L.R No. 12715/324 I.R 44727 and **David Mulwa Mwanza** settled the purchase price and was issued with ownership documents. Similarly, between 9th February 2011 and 9th March 2011 the company sold plot No. 35 to **Joseph Kinyua Mwai** the 3rd Interested Party , a plot purported to be found in a parcel of land described as L.R 12715/324 I.R 44727 situated at North –West Athi River in Machakos District at the purchase price of One Million Two Hundred Thousand Shillings Only (Kshs. 1,200,000/=) of which **Joseph Kinyua Mwai** settled and was issued with ownership document under the terms that once the payment was settled he would be issued with the title deed of which did not happen.
14. According to the deponent, during the investigations it was established that land described as L.R 12715/324 I.R 44727 measuring 2.023 Hectares situated at North –West Athi River in Machakos District belong to one **Martin Kanyonyi Mwobia** who through a letter dated 9th January 2007 gave authority over the same to the Company and on 22nd January 2007 the same **Martin Kanyonyi Mwobia** sent another letter to the Company with clear guidelines on terms and conditions of his parcel of land authorising the Company to sell plot Nos. 4,5,12,13,20,21 28, 29, 30 and 31 only.
15. It was disclosed that the Director of the Company is **James Muli Wambua** while the ex parte applicant is the secretary. According to the deponent, the three Interested Parties transacted with the ex parte applicant, a Director of **Exotic Homes Property Limited** and not **Exotic Garden Homes Limited** which was the company given authority to subdivide and sell the parcel of land described as L.R 12715/324 I.R 44727 and that the plots sold by the ex parte applicant not among the ones listed to her in the letter dated 22nd January 2007 hence the ex parte applicant as one of the Directors of **Exotic Homes Property Limited** obtained money from the above mentioned interested parties by falsely pretending that she was in a position to sell the land in question L.R 12715/324 I.R 44727 North –West Athi River in Machakos District a fact she knew was false

leading to institution of Criminal Case No. 857/2012.

16. It was therefore contended that the Application herein has been filed in bad faith, misconceived and abuse of the court process and meant to defeat the cause of justice.
17. To her, the Directorate of Criminal investigations' is established under Section 28 of the ***National Police Service Act*** under the direction, command and control of the Inspector General of the National Police Service while the objects and functions of the National Police Service are set out in Article 244 of the Constitution of the Republic of Kenya and the National Police service and the functions of the Directorate and the National Police Service are particularise thereunder. It was however the deponent's view that the Petitioner had not demonstrated that in undertaking investigations in the complaint lodged with the National Police Service and in making the decision to prefer Criminal charges against them, either the Director of Public Prosecution or any member of staff of the office of the Director of Public Prosecution or the National Police Service acted without or in excess of the power conferred upon them by the law or infringed, violated, contravened or in any other manner failed to comply or respect and observe the foregoing provisions of the Constitution of Kenya 2010 or any other provisions thereof or any other provisions of the law.
18. To the contrary, the DPP independently reviewed and analyzed the evidence contained in the investigations file compiled by the Directorate of Criminal Investigations including the witness statements, documentary exhibits and statements of the Petitioner as required by the law and it was on the basis of the said review and analysis that the DPP gave instructions to prosecute the Petitioner. The said decision, she averred, was informed by the sufficiency of evidence on record and the public interest and not on any other considerations hence the accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of evidence gathered and properly adduced in support charges. It was therefore asserted that the contention by the Applicant that the case against her is oppressive and malicious and amounts to an abuse of court process is unfounded and bad in law and the Applicant failed to demonstrate that the DPP lacked the requisite authority acted in excess jurisdiction or departed from the rules of natural justice in directing that the Petitioner be charged with offences disclosed by the evidence gathered and filed the Application in bad faith and is an attempt to defeat justice.

1st Interested Parties' Case

19. On her part, the 1st Interested Party, **Jane Wanjiru Ndegwa**, filed a replying affidavit sworn on 21st January, 2015.
20. According to her, it was after she complained and recorded a statement with the Police that the Police proceeded to arrest the ex Parte Applicant and not vise versa. In her view, the contents of the verifying affidavit vis-à-vis annextures are contradictory in the sense that whereas the ex parte Applicant alleges that the company that was given authority to sub–divide and sell the plots was **Exotic Homes Properties Limited**, the annextures clearly reflects that the authority had been given to **Exoric Garden Homes** evidently, these are two different entities.
21. According to her, she was dealing with the ex parte Applicant to whom she paid money and regardless of the outfit she was using to transact, she was duty bound to ensure the 1st interested party got title documents to the plot she purchased but unfortunately she did not.
22. She deposed that she instructed her Advocates to peruse the Court file relating to Machakos HCCC No. 258/12, **Exotic Homes Properties Limited –vs- Martin Kanyonyi Muovya** whereupon it was established that the file was transferred to the Chief Magistrate's Court by lady Justice Thuranira Jaden on 6th February 2014 and given a new case No. being Machakos CMCC No. 133 of 2014 whose last position was that the Application by way of Motion dated 17th July 2012 had since been dismissed with costs pursuant to Ruling delivered on 15th August 2014 in absence of Plaintiff's counsel. It was therefore her view that since the dismissal of the Plaintiff's (ex parte Applicant's) aforesaid Application at the Chief Magistrate's Court at Machakos on 15th August 2014, the ex parte Applicant had not taken any step to prosecute the said suit which evidently demonstrates their lack of interest in the same.
23. Based on legal advice she contended that Machakos Chief Magistrate's Court has no jurisdiction

to entertain the said suit since it is a matter which belongs to the Environment and Land Court Division of the High Court.

24. According to her, she did not know exactly the relationship between **Exotic Garden Homes** and **Exotic Homes Properties Limited** but it would appear that she dealt with the latter who was apparently a different legal entity from the former.
25. In her view, while associating herself with the contents of the Replying Affidavit sworn by one corporal **Amina Thomas** on 17th November 2014, the ex parte Applicant seems to be a vexatious litigant and a "forum shopper" in view of the fact that she filed a similar J.R Application being Nairobi H.C Misc 115/13 which was dismissed by on 4th April 2014. To her, the instant judicial review application is mischievous, frivolous, vexatious and an abuse of the court process and we pray that this Honourable Court finds as such.

Determinations

26. I have considered the parties' respective cases, as contained in their affidavits as well as submissions on record.
27. As has been held time and time again the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions (DPP) to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution. The mere fact therefore that the intended or ongoing criminal proceedings are in all likelihood bound to fail, is not ipso facto 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. An applicant who alleges that he or she has a good defence in the criminal process ought to ventilate that defence before the trial court and ought not to invoke the same to seek the halting of criminal proceedings undertaken *bona fides* since judicial review court is not the correct forum where the defences available in a criminal case ought to be minutely examined and a determination made thereon. 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.
28. 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."

29. 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 Court 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..."

30. 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..."

31. 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".

32. Clearly, therefore 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 in the wider interest of the public. Otherwise if 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. It is, however upon the ex parte applicant to satisfy the Court that the discretion given to the DPP to investigate and prosecute is being abused and ought to be interfered with.

33. This burden and standard was expounded in **Kuria & 3 Others vs. Attorney General** (supra) where it was held:

"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 affair 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."

34. Similarly in **Republic vs. Attorney General & 4 others Ex-Parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR** this Court expressed itself a follows:

"Before dealing with the issues raised herein, it is my view that the principles guiding the grant of the orders in the nature sought herein ought to be reiterated. Several decisions have been handed down which in my view correctly set out the law relating to circumstances in which the Court would be entitled to prohibit, bring to a halt or quash criminal proceedings. It is however always important to remember that in these types of proceedings the Court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings. As judicial review proceedings are concerned with the process rather than merits of the challenged decision or proceedings the court is not entitled to make definitive findings on matters which go to the merit of the impugned proceedings. In determining the issues raised herein the Court will therefore avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial Court. 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."

35. It must always be remembered that judicial review applications do not deal with the merits of the case but only with the process. In determining the process the Court will inquire into such issues as 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, whether the decision was irrational or tainted with such other factors as biased and whether the decision breached the legitimate expectations of the aggrieved person. This list is however not exhaustive. It follows that where an applicant sets out to have a determination on 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 issues. In those circumstances the parties are better left to resort to the normal forums where such matters ought to be resolved on their merits. It follows that judicial review proceedings are not the proper legal regime in which the innocence or otherwise of the applicant ought 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 as to do so in my view amounts to abuse of the judicial process. To a judicial review court, what is paramount is 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, within the legal parameters recognised for the conduct thereof, 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.

36. A word of caution is however necessary with respect to the exercise of the discretion to prosecute. 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.

37. 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 current prosecutorial regime does not grant to the DPP a carte blanche to run amok in the exercise of his prosecutorial powers. Where it is alleged that the standards set out in the Constitution and in the aforesaid Act have not been adhered to, this Court cannot shirk its Constitutional mandate 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."

38. 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."

39. In appropriate circumstances, the Court may properly intervene in the exercise of discretion by the DPP and any other inferior authority for that matter and may justifiably do so 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.**

40. As was held in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001**:

"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...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...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...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."

41. In this case, the ex parte applicant contends that by the time she was charged, no statement had been taken from her; that there exists a civil case in which the issue of transfer of the suit properties is in issue; that the evidence presented or to be presented cannot sustain the charges preferred against her.
42. The applicant contends that the prosecution in question was commenced before her side of the story was considered. This Court associates itself with the position adopted in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR** to the effect that 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. In that case it was held:

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

43. Where therefore the predominant reason for the institution of the criminal proceedings is not the vindication of the criminal justice such proceedings will be liable to be terminated.
44. As was held in **James Karuga Kiiru vs. Joseph Mwamburi and 3 Others Nrb C.A No. 171 of 2000** to prosecute a person is not *prima facie* tortuous, but to do so dishonestly or unreasonably is, the burden of proving that the prosecutor did not act honestly or reasonably being on the person prosecuted.
45. 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 does not make the subsequent prosecution malicious. However, where the police deliberately decide not to take into account the version of the suspect and acts on a story that eventually turn out to be improbable and which no ordinary prudent and cautious man would have relied upon that failure may constitute lack of reasonable and probable cause for the purposes of malicious prosecution. On the other hand it would be obviously absurd to make a defendant liable because matters of which he was not aware put a different complexion upon facts, which in themselves appeared a good case for prosecution. But neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of want of reasonable and probable cause and also malice. It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is a reasonable and probable case for a prosecution. Circumstances may exist in which it is right before charging a man with misconduct to ask for an explanation but no general rule can be laid down.
46. Therefore the Court would not halt criminal proceedings merely because the applicant's version was never considered though that is a factor which may be considered in determining whether on the totality of the material presented the prosecution is coated with malice.

47. With respect to whether based on the evidence the charges can be sustained and whether the applicant had knowledge of the interested party's interest as well as the exculpatory evidence, these are matters which ought to be adequately investigated by the trial court. This Court cannot for example be excepted to make a determination as to whether the removal of the caveat was engineered by the applicant without calling the evidence as to how the same was removed. Similarly the issue of whether the applicant had knowledge of the interested party's interest is a factual issue. Whether or not there is sufficient evidence to sustain the charge is ordinarily not a ground for halting criminal proceedings. As was held in **Meixner & Another vs. Attorney General [2005] 2 KLR 189:**

"The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion is acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution... Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it; it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power. Having regard to the law, the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision is correct. The other grounds, which the appellants claim were ignored ultimately, raise the question whether the evidence gathered by the prosecution is sufficient to support the charge. The criminal trial process is regulated by statutes, particularly the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court, which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence and that is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court."

48. On the issue of the existence of the civil proceedings, section 193A of the ***Criminal Procedure Code*** Chapter 75 Laws of Kenya provides that notwithstanding the provisions of any other written laws, the fact that any matter in issue in any criminal proceedings is also directly and substantially in issue in any civil proceedings shall not be a ground for stay, prohibition or delay in criminal proceedings. However, although under section 193A of the ***Criminal Procedure Code*** the existence of civil proceedings do not act as a bar to the criminal process, where the criminal process has been instituted as a means of hastening the civil process by either forcing the applicants to concede the civil claim or abandon their claim altogether, the commencement of the criminal proceedings are an abuse of the process of the court and on the authority of **Stanley Munga Githunguri vs. Republic Criminal Application No. 271 of 1985**, this Court is obliged to stop such proceedings.

49. This position was confirmed by the Court of Appeal in **Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others Nairobi Civil Appeal No. 56 of 2012 [2013] eKLR** when it held:

"While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised

responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court. This is case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations"

50. In this case the applicant contends that her company was just acting as an agent for the vendor. It is however unclear who the agent was between **Exotic Garden Homes** and **Exotic Homes Properties Limited** and which of the two was instructed by the vendor. Whereas the applicant contends that the two are sister companies, that is an issue which cannot be resolved in these proceedings without going into the evidence since prima facie each company is in law a different legal person from the other. It is the case for the prosecution that the legal entity that purportedly entered into the sale agreement was not the one authorised by the vendor to do so and that the properties the subject of the transaction were similarly not the ones it had been authorised to transact over. If these allegations were to be correct they may well found a basis for an offence of obtaining by false pretences. As to whether there is evidence to support such allegations is a matter for the trial Court. As opposed to where the prosecution has no evidence at all the court will not halt a prosecution simply because the court is of the view that the evidence would not in all probability lead to a conviction. To do that would, as I have stated hereinabove, amount to this court in a judicial review proceedings stepping into the shoes of the trial court and usurping the powers of the trial court.
51. Similarly, it is not for this Court to stop the DPP in his tracks simply because the Court believes that the DPP ought to have done better. The constitutional discretion given to the DPP ought not to be lightly interfered with especially if on the evidence in his possession if true may well sustain a prosecution. Trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on his defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of an appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words I am not satisfied based on the material before me that the applicant will not receive a fair trial before the trial court more so as no allegations are made against the 2nd respondent towards that direction. Therefore the mere insufficiency of evidence does not in my considered view justify the halting of a criminal trial.
52. In these types of proceedings the Court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings. As judicial review proceedings are concerned with the process rather than merits of the challenged decision or proceedings the court is not entitled to make definitive findings on matters which go to the merit of the impugned proceedings.
53. In the premises I am not satisfied that this is a proper case in which the court ought to bring the criminal proceedings to a halt. The applicant will be afforded an opportunity to defend herself, cross-examine witnesses and adduce evidence in support of her case and that in my view is the proper course to take in the circumstances of this case.
54. Another issue that has weighed heavily on my mind is the status of the criminal case sought to be quashed. Whereas there is nothing that can bar the Court from terminating pending criminal proceedings at any stage of those proceedings, it must always be remembered that judicial review remedies are discretionary in nature and one of the factors which would militate against the grant thereof is delay in seeking relief. As was held by **Nyamu, J** (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728 and Mureithi & 2 Others vs. Attorney General & 4 Others [2006] 1 KLR (E&L) 707: "***Speed and promptness are the hallmarks of judicial review.***"** Judicial review, it has therefore been held**,** acknowledges the need for speedy certainty as to the legitimacy of the target activities and requires the applicants for

judicial review to act promptly. See **Mutemi Kithome vs. The District Land Adjudication & Settlement Officer Mwingi District & Others Nairobi HCMA No. 1108 of 2004 [2006] 1 EA 116.**

55. Therefore whereas under the ***Law Reform Act*** there is no limitation as to when to apply for orders of prohibition the Court in determining whether or not to grant the relief sought will take into account the delay in making the application and the import and impact of such delay in the administration of justice.

56. This position was similarly appreciated in *Judicial Review Misc. Civil Appl. No. 139 of 2014 between* ***Vania Investments Pool Limited and Capital Markets Authority & Others*** where the learned Judge pronounced himself as hereunder:

"The issue of failure to invoke alternative remedies is intricately linked with the issue of delay. Applications seeking leave to commence judicial review proceedings must be made promptly as soon as grounds giving rise to the need for judicial review become known. Undue and inordinate delay in applying for judicial review is a major factor for consideration. Lord Hope of Craighead in Regina v London Borough of Hammersmith and

Fulham (Respondents) and Other Exparte Burkett &

Another (FC) (Appellants) [2002] UKHL 23 noted the need for the applicant to move the court promptly when he observed that,

> ***"[64] On the other hand it has repeatedly been acknowledged that applications in such cases should be brought as speedily as possible. Ample support for this approach is to be found in the well-known observations of Lord Diplock in O'Reilly v Mackman [1983] 2 AC 237, 280-281 to the effect that the public interest in good administration requires that public authorities and third parties should not be kept in suspense for any longer period than is absolutely necessary in fairness to the person affected by the decision… But decisions as to whether a petition should be dismissed on the ground of delay are made in the light of the circumstances in which time was allowed to pass. As Lord President Rodger put it in Swan v Secretary of State for Scotland 1998 SC 479, 487:"It is, of course, the case that judicial review proceedings ought normally to be raised promptly and it is also undeniable that the petitioners let some months pass without starting these proceedings. None the less, in considering whether the delay was such that the petitioners should not be allowed to proceed, we take into account the situation in which time was allowed to pass."***

57. Apart from that it is stated in ***Halsbury's Laws of England*** **4th Edn. Vol. 1(1) para 12 page 270:**

"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary

decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders."

58. It this case it is clear that the criminal proceedings which were instituted in the year 2012 are already in the course of hearing. The applicant contends that so far the evidence does not point to her culpability. In deciding whether or not to grant orders of judicial review, the Court must consider whether or not the orders sought by the applicant are the most efficacious remedies in the circumstances. As stated in ***Halsbury's Laws of England 4th Edition Vol. 1(1) paragraph 122***, the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles. Sound legal principles, in my view would dictate that where what is sought to be prohibited has reached a very advanced stage due to the failure by the applicant to act promptly, it may well be prudent to allow the process to run its course.
59. Having taken into account the foregoing the inescapable conclusion I come to is that this application is not merited

Order

60. In the result the Notice of Motion dated 10th November, 2014 fails and is dismissed with costs to the Respondents and the 1st Interested Party.

Dated at Nairobi this 28th day of May, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Orina for the Interested Party

Cc Patricia