



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC CIVIL CASE NUMBER 418 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..... 1<sup>ST</sup> RESPONDENT**

**THE CHIEF MAGISTRATE'S COURT, NAIROBI..... 2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL..... 3<sup>RD</sup> RESPONDENT**

**AND**

**CONSTANTINO MUTUA..... INTERESTED PARTY**

**EX PARTE MILDRED MBUYA MULI**

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 10<sup>th</sup> November, 2014, filed in Court on 11<sup>th</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 506 of 2014 or any other proceedings that may be instituted on the same basis.

3. That an Order of Prohibition to prohibit the 2<sup>nd</sup> Respondent from taking evidence, conducting proceedings or carrying on with the trial of the Applicant in Milimani Chief Magistrate's Criminal case No. 506 of 2014 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 5<sup>th</sup> November, 2014 and 2<sup>nd</sup> December, 2014.
3. According to the applicant, on 7<sup>th</sup> April, 2014, she was arrested by police officers and charged with two counts of Conspiracy to defraud contrary to section 317 of the **Penal Code** and obtaining registration of land by false pretences contrary to section 320 of the **Penal Code**.
4. By the time the said officers charged her in court as per count 1 they had not taken any statement from her and should have realized that the Interested Party had no Title to Parcel No. L.R. 12715/269 I.R. 44623 that he was capable of being deprived of.
5. According to the ex parte applicant, the background to the charge as per count two was a conveyancing transaction whereby she had bought the said parcel of land from the spouse of **Jostina Mueni Kalani** (deceased) one **Joseph Karani Matuku** who had capacity to act on behalf of the deceased as per the exhibited copies of Certificate of Confirmation of Grant and acknowledgement of purchase price by the said administrator.
6. It was deposed that the said transaction involved the sale and purchase of a property known as LR No. 12715/269 which is the same property stated in the Certificate of Confirmation of Grant and at all times the due diligence carried out in respect of the said property failed to disclose the Interested Party's interest on the said property. Further, nowhere in the course of the said transaction did the Interested Party appear and claim any form of ownership of the property and the applicant never at all transacted with him.
7. 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 exculpatory evidence that is glaring on the face of the statements and documents available to them hence she believed that the decision to charge and prosecute her in Milimani Chief Magistrate's Criminal case No. 506 of 2014 was made in breach of sound principles of fair administrative action, in breach of principles of natural justice that no person should be condemned without a hearing, without taking into account very relevant considerations hence the same was oppressive and a gross abuse of the criminal justice process.
8. It was further deposed that on or about the 28<sup>th</sup> July 2007 one **Joseph Karani Mutuku** the administrator of the estate of **Justina Mueni Kalani** approached the applicant's offices and an Agreement was made for the eventual transfer and sale of land LR NO. 12715/269 situate in North West of Athi River in Machakos district. Though the said administrator had not done the transfer of the said parcel of land to his name, the lawyers acting for both parties informed the applicant that there was no harm for the Agreement to be in the name of the deceased and indeed the proceeds of the sale was paid to the administrator. She averred that she was not aware of the sale agreement between the deceased and the Interested Party at all and did not in any way participate in the removal of the caveat as alleged as she only dealt with the administrator of the estate. She reiterated that she could not have dispossessed the Interested Party of any land as he legally did not own any land at the time.

9. The applicant's view was that the interested party was laying claim of land 24 years later yet he should have laid claim within twelve years. According to her the police did not even take time to talk to the lawyers involved in the transaction and confirm the issues raised about the agreement and transfer bearing the name of the deceased.
10. The applicant emphatically denied that she entered into an agreement with a deceased person, but asserted that she dealt and transacted with the Administrator of the Estate.
11. To her, had the police sought audience with the lawyers who witnessed the parties in the agreement and transfer they could not have charged her with the offences in Criminal Case No. 506 of 2014. It was her position that if the Interested Party had any claim on the parcel of land, he should have filed a claim of land rather than complain about an alleged removal of caveat, an allegation that the applicant totally denied.
12. With respect to the second count, the applicant deposed that the complainant should be the administrator of the estate of the deceased yet the police had not even taken a statement from him and in any event, the said second count was not supported by any evidence as indeed the administrator of the estate was aware and he took payment for the land that the applicant purchased.
13. To the applicant, the police did not act in good faith in charging her with the offence and the 1<sup>st</sup> Respondent did not at all give consent for her to be charged as alleged as the said communication has not been exhibited or if indeed he did consent then the same should be faulted by this honourable court.

### **Respondent's Case**

14. The respondent opposed the application vide a replying affidavit sworn by **Inspector Peter Obonyo**, one of the investigating officers in the criminal case.
15. According to him, on 3<sup>1st</sup> October 2012 a complaint was made by 1<sup>st</sup> Interested Party **Constatino Mutua** who reported that a parcel of land registered as **12715/269 L.R 44623** situated in **Syokimau area** was fraudulently transferred in the name of the Applicant **Mildred Mbuya Muli** who claimed to be the new owner prompting investigations and filing of charges at Milimani court. The said interested party reported that the Applicant had forged an agreement letter and fraudulently removed a caveat by forging his signatures at the lands office. Following investigations on the said complaint, it was revealed that the said parcel of land had original number **12715/269 I.R 44623** and was originally granted to **Syokimau Farm Limited**. On 30<sup>th</sup> October, 1989, the said **Syokimau Farm Limited** transferred this land to **Justina Mueni Kalani** the mother in-law of to the interested party. On 6<sup>th</sup> February 1992 a Sale Agreement of the said land was entered into between the Interested Party and the owner **Justina Mueni Kalani** his mother in-law in the presence of his wife **Rose Wanza**. Later after the death of **Justina Mueni Kalani**, the Applicant **Mildred Mbuya Muli** conspired with other unknown persons and removed a caveat in the land office which was earlier on put by the 1<sup>st</sup> interested Party **Constatino Mutua**.
16. He added that a transfer agreement was made on 28<sup>th</sup> day of July 2007 between **Jostina Mueni Kalani** and **Exotic Home Properties Limited** transferring the parcel of land **LR .12715/269** to the purchaser. However, when the transfer was done between **Justina Mueni Kalani** and **Exotic Home Properties Limited** whose Director is the Applicant, **Justina Mueni Kalani** had died two years earlier which means by the time of signing she had passed away. As a result, criminal charges were preferred against **Exotic Home Properties Limited** vide Milimani Chief Magistrate Court Criminal case No. 506 of 2014.
17. It was therefore the deponent's case that this Application was filed in bad faith, misconceived and abuse of the court process and meant to defeat the cause of justice.
18. To him, 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.

19. 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, he 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.

### **Interested Party's Case.**

20. The interested party, **Constantino Mutua**, on his part filed a replying affidavit sworn on 13th January, 2015.
21. According to him, on 6<sup>th</sup> February 1992, he entered into a sale agreement between himself and **Justina Mueni Kalani** being the owner of parcel number 12715/269 I.R 44623. However, as he process of conveyancing was going on well, suddenly **Justina Mueni Kalani** fell ill and died on 8<sup>th</sup> September 2005. He immediately approached the deceased husband, one **Joseph Kalani Mutuku** and requested him to obtain relevant letters of administration and thereafter to initiate the transfer of the land to him. However, the deceased husband appeared reluctant to obtain the letters of administration in order to enable him finalize a transaction he had started with his deceased wife. In view of the above development, the interested party approached a firm of advocate by the name Kahari and Kiai Advocates who advised him that in order for him to protect his interest in the plot he should place an absolute caveat on the plot which he did.
22. The interested party disclosed that in the year 2005, he was transferred from Nairobi to Kisumu by which time, there was on his plot one uncompleted house. When in the year 2009, he visited his plot at Syokimau with a view to exploring possibilities on how he could complete his unfinished house and further embark on other development projects thereon he discovered that his uncompleted house had been completed by an unknown person and there were other several structures standing thereon. Upon conducting a search through his advocates, it was established that an advocate by the name **Mrs. Kivuva** had purportedly acted on the interested party's instructions and applied for the removal of the said caveat which paved way for **Mildred Mbuya Muli** of Exotic Homes properties Limited who started transaction on the property from 13<sup>th</sup> March 2008 purportedly with **Justina Mueni Kalani** who had died on 8<sup>th</sup> September 2005 and they purported to have paid a sum of Kshs. 4.5 million to the dead person and thereafter the deceased signed a sale agreement then subdivided the plot into 39 other plots.
23. He further averred that it was further established that one **Mildred Mbuya Muli** had forged an agreement letter and fraudulently removed the caveat at the land offices by forging the interested party's signature. On exercising his constitutional right under the constitution of the Republic of Kenya, **The Criminal Procedure Act** and the **Penal Code** to report to the police whenever my property has been unlawfully and criminally interfered with. Following police investigations, they established that indeed one **Mildred Mbuya Muli** was responsible for the unlawful transfer of the plot and decided to prefer criminal charges against her criminal case no 506 of 2014.
15. It was therefore his belief that the decision by the police to charge the Applicant was reached

after the police had conducted investigations and collected enough evidence against the ex parte Applicant hence the allegations by the ex parte Applicant that the police acted maliciously and oppressively is unattainable and unjustified. In his view, judicial review is a process by which High Court exercises its supervisory roles over proceedings and decisions of inferior courts, tribunal and other bodies or persons who carry out quasi judicial duties, who are charged with performance of Public Acts and duties and therefore the discretion by the police to charge the *Ex parte* Applicant was lawful and in good faith there was no dishonesty or malice.

### **Determinations**

24. The parties herein filed written submission in support of their respective positions. I have considered the application, the evidence on record as well as the submissions filed.
25. It is important to first deal with the circumstances under which the Court will grant order prohibiting the commencement or continuation of a criminal trial process.
26. It is trite that 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 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.
27. 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.”**

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

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

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

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

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

**public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in...”**

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

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

31. It is therefore clear that whereas the discretion given to the 1<sup>st</sup> respondent to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised in the public interest and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence, the Court will not hesitate to bring such proceedings to a halt. However, it 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.

32. Dealing with the burden and standard in judicial review applications, it was held in **Kuria & 3 Others vs. Attorney General** (supra) that:

**“A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution...In the instant case there is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even of manipulation of court process so as to seriously deprecate the likelihood that the applicants might not get a fair trial as provided under section 77 of the Constitution. It is not enough to simply state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an “abuse of process”, is a “manipulation”, “amounts to selective prosecution” or such other processes, or even supposing that the applicants might not get a fair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts. The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial...In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names.”**

33. In **Republic vs. Attorney General & 4 others Ex-Parte Diamond Hashim Lalji and Ahmed**

Hasham Lalji [2014] eKLR this Court expressed itself as 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.”**

34. 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 such proceedings to determine such matters and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and once the Court is satisfied that the same are *bona fides* and that the same are being conducted in a fair manner, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution's evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.

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

36. 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 laissez-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.”**

37. 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.”**

38. 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.**

39. 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.”**

40. In this case, the ex parte applicant contends that by the time she was charged, no statement had

been taken from her; that had that been done the police officers would have realised that the interested party had no title to the suit property to warrant the charge of fraud and obtaining registration by false pretences being preferred against her; that that she entered into the subject transaction without knowledge of the interested party's interest in the subject land; and that the police ignored the exculpatory evidence in her favour. In her further affidavit it was however disclosed that since the administrator had not transferred the land into his name, her advocates informed her there was no harm in the agreement being made in the name of the deceased and that she never participated in the removal of the caveat. In her view the interested party ought to have sued for the land rather than institute criminal proceedings.

41. The applicant contends that the prosecution in question was commenced before her statement was taken. As already stated hereinabove, 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 and as was aptly put in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR**:

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

42. Therefore where the Court finds that the discretion reposed on the DPP is being used to achieve some collateral purposes such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to terminate such proceedings.
43. 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.
44. 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.
45. 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.

46. 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 expected 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.”**

47. As to whether the interested party ought to have filed a suit for claim of the land, 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. I must hasten to add however that 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.

48. 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.”**

49. In this case the applicant concedes that the sale agreement was entered in the name of deceased. Whether the reason advanced for doing so is legally tenable is an issue for determination by the trial Court. This Court however cannot make a determination that that kind of action cannot be a basis for preferring the criminal charges she is facing. In this case I am not satisfied that the orders sought herein are merited since it has not even been alleged that the criminal proceedings are being mounted with a view to compromising the civil proceedings.
50. 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 2<sup>nd</sup> 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.

### **Order**

54. In the result the Notice of Motion dated 10<sup>th</sup> November, 2014 fails and is dismissed with costs to the Respondents and Interested Party.

**Dated at Nairobi this 28<sup>th</sup> day of May, 2015**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Orina for the Interestd Party**

**Cc Patricia**