**REPUBLIC OF KENYA**

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

**MISC CIVIL CASE NUMBER 340 OF 2014**

**IN THE MATTER OF AN APPLICATION BY FRANCIS NJAKWE MAINA AND SARAH WAMBUI HASSAN FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF NAIROBI CRIMINAL CASE NUMBER 1231 OF 2011 REPUBLIC VERSUS FRANCIS NJAKWE MAINA**

**AND**

**IN THE MATTER OF NAIROBI CRIMINAL CASE NUMBER 854 OF 2014 REPUBLIC VERSUS SARAH WAMBUI HASSAN**

**AND**

**IN THE MATTER OF MILIMANI CHIEF MAGISTRATE CIVIL SUIT NUMBER 3184 OF 2011 CAROGA PHARMA KENYA LIMITED VERSUS NJAMA LIMITED**

**BETWEEN**

**REPUBLIC……„„…………..…………………………….………. APPLICANT**

**VERSUS**

**THE DIRECTOR OF PUBLIC**

**PROSECUTIONS....……………………….….……….…. 1ST RESPONDENT**

**THE CHIEF MAGISTRATE'S COURT,**

**MILIMANI LAW COURTS……...……...…….……...… 2ND RESPONDENT**

**DCIO LANGATA POLICE STATION…........………. 3RD RESPONDENT**

**AND**

**CAROGA PHARMA (K) LTD……..………… 1ST INTERESTED PARTY**

**EX PARTE**

**FRANCIS NJAKWE MAINA**

**SARAH WAMBUI HASSAN**

**JUDGEMENT**

## Introduction

1. By a Notice of Motion dated 31st October, 2014, filed in Court the same day, the *ex parte* applicants herein, **Francis Njakwe Maina** and **Sarah Wambui Hassan**, husband and wife respectively seek the following orders:

> **1. AN ORDER OF CERTIORARI to quash the decision by the 3rd Respondent to charge and continue with Nairobi Criminal Case No. 1231 of 2011 Republic versus Francis Njakwe Maina and Criminal Case 854 of 2014 Republic versus Sarah Wambui Hassan.**
>
> **2. AN ORDER OF PROHIBITION to prohibit the Respondents from proceeding further with Nairobi Criminal Case No. 1231 of 2011 Republic versus Francis Njakwe Maina and Criminal Case 854 of 2014 Republic versus Sarah Wambui Hassan.**
>
> **3. THAT the Respondents be condemned to pay the costs of this Application.**

## Applicants' Case

2. The ex parte applicants' case was that the 1st Applicant is a shareholder and Director of a company called **Njama Limited** (hereinafter referred to as "the Company") while the 2nd ex parte applicant is the 1st applicant's wife.

3. On or about 14th September, 2011, the 1st applicant was arrested and arraigned in court in Criminal Case No. 1231 of 2011 with obtaining goods by false pretences which case is still pending before court. Apart from that the said Company was sued in Civil Suit No. 3184 of 2011 by the interested party herein, the complainant in the said criminal case for the sum of Kshs 1,932,930.00 being damages arising from an alleged breach of claim the Company filed a defence in which it was contended that the Company which engages purely in building and construction works had no dealings with pharmaceutical works and has never entered into any contractual agreement with the interested party for the supply of such products.

4. It was contended that upon realising that the civil case was not yielding immediate results, the Interested Party's principal Director, **Nicholas Karani Gichohi**, procured the services of the 3rd respondent to harass, threaten and intimidate the 1st applicant to take up the alleged liability of the Company personally hence the commencement of the said criminal case, whose subject is also the same amount. It was averred that in the said criminal proceedings, the said Director admitted that his only prayer in the criminal proceedings is for the repayment of the alleged sum.

5. However, upon realisation that both the civil case and the criminal case were not meeting the targeted results, the interested party once more decided to use the 3rd Respondent's office, which arrested the 2nd applicant, the 1st applicant's wife on a weekend on 9th June, 2014, detained her without an option of a bond and arraigned her in Court in criminal case no. 854 of 2014 with the same charge which matter is similarly still pending in Court. Upon the arrest of the 2nd applicant, she was, according to the applicants, informed by one of the 3rd respondent's officers, **Corporal Daniel Mutisya** that he would not be released until she paid the amount claimed.

6. It was therefore the applicants' position that the 3rd respondent and its officers had allowed

themselves to be used and be directed by the said interested party's director who even supplied in own vehicle for use in ferrying the 2nd applicant when she was arrested and directed the police not to release her on bond which instructions were complied with.

7. The applicants contended that the respondents' acts, of continuously harassing and arresting them, were based on ulterior motives meant to frustrate them and not to meet the ends of justice. Further the said acts were a violation of the applicants' constitutional rights hence the orders sought herein.

8. The *ex parte* applicant relied on **Republic vs. Chief Magistrates Court at Mombasa Ex parte Ganijee & Another [2002]2 KLR 703** and **High Court at Machakos Criminal Appeal 151 of 2008, Benson Mutuku Mutua vs. Republic**, for the submission that criminal justice system ought not to be used for achieving collateral aims. To the *ex parte* applicant, the subject prosecution was being perpetuated to achieve an ulterior motive since in the plaint, there is no mention of fraud or obtaining by false pretences and the two *ex parte* applicants are not even parties to the civil case. It was his view that had the criminal cases been instituted prior to the civil case, one would be justified in assuming that the criminal case was lodged in good faith. It was further contended that there was no reason why the 3rd respondent had to use the complainant's car to ferry the 2nd applicant to the police station and also dictate to the police not to release the accused on a bail.

9. It was therefore submitted that the whole process was orchestrated for the recovery of a civil debt and the actions of the respondent in taking part in such a scheme are *ultra vires* and reliance was placed on section 49(4) of the ***National Police Service Act***, Cap 84.

**1st and 3rd Respondents' Case.**

10. According to the 1st and 3rd respondents, on 26th April, 2011 a report was made by one **Nicholas Karani Gichohi**, of the Interested Party to the effect that the applicants had issued cheques which were subsequently dishonoured by the bank. The said cheques were purportedly for payment for assorted medical drugs and supplies made by the Interested Party to the said Company, **Njama Limited**, in which the applicants are the directors. Despite communicating the fact of dishonour to the applicants, the latter kept giving excuses and false promises that they would settle the entire amount.

11. Investigations, according to the respondents, revealed that on or about the 20th November, 2010, the *ex parte* applicants, in their capacities as directors of the said Company, requested the interested party, which deals with sourcing and supply of medical diagnostic pharmaceuticals and other medical products, to be supplied with assorted medical drugs and commodities under the pretext that the said Company was a family business venturing in pharmaceuticals on consideration that they would pay for the same. Pursuant thereto, the interested party complainant supplied the same on the strength of cheques nos. 000294, 000296 and 000297 for Kshs 395,080.00, Kshs 565,250.00 and Kshs 565,000.00 respectively all dated 28th December, 2010 which cheques on being presented for payment were returned dishonoured on the ground that there were insufficient funds in the account.

12.On a complaint being made by the interested party to the police and after completion of the investigations, the 1st applicant was arrested on 13th September, 2011 and arraigned in court with the offence of obtaining goods by false pretences in criminal case no. 1231 of 2011. Subsequently charges were preferred against the 2nd applicant vide criminal case no. 302 of 2012 and a warrant of arrest was issued against her following her failure to appear in court. However despite several visits to her homes the 2nd applicant could not be traced leading to the withdrawal of the said case on 16th May, 2012 under section 87(a) of the ***Criminal Procedure Code*** pending her arrest. The case against the 1st applicant, it was averred proceeded and several witnesses had testified.

13.The 2nd applicant was however arrested on 6th June, 2014 and arraigned in Court on 7th June, 2014 in criminal case no. 854 of 2014.

14.It was the respondents'' case that both criminal cases were solely based on the evidence gathered during the investigations and were not intended to harass the applicants or their family and had not been influenced by anyone. To the respondents. Had it not have been for the disappearance of the 2nd applicant, both applicants would have been charged jointly in the year 2011.

15. With respect to the said civil case, it was the respondents' position that its existence is no bar to the criminal case hence the application was misconceived, made in bad faith with the sole intention of derailing the course of justice.

16.It was submitted that Article 243 of the Constitution establishes the National Police Service to "maintain law and order, preserve peace, carry out investigations and apprehend offenders". The said powers are also enshrined in section 24 of the ***National Police Service Act***. The Constitution under Article 245 empowers the National Police Service to "investigate any offence and enforce the law against persons in contravention" under the directive of either the Inspector General or the Director of Public Prosecutions (the DPP) and no other person while the DPP derives his mandate from Article 157 of the Constitution.

17. The 1st and 3rd respondents submitted that the applicants failed to demonstrate that the respondents' decision to investigate and prosecute was motivated by something else other than the discharge of their constitutional mandate and relied on **Beatrice Ngongo Kamau & 2 Others vs. Commissioner of Police & Others** **Petition No. 251 of 2012** and **Paul Ng'ang'a Nyaga & 2 Others vs. The Hon. Attorney General & 2 Others Petition No.518 of 2012**.

18.Furthermore, the charges preferred against the applicants were based solely on the basis of the evidence on record which was sufficient. To these respondents, the ex parte applicants' averment that the civil suit between them and the interested party is a ground to demonstrate ulterior motives by the respondent was not only farfetched but also blatant misrepresentation of facts since from the affidavit sworn by the Investigating Officer it was clear that the complaint was lodged on 26th April 2011, way before the institution of the civil suit alluded to and the existence of a civil suit can never operate as a bar to criminal proceedings. Section 193A of the Criminal Procedure Code and **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR** were relied upon in support of this submission.

19.It was contended that criminal proceedings are instituted merely as a process of determining whether the conduct of the accused person amounts to an offence and that the criminal proceedings against the applicants have not been instituted for any other purpose other than for the trial court to consider the conduct of the accused (now ex parte applicants) and to determine whether or not an offense has been committed.

**Determinations**

20. I have considered the parties' respective cases, as contained in their affidavits as well as submissions on record. It is important to first deal with the circumstances under which the Court will grant stay of a criminal process in these kinds of proceedings.

21.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. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail 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. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a

criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, *ipso facto*, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim.

22. However 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."**

23. 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."**

24. In **Meixner & Another vs. Attorney General [2005] 2 KLR 189,** the same Court expressed itself as hereunder:

> **"The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion is acting lawfully. The High**

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

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

**"The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far that which the courts indeed the entire system is constitutionally mandated to administer...In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute. It is further alleged that the criminal prosecution is an abuse of the court process epitomised by what is termed as selective prosecution by the Attorney General. It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been 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 fact that it has not been argued before however does not mean that the law stops dead at its tracks. An order of prohibition looks to the future and not to the past; it is concerned with the happenings of future events and little, if any, of past events. Where a decision has been made, there is little that the court can do by an order of prohibition to**

**actually stop the decision from being made, because simply that which is sought to stop has already been done. However in such circumstances, the power of judicial review is not limited to the other orders of judicial review other than prohibition. With respect to civil proceedings prohibition lies not only for the excess of jurisdiction but also from a departure of the rules of natural justice...So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions...This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit. The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law...In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed...There is nothing which can stop the from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made...Under section 77(5) of the Constitution it is a constitutional right that no person who has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of the offence. What is clear from this constitutional right is that it prevents the re-prosecution of a criminal case, which has been determined in one way or another. However, it does not mean that a civil suit and a criminal case cannot co-exist at any one particular time. This is because the section envisages the re-prosecution of a criminal case substantially dealt with either in fact or law, a case in which issues have been laid to rest. There is no mention in the section that the simultaneous existence of a civil and criminal cases is constituting double jeopardy. The courts have, however stated that the power to issue an order of prohibition to stop a criminal prosecution does not endow a court to say that no criminal prosecution should be instituted or continued side by side with a civil suit based on the same or related facts, or to say that a person should never be prosecuted in criminal proceedings when he has a civil suit against him relating to matters in the criminal proceedings...The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution...."**

26. 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... In this case it is asked to step in to grant an order of prohibition. Prohibition looks into the future and can only stop what has not been done. It is certiorari that would be efficacious in quashing that which has been done but it is not prayed for in this matter. There was no order granted for stay of further proceedings when leave was granted and it is possible that the private prosecution has proceeded either to its conclusion or to some extent. In the former event an order of prohibition has no efficacy and the court would be acting in vain to grant one. What is done will have been done. If there is anything that remains to be done in those proceedings, however, the order of prohibition will issue to stop further proceedings."**

27. In this case the ex pate applicants' case is that the Respondent is using the criminal process to harass and intimidate the applicants into personally shouldering the alleged liability of the company. However, no evidence has been adduced by the applicants apart from mere allegations of purported utterances made by the police officers that this is the case. Whereas the applicants have contended that in the criminal proceedings the interested party's director admitted that the criminal proceedings were commenced with a view to recover the sum claimed in the civil suit, for reasons unknown to the court, the applicants did not exhibit a copy of the said proceedings. The applicants however contended that this averment was not denied by the respondent. 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.

28. 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..”**

29. 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 law, 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.

30. 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”**

31.However as was appreciated in **Kuria & 3 Others vs. Attorney General** (supra):

> **“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...”**

32. The burden was therefore upon the applicants to place before the Court, not by mere allegations, but also by way of available evidence that the respondent’s conduct in preferring the criminal charges in the face of existing civil proceedings is reprehensible and an abuse of the Court and legal process and ought to be arrested. As I have said the applicants have failed to produce the

crucial evidence in support of their allegations that the evidence presented by the complainant proves their case that the criminal process was put into motion with a view to intimidating them into admitting liability in the civil suit.

33. It must always be remembered that the mere fact that criminal proceedings are being undertaken at the same time as the civil proceedings does not *ipso facto* amount to an abuse of the court process. The applicant ought to go further and show that the dominant motive for the institution of the criminal proceedings is to scuttle the civil process or force the applicant into abandoning his civil claim or force the applicant into submitting to the civil claim. If it is shown that the object of the prosecutor 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 other words the prosecutor must be actuated more 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 in such circumstances would be to further that ulterior motive and that is when the High Court steps in**.** This position was appreciated in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** where the Court expressed itself as hereunder:

> **"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".**

34. I therefore wish to disabuse the respondents' notion that criminal proceedings are instituted merely as a process of determining whether the conduct of the accused person amounts to an offence for the trial court to consider the conduct of the accused. A prosecution ought not to be commenced simply to enable the Court determine whether or not the allegations made against the accused are true. The people charged with conducting prosecutions must themselves show that they have credible evidence in their possession on the basis of which a conviction may result. If the prosecutor himself does not believe that the material in his possession may result in a conviction, it would be baseless to parade a person before a Court of law. Prosecution is a serious matter that ought not to be treated merely as a conveyor belt or a winnowing device for sorting out the wheat from chaff.

35. In this case the court must take into account the fact that the criminal process against the 1st applicant is on course and it is not contended that in the course of the said proceedings an event took place which manifested an intention to secure some other purpose than the need to vindicate the committal of the offences charged. It must be remembered that justice must be done to both the complainant and the accused and where there is evidence upon which the prosecution can reasonably mount a prosecution, it is not for the High Court in a judicial review proceeding to inquire into the sufficiency or otherwise of such evidence since the High Court ought not to usurp the role of the trial court in determining the merits of the criminal case. This position was appreciated in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR** where it was held:

> **"the police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court...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".**

36. In similar vein, the status of the criminal case sought to be quashed ought to be considered. 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.**

37. 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.

38. 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."***

39. 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."**

40. It this case it is clear that the criminal proceedings against the 1st applicant which were instituted in the year 2011 are already in the course of hearing. The applicant contends that it has been admitted in the said proceedings that the same proceedings were solely instituted for recovery purposes. It is further contended that the applicants are not liable to the interested party. 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. As was expressed in **Kuria & 3 Others vs. Attorney General** (supra):

**"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."**

41.In the grounds in support of the application the applicants alluded to the fact that the 2nd Applicant is not a director in the Company. One would have expected this crucial point to be brought by way of affidavit evidence. However, in the affidavit itself, this point was curiously omitted. Accordingly, this Court cannot rely on the grounds to find that the 2nd Applicant is not a director or shareholder in the Company. That criminal charges can in certain circumstances be brought against directors of a company in their capacity as such is not in doubt. Whether or not they ought to be brought is in my view a matter for the criminal trial court. The respondents have exhibited copies of cheques issued by **Njama Company Limited** in favour of **Caroga Pharma Kenya Limited**. It is said that all these cheques were dishonoured on their presentation to the Bank. The applicants did not controvert this damning averment. In light of the applicants' contention that there was no transaction between the applicants and the interested party, the applicants' position in so far as this issue is concerned and without making a determination on their criminal culpability or otherwise, may well warrant further investigation on merit a task which can only be properly performed by the trial Court.

42. 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.

43. I have considered the applicants' case as well as the respondent's case. Whereas the criminal case against the 2nd Applicant was preferred much later, the respondents have explained the delay as having been occasioned by their inability to trace the 2nd Applicant and arraign her in Court which led to the withdrawal of the earlier instituted proceedings. 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 applicants will be afforded an opportunity to defend themselves, cross-examine witnesses and adduce evidence in support of their case and that in my view is the proper course to take in the circumstances

of this case.

**Order**

44. Accordingly, the order that commends itself to me is that the Notice of Motion dated 31st October, 2014 be and is hereby dismissed with costs to the 1st and 3rd Respondents.

**Dated at Nairobi this day 17th day of June, 2015**

***G V ODUNGA***

***JUDGE***

**Delivered in the presence of:**

**Mr Thuita for the ex parte applicant**

**Mr Sang for Miss Ngaluika for the Respondent**

**Cc Patricia**