REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

J R MISC. CIVIL APPLICATION NO. 25 OF 2015

IN THE MATTER OF CHAPTER 4 OF THE BILL OF RIGHTS, ARTICLES 19,20,21,22,23,25 AND 159 (2D) OF THE CONSTITUTION

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOM UNDER ARTICLES 19,20,21,22,23 AND 25 OF THE CONSTITUTION

AND

IN THE MATTER OF INTENDED PROSECUTION OF THE PETITIONER IN RESPECT OF THE SALE OF SAND TRANSACTION DATED 27TH FEBRUARY 2014

AND

IN THE MATTER OF THE CRIMINAL PROCEDURE CODE, CAP 75, LAWS OF KENYA

AND

IN THE MATTER OF PENAL CODE, CAP 63, LAWS OF KENYA

AND

IN THE MATTER OF ADVOCATES ACT, CAP 16, LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION BY ALBERT MOKONO ONDIEKI FOR LEAVE TO APPLY FOR ORDERS OF PROHIBITION, CERTIORARI

BETWEEN

REPUBLIC.....APPLICANT

VERSUS-

THE DIRECTOR OF PUBLIC PROSECUTION (DPP).....1ST RESPONDENT

THE INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE....2ND RESPONDENT

THE OCS KASARANI POLICE STATION.....3RD RESPONDENT

JUDGMENT

Introduction

1. By a Notice of Motion dated 10th February, 2015, the *ex parte* applicant herein, **Albert Mokono Ondieki**, seeks the following orders:

> **a. An order of *Certiorari,* to remove into this honourable court, the proceedings before *The OCS Kasarani Police Station* for the purposes of being quashed, and quash the charge sheet therein.**
>
> **b. An order of *prohibition* directed at the 2nd, 3rd and 4th prohibiting the respondents from presenting or filling a criminal charge sheet and/ or prosecuting him at *makadara Chief Magistrate court,* or any other court or bring any charges against the applicant, arising from the same transaction, pending the hearing and determination of the substantive application to be filed herein.**
>
> **c. THAT the applicant, *M/s Albert Mokono Ondieki,* be granted an order at the 1st instance prohibiting the respondents from charging or filling a charge sheet against him in either the Chief Magistrates Court at Makadara or in any other Court elsewhere.**
>
> **d THAT costs of this application be provided for.**

Applicant's Case

2. The application was supported by an affidavit sworn by the applicant herein on 26th January, 2015.

3. According to the applicant, sometimes on 27th February2014, he acted for and subsequently drew a sale agreement between **Patrick Nderitu Macharia** (Buyer) and **Samuel Kagithi Waithaka** (Seller), in which the complainant had agreed to sale sand to **Mr. Macharia** at a price of Kshs. 1,300,000 (Shillings One Million Three Hundred Thousands) which purchase price was to be paid in 4 instalments. Prior to instructing the applicant, the interested party had received the instalment purchase price deposit of Kshs. 500,000 (Shilling Five Hundred Thousands Only) from **Mr. Macharia** towards the purchase/sale of the sand while the balance of Kshs. of Kshs. 800,000 (Eight Hundred Thousands Shillings) thereof was supposed to be liquidated in three instalments of Kshs. 300,000 (Three Hundred Thousands Shillings) Kshs. 250,000 (Two Hundred and Fifty Thousands Shillings) and Kshs. 250,000 (Two Hundred and Fifty Thousands Shillings) respectively.

4. According to the applicant, it was terms of the sale agreement, *inter alia,* that the said sum of Kshs. 800,000.00 (Eight Hundred Thousands Shillings) was to be paid by way of three post-dated cheques issued by the applicant on behalf of the buyer in the name of the seller be paid later after measuring and ascertaining the exact quantity of the sand in terms of the numbers of trucks.

5. It was added that since the applicant was an Advocate for both the interested party and the purchaser **Patrick Macharia**, he would issue three post dated cheques to the interested party which cheques were to be banked only (i) upon ascertaining the exact quantity and measurement of the sand, (ii) after the purchaser has deposited a sum of Kshs. 800,000 (Eight Hundred Thousands Shillings) in the applicant's bank account, and, after the interested party has sought and obtained express instructions from the applicant as to the availability of the funds in the account, that is to say, that the interested party had agreed to ascertain from the applicant whether the purchaser had deposited the balance purchase price aforesaid in his bank account, so as to enable him to bank the post dated cheques.

6. Pursuant thereto on the 27th day of February, 2014, the applicant issued three post-dated cheques, numbers 000204 for Kshs. 300,000, payable in the month of August, 000206 for Kshs. 250,000 payable in the month of September, 2014, and 000207 for Kshs. 250,000 payable in the month of October, 2014 to the Interested Party.

7. However, the purchaser did not deposit the balance purchase price in the applicant's account as agreed and when asked to do so declined to do so claiming that the interested party had not measured and/or ascertained the measurement/ quantity of the sand in terms of trucks.

8. The interested party, however, proceeded to bank the three post dated cheques despite being advised by the applicant not to do so. The applicant asserted that cheque Nos. 000207 for Kshs. 250,000 (Two Hundred and Fifty Thousands Shillings) dated 7th July, 2014, and No.0 00206 for Kshs. 300,000 (Kenya Shillings Three Hundred Thousands) were issued to the interested party on the 27th February, 2014, when the parties thereto executed it while cheque No. 000213 for Kshs550,000 (Kenya Shillings Five Hundred and Fifty Thousands Shillings) and Cheque No. 000206 which were presented for payment by the interested party on the 30th November, 2014 and 30th September, 2014, respectively, were issued on 5th August, 2014 thus making them post dated.

9. Based on legal advice the applicant deposed that the bouncing of the three post dated cheques issued by myself to the complainant has no criminal element at all since section 316A (2) of the ***Penal Code***, Cap 63 of the Laws of Kenya clearly stipulates that issuing of a post dated cheque which is thereafter dishonoured does not amount to a criminal offence. It was the applicant's case that charging him with a criminal case without any evidence that he committed a criminal offence just because he issued the three post dated cheques, which were later returned unpaid amounts to misuse and an abuse of prosecutorial powers on the part of the Respondents. He therefore contended that the process being adopted by the Respondents in these matters to recover the sand's purchase price on behalf of the complainants, or in default charge the him in Court with charges of issuing bad cheques, when he was not a purchaser, amounts to abuse of the court process and an abuse of prosecutorial powers on the part of the Respondents. Further the Respondents are abusing, misusing and/or manipulating the criminal process for ulterior motives and therefore this Honourable has unfettered Jurisdiction to invariably invoke/exercise the power of judicial review to zealously guard its independence and impartiality to protect the applicant's constitutional rights from abuse. Further, in the instance case, the intended criminal prosecution is tainted with ulterior motive, to bear pressure on him in order to settle a civil dispute between the complainant and the purchaser.

10. According to the applicant, the 1st Respondent and its agents the Kenya Police have acted irrationally and without regard to the principles applicable, in its decision making, pursuant to, and in exercise of its powers as conferred to its officers under the ***Criminal Procedure Code***, Cap 75 Laws of Kenya, the ***Penal Code*** Cap 63 Laws of Kenya and the Constitution which is wanting, when it and/or its agents have threatened to charge the applicant with a charge not known in law.

Respondents' Case

11. The Respondents filed a replying affidavit sworn by **PC Lucy Kiongo**, the investigating officer on 23rd February, 2015.

12. According to her, a report was made by the complainant one **Samuel Kagithi Waithaka,** the seller in a sale transaction which was entered on the 27th day February, 2014, vide OB No. 39/12/2014 in which he reported that on the aforesaid date, he sold 50 trucks of sand to one the purchaser, at a price of Kshs. 1,300,000/- which was witnessed by the Applicant herein as their Advocate. He said that he was paid Kshs 500,000/- in cash and the balance of Kshs. 800,000/- was paid through cheques which were dishonoured upon deposit.

13. Upon the complainant, the interested party herein recording his statement, the deponent commenced investigations which established that there was a sale transaction between the purchaser and Interested

Party herein as per the sale agreement dated the 27th day of 2014, which was witnessed and drawn by the Applicant; that the Complainant/Interested Party herein was "the seller" (of sand), one **Patrick Macharia** was "the purchaser" and the Applicant herein witnessed the said sale agreement for both parties; that the Complainant was paid a deposit of Kshs. 500,000/- cash out of the agreed price of Kshs. 1,300,000/- and the balance was to be paid within Forty Five (45) days as provided in paragraph 4 of the said agreement which was prepared by the Applicant; that the Applicant is an Advocate of the High Court of Kenya and a sole proprietor of Mokono Ondieki & Co. Advocates and is a signatory to account number 0240290500985 which belongs to the said law firm; that the said balance was not paid within the time limit as stipulated in the agreement; that on the 7th day of July, 2014 the Applicant herein issued a cheque number 000207 for Kshs. 250,000/- to the Complainant which he banked but it was dishonoured due to insufficient funds; that on the 5th day August, 2014 the Applicant again issued the Complainant with a current cheque number 000205 for Kshs. 300,000/- and another post dated cheque number 000206 for Kshs. 250,000/- which was to be deposited as from the 5th day of September, 2014. However, the following day the Applicant called the Complainant and requested him not to deposit the current cheque number 000205; that on the 30th day of November, 2014 the Applicant issued the Complainant with another current cheque number 000213 for Kshs. 550,000/- which he deposited together with the earlier post dated cheque number 000206 at the Bank of Africa Thika branch but the two cheques were also dishonoured owing to insufficient funds in the drawer's account; and that the dishonoured cheques were issued by the Applicant while knowing that the account had insufficient funds which act is criminal.

14. It was deposed that that after completion of the investigations, the respondents preferred charges against the Applicant who is yet to be arraigned in court.

15. According to the respondents, 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 and its functions include but are not limited to collecting and providing criminal intelligence; undertaking investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cyber crime among others; maintaining law and order; detecting and preventing crime; apprehending offenders; maintaining criminal records; conducting forensic analysis; executing the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157(4) of the Constitution; co-ordinating country Interpol Affairs; investigating any matter that may be referred to it by the Independent Police Oversight Authority; and performing any other function conferred on it by any other written law.

16. It was further deposed that the objects and functions of the National Police Service are set out in Article 244 of the Constitution of the Republic of Kenya 2010 and the National Police Service and that it is the mandate of the 2nd& 3rd Respondents and in the Public interest that they receive all complaints from the public, carry out investigations and upon reasonable grounds a prosecution may be instituted.

17. It was deposed that the offence with which the Applicant is to be charged with is clearly spelt out in the respective statutes and the penalties thereof specified and that the Applicant has neither demonstrated that the Respondents have exceeded their jurisdiction nor is there evidence of abuse of the court process. It was contended that Article 157(6) of the Constitution of Kenya 2010 mandates the Director of Public Prosecution to institute and undertake criminal proceedings against any person in respect of any offence alleged to have been committed upon conclusion of investigations by the 2nd & 3rd Respondents while Article 157 (11) Constitution of Kenya 2010 provides that the Director of Public Prosecution in exercising his constitutional mandate 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.

18. However, the Applicant has not shown how the 1st Respondent has exceeded his jurisdiction and likewise, there is no evidence of ulterior motives, intimidation, threats and being malicious on part of the Respondents to deprecate the likelihood that the applicant might not get a fair trial as provided for under the Constitution to warrant the High Court to interfere with preferring charges against the Applicant. It was therefore the respondents' case that the Applicant herein has not met the threshold by showing that

there is a prima facie case as to why charges should not be preferred against him if there is reasonable grounds to be prosecuted hence he is not eligible for orders sought. To the contrary, the decision to charge and prosecute the Applicant is based on the sufficiency of the evidence after investigations and analyzing the evidence gathered and it is manifestly clear from the evidence obtained during investigations that the Applicant was very much aware of the financial status of his law firm's account before he decided to issue the said cheques. As a professional it was the burden or duty of the Applicant to ensure that there was sufficient funds in the account when the cheques were presented.

19. According to the respondents, the Applicant has not demonstrated and/or there is no evidence that the cheques he issued were post dated as alleged since arguments are mere allegations and he is taking advantage that once he requested the complainant not to deposit the current cheque number 000205 when the complainant accepted in good faith but not that the cheque was post dated. It was asserted that the Applicant in paragraph 4 & 5 of his notice of motion is misleading this honourable court as there are no such provisions in the sale agreement as he purports and further, in paragraph 20 of the supporting affidavit the Applicant is insincere by purporting that the Respondents are in the process of recovering the purchase price on behalf of the complainant and yet the issue at hand is the issuance of bad cheques which were drawn by the Applicant which he does not dispute.

20. The Respondents however averred that they were strangers to Kibera Chief Magistrate Criminal Case No. 624 of 2013 referred to in paragraph 22 of the Applicant's statutory statement but asserted that the Applicant is abusing the court process as he had earlier filed a petition no. 11 of 2015 seeking same orders as herein but the court declined to grant stay orders. Then thereafter he filed this application herein and managed to get ex-parte orders for leave which shall operate as a stay then he immediately filed a notice to withdraw the said Petition. This act amounts to non disclosure and forum shopping which should be stopped.

21. According to the applicant, section 193 A of the ***Criminal Procedure Code*** provides that the subsistence of civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings arising out of the same set of facts hence the instant application is only a delaying strategy by the Applicant meant to delay prosecution and hence defeat the ends of justice. Further the application is frivolous and an abuse of the court process and meant to circumvent the criminal justice.

Interested Party's Case

22. The Interested Party herein, **Samwel Kagithi Waithaka**, filed a replying affidavit sworn on 11th March, 2015.

23. According to him, the Applicant ex parte, one **Albert Mokono Ondieki**, issued 3 personal cheques drawn, in his favour and upon presenting the said cheques to his bank at Equity Bank and Bank of Africa Bank, the same were dishonoured for lack of funds. It was therefore averred that the Ex parte Applicant committed an offence, known in law, and his prayers to have the proceedings at OCS Kasarani Police Station quashed are not tenable.

24. According to the interested party, if the Ex parte Applicant has not committed any offence, by issuing cheques which later bounced, the trial court at Makadara Chief Magistrate's Court or elsewhere shall acquit him. However, according to Article 15(6) of the Constitution of Kenya 2010, the Director of Public Prosecution has mandate to undertake criminal investigation and proceeding including charging any person for any offence believed to have been committed hence the issues raised by the Defendant should be canvassed before a court hearing criminal proceedings and not through a constitutional petition, as there is a *prima facie* case against him.

25. The interested party's case was that the petition before this court is frivolous vexations and an abuse of the court process, as the Defendant had filed a similar application, seeking for similar orders.

Purchaser's Case

26. On his part, the purchaser, **Patrick Nderitu Macharia**, swore an affidavit on 15th April, 2015.

27. According to him, on the 27th day of February 2014 he entered into a sale agreement with the interested party to buy a heap of sand at a price of Kshs. 1,300,000 (Kenya Shillings One Million Three Hundred Thousands) which agreement was reduced in writing by **Albert Monono Ondieki** of Mokono Ondieki & Company Advocates who acted for the purchaser and the vendor of the sand, and executed accordingly.

28. According to the purchaser, it was orally agreed between the two parties to the agreement that the purchaser would the 1st initial instalment of Kshs 500,000 (Kenya Shillings Five Hundred Thousands) the balance thereof to be liquidated by three instalments of post dated cheques of Kshs. 250,000.00 and Kshs 300,000.00, payable at three different respective dates in future. The purchaser added that further terms of the oral agreement were that the sand quantity be measured and ascertained before the post dated cheques issued by the parties' advocates to the interested party, are presented to the bank for payment. It was further agreed that though the interested party was issued with three post dated cheques by the Applicant, those cheques were to be presented to the bank for payment after the sand's quantity has been measured and ascertained and after the purchaser deposited the balance of the purchase price in Mokono's bank account upon the ascertainment of the quantity of the sand which deposit was to be ascertained by the Applicant.

29. Notwithstanding the foregoing, it was deposed that the vendor declined to measure the sand and simply demanded for the payment of the purchase price balance thereof from the advocate by intimidation and coercion, rather than from the purchaser and before the Applicant could certify the conditions of the sale agreement, he presented the post dated cheques for payment to the bank and they were all dishonoured for non availability of funds.

30. The purchaser clarified that it is himself that was supposed to pay the interested party the balance of the purchase price of Kshs 800,000.00 (Kenya shillings Eight Hundred Thousand) by depositing the said purchase price in the Applicant's bank account so that the cheque issued their common advocate to the interested party could be honoured upon presentation upon ascertaining the sand's capacity, and not the Applicant.

31. To the purchaser, despite making this clear to the Kasarani Police Officers and the interested party, they have ignored and have commenced the process of charging the Applicant with an offence of issuing post dated cheques that were dishonoured upon presentation.

32. Apart from that the interested party has commenced a civil process to demand from the purchaser the payment of the balance of Kshs 800,000 (Kenya Shillings Eight Hundred Thousands).

Determination

33. I have considered the application, the affidavits in support of and in opposition to the application as well as the submissions made and authorities relied upon.

34. The principle that runs across the proceedings in the nature instituted by the applicant herein is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution and that 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. The principle behind this reasoning is that judicial review proceedings are not concerned with the merits but with the decision making process. Therefore the mere fact an applicant has a good defence in the criminal process is not a basis for halting criminal proceedings undertaken *bona fides* since the purpose of a criminal trial is to determine the guilt or otherwise of an accused person and therefore where an accused has a defence to the offence with which he is charged, that defence is open to the accused in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not

hesitate in putting a halt to such proceedings.

35. 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."**

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

> **"The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion if acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution... Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power. Having regard to the law, the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision is correct."**

37. However, 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 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...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...There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an "abuse of process", is a "manipulation", "amounts to selective prosecution" or such other processes, or even supposing that the applicants might not get affair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts. The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded,

whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial... In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names."

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

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

39. 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".**

40. While it is appreciated that under Article 157(10) of the Constitution the Director of Public Prosecutions does not require the consent of any person or authority in order to commence criminal proceedings and that in the exercise of his or her powers or functions, he is 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.***

41. Similarly, 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.

42. What comes out clearly from the foregoing provisions is 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***. Unless these provisions are adhered to, this Court would be entitled to interfere with the exercise of discretion by the DPP. 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. This was the position adopted in **Nakusa vs. Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565** in which it was held:

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

43. 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."**

44. 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 may 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.**

45. It is, however, upon the ex parte applicant to satisfy the Court that the discretion given to the DPP ought to be interfered with.

46. In this case it is the applicant's case that the facts of the case do not constitute an offence. in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** it was held that:

> **"The function of any judicial system in civilized nations is to uphold the rule of law. To be able to do that, the system must have power to try and decide cases brought before the Courts according to the established law. The process of trial is central to the adjudication of any dispute and it is now a universally accepted principle of law that every person must have his day in court. This means that the judicial system must be available to all...Although the Attorney General enjoys both constitutional and statutory discretion in the prosecution of criminal cases and in doing so he is not controlled by any other person or authority, this does not mean that he may exercise that discretion arbitrarily. He must exercise the discretion within lawful boundaries...Although the state's interest and indeed the constitutional and statutory powers to prosecute is recognised, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious...In doing so the Court may be guided by the following principles: (i). Where the criminal prosecution amounts to nothing more than an abuse of the process of the court, the Court will employ its inherent power and common law to stop it. (ii). A prosecution that does not accord with an individual's freedoms and rights under the constitution will be halted: and (iii). A prosecution that is contrary to public policy (or interest) will not be allowed...A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case. Evidence of extraneous purposes may also be presumed where a prosecution is mounted after a lengthy delay without any explanation being given for that delay...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...A criminal prosecution that does not accord with an individual's freedoms and rights, such as where it does not afford an individual a fair hearing within a reasonable time by an independent and impartial court, will be the clearest case of an abuse of the process of the Court. Such a prosecution will be halted for contravening the constitutional protection of individual's rights...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary**

at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds."

47. That said, judicial review applications, however, do not deal with the merits of the case but only with the process. In other words judicial review determines, *inter alia*, whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and once the Court is satisfied that the same are bona fides and that the same are being conducted in a fair manner, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution's evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.

48. In exercising their discretion to charge a person both the police and the DPP's office must take into account and must exercise the discretion on the evidence of sound legal principles. As was held by **Ojwang, J** (as he then was) in **Nairobi HCCC No. 1729 of 2001 – Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another**:

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

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

50. In this case, it is the applicant's case that he was retained to act in a conveyancing transaction and that he was neither the vendor nor the seller and carried out his obligations as per the terms of the agreement for sale. He therefore was of the view that the intended charges against him for issuing a bad cheque were completely baseless.

51. That the Respondents are aware that the applicant was acting in the said transaction as an advocate for the vendor and not as the vendor is clear from the replying affidavit. He was therefore an agent of a disclosed principal. The respondents must have been aware that there were parties to the transaction in question. The respondents ought to have considered the totality of the evidence and not only the statement given by the complainant. The purchaser herein has explained the circumstances of the transaction leading to the impugned criminal proceedings and has stated on oath that the same explanation was made available to the respondents who ignored the same.

52. Apart from that it is contended that the subject of the criminal proceedings were post-dated cheques which do not constitute an offence under section 316A (2) of the ***Penal Code***. Section 316A(1) and (2) thereof provides:

> *(1) Any person who draws or issues a cheque on an account is guilty of a misdemeanour if the person -*
>
> *(a) knows that the account has insufficient funds;*
>
> *(b) knows that the account has been closed; or*
>
> *(c) has previously instructed the bank or other institution at which the account is held not to honour the cheque.*
>
> *(2) Subsection (1)(a) does not apply with respect to a post-dated cheque.* [Emphasis mine].

53. The respondents in their affidavit have not even alluded to the statement issued by the purchaser. In my view, the purchaser's statement was clearly a relevant factor to be taken into account in the exercise of discretion. As was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**:

> **"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to 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*…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."** [Emphasis added].

54. Clearly therefore the failure in the exercise of a power conferred on an authority, body or person to consider relevant matters, is aground for grant of judicial review orders. This position has acquired statutory underpinning in section 5(1) as read with section 7(2)(f) of the ***Fair Administrative Action Act, 2015***.

55. Where however such material is considered and rejected, the Court would not interfere with such a decision unless the decision is shown to be irrational. This position was appreciated in **Associated Provincial Picture Houses vs. Wednesbury Corporation [1948] 1 KB 223** where it was held:

"**It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person**

entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in *Short vs. Poole Corporation* [1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."

56. Having considered the issues raised herein I am satisfied that the respondents ought to have considered the statement by the purchaser in the exercise of their discretion to commence criminal proceedings against the applicant and the failure to consider the same in the circumstances of this case where it is contended that no offence was disclosed amounts to abuse of power and may well amount to wrong exercise of discretion and being motivated by collateral considerations.

Order

57. In the result I find merit in the Notice of Motion dated 10th February, 2015 and grant the following orders:

a. **An order of *Certiorari,* removing into this Court, the proceedings before *the OCS Kasarani Police Station* for the purposes of being quashed, and quash the charge sheet therein.**
b. **An order of *prohibition* prohibiting the respondents from charging or filling a charge sheet against the applicant in either the Chief Magistrates Court at Makadara or in any other Court elsewhere without considering the relevant material placed before them.**
c. **With respect to costs I direct each party to bear own costs as the application was not properly intituled in line with the directions in Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486. In this Motion the ex parte applicant's name does not appear anywhere as a party to the proceedings.**

Dated at Nairobi this 21st day of October, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Sang for Mr Ndege for the Respondent

Cc Patricia