REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI CONSTITUTION & JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 151 OF 2013

REPUBLIC…..…..……. APPLICANT

VERSUS

THE HON. THE ATTORNEY GENERAL .....……..1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE .....…..… 2ND RESPONDENT

THE DIRECTOR OF CID…….....… 3RD RESPONDENT

THE CHIEF MAGISTRATE KIBERA …….....….....4TH RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS….....5TH RESPONDENT

EX-PARTE ……...….....KENNETH KARIUKI GITHII

JUDGEMENT

INTRODUCTION

1. By a Notice of Motion dated 15th May, 2013, filed in Court the same day, the *ex parte* applicant herein, **Kenneth Kariuki Githii**, seeks the following orders:

1. **That this Honourable Court be pleased to issue Orders of Certiorari directed to the 1st, 2nd and 3rd Respondents, by themselves, their servants and/or agents or any other officer acting under their authority to bring to the court for the purpose of being quashed the decision by them made on or about 15th November 2012 to institute and/or commence criminal proceedings against the Subject.**
2. **Orders of Prohibition directed to the 5th Respondent, prohibiting the 5th Respondent or any of others officers acting with his authority, prohibiting him/her and each one of them from proceedings with the conduct and/or prosecution of Criminal Case No.6042 of 2012 with regard to the Subject and pending before the Chief Magistrate's Court Kibera.**
3. **That the Honourable Court be pleased to issue an Order of Prohibition directed against the 4th Respondent, by himself, his servants and/or Agent or any other Judicial officer for the time being seized of hearing or the conduct of Criminal Case No. 6042 of 2012 from trying and/or carrying on any further proceedings on the matter pending the full hearing and determination of the this application or the further Orders of the court.**
4. **That the Honourable Court be pleased to issue conservatory Orders Staying any**

proceedings in the matter as the same are an abuse of process, arbitrary, capricious and brought male fides by the Respondent in abuse of due process of the court, and have occasioned the subject great prejudice.

EX PARTE APPLICANTS' CASE

5. The application was supported by an affidavit sworn by the applicant herein on 15th May, 2013.
6. According to the applicant, he is the second accused in Criminal Case No.6042 of 2012 at Kibera Magistrates Court. According to him, although the Application for Judicial Review has been filed within time the same could have been presented to court much earlier upon commencement of the Criminal Proceedings had the prosecution availed him with all relevant documents relating to the Criminal Case and which are important in making his application but to date the prosecution is yet to furnish him with all material documents despite a court order issued in his favour to that effect. He was therefore constrained to file these proceedings with the documents available to avert being time barred in filing the present application for Judicial Review which has included gathering the necessary material especially court documents from Nakuru law courts which exercise further prolonged the period for filing this application.
7. According to the applicant, he is charged on Count 1 with conspiracy to defraud contrary to Section 317 of the ***Penal Code*** and Count 5 making a false document contrary to Section 347(a) as read together with Section 349 of the ***Penal Code***. In his view, Count 1 can only be sustained at law if (a) the land in question exist and is registered in the name of the complainant; the complainant is legally capable to holding a registrable interest; and the registrable interest is capable of fraud. In respect to Court 5, he contended that to sustain the offence the following conditions it must be proved that the letter dated 28th July 2007 is a proved a forgery beyond any doubt and that there exist overt and/or covert acts by myself that aided in the making of this document beyond any doubt.
8. It was the applicant's case that subsequent to recording his statement in compliance with the police summons he only came to know of the institution of the case after the same had been presented in court and warrants of arrest applied for by the prosecution on 16th November 2012. He contended that he was never informed of any intention of being charged in court over any criminal offence nor were his finger prints taken as is the procedure upon commencement of any criminal proceedings which remains the position to date.
9. Upon learning of the said warrant of arrest he presented himself before court and upon hearing his application the said warrant of arrest was lifted to the chagrin of the investigating officer who came to arrest him at his offices forcefully even after he presented him with the order lifting the warrants of arrest. He similarly applied for an order of the Court to fortify his rights to all prosecution evidence which to date has been complied with fully.
10. In his view it is curious to note that the criminal proceedings instituted relate to a parcel of land as aforestated in Nakuru wherein two parties are claiming ownership adversely to each other and have both filed suit in Nakuru. From the documents received the applicant believed that the Complainant is not a legal person; that no lease had ever been registered in favour of the purported non-legal person; that there exists a court dispute in Nakuru High Court being Nakuru HCCC 334 of 2010 and High Court Misc. 29/2001 where he is not a party and which is the source of these Criminal Proceedings; that that the Plaintiff in Nakuru HCCC 334 of 2010 is purporting to be the owner of the same piece of land as the complainant in Criminal Case vis Kibera CRCC 6042 of 2012; that there is ample evidence of confusion as to who actually is the legal owner of the premises and this is the moot point for determination at the High Court suits at Nakuru; that for anybody to purport and or act as the purported complainant has done in the criminal proceedings is speculative, pre-emptive and an act in wishful thinking of a futuristic judgment in has favour in the civil suit at Nakuru which is a complete abuse of the process of court under any jurisprudence; that there is connivance between the investigating officiating these criminal proceedings at Kibera and the plaintiffs at the Nakuru HCCC 334 of 2010 which is calculated to achieve the mischievous interest of the plaintiff; that at all material times to date, his handwriting has never been subjected to examination determine whether the hand on the letter generating Count 5 is his; that having caused a parallel handwriting examination to be done by an expert, the report contradicts the police report that the signature is a forgery; that there is no direct evidence to show existence of

any overt or covert act on his part in the forgery as alleged on count 5; that the totality of the prosecution evidence as given shows irreconcilable fact, speculation and conjecture which cannot stand as pillars of criminal trial; that these criminal prosecutions started when the plaintiff in Nakuru HCCC 334 of 2010 failed to obtain an injunction and is therefore vexatious; that the instant prosecution is an ill-advised attempt by the investigating officer to criminalize a civil matter with the aim of assisting a civil litigant, a matter which the court must prevent.

11. It was further contended that the only connection with the said case relating to land is the fact that he was the Land Registrar at Nakuru at the time and had raised the issue with his boss the Commissioner of Lands under whom he worked as the Land Registrar Nakuru hence the purported criminal proceedings relate to actions and information he obtained in his official capacity and in the conduct of his duties over six (6) years ago. In his view, there has been no new developments in the suits instituted at Nakuru as stated in his statement of facts nor have the same been concluded to occasion the current proceedings of a criminal nature.
12. He exhibited an affidavit sworn by one **Silas Kiogora Mburugu** on behalf of the Commissioner of Lands in response to the claims made by the complainant in the criminal case which affidavit according to him, details and answers the entire question of ownership of the said parcel of land which information is well known to the complainant who is the plaintiff in Nakuru HCCC NO. 334 of 2010 wherein the affidavit was field hence the complainant ought to have revealed the same to the investigating officer if at all credible investigations were carried out.
13. However despite the said information from the Commissioner of Lands being availed the same appears to have been conveniently ignored by the investigating officer in forming his opinion or arriving at his decision to institute Criminal Proceedings against the applicant hence it is clear that the procedure followed was flawed and laced with malice. Due process was not observed nor was he granted a fair hearing before the said proceedings were instituted not to mention that relevant material evidence and facts were conveniently ignored by the investigating officer whose recommendations to prosecute was adopted by the 1st, 2nd, 3rd and 5th Respondents. He believed that no fair and impartial investigations would have failed to consider the weight of evidence presented and if at all considered proceed to arrive at the flawed decision to prosecute as the case herein and further no fair investigations would have ignored the aforesaid averments unless motivated by other factors outside public interest and ends of justice.
14. He was therefore of the view that the conduct of the investigating officer on him and other persons whom he considers as obstacles to his interest demonstrates all the more that this is not a public prosecution but an abuse of the court process and points fingers at the ulterior motive and the same not being made in favour of public interest or common good but clearly an abuse of due process. To him, this Honourable Court's intervention is his only remedy to the deliberate affront and violation of his constitutional rights to a fair process devoid of intimidation, harassment and malice. He therefore held the view that his prosecution in the criminal court is a deliberate violation of his rights to be tried in a fair manner if at all there was a legitimate offence committed and the intervention of this court to protect his rights is warranted.

RESPONDENTS' CASE

15. In response to the application the Respondents filed a replying affidavit sworn by **Chief Inspector James Oludhe**, the investigating officer on20th September, 2013.
16. According to the deponent, on 9th December 2011, the directors of St. Columbus High School Limited (hereinafter referred to as "the school") based in Nakuru who are the complaints in this case reported to the Directorate of Criminal Investigations, a case of Conspiracy to defraud against several individuals in respect of a piece of land registered as Nakuru Municipality Block15/792. Upon receiving the said report/complaint, investigations commenced which investigations established that the said St. Columbus High School is established on a piece of land known as Nakuru Municipality Block 15/276 and adjoining it is a piece of land registered as Nakuru Municipality Block 15/792 which was initially allocated to the said School for educational purposes (experimental agricultural purposes). On 28th November 1984, one of the director's of St. Columbus High School wrote to commissioner of lands seeking the allocation of later piece of land and as the Nakuru District Lands Officer expressed no objection for the land been used by the school for agricultural experimental purpose, the school was granted a Temporary Occupation

License followed by a letter of allotment dated 26/10/1995 which was duly accepted by the School vide a letter to the commissioner of lands enclosing a Bankers cheque for Kshs.174,040/= as payment for the land as stipulated in the letter of allotment. Subsequently, the Commissioner of lands wrote to the director of survey in reference to the letter of allotment of the land to the school to make arrangements for survey which survey was done and the Director of survey confirmed to the Commissioner of Lands vide a letter dated 19/10/2000 that the Registered Index Map (RIM) had been amended to reflect parcel No.792 measuring 0.921 Ha as per FR.306/47 and the school was now to wait the processing of title deed. Vide a letter dated 8th November, 2007, the Commissioner of Lands forwarded the lease document to the Nakuru District Land Registrar. However, when one of the directors of the School Ltd went to execute the lease, it was reported to them that the lease document could not be traced and at the same time, the school land was invaded by some people whom the directors of the School identified as **Mr. Gachanja**, **Mr. Lawrence Mwangi** and a **Mr. Ronoh** whereupon he complained to the Minister of Lands vide a letter dated 17th August 2007. Similarly, the director also wrote to the then District Land Registrar as well as the Minister of lands on 14/8/2007. Vide a letter dated 26.11.2007 the commissioner of lands confirmed to District Land Registrar Nakuru dated that the land in question had been allocated to St. Columbus High School. However, One **Francis Gachanja Mwangi** emerged with letters of allotment dated 3/7/1996 and 31/12/1999 marked and laid claim on the same parcel of land though one of the purported signatory of the letters of allotment, **Phoebe Amiani,** refuted the signatures on the allotment letters as not hers and her specimen signature upon comparison with the signatures on the questioned letters of allotment were subjected to forensic examination which confirmed that the signatures **were** forgeries. Investigators also obtained a lease document dated 10/8/2005 for Nakuru block 15/792 in favour of **Francis Gachanja Mwangi** and signed by **Kenneth Kariuki Githii**, the ex parte applicant herein who was at that time the Land Registrar in Nakuru and on comparing the signature of **Sammy Silas Mwita Komen** on the lease documents with his specimen signature it was confirmed to be a forgery. Further, the said lease is also purported to have been witnessed by an advocate named **Elijah Maragia Ogaro** on 15/2/2003 who provided his signature and handwriting for forensic examination which confirmed the same to be forgeries. The said advocate further argues that he could not have witnessed the signature of **Francis Gachanja Mwangi** on the lease document as he had not been admitted to the Roll of Advocates as he was admitted in 28th October, 2004 which the Law Society of Kenya indeed confirmed. The ex parte applicant herein however admitted in his statement having registered the lease documents for **Francis Gachanja Mwangi** on the 10/8/2005 which lease though purportedly registered on 10/.8.2005 did not appear in the presentation book for that date. It was also established that, a letter dated 29/1/2003 forwarding the lease documents to the ex pare applicant was not signed by one **Margret Kanake** on behalf of the Commissioner of Lands was a forgery. The ex parte applicant stated in his statement to the investigators that, though he had received the Lease document for St. Columbus High School, he could not register the same because he had already registered lease document for **Mr. Gachanja**. He however kept on telling the directors of the school that he could not trace their lease as it was misplaced or destroyed. It was also established that, the ex pare applicant registered a certificate of lease for **Henry Methu Waitindi** and **James Kamau Mwangi** and even registered it in the presentation book on 24/8/2007 from **Francis Gahanja Mwangi**. However, a witness, **Daniel Nyantika** averred that the procedure was flouted as there are no transfer documents from **Francis Gachanja Mwangi** to **Henry Methu Waitindi** and that **Henry Methu Waitindi** and **James Kamau Mwangi**,

17. According to the deponent, he also obtained documents in respect of Nakuru High Court Judicial Review application number 29 of 2009, **Republic versus Ex parte James Kamau and Francis Gachanja Mwangi** and that in an affidavit filed in the said application sworn by **Silas Mbururugu Kiongora**, the said deponent has deposed that the Letter of allotment for **Francis Gachanja Mwangi** was a forgery; that the Letter of allotment for **Francis Gachanja Mwangi** compared to the certificate of lease and part development plan had anomalies as to the date of allotment, date of approval and when the certificate of lease was issued; that payment for receipt for the letter of allotment is a forgery and does not appear in the accounts analysis book; and that the there is no background information on how **Mr. Francis Gachanja Mwangi** acquired the land in question.

18. He deposed that from the foregoing background the land registered Nakuru municipality block 15/792 was rightfully allocated to St. Columbus High School Ltd by the commissioner of Lands. After the directors of the school complained to the land Registrar, the ex parte applicant purported to have written a letter to the Commissioner of Lands on 16th August 2007 seeking information on the proper allottees of the land in question and that an officer by the name **Mr. I.A, Machuka** working in the Ministry of Lands responded and vide a letter dated 28th August 2007 and confirmed that the land was in the name of **Francis Gachanja Mwangi**. However, the said officer denied having signed authored and signed the letter under reference and provided his specimen signature for comparison with the letter in question which was subjected to forensic analysis and confirmed to be a forgery as per the report of the document examiner.
19. According to the deponent at the conclusion of investigations, a decision was made to prefer the charges currently facing the ex parte applicant hence the application has not met the prerequisite requirements for the grant of the orders sought since the matters raised by the ex parte applicant form the basis of his defences before the trial court which should be raised before the trial court and as such cannot be raised before the High Court in the manner herein. In his view, no sufficient grounds have been advanced to warrant the grant of the orders sought. Further the applicant is guilty of material non-disclosure which disentitles him to the orders sought and that the High Court cannot quash criminal proceedings by way of writs of certiorari or prohibition in the manner sought herein. Similarly, an order of prohibition cannot issue against an action or decision which has already been taken or made before such an order is made and the High Court has no jurisdiction to decide whether or not the ex parte applicant has a prima facie case or whether here is sufficient evidence against the ex parte applicant. In any case the ex parte applicant shall have the opportunity before ht subordinate court to tender evidence to controvert and challenge the prosecution's case and evidence as guaranteed in the ***Criminal Procedure Code*** Cap 75 and the ***Evidence Act*** Cap 80 of the Laws of Kenya. The High Court cannot however play the role of the trial court in the manner pleaded herein.

APPLICANT'S SUBMISSIONS

17. On behalf of the applicant it was submitted that the challenge t the decision of the respondents is founded on the considered view that the decision is wrong, improper, an abuse of office, is capricious and will lead to an abuse of the due process. It was further submitted that the process followed was neither fair nor reasonable given the circumstances and time taken since 2007, the pending litigation in court and the failure to appreciate and consider relevant material facts. It was contended that the decision to prosecute is founded on malice by the servants and/or gents of the 1st, 2nd and 3rd Respondents and aimed at assisting a litigant in a civil matter hence improper. It was submitted that the 1st, 2nd, 3rd and 5th respondents though well aware of the applicant's address did not notify the applicant that complaints had been lodged against him thus leading to issuance of a warrant of arrest a course which was intended to humiliate, intimidate and/or otherwise harass the Applicant hence evidence of malice.
18. It was submitted that the 1st, 2nd, 3rd and 5th failed to appreciate the relevant material information/facts before proceeding to institute the said criminal proceedings and that in the alternative the decision was made in a capricious and arbitrary manner with the sole intention of assisting the Complainant in a civil matter which is already in court.
19. It was submitted that criminal prosecution should be aimed towards upholding and safe guarding public interest and justice, based on grounds or suspicions at are reasonable as demanded by law. In the instant matter, there are no reasonable grounds and/or suspicions within which a criminal prosecution can be conducted. It was submitted that the time lapse in bringing these proceedings is unexplained and defeats the principle of legitimate expectation.
20. Since the charge as indicated in the charge sheet is defective as the land in question nolonger exists, it was submitted that the charge is unsustainable. The applicant relied on **Samson Sapei Ole Maita [2012] eKLR, Saina Vincent Kibiego vs. The Attorney General Mombasa Misc. Application No. 8 of 1997** and **Tirop vs. Attorney General Misc. Application No. 1201 of 2011**.

RESPONDENTS' SUBMISSIONS

21.. On behalf of the Respondents it was submitted that the matters complained of by the ex parte applicant are prematurely before the Court as they form the basis of the defences of the applicant and ought to be canvassed before the trial magistrate and not the High Court hence it cannot be said that the decision to charge the ex parte applicant is an abuse of the powers vested on the 5th Respondent or that the same is irrational or actuated by ulterior motive or malice as alleged.

22. It was submitted that the 5th Respondent herein, Director of Public Prosecutions (hereinafter referred to as the DPP), is conferred with State powers of prosecution under Article 157 of the Constitution and that the charges sought to be quashed were preferred pursuant to those powers hence it has not been demonstrated that he acted in excess of his powers. To issue the orders sought would therefore be tantamount to ordering the DPP not to discharge his constitutional mandate. It was submitted based on **Thuita Mangi & 2 Others vs. The Ethics & Anti-Corruption Commission & 3 Others High Court Petition No. 369 of 2013** that only a trial court can make a finding whether or not a criminal offence was committed after hearing the evidence.

23. It was submitted on the authority of **Surjit Singhhunjam vs. The Principal Magistrate Kibera Misc. Appl. No. 519 of 2005** that the police only need to establish reasonable suspicion before preferring charges and the rest is then left to the trial court.

24. Based on a number of authorities, it was submitted that this court cannot take evidence from an applicant who has been charged in the lower court and purport to grant prohibition.

DETERMINATIONS

25. I have considered the application. It is important to first deal with the circumstances under which the Court will grant order prohibiting the commencement or continuation of a criminal trial process.

26. 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, it has been held time and again, is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings. 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. In the exercise of the discretion on whether or not to grant an order of prohibition, the court takes into account the needs of good administration. See **R vs. Monopolies and Mergers Commission Ex Parte Argyll Group Plc [1986] 1 WLR 763** and **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK).**

27. In **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170,** the Court of Appeal held:

"It is trite that an Order of Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...Equally so, the High Court has inherent jurisdiction to grant an order of

prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court."

28. In **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. 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."

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

"The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform.....A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious... The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far that which the courts indeed the entire system is constitutionally mandated to administer... 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. 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... A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution.....In the instant case there is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even of manipulation of court process so as to seriously deprecate the likelihood that the applicants might not get a fair trial as provided under section 77 of the Constitution. It is not enough to simply state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an "abuse of process", is a "manipulation", "amounts to selective

prosecution" or such other processes, or even supposing that the applicants might not get affair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts. The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial... In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names."

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

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

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

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

32. 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".

33. It is therefore clear that whereas the discretion given to the 3rd respondent to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt.
34. Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in 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.
35. Therefore the determination of this case must be seen in light of the foregoing decisions. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the DPP to investigate and prosecute ought to be interfered with. Such a power ought not to be lightly invoked and it is not enough to simply inform the Court that the intended trial is bound to fail or that the complaints constitute both criminal offence as well civil liability. Nor is it enough to display to the Court the nature of the defence the applicant intends to bring forward in the criminal proceedings. The High Court ought not to interfere with the investigative or prosecutorial powers conferred upon the police or the Director of Public Prosecution unless cogent reasons are given for doing so.
36. In this case it is the applicant's case that the subject of the criminal proceedings is similarly subject of pending civil proceedings in which the ownership of the disputed parcel of land is pending determination. However, as stated hereinabove, the mere fact that the facts disclose both criminal offence as well as civil liability does not entitle the Court in judicial review proceedings to bring to a halt the criminal proceedings.
37. It was further contended that the actions of the Respondents are malicious and are motivated by extraneous matters. The applicant was however unable to pinpoint the basis for the alleged malice save for the fact that the warrants for arrest were applied for before he was made aware of the existence of the complaints or the proceedings. Malice here must however go the root of the proceedings complained of and not just the procedure adopted. Mere carelessness or recklessness would not ipso facto amount to malice which would justify the halting of criminal proceedings. In my view even in cases where it is shown that the prosecution is partly motivated by malice or other extraneous considerations unless it is shown that the predominant motive for preferring charges is informed by such malicious or extraneous matters, the Court ought not to interfere if apart from such motives the facts of the case justified the course taken. In other words malice ought to be the driving force behind the institution of the criminal process and not just one of the factors.
38. The applicant also alluded to the fact that the criminal charges were brought after a long delay. However as was held by this Court in **George Joshua Okungu & Another vs. The Chief Magistrate's Court Anti-Corruption Court at Nairobi & Another Petition No. 227 and 230 of 2009**:

".....it is not mere delay in preferring the charges that would warrant the halting of the criminal proceedings. Rather, it is the effect of the delay that determines whether or not the proceedings are to be halted. In this case, there is no allegation made by the Petitioners to the effect that the delay has adversely affected their ability to defend themselves. In other words, the Petitioners have to show that the delay has contravened their legitimate expectations to fair trial."

39. In this case the applicant has not contended that as a result of the long delay in bringing the criminal charges his defence has been compromised for example by making it impossible for him to efficiently present a formidable defence which he could have done had the charges been preferred earlier on.
40. It was the applicant's case that contrary to the position taken by the Respondents he has in his possession evidence which is contrary to the case presented by the prosecution. He for example contended that he has in his possession evidence which contradict the implication that he could have been involved in the forgery of the alleged documents. He further referred to various matters which according to him show that the criminal charges cannot be successfully prosecuted. Whereas that may be so and the applicant may well prove at the trial that the he is after all innocent, it is not for this court to consider the strength of the prosecution case vis-à-vis the defence and make a determination as to which one has more weight. As opposed to where the prosecution has no evidence at all the court will not halt a prosecution simply because the court is of the view that the evidence would not in all probability lead to a conviction. To do that would amount to this court in a judicial review proceedings stepping into the shoes of the trial court and usurping the powers of the trial court.
41. Similarly, it is not for this Court to stop the DPP in his tracks simply because the Court believes that the DPP ought to have done better. The constitutional discretion given to the DPP ought not to be lightly interfered with especially if on the evidence in his possession if true may well sustain a prosecution. Trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on his defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of an appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words I am not satisfied based on the material before me that the applicant will not receive a fair trial before the trial court more so as no allegations are made against the 5th respondent towards that direction. Therefore the mere insufficiency of evidence does not in my considered view justify the halting of a criminal trial.
42. However where the it is shown that even if the evidence in possession of the prosecution were true still no offence would be disclosed it would be an abdication of this Court's constitutional mandate to allow such a prosecution to proceed.
43. 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.
44. Although the applicant has alleged that the criminal proceedings are being mounted with a view to compromising the civil proceedings, no attempt has been made to elaborate on this contention.
45. I have considered the positions taken by the parties to these proceedings and I am unable to find that there is absolutely no iota of evidence against the applicant in the said criminal proceedings. Whereas the criminal proceedings may well eventually fail that is not the same thing as saying that there is no evidence at all. I am also not convinced that the predominant purpose of mounting the said criminal offence is to achieve some collateral purposes rather than the vindication of a criminal offence. Whereas the facts may well constitute civil liability I am not convinced that under no circumstances would they constitute a criminal offence and that is as far as I am prepared to go.
46. In the premises I am not satisfied that this is a proper case in which the court ought to bring the criminal proceedings to a halt. The applicant will be afforded an opportunity to defend himself, cross-examine witnesses and adduce evidence in support of his case and that in my view is the proper course to take in the circumstances of this case.
47. In the result the Notice of Motion dated 15th May, 2013 fails and is dismissed with costs to the Respondents.

Dated at Nairobi this day 28th day of March 2014

G V ODUNGA

JUDGE

Delivered in the presence of Mr Waweru and Mr Wandugi for the applicant