REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO 154 OF 2013

(FORMERLY MISC. APPLICATION NO. 645 OF 2010)

REPUBLIC.....APPLICANT

VERSUS

CHIEF MAGISTRATE'S COURT, MILIMANI COURT.....RESPONDENT

EX-PARTE

TRIPLE A CAPITAL LIMITED,

JOHN GICHIA MACHARIA, &

JANICE THERESIA KIARIE WANJIKU alias TERRY WINJENJE

JUDGEMENT

In these proceedings the ex-parte applicants are Triple A Capital Limited, John Gichia Macharia and Janice Theresa Kiarie alias Terry Winjenje. The Chief Magistrate, Nairobi is the respondent. Shem Ochuodo is the 1st Interested Party and the Kenya Anti-Corruption Authority (KACC) (now the Ethics & Anti-Corruption Commission (EACC)) is the 2nd Interested Party.

Before the respondent is **Anti-Corruption Case No. 3 of 2010** in which Dr. Shem Odongo Ochuodho, Maurice Dantas, John Gichia Macharia, Janice Theresia Kiarie Wanjiku alias Terry Winjenje and Triple A Capital Limited are jointly and severally charged with eight counts arising from alleged corrupt practices. The 1st to 3rd applicants who are the 5th, 3rd and 4th accused persons respectively in the said criminal case have through the notice of motion application dated 8th November, 2010 prayed for an order of prohibition directed at the respondent or any other magistrate prohibiting the hearing or further proceeding with or determining **Nairobi Chief Magistrate's Anti-Corruption Case No. 3 of 2010 (REPUBLIC v JOHN GICHIA MACHARIA & 4 OTHERS)** or any charges arising from the transactions giving rise to the charges in the said **Nairobi Chief Magistrate's Anti-Corruption Case No. 3 of 2010.**

Dr. Shem Ochuodo, the 1st Interested Party herein is the 1st accused person in the said criminal case and he supported the application. The respondent and the 2nd Interested Party opposed the application.

According to the applicants, Kenya Pipeline Company Ltd (KPC) a State Corporation entered into an agreement with a private firm Triple A Capital Limited (the company) in which the company was to pay KPC's international creditors on agreed terms. It is the applicants' case that before the agreement was reached the matter was discussed and approved by KPC's Board and it also received the blessings of the Attorney General. The applicants have on that basis come to this Court to prohibit their prosecution before the magistrates' Court.

These proceedings were commenced at the infancy of the Constitution of Kenya 2010 and the attack is directed at the Attorney General who was at the time mandated to exercise prosecutorial powers as the Director of Public Prosecutions had not been appointed.

According to the statutory statement dated 1st November, 2010 and the verifying affidavit of the 2nd applicant sworn on the same date, the applicants' prosecution is bad for several reasons.

Firstly, the applicants contend that their prosecution is characterized by prosecutorial manipulation and amounts to an abuse of the court process. It is the applicants' case that their prosecution is so unfair and severely prejudicial due to prosecutorial impropriety on the part of the Attorney General that it makes it impossible for them to receive a fair trial as guaranteed by Article 50 of the Constitution.

Further, the applicants argue that the Attorney General failed to act independently and judiciously and instead acted oppressively when he decided to prosecute them. In support of this argument, the applicants argue that the Attorney General had an interest in the complaint and lacked impartiality. The applicants submit that the Attorney General cannot be impartial since he incorporated KPC by drawing the Memorandum and Articles of Association. The applicants assert that since the Attorney General incorporated KPC, there will be conflict of interest as he will be acting as a complainant and prosecutor at the same time.

The applicants also contend that the Attorney General cannot be impartial in that he participated in the deliberations that approved and authorized the acts of the applicants which are now being alleged to be criminal.

It is also submitted that the Attorney General is a legal advisor and director of KPC and he is likely to be called as a witness in a case which he is purporting to prosecute. The applicants argue that not only is the Attorney General a potential witness but he is also a potential accused person having participated in the deliberations that authorized the transaction and having advised and recommended that the dispute be subjected to arbitration. It is further submitted that the Attorney General received and acted on the investigation report of KACC and having participated in the transaction that led to their prosecution, it will amount to the Attorney General acting as a judge in his own case. To the applicants, it cannot then be said that the decision to prosecute them is fair and just.

The applicants further contend that the decision to prosecute them is selective in that the Attorney General, the other directors of KPC and third parties such as the Standard Chartered Bank of Kenya Limited were not prosecuted. The applicants contend that the Attorney General has as a consequence perverted the course of justice.

Secondly, the applicants argue that there was inordinate delay in instituting the criminal charges against them. The applicants point out that the transaction that informs the purported prosecution took place in 2003 but they were charged in 2010 which is seven years after the alleged crime was committed. The applicants contend that a hiatus of seven years is irremediable and their prosecution should be prohibited. The applicants contend that the right to a speedy trial is not separate and distinct from the right to a fair trial. The applicants point out that this right is guaranteed by Article 50(2)(e) of the Constitution which provides that every accused person has the right to a fair trial, which includes the right to have the trial begin and conclude without unreasonable delay. It is their case that the delay of seven years has prejudiced them since no fair trial can take place after such delay. The applicants argue that it is against public interest to institute criminal charges against a person seven years after the occurrence of the event allegedly giving rise to the criminal charge without justifiable or reasonable explanation being given by the prosecution for the delay.

Thirdly, the applicants assert that this Court should enforce their legitimate expectation based on the principle of fairness and the need for prevention of abuse of power by public bodies. The applicants contend that they entered into a commercial contract with KPC within the rules of offer and acceptance and this Court has a duty to protect the legitimate expectation of each party. The applicants urged this Court to take note of the fact that there was a letter of offer by the applicants to KPC who is the complainant in the criminal case. There was also a letter of acceptance from KPC.

The applicants further urge the Court to note that due process was followed as the state through the Ministry of Finance authorized the applicants to contract with KPC. Further KPC duly notified the applicants that the transaction had been approved. It is the applicants' case that their legitimate expectation was that the transaction was acceptable in law and all procedural formalities had been complied with because relevant authorities and stakeholders had approved the transaction. They contend that it is against their legitimate expectation for the Attorney General who participated in the process and gave a written legal opinion approving the transaction to subsequently prefer criminal charges against them for a transaction his office approved.

Fourthly, the applicants submit that their prosecution was not commenced in the public interest but for an ulterior purpose. The applicants contend that their prosecution was commenced with a view to influencing the outcome of a civil case between them and KPC.

The 1st Interested Party swore an affidavit on 7th November, 2011 in response to the application. The 1st Interested Party drew the Court's attention to the existence of **Nairobi HCCC No. 173 of 2005, TRIPLE A CAPITAL LTD v KENYA PIPELINE CORPORATION LTD & ANOTHER** which was by consent of the parties referred to arbitration thus resulting in the Final Award by the Arbitrator Mr. Justice R. O. Kwach on 5th November, 2008. He also mentioned that he had filed a judicial review application namely **Nairobi High Court Misc. Application No. 416 of 2005** against the Attorney General and others challenging his dismissal from KPC and that the said application was still pending at the time he swore the affidavit. The 1st Interested Party also gave a background to the signing of the agreement between KPC and Triple A Capital Ltd. He was at the time the Managing Director of KPC.

He asserted that he sought the opinion of the Attorney General as to whether the transaction between the company, KPC and Standard Chartered Bank was in tandem with the approval of the Ministry of Finance and the Attorney General indicated on 14th October, 2003 that all the documents were in order and further approvals from the Minister of Energy and the Minister of Finance were required in order to comply with the State Corporations Act. He contends that the approvals of the two ministries were subsequently sought and obtained.

The 1st Interested Party informed the Court that the company later sued KPC for breach of the commercial transaction vide **Nairobi HCCC No. 173 of 2005** and on 1st March, 2006 the Attorney General advised that the matter should be settled through arbitration as it was a commercial dispute.

The 1st Interested Party asserts that the transaction which is now claimed to be founded on criminal motives was a negotiated contract willfully entered into between KPC and the company and the dispute was referred to arbitration by consent of the parties. Further, the 1st Interested Party submits that the matters in dispute between the company and KPC were conclusively resolved by an independent and

impartial arbiter and no appeal had been preferred against the award.

The 1st Interested Party therefore argues that his prosecution is not founded on law, is unreasonable, biased, unfair and against the rules of natural justice. He argues that the fact that the Attorney General recommended that the matter be resolved through arbitration only meant that he knew the dispute was commercial and he cannot now be allowed to turn around and prosecute them.

The 1st Interested Party submits that the Attorney General is a potential witness having attended the meetings of KPC's Board which deliberated and approved the transaction. It would therefore be prejudicial and unfair for the same Attorney General to prosecute them.

The respondent opposed the application through a replying affidavit sworn on 9th December, 2010 by James Mungai Warui. In response to the application, the respondent asserts that the fact that the dispute between the company and KPC was the subject of **Nairobi HCCC No. 173 of 2005** is no bar to criminal prosecution of the applicants and the 1st Interested Party. It is submitted that the law allows the Attorney General now Director of Public Prosecutions to institute criminal charges against any person notwithstanding the existence of a civil suit between that person and the complainant over the same set of facts.

The respondent contends that the prosecution of the applicants is not an abuse of the court process as Justice (Rtd) R. O. Kwach who arbitrated the dispute between the company and KPC found that the whole transaction was fraudulent and founded on blatant lies.

It is submitted for the respondent that the participation of the Attorney General in a Board meeting does not preclude him from prosecuting a suspect. Further, it is submitted that the approval granted by the KPC Board meeting was fraudulently altered by the applicants and their co-accused.

The respondent's case is that the Attorney General is no longer the prosecutor in the criminal trial as the function has been constitutionally taken over by the Director of Public Prosecutions and therefore the apprehensions of the applicants no longer hold.

As to whether there was inordinate delay in the prosecution of the applicants and the 1st Interested Party, the respondent contends that the matter was referred to KACC in January 2005 and KACC embarked on their investigations in February of the same year. The investigations were concluded in November 2007 and the file forwarded to the Attorney General as required by the law. The Attorney General identified areas that required further investigation before a decision to prosecute could be made and thereafter sent back the file to KACC for further investigations. Further investigations were concluded in December 2009 and it is only in January 2010 that the Attorney General sanctioned the prosecution of the applicants and their co-accused. The respondent contends that the matter was handled with diligence and it took long to conclude investigations due to the complexity of the transaction.

Finally, it is the respondent's case that the applicants have not demonstrated that these proceedings were commenced for ulterior motives.

The 2nd Interested Party opposed the application through the replying affidavit sworn by Soita Wasike on 11th November, 2010. In reply to the applicants' case, the 2nd Interested Party submitted that this application is just a tactic to delay the criminal case before the magistrate's Court. It is the 2nd Interested Party's case that the issues being raised by the applicants in this application could have been raised in the criminal trial and the Court should not entertain applications which are only meant to obstruct law enforcement agencies and other constitutional offices from carrying out their constitutional and statutory duties.

It is also argued for the 2nd Interested Party that the concerns or complaints being raised by the applicants are simply the defences to the charges facing them in the criminal proceedings and they can be raised in the criminal trial since they do not constitute constitutional issues to invoke the jurisdiction of the Court.

Counsel for the 2nd Interested Party argued that unless the principle of legality has been offended, in law, there is no legitimate expectation not to be investigated or prosecuted for criminal offences which a person has committed. It is argued that criminal liability is personal and the mere fact that the Attorney General was represented in the Board of KPC does not absolve the applicants and their co-accused.

It is the 2nd Interested Party's case that due process was followed in the investigation and prosecution of the applicants and there is no evidence that their rights have been breached or are likely to be violated.

The 2nd Interested Party contends that the applicants have not proved that it had no justification or excuse whatsoever in investigating and recommending their prosecution. They have also not shown that the actions of the 2nd Interested Party were intended to cause harm to the applicants. It is argued that the applicants have not demonstrated that KACC acted with the intention of harming the applicants. In short, it is submitted that there is no evidence of malice and neither were the particulars of the alleged malice pleaded. It is asserted that the 2nd Interested Party is a statutory body that was established to investigate and recommend prosecution of corruption and economic crimes and it acted in accordance with its mandate when it investigated the applicants and recommended their prosecution.

As to whether the prosecution of the applicants is selective, the 2nd Interested Party submits that there is no legal requirement to charge all persons involved in a criminal activity in order to sustain the charge. The 2nd Interested Party argues that the charging of a person is based on the evidence gathered and the decision to charge rests with the prosecuting authority and not an accused person.

The 2nd Interested Party argues that the existence of civil proceedings is no bar to criminal prosecution. In support of this argument the 2nd Interested Party cites **Section 193A of the Criminal Procedure Code (Cap 75)** which provides that:

> **"Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings."**

It is submitted that the pendency of a civil matter is therefore not a bar to criminal proceedings and cannot be used to stay a criminal prosecution.

The 2nd Interested Party argues that **Section 4(3) of the Anti-Corruption & Economic Crimes Act, 2003** allows the prosecution, before a special magistrate gazetted under the Act, of an accused person for offences committed under other laws.

I have gone through the pleadings, documents and submissions filed by the parties in this matter. I must thank the advocates for the detailed submissions and the authorities they have provided to the Court. I will not refer to each and every one of the cited authorities but I will bear them in mind in reaching my decision.

In my view, the fundamental question to be answered in these proceedings is whether the prosecution of the applicants by the Attorney General is illegal and an abuse of power. All the other issues converge on this particular issue.

There is no dispute in respect of the supervisory power of this Court over the prosecutorial powers granted to the Attorney General by the repealed Constitution. For record purposes, I will state that the power to prosecute at the time material to this case belonged to the Attorney General. That power was to be exercised in accordance with the Constitution and the law. Where the Attorney General exercised his powers unconstitutionally, unlawfully, unreasonably or maliciously the Court was entitled to intervene and stop such prosecution. The position has not changed even with the advent of the current Constitution.

Whether or not the prosecuting authority is found to have abused prosecutorial powers is a matter to be decided upon consideration of the facts of each case.

The applicants claim that there was inordinate delay before the decision to charge them was made. The 2nd Interested Party has explained why the applicants were brought to Court seven years after the occurrence of the events which form the basis of their prosecution. It is noted that the investigations took five years to complete. I am not satisfied with this state of affairs. However complex a matter is, the investigating and prosecuting agencies should endeavour to finalize investigations as soon as practicable. Nevertheless, I cannot say that the delay prejudiced the applicants. It is also in the public interest that crimes once detected are prosecuted and punished.

The applicants and the 1st Interested Party argued that their prosecution is malicious in that they are being charged in respect of a transaction which is purely commercial in nature. The respondent and the 2nd Interested Party contend that there is a criminal element to that transaction and that is why the applicants, the 1st Interested Party and another person not party to these proceedings have been taken to Court.

The applicants also submitted that the matter had been resolved through arbitration. The answer to this argument is that sometimes a transaction is both criminal and civil in nature. In such circumstances both the criminal and civil processes are engaged. **Section 193A of the Criminal Procedure Code** allows this. The fact that the matter was subjected to arbitration is of itself no bar to criminal proceedings. Whether the transaction was commercial in nature and should not attract criminal liability is a different issue altogether.

There was an argument by the applicants that they were charged so that the civil dispute could be compromised. It is noted that the prosecution commenced in 2010 but the arbitration had been completed in 2008 almost two years earlier. There is no evidence that the investigation that was ongoing at that time influenced the arbitrator's decision. This would not be a sufficient reason for allowing the application. It is not enough for the applicants to allege that their prosecution was meant to settle a civil dispute without providing facts to back their claim.

That then brings me to the issue as to whether the Attorney General having been represented in the Board is not the best person to prosecute this matter. The applicants' case is that not only is the Attorney General a potential witness but he is also a potential accused person. In support of this argument the applicants cited the case of **GEORGE JOSHUA OKUNGU & ANOTHER v THE CHIEF MAGISTRATE'S ANTI-CORRUPTION COURT AT NAIROBI & ANOTHER [2014] eKLR** in which the Court in prohibiting a criminal trial against the petitioners observed that:

> **"70. Where therefore the prosecution has been commenced or is being conducted in an arbitrary, discriminatory and selective manner which cannot be justified, that conduct would amount to an abuse of the legal process. Similarly, where the prosecution strategy adopted is meant to selectively secure a conviction against the petitioner by ensuring that certain individuals from whom the Petitioner derived his decision making power are unjustifiably shielded therefrom, it is our considered view that such prosecution will not pass either the Constitutional or Statutory tests decreed hereinabove. It is even worse where from the circumstances of the case, the same persons being shielded could have been potential witnesses for the Petitioner and who have, with a view to being rendered incompetent as the Petitioner's witnesses have been in a way enticed to be prosecution witnesses. That strategy, we hold, constitutes an unfair trial under Article 50 of the Constitution.**
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> **71. Here for example, the Petitioners contend that they took all the necessary steps to obtain the requisite legal advice and approvals or authorisations. To turn round and institute criminal prosecution against the Petitioners while making the very persons who authorised the Petitioner's action into prosecution witnesses, in our view, amounts to selective and discriminatory exercise of discretion. In such an event the Director of the Public Prosecutions cannot be said to have been guided by the requirement to promote constitutionalism as mandated under the Constitution and the *Office of the Director of Public Prosecutions Act.* To the contrary the DPP would be breaching the Constitution which *inter alia* bars in Article 27 discrimination "directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status,**

health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth."

Mr. Ruto for the 2nd Interested Party urged this Court to find that the circumstances of the case before me are distinguishable from those in the case of **GEORGE JOSHUA OKUNGU** (supra).

I was in the bench that heard the **GEORGE JOSHUA OKUNGU** case and the basis of the petitioners' case was that they were being charged in regard to a decision that was made by the Board of Kenya Pipeline Company. One of the witnesses lined up to testify for the prosecution was the Permanent Secretary of the Ministry of Energy who had participated in the Board meetings that reached the decision for which the petitioners were being charged.

The circumstances surrounding the current case are slightly different. According to the respondent and the 2nd Interested Party, the basis of the charges facing the applicants and their co-accused is that the transaction was not approved by the Board and even if there was such approval, then the same was obtained fraudulently. It is also submitted for the respondent and the 2nd Interested Party that the legal opinion of the Attorney General was secured without the disclosure of the full facts. The point of convergence between the **GEORGE JOSHUA OKUNGU** case and this matter is that the applicants herein also contend that their transaction was approved by the Board of KPC.

The respondent and the 2nd Interested Party also argued that the participation of the Attorney General in the Board meetings of KPC did not take away his constitutional powers to prosecute. They further argued that in any case the office currently mandated to prosecute criminal cases is that of the Director of Public Prosecutions and the applicants and their co-accused will not suffer any prejudice.

The 2nd Interested Party submitted that any apprehension that the applicants may have had about being prosecuted by the Attorney General was cured by the 2010 Constitution. It is also argued that in any case, the prosecution case is based on the fact that the Attorney General's legal opinion was secured fraudulently.

It appears that the drafters of the Constitution of Kenya 2010 were alive to the conflict that could arise where the Attorney General gave a legal opinion and later proceeded to charge those who acted on that legal opinion. Now the role of provider of legal advice to the Government belongs to the Attorney General and that of prosecuting criminal cases has been given to the Director of Public Prosecutions. In this matter, the Attorney General is the one who made the decision to charge the applicants. The distinction between the offices of the Attorney General and the Director of Public Prosecutions created by the 2010 Constitution is therefore not applicable. The applicants' apprehensions cannot be brushed off in the manner suggested by the 2nd Interested Party.

The applicants also contended that the Attorney General should not be allowed to prosecute them as he incorporated KPC and that makes him a complainant in this matter. This argument is erroneous. In incorporating KPC, the Attorney General was merely executing his mandate. KPC is not the Attorney General's private property and it cannot be said that he is the complainant in the matter.

The question that remains unanswered is whether the Attorney General abused his prosecutorial powers when he recommended that the applicants be charged. In order to answer this question, it is necessary to peruse the material placed before the Court.

The respondent's case has some backing from the documents availed to the Court. The applicants exhibited a copy of a report of the National Assembly titled: **FOURTEENTH REPORT OF THE PUBLIC INVESTMENTS COMMITTEE ON THE ACCOUNTS OF STATE CORPORATIONS, VOLUME 1, 2007.** From page 243 to page 253 the Public Investments Committee (the Committee) discusses KPC's financing arrangement with the company and concludes, *inter alia*, that **"(i) the final version of financing from M/s Triple A was not tabled before the Emergency Committee meeting of the full Board nor the full Board;……(vi) the advice of the Attorney General which was received on October 14 2013, only related to borrowing from M/s Triple A. Refinancing by Standard Chartered Bank Ltd was introduced later."**

The Committee went ahead and made recommendations including a recommendation that **"the Kenya Anti–Corruption Commission institutes investigations into the roles played by members of the so-called Emergency Board Committee, Management as well as those in the Ministries of Energy and Finance involved in this whole saga and take appropriate action."**

The applicants also exhibited the Final Award of Justice R. O. Kwach made on 5th November, 2008 in the arbitration between **TRIPLE A CAPITAL LTD v KENYA PIPELINE COMPANY LTD.** The Arbitrator made several findings including the following:

> **"(220) The whole transaction was based on two blatant lies. The first lie was that KPC was in dire financial straits and no Bank or financial institution was prepared to lend it money. The second lie was that because of persistent default, KPC had fallen out with its international creditors as a result of which they had refused to deal directly with KPC in connection with the recovery of their debts. Both these claims were false because in the event, the Bank lent KPC the money used to pay the debts. As for the purported refusal by the creditors to deal directly with KPC, I have already alluded to the letter from JFE (C-23) to KPC dated 8th June 2004 rejecting KPC's request that they should deal with TAC.**
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> **(221) Obviously, these lies were concocted to convince the Ministry of Energy, Ministry of Finance and the KPC Board to allow payments to be made through a third party-TAC. Having obtained that authority, these gentlemen then devised a complex web of dubious legal documents (Deeds of Assignment of Debt, Limited Power of Attorney, Refinancing Arrangements) in order to make a lot of money for themselves in the process of paying the debts owed by the KPC to the international creditors. On paper, the money coming from the installments was supposed to go to TAC, but I doubt if that is in fact what really happened. This was a scam involving a number of people. That is why it was important to call people like Ochuodho, Dantas, Orata and the Bank Manager as witnesses to explain exactly what happened. This was a very cleverly constructed racket and its architects obviously believe that it was watertight."**

The respondent and the 2nd Interested Party contend that the prosecution of the applicants and their co-accused is based on the allegation that they entered into a deal whose sole aim was to milk the coffers of KPC. They also assert that the approval of the Board was not obtained and that of the Attorney General was obtained fraudulently.

The Court of Appeal clarified the limited scope of judicial review in criminal cases when it stated in **MEIXNER & ANOTHER v ATTORNEY GENERAL [2005] 2KLR 189** that:

> **"As the learned judge correctly stated, 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 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.**
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> **Having regard to the law, we agree with 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. 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.**
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> **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 an examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence. 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."**

The analysis of evidence is better left to the trial court. A judicial review court has limited information before it and it is in most times advisable that the trial court be left to deal with the nitty-gritty of analyzing the evidence adduced and reaching an independent conclusion.

That judicial review is a tool to be used sparingly in relation to criminal trials was affirmed by Lord Steyn in **REPUBLIC V DPP, EX-PARTE KEBILENE & OTHERS [2000] 2 A.C. 326** when he opined:

> **"My Lords, I would rule that absent dishonesty or mala fides or an exceptional circumstance, the decision of the Director to consent to the prosecution of the applicants is not amenable to judicial review. And I would further rule that the present case falls on the wrong side of that line. While the passing of the Human Rights Act 1998 marked a great advance for our criminal justice system it is in my view vitally important that, so far as the courts are concerned, application in our law should take place in an orderly manner which recognizes the desirability of all challenges taking place in the criminal trial or on appeal. The effect of the judgement of the Divisional Court was to open the door too widely to delay in the conduct of criminal proceedings. Such satellite litigation should rarely be permitted in our criminal justice system. In my view the Divisional Court should have dismissed the applicants' application."**

I agree with the proposition that the prohibition of criminal prosecution is a power to be exercised sparingly. The trial court is fully equipped to handle all the issues raised in the course of the trial. A criminal trial is also protected by the Constitution**–see Article 50.**

There are documents which support the applicants' case. From the material in Court, it is clear that the idea to provide external funding to KPC kept on evolving from the date it was first mooted. In a letter dated 9th May, 2003 addressed to the Chairman of KPC Mr. Maurice Dantas by the 2nd applicant who introduced himself as the Managing Director of the company, it is stated *inter alia*:

> **"In our discussions, I was made to understand that KPC has capital expenditure plans amounting to USD 50 million, and are currently considering financing proposals. We would like to offer the services of Triple A and an associated company, Sovereign Capital Partners in providing a composite of financial services solution to your medium term financing requirements. Our combined strength lies in being able to provide financial advisory and structuring solutions together with arranging and participating in the actual funding requirements.**
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> > **We anticipate working very closely with other lenders such as banks and DFIs (Development Financial Institutions) and specifically, Standard Chartered Bank with whom both KPC and Triple A have an excellent banking relationship."**

At this stage it is apparent that the company is the only entity proposing a financing arrangement with KPC. The mention of the Standard Chartered Bank is, in my view, only meant to boost the company's credentials.

According to the minutes of KPC's 148th Board of Directors Meeting held on 21st July, 2003 it is noted in minute (r) as follows:

> **"<u>External Funding</u>**
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> **It was reported that during the 146th Board meeting Management was given approval to source for funds.**
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> **It was further reported that Triple A Capital Limited was approached amongst other commercial banks. It was found that Triple A's offer was the most attractive and they offered to lend KPC Kshs. 2 billion at an interest rate of 1%.**

Management reported that it had written to the Ministry of Finance to seek approval to borrow the funds, which approval has been granted.

The Board noted the report and resolved:-

a. To approve the borrowing of Kshs. 2 Billion from Triple A Capital Limited.

b. That Management puts aside funds for repayment of the loan."

From the minutes of the Board, Standard Chartered Bank had not clearly come on board. It is also assumed that the consent of the Ministry of Finance referred to in the minutes was obtained on the basis that the borrowing would be from the company.

There is a letter dated 22nd July, 2003 signed by the then Minister of Finance David Mwiraria. In that letter, he approves the application to fund KPC from external sources and concludes that:

"In accordance with Section 5(2) of the State Corporations Act Cap 446 the authority for KPC to borrow Kshs. 2.0 million from Triple A Limited under the stated terms is therefore hereby granted."

Once again there is no mention of the Standard Chartered Bank.

By a letter dated 19th September, 2003 the 1st Interested Party sought the Attorney General's consent on the transaction and annexed several documents to the letter. It is important to reproduce the said letter. It states:

"We have proposed to sell our creditors to Triple A Capital Limited under a tripartite Deed of Assignment of Debt to be executed by ourselves, Triple A Capital Limited and the respective creditors. This has been necessitated by the cash flow problem we are currently facing.

Triple a Capital Limited has, in turn, under a Master Agreement, negotiated with Standard Chartered Bank Kenya Limited to allow the bank to refinance such amounts owed by us with full recourse to us.

It is intended that Standard Chartered Bank Kenya Limited will make available to us, a medium term loan facility to be used to refinance the debt owed by us to Triple A Capital Limited and our various creditors, under the terms of the aforesaid Deed of Assignment of Debt.

Thus, in a nutshell, Triple A Capital Limited will negotiate the purchase of debts with our creditors and under the tripartite Master Agreement (Standard Chartered Bank Kenya Limited/Kenya Pipeline Company Limited/Triple A Capital Limited) have the option to sell the discounted debt to Standard Chartered Bank who will have recourse for the full debt to us.

This facility has been approved by the Treasury and the Ministry of Energy as per the enclosed letters.

We enclose the following draft documents for your perusal:-

1. Term Sheet from Standard Chartered Bank Kenya Limited, which outlines the intended facility.

2. Draft Master Agreement between Standard Chartered Bank Kenya Limited, Kenya Pipeline Company Limited and Triple A Capital Limited.

3. Tripartite Agreement between the creditors, Kenya Pipeline Company Limited and Triple A Capital Limited.

The security to be held by Standard Chartered Bank Kenya Limited for the said facility will be the following documents which we enclose herewith in draft from;

a. A fixed debenture supported by assignment of receivables from Kenya Shell Limited arising from their transportation and storage contract with us.

b. Draft Deed of Assignment between ourselves and Standard Chartered Bank Kenya Limited.

c. Master Assignment Agreement between ourselves and Standard Chartered Bank Kenya Limited.

Kindly let us have your legal opinion as to whether the said transaction is in tandem with the Ministry of Finance approval and that the security documents are in order."

The letter was copied to the Permanent secretary of the Ministry of Finance, the Permanent Secretary of the Ministry of Energy among others. The ministers of the two ministries were therefore aware of the kind of transaction that was being entered into by KPC.

Through a letter dated 14th October, 2003 one D. Achapa for the Attorney General approved the transaction and observed that the documents were in order from a legal point of view. The author advised the 1st Interested Party to **"ensure that approvals for this transaction are granted both by the Minister for Energy and the Minister for Finance in writing in order to comply with the requirement under Section 5(2) of the State Corporations Act."** Could the author be the Dorcas Achapa who represented the Attorney General in the meetings of KPC's Board? If so, then it can be assumed that she knew everything about this transaction.

The documents forwarded to the Attorney General by the 1st Interested Party vide the letter dated 19th September, 2003 show a nexus between KPC, the company and Standard Chartered Bank.

Additional consents were sought by the 1st Interested Party and the consents were granted by the Minister of Finance through a letter dated 23rd October, 2003 and the Minister of Energy through a letter dated 28th October, 2003. The two ministers gave consents to KPC to borrow on a revolving basis Kshs. 2 billion from Standard Chartered Bank to allow the bank refinance amounts owed to Triple A Capital Limited by KPC under Deeds of Assignment of Debt from time to time.

From the documents availed to the Court, the agreements were reached following the laid down mechanisms. As already stated, the arbiter found that the transaction was premised on lies. A Parliamentary Committee also concluded that the authority of the Board was not obtained. If the authority of the Board was indeed not obtained, how can one explain the approval of the transaction by Dorcas Achapa? She was an ex-officio member of the Board and there is evidence that she was present in one of the meetings in which the matter was discussed. There is therefore really no basis for claiming that the Board did not approve the transaction that was submitted to the Attorney General by the 1st Interested Party.

Going through the documents in the Court file, it becomes clear that this was a commercial transaction that went awry. It looks like the ministers in charge of Finance and Energy never bothered to familiarize themselves with the transaction before granting the approvals for the external funding and in particular the further consents granted in October, 2003. Whether the ministers were simply negligent or had criminal intents is not known. The fact is that they did indeed grant permission to KPC to borrow money from the company. They also approved refinancing by the Standard Chartered Bank.

As already stated, the Attorney General gave a clean bill of health to the transaction. I do not understand the claim by the 2nd Interested Party that the legal opinion of the Attorney General was obtained through fraud or non-disclosure of material facts. All the documents regarding the transaction were indeed forwarded to the office of the Attorney General by the 1st Interested Party.

I do not think that a person can escape criminal liability simply because he sought the opinion of an advocate before doing something that later turns out to be criminal. However, the opinion of the Attorney General cannot be equated to that of any ordinary advocate. The Attorney General's opinion is cemented in the Constitution. Public entities like KPC normally seek the opinion of the Attorney General before entering certain transactions. The Attorney General is deemed to give the best legal opinion in good faith. Those who act on the opinions of the Attorney General should not be punished for doing so. It is assumed that the Attorney General has sufficient capacity to render such advice.

The Government is a behemoth of a commercial enterprise and those who transact with the Government and its agencies do so in the strong belief that the business transactions have been authorized. They have legitimate expectation that whatever has been approved by the relevant authorities is legal. The applicants received a letter informing them that all the approvals had been obtained. What more was expected of them?

In the case of **BANK OF UGANDA v BANCO ARABE ESPANOL, Supreme Court Civil Appeal No. 8 of 1998,** the Supreme Court of Uganda held that the opinion of the Attorney General should not be taken lightly. The Court stated that:

> **"On whether or not the loan agreement was valid and enforceable, the parties to this tripartite agreement had been particular to include a clause in it which sought legal opinion as a condition precedent. The appellant is the principal-financial adviser to the Government of Uganda and the Attorney General is the principal legal adviser to the same Government. In consequence, nothing could be more authoritative and authentic than the opinion of the Attorney-General of Uganda, which he expressed and wrote on the loan agreement…….**
>
> **At the time-the loan agreement was signed, the Uganda Constitution designated the Attorney-General as the Principal Legal Advisor of the Government of Uganda with functions, *inter alia,* to give legal advice and legal services to the Government on any subject and to draw and peruse agreements, contract treaties, conventions and documents by whatever name called, to which the Government is a party or in respect of which the Government has an interest.**
>
> **In my view, the opinion of the Attorney General as authenticated by his own hand and signature regarding the laws of Uganda and their effect or binding nature on any agreement, contract or other legal transaction should be accorded the highest respect by government and public institutions and their agents,. Unless there are other agreed conditions, third parties' are entitled to believe and act on that opinion without further enquiries or verifications, It is also my view that it is improper and untenable for the Government, the Bank of Uganda or any other public institution or body in which the Government of Uganda has an interest, to question the correctness or validity of that opinion in so far as it affects the rights and interests of third parties……**
>
> **While it is true that the Attorney-General plays a dual role as Government principal legal adviser on both political and legal matters. Nevertheless, in the latter role, the Attorney General is a law officer for the sole purpose of advancing the ends of Justice. In this role, the Attorney General has access to all types of advice from fellow ministers who may have negotiated and authorised the singing of contracts- He has a host of qualified and experienced advisers on legal matters of the kind that**

were involved in this loan agreement. Of the Attorney-General of England whose functions are legacies adopted in the Ugandan Constitution and laws, it was said in the House of Commons Debates, Vo1.179, Cols 1213-1214 of December. 18, 1924, which is reported in John L. J. Edwards "The Attorney General, Politics and the Public Interest, 1984", that:

"It is the duty of the Attorney General, in the discharge of his responsibilities – entrusted in him, to inform himself of all relevant circumstances which might properly affect his decision."

Consequently, the opinion of the Attorney General on this matter should not be taken lightly. All things being equal, the opinion of the learned Attorney-General on this loan agreement was the best any of the parties could have received and having received it, the appellant should not have a sound reason for seriously questioning its correctness or applicability in relation to the loan agreement. In the result grounds 1 and 2 of the appeal ought to fail."

It would indeed be unconscionable and immoral for those who rely on the legal expertise of the Attorney General to be taken through a criminal process for acting on his advice.

I was urged by the advocates for the respondent and the 2nd Interested Party to be persuaded by the decision of this Court in the case of **WILLIAM S. K. RUTO & ANOTHER v ATTORNEY GENERAL [2010] eKLR** on this issue**.** I have gone through the judgement and I think the relevant passage is as follows:

"It is the applicants' submission that the decision whether or not to allocate land lies with the President and that the decision being a discretionary one, the applicants are being subjected to trial in exercise of Presidential discretion cannot be challenged. The President performs his functions through civil servants. In this case, he must have acted on the advice of the Commissioner of Lands and all others involved. Those officers must act and give advice in accordance with the law and also consider public interest. They cannot be a law unto themselves. If they give advice that results in unlawful acts and decisions that are contrary to public policy, those decisions cannot be upheld just because it was exercise of Presidential discretion if that argument of counsel were to be allowed, then there would be total anarchy resulting from abuse of exercise of Presidential discretion which would be hijacked by unscrupulous self-serving officers. We are of the view that Presidential discretion cannot be invoked to aid officers who may have committed criminal acts. We need not say anymore on that issue. "

I hold the view that this passage is not relevant to the case before me. The legal opinion of the Attorney General cannot be equated to the decisions made on a day to day basis by public servants.

Should the applicants' prosecution be prohibited? Prohibiting a criminal prosecution in **MOHAMMED GULAM HUSSEIN FAZAL KARMALI & ANOTHER v THE CHIEF MAGISTRATE'S COURT, NAIROBI & ANOTHER [2006] eKLR,** Nyamu, J (as he then was) after analyzing various decisions summed up the policy to be considered in dealing with abuse of process thus:

"The first is that public interest in the administration of justice require that the court protects its ability to function as a court of law by ensuring that its processes are used fairly by the state and citizen alike. The second is that, unless the court protects its ability to function in that way its failure will lead to an erosion of public confidence by reason of concern that the courts processes may lend themselves to oppression and injustice."

It is not in the public interest to prosecute those who enter commercial transactions based on the legal opinion of the Attorney General.

To my knowledge, our laws do not provide a mechanism for a person charged before a magistrate to apply for the dismissal of the charges on the ground that they are an abuse of power. The High Court still remain the only beacon of hope for those who have suffered from abuse of prosecutorial powers.

In **REPUBLIC v THE ATTORNEY GENERAL AND ANOTHER, EX-PARTE KIPNGE'NO ARAP NGENY, Nairobi Miscellaneous Civil Application No. 406 of 2001** the Court considered the circumstances under which a criminal trial can be terminated and opined:

"We recognize the state's interest and indeed constitutional and statutory powers to prosecute criminal offences. It is a necessary power to protect the common good: To punish wrongs against the society. However, in the 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 recognized lawful parameters. The approach of our Courts to interfere with the State's power to prosecute criminal cases has been based on the view that the prosecution should be halted because it has become an abuse of the process of the Court and/or because the prosecution is also oppressive and vexatious - that it has no foundation and is brought recklessly for extraneous purposes. This Court will, therefore, in a proper case 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 my view those grounds remain valid to date. Prosecutorial power should be exercised with due regard to **"the public interest, the interests of the administration of justice and avoid abuse of the legal process."-Article 157(11) of the Constitution.**

In the case before me, it is apparent that the applicants and the 1st Interested Party have been subjected to an unnecessary trial. This Court must exercise its judicial authority and protect them. That protection comes by way granting the order sought. An order of prohibition will therefore issue as prayed.

There is no evidence that the decision to charge the applicants and the

1st Interested Party was driven by malice. For that reason, I will make no orders on costs.

Dated, signed and delivered at Nairobi this 28th day of May, 2014

W. KORIR,

JUDGE OF THE HIGH COURT