



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISC. APPLICATION NO. 133 OF 2013

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF
CERTIORARI**

AND

IN THE MATTER OF THE PENAL CODE CHAPTER 63 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE CRIMINAL PROCEDURE CODE CHAPTER 75 LAWS OF KENYA

AND

IN THE MATTER OF THE ETHICS AND ANTI-CORRUPTION COMMISSION ACT, 2011

AND

**IN THE MATTER OF NAIROBI CHIEF MAGISTRATES COURT ANT-CORRUPTION CASE
NO. 15 OF 2010**

BETWEEN

REPUBLICAPPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

KENYA ANTI-CORRUPTION COMMISSION.....2ND RESPONDENT

***EX PARTE:* MARY NDIRANGU**

JUDGEMENT

Introduction

1. By a Notice of Motion dated 30th April, 2013, the *ex parte* applicant herein, **Mary Ndirangu**, seeks the following orders:

1. That orders of judicial Review of certiorari do issue and remove the High Court and quash

the decision by the Respondents to charge the Applicant in Nairobi Chief Magistrates Court Ant-Corruption Case No. 15 of 2010 being Republic vs Francis Zurels Moturi and 8 others.

2. That costs of this application be borne by the Respondents.

2. The application was supported by an affidavit sworn by the applicant on 25th April, 2013.
3. According to her, she is qualified and Certified Public Accountant and a certified Public Secretary Employed with the NSSF (herein the fund) as its Internal Auditing Manager and amongst others she was mandated to do internal audits of all the departments in the fund as well as carrying out other duties and responsibilities including review of the applicable systems of internal controls of the organization.
4. She further deposed that she was in charge of all the staff in the Internal Audit Department besides being in charge of training and development of the audit staff and also being a member of the senior Management Committee. According to her, the audits were being conducted in all the Departments within the fund upon approval by the top management team being the Board Audit Committee in liaison with the Management and in effecting the audits, the same was to be in line with the Funds policies, procedures, and guidelines/rules and regulations as laid down from the time to time.
5. In conducting the said assignment, the applicant deposed that the same entailed reviews and appraisals of the policies, procedures, rules and regulations of the department under audit and that each Department had a specific demand hence the reason why audits had to be done in line with the particular demand of that office/department as approved by the Board Audit Committee.
6. The applicant averred that she was appointed to the audit office by the Board of Directors of the fund through the recommendation of the then Managing trustee who was the overall in-charge of the fund and that when the Internal Audits had been done on any particular department/section, she would report of the findings of that Audit to the Managing Trustee who could facilitate the said report to the Board Audit committee as and when it met.
7. The deponent further averred that as at the time she was at the helm of the Internal Audit Department, it was comprised of 16 members all of whom were stationed in Nairobi. To her, the Audit Department does not pre-Audit payment vouches and that the same is done by the examination department which is responsible in analysing whenever payments are done to approve and raise queries which examination department is based in the finance department which was one of the Departments that were being internally audited at the end of the exercise of payment by the internal audit department as and when mandated and directed by the board of trustees.
8. It was deposed that all payments vouchers were examinable and approved by the examination section within the finance department and no payment could have been made without the examinations section approving since the internal audit doesn't pre-audit the payment vouchers but its mandate in the payment process is only limited to the financial systems audit and that should there be an issue where the internal audit department is involved, the only mandate that it had was to come up with measurable services to the department in question to ensure effective and efficient utilization of funds in accordance to/with the spelt out objectives of the corporate strategic plan. On the other hand the departments to be so audited would identify the auditable activities or areas that required to be audited say once during the period set for the strategic plan which plan could last for at least a period of 3 years. The said identified areas, it was averred could be those considered risky audited areas in terms of cash-flow for the example the funds Tenant-Purchase Scheme and also benefits processing within the finance department.
9. The applicant further averred that each of the years at the internal audit, she could prepare audit plans to be approved by the Board of trustees upon submission or the said board could enrich the said audit plan by putting necessary insertions of the areas they felt that ought to be covered and thereafter the applicant could then tender the plan of the audit and if approved the audit committee meetings were supposed to be held at least quarterly. Apart from these there were also *ad-hoc* activities done by the internal audit which entailed activities that were not envisaged during the preparation of the audit plan.
10. According to the applicant, during the years 2006-2009, there were 14 areas identified by the Board/Internal Audit as being auditable in the investments department, these were staff mortgage

- and car loans; Tenant Purchase Schemes of Kibera Highrise, Embakasi Nyayo Highrise, Kitisuru, Tassis Estate 1 & 2, Mountain View Estate, Hazina Estate and Kapsoya; Investments in Equity Treasury bills/fixed deposit/stocks and other real estate and land; Group life Insurance; Motor Vehicle Insurance System; Marketing and Sale of fund properties; and Rent and rates. These areas, according to her were rolled out in a plan which had been approved.
11. It was averred that whereas audit of investments in equity/treasury bills fixed deposit was done and a report issued, there was no audit of investments for the period 2007/2008 and 2008/2009 in respect of bonds, treasury bills, Nairobi City Council Stocks Fixed Deposit Receipts and Equity, since its audit had been done the year 2006-2007.
 12. The applicant averred that on the 15th October, 2008, while she was at the helm of internal audit manager at the Fund, she was summoned to the Corporation Secretary **Mr. Said Chitembwe** (as he was then) and queried on the issues to do with the audit on the shares by Discount Securities Limited which was an issue to do with the Board of Trustees and it was confirmed from that meeting that the internal audit department had done broad audits in the Investments Departments in bonds, Treasury Bills, Nairobi City Council Stock Fixed Deposit slips etc. However, the audit so done was not specifically on purchase of shares which the board had raised a query on and the meeting of 15th October 2008 ended without anything concrete coming up and she finished the business of her office without a hitch.
 13. However, the next day being the 16th October 2008, she was served with a letter dated same day effectively interdicting her and directing her to hand over the office to pave way for investigations as a member of investment committee but before she would comprehend what was happening and upon approaching one of the board members (**Mr. Juma Makopa**) to be told why she was being investigated, he told her that the letter was issued in error and it could be suspended/lifted. Indeed after a span of say 20 minutes the very person who had handed over the letter to her, told her that he had been ordered to retrieve the letter so handed to her to be taken to the Managing Trustee and that was the last time she saw the original of that letter though she kept a copy to herself.
 14. However on the 17th October 2008, she received yet another letter dated 16th October 2008 whose contents were different from the one issued to her on the 16th October 2008 much as it was on the same subject of interdiction. The letter was to the effect that she was being interdicted for reason that she failed to organize the audit program to cover the Investment Department for 2 years thereby failing to detect irregularities which exposed the fund to lose 1.4 billion shillings. To the said letter the applicant reacted that the internal audit was within its time frame and whatever irregularities with the Discount Securities Ltd over the share purchase would be covered by the department as an *ad-hoc* entity/assignment which was actually on course. As approved in the minutes No. 64/BAUD/2008/2009 audit plan marked above as MN-1. She however deposed that what followed thereafter was a letter dated 24th October 2008 requiring her to show cause why she should not be dismissed from service for gross dereliction of duty attributed to gross negligence to which she replied by a letter dated 30th October 2008, thereby exonerating herself from any blame/negligence and the explanation given was that there were audit plans prepared each year which were approved by the Boards audit committee and stated in detail the duties and responsibilities of the internal audit which is to evaluate systems of internal control and ensuring that they are not only in place but also enhancing in an effective manner.
 15. Further, officers from the Kenya National Audit Office who were external auditors who could re-audit the internal auditors didn't come up with any irregularity regarding work done by the internal auditors for any query to be raised regarding the issues that the Board of Trustees were now raising against her.
 16. She however deposed that she was then thereafter arrested and arraigned in court on 9th April and charged with a single offence of neglect of official duty by a public officer contrary to Section 128 of the **Penal Code** together with others who were charged with various other offences vide Nairobi Chief Magistrates Court corruption court case No. 45 of 2010. However, although by another letter dated 24th April 2009, her interdiction was lifted with immediate effect and asked to resume my duties, the lifting interdiction was short lined as the Managing Trustee of the fund through another letter dated 13th April 2010 suspended her from duty on account of the Anti-corruption case aforesaid. Nevertheless, on the 27th April 2009 she was appointed by the Board of Trustees as head of Department and a senior Manager internal audit vide letter dated same day.

17. Immediately upon taking pleas in the Anti-Corruption case aforesaid, she applied for issuance of witness statement and copies of exhibit to enable her raise a defence over the allegations. However the first batch of documents and copies of witness statements issued by the prosecution never directly or remotely touched on her plight to facilitate in raising any known defence in law and upon seeking further statements it was confirmed that no further statement had been gotten from the state and that they did not have any further statement. According to the applicant though the proceedings in the case have been ongoing, the 18 witnesses who tendered their testimony did not touch on her involvement in the charge preferred and a perusal of all witness statements did not reveal her involvement in the case in court. Further the charge sheet by itself is defective and the Honourable Chief Magistrates Anti-Corruption Court lacks jurisdiction to hear and determine the issues that the prosecution has raised.
18. On behalf of the applicant it was submitted that since the decision sought to be quashed are not orders that have been adjudicated upon by the Court hence not subject to scrutiny under section 9(3) of the **Law Reform Act** hence the objection on time bar is misplaced. It was further contended that apart from the foregoing submission Article 159(d) of the Constitution comes to aid of the applicant as the objections raised will be unnecessary procedural technicality which the court should disregard more so as leave had been granted.
19. It was submitted that since the 1st Respondents are the ones prosecuting on the complaint by the 2nd, they are necessary parties to the proceedings. The 1st Respondent, it was contended, being a creature of the Constitution should exercise its functions and powers as per the constitution and cannot at will abuse the ex parte applicant's rights to fair trial in so executing their duties.
20. According to the applicant, she has moved the court for redress after her frustrations in the hands of the Respondents who have continued to retain information and exhibits and the very retention has left her without any participation in the said case. It was therefore her view that the only remedy available if the Respondents cannot supply any better particulars is to allow the application since the charge is not informative with sufficient detail for her to answer it.

1st Respondent's Case

21. In opposition to the application, the 1st Respondent filed the following grounds of opposition:
 1. **That the Applicant has failed to demonstrate sufficient grounds to warrant issuance of the orders sought in the said application.**
 2. **That the orders of certiorari sought against the Respondents are incapable of being issued as they are aimed at an action that was taken over six months ago.**
 3. **That the actions of the Respondents that the Applicant seeks to mount a challenge against are well within the constitutional and statutory mandate of the Respondents.**
 4. **That the orders sought by the Applicant will amount to the court exercising the mandate of an independent constitutional body.**
 5. **That the 1st Respondent is constitutionally empowered under the provisions of Article 157 (6) of the Constitution of Kenya to institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed.**
 6. **That under Article 157 (10) of the Constitution of Kenya, the 1st Respondent does not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.**
 7. **The prosecution has not closed its case in Anti-Corruption Case No. 15 of 2010. The *Ex parte* Applicant's innocence can only be determined by the trial court once the prosecution has closed its case.**
 8. **That the application is misconceived and an abuse of the court process and the same should be dismissed with costs.**
22. The 1st Respondent also filed a notice of preliminary objection in which the following issues were raised:

1. **That the Notice of Motion is incompetent and bad in law as it offends Section 9(5) of the Law Reform Act and Order LIII, rule 2(2), rule 3 (2) and rule 7(1) of the Civil Procedure Rules, 2010.**
 2. **That the actions of the Respondents that the Applicant seeks to mount a challenge against are well within the constitutional and statutory mandate of the Respondents.**
 3. **That the orders sought by the Applicant will amount to the court exercising the mandate of an independent constitutional body.**
 4. **That the application is misconceived and an abuse of the court process and the same should be dismissed with costs.**
23. It was submitted on behalf of the 1st Respondent that since the applicant seeks to quash the decision made by the Respondents to charge her which decision was made in 2010 and the application was filed in 2013 a period of more than three years from the date of the decision sought to be quashed, the application was under section 9(3) of the **Law Reform Act** as read with Order 53 rule 2 of the **Civil Procedure Rules**, outside the limitation period.
24. It was further submitted that in deciding to prosecute the applicant, the 1st Respondent acted within his powers and mandate under Article 157 of the Constitution under which the 1st Respondent does not require the consent of any person or authority in deciding to do so. So unless the applicant shows that the said Respondent's action is tainted with an illegality, irrationality or impropriety of procedure, the Court cannot interfere since the Court cannot interfere with or probe into the merits of the exercise of statutory duty of an authority.
25. In support of its submissions the 1st applicant relied on **Kunste Hotel Ltd vs. The Commissioner of Lands Civil Appeal No. 234 of 1995** and **Kenya National Examinations Council vs. Republic ex parte Njoroge Civil Appeal No. 266 of 1996.**

2nd Respondent's Case

26. On behalf of the 2nd Respondent, a notice of preliminary objection together with grounds of opposition were filed raising the following issues:
1. **THAT the said application is time barred under the provisions of the Law Reform Act Section 9(3) and Order LIII rule 2 of the Civil Procedure Rules, 2010.**
 2. **The 2nd Respondent is empowered by law to investigate the conduct of any person that in its opinion constitutes corruption or economic crime pursuant to the provisions of the Anti-Corruption & Economic Crimes Act, 2003 and Ethics and Anti-Corruption Commission Act, No. 22 of 2011.**
 3. **THAT the 1st Respondent is constitutionally empowered under the provisions of Article 157(6) of the Constitution of Kenya to institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed.**
 4. **Under Article 157(10) of the Constitution of Kenya, the 1st Respondent does not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers of functions, shall not be under the direction or control of any person or authority**
 5. **The decision by the Respondents to charge the *ex parte* Applicant before a competent court of law, with an offence known in law was not arrived at in contravention of the law and the Respondents acted within their constitutional and statutory mandates even if the ensuing decision is deemed by the *ex parte* Applicant to have been wrong**
 6. **It is at the Respondents discretion who to treat as a prosecution witness and the Respondents were under no obligation or duty whatsoever to treat the *Ex parte* Applicant as a prosecution witness**
 7. **The remedy of Judicial Review is concerned with reviewing not the merits of the decision in respect of which the application for Judicial Review is made, but with the decision making process itself. This court cannot therefore be invited to look at the sufficiency of the evidence against the *Ex parte* Applicant and to determine whether or not the contents of the charges facing the *Ex parte* Applicant are defective in substance and form.**

8. **The Ex parte Applicant is trying to ventilate her defense before this court and should not be allowed to convert the Judicial Review court into a trial court. It is the trial court which is best equipped to deal with the issue of whether or not there is adequate evidence to sustain the charge facing the Ex parte Applicant in Anti-corruption Case No. 15 of 2010.**
 9. **The prosecution has not closed its case in Anti-Corruption Case No. 15 of 2010. The Ex parte Applicant's innocence can only be determined by the trial court once the prosecution has closed its case.**
 10. **Judicial Review orders cannot be sought and obtained against persons who are not parties to the proceedings.**
 11. **The application is without merit.**
27. It was submitted on behalf of the 2nd Respondent that the application was time barred on the same grounds upon which a similar submission was made by the 1st Respondent. According to the 2nd Respondent there is no power to enlarge the time for seeking the said 6 months' period and in support of this decision the 2nd Respondent relied on **Amota Nyasoe Nyanera vs. Public Service Commission of Kenya & 2 Others [2013] eKLR.**
 28. It was similarly argued that the statutory mandate of the 2nd Respondent with respect to matters giving rise to the charges facing the ex parte applicant in the said criminal case was limited to investigating the matter and forwarding the findings of the investigations to the 1st respondent who is constitutionally empowered under Article 157 to institute and undertake criminal proceedings against any person and in so doing does not require the consent of any person.
 29. To the 2nd Respondent the documents filed by the ex parte applicant in support of the instant application do not contain any material evidence to show that the Respondents have discharged their constitutional mandate in breach of the law hence pursuant to **Kenya National Examinations Council Case** (supra), **Chief Constable of North Wales Police vs. Evan [1982] 1 WLR 155** and **Reg vs. DPP ex parte Kebilene [2000] 2 AC 326** the orders sought ought not to be granted.
 30. It was submitted that the ex parte applicant seems to be ventilating her defence before this Court yet it is the trial court which is well equipped to deal with the issue of adequacy of evidence and reliance for this submission was placed on **Meixner & Another vs. Attorney General [2005] eKLR.**

Determinations

31. Having considered the application, the affidavits both in support of and in opposition to the application, the grounds of opposition and the submissions for and against the grant of the orders sought, this is the view I form of the matter.
32. It was contended that the applicant's claim is time barred since it was not brought within six months. Sections 9(2) and (3) of the ***Law Reform Act*** provides as follows:
 - (2) ***Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.***
 - (3) ***In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.***
33. In **R. vs. The Judicial Inquiry Into The Goldernberg Affair Ex Parte Hon Mwalulu &**

Others HCMA No. 1279 of 2004 [2004] eKLR as well as Republic vs. The Commissioner of Lands Ex Parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998, it was held that the 6 months limitation period set out in Order 53 rules 2 & 7 only applies to the specific formal orders mentioned in Order 53 rules 2 and 7 and to nothing else and a decision to alienate or to allocate land is not formal because the commissioner may in most cases issue titles without necessarily identifying the decision.

34. The phrase “or other proceedings” for the purposes of judicial review has been considered by the Tanzania Court of Appeal in Mobrama Gold Corporation Ltd vs. Minister for Water, Energy and Minerals & Others Dar-Es-Salaam Civil Appeal No. 31 of 1999 [1995-1998] 1 EA 199, in which case the said Court held that the phrase “or other proceedings” has to be construed *ejusdem generis* with judgement, order or decree, and conviction as having reference to a judicial or quasi-judicial proceedings as distinct from acts and omissions for which *certiorari* may be applied for. In my decision made in Amota Nyasoe Nyanera vs. Public Service Commission of Kenya & 2 Others (supra), it is clear that my attention was not drawn to the foregoing decisions which, decisions in my view express the correct legal position. Accordingly, I wish not to follow the same with respect to the applicability of the 6 months limitation to these proceedings.
35. However, it must be noted that the nature of judicial review requires parties to approach the Court expeditiously. Expedition in my view is the hallmark of judicial review proceedings and where the Court finds that an applicant has approached the Court after an inordinate delay the Court would still be entitled to decline to grant the orders sought time bar or otherwise notwithstanding. The rationale for this is that judicial review deals with administrative actions and such actions ought not to be placed in a status of uncertainty as to whether they would be subject of challenge. I associate myself with the decision in Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others [2006] 1 KLR 443 where it was held:

“As stated herein it is a requirement of the rule of law that law must be certain and predictable... Thus the advantages of upsetting these ingredients at the altar of individual claims no matter how meritorious are heavily outweighed by the advantages of certainty predictability and stability... I believe one of the pillars of the rule of law which the Court should always uphold is the predictability of law so that individuals and other juristic persons can plan their lives and affairs on the basis of certainty of the applicable law. On this ground also I would not exercise my discretion to grant the relief sought even if it was properly sought and properly grounded because the delay even by the known judicial review standards is inordinate. Limitation in judicial review actions is that of a reasonable time (except as regards *certiorari* orders and proceedings set out in order 53 rule 2, which is six months). Reasonable time will in my view vary depending on the reasons for the delay. Where the decision being impugned has been implemented and third parties have come onto the scene the Court should not intervene because speed and promptness are the hallmarks of judicial review. Hardship to third parties should keep the Court away.”

36. It is therefore clear that prayers 1 and 2 of the instant application are clearly incompetent since they in effect seek to quash decisions made by a Court outside the 6 months limitation period.
37. Before dealing with the merits of the application it is always important to remember that in these types of proceedings the Court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings. As judicial review proceedings are concerned with the process rather than merits of the challenged decision or proceedings the court is not entitled to make definitive findings on matters which go to the merit of the impugned proceedings. In determining the issues raised herein the Court will therefore avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial Court.
38. Dealing with the merits of the application, it is trite that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution. 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.

39. 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.”

40. 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.” [Underlining mine].

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

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal

score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far that which the courts indeed the entire system is constitutionally mandated to administer... In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute. It is further alleged that the criminal prosecution is an abuse of the court process epitomised by what is termed as selective prosecution by the Attorney General. It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been be argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law...In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed...There is nothing which can stop the from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made...Under section 77(5) of the Constitution it is a constitutional right that no person who has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of the offence. What is clear from this constitutional right is that it prevents the re-prosecution of a criminal case, which has been determined in one way or another...*A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution.....In the instant case there is no evidence of malice, no evidence of unlawful*

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

42. 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”.

43. 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”.

44. It is therefore clear that whereas the discretion given to the 1st 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.

45. Judicial review applications do not deal with the merits of the case but only with the process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and once the Court is satisfied that the same are bona fides and that the same are being conducted in a fair manner, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial

by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution's evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.

46. It was contended this Court ought not to interfere with the Constitutional mandate given to the DPP to prosecute. However as was held by **Wendoh, J** in **Koinange vs. Attorney General and Others [2007] 2 EA 256:**

“Under section 26 of the Constitution the Attorney General has unfettered discretion to undertake investigations and prosecute. The Attorney Generals inherent powers to investigate and prosecute may be exercised through other offices in accordance with the Constitution or any other law. But, if the Attorney General exercises that power in breach of the constitutional provisions or any other law by acting maliciously, capriciously, abusing the court process or contrary to public policy the Court would intervene under section 123(8) of the Constitution and in considering what constitutes an abuse of the court process the following principles are relevant: (i) Whether the criminal prosecution is instituted for a purpose other than the purpose for which it is properly designed; (ii) Whether the person against whom the criminal proceedings are commenced has been deprived of his fundamental right of a fair trial envisaged in the provisions of the constitution; (iii) Whether the prosecution is against public policy.”

47. Therefore this Court is perfectly entitled in appropriate cases to interfere with the decision of the DPP to commence and proceed with prosecution.

48. In this case, however the ex parte applicant's case is that the prosecution has no evidence which can sustain a prosecution. As stated in the above authorities, the mere fact there is no sufficient evidence to sustain a conviction is no ground for halting or terminating a criminal case. In my view the trial Court is usually in a better position to scrutinise the evidence presented before it in determining whether such evidence prove the accused's guilty beyond reasonable doubt. Unreliable or inconsistent evidence may well be a ground for acquitting the accused. It was the applicant's case that she is not culpable. That contention in my view is better applied in her defence in the trial court since this Court cannot embark on the minute examination of the case facing the applicant in order to make conclusive findings thereon. To paraphrase the decision in **Meixner & Another vs. Attorney General** (supra) to set out on that voyage would have the effect of embarking upon an examination and appraisal of the evidence to be adduced before the trial Court with a view to show the applicants' innocence yet that is hardly the function of the judicial review court.

49. Whereas the applicant may well prove at the trial that the criminal charges cannot be successfully prosecuted and that she 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.

50. In this case I am unable say based on the material before me that there is no case at all against the applicant. In fact the applicant's case seems to be that from the evidence furnished to her, no offence against her is disclosed. That however, is a different thing from saying that there is no case against her at all. In the submissions the applicant seems to be seeking that the prosecution furnishes her with all the evidence to be relied upon by the prosecution. That in my view is a remedy which can properly be sought and obtained before the trial court which in the course of the trial is obliged to ensure that the applicant is accorded a fair trial as envisaged under the Constitution.

51. Further the lack of evidence is an issue which the trial courts is better placed to consider in deciding whether or not to place the applicant on her defence and even after doing so, 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 applicants will not receive a fair trial before the trial court more so as no allegations are made against the trial Court in that direction.

52. Having considered the issues raised herein I am not satisfied that the case meets the legal threshold for prohibiting the criminal case from proceeding.

Order

53. In the result I find no merit in the Notice of Motion dated 30th April, 2013 which I hereby dismiss with costs.

54. It is so ordered.

Dated at Nairobi this 30th day of October, 2014

G V ODUNGA

JUDGE

Delivered in the absence of the parties

Cc Patricia