REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPL. NO. 124 OF 2013

IN THE MATTER OF AN APPLICATION BY DISMAS NDEGE OGWOKA AND SIMON NDEGE FOR ORDERS IN THE NATURE OF JUDICIAL REVIEW

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES AND SECTIONS 8 AND 9 OF THE LAW REFORM ACT

BETWEEN

REPUBLIC…….…………………………………………….…..…..APPLICANT

-VERSUS-

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

THE CHIEF MAGISTRATE'S COURT, KIBERA.......…....2ND RESPONDENT

THE HON. ATTORNEY GENERAL...................................3RD RESPONDENT

***EX PARTE*: DISMAS NDEGE OGWOKA**

SIMON NDEGE

JUDGEMENT

Introduction

1. By a Notice of Motion dated 19th April, 2013, the *ex parte* applicants herein, **Dismas Ndege Ogwoka** and **Simon Ndege** seek the following orders:

> **1. An order of Certiorari to bring into this honourable court and quash the decision of the 1st Respondent or officers subordinate to him, and or the Kenya Police, to charge the Applicants with the offence of Obtaining Money by False Pretences in Kibera Chief Magistrates Criminal Case No. 1987 of 2012 now consolidated with Kibera Chief Magistrates Criminal Case number 1455 of 2012.**

2. An order of prohibition directed at the 1st Respondent in person or through officers subordinate to him prohibiting him from carrying on with the further prosecution of the Applicants in Kibera Chief Magistrate's Criminal Case Number 1987 of 2012 as consolidated with Kibera Chief Magistrates Criminal Case number 1455 of 2012 or any other proceedings that may be instituted on the same basis as Kibera Chief Magistrate's Criminal Case Number 1987 of 2012 as consolidated with Kibera Chief Magistrates Criminal Case number 1455 of 2012.

3. An order of prohibition to prohibit the 2nd Respondent from taking evidence, conducting proceedings or carrying on with the trial of the Applicants in Kibera Chief Magistrate's Criminal Case No. 1987 of 2012 as consolidated with Kibera Chief Magistrate's Criminal Case No. 1455 of 2012 or any other criminal proceedings that may be instituted on the same basis as Kibera Chief Magistrate's Criminal Case No. 1987 of 2012 as consolidated with Kibera Chief Magistrate's Criminal Case No. 1455 of 2012.

4. Costs of and incidental to these proceedings

<u>Applicants' Case</u>

2. The application was supported by **Simon Ndege**, the 2nd Applicant herein on 16th April, 2013.

3. According to the deponent, on 17th April 2012, police officers arrested the applicants and on the 18th April, 2012, were both charged with two counts of Obtaining Money by False Pretences contrary to Section 313 of the ***Penal Code***. By the time they were charged in court, they were in the middle of taking the 1st Applicant's statement and they had not taken any statement from the deponent which omission deprived the police of an opportunity to fairly evaluate the case before deciding to charge them in court.

4. It was deposed that the background to the charge was a conveyancing transaction which was once conducted by the firm run by the deponent and in which the 1st Applicant is an associate and has never been a partner which firm was at all material times and todate known as **S. Ndege and Company Advocates**.

5. He added that the said transaction at the time when it was being handled at his said firm was handled on behalf of the said firm singularly by the 2nd Interested Party, **Stephene Mose**, exclusively and it involved the sale of property known as LR No. 12715/517 – Syokimau from one **Regina Nyokabi Kuria** to the first Interested Party, **Mercia Properties Limited** as purchasers. In the course of and before completion of the said transaction, **Stephen Mose** who was handling the said transaction left the firm of **S. Ndege and Company Advocates** and established his own firm known as **Mose and Company Advocates** as a consequence of which the firm of **S. Ndege and Company Advocates** released all monies in relation to this transaction that were held in its account to the firm of **Mose and Company Advocates** receipt of which the latter firm acknowledged and released the firm of **S. Ndege and Company Advocates** from any liabilities relating to the said transaction.

6. He disclosed that while under arrest at Gigiri Police Station, the 2nd Interested Party came with the above stated letter of discharge to inform the police that none of the Applicants had anything to do with this transaction but the DCIO, a **Mr. Mungai**, refused to take this letter as part of the evidence for consideration in the case and therefore it came as a great surprise to him when he was arrested together with the 1st Applicant on 17th April 2012 purportedly in relation to the transaction which neither of them had ever handled and also which had since moved together with all the money related to it with the 2nd Interested Party to the new firm of **Mose and Company Advocates**.

7. It was therefore his view that from the evidence available to him following disclosure by the police upon charging them in court, it is apparent that the police have decided to ignore all exculpating evidence that is glaring on the face of the statements and documents available to them and this is from the following factors:

(a) The charge sheet on the face of it states that on 7th April 2011, the Applicants received Kshs. 9,400,000 from Mercia Properties Limited by falsely pretending that they were in a position to sell a piece of land being LR No. 12715/517 Syokimau, a fact they knew to be false yet there is no statement before the police or any other document showing that either of the Applicants have ever been owners of the subject property or have ever offered it for sale to anybody. The evidence before court clearly shows that from the documents available the said property was in the name of one **Regina Nyokabi Kuria** and she was the one who was selling it.

(b) The evidence with the police clearly shows that **Mr. Stephen Mose** forwarded all documents in relation to the land parcel to the firm of **Lumumba & Lumumba Advocates** who were handling the transaction on behalf of the purchaser for due diligence and that the said firm did in fact conduct the due diligence and independently verified that the said parcel of land was registered in the name of **Regina Nyokabi Kuria** the seller.

8. He therefore believed that:

(a) The decision to charge and prosecute them in Kibera Chief Magistrate's Criminal Case No. 1987 of 2012 as consolidated with Kibera Chief Magistrate's Criminal Case No. 1455 of 2012 was made in breach of sound principles of fair administrative action.

(b) The decision to charge and prosecute them in Kibera Chief Magistrate's Criminal Case No. 1987 of 2012 as consolidated with Kibera Chief Magistrate's Criminal Case No. 1455 of 2012 was made in breach of principles of natural justice that no person should be condemned without a hearing.

(c) The decision to charge and prosecute them in Kibera Chief Magistrate's Criminal Case No. 1987 of 2012 as consolidated with Kibera Chief Magistrate's Criminal Case No. 1455 of 2012 was made without taking into account very relevant considerations.

(d) The decision to charge and prosecute them in Kibera Chief Magistrate's Criminal Case No, 1987 of 2012 as consolidated with Kibera Chief Magistrate's Criminal Case No. 1455 of 2012 as well as the further conduct of proceedings in the case is oppressive.

(e) The decision to charge and prosecute the 1st Applicant and myself in Kibera Chief Magistrate's Criminal Case No. 1987 of 2012 as consolidated with Kibera Chief Magistrate's Criminal Case No. 1455 of 2012 is a gross abuse of the criminal justice process.

9. The applicant submitted that since the Respondents did not respond to the application the facts set out in the statutory statement are not disputed.

10. It was submitted based on **Padfield vs. Minister of Agriculture and Fisheries [1968] HL** cited with approval in **Republic vs. The Judicial Commission of Inquiry into the Goldenberg Affair ex parte Hon. Professor George Saitoti** that unlawful behaviour might be constituted by an outright refusal to consider a relevant matter or wholly refusing to take into account a relevant matter. It was submitted that the Court ought to consider the failure by the investigating and prosecuting authorities to take into account the fact that all documents originating from the applicants' firm were signed by **Stephen Mose**; that the money in question was transferred to the latter's firm and an appropriate indemnity issued to the applicants' firm and that all due diligence carried out independently by the purchaser's advocate's revealed the facts as presented by the seller's advocates as correct.

Determination

11. I have considered the foregoing and taken into account the fact that the averments made by the applicants have not been controverted as the Respondents have not sworn any affidavit in reply.

12. 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.

13. 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."**

14. 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...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..."

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

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

16. 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".**

17. It is therefore clear that whereas the discretion given to the 3rd respondent to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the

Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence, the Court will not hesitate to bring such proceedings to a halt.

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

19. Therefore the determination of this case must be seen in light of the foregoing decisions.

20. Whereas Article 157(10) of the Constitution provides that the Director of Public Prosecutions shall 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, Article 157(11) provides:

> ***In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.***

21. Apart from that, section 4 of the ***Office of Public Prosecutions Act***, No. 2 of 2013 provides:

> ***In fulfilling its mandate, the Office shall be guided by the Constitution and the following fundamental principles—***
>
> ***(a) the diversity of the people of Kenya;***
>
> ***(b) impartiality and gender equity;***
>
> ***(c) the rules of natural justice;***
>
> ***(d) promotion of public confidence in the integrity of the Office;***
>
> ***(e) the need to discharge the functions of the Office on behalf of the people of Kenya;***
>
> ***(f) the need to serve the cause of justice, prevent abuse of the legal process and public interest;***
>
> ***(g) protection of the sovereignty of the people;***
>
> ***(h) secure the observance of democratic values and principles; and***

(i) promotion of constitutionalism.

65. It is therefore clear that the terrain under the current prosecutorial regime has changed and that the discretion given to the DPP is not absolute but must be exercised within certain laid down standards provided under the Constitution and the ***Office of the Director of Public Prosecutions Act***. Where it is alleged that these standards have not been adhered to, it behoves this Court to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, the Constitution itself. I associate myself with the sentiments expressed in **Nakusa vs. Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565** to the effect that :

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

22. Where therefore it is clear that the discretion is being exercised with a view to achieving certain extraneous goals other than those legally recognised under the Constitution and the ***Office of the Director of Public Prosecutions Act***, that would, in my view, constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion. As was held by **Wendoh, J** in **Koinange vs. Attorney General and Others [2007] 2 EA 256**:

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

23. It is now clear that even in the exercise of what may appear to be prima facie absolute discretion conferred on the executive the Court may interfere. The Court can only intervene in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in

a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**

24. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the DPP to investigate and prosecute ought to be interfered with.

25. In this case it is the applicant's case that the criminal charges have been preferred in circumstances which violate the rules of natural justice and in disregard of relevant matters. In exercising their discretion to charge a person both the police and the DPP's office must take into account and must exercise the discretion on the evidence of sound legal principles. As was held by **Ojwang, J** (as he then was) in **Nairobi HCCC No. 1729 of 2001 – Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another**:

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

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

27. In this case, it is alleged that the police were presented by evidence which clearly exonerated the applicants but the same was never taken into account. It was further contended that based on the evidence on record the charges as preferred could not lie. In the absence of the controverting evidence, I find that to charge an advocate who was involved in a conveyancing transaction with obtaining money by false pretences when the evidence shows that the advocate was not a party to the transaction in question reeks of malice. This is not to say that an advocate cannot in the course of a conveyancing transaction commit a criminal offence but the offence preferred against the applicants in the circumstances of this case was clearly inappropriate. The futility of proceeding with the case must have dawned on **Mr Kipkorir** the special prosecutor who informed this Court that he had advised the 1st Respondent to withdraw the charges as set out in the criminal case and that an appropriate advice was given to the Director of CID to proceed accordingly. In the absence of evidence to the contrary this Court has no basis upon which, based on the only evidence on record, it can find that that was not the case.

28. Accordingly, it is my view and I so hold that the levying of criminal charges against the applicants herein is ill motivated, malicious and an abuse of both investigatory and prosecutorial powers.

Order

29. In the result I find merit in the Notice of Motion dated 19th April, 2013.

30. Consequently I grant the following orders:

1. An order of Certiorari removing to this High Court for the purposes of being quashed the decision of the 1st Respondent or officers subordinate to him, and or the Kenya Police, to charge the Applicants with the offence of Obtaining Money by False Pretences in Kibera Chief Magistrates Criminal Case No. 1987 of 2012 now consolidated with Kibera Chief Magistrates Criminal Case number 1455 of 2012 which decision is hereby quashed.

2. An order of Prohibition directed at the 1st Respondent in person or through officers subordinate to him prohibiting him from carrying on with the further prosecution of the Applicants in Kibera Chief Magistrate's Criminal Case Number 1987 of 2012 as consolidated with Kibera Chief Magistrates Criminal Case number 1455 of 2012 or any other proceedings that may be instituted on the same basis as Kibera Chief Magistrate's Criminal Case Number 1987 of 2012 as consolidated with Kibera Chief Magistrates Criminal Case number 1455 of 2012.

3. An order of prohibition, prohibiting the 2nd Respondent from taking evidence, conducting proceedings or carrying on with the trial of the Applicants in Kibera Chief Magistrate's Criminal Case No. 1987 of 2012 as consolidated with Kibera Chief Magistrate's Criminal Case No. 1455 of 2012 or any other criminal proceedings that may be instituted on the same basis as Kibera Chief Magistrate's Criminal Case No. 1987 of 2012 as consolidated with Kibera Chief Magistrate's Criminal Case No. 1455 of 2012.

4. The costs of this application are awarded to the Applicants to be borne by the 1st Respondent.

Dated at Nairobi this 17th day of October, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Onyancha for Mr Ongoya for the Applicants

Cc Patricia