REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISC. APPLICATION NO. 20 OF 2014

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT, (CAP 26)

IN THE MATTER OF ARTICLES 47 AND 49 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF THE PRINCIPAL MAGISTRATE'S COURT AT MAKADARA

AND

IN THE MATTER OF AN APPLICATION BY STEPHEN MWANGI MACHARIA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF PROHIBITION

BETWEEN

REPUBLIC…….…….....……APPLICANT

AND

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

THE PRINCIPAL MAGISTRATE, MAKADARA….....2ND RESPONDENT

THE INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE……3RD RESPONDENT

EX PARTE: **STEPHEN MWANGI MACHARIA**

JUDGEMENT

Introduction

1. By a Notice of Motion dated 28th January, 2014, the *ex parte* applicant herein,**Stephen Mwangi Macharia**, seeks the following orders:

   (a) An order of *certiorari* directed at the 1st and 2nd Respondents quashing the charge sheet and the entire criminal proceedings against the Applicant in Makadara Criminal Case No. 122/2013; Republic Vs Stephen Mwangi Macharia

   (b) An order of prohibition directed at the 1st and 3rd Respondent restraining them from

undertaking any form of criminal proceedings against the Applicant on the basis of the same facts as those alleged in Makadara Criminal Case No. 122/2013 Republic Vs Stephen Mwangi Macharia

(c) An order of prohibition directed at the 2nd Respondent prohibiting the court from conducting or continuing to entertain any form of the proceedings in Makadara Criminal Case No. 122/2013 Republic Vs Stephen Mwangi Macharia or any other case founded on the same facts.

(d) An order of prohibition directed at the 3rd Respondent prohibiting the 3rd Respondent or any officers subordinate to him from arresting, harassing intimidating or in any way threatening the Applicant on the basis of the same facts as those set out in Makadara Criminal Case No. 122/2013 Republic Vs Stephen Mwangi Macharia.

(e) Costs of and incidental to this application be provided for.

(f) Such further and other relief that the honourable court may deem fit just and expedient to grant.

2. The application was supported by a verifying affidavit sworn by the applicant on 16th January, 2014.
3. According to him, on 19th June 2012 he entered into an agreement for the sale of his motor vehicle registration number KBN 363S with a lady by the name **Rachel Jennipher Mundia** (**Ms Mundia**) which agreement was drawn and witnessed by an advocate known as **Nyoike Sarah Waigwe**.
4. According to him, the consideration for the said transaction was agreed at Kshs. 1,200,000.00 (Kenya Shillings One Million Two Hundred only) out of which Kshs. 850,000.00 (Kenya shillings Eight Hundred and Fifty Thousand) was payable upon execution and the balance was to be paid on or before 30th June 2012.
5. According to him, generally, motor vehicles are sold on "an as is where is" basis and every buyer is expected to test and satisfy himself or herself as the status of the motor vehicle before entering into an agreement to purchase it. In the same way the said **Ms Mundia** undertook her due diligence on the car and entered into the agreement once she was satisfied that it was a legitimate transaction.
6. It was deposed that **Ms Mundia** paid an additional Kshs. 50,000 on 16th July 2012 (way beyond the completion time) leaving a balance of Kshs 300,000 and was given the original logbook and a transfer form executed in her favour after which she undertook the transfer of the motor vehicle into her name.
7. However when the applicant tried to follow up on the payment of the balance **Ms Mundia** started giving all manner of excuses including the fact that the motor vehicle was not in good working condition when it was sold to her and that she had spent a lot in repairs and even went to the extent of demanding that the applicant refund the amount that she had paid towards the purchase price for the motor vehicle which demand the applicant since there was no such recourse in their agreement the motor vehicle having been sold on "as is where is basis" as is normally the case in such transaction.
8. It was therefore shocking for the applicant when police officers from the flying squad arrested him and arraigned him in court on 8th January 2013 on the charge of obtaining money by false pretence contrary to section 313 of the ***Penal Code*** based on a complaint by the said **Ms Mundia.**
9. According to the applicant, he suspected that the primary motive of making a complaint of criminal nature to the police for a purely civil transaction against him was to coerce him to abandon his claim for the balance or to aid the complainant to avoid the transaction because in her opinion she did not get a good bargain. To the applicant, the charges are clearly trumped up so as to aid the complainant achieve the above mentioned motive as he could be accused of obtaining by false pretence where the complainant is already not only in possession of the subject matter of our agreement but is also the registered owner of the motor vehicle.

10. It was therefore averred that the Complainant was using the 1st and 3rd Respondents to draw up charges and have the applicant arraigned in court for an improper motive hence these charges should, not be allowed to stand. Based on his advocate's counsel the applicant was of the view that the use of criminal proceedings to force the settlement or performance of a civil obligation amounts to abuse of the court process and should not be entertained and as the charges were brought *mala fides* they should be quashed.
11. There was a further affidavit sworn by the applicant on 30th September, 2014 in which he deposed that even going by the position taken by the 1st and 3rd respondents, the facts do not disclose the offence of obtaining by false pretences and further that section 193A of the ***Criminal Procedure Code*** is not a bar to the orders sought herein.

1st and 3rd Respondent's Case

12. In opposition to the application, the 1st and 3rd Respondents filed a replying affidavit sworn by **Patrick Shiundu**, the Investigating Officer in respect of the subject criminal case on 20th May, 2014.
13. According to him pursuant to a complaint made by one **Racheal Jannipher Mundia** with regard to a motor vehicle, Mercedes Benz C 180 Silver in colour, Registration No. KBN 363S ("subject motor vehicle") that she bought from one the applicant, the police embarked on an investigation and established that the motor vehicle registration KBN 363S was a Mercedes Benz Compressor C180 was involved in an accident on 18/5/201 along Nairobi Sagana road and was taken by CIC Insurance Company and the wreckage/salvage was sold off to one **Tajinder Sighn Mattary** alias **TIPPSY**, a Junk Dealer situated along Baricho road in Nairobi who in turn sold the said salvage to the petitioner to who the original logbook was given and transfer form duly signed. On conducting forensic analysis on the motor vehicle the police established that the vehicle had both the chassis number and engine number tampered with and as a result the police sought a second opinion from DT Dobie the dealers of the Mercedes Benz in the country. After conducting a forensic analysis on the subject motor vehicle it was revealed that the chassis number on the body of the vehicle was WDC2030462R088086 Engine No. 27194630059240 while the electronic components in the vehicle that usually indicates the vehicle Identification Number indicated that the chassis number was WDC2030352R059975 while the Engine No. was 11195132404312.
14. According to the deponent, the result revealed disparities between the chassis number (that was welded on the body of the motor vehicle) and the electronic component which in essence should be the same in a motor vehicle proving the fact that the motor vehicle is not the motor vehicle with the Registration No. KBN 363S. According to him, from his investigations it was evident that the applicant was fully aware that despite the documentation of motor vehicle registration KBN 363S a Mercedes Benz Compressor C180 being genuine the physical subject motor vehicle may have been stolen and the chassis number and registration number tampered with by the applicant to make the motor vehicle seem genuine.
15. It was therefore deposed that the allegation that the complainant was unable to pay the balance on the purchase price of the vehicle was false.
16. The deponent further contended that section 193A of the ***Criminal Procedure Code*** provides that notwithstanding the provisions of any other written law, the subsistence of a related civil proceeding shall not be a ground for any stay, prohibiting or delay of the criminal proceedings; the Applicant has been charged with an offence known to law and the prosecution has sufficient evidence to sustain the respective Charge and the issues meant to vindicate the Applicant should be canvassed in the criminal court and fairly determined; and that the Application is frivolous and an abuse of the court process and meant to circumvent the criminal justice system.
17. The deponent therefore was of the view that the Applicant intended to defraud the complainant hence the police did not act illegally or contravene any code of regulation; and neither did they act under the control or direction of any party; but were independently discharging their duties after conducting thorough investigations as mandated by Article 244 of the constitution of Kenya, 2010 and the ***National Police service Act***, section 24 and 35, *inter alia* mandates the police with the investigations of crimes and apprehension of offenders. To him, the Application was based on deliberate concealment, distortion and non-disclosure of material facts made with the latent intent

to mislead the Honourable Court as to the true facts leading to the subject criminal complaint and charges.

18. To the deponent, the Respondents acted within their respective mandates under the relevant establishing legislation and in the circumstances, it cannot be said that the actions of the Respondents were in breach of the mandate vested upon them.

Determinations

19. I have considered the application, the affidavits in support thereof, the affidavit in opposition to the application and the submissions filed as well as the authorities relied upon in support thereof.
20. It bears repeating 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.
21. The general rule in these kinds of proceedings is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution. Therefore mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, is not, on its own and without more, a ground for halting such proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. An applicant who contends that he has a good defence in the criminal trial ought to be advised to raise the same in his defence before the criminal trial instead of invoking this Court's jurisdiction with a view to having this Court determine such an issue as long as the criminal process is being conducted bona fides and in a fair and lawful manner. 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.
22. 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."

23. 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."

24. 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....The invocation of the law, by whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far from that which the courts indeed the entire system is constitutionally mandated to administer..."

25. The Court proceeded:

"In the instant case it is... 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... ...[W]here the prosecution is an abuse of the process of court...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...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".

26. The Court was however of the view that:

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

27. The duty and mandate of the police was appreciated in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR** where it was held:

"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".

28. 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. However, it must be emphasised that 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.

29. It was contended that the courts cannot direct the 1st Respondent on how to exercise his powers under Article 157 of the Constitution as that would amount to emasculating the said respondent and rendering the independence of that office constitutionally irrelevant. With due respect this broad statement cannot be taken to be absolutely correct. In exercising its mandate under section 4 of the ***Office of the Director of Public Prosecutions Act***, the Respondent must take into account the provisions of section of the said Act which 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.***

30. It follows that the discretion and powers given to the 1st Respondent under Article 157 of the Constitution cannot be said to be unfettered. 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."

31. Similarly in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001**, it was held:

"**Although the Attorney General enjoys both constitutional and statutory discretion in the prosecution of criminal cases and in doing so he is not controlled by any other person or authority, this does not mean that he may exercise that discretion arbitrarily. He must exercise the discretion within lawful boundaries...Although the state's interest and indeed the constitutional and statutory powers to prosecute is recognised, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters....."**

32. Therefore this Court is perfectly entitled in appropriate cases to interfere with the decision of the DPP to commence and proceed with prosecution.
33. In this case, the *ex parte* applicant's case is that the offence with which he is charged is maliciously brought since the subject motor vehicle was duly sold to **Ms Mundia** who after inspecting the same partly paid for the same but failed to settle the balance and thereafter sought to rope in the 3rd Respondent to evade her contractual duties. However, from the applicant's own averments, it comes out that the said **Ms Mundia** seemed to have been dissatisfied with the state of the subject vehicle and sought to rescind the contract by demanding her money back, a demand which the applicant rejected.
34. The Respondent's position is that the subject vehicle was from the investigations fraudulently interfered with and that the applicant was aware of such interference at the time of the sale transaction. Whereas this court cannot determine that allegation, if the same turns out to be true, it may well found a charge for obtaining money by false pretences. In other words it cannot be said at this stage based on the material before the Court that the 3rd Respondent had no reasonable and probable cause for preferring the said charges against the applicant. As to whether the said charges will succeed is another matter altogether which matter can only be resolved by the trial court after hearing and analysing the evidence to be presented before it.
35. 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. 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. 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 showing the applicants' innocence yet that is hardly the function of the judicial review court.
36. Whereas the applicant may well prove at the trial that the criminal charges cannot be successfully prosecuted and that he is after all innocent, it is not for this court to consider the strength of the prosecution case vis-à-vis the defence and make a determination as to which one has more weight. As opposed to where the prosecution has no evidence at all the court will not halt a prosecution simply because the court is of the view that the evidence would not in all probability lead to a conviction. To do that would amount to this court in a judicial review proceedings stepping into the shoes of the trial court and usurping the powers of the trial court.
37. 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

38. Consequently, I find the Notice of Motion dated 28th January, 2014 unmerited and I hereby dismiss the same with costs.
39. It is so ordered.

Dated at Nairobi this 27th day of November, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Kithiki for Miss Spira for the Respondents

Cc Richard