



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISC. APPLICATION NO. 444 OF 2013

IN THE MATTER OF ARTICLE 165(6) OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
ORDER OF PROHIBITION**

**REPUBLIC.....
.....APPLICANT**

AND

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

**THE ATTORNEY GENERAL.....2ND
RESPONDENT**

**THE CHIEF MAGISTRATE IN THE CHIEF MAGISTRATE'S COURT AT THIKA....3RD
RESPONDENT**

AND

**PERCY ARTHUR OYUGI OPIO.....INTERESTED
PARTY**

***EX PARTE:* DAVID MATHENGE
NDIRANGU**

JUDGEMENT

1. By a Notice of Motion dated 12th May, 2014, the applicant herein, **David Mathenge Ndirangu**, seeks the following orders:

1. An order of prohibition directed at the 3rd Respondent to prohibit the 3rd Respondent from proceeding with the trial of the Applicant in Thika CMCCR No. 3906 of 2012, Republic vs David Mathenge Ndirangu.

2. Costs of this application be borne by the Respondents.

2. The application was supported by a verifying affidavit sworn by the applicant on 11th December, 2013.
3. According to the applicant, sometimes in 1990, he acquired a beneficial interest over a parcel of land measuring approximately 1 ¼ acre from **Githunguri Constituency Ranching Company Limited** (hereinafter referred to as the Company) and was issued with certificate No.B3094 dated 12th November, 1990. He thereafter retained the beneficial interest until the year 2009 when he was registered as the proprietor of the parcel and issued with a title to the parcel Title No. Ruiru East Block 1/104 (hereinafter referred to as the suit property). He then sold the parcel of land to the Interested Party in 2010 at a consideration of Kshs 5,800,000/- which was fully financed by Equity Bank Limited.
4. According to the applicant, he observed all the terms of the agreement for sale and the Interested Party was on 12th March, 2013 registered as the proprietor of the parcel with a charge to Equity Bank Limited to secure a sum of KShs.7,000,000/-. Prior to the completion date as stipulated in the agreement for sale, the applicant pointed out the beacons to the Interested Party and he confirmed that the parcel was vacant and undeveloped.
5. The applicant was therefore surprised when he was served with court papers in **Nairobi HCELC No.617 of 2011, David Mburu Wakaimba vs. Chief Land Registrar and 3 Others** (hereinafter referred to as the civil case) where the plaintiff is claiming ownership of the parcel and alleging fraud and collusion between the defendants. According to the applicant, the Interested Party has filed a defence jointly with Equity Bank Limited in which he is defending the title issued to him and has counterclaimed against the plaintiff for him to be declared the bona fide owner of the parcel. Similarly, the Chief Land Registrar has also filed a defence disowning the plaintiff's claim and further states that all transactions affecting the parcel were in accordance with the law per the legal requirements.
6. He deposed that in the same vein, the Interested Party complained to the police that the applicant obtained money from him by falsely pretending that the former could sell the parcel in question to the later and the applicant was subsequently been arrested and arraigned in court by the 1st Respondent on 10th September, 2012 before the 3rd Respondent in the said Criminal Case for an alleged charge of obtaining land registration by false pretences contrary to section 320 of the **Penal Code** and obtaining money by false pretences contrary to section 313 of the **Penal Code**.
7. According to the Applicant, the complainant in the charge sheet is indicated as the Republic through Kenya Police Ruiru and the Interested Party is named as the Chief witness and neither the Chief Registrar nor the District Registrar, Thika District is the complainant in the said Criminal Case despite them being the custodian of the records in the Thika District Lands Registry where the alleged offence in count I is said to have taken place. He averred that the ownership of the suit property is the main issue for the Court's determination in the civil case and that both the plaintiff in the same suit and himself claim to trace their titles to the Company which curiously has not been made a party or complainant or witness in either the civil case or the criminal.
8. In the applicant's view the pleadings filed on behalf of the Interested Party in the civil case are inconsistent with the charges in the said criminal case and the Interested Party is advancing contradictory positions in the two cases which may lead to conflicting findings thereby causing legal absurdity. To him, the criminal case is an abuse of the Court process and is meant to embarrass him to ensure that he does not adequately advance his defence in the civil case and give the plaintiff an upper hand and is otherwise a fishing expedition for evidence for use in this latter case.
9. To the applicant, this Court has supervisory jurisdiction over the 3rd Respondent by dint of Article 165(6) of the Constitution of Kenya to ensure that the process before the 3rd Respondent is not abused nor does it violate fundamental rights and freedom of individual citizens and hence it is in the interest of justice and fairness that an order of prohibition do issue to prohibit the 3rd Respondent from proceeding with the trial of the Applicant in the criminal case in order to ensure there is parity of arms in the civil case and also that the 3rd Respondent and the Environment and Land Court do not arrive at conflicting decisions.

1st Respondent's Case

10. In opposition to the application the 1st Respondent filed the following grounds of opposition:

1. **THAT the 1st Respondent has a Constitutional and statutory duty to conduct prosecutions and this duty cannot be unnecessarily fettered, in any case no prayer has being sought as against the 1st respondent.**
2. **THAT section 193A of the CPC provides that the fact that a matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.**
3. **THAT an order of prohibition cannot issue in the circumstances of this case as the 3rd respondent is carrying out its constitutional and statutory mandate of conducting criminal trials..**
4. **THAT the application is without merit and should be dismissed with cost.**

11. Apart from the said grounds of opposition the 1st Respondent filed a replying affidavit sworn by PC **Patrick Kiplangat Ronoh**, a police constable attached to the Divisional Headquarters at Ruiru and a lead investigating officer in the said criminal case.

12. According to the deponent, it is apparent from the application herein that the Applicant is protesting about the said criminal case. However, it is mandate of the CID and in the public interest that the CID receive of complaints from the public, carry out investigations and upon reasonable grounds a prosecution may be instituted. According to him, he was duly instructed by the In-charge CID Ruiru office to conduct Investigation into a complaint made by **David Mburu Wa Kaimba**, the owner of **Ruiru East Block 1/104** situated at Kihinguro area on the 8th day of January, 2011 to the effect that the complainant had learned that there was somebody who had fenced the said land without his knowledge and was claiming the ownership of the said property.

13. Upon receipt of the complain, investigations commenced and after completion of the investigations it was found through the records at the Ministry of Lands Thika and in the office of Company that indeed the accused person, the applicant herein had forged the documents in question and therefore the title deed of land in question was acquired through fraudulent documents. From his investigations he established that the interested party herein **Percy Arthur Oyugi Opio** charged a title deed obtained through fraudulent means; that the land in question herein originally belonged to the **Benard Kuria Waweru** who later transferred it to the complainant herein **David Mburu Wakaimba** the owner of the suit property herein; that the share certificate which the applicant purport that it was issued by the Company did not originate from the said offices and that the investigation revealed that the title deed in question was obtained through forgery.

14. He therefore formed the opinion that without the supporting documents the title deed charged by the interested party herein has no legal basis and the purported whole transfer transaction was done fraudulently by the applicant hence he decided to charge the applicant in the said criminal case since he had reason to believe that the evidence is sufficient to support a prosecution.

15. In his view, under Article 157 (6) of the Constitution of Kenya 2010, the 1st Respondent exercises the state powers and functions of prosecution which entails the institution, undertaking, taking over continuance and or termination of criminal proceedings amongst other functions and duties in addition to thereto, the 1st Respondent in the discharge of its duties and functions, is required to respect, observe and uphold the provisions of the Constitutions. In his view, the applicant has not demonstrated that in making the decision to prefer criminal charges against him, the 1st Respondent has acted without or in excess of the powers conferred upon them by the law or have infringed, violated, contravened and or in any other manner failed to comply with or respect and observe the foregoing provisions of the Constitution or any other provision thereof. Rather it was the deponent's position that the applicant is seeking to curtail the mandate of the criminal justice system actors enshrined in within the Constitution of Kenya; that the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be the ground for any stay, prohibition or delay of the criminal proceedings; that the applicant has not adduced sufficient evidence before this Court on the merit of each case

to show that prejudice has been occasioned; that the accuracy and correctness of the evidence or facts gathered in any investigation can only be assessed and tested by the trial Court which is best equipped to deal with the quality and sufficiency of evidence gathered and properly adduced in support of the charges; that the 1st Respondent does not require the consent of any person or authority for the commencement of criminal proceedings; that the 1st Respondent does not act under the direct or control of any person or authority and as such Article 249(2) of the Constitution, provides that an independent office is subject only to the Constitution and the law and is not subject the direction or control by any person or authority; and that allegation by the applicant is without merit, legal reason or backing.

16. The deponent therefore was of the opinion that in view of the foregoing, the court should exercise extreme care and caution not interfere with the Constitutional powers of the 1st Respondent to institute and undertake criminal proceedings and should only interfere with independent judgment of the 1st Respondent if it is shown that the exercise of powers is contrary to the Constitution, is in bad faith or amounts to abuse of process. In this case, however, the applicant has failed to demonstrate that the 1st Respondent has not acted independently or as acted capriciously, in bad faith or has abused the legal process in manner to trigger the High Court's intervention and has further failed to demonstrate that the 1st respondent lacked jurisdiction or departed from the rules of natural justice in directing that the applicant be charged with the criminal offences hence the application ought to be dismissed in its entirety.

2nd and 3rd Respondents' Case

17. On behalf of the 2nd and 3rd Respondents the following grounds of opposition were filed:

- 1. That the application herein is unmerited and therefore an abuse of the due process of the court.**
- 2. That the application herein is intended to curtail the statutory obligations and duties of the magistrate.**
- 3. That should the applicant be charged he has an opportunity before the trial court to prove and or demonstrate innocence.**
- 4. That the magistrate is carrying out its constitutional and statutory mandate of conducting criminal trials.**
- 5. That judicial review orders are discretionary in nature and should not be granted in the case herein.**

Applicant's Submissions

18. It was submitted on behalf of the applicant that in this case the applicant has presented material which demonstrate that his prosecution in the criminal case is not being undertaken in good faith and is an abuse of the process of the Court process. While the complainant ought to have been the Land Registrar, it is submitted that the Registrar has in the civil proceedings filed pleadings in which he is defending the applicant's title. Similarly, the interested party from whom it is purported the applicant obtain the money has in the same proceedings stated that she has good title. It was therefore submitted that it is clear that the applicant's prosecution is not only irrational and unreasonable but also not in good faith and may well be a means of forcing the applicant to accede to the claim and amounts to an abuse of the Court process.

19. In support of the submissions, the applicant relied on **Republic vs. The Anti Banking Fraud Unit & Others ex parte Selina Betty Pambe Sande HC JR Misc. Application No. 289 of 2013** and **Investments & Mortgages Bank Limited (I & M) vs. Commissioner of Police & Others [2013] KLR.**

1st Respondent's Submissions

20. On behalf of the 1st Respondent it was submitted that the DPP is conferred with State powers of prosecution under Article 157 of the Constitution and as such, the trial sought to be barred was out of a decision made pursuant to those powers; that it has not been demonstrated that the 1st respondent acted in excess or without powers; that the High Court cannot take place of the DPP or Director of Criminal Investigations; and that it is only after investigations and analysing of evidence and upon reasonable grounds that a prosecution may be instituted hence only a trial court can competently make a finding whether or not a criminal offence was committed after hearing evidence. In support of this submission High Court Petition No. 369 of 2013 – **Thuita Mwangi & 2 Others vs. the Ethics & Anti-Corruption Commission and 3 Others** was cited.
21. It was submitted that to grant the orders sought would be tantamount to ordering the DPP not to discharge his constitutional mandate and functions. As the respondents acted within the provisions of Article 244 of the Constitution as read with section 24 of the ***National Police Service Act***, it was submitted that the order of prohibition cannot be sustained. Further the 3rd Respondent cannot be prohibited from prosecuting the applicant where the 1st Respondent has made a decision to charge him as there is sufficient evidence to prosecute and that an order of prohibition cannot issue against an action or decision which has been undertaken or made in execution and discharge of a Constitutional or legal mandate hence the application is unmeritorious and cannot be sustained.
22. According to the 1st Respondent the applicant should allow the Magistrate's Court to carry out the criminal proceedings as that is where the rules of natural justice will be followed and he will be afforded an opportunity to put his case forward. To the 1st Respondent the applicant is abusing the court process by trying to get a leeway to avoid criminal charges being brought against him. In its support the 1st Respondent relied on **Yabesh Amoro vs. the DPP & 2 Others JR Case No. 250 of 2011** and **Bryan Yongo vs. Attorney General High Court Civil Case No. 61 of 2006 and 196 of 2006**.
23. It was further submitted that the allegation that there is a civil case pending in court on the same issues cannot in light of section 193A of the ***Criminal Procedure Code*** stop the criminal case and relied on **William S K Ruto & Another vs. Attorney General Civil Suit No. 1192 of 2005**.

2nd and 3rd Respondents' Submissions

24. On behalf of the 2nd and 3rd respondents it was submitted that any unlawful act is a matter of evidence and that the police and the DPP have special powers of investigations and if satisfied that there are reasonable grounds for suspecting that an offence has been committed by the person investigated, that person will be charged for the offence.
25. It was submitted that matters of fraud are complex and require investigations and that the offenders be brought to book at the completion of the investigations hence the 3rd Respondent has powers to conduct trial. It was submitted that the grounds relied upon do not show that the applicant will not get a fair trial as it has not been shown that the 3rd trial acted without or in excess of jurisdiction.
26. It was further contended that the fact that there exists a civil suit is not a bar to any criminal proceedings and section 193A of the ***Criminal Procedure Code*** was cited in support of this contention.

Determination

27. I have considered the material presented before the court in the instant application.
28. As this Court noted in its ruling on the application for leave and stay, it is clear that the whole dispute between the parties herein rests on the ownership of the suit parcel of land. The Court noted that in matters of ownership of land, the records kept by the Land Registrar play a crucial part and that the applicant had exhibited a copy of the title deed which *prima facie* showed that he was the registered proprietor of the suit parcel of land and that the Chief Lands Registrar seemed

to be unaware of the allegations made by the plaintiff in the related civil suit.

29. **Majanja, J** in Petition No. 461 of 2012 – **Francis Kirima M'ikunyua & Others vs. Director of Public Prosecutions**, when dealing with situations where there exist criminal and civil proceedings arising from the same facts pronounced himself as follows:

“It is very clear that the criminal process and the resultant court proceedings are being used to settle what is otherwise civil dispute which has been the subject of several court cases and indeed decisions. It is clear to me that the contending parties wish to use the criminal process to score points against each side in order to assert the rights of ownership. The use of the criminal process in this manner is not uncommon within this jurisdiction to find that intractable land disputes mutate into criminal matters. It is not difficult to see why. In criminal cases the State’s coercive power is brought to bear upon the individual and where we have an inefficient system to settle civil claims, a person who can tie his opponent in the criminal justice system and ultimately secure a conviction will no doubt have an advantage over his opponent.”

30. 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, 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... 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”.

31. The Court went further to hold that:

“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 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 fact that it has not been argued before however does not mean that the law stops dead at its tracks. An order of prohibition looks to the future and not to the past; it is concerned with the happenings of future events and little, if any, of past events...So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions...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 Court 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...However, it does not mean that a civil suit and a criminal case cannot co-exist at any one particular time. This is because the section envisages the re-prosecution of a criminal case substantially dealt with either in fact or law, a case in which issues have been laid to rest. There is no mention in the section that the simultaneous existence of a civil and criminal cases is constituting double jeopardy. The courts have, however stated that the power to issue an order of prohibition to stop a criminal prosecution does not endow a court to say that no criminal prosecution should be instituted or continued side by side with a civil suit based on the same or related facts, or to say that a person should never be prosecuted in criminal proceedings when he has a civil suit against him relating to matters in the criminal proceedings....”

32. It is therefore clear that this Court has the power and indeed the duty to bring to a halt criminal proceedings where the same are being brought for ulterior motives or for achievement of some collateral purposes notwithstanding the constitutional and legal powers conferred upon the DPP and the police. 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.”

33. 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.”

34. The mere fact that criminal proceedings have been commenced does not bar the court from halting them as long as the same have not been determined. In my view, it is only where the decision in question is complete that the Court cannot stay the same. However where what is sought to be stayed is a continuing process, the same may be stayed at any stage of the proceedings. In criminal proceedings the mere fact that the proceedings are ongoing does not bar the Court from staying the same at any stage of the proceedings before they come to an end. Accordingly this Court still has jurisdiction to stay the prosecution of the criminal proceedings.
35. Whereas the mere fact that the facts of the case constitute both criminal and civil liability does not warrant the halting of the criminal case, in **Republic vs. Chief Magistrate’s Court at Mombasa Ex Parte Ganjee & 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...”

36. It was similarly held by the Court of Appeal in **Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others Nairobi Civil Appeal No. 56 of 2012 [2013]eKLR** that:

“While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of administration of justice to use criminal justice process as

a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court. This is case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations”

37.The role of police in criminal process was recognised 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”.

38.However, it was similarly appreciated 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”.

39.As this court appreciated at the time of considering the application for leave, persons who ought to be at the forefront in ensuring the wheels of the criminal process runs, the Lands Registrar and the interested party herein seems to have taken a back seat in the whole process. The same position has not changed at all. It is therefore my view that in the instant application the prosecutor has not demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution thus rendering the prosecution malicious and actionable. As was held in **Githunguri vs. Republic (1985) KLR 91:**

“A prosecution is not to be made good by what it turns up. It is good or bad when it starts.”

Order

40.In the premises, I find merit in the Notice of Motion dated 12th May, 2014, and I grant the following orders:

1. An order of prohibition will issue directed at the 3rd Respondent prohibiting the 3rd Respondent from proceeding with the trial of the Applicant in Thika CMCCR No. 3906 of 2012, Republic vs David Mathenge Ndirangu pending the hearing and determination of Nairobi HCELC No.617 of 2011, David Mburu Wakaimba vs. Chief Land Registrar and 3 Others.

2. The costs of this application be borne by the 1st Respondent.

Dated at Nairobi this 19th day of December, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Nyonje for Mr Mungai for the Applicant

Mr Ndege for the 1st Respondent

Cc Richard