REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Case 1089 of 2007

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
BETWEEN

REPUBLIC .....APPLICANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE COMMISSIONER OF POLICE..... 2ND RESPONDENT

THE DIRECTOR OF C.I.D.....3RD RESPONDENT

THE CHIEF MAGISTRATE KIBERA.....4TH RESPONDENT

AND

AVITON ENTERPRISES LTD.....INTERESTED PARTY

EX PARTE:
1. **JOHN WACHIRA MACHARIA**
2. **JULIUS NDIRITU MIRITI**
3. **JARED ODUOR OSODO**

JUDGEMENT

INTRODUCTION

1. By a Notice of Motion dated 11th October 2007, file in Court on 11th October 2007, the ex parte applicants herein seek the following orders:

1. An order of prohibition to prohibit the Attorney General, the Commissioner of Police, the Director of Criminal Investigations Department or any other police officer from arresting and/or prosecuting the applicant in respect of the alleged complaints from one Antony Kimemia Gathumbi for Aviton Enterprises in respect of transactions arising from and/or connected to the sale and/or connected to the sale and/or conveyance of Title Number NAIROBI/BLOCK 83/893.

2. An order of prohibition to prohibit the Attorney General, the Director of Criminal investigations, the Commissioner of Police from arresting and instituting the Applicant based on the alleged complaints of one Antony Kimemia Gathumbi for Aviton Enterprises in respect

of conveyance of Title Number NAIROBI/BLOCK 83/893.

3. An order of certiorari to bring up before this court and quash the decision of the Commissioner of Police, the Hon-Attorney General, director of CID or any other police officer to charge the applicant with the offence of obtaining money by false pretences or any other offence related to complaints by one Antony Kimemia Gathumbi for Aviton Enterprises in respect of sale of a portion of Title Number NAIROBI/BLOCK 83/893.

4. An order of mandamus to issue compelling the Attorney general, the Commissioner of Police, the director of Criminal Investigations, their servants, agents or whomsoever acting on their behalf not to charge the applicant in connection with a complaint by one Antony Kimemia Gathumbi for for Aviton Enterprises in respect of sale of Title Number NAIROBI/BLOCK 83/893.

5. That the costs of the application herein be provided for

2. The said Motion is based on the following grounds:

(a) The decision by the Respondents to arrest, institute and/or undertake criminal proceedings against the applicant on the basis of the complaints of one Anthony Kimemia Gathumbi for Aviton Enterprises is driven by ulterior motives is malafides oppressive and unfair.

(b) The dispute herein, if any, relates a conveyance to which the applicant merely participated as a member of the Board of trustees, which conveyance was above board the alleged complainant executed all the documents with the advice and in the presence of his advocates.

(c) That it would be unfair and oppressive to arrest and/or prefer any criminal charges against the applicants whereas the alleged complainant has already instituted a criminal suit no. 2168 of 2006 Kibera Law Courts, Nairobi which civil suit relates the same subject matter and it is still pending for determination.

(d) That the alleged complainant has in the suit above offered an out of court settlement and there has been a counter offer from the applicant's Board of trustees which offers are still under consideration.

(e) That it would be unfair and oppressive to arrest the applicant on the basis of the complaints of the said Antony Kimemia Gathumbi for Aviton Enterprises when in fact the alleged complainant is in possession of the property herein.

(f) The Decision by the Respondents to arrest or institute or undertake criminal proceeding against the Applicant is tainted with irrationality impropriety, illegality bad faith and is an abuse of police power.

(g) That the intention and/or decision of the respondents to arrest and charge the applicant is a gross abuse of prosecution vested in the Attorney general because the said power is being used for extraneous purposes i.e. to settle what is a purely civil dispute.

(h) **That there is no criminal offence disclosed in the complaints of Antony Kimemia Gathumbi for Aviton Enterprises as his discontent merely relates delay in getting title documents to a portion of property purchased from the Applicant's Board of Trustees.**

APPLICANTS' CASE

3. The Motion is supported by Statement filed on 25th September 2007 as well as the affidavit verifying the facts relied on sworn by **Jared Osoro Oduor**, the 3rd applicant herein, on 25th September 2007.

4. According to the deponent, the applicants are registered officials of a self-help group known as **Wazee**

Makadara Self Help Group (hereinafter referred to as the Group) and are the accused persons in Kibera Criminal Case Number 2168 of 2006 (hereinafter referred to as the Criminal Case). There is, however, also HCCC No. 193 of 2006, Nairobi (hereinafter referred to as the Civil Case) filed on 3rd March 2006 in which the deponent is the 2nd plaintiff together with 2nd and 1st applicants as 1st and 3rd plaintiffs respectively in which the High Court issued restraining orders against the defendant therein. According to him the Group, whose officials are the applicants herein, is the sole proprietor of the suit property in the Civil Case. On 23rd February 2004 the Defendant in the Civil Case engaged surveyors to establish beacons on the plots within the land and following the plaintiff's report to the OCPD Buru Buru the surveyor was stopped from doing so and the plaintiffs were advised to go to Court. However the Defendant has persistently disobeyed the said restraining orders and commenced the subdivision under the company name of **M/s Aviton Enterprises Ltd** (hereinafter referred to as the Company) through **Anthony Kimemia Gathumbi**, a son of one **Habib Omar Kongo** the complainant in the Criminal Case both of whom are directors of the said Company. According to the deponent the Company has been joined as a Defendant in the Civil Case since it is being used to defy the said orders. It is therefore deposed that the Criminal charges are preferred against the applicants with the intention of circumventing the course of justice in a purely civil dispute.

RESPONDENT'S CASE

5. Although the Respondent had filed a replying affidavit, the same was by a ruling dated 22nd February, 2011 expunged from the record. Accordingly, there is no replying affidavit from the Respondent.

INTERESTED PARTY'S CASE

6. In opposition to the application, the Respondents filed a replying affidavit sworn by **P C Kimathi** on 22nd July 2009. According to the deponent, he is a police officer attached to the CID Nairobi Area attached to the investigations concerning the forgery of documents relating to L R No. Nairobi Block 83/530 and that some time on 24th March 2006 **Omar Habib Kongo** reported to the CID Nairobi Area that the ex parte applicants had forged documents relating to a parcel of land belonging to his company and recorded a statement to the effect and went ahead to furnish to the CID copies of documents for investigations. Subsequent investigations revealed that the documents purported to create LR No. Nairobi Block 83/893 in favour of the ex parte applicants were false or forged and pursuant thereto the ex parte applicants were arrested and charged in the said Criminal Case with forgery related offences. According to him as the decision to charge the applicants was made more than six months after the filing of the current application, the same cannot be the subject of an order of certiorari. It is deposed that the ex parte applicants subsequently withdrew the Civil Case thus the issue of abuse of criminal justice system by the respondents nolonger exists. In his view the complaint in the offences with which the ex parte applicants are charged with is the Ministry of Lands officials to whom the forged documents were presented for execution. By withdrawing the Civil Case, it is contended that the current application has been overtaken by events and is spent.

7. There was also a replying affidavit sworn by **Anthony Kimemia**, a Director of the Interested Party herein, on 27th July 2012, in which he deposed that he lodged a complaint with the Police and the CID Department on behalf of the Interested Party against the ex parte applicants for various offences relating to forgery in respect of land parcel Nairobi Block 83/530. Pursuant to investigations lodged thereafter the applicants were charged with the said offences. According to him the ex parte applicants falsified the documents relating to the said land owned by the Interested Party and has been busy duping members of the public to buy land on the strength thereof. The applicants were charged on 6th July 2006 and their application for judicial review filed after 25th September 2007 beyond the six months provided for seeking certiorari hence the said remedy is unavailable to them. By taking part in the criminal proceedings without filing these proceedings earlier, it is admitted that the ex parte applicants acquiesced and waived their right to apply for the Judicial Review remedies. Since the applicants have been charged it is deposed that prohibition can nolonger issue while with respect to mandamus sought it is deposed that the ex parte applicants have not shown that they have a right to compel the public authority to perform the duty in question. Further mandamus can only issue to compel a positive order and not to prohibit the

performance of a duty. In his view the ex parte applicant's remedy is to marshal a strong defence in the criminal court since the orders sought cannot issue if there is an alternative remedy since judicial review is discretionary and the conduct of the ex parte applicants does not deserve its exercise. After obtaining the stay to the in these proceedings, it is deposed the ex parte applicants became lethargic about prosecuting these proceedings and totally lost interest in it but have instead continued to present the said false document to various authorities purporting them to be genuine and have filed the Civil Case using the said forged documents on the strength of which they have obtained interim orders. It is therefore contended that this application ought to be dismissed.

EX PARTE APPLICANT'S SUBMISSIONS

8. It was submitted on behalf of the ex parte applicants, while reiterating the contents of the supporting affidavit, that the police have no powers to arrest or institute or undertake criminal proceedings against a subject based on irrationality, procedural impropriety, illegality, bad faith and abuse of police power. Further, it is submitted that the police have no power to arrest and charge a subject for extraneous purposes and criminal law is not to be used oppressively to punish acts which in truth might be technically a breach of criminal law but which contain no real vice but which can only be best handled under a process other than the criminal process namely any of a different systems of civil redress applicable. Where a case is more suitable for trial in Civil Courts than it can be solved in a criminal tribunal, then a decision to pursue a Criminal option must be suspect for ulterior motives other than for search of justice. In the ex parte applicants' view, whereas the Police and the Attorney are not subject to control in the exercise of power to arrest and prosecute criminal offences, that power must be upon reasonable grounds.

9. In his oral address to Court, **Mr. Obura**, learned counsel for the applicant submitted that the orders of the Commissioner of Police to charge the applicant is in bad faith, is an abuse of the court process, is un-procedural and based on irrationality and impropriety because it is trite law that a matter which is purely civil ought not to be criminalised. A civil matter ought not to be subject of criminal case. In counsel's view, the filing of charges in the criminal case against the applicants falls under the umbrella of the principles enunciated because the applicants had filed a civil suit against **Aviton Enterprises** and **Habib Omar Kongo** claiming ownership of the land and restraining orders were issued. During the pendency of this suit, on 6th July 2006 criminal charges were preferred against the applicants in respect of the same parcel of land with the complaints being the same interested parties herein. Accordingly counsel was of the view that this is a glaring case of abuse of court process of circumventing the civil process and in bad faith. In his submission learned counsel relied on **Republic vs. Commissioner of Police Ex Parte Tarus t/a Tarus & Co. Advocates Miscellaneous Application No. 476 of 2003 [2003] KLR 583**.

RESPONDENTS' SUBMISSIONS

10. On behalf of the Respondent, **Mr Njogu**, their learned counsel that it had not been demonstrated that there was bad faith exhibited by the police who were discharging their mandate to investigate matters where there are reasonable apprehension and the offences were known to law. The fact that there is a civil case, it was submitted, does not mean it cannot be subject of criminal case. It was submitted that it is not for this court to investigate the facts since the Director of Public Prosecutions is mandated to institute proceedings where criminal offence is proved to have been committed hence the application ought to be dismissed.

INTERESTED PARTY'S SUBMISSIONS

11. On behalf of the Interested Party it was submitted, while reiterating the contents of the replying affidavit, that the applicants were charged in July 2006 and the application for judicial review was filed sometimes after 25th September 2007 beyond the stipulated six months. According to the Interested Party Judicial Review is the law concerning control by the court of the powers, functions and procedures of administrative authorities and bodies discharging public functions and courts do not come to review the powers of public bodies, or the decisions which have been made but the manner in which they have been arrived at. For this submission reliance was placed on **Cape Holdings Limited vs. A G & 2 Others**

Misc. Civil Application No. 240 of 2011. The Interested Party, it is submitted had a right to lodge a complaint with the police and having done so and pursuant to investigations by the police the charges were preferred. According to the Interested Party the Police and Attorney General are not subject to control in the exercise of their power to arrest and prosecute criminal offences as long as the same is exercise don reasonable grounds. However, it has not been proved that the police were acting on unreasonable grounds and there is no proof of irrationality, procedural impropriety, illegality, bad faith and abuse of police powers since the applicants'' allegations are not proved. The fact that there are pending civil proceedings, it is submitted does not bar institution of criminal proceedings. Since the decision whether or not to grant the orders sought is discretionary, it is submitted based on **R vs. Kenya National Human Rights Commission Ex Parte Uhuru Kenyatta Nairobi Misc. 86 of 2009** and **R vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR**, that the public interest will not be served in any way if the prerogative orders sought are issued since they are likely to create a bad precedent where any person charged would run to court for similar orders.

12.Since the ex parte applicants were arrested and charged in court on 6th July 2006 and the application was filed on 11th October 2007, it is submitted that the application is time barred.

13.Since the applicants are seeking to prohibit actions which have already been undertaken it is submitted that prohibition cannot issue. It also submitted that certiorari cannot issue since there is no allegation of excess of jurisdiction and that the criminal proceedings should be allowed to continue where the applicants will be afforded an opportunity of being heard. With respect to mandamus it is submitted that the order cannot be issued to compel the respondent from carrying out their duties. Since there is an alternative remedy available to the applicants of defending themselves in the criminal case, it is submitted that the judicial review proceedings being discretionary ought not to be granted. Therefore it was submitted that the application should be dismissed.

14.These submissions were highlighted by **Mr. Thuita** learned counsel for the Interested Party.

APPLICANT'S REJOINDER

15. In a rejoinder, **Mr Obura** submitted that the charging did not end at the time of arraignment of the applicants in Court but was a continuous process. Learned Counsel further urged the Court to invoke the Oxygen Rules and not to strictly interpret the procedural provisions. With respect to section 193 of the Criminal Procedure Code, learned counsel submitted that the provision ought not to be used to abuse the process or used in bad faith and that the applicants ought not to be subject to a sham criminal process.

DETERMINATIONS

16.In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. See **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479**

17.Similarly, in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** the Court of Appeal expressed itself as follows:

"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...To consider" is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... "Consider" implies looking at the whole matter before reaching a conclusion...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void *ab initio.*"

18. I have considered the application. It is important to first deal with the circumstances under which the Court will grant stay of a criminal process in these kind of proceedings.

19. 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. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail 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. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. In the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration. See **R vs. Monopolies and Mergers Commission Ex Parte Argyll Group Plc [1986] 1 WLR 763** and **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK).**

20.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."

21. 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 is 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."

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

"The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform... A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious... The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far that which the courts indeed the entire system is constitutionally mandated to administer... In the instant case, criminal prosecution

is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute. It is further alleged that the criminal prosecution is an abuse of the court process epitomised by what is termed as selective prosecution by the Attorney General. It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been be argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit... The 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. Where a decision has been made, there is little that the court can do by an order of prohibition to actually stop the decision from being made, because simply that which is sought to stop has already been done. However in such circumstances, the power of judicial review is not limited to the other orders of judicial review other than prohibition. With respect to civil proceedings prohibition lies not only for the excess of jurisdiction but also from a departure of the rules of natural justice... 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... This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit. The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law... In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed... There is nothing which can stop the from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made... Under section 77(5) of the Constitution it is a constitutional right that no person who has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of the offence. What is clear from this constitutional right is that it prevents the re-prosecution of a criminal case, which has been determined in one way or another. 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... The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution... A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution... In the instant case there is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even of manipulation of court process so as to seriously deprecate the likelihood that the applicants might not get a fair trial as provided under section 77 of the Constitution. 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."

23.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... In this case it is asked to step in to grant an order of prohibition. Prohibition looks into the future and can only stop what has not been done. It is certiorari that would be efficacious in quashing that which has been done but it is not prayed for in this matter. There was no order granted for stay of further proceedings when leave was granted and it is possible that the private prosecution has proceeded either to its conclusion or to some extent. In the former event an order of prohibition has no efficacy and the court would be acting in vain to grant one. What is done will have been done. If there is anything that remains to be done in those proceedings, however, the order of prohibition will issue to stop further proceedings."

24. In this case the ex pate applicants' case is that the Respondent is using the criminal process to circumvent the civil case. However, the mere fact that criminal proceedings are being undertaken at the same time as the civil proceedings does not *ipso facto* amount to an abuse of the court process. The applicant ought to go further and show that the dominant motive for the institution of the criminal proceedings is to scuttle the civil process or force the applicant into abandoning his civil claim or force the applicant into submitting to the civil claim. If it is shown that the object of the prosecutor 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 other words the prosecutor must be actuated more 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 in such circumstances would be to further that ulterior motive and that is when the High Court steps in**.**In this case the criminal process had already commenced and it is not contended that in the course of the said proceedings an event took place which manifested an intention to secure some other purpose than the need to vindicate the committal of the offences charged. It must be remembered that justice must be done to both the complaint and the accused and where there is evidence upon which the prosecution can reasonably mount a prosecution, it is not for the High Court in a judicial review proceeding to inquire into the sufficiency or otherwise of such evidence since the High Court ought not to usurp the role of the trial court in determining the merits of the criminal case.

25.In this case it is the respondent's case that they relied on the documents from the Ministry of Land as well and formed an opinion that a case had been made out to warrant the criminal prosecution. Whether or not the prosecution's view is erroneous cannot be a ground for granting the orders sought. It will be upon the trial court to consider the evidence and make a finding as to whether or not there is in fact sufficient evidence to sustain a conviction. As stated above 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 designed to perform. In other words the criminal justice system ought not to be selectively invoked by a party in order to achieve collateral purposes not recognise as genuine. Where it is shown that 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 a prohibition should be granted. The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. If it is shown that it is so being used 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 the Court's independence and impartiality.

26. In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely to bear pressure on the applicants in order to settle the civil dispute. However, there is an order of the Court issued on 16th June 2008 in which it is indicated that the said suit was withdrawn. The withdrawal of the said suit has the effect of rendering the argument that the criminal proceedings were commenced with a view to circumvent the said civil case weightless.

27.Whereas I agree that the mere fact that criminal proceedings have been commenced does not take away the Court's jurisdiction to grant the remedy for judicial review where it is shown that the on-going criminal proceedings are not genuine, the delay in taking the steps at the earliest opportunity when the same ought to have been taken would militate against the grant of the discretionary orders unless a very strong case is shown to justify such action. I however, disagree with the Interested Party's position that judicial review proceedings can only be undertaken within 6 months of the date of the charge. Where proceedings are still on-going, I do not see any reason why the High Court if properly moved should not bring the same to a halt if the orders are warranted.

28. I however agree with the Interested Party's position that mandamus being an order issued to compel a duty ought not to issue in negative terms and where what is sought is a negative order, prohibition is the best remedy to resort to.

29. Having considered the material before me I am not satisfied that a case has been made out by the applicants to warrant the grant of the orders sought herein. The *ex parte* applicants are at liberty to defend the suit in the lower court where there will be an opportunity afforded to them to challenge the veracity of the evidence against them. At this stage I cannot say with certainty that the criminal process has been commenced mala fides or with ulterior motives. If that evidence was to come out in the course of the proceedings, the ex parte applicants would still be at liberty to institute a claim for malicious prosecution.

30. Lastly, although the Chief Magistrate, Kibera Law Courts is mentioned as the 4th Respondent, there are no orders which are sought against the Court. There, for example, are no orders seeking to prohibit the Court from proceeding with the matter. On the other hand all the other prayers seek to prohibit arrest and/or prosecution of the applicant or quash the decision to charge the applicants. Whereas the order for certiorari may still be granted, I doubt the reason for seeking to prohibit the arrest and charging of the ex parte applicants when the criminal trial has already commenced.

ORDER

31. Accordingly, the order that commends itself to me is that the Notice of Motion dated 11th October 2007 be and is hereby dismissed with costs to the Respondent and Interested Party.

Dated at Nairobi this day 14th day of March 2013

G V ODUNGA
JUDGE

Delivered in the presence of Mrs Sirai for the Attorney General.