# Republic v Chief Magistrate's Court at Kibera Law Courts Nairobi, Commissioner of Police & Director of Public Prosecutions Ex-parte Qian Guo Jun, China Young Tai Engeneering Company Limited & Ravasam Development Company Limited (Miscellaneous Application 453 of 2012) [2013] KEHC 6474 (KLR) (Judicial Review) (2 August 2013) (Judgment)

*Republic v Chief Magistrate's Court at Kibera Law Courts Nairobi & 2 others Ex-parte Qian Guo Jun & 2 others [2013] eKLR*

Neutral citation: [2013] KEHC 6474 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**JUDICIAL REVIEW**

**MISCELLANEOUS APPLICATION 453 OF 2012**

**GV ODUNGA, J**

**AUGUST 2, 2013**

**IN THE MATTER OF THE PREAMBLE AND ARTICLES 1, 2, (1) (2) (4), 3 (1), 4, 10, 12(1) (A), 19, 20, 22, 23, 73, 165, 258 AND 259 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF APPLICATION BY QIAN GUO JUN AND CHINA YOUNG TAI ENGINEERING COMPANY LIMITED FOR ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT AT NAIROBI, KIBERA LAW COURTS CRIMINAL CASE NUMBER 6490 OF 2012 REPUBLIC -VS- QIAN GUO JUN**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010**

**BETWEEN**

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

**AND**

**THE CHIEF MAGISTRATE'S COURT AT KIBERA LAW COURTS NAIROBI ............................................................................................ 1ST RESPONDENT**

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

**THE DIRECTOR OF PUBLIC PROSECUTIONS ................... 3RD RESPONDENT**

**AND**

**RAVASAM DEVELOPMENT COMPANY LIMITED .......... INTERESTED PARTY**

**AND**

**QIAN GUO JUN ................................................................. EXPARTE APPLICANT**

**CHINA YOUNG TAI ENGINEERING COMPANY LIMITED .... EXPARTE APPLICANT**

**JUDGMENT**

**Introduction**

1. By a Notice of Motion dated 4th January 2013, filed in Court on 7th January 2013, the ex parte applicants herein, Qian Guo Jun And China Young Tai Engineering Company Limited, seek the following orders:

    1. That this Honourable Court be pleased to grant an Order of Certiorari to remove into this Honourable Court for the purpose of its being quashed and to quash the Charge Sheet filed in, and charges and proceedings in the CHief Magistrate's Court At Nairobi Kibera Law Courts, Criminal Case No.6490 Of 2012 (republic Vs Qian Guo Jun) by the 2nd and 3rd Respondents against the 1st Applicant.

    2. That this Honourable Court be pleased to grant an Order of Prohibition directed to the Chief Magistrate's Court at Nairobi Kibera Law Courts prohibiting her/him and or any other Court of concurrent jurisdiction from hearing, proceeding with and determining The Chief Magistrate's Court At Nairobi Kibera Law Courts Criminal Case Number 6490 Of 2012 Between The Republic Versus Qian Guo Jun.

    3. That the Honourable Court be pleased to grant such further Orders and directions as it may deem apt, necessary and just to grant.

    4. That costs of and occasioned by this Application provided for.

**Applicants' Case**

2. The Motion was grounded on the Statement of Facts filed on 24th December 2012 and substantially on the verifying affidavit sworn by Qian Guo Jun, the Managing Director of the 2nd applicant herein on 24th December 2012.

3. According to the deponent, by a standard of Kenya Association of Building and Civil Engineering Contractors (KABCEC) contract dated 28th April 2009 the 2nd Applicant Company was contracted by the interested party for the construction and completion of the Proposed Elysee Plaza and auxiliary works on Plot 209/2/186, Kilimani, Nairobi at the negotiated contract sum of Kshs.535,000,000 (Kenya Shillings five hundred and thirty five million only) for the contract period of 90 calendar weeks commencing 1st May 2009 and the practical completion of the project was anticipated to be 18th January 2011. The terms governing the contract, according to him, were the KABCEC Conditions of Contract for Building Works (1999 edition) as amended together with the appendix forming part of

the agreement and addendum signed between the parties and under the said addendum, all payments were to be released as per the schedule annexed to the minutes of the negotiation meeting. However in breach of the contract, the Interested Party delayed in releasing monthly payments from November 2009 to date which delays continued until 22nd December 2010 when the 2nd Applicant Company finally suspended execution of works on site after exhausting all avenues of requesting for payments. The suspension was effected after the issuance of all the required notices as provided under Clause 29.2 of the contract. At the negotiation meeting held on 1st February 2011, the Interested Party finally agreed to remit Kshs.30,000,000.00 in loss and expense, confirmation of availability of sufficient funds for the outstanding payments and to the smooth issuance of instructions and directions. However, in further breach of the contract, the Interested Party failed, ignored or simply refused to comply with the terms agreed at the negotiation meeting of 1st February 2011 aforesaid and consequently by the letter dated 10th February 2011, the 2nd Applicant Company referred the matter to arbitration in terms of Clause 45 of the contract. Meanwhile, the Interested Party resorted to harassment and intimidation instead of concurring to resolution of any dissolute in terms of the contract and thus occasioned the applicant's letters dated 16th February 2011 to the Secretary Building Contractors Registration Committee, 17th February 2011 to the second Defendant, 17th February 2011 to the OCS Kilimani Police Station and 24th February 2011 to M/S Kipkenda, Lilan & Koech Advocates. The 2nd Applicant Company received the letter dated 1st March 2011 from the 2nd Respondent agent purporting to terminate the contract and to call a meeting on the 9th March 2011 for purposes of taking inventory pursuant to the purported termination. However, no joint inventory or accounts of the project have hitherto been taken by the 2nd Applicant Company and the interested party. By the letter dated 2nd March 2011 the 2nd Applicant Company rightly challenged the purported termination and declined the site meeting.

4. Due to those circumstances, the 2nd Applicant Company was forced to file High Court Civil Suite number 81 of 2011 (Nairobi) where it sought the protection of the court to prevent the second Respondent from terminating the contract and illegally taking over the premises. Together with the Suit, the Applicant also filed an application for a temporary injunction preventing the Interested Party from illegally terminating the contract and taking over the premises. The court at the first instance granted the orders sought, stopped the termination of the contract and taking over of the premises. It is averred that the Interested Party duly entered appearance in the matter and filed a Defence and counterclaim. In the meantime, the Interested Party filed an application with the Arbitrator who had duly been appointed challenging jurisdiction of the Arbitrator to hear and determine the matter and then refused to participate in the financing the hearing of its application resulting in the arbitration proceedings grinding to a halt. Before that application could be heard, the Interested Party's Directors/ shareholders had a dispute as to who would be in charge of the company and therefore what firm of Advocates would represent the Company which issue took some time to be resolved but eventually the court ruled on the matter. According to the deponent, there is pending a case being High Court Civil Case number 450 of 2011 where the issue in contention is the ownership of the Interested Party. One of the factions represented by the firm of Muturi Mwangi & Company Advocates attempted though unsuccessfully to dispose off the property subject matter of the suit but failed because of the pendency of the High Court Civil Suit Number 81 of 2011. It is deposed that Civil Case Number 81 of 2011 is now part heard in as far as the Application for Orders to stay the suit and an Interlocutory Injunction is concerned and there are high chances of success in the 2nd Applicant's favour and the matter is coming up for further hearing on 14th February 2013.

5. It therefore came as a surprise to the deponent when he was summoned to Kilimani Police Station and questioned over matters which form the subject matter in High Court Civil number 81 of 2011 (Nairobi) in a complaint lodged by the Interested Party against him personally. His Advocate on record

appeared at the police station and explained to the officers concerned that the matters forming the subject matter of the complaint lodged were an integral part of the issues in dispute in HCCC Case number 81 of 2011 (Nairobi) and also an arbitration before QS Norman Mururu and even showed the documents to that effect to no avail. He was however, subsequently charged on 21st December, 2012 in Chief Magistrates Court, Kibera Law Courts Case number 6490 of 2012. To him the charges in case number 6490 of 2012 are not in the public interest but are motivated by other selfish interests of the Interested Party aimed at arm twisting the said 2nd Applicant into withdrawing or otherwise compromising High Court Civil Suit number 81 of 2011 (Nairobi) and paying the Interested Party monies for the following reasons; a) That the directors who made the report at Kilimani Police Station are in dispute with the real owners of the Company in Case Number 450 of 2012 (Nairobi). b) The same directors through the firm of Muturi Mwangi & Associates attempted to dispose of the property subject matter of High Court civil suit 81 of 2011 (Nairobi but were not successful due to the pendency of that suit. c) The complaint is being made over a year down the line when an important application is being canvassed in High Court Civil Suite number 81 of 2011 (Nairobi). d) He never received any monies in my individual capacity from the Interested Party neither have I made any false pretences.

6. Based on his advocate's information, he believes that the actions of the Interested Party in lodging the Complaint are well intended to intimidate him and frustrate the hearing of High Court Case number 81 of 2011 and therefore proceedings based on any such complaints should be quashed. Further he believes that the Applicants have satisfied all the requirements necessary for the grant of the orders for leave for the Applicants to commence Judicial Review proceedings by way of orders of Prohibition and certiorari in accordance with the Application filed herewith.

**Supplemantary Affidavit**

7. On 12th February 2013, the applicant filed a supplementary affidavit sworn by the same deponent on 11th February 2013.

8. According to the said affidavit, China Young Tai Engineering Company limited entered into a Standard Kenya Association of Building and Civil Engineering contractors (KABCEC) Contract dated 28th April, 2009 with Ravasam Development Limited (the Interested Party) for the Construction of Elysee Plaza and auxiliary works on Plot No.209/2/186 Kilimani, Nairobi at the negotiated Contract sum of Kshs.535,000,000/=. The details are in the Statement filed herein. Through further negotiations and agreements Ravasam Development Company Limited agreed to pay Kshs.30,000,000/= to the 2nd Ex parte Applicant in loss and expenses confirmation of availability of sufficient funds, in order to settle an issue which had arisen regarding the progress of works and payment due under the said contract. Ravasam Development Company Limited breached the said Contract and any subsequent understanding between it and the 2nd Ex parte Applicant China Young Tai Engineering Company Limited causing the latter to declare an arbitration dispute which process led to the appointment of QS Norman Mururu as Arbitrator. Ravasam Development Company Limited refused to cooperate and partake in the process of Arbitration, leading to China Young Tai Engineering Company Limited to file HCCC Number 81 of 2011 (Nairobi) principally seeking the Courts intervention to aid the process of arbitration. Ravasam Development Company Limited filed a Statement of Defence and a Counter-Claim in the above Case, however irregular that action may be.

9. However, Ravasam Development Company Limited thereafter caused Police Officer from Kilimani Police Station to summons him to the Station on 13th December, 2011 when he was asked to refund the sum of Kshs.84,531,475/= allegedly paid to him for the purpose of purchasing Construction Materials from China. According to the deponent, he is a separate individual from China Young Tai Engineering Company Limited and has never received any money in his personal capacity in connection with the

matters stated hereinabove, any payments received under the Contract have been for the account of China Young Tai Engineering Company Limited and at no time has the sum of Kshs.84,531,475/= been specifically paid acknowledged or received. To him, the issue of what payment have been made; the circumstances of such payments the value of works undertaken by China Young Tai Engineering Company Limited; Materials on Site; Money owed to China Young Tai Engineering Company Limited out of the said Contract; payments due under the alleged breach of Contract and other matters are yet to be addressed through arbitration in accordance with the arbitration agreement and he believes that arbitration is the forum at which these matters may be canvassed. He deposed that the aforesaid matters were brought to the attention of the officers investigating the Complaint by Ravasam Development company Limited by both himself and his Lawyers on record but the Police Officers were not interested insisting that unless the sum of Kshs.84,531,475/= was paid to Ravasam Development Company Limited he would be charged with obtaining the same by false pretences, whether the evidence available was sufficient or not. He avers that before any investigations were undertaken by Police at Kilimani Police Station, two Police Officers namely PC Mbuvi and PC Sunta were sent to his residence at Kileleshwa at 6 am in the early morning of 20th December 2012 when they informed him that he was under arrest and would be charged unless he agreed to pay Kshs.84,531,475/- to Ravasam Development Company Limited. After arresting him the said Officers took him to Kilimani Police Station where he waited with his Advocate Anthony Milimu Lubulellah. In the meantime the Offices called Eric Agbeko and one Abok James Odera who are directors of Ravasam Development Company Limited together with their Advocate Muturi Mwangi. He states that Eric Agbeko, Abok James Odera and Muturi Mwangi said that they had come to find out from him how and when he intended to refund the sum of Kshs.84,531,475/= to Ravasam Development Company Limited otherwise he would be charged and that there was nothing else for them to discuss with him or with the Police. When his Advocate informed the Police that the Claim by Ravasam Development Company Limited was disputed and subject to HCCC No.81 of 2011 and to arbitration before QS Norman Mururu their Lawyer said that this is not a bar to his prosecution and they then at that point ordered the Police to charge him forthwith whereupon he was placed in the Police Cells. However, the DCIO was kind to release him on Police Cash Bail to appear in Court on Monday 21st December, 2012. He later learnt that PC Mbuvi and PC Sunta who arrested him are also the Officers investigating his Case although they have never recorded any Statement from him, neither have they shown any interest in knowing his side of things. He was charged at the Kibera Magistrates Court on 21st December, 2012 with the offence of obtaining Kshs.84,531,475/= by false pretences from Ravasam Development Company Limited in Criminal Case No.6490 of 2012 and was released on Cash bail by the Court. On 24th December, 2012 I obtained a further Order from the Court allowing him to travel to China for his daughter's wedding.

10. According to him, the prosecution intends to use Eric Agbeko, Simon Njoroge, Abok James Odera, Philip Ambok, Philemon Koech Kiputum Busienei and P.C. Mbuvi as witnesses yet to him, the Charges filed against him are not in the Public Interest but are motivated by malice, personal vendetta and for the ulterior motive of forcing him and China Young Tai Engineering Company Limited to pay a bona fide disputed debt, when it is even clear from the Statement of Philemon Koech Kiptum Busienei Advocate that a dispute has been declared between the Parties. Further the said Criminal Proceedings are calculated to harass and intimidate him into submission since Eric Agbeko and Abok James Odera have told him that they are well connected and will teach him a lesson. He further avers that the same Ravasam Development Company Limited and its Director Eric Agbeko moved to Court in Milimani Commercial Courts Civil Case No.7721 of 2012 and obtained Orders on 27th December 2012 freezing the Accounts of China Young Tai Engineering Company Limited, himself and his Wife by deceiving the Court that he had run away from Kenya. He has however, since also filed Judicial Review Proceedings aimed at the above Case in Miscellaneous High Court JR No.19 of 2013 which is also pending before this Court.

11. To him, the Directors of Ravasam Development Company Limited will go to every extent to exhibit their malice against him and China Young Tai Engineering Company Limited and he therefore believes that they are misusing the Criminal Case for a purpose which is not legal and that the Police in Kilimani have surrendered their impartiality and independence as Officers of the State and are acting as agents of Ravasam Development Company Limited and its Directors. To him, the Charge Sheet drawn against him is tainted with the malice of Ravasam Development Company Limited and its directors as it is drawn by an Officer serving the interests of Private Company which is outside his power or in misuse of his Power.

**Respondents' Case**

12. The respondents in opposition to the application filed the following grounds of opposition:

    1. The application is misconceived, frivolous, vexatious, incompetent. Improperly before court and an abuse of the court process.
    2. The application has not met the prerequisite requirements for the grant of the orders sought.
    3. The matters raised by the petitioners are their defences which should be raised before the trial court and are as such cannot be raised before the High Court in the manner herein.
    4. No sufficient grounds have been advanced to warrant the grant of the orders.
    5. The applicants are guilty of material non-disclosure.
    6. Criminal charges were preferred after investigations were conducted which pointed to the commission of an offence.

**Applicant's Submissions**

13. On behalf of the applicant, it was submitted that whereas it is true that under section 193A of the *Criminal Procedure Code* the fact that any matter is in issue in any criminal proceedings is also directly or substantially in issue in any pending Civil Proceedings, is not a ground for any stay, prohibition or delay in Criminal Proceedings, the same is not to be used as a basis for abuse of the criminal process in order to achieve a favourable result in the civil proceedings. It is submitted that that provision does not justify or excuse any abuse of the criminal process and that section 193A aforesaid does not displace the common law principles upon which the order of prohibition will be issued to stem abuse of process and the use the criminal process for ulterior purpose. According to the applicants, the prosecution of the 1st ex parte applicant is demonstrably actuated by malice and for ulterior motive of arm-twisting the ex parte applicants to settle a bona fide disputed debt and to cheat them out of the benefits of arbitration, and benefits of the aforesaid contract. In support of their submissions, the ex parte applicants rely on *Kenya National Examinations Council vs. Republic ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996*; Kadamas vs. Municipality of Kisumu [1985] KLR 954; Jared Benso Kangwana vs. Attorney General High Court Misc. Application No. 446 of 1995; Republic vs. Attorney General ex parte Kipng'eno Arap Ng'eny Misc. Civil Application No. 406 of 2001; Samuel Kamau Machari & Another vs. Attorney General & Another Misc. App. No. 356 of 2000; Mohammed Gulam Hussein Fazal Karmal & Another vs. The Chief Magistrate and Attorney General; and O'Reilly vs. Mackman [1982] 3 WLR 604 at 620.

**Respondent's Submissions**

14. On behalf of the respondents, it was submitted that the matters complained of by the applicants are prematurely before the High Court as these matters form the defences of the applicants and as such can only be canvassed before a trial magistrate and not by the High Court. Several authorities were cited to the effect that the Court ought not to interfere with the decision by the police and the Director of Public Prosecutions to prefer charges in cases where an offence has been committed.

**Determinations**

15. 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.

16. I have considered the application. It is important to first deal with the circumstances under which the Court will grant order prohibiting the commencement or continuation of a criminal trial process.

17. 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, it has been held time and again, is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings. 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 an order of prohibition, 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).

18. 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."

19. 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."

20. 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."

21. 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."

22. I also agree with the decision in R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001 that:

> " A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable".

23. As was aptly put in Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR:

> " the police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene".

24. It is therefore clear that whereas the discretion given to the 3rd respondent to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence 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.

25. In this case, whereas the respondents filed grounds of opposition, no replying affidavit was filed. Therefore the applicants" factual contentions made on oath remained largely uncontested. Similarly the interested party though duly served did not oppose the application. Consequently the applicants' averments that the impugned criminal charges were preferred with a view to furthering the interested party's disputed civil claims through the 2nd and 3rd respondents are not disputed. Although under section 193A of the *Criminal Procedure Code* the existence of civil proceedings do not act as a bar to the criminal process, where the criminal process has been instituted as a means of hastening the civil process by either forcing the applicants to concede the civil claim or abandon their claim altogether, the commencement of the criminal proceedings are an abuse of the process of the court and on the authority of Stanley Munga Githunguri vs. Republic Criminal Application No. 271 of 1985, this Court is obliged to stop such proceedings.

26. Although the Court appreciates that the discretion given to the police to investigate offences and that given to the Director of Public Prosecutions ought not to be lightly interfered with, where an applicant places before court material which prima facie show that the dispute between the applicant and the interested party is purely civil in nature and that the criminal proceedings are being undertaken with

ulterior motives, it behoves the respondents to place some material before the court which though not conclusively proving the guilt of the applicant warrants their action to charge the applicants. In absence of such material and in light of the material placed before the Court by the applicant, the Court would be left with no option but to believe the applicant's version that being the only factual version before it. As was held in R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001 (supra) 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.

27. In the absence of any material controverting the factual averments made on behalf of the applicants herein I have no option but to find that the decision by the 2nd and 3rd respondents to charge the 1st applicant herein is malicious and actionable.

**Order**

28. Accordingly, I allow the Notice of Motion dated 4th January 2013 and order:

    1. That an order of certiorari be and is hereby issued removing into this Court for the purpose of its being quashed and to the Charge Sheet filed in, and charges and proceedings in the Chief Magistrate's Court At Nairobi Kibera Law Courts, Criminal Case No.6490 Of 2012 (republic Vs Qian Guo Jun) by the 2nd and 3rd Respondents against the 1st Applicant and the same are hereby quashed.

    2. That an Order of Prohibition is hereby issued directed to the Chief Magistrate's Court at Nairobi Kibera Law Courts prohibiting her/him and or any other Court of concurrent jurisdiction from hearing, proceeding with and determining The Chief Magistrate's Court At Nairobi Kibera Law Courts Criminal Case Number 6490 Of 2012 Between The Republic Versus Qian Guo Jun.

    3. That the costs of this application are awarded to the 1st applicant to be borne by the interested party.

**DATED AT NAIROBI THIS 2ND DAY OF AUGUST 2013**

**G V ODUNGA**

**JUDGE**

Delivered in the presence of Ms Wanguhu for Mr Muturi for the Interested Party and Ms Ngeresa for Mr Lubulellah for the applicant