REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MILIMNAI LAW COURTS

MISCELLANEOUS JUDICIAL REVIEW APPLICATION NO.239 OF 2012

IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE ACT

AND

IN THE MATTER OF CRIMINAL PROCEDURE ACT, CHAPTER 75 LAWS OF KENYA

AND

IN THE MATTER OF THE POLICE ACT, CHAPTER 84 LAWS OF KENYA

AND

IN THE MATTER OF THE MEDICAL LABORATORY TECHNICIANS AND TECHNOLOGISTS ACT NO.10 OF 1999 LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION BY DR. MAHABURBUR RAHMAN KHAN FOR LEAVE TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS

BETWEEN

REPUBLIC ....APPLICANT

-VERSUS –

THE KENYA MEDICAL LABORATORY TECHNICIANS

AND TECHNOLOGIST BOARD ....1ST RESPONDENT

THE CHIEF MAGISTRATE,

MAKADARA LAW COURTS.....................2ND RESPONDENT

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

THE COMMISSIONER OF POLICE............4TH RESPONDENT

THE OFFICER COMMANDING STATION,

PANGANI POLICE STATION.....................5TH RESPONDENT

EX-PARTE: DR. MAHABURBUR RAHMAN KHAN

JUDGEMENT

INTRODUCTION

1. By a Notice of Motion dated 22nd June, 2012, filed in Court on 25th June 2012, the *ex parte* applicants herein, **Dr. Mahaburbur Rahman Khan,** seeks the following orders:

1. **An Order of Certiorari to remove into the High Court for the purposes of quashing the criminal proceedings relating to Criminal Case No.1149 of 2011, Republic - Versus – Dr. Mahaburbur Rahman Khan, before the Chief Magistrates Court, Makadara Law Court;**
2. **An Order of prohibition to issue to the Respondents, their employees, agents and/or servants from harassing, arresting and/or charging the Applicant in relation to the conduct leading to the institution of Criminal Case NO.1149 of 2011, Republic – Versus – Dr. Mahabubur Rahman Khan, before the Chief Magistrates Court, Makadara Law Court;**
3. **The costs of this Application be provided for.**

APPLICANTS' CASE

2. The Motion was grounded on the Statement of Facts filed on 5th June 2012 and is based on the following grounds:

1. **The Applicant is a dentist operating a dentist clinic known as Taiba Medical Centre registered and licenced by the Medical Practitioners and Dentists Board along Parkroad of Pangani area within Nairobi;**
2. **That on the 26th June, 2011, an employee, agent and/or servant of the 1st Respondent, who introduced himself as Mr. Jeff Ochieng' visited the applicants dental clinic and demanded that the Applicant produce the certificate of registration as a laboratory technician and that of his employees;**
3. **That the Applicant did indicate that while his was a registered and licenced dental clinic with no laboratory, he was, in any event, aware of an existing Court order stopping the Medical Laboratory Technicians and Technologists Board from conducting any business up to and including supervision and the issuance of practicing Certificates and licences and acting otherwise would have been in contempt of the said court order whose contents were published in the newspaper and which the Applicant showed to the employee, agent and/or servant or the 3rd Respondent;**
4. **That however, the said employee, agent and/or servant of the 1st Respondent kept on insisting that the registration certificate and licence has to be produced and visited the Applicants dental clinic on subsequent days with the same demands;**
5. **That on the 29th June, 2011, several police officer from the 5th Respondent's Police Station, in the company of the aforesaid 1st Respondent's employee, agent and/or servant arrested**

the Applicant and took him to Pangani Police Station where he reiterated his position producing a copy of the said order but to no avail;

6. **That the Applicant was charged before the Chief Magistrates Court, Makadara Law Courts on the 4th July, 2011 in Criminal Case No.1149 of 2011, Republic – Versus – Dr. Mahabubur Rahman Khan, and the same is slated for hearing on the 6th June, 2012;**
7. **The actions of the 1st Respondent, its servant, agent and/or employee during the subsistence of the order of stay was a glaring upfront to the authority and integrity of the judicial system and therefore illegal, unreasonable and oppressive to the Applicant and is thereby void and a nullity *ab initio*;**
8. **That the criminal charges and proceedings before the Honourable Chief Magistrates Court are a direct consequence of the illegal actions by the 1st Respondent, its servant, agent and/or employee which illegality goes to the very substratum of the criminal charge and the proceedings thereof making it an out rightly unjust and illegal process that cannot stand the test of the principle of natural justice to fair trial and the same should not be condoned by this Honourable court;**
9. **That the illegality of the Criminal Charges was clearly pointed out to the Presiding Magistrate in Criminal Case NO.1149 of 2011, Republic – Versus – Dr. Mahabubur Rahman Khan, but the Presiding Magistrate proceeded to admit the Criminal Charges.**

3. The supported by an affidavit sworn by the ex parte applicant sworn on 4th June 2012, a dentist operating a dentist clinic known as Taiba Medical Centre registered and licensed by the Medical Practitioners and Dentists Board along Parkroad of Pangani area within Nairobi.
4. According to the applicant, on the 26th June, 2011, an employee, agent and/or servant of the 3rd Respondent, who introduced himself as **Mr. Jeff Ochieng'** visited his dental clinic and demanded that the he produces the certificate of registration as a laboratory technician and that of his employees to which demand the applicant responded that while he was operating a registered and licensed dental clinic with no laboratory, he was, in any event, aware of an existing Court order stopping the Medical Laboratory Technicians and Technologists Board from conducting any business up to and including supervision and the issuance of Practicing Certificates and licences which order had been extended and was still in place and he exhibited copies of the said order. According to him, acting otherwise would have been in contempt of the said court order whose contents were published in the newspapers and which Order and newspaper cutting he showed to the 3rd Respondent's said employee, agent and/or servant. Despite this, the said officer kept on insisting that the registration certificate and licence had to be produced and visited the dental clinic on subsequent days with the same demands. Subsequently, on the 29th June, 2011, several police officers in the company of the 3rd Respondent's employee, agent and/or servant arrested the applicant and took him to Pangani Police Station where the applicant reiterated the true position producing a copy of the said Order but to no avail and his Dental Clinic was closed and he was charged before the Chief Magistrates Court, Makadara Law Courts on the 4th July, 2011. According to the applicant, actions of the 3rd Respondent, its servant, agent and/or employee during the subsistence of the Order of stay was a glaring upfront to the authority and integrity of the judicial system and therefore illegal, unreasonable and oppressive to him and was thereby void and a nullity *ab initio*. He further contends that the criminal charges and proceedings before the Honourable Chief Magistrates Courts are a direct consequence of the illegal actions by the 3rd Respondent, its servant, agent and/or employee which illegality goes to the very substratum of the criminal charge and the proceedings thereof making it an out rightly unjust and illegal process that cannot stand the test of the principle of natural justice to fair trial and the same should not be condoned by this Honourable court.

1ST RESPONDENT'S CASE

5. In response to the application the 1st respondent on 12th November 2012 filed an affidavit sworn by **Michael Abala**, its Executive Officer on 12th November 2012.
6. According to the deponent, the 1st Respondent herein **Kenya Medical Laboratory Technicians**

and Technologists Board (hereinafter referred to as the Board) is a creature of statute created by section 3 of the ***Medical Laboratory Technicians and Technologists Board Act*** Number 10 of 1999 (hereinafter referred to as the Act) and pursuant to the statutory mandate conferred on the 1st Respondent to inspect, license and regulate the standards to be maintained in all medical laboratories in the country, the 1st Respondent inspected the *ex parte* Applicant's medical laboratory and found that he had employed in medical laboratory an unregistered laboratory technician contrary to section 19(3) and (4) of the Act. According to the deponent, the 1st Respondent found the ex-parte Applicant to be engaging in private practice as a laboratory technician without a license contrary to section 20(1) (b) and 20 (3) of the Act. Accordingly, 1st Respondent then made a formal complaint with the Police at Pangani Police Station who investigated the 1st Respondent's complaint and found the same to be merited and accordingly charged the ex-parte Applicant with offences he had committed under the Act before the Chief Magistrates Court in Makadara whereby the ex-parte Applicant plea was taken. It is therefore contended that the actions taken by the Respondents against the ex-parte Applicant are within the law hence the Respondents herein cannot be said to have in any way breached the rules of natural justice, acted in excess of their powers and/or acted *ultra vires* to any law. It is further deposed that the J.R 316 of 2010 wherein the Order of stay the ex-parte Applicants sought to base his case on was granted had since been finalized and an attempt by the ex-parte Applicants in that case to have the court quash and/or nullify the transactions undertaken by the 1st Respondent herein were unsuccessful and a copy of the judgement was exhibited. According to the deponent, it is in the interest of public policy, good order and public interest in general that the criminal proceedings against the ex-parte Applicant in the Chief Magistrates Court at Makadara Criminal Case Number 1149 of 2011 be sustained as the Application herein is not merited and is only a bid by the ex-parte Applicant to avoid action against it for non-compliance with the Act No.10 of 1999 and further to stifle the Respondent from exercising powers granted to it by statute as the regulator of medical laboratory practice. It is further the 1st respondent's position that the Application for Certiorari and Prohibition contravenes the law as it is brought more than sic (6) months after the acts complained of.

7. Apart from the replying affidavit, the 1st respondent on 1st October 2012 filed a notice of preliminary objection in which it raised the following issues:

1. **That the said Notice of Motion offends the mandatory provisions of Section 9(3) of the Law Reform Act as read together with Order 53 Rule 2 of the Civil Procedure Rules.**
2. **The said Notice of Motion seeks an Order of Certiorari to remove into the High Court for the purposes of quashing the criminal proceedings relating to Criminal Case Number 1149 of 2011, Republic Versus Dr. Mahabubur Rahman Khan, before the Chief Magistrates Court, Makadara law Court despite the fact that the proceedings sought to be quashed were commenced on 4th July, 2011, which is Eleven (11) months after the said proceedings were commenced contrary to the mandatory provisions of Section 9(3) of the Law Reform Act as read together with Order 53 Rule 2 of the Civil Procedure Rules.**
3. **The said Notice of Motion seeks an Order of Prohibition to issue to the Respondents, their employees agents and or servants from harassing, arresting and/or charging the Applicant in relation to the conduct leading to the institution of Criminal Case Number 1149 of 2011, Republic Versus Dr. Mahabubur Rahman Khan, before the Chief Magistrates Court, Makadara Law Court despite the fact that the actions and proceedings sought to be prohibited cannot be prohibited without the proceedings first being quashed and the said proceedings cannot be quashed having been commenced on 4th July, 2011, which is Eleven (11) months after the said criminal proceedings were commenced, yet the mandatory provisions of Section 9(3) of the Law Reform Act as read together with Order 53 rule 2 of the Civil procedure Rules, mandatorily requires the present proceedings to have be brought within six months.**
4. **The leave granted to the Ex-parte Applicant on 5th June, 2012 is a nullity and the same should be discharged and or vacated.**
5. **The Honourable Court has no jurisdiction to hear the said Notice Motion.**

2ND, 3RD AND 4TH RESPONDENTS CASE

8. In opposition to the applicant's case the 2nd, 3rd and 4th respondents on 2nd October 2012 filed the following grounds of opposition:

1. **That the application has drawn and taken out amounts to an abuse of court process and an attempt to stifle the ends of justice.**
2. **That the application is fatally defective for non-compliance of the mandatory provisions of order 53 Rules 4(1) and rule 2 of the civil procedure rules and the provisions of the Law Reform Act Cap 26 Laws of Kenya.**
3. **That the applicant has neither demonstrated any element of lack of or excess of jurisdiction on the part of the Respondent's actions nor has he demonstrated any bias or lack of an opportunity to be heard to warrant the issuance of orders sought.**
4. **That the prayers sought cannot issue as the court cannot issue orders to prohibit or quash that which is authorized by the law.**
5. **That the suit as against the 2nd, 3rd and 4th Respondents is premature and incompetent as no decision has been made by them to require determination by this court.**

APPLICANT'S FURTHER AFFIDAVIT

9. In response to the issues raised by the respondents, the ex parte applicant on 3rd October 2013 filed a supplementary affidavit sworn by himself on 1st October 2013 in which he deposed that upon his arrest and arraignment in Court, his Advocate on the 4th July, 2011 made an application to Court seeking to have the criminal charges discharged on the basis that they were not admissible under Section 89(5) of the ***Criminal Procedure Code***, Chapter 75, Laws of Kenya and that having made the aforementioned application before a Court of Competent Jurisdiction with powers to refuse to admit the charges the aforementioned provision of Law, making an application to this Honourable Court, while the application before the Lower Court was still pending, which application would have had a similar result would be abuse of the Court Process, would have resulted in duplicity and in bad taste to the administration of justice. He deposed that the Honourable Magistrate delayed the delivery of the ruling on the aforementioned application and only delivered the same on the 2nd March, 2012 by which ruling he dismissed the Ex-parte Applicant's Application on the ground that only leave had been granted to the Applicant in Misc. Application NO.316 of 2010 and that no ruling had been furnished to Court regarding the same application contrary to the express terms of the said order and disregarded the Stay Orders as issued by the High Court and produced before the court touching on the legality of the criminal charges before the Honourable Court. In the deponent's view, the apparent disregard of the existence of the Stay Orders was not Judicial and rendered the decision of the Honourable Magistrate unreasonable as admitting the criminal charges after being notified of the underlying illegality when mandated by law not to admit would only serve to infringe on his right to fair trial, fair administrative action, and it is this action that resulted in the application for leave to institute proceedings to quash the criminal proceedings relating thereto. It is deposed that the application for leave to institute the judicial review proceedings herein was filed before this Honourable Court on the 5th June, 2012 after the decision by the Honourable Magistrate vide the Ruling dated the 2nd March, 2013 and in the applicant's view, the application for leave to institute judicial review proceedings within a period of Three (3) or thereabout of the date of the said ruling and based on legal advice from his advocate, the application was filed within the prescribed time limits for filing such an application contrary to the assertion by the 1st Respondent hence this Honourable Court should not allow the prosecution of the ex-parte Applicant based on a wrongful decision.

APPLICANT'S SUBMISSIONS

10. On behalf of the applicant it is submitted based on **Mohammed Yeslam Awadh vs. Peter Wilbur Murumbi [2005] eKLR** that a party who knows of an order whether null or valid or

irregular, cannot be permitted to disobey it hence the actions of the 1st respondent carried out during the subsistence of an express order of the court was a wilful disobedience of the Court order. Based on **Mulraj vs. Murti Raghunathji Maharaj AIR 1967 SC 1386**; **Surjit Singh vs. Harbans Singh, AIR 1996 SSC 135** and **All Bengal Excise Licensees Association vs. Raghabendra Singh & Others AIR 2007 SC 1386**, it was submitted that the actions taken contrary to an order of the court amounts to a nullity, are illegal and therefore unenforceable in law and that the actions of the 1st respondent were a nullity, void *ab initio* and illegal in the circumstances.

11. It is submitted that since there was an order in force prohibiting the 1st Respondent from exercising its mandate of registering and licensing medical laboratories, it would have been impossible for the ex parte applicant to either register or be licensed and an attempt to do so would have been illegal hence no criminal offence could be committed by the applicant in the face of the order yet the magistrate allowed the charge contrary to section 89(5) of the ***Criminal Procedure Code***.
12. Citing **Republic vs. Nakuru Water & Sewerage Services & Another, exp Londra Limited Misc. Civil Appl. No. 6 of 2003**, it was submitted that public bodies such as the 1st, 2nd and 5th do not have unfettered powers and discretion, they should act lawfully, fairly, reasonably and with due regards to public interest yet the said respondents acted contrary to the said expectation thereby rendering the said criminal charges illegal. Relying on ***The Supreme Court Practice*** Vol. 1 page 902, it was submitted that the actions of the 1st respondent in the face of the said order was without jurisdiction and the 2nd and 5th respondents acted unreasonably in the circumstances in charging and confirming the criminal charges against the ex parte applicant hence the Court ought to intervene under its supervisory jurisdiction in Article 165(6) of the Constitution and grant the judicial review orders sought.

1ST RESPONDENT'S SUBMISSIONS

13. On behalf of the 1st respondent it was submitted based on section 9(3) of the ***Law Reform Act*** Cap 26 Laws of Kenya, Order 53 Rule 2 of the ***Civil Procedure Rules***, 2010 and **Republic vs. Chief Magistrates Court, Nakuru & Another exp Ndara Karugu [2012] eKLR** that the Notice of Motion herein ought to be found incompetent and consequently struck out with costs as leave to commence these proceedings was sought and granted out of time and that the actions sought to be prohibited had already occurred and could not in any event be prohibited without the proceedings sought to be quashed were actually quashed.
14. According to the 1st respondent the applicant did not disclose to the Court that their application for leave was brought eleven months after the proceedings sought to be quashed had occurred hence came to court with unclean hands with the intent of misleading the Court. It is therefore submitted that as leave was obtained by misrepresentation, the same is a nullity and ought to be discharged and the application dismissed.
15. It is submitted that as the Board is mandated to regulate the business and practice of registered laboratory technicians and technologists and to make regulations for the inspection of medical laboratories, it would be contrary to public policy and good order for the Court to sanction the technicality being relied upon by the ex parte applicant to condemn the respondents for taking action against the ex parte applicant for breaching the law taking into account the fact that the court on the application of the ex parte applicants in JR 316 of 2010 where the stay orders the present application seeks to rely on were granted refused to nullify any and all transactions carried out by the 1st Respondent during the subsistence of the stay order in question and reliance was placed on this Court's decision in **Director of Public Prosecutions vs. Samuel Kimuchu Gichuru & Another [2012] eKLR**. It was therefore submitted that the Court ought to find that public interest in this matter is paramount, that interest being the 1st respondent ensuring that the public is not exposed to sub-standard medical laboratory services which could result in fatalities as opposed to business interest of the ex parte applicant herein whose objective is to maximise profits in his business of providing healthcare services which include the medical laboratory that he runs offering substandard services to the unsuspecting public by virtue of employing an unqualified

person and running an unlicensed institution. The 1st respondent relied on **Republic vs. Permanent Secretary Ministry of Local Government and 4 Others Misc. Application 133 of 2008** where it was held at page 8 that on the issue concerning the public interest, there cannot be a greater public interest concerning traffic matters than achieving the smooth flow of traffic, order and discipline on our roads. On the issue of fair hearing it was submitted that since the matter is before the Court the applicant has been given a fair hearing and that by taking steps to have the applicant answer for his alleged breach of law the respondents' action cannot be held to be ultra vires. It was therefore submitted that the application is without merits and should be dismissed with costs to the 1st respondent.

2ND, 3RD, 4TH AND 5TH RESPONDENTS' SUBMISSIONS

16. On behalf of the 2nd to 5th respondents it was submitted that the applicant has not pleaded that the Respondents acted in excess of the powers or lack of jurisdiction and has no pleaded lack of opportunity to be heard or bias. It is submitted that if it is true that there were stay orders in place the applicant should have moved the Court for redress in the pending suit and by filing these proceedings, it amounts to an abuse of the court process.
17. It is further submitted that the subject stay orders in Misc. Application 36 of 2010 lapsed on 19th September 2011 so that as at 26th June 2012 when the 1st Respondent acted, there were no stay orders. Since the said orders were directed at the Board such orders could not be interpreted to apply to the rest of the respondents who were not parties to the said suit. It is therefore submitted that the actions of the respondents could not be said to have been illegal for non-compliance with non-existent orders and that the subsequent arrest and charging of the applicant was within the respondents' powers and mandate. It is further submitted that the applicant has not categorically denied the charges which were preferred against him.
18. It is submitted that even if the stay was in force it did not and could not suspend the operation of the Act.
19. It is further submitted that in the present case the applicant seeks to quash the proceedings in criminal case No. 1149 of 2011 when the decision to charge and subsequent prosecution was made on 4th July 2011 when the applicant took plea hence the instant proceedings were commenced contrary to Order 53 rule 2 which require that such proceedings be instituted not later than 6 months after the date of the proceedings.
20. It is further submitted that these proceedings are incompetent for non-service of the chamber summons, statement of facts, grounds and verifying affidavit as required under Order 53 Rule 4(1). Apart from that since the proceedings sought to be quashed are before an impartial arbiter the applicant will have a chance to be heard. Hence the application lacks merit and should be dismissed with costs.

APPLICANT'S REJOINDER

21. In his rejoinder the applicant submitted that the ex parte applicant having made an application before the Magistrate's Court to disallow the charges, the period commenced to run only after the ruling by the magistrate allowing the charges and for this submission reliance is placed on ***Halsbury's Laws of England, 3rd Edn. Vol. 11 page 73***.

DETERMINATIONS

22. The first issue for determination is whether these proceedings were instituted out of the six months limitation period provided under section 9(3) of the ***Law Reform Act*** Cap 26 Laws of Kenya as read with Order 53 Rule 2 of the ***Civil Procedure Rules***, 2010. It is clear that in prayer 1 of the Notice of Motion the ex parte applicant seeks an order of "Certiorari to remove into the High Court for the purposes of quashing the criminal proceedings relating to Criminal Case No.1149 of 2011, **Republic - Versus – Dr. Mahaburbur Rahman Khan**, before the Chief Magistrates Court, Makadara Law Court". It is my view that such prayer could be made at any time in the course of the proceedings and therefore the mere fact that the impugned proceedings

were on going does not necessarily mean that the six months were over even if the judicial review proceedings were commenced six months after the institution of the criminal case since what is under challenge is not the charge but the proceedings.

23. It must however be noted that the decision whether or not to grant judicial review remedies is an exercise of discretion and the conduct of the applicant may deny him favourable exercise of discretion. In **Re: National Hospital Insurance Fund Act and Central Organisation Of Trade Unions (Kenya) Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47,** it was held that applications for judicial review are required to be made promptly and that undue delay in applying is a major factor and the needs of good administration must be borne in mind as courts cannot hold decision making bodies hostage. Judicial review acknowledges the need for speedy certainty as to the legitimacy of the target activities and requires the applicants for judicial review to act promptly. See **Kithome vs. The District Land Adjudication & Settlement Officer Mwingi District & Others Nairobi HCMA. No. 1108 of 2004 [2006] 1 EA 116.** Applications for leave must therefore be made promptly from the date when the grounds for the application first arose otherwise leave may be refused and a party can still impeach leave even at or during the hearing of the substantive motion. See **Ex Parte Virash Cash & Carry & 14 Others vs. Minister for Finance & Another Misc. Civil Application No. 288 of 2005**.

24. With respect to the prayer for an order of prohibition to issue to the Respondents, their employees, agents and/or servants from harassing, arresting and/or charging the Applicant in relation to the conduct leading to the institution of Criminal Case NO.1149 of 2011, **Republic – Versus – Dr. Mahabubur Rahman Khan**, before the Chief Magistrates Court, Makadara Law Court, it is clear that this prayer was overtaken by events once the ex parte applicant was arraigned in court. As was held in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996,** an order of prohibition unlike certiorari cannot quash what has already been done. It follows that prayer 2 of the Notice of Motion herein is misconceived and does not lie.

25. That brings us to the issue whether in the circumstances of this case prayer 1 of the Notice of Motion ought to be granted.

26. 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.**

27. It is therefore clear that whereas the discretion given to the Director of Public Prosecutions, who is the office entrusted with prosecutions and who for reasons unknown to the Court was not joined in these proceedings, 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.

28. In this case, the ex parte applicant's case is that despite the pendency of a stay order granted in Nairobi High Court Miscellaneous Civil Application No. 316 of 2010 which prohibited the Board from operating any business, the impugned criminal proceedings were instituted at the instigation of the said Board. It is true that on 27th October 2010, **Maraga, J** (as he then was) granted a stay as aforesaid. However the said order was expressed to be for a period of 30 days or until further

orders of the Court. My understanding of that order was that unless otherwise ordered the same was to last for 30 days with the effect that the same was to automatically lapse on 26th November 2010 after which the said orders were variously extended until 7th February 2011. On the said day although the file was in Court there was no order extending the same. The applicant's complaint however is that on 26th June 2011 during the pendency of the said orders the Board instigated the actions complained of. As of that date it is clear that as the stay orders granted earlier had not been extended after 7th February 2011, there were no orders staying the Board's functions. Accordingly, there was no reason why the Board could not if it found that the ex parte applicant had committed an offence report the matter to the police for investigations.

29. Apart from the foregoing, the mere fact that the Board was restrained from carrying out its duties including the issuance of the relevant practising certificates and licences did not give the ex parte applicant or any other person a licence to break the law. Even without a report being made by the Board the police were entitled to take action against the ex parte applicant if it was suspected that the ex parte applicant had committed an offence.

30. Further, in **Republic vs. The Public Procurement Administrative Board ex parte Avante International Technology Inc** Nairobi High Court Judicial Review Application No. 451 of 2013, I expressed myself as follows:

"..in Kenya under the current Constitutional dispensation judicial power whether exercised by the Court or Independent Tribunals is derived from the sovereign people of Kenya and is to be administered in their name and on their behalf. It follows that to purport to administer judicial power in a manner that is contrary to the expectation of the people of Kenya would be contrary to the said Constitutional provisions. I therefore associate myself with the decision in Konway vs. Limmer (supra) that there is the public interest that harm shall not be to the nation or public and that there are many cases where the nature of the injury which would or might be done to the Nation or the public service is of so grave a character that no other interest public or private, can be allowed to prevail over it...in appropriate circumstances, Courts of law and Independent Tribunals are properly entitled pursuant to Article 1 of the Constitution to take into account public or national interest in determining disputes before them where there is a conflict between public interest and private interest by balancing the two and deciding where the scales of justice tilt. Therefore the Court or Tribunals ought to appreciate that in our jurisdiction, the principle of proportionality is now part of our jurisprudence and therefore it is not unreasonable or irrational to take the said principle into account in arriving at a judicial determination."

31. As was held in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354**:

"It may indeed be true that the notice that is impugned is irregular or unlawful and an order of *certiorari* would be deserved, but it is not in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being discretionary remedy will only issue if it will serve some purpose. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles…..So that in this case, even though this application were properly before this Court and the application had merit, the court may not have granted an order of *certiorari* because it would not be the most efficacious remedy in the circumstances."

32. Therefore the Court in considering whether or not to exercise its discretion will look at all the circumstances of the case including the effect of granting the orders sought on the public. In this case the allegations which were made against the applicant were very serious allegations whose effects, if true were likely to affect the public. The Court cannot just shut its eyes to such allegations. As was held in **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 Of 2000** the court exercises a discretionary jurisdiction in

granting prerogative orders and can withhold the gravity of the order where among other reasons there has been delay, where the public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised.

33. Therefore whereas I appreciate the fact that Civil Application No. 316 of 2010 was determined in favour of the applicant, taking into account the fact that as at the time of the actions complained of there were no stay orders in existence, coupled with public interest consideration as well as the fact that the DPP is not a party to these proceedings and that apart from the Board, the rest of the respondents herein were never parties to Civil Application No. 316 of 2010, I am disinclined to exercise my discretion in favour of the applicant herein.

ORDER

34. In the result the Notice of Motion dated 22nd June, 2012, filed in Court on 25th June 2012, fails and is dismissed but with no order as to costs.

Dated at Nairobi this 28th day of October 2013

G V ODUNGA

JUDGE

Delivered in the presence of Mr Ondati for Mr Sumba for the ex parte applicant and Mr. Mongeri for 1st respondent: