REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc Appli 678 of 2005

IN THE MATTER OF: AN APPLICATION BY HENZRON KAMAU WAITHAKA FOR JUDICIAL REVIEW ORDERS OF PROHIBITION

AND

IN THE MATTER OF: THE CHIEF MAGISTRATE'S COURT KIBERA, NAIROBI CRIMINAL CASE NO. 2738/05 REPUBLIC VERSUS HENZRON KAMAU WAITHAKA BEFORE THE SENIOR PRINCIPAL MAGISTRATE

BETWEEN

REPUBLIC …….....…….. APPLICANT

AND

THE CHIEF MAGISTRATE, KIBERA, NAIROBI ……..... RESPONDENT

(Ex-parte ……..…….HEZRON KAMAU WAITHAKA)

J U D G M E N T

The Applicant, herein filed a Notice of Motion dated 31-05-2005 on 2-06-2005 and prays for an order of prohibition directed at the Chief Magistrate, the Senior Resident Magistrate, the Resident Magistrate or any other magistrate sitting at the Chief Magistrates' Court, Law Courts – Kibera, Nairobi from mentioning, hearing, continuing to hear or further hearing or determining any or all the courts, or any variation thereof or any charge and charges in substitute thereof akin to the charge in Criminal Case No. 2738 of 2005 ***REPUBLIC –VS- HEZRON KAMAU WAITHAKA***, be granted to the Applicant.

The Application is premised upon the Statutory Statement dated 31st May, 2005, the Affidavit of the Applicant wrongly dabbed Supporting Affidavit whereas it should be styled **Affidavit Verifying the Facts** as required under Order LIII, rule 1 (2) of the Civil Procedure Rules sworn also on 31st May, 2005, the Further Affidavit of the Applicant sworn and filed on 22-09-2005; the Applicant's Counsel's Skeletal Arguments dated the 13th November, 2006, and the Applicants Further Supplementary Affidavit sworn on 13th November, 2006, but filed on 20-11-2006.

The Application was opposed, firstly by the Respondent through the Attorney-General who filed a Replying Affidavit of one ***Mutua Ndambuki***, an Inspector of Police sworn on 29th June, 2005 and filed on the same day. Secondly the Application was also opposed by the Interested Party one ***Cyrus Kariuki***

Waithaka through an Affidavit sworn on 6-07-2005. His Counsel, Mwaura & Wachira Advocates also relied upon Skeleton Arguments dated 13-10-2005, and filed on 14-10-2005.

During the hearing of this matter before me on 28-11-2006, Applicant was represented by Miss Kinyili the Interested Party, by Mr. Wandabwa while the State or the Respondent was represented by Mr. Kaigai, Senior State Counsel. The basic issue is what to make of the facts leading to the institution of prosecution of the Applicant Hezron Kamau Waithaka through a complaint made to the Police Kilimani Police Station through his "***friend"*** Mr. Cyrus Kariuki Waithaka, the Interested Party.

The story, whether looked at from various Affidavits of the Applicant, or the Replying Affidavit of the Interested party, appears to be this. The Applicant and the Interested Party were friends of long standing. In that relationship, the Applicant persuaded the Interested Party to join him in a common venture to purchase a property, the Applicant had identified at Dagoretti a suburb of the City of Nairobi. The Applicant estimated the value of the property to be about Kshs.10 million. He asked the Interested Party to contribute one half of that value, that is to say Kshs.5 million towards the joint venture.

In the event within the space of about one year, February, 1999 and February, 2000, the Interested Party had contributed about Kshs.3,350,000/= towards no doubt the purchase of at least his interest in the property at Dagoretti Most of the payment of this money was made for the benefit by way of foreign currency drafts mostly U.S.A. Dollars for college fees of the Applicant's children who were studying in the United States of America (U.S.A.).

While the Interested Party was making these payments, the Applicant had by June, 7 1999 procured the transfer and registration of the property Title No. Dagoretti (Riruta/853 in his own name, ***Hezron Kamau Waithaka***, a substantial piece of land of approximately 4.94 acres or rounded up to 5 acres. Correspondence by the Applicant (***in particular dated 12th November, 1999 to the Interested Party)*** acknowledges that the contribution by the Interested Party as at Kshs.5 million, and showed the amount paid by the Interested Party as at that Kshs.2,211,790, leaving a balance of Kshs.2,788,210 out of the said outstanding balance the Interested Party paid the sum of Kshs.740,000/= by way of a U.S. Dollar draft of US $ 110,000=00 exchanged at the rate of U.A.$ to Kshs.74/=. That payment increased the Interested Party's contribution to Kshs.2,951,780/= the Interested Party claims to have paid Kshs.3,350,000/= meaning that he paid a further sum of Kshs.398.130/= later to make that total of 3,350,000/=.

By his letter dated 5th October, 2004, the Applicant infuriated and insensed the Interested Party by claiming that the Interested Party was in breach of the verbal arrangements to contribute Kshs.5 million, had caused the Applicant colossal financial losses and embarrassment as a result of the advertisement of the property for sale arising from defaults to service a bank loan, and that he, the Applicant would out of compassion and gratuitously refund the Interested Party his contribution. Attempts to reconcile the Applicant and Interested Party failed. So the Interested Party filed suit in H.C.C.C. No. 146 of 2005, dated 15th March, 2005, and last amended on 27th September, 2006. The Applicant filed an Amended Defence to that suit on 25th October, 2006. The Interested Party only claims the said sum of Kshs.3,350,000/= plus interest at 18% from 1999 until payment in full. The Interested Party does not claim any interest in the property. Perhaps properly advised, by his legal advisers, in the absence of any memorandum in writing to evidence his interest in the Dagoretti plot.

That is the background which is relevant to the issue here, as will presently be shown.

Perhaps impatient with the time taken by due process, through the civil suit, the Interested Party complained to the police, that his friend, the Applicant had obtained credit or moneys to the tune of Kshs.3,350,000/=- from the Interested Party by falsely pretending that the said money was the Interested Party's contribution towards a joint venture in the purchase of a piece of land valued at Kshs.10 million on a 50:50 contribution basis, being Dagoretti/Riruta/853.

Following the complaint, the Applicant presented himself to the Police on 30th March, 2005 and again on 1st and 5th April, 2005 when he met the Interested Party his accuser or complainant. According to the

Affidavit of the Applicant paragraphs 16, 17, and 18, the meeting of 1st April was attended among others by the Interested party, and his Advocate, ***Mr. J. J. Wachira***, ***Inspector Ndambuki***, referred to above, the Interested Party's friend, ***Miringu*** who with the Applicant's friend ***F.K. Njoroge*** (who did not attend any of the meetings), the Applicant was presented with a draft agreement setting up the terms of settlement which were generally harsh to the Applicant and he depones in his Affidavit (paragraph 22) that he declined to sign it until he had consulted his Advocates, M/S Waweru Gatonye & Co. Advocates who advised him that the agreement was "***extortionist*** and not ***binding"*** as he had agreed to the same under duress from the Police and other persons under the threat of arrest and imprisonment.

Having failed to reach a settlement with the Interested Party, that is the Complainant, the Applicant was charged with the offence of obtaining credit of Kshs.3,350,000/= from the Interested Party contrary to Section 316 (a) of the Penal Code. Besides this count the Applicant was also threatened with additional charges namely making a false document, namely the letter of consent and subsequent transfer of Dagoretti/riruta/853, all with intent to defraud. All this is contained in the Replying Affidavit of Inspector of Police Mutua Ndambuki. This Court issued temporary orders prohibiting the prosecution of the Applicant pending the hearing and determination of the Application herein, the subject of this judgement.

There is just but one issue to be determined in this Application, namely, whether an order of prohibition should issue against the prosecution of the Applicant. The parties have as expected taken two different positions. I will consider the position of each before arriving at my conclusion.

On advice from the State Counsel, (Mr. Karundu Kaigai,) Inspector Mutua Ndambuki, maintains at paragraph 24 of his Replying Affidavit that the fact that the transaction the subject matter of the criminal case has a civil aspect of it is not a bar to the criminal process. For this proposition, Mr. Kaigai, Senior State Counsel relied upon the provisions of Section 193A of the Criminal Procedure Code which provides:-

"*193A.* ***Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings."***

The side not to the said Section reads – "***concurrent criminal*** *and* ***civil proceedings.***" In other words, according to Senior State Counsel Kaigai, it is in order to maintain parallel or concurrent criminal or civil proceedings where the issues are either directly or substantially in issue in any pending proceedings. This is the same line of argument adopted in the Skeleton Argument of M/S Mwaura and Wachira also referred to above; and that this is not a proper case for the exercise of the court's jurisdiction to grant a prohibitory order. The Applicant will have an adequate opportunity to defend himself against the charges preferred against him.

The Applicant's Counsel argued to the contrary. So far as the Applicant's Counsel were concerned, and as particularly put in paragraph 9 of the Applicant's Further Supplementary Affidavit sworn on 13th November, 2006, and filed on 20th November, 2006 that the provisions of Section 193A of the Criminal Procedure Code by providing that any pending civil proceedings shall not be a ground for any stay, prohibition and/or delay of the criminal proceedings, the provisions do not in any manner or form displace, the common law position concerning abuse of process and the use of the criminal process for ulterior purposes. That provision only seeks to prevent a stay in a situation where dualities of civil and criminal proceedings converge; and where the proceedings are premised upon full disclosure of facts by a complainant on the basis of which an offence would be disclosed, and upon the absence of facts supporting the existence of a likelihood of an abuse of the criminal process.

For these propositions, the Applicant's Counsel relied upon the following authorities.

(1) Republic –Vs- Commissioner of Income Tax ex parte DHL Worldwide Limited (H.C. Misc. Application No. 317 of 2005),

(2) Shah –Vs- Resident Magistrate Nairobi [2000] I.E.A. 208,

(3) ***Williams –Vs- Spautz [1992] 66 NSWLR. 585.,***

(4) ***Republic –Vs- (1) Chief Magistrates Court, Nairobi (2) Attorney-General, ex parte Mohammed Gulam Hussein Fazal Kamuali and Hyundai Motors Kenya Ltd. (Mis. Application 367 of 2005***).

The basic tenet of the Applicant's application is that the criminal proceedings instituted against him in Criminal Case top 2738 of 2005 are an abuse of the criminal law process. The tort of abuse of or sometimes also referred to as collateral abuse of process differs from the old action of malicious prosecution in that the plaintiff who sues for abuse of process need not show-

(a) that the initial proceedings have terminated in his or her favour, and

(b) want of reasonable and probable cause for institution of original proceedings.

Abuse of process is not a tort easily recognized and therefore less accepted, by our investigation and prosecution authorities, and it is perhaps necessary to lay down some background to, and the origin of the tort.

In **REPUBLIC –VS- THE CHIEF MAGISTRATE'S COURT, NAIROBI, AND ATTORNEY-GENERAL, EX PARTE** ***Mohammed Gulam-Hussein Fazal Karmali and Hyundai Motors Kenya Ltd***. (***supra***) (the ***Hyundai Case***) Honourable Mr. Justice Nyamu, (the Presiding Judge of the Constitutional and Judicial Review Division of the High Court of Kenya), in his usual lucid and precise style, discussed and distilled nineteen principles running through the decisions of the Constitution Court in the following cases-

(1) Ex parte ***JARED BENSON KANGWANA*** (Misc H.C. Application No. 446 of 1995 Hon. Mr. Justice Khamoni (unreported)

(2) Ex parte ***FLORICULTURE INTERNATIONAL LTD***. H.C. Misc, Application No. 144 of 1997 (Justice Kuloba rtd. (*unreported)*

(3) ***Samuel Kamau Macharia & 70 others –Vs. Attorney-General H.C. Misc. Application No. 356 of 2001*** *(unreported**)**.*

(4) ***Republic -Vs- Attorney-General, ex parte Kipng'eno Arap Ngeny*** (H.C. Misc. Application No. 406 of 2001).

(5) ***Republic -Vs- ATTORNEY-GENERAL*** ex parte JPL Nyaheri (H.C. Misc. Application No. 1151 of 1999).

(5) **Republic –Vs- Attorney-General Ex Parte K.D. Pattni, Bernard Kalove and 7 others (H.C. Misc. Application No. 1296 of 1998).**

(6) **Republic –Vs- City Hall Magistrate's Court, ex-parte Sennik (H.C. Misc. Application No. 652 of 2005.**

Today, I will touch on the evolution of the tort of abuse of process as discussed in the old English case of ***CRAINGER -VS- HILL***, the subsequent English cases, and the Australian case of **WILLIAMS –VS SPAUTZ** which is also applied by Mr. Justice Nyamu in ***ex parte Sennik.***

Central to the tort of abuse of process is the requirement that the party who has instituted proceedings has done so for a purpose or to effect an object beyond that which the process offers. The centrality of this element in the tort of abuse of process was first recognized and articulated in the case of ***GRAINGER –VS- HILL*** 132 E.R. 769.

In that case, the Defendant, ***HILL*** lent money to the Plaintiff (***GRAINGER)*** in the year 1836**,** upon the security of a mortgage of a ship. The money was to be repaid in September, 1837. However the Defendant decided to demand the ship's register (the equivalent of a vehicle's logbook) before the moneys were due for repayment. When Grainger refused to deliver the ship's register, the Defendant Hill, threatened Grainger the debtor, with arrest and had him arrested and put in jail for twelve hours, thus forcing him to part with the ship's register.

When Grainger sued, the Defendant ***HILL*** argued that he was ***non-suited*** (there was no cause of action), "***that it had not been proved that the Defendant's action had terminated, and neither had Grainger alleged an absence of reasonable and probable cause."***

These were good arguments and would have prevailed if Grainger's action had been for malicious prosecution or malicious arrest, it was not. The Court rejected the notion that the action was in essence an action for malicious prosecution and held that it was a distinct and independent action for abuse of process. Tindal C.J. said (1838) 132 E.R. at page 773-

"***If the course pursued by the Defendants is such that there is no precedent of a similar transaction, the Plaintiff's remedy is by action on the case, applicable to such new and special circumstances, and his complaint being that the process of the law has been abused, to effect an object*** *not within the scope of the process,* ***it is immaterial whether the suit which that process commenced has been determined or not, or whether or not it was founded on reasonable and probable cause."***

In the same case, Basanquat J. said at page 774-

"***This is not action for malicious arrest or prosecution, or maliciously doing that which the law allows to be done; the process was enforced for an ulterior purpose, to obtain property by duress to which the Defendants had no right. The action is not for maliciously putting the process in force, but for maliciously abusing the process of the Court."***

Similarly in ***VARAWA –VS- HOWARD SMITH*** COL. LTD. (1911) 13 C.L.R. 35, the Plaintiff alleged that the Defendant company had instituted proceedings for breach of contract, and procured the arrest of the Plaintiff coercing him into paying the Defendant money to which it was not entitled. Griffith C.J. referred to the abuse in ***CRAINGER –VS- HILL As*** being "***abuse of original process for purposes foreign to the scope of the process itself, that scope being merely to obtain security for enforcing the payment of an alleged debt."***

Isaacs J. observed at page 91-

"***In the sense requisite to sustain an action the term "abuse of process" connotes that the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings are merely a stalking horse to coerce the dependant in some way entirely outside the ambit of the legal claim upon which the Court is asked to adjudicate they are regarded as the abuse of process for this purpose.''***

In re ***MAJORY [1955] Ch. 600 at 623 -624***, Evershed M.R. referred to a general rule –

"***….. that Court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist, and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court and therefore disqualified from invoking the powers of the court by proceedings he abused."***

In ***JAGO –Vs-DISTRICT COURT*** **(NSW) (1989)** 168 CLR 23, at pages 47-48, Brennam J. said-

"***An abuse of process occurs when the processes of the court is put in motion for a purpose which, in the eye of the law, it is not intended to serve or when the process is incapable of serving or serving the***

purpose it is intended to secure……. Although it is not possible to state exhaustively all the categories of abuse of process, it will generally be found in the use of the criminal process inconsistently with some aspect of its true purpose, whether relating to the hearing and determination, its finality, the reason for examining the accused's conduct or the exoneration of the accused from liability to punishment for the conduct alleged against him. When the process is abused, the unfairness against which a litigant is entitled to protection is his subjection to process which is not capable of serving its true purpose."

The last case I will cite in this discussion of the tort of abuse of process is the Australian Case of **WILLIAMS –VS- SPAUTZ [1992] 66 NSWLR. 585.** In that case, the Defendant Dr. Spautz was dismissed from his position of Senior Lecturer from the University of New Castle for what might in short be termed gross disobedience and insubordinations against his superiors, and in particular Professor Williams, the Plaintiff who was the Chair of the Department of Commerce in which Department Dr. Spautz as was Senior Lecturer as stated above. Perhaps out of frustration and bitterness at his dismissal Dr. Spautz instituted no less than thirty (30), cases, the majority criminal prosecutions against persons who occupied positions of authority or who played a role in the events leading to his dismissal. The criminal information laid by Dr. Spautz alleged a range of offences including criminal defamation, conspiracy seriously to injure, conspiracy false to accuse, attempting to pervert the cause of justice and unlawful conspiracy against the Applicant Prof. Williams, and several of his colleagues.

The judge of first instance, Spautz, after examining the conduct of Dr. Spautz during his self-proclaimed campaign for justice made the following finding of fact-

"***The predominant purpose of Dr. Spautz, in*** *instituting* ***and*** *maintaining* ***the criminal proceedings ….. against Prof. Gibbs and Williams and Mr. Morris was to exert pressure upon the university of Newcastle to reinstate him and/or to agree to a favourable settlement of his wrong dismissal case.'***

The trial judge (**Smart J.)** based his understanding of the concept of abuse of process upon the formulation of the principle by Hunt J. in ***SPAUTZ –Vs- WILLIAMS*** (at 539) in these terms-

" ***The essence of an abuse of process action is that the proceedings complained of were instituted and/or maintained for a purpose other than for which they were properly designed or exist, or to achieve for the person instituting them some collateral advantage beyond that which the law offers, or to exert pressure to effect an object not within the scope of the process. The focus in such a suit is on the purpose of the person charged with abuse of process in instituting them."***

On appeal by (Dr. Spautz), the Court of Appeal reversed the decision of the trial judge, Priestly J.A. concluding that the trial judge erred in his formulation of the principles governing abuse of process and in his view of the circumstances in which a stay of proceedings would be stayed. While conceding that proceedings instituted for an improper purpose were in a sense an abuse of process, Priestly, J.A. was of the view that no ***permanent stay*** should be granted in the absence of some improper act in the prosecution of the process, and further considered that the governing principle was that supervising courts should restrict use of their power to control abuse of process to those cases in which exercise of the power is the only way of ensuring that an accused person is not deprived of a fair trial by reason of such abuse, and concluded that the appellants would not have been deprived of a fair trial.

On the other hand, Mationey J.A. dissenting, applied the basic principle followed by the trial judge (Smart J.) that to bring proceedings to achieve objects ulterior to the purpose of the cause of action as pleaded was an abuse of process for which a permanent stay should be granted.

On appeal, the Federal Supreme Court of Australia, reserved the decision of the Court of Appeal restored the judgement of the trial judge, and held by majority – ***that to bring proceedings to achieve objects ulterior to the purpose of a cause of action as pleaded is an abuse of process for which a permanent stay should be granted.*** In that case it followed that the threat and maintenance of the criminal actions for defamation, with the predominant purpose of seeking reinstatement in employment were such an abuse of process.

From the **WILLIAMS c**ase, the true test for abuse of process, is whether the improper purpose is the sole purpose of the moving party. The English cases have applied the test of the predominant purpose as the criterion for determining abuse of process, Lord Denning in ***GOLDSMITH –VS-STERRING [1977] I.W.L.R. 478*** at 496, and the English Court of Appeal in ***METTAL & ROHSTOFF AG –VS- DONALDSON ETC INCL***. [1990] I.Q.B. 391 at 469 where Slade LJ said-

"***A person alleging such an abuse must show that the predominant purpose of the other party in using the legal process has been one other than that for which it was designed."***

The onus of establishing and satisfying the Court that there is an abuse of process lies upon the party alleging it, and Scarman LJ said in ***Goldsmith –vs- Sperring*** (supra) at stage 495, "***the onus is a heavy one and the power to grant a permanent stay is one to be exercised only in the most exceptional circumstances."***

Here in Kenya, in ***REPUBLIC –VS- CHIEF, MAGISTRAT'S COURT at Nairobi & ATTORNEY-GENERAL*** ex parte Mohammed G.H. Karmali & Hyundai Motors Kenya Ltd (supra), Nyamu J, (the presiding Judge of the Constitutional and Judicial Review Division of the High Court of Kenya) set out nineteen (19) principles derived from ***inter alia*** the **FLORICULTURE** case, **WILLIAMS** (supra) ***Kangwana*** cases –(to institute proceedings to exert pressure for payment of a debt bonafide disputed, where those proceedings are not for the purpose of deciding the disputed debts constitutes abuse of process of the court), there must be avoidance of oppression in our criminal justice system.

In the ***Hyundai Case*** Nyamu J. granted orders of Certiorari and Prohibition. Why? Because in that case the State tried to apply the criminal law justice system to secure the delivery of contracted vehicles and for which payment was disputed. The learned judge observed ***inter alia*** that where the predominant element in a matter is civil and a decision is made to take it to a criminal court, it is unlikely that a fair trial would result because the requirements of holding a fair trial under the criminal jurisdiction as set out in Section 77 (1) of the Constitution are different from the requirements for conducting a fair trial as regards civil rights and obligations which are set out in section 77(9) of the Constitution.

For instance whereas the standard of proof in a criminal trial is beyond reasonable doubt, and is premised upon the principle of equality of arms, the right in adversarial proceedings to equality of treatment as between the prosecution (***the State***) and the defence, the citizen, the standard of proof in civil matters is on the balance of probability.

A fair trial under Section 77 (1) of the Constitutions is predicated upon the principles of ***inter alia*** that an accused person –

(a) is presumed innocent

(b) will be granted adequate time and facilities to prepare his defence,

(c) the right to be represented by Counsel of his/her choice

(d) is promptly informed of the nature of the charge in a language he understands, and to interpretation),

(e) the right to call witnesses and to cross-examine those of his accuser,

(f) no offence or penalty may be retroactive,

(g) no double jeopardy,

(h) right to be convicted only of an offence and penalty known or prescribed by law.

(i) the right not self-incriminate or to be compelled to give evidence,

(j) the right to be tried by an independent and impartial court established by law.

On the other hand, the requirements regarding civil rights are less stringent under Section 77 (9) of the Constitution:-

(1) the Court or adjudicating authority be prescribed by law to determine the existence or extend of a civil right;

(2) be independent and impartial,

(3) the case or proceedings be granted a fair hearing within a reasonable time.

In other words, the ***scales in two systems of justice*** are radically different, and because of the different standards of proof, the ingredients of a fair trial are substantially different.

So what does this mean in determining or deciding to charge a person for an offence which is intrinsically civil in nature? The decision to do so must be made in a quasi-judicial manner at all times, with the above constitutional requirements in mind. Failure to do so would lead to a successful challenge on the principles of what constitutes a fair trial, and fair administration of justice.

I will give two more examples to illustrate this point. A tenant takes possession of a residential property after paying the tenancy deposit and the monthly rent. He, under financial pressure, defaults and secretly decamps from the house. The landlord's remedy does not lie in reporting him to the Police that the tenant has run away with outstanding rent for the criminal justice to be invoked. The landlords remedy lies in a civil action.

Another example, a tour operator, who secures customers from overseas but does not own her own mini-buses to carry tourists around say site- seeing on a tour of the City of Nairobi, or even for long distance around the National Parks. He or she is paid periodically by her customers perhaps another tour operator based overseas. She defaults in payment to the owner of the hired mini- buses failure to pay be regarded as an offence of obtaining good by false pretences?

In my opinion to subject such persons to the criminal process would be to use that a process for an ulterior or improper purpose, for in either case, like in this, the primary purpose of the application of the criminal law process would be to exert pressure upon the debtor, or like in this case, the Applicant, and coercing him into paying a defendant or like here, the Interested Party moneys, under dispute, or for breach of contract.

Purely from a policy aspect the proper administration of justice demands that courts should exercise rather than refrain from exercising, their jurisdiction especially their jurisdiction to try persons charged with criminal offences, and that persons charged with such offences should not obtain an immunity from prosecution. It is however equally important that freedom of access to the Courts should be preserved and that litigation of the principal proceedings, whether criminal or civil should not become a vehicle for abuse of process on an application for stay, unless once again the interests of justice demand it. As the majority of the seven judges including Mason C.J. observed in the ***WILLIAMS –VS- SPACITY*** Case (supra), at page 588-

"***There is always a risk that the exercise of jurisdiction to grant a stay may encourage some defendants or accused persons and suspects to seek a stay on flimsy grounds for tactical reasons. But that risk and other policy considerations ….. are not so substantial as to outweigh counter availing policy considerations and deter the courts from exercising the jurisdiction in appropriate circumstances."***

I described fully at the beginning of this judgement the facts relating to this Application. In summary, the Applicant and the Interested Party, friends of long standing persuaded each other upon the instance of the Applicant, that the Interested Party advance him money in consideration of an interest in a property to

be purchased. It was unclear whether by the applicant alone or jointly with the Interested Party on an equal footing. In the end the Interested Party contributed Kshs.3,350.000/= out of the agreed Kshs.5 million. Technically, the Interested Party was also in breach of that verbal agreement, he failed to contribute his shares (the Kshs. 5 million). He has sued his friend the Ex parte Applicant for the refund of the full sum of Kshs.3,350.000. That suit is pending. To coerce his friend, the ex Applicant to either settle the suit (Milimani Commercial Court Chief Magistrates Civil Case No. 146 of 2005), the Interested Party went over to the Police and made a complaint as to how his friend cheated him and obtained moneys from him through false pretences that he would purchase a plot jointly.

This court does not condone the behaviour or actions of the Applicant . It is however clear to this point that the action of the Interested Party and the subsequent prosecution of the Applicant is motivated by an ulterior motive, to achieve objects unconnected with the purpose of the criminal law process, namely to obtain a collateral advantage over the Applicant so that he could settle the claim quickly. This is not dissimilar to the Hyundai Motors, Kenya Ltd. (supra) where the directors were charged in essence to coerce them to deliver vehicles to the Government upon a disputed contract. All those instances are an abuse of the criminal justice process.

The Court's inherent power extends to preventing an abuse of process resulting in oppression even if a party, like the Interested Party here, had a prima-facie case. The court does not concern itself with whether or not a fair or unfair trial will ensue or result if the prosecution is not stopped. The Court's sole concern is that its process must be used fairly in the promotion of the administration of justice.

Being therefore of the above mind and being in general accord with the principles enumerated in the case of ***Mohammed Gulan Hussein Fazal Kamali & Another –Vs- Chief Magistrate's Court Nairobi and Another (****supra*), I would grant an order of prohibition, and order the immediate issue of the order of the judicial orders of prohibition's as prayed.

The ex Applicant also sought an order for costs. I decline to grant such order. Justice acts both ways, the decision herein concerns issues of public law and proper administration of Justice, it does not concern itself with the adjudication of private rights. Each party shall therefore bear its own costs.

Dated and delivered at Nairobi this 6th day of March, 2007.

M.J. ANYARA EMUKULE

JUDGE.