



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc Civ Appli 367 of 2005

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL
REVIEW ORDERS OF PROHIBITION**

AND

**IN THE MATTER OF: THE CHIEF MAGISTRATE'S COURT
AT NAIROBI**

AND

IN THE MATTER OF: CRIMINAL CASE NO.2804 OF 2004

**MOHAMMED GULAM HUSSEIGN FAZAL KARMALI 1ST
APPLICANT**

**HYUNDAI MOTOS KENYA LIMITED 2ND
APPLICANT**

VERSUS

**THE CHIEF MAGISTRATE'S COURT, NAIROBI 1ST
RESPONDENT**

THE ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

The factual background in this matter is that on 8th November 1997 the Kenya Government under the hand of the Permanent Secretary office of the President and Permanent secretary, Ministry of Finance entered into an international contract with Hyundai Motor Company incorporated in Korea for the supply of 540 vehicles with the Kenya government being described as a “buyer” and the Hyundai Motor Company (Korea) as “seller”. The subject matter of the contract was the supply of 540 units of assorted Hyundai motor vehicles – this figure was later on reduced to 520 units under a separate agreement. The cost was indicated as US 10,000.000 plus interest at the rate of 7.2% per annum. The payment was initially to be by way of a letter of credit from a first class international bank. The credit period was five

and a half years (5½years).

By a later agreement signed on 10th December, 1997 by the two Permanent Secretaries and Hyundai Motors (Kenya) Ltd as agents of Hyundai Motors Ltd (Korea) the terms of the international agreement were altered as follows:

4.2 payment will be by way of issue of 3 Kenya Government Promissory Notes of equal amount comprising Principal plus interest at LIBOR plus 0.75% per annum

4.3 the promissory notes will be due for payment on 15th May 1999, 15 May 2000 and 15th May 2001 respectively

4.4 the promissory notes will be made out in seller's prescribed format as enclosed and be unconditionally negotiable and transferable.

Following the change in mode of payment from letter of credit to promissory notes the purchase price was increased to from. US dollars 10,000,000 to 11,577,114 and the units were reduced from 540 to 520.

Subsequently the Promissory Notes were discounted for a net sum of US dollars 8,277,811 thereby resulting in a loss of US Dollars 1,522,687.89. There is correspondence showing that the Kenya Government through the two Ministries was aware of the discounting and knew the rates at which the discounting was done. The court have not seen a single letter disputing or contesting the discounting.

Clause 9 of the International Agreement described above provided that all disputes controversies or differences which may arise between the Seller and the Buyer out of, or in relation to, or in connection with the Agreement of for breach thereof, shall be settled by arbitration in London, England in accordance with the Commercial Arbitration Rules of the London Court of International Commercial Arbitrations and under the law of England and that the award shall be final and binding upon both parties.

The second Agreement as described above reiterated the terms of the International Agreement except for the specific variations as set out above. It follows therefore all the terms of the International Contract continued to regulate the contractual relationship of the parties to the contract including the arbitration clause (9).

Between 1997 – 2002 a total of 377 units of assorted Hyundai motor vehicles valued at US dollars 7,028 715 were delivered and recovered by the Government of Kenya as per the delivery notes annexed to the application.

As at December 2002, the undelivered units were 143 valued at US Dollars 2,970 684.

By a letter dated 16th December 2002 the Government unilaterally terminated the Credit Sale Agreement by a letter of the same date and inspite of the termination the Government of Kenya insisted on delivery of motor vehicles and six vehicles were delivered by the applicants in April 2004.

The Kenya Government has not controverted the above factual background at all.

The applicants contend inter alia that the dispute between the parties is that of payment in that the Government of Kenya has not paid for the undelivered units and that they have always been ready and willing to deliver the remaining units subject to payment. The applicants contend that instead of invoking the laid down method of dispute resolution as per clause 9 of the Agreement by way of arbitration the Kenya Government has instead invoked the criminal process with a view to applying pressure on the applicants to pay contrary to the terms of the Agreement.

As a result, the applicants were arraigned in court with criminal charges as under:

“On diverse dates between 8th November 1997 and 15th May 2001 at Treasury, Nairobi within Nairobi Area Province with intent to defraud jointly with others not before the court obtained from the government of Kenya, the sum of US dollars 3,262 760 by falsely pretending that they were in a position to deliver 153 units of motor vehicles to the Government of Kenya, a fact they knew to be false”.

The charge in court is obtaining by false pretences.

The applicants claim that they have been harassed and oppressively treated by the respondents through the officials of the Government and for this reason the applicants claim that the respondents are using criminal case Chief Magistrate’s Court case 2806 of 2004 to improperly secure settlement of a disputed civil claim and that the criminal process is being used unfairly vexatiously and oppressively and that the respondents conduct constitutes abuse of power and the court process. The applicants pray that the court invokes its inherent powers to stop the criminal case by way of prohibition orders.

In support of the application dated 30th March 2005 the applicants filed a statement dated 14th March and a verifying affidavit with annexures thereto sworn on 8th July 2005 by Mr Karmali. In addition on 2nd May 2006 they filed skeleton arguments. They have filed a list of authorities and a bundle of authorities duly highlighted.

In opposition the respondents have filed two replying affidavits both sworn on 6th July 2005 by Mr Mohammed Chidziga and Daniel Kandie. On 10th March 2006 the respondents filed skeleton arguments. The opposition is substantially centred on the following grounds:

- (i) The prosecution is not malicious and/or vexatious and was mounted as a result of investigation on complaint raising reasonable suspicion than an offence or offences have been committed by the applicants
- (ii) The charges were preferred after ascertaining that the applicants had not supplied the requisite number of motor vehicles to the Government of Kenya, despite payment having been made and/or guaranteed by way of promissory notes despite the fact that the applicant had already discounted the promissory notes.
- (iii) The second respondent in mounting the prosecution relied on the evidence gathered and not the media reports
- (iv) That the trial court is the best forum where the applicant can challenge the veracity of the evidence gathered by prosecution and not in a judicial review court.
- (v) The existence of a civil case is not a bar to criminal proceedings since the case had both features – section 79 of the Criminal Law Amendment Act 2003 (which incorporated S 193A of the Criminal Procedure Code)
- (vi) According to the affidavit of Mohammed Chidzuga, the applicants do not have any valid claim against the government in respect of the alleged loss arising out of the discounting of promissory notes
- (vii) The respondents finally contend that for the applicants to succeed they must demonstrate
 - (a) Criminal prosecution is instituted for a purpose other than what it is intended
 - (b) The prosecution is against public policy. Burden lies on the applicants to show mala fides on the part of the respondent in instituting this prosecution and therefore orders of prohibition should not issue.

FACTUAL ANALYSIS OF THE MATTER

The applicants have detailed in paragraphs 19 to 26 of Karmalis affidavit what they consider to be

acts of harassment oppression and intimidation as follows:

- (i) February 2004 visits by the officials of the office of the President accompanied by two officers of the Criminal Investigations Department who enquired concerning the undelivered units. They demanded delivery and when the applicant resisted they were taken to the CID Headquarters for interrogation by a lady inspector who warned the applicants that drastic action would be taken against the applicant if no delivery was made. At the CID Headquarters a Mr Kandie impounded the applicant's passport which has not been released to date.
- (ii) Discussions with the P.S. Dave Mwangi, when he demanded delivery by end of July 2004
- (iii) On 8th July 2004 while waiting in Dave Mwangi's office Mr Karmali was picked by CID officer, a Mr Kandie and taken to the CID Headquarters where the same lady inspector informed Mr Karmali that they had instructions from the office of the President to arrest him. Mr Karmali was locked up and released the following day after advice that he delivers the remaining units to avoid prosecution
- (iv) By a letter dated 10th August, 2004 written by the P.S. Mwangi he instructed the Director of CID to take up the matter and ensure that appropriate measures have been taken for a full redress to the Government." The letter was exhibited as exhibit 12"
- (v) In September the Kenya Revenue Authority visited the applicants showroom and impounded 5 motor vehicles which they released after 2 weeks
- (vi) Between 1st and 5th September, 2004 the subject matter of the proceedings were given wide and extensive coverage in the local media and some of the banners read:

"Deal was cancelled before Narc came to power in 2002"

"390 m police cars scandal"

"Five cars seized in fraud probe – five"

"Police seize passport of cars scandal Head – The passport of the man at the centre of a 390 million police cars scandal has been confiscated by the CID. And it is likely he will face criminal proceedings said the Permanent Secretary, Office of the President, Mr Dave Mwangi"

S 193A OF THE CRIMINAL PROCEDURE CODE. The learned counsel for the prosecution Mr Kilukumi has strongly argued that the new amendment to the Criminal Procedure Code, S 193A does not displace the common law position concerning abuse of process and the use of the criminal process for ulterior purpose. It prevents stay in situation where duality of civil and criminal proceedings converge. I agree with the learned counsel. The law on the topic has been very ably articulated in a line of landmark decisions of the High Court and other courts. The learned counsel has in a very well prepared list and bundle of authorities brought out all the relevant cases. Before I cite them I wish to repeat here what I said in my own judgment in the case of *R v ATTORNEY GENERAL & ANOTHER* Ex parte *HUSSEIN Mudobe H.C. Misc Civil Application No. 898 of 2003* (unreported) where I found that the Police in instituting criminal proceedings were being used by one of the parties to a written lease to criminalize the terms of lease and where I had no hesitation in frowning upon the practice by granting an order of certiorari and prohibition to stop the criminal proceedings. I had this to say at pages 9,21,22 respectively:

"It follows therefore that under the Constitution and our law, a civil right or obligation cannot be determined in a criminal court in view of (S 77(1) and S 77(9) of the Constitution and the definition of court in the Civil Procedure Act. Any attempt to determine any such right or obligation in a criminal court, clearly in my opinion violates the constitution and it would be therefore unconstitutional. A criminal court does not have the necessary procedural safeguards which can lead to a fair trial" ...

“We must also remind ourselves that the reason why that independence was conceived, fought for and maintained in the first place was to enable us to hold the scales of justice in cases such as this between the power of the state on the one hand (to prosecute) and the liberty and freedom of the individual”

...”In this case I find that the institution of the action in a criminal court is indeed unconstitutional I further and that the institution and the charging of the applicant is tainted with mala fides and that the court process has been abused. I further find that there was an ulterior purpose in the institution of the prosecution.”

Similarly, in the case cited by the applicants’ counsel, namely *R v KENYA REVENUE AUTHORITY ex-parte ABERDARE FREIGHT* H C Misc 946 of 2004 (unreported) at pages 16-17, Nyamu J stated:

“The applicants admission in the submission made on its behalf that the consignment hereof was a new shipment not covered in the earlier order in H C Misc 646 of 2004 does reveal to this court an unfair use of the court process and it borders on intellectual dishonesty. Abuse of the process would involve using the process for a purpose or in a significantly different from its ordinary and proper use. It is an abuse to bring vexatious proceedings.:

POLICY CONSIDERATIONS FOR HALTING CRIMINAL PROCEEDINGS

Notwithstanding the provisions of S 193A of the Criminal Procedure Code the court is still bound to ensure that its process is not abused and also to protect itself against the abuse of its process by litigants. I fully endorse the powerful submission by the learned counsel on this point as per paragraph 23 of his written submissions. In short the learned counsel has argued that in the context of criminal proceedings there are two fundamental policy considerations which the court must take into account in dealing with the abuse of process. Referring to the two considerations in *MODEVAO v DEPARTMENT OF LABOUR [190] INZLR 464* at 481 in a passage which Manson CJ quoted in *JAGO* (1989) 168 CLR at 30 Richardson J, reproduced the two policy considerations as follows:

“The first is that the public interest in the administration of justice require that the court protects its ability to function as a court of law by ensuring that its processes are used fairly by state and citizen alike. The second is that, unless the court protects its ability to function in that way its failure will lead to an erosion of public confidence by reason of concern that the courts processes may lend themselves to oppression and injustice. At page 482 Richardson added:

“the court grants a permanent stay in order to prevent the criminal processes from being used for purposes alien to the administration of criminal justice under the law. It may intervene in this way if it concludes ... that the court processes are being employed for ulterior purposes or in such a way ... as to cause improper vexation and oppression.”

The learned judge was obviously quoting the seminal case of *WILLIAM v SPAUTZ [1992] 66 NSW LR 585* at page 588 E-G. It is this case that constituted the genesis of this country’s current jurisprudence as clearly reflected in the following landmark cases:

- 1. EX PARTE JARED BENSON KANGWANA H.C. Misc 446 of 1995 (Hon Justice Khamoni) H.C. unreported**
- 2. EXPARTE FLORICULTURE INTERNATIONAL LTD H.C. Misc 144 of 1997 (Justice Kulobartd) H.C unreported**
- 3. SAMUEL KAMAU MACHARIA 7 ANOTHER v ATTORNEY GENERAL Application No. 356 of 2000 (H.C)**
- 4. R v ATTORNEY GENERAL Ex-parte KIPNGENO ARAP NGENY H.C. Misc Civil Application No. 406 of 2001 (H.C)**

5. R v ATTORNEY GENERAL Ex-parte JPL NYABERI Misc Civil Application No. 1151 of 1999 (H.C)

6. R v ATTORNEY GENERAL Ex-parte KD PATTNI, BERNARD KALOVE 7 ANOTHER H.C. Misc Application No 1296 of 1998 (H.C)

It is therefore clear from the above line of authorities that our jurisprudence has taken a clear line and the principles which have emerged can be illustrated as follows:

FLORICULTURE CASE

1. “Proceedings taken in bad faith or circumstances yielding an inference that they were up to no good. Criminal law is not to be used oppressively to punish acts which in truth might be technically a breach of the criminal law but which contain no real vice and which can only be best handled under a process other than the criminal process namely any of the different systems of civil remedies. The existence of other remedies which have either have already been unsuccessfully sought or which may be open and are less drastic and stigmatic than the criminalization of an otherwise civil dispute is indicative of improper and ulterior purpose.

2. It is an abuse of criminal process for a person to launch criminal proceedings against the other, in civil matters which are genuinely disputed on substantial grounds by that other person and the civil dispute cannot be reasonably ventilated and decided with a fair finality in the criminal process.

WILLIAMS CASE supra pages 596F and 593E

3. “That the purpose of criminal proceedings generally speaking, is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and, on that account, is deserving of “punishment.”

KANGWANA CASE (supra)

4. The court would not permit a party initiating criminal proceedings so as to exert pressure on the opponent to submit to judgment and/or to forego a disputed claim

5. It is indisputable that the High Court has both statutory power and inherent power to intervene and prevent a prosecution which is vexatious or a harassment and oppression instituted for an improper purposes, mala fides and therefore an abuse of the court process.

6. It is therefore immaterial whether the prosecution reasonably suspects that an offence has been committed because that is not an issue in a prohibition

7. The question for the court to ask is whether its process is being fairly invoked

8. There must be some abuse of the process of the court, some improper and may be mala fides use of its procedure before an order of judicial review in the nature of prohibition will be made

9. I think the principle is clear that to institute proceedings to exert pressure for the payment of debt bona fide disputed, where those proceedings are not for the purpose of deciding the disputed debt, constitutes an abuse of the process of the court.

10. Justice Khamoni posed important questions arising from WILLIAM’S case (supra) which shatter the notion even today that s 193A of the Criminal Procedure Code (which was apparently introduced after the Kangwana case) has displaced the common law or in any way interfered with the courts inherent power to protect its process:

“The court did not therefore advise the appellant to go and present his defence in the criminal

prosecution. The court did not tell professor Williams or any of the other appellants to shut up because he had civil cases and other criminal prosecutions filed and pending against him. The court did not tell any of the appellants to shut up because it was normal and lawful for civil and criminal cases to be filed against individuals and could be filed side by side.”

11. There must be a square deal among the parties involved in criminal prosecutions in our courts of law. It is this caution of the two which maintains conditions for order and fairness in criminal cases

12. There must be avoidance of oppression in our criminal justice system

13. The fact that criminal cases can be constituted in every civil transaction, should be the more reason to make the state extra alert to ensure that criminal proceedings are not used for the collection of civil debts bona fide disputed when those criminal proceedings are not under the law which makes provisions for deciding the disputed debts

KAMLESH PATTNI case

14. Whilst the power of the High Court to intervene and stop a criminal prosecution must be exercised sparingly the High Court must always be ready to intervene to prevent any prosecution which is vexatious, oppressive, mala fides, frivolous or taken up for other improper purposes such as undue harassment of a party or abuse of the process of the court.

S.K. MACHARIA case

15. The Attorney General’s discretion to arraign a person in court should be exercised in a quasi judicial way. The principles set out above concerning abuse of court process were repeated

NGENY’S CASE

16. 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 reasonable and probable cause for mounting a criminal prosecution otherwise, the prosecution will be malicious and actionable

NYABERI case

17. Prosecution aimed at securing private vengeance or vindictiveness must be stopped as contrary to public policy and the public interest

WILLIAM case

18. If proceedings obviously lack any proper foundation in the sense that there is no evidence of sustaining a committal they will obviously be vexatious and oppressive. In such a case the proceedings themselves are an abuse of the lower Court and will inevitably result in the discharge of the defendant and that the charges against the defendant, lack any foundation, the supreme court could be justified in intervening to halt the proceedings in limine in order to prevent the defendant from being subjected to unfairness vexation and oppression.”

19. The rationale for prohibiting such proceedings is that for a man to be harassed and put to the expense of perhaps a long trial and then given an absolute discharge is hardly from any point of view an effective substitute for the exercise by the court [of its inherent power to prevent abuse of its process]. On the score of costs alone, the exercise of the power will protect the accused person from expenditure on a trial on indictment which he or she cannot recoup.

SUMMARY OF FINDINGS

The uncontroverted position of the applicants that in the discussions with the then P.S. Office of the President it was disclosed to them that they had to deliver the undelivered units or face consequences. This is a clear indication to the court that the purpose of the subsequent institution of the criminal proceedings was to force the delivery of the undelivered units. Indeed the letter from the P.S. to the Director of Criminal Investigation Department dated 10th August, 2004 exhibited as Exh 12” confirms beyond any reasonable doubt the intentions of the office of Mr Mwangi: The letter reads:

.....

“At this juncture, I wish you to take up the matter and ensure that appropriate measures have been taken for a full redress to the Government. Your officers have been handling the matter and will take up the issue from where it is currently.”

It is also significant to note that on 16th December 2002 the then P.S. office of the President Mr Z.A Cheruiyot did unilaterally terminate the contract between the parties by a letter of the same date, but notwithstanding the termination the Narc Government continued to apply pressure for delivery to be made. This was obviously pressure which had no basis in contract law and if it did not have a contractual base and in the view of the court it constitutes harassment and any criminal proceedings pegged on such pressure is heavily tainted with illegality, coercion and oppression. Related to this is the fact that the particulars of the figures set out in the charge sheet namely US dollars 3262,760 and 153 units have absolutely nothing to do with the two agreements. The choice of these figures appear to the court to have been picked in an arbitrary manner since there was no contract setting out these figures. The correct contractual figures are as set out in the two agreements yet there is no reference to it in the charge sheet. The charge sheet is based on very shaky factual foundation.

It is also significant to note that Clause 9 of the first Agreement contains an arbitral clause which is binding on all parties including the Government. The two agreements are commercial agreements which in unequivocal terms provide for the only means of resolving any commercial dispute arising from the Agreements that is by arbitration in London under the Rules of the London Court of International Commercial Arbitration (LCICA). The effect of this is that the parties had by a consensual process agreed to resolve any dispute or differences arising from the agreements by arbitration. This court has a responsibility to uphold party autonomy. In this regard had the Permanent Secretaries concerned sought proper advice say from the office of the Attorney General, he would have reminded them that the State of Kenya has duly ratified the UNCIITRAL Mode Law which requires the State and the courts to uphold the principle of party autonomy in resolving commercial disputes and where there is an arbitration agreement such as in this case ie clause 9. The P.S.s would also have been advised that S 10 of the Arbitration Act 1995 of Kenya which is modeled on UNCITRAL MODEL LAW prevents the courts from interfering with the arbitral process or party autonomy. S 10 of the Arbitration Act 1995 reads:

“Except as provided in this Act, no court shall intervene in matters governed by this act

Under section 3 of the Interpretation and General Provisions Act cap 2 the word “court” is defined as under:

“court” means any court of Kenya of competent jurisdiction”

Finally section 2 of the Arbitration Act 1995 defines “an arbitration agreement” as follows:

“Arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not”

The importance of this provision is that if the proceedings in the Magistrate’s Court Criminal case 2804 of 2004 were civil proceedings and not criminal proceedings the court would have a statutory duty to stay

the proceedings under S 6 of the Arbitration Act so as to uphold the party autonomy to go to arbitration as per the agreement. I dare say by analogy even a criminal court has no business (quite apart from lacking the competence) adjudicating commercial agreements where the dispute is arbitrable under the relevant contract as in this case and where there is an enforceable arbitral clause and an underlying commercial agreement. In view of the definition of court as above a criminal court would not be competent to uphold the principle of party autonomy and this is even the more reason for the court making a finding that the criminal process is being abused or used for an improper purpose.

The court finds that it was high handed on the part of the two Ministries to take a decision of this magnitude without any reference to the Attorney General (at least nothing has been said about his role in this matter) which decision clearly reveals an irresponsible demonstration of the mighty hand of the State in enforcing contractual obligation through a criminal process. I call it irresponsible in that the State had as its only remedy the invocation of the arbitral clause to enforce (if justified) the delivery of the undelivered units (if any) by obtaining an arbitration award and enforcing it either in Korea or in Kenya. It is also irresponsible for the State to have resorted to the criminal process because even as regards the facts the court finds that one would have to stretch the meaning of a prima facie case for the state to be able to prove mens rea in relation to the non delivery. The institution of the proceedings violates S 10 of the Arbitration Act. The Agreement between the parties constitute an international agreement and all indications are that the arbitration which should have been pursued is also international arbitration as per the definition in S 2 of the Arbitration Act 1995. Surely as stated above principles 1 to 19 the existence of the alternative remedy of international arbitration or in the case of Hyundai Kenya Ltd being regarded as principal, being treated as a domestic arbitration, in resolving the matter does reveal both the fact that the State is patently using the criminal process in a manner that snacks of oppression, manipulation and a clear abuse of the criminal justice system and macks bona fides associated with Commercial transactions. In the view of the court, the chosen method of recovery is contrary to public policy and public interest. The public interest is better secured by recovery of the undelivered units if any by using the arbitral process or recovery damages which an arbitrator could award after establishing any breach of contract. To me, this case reveals an incredible poor sense of judgment in articulating public interest in that the Government of Kenya cannot through the criminal proceedings recover a single unit of the assorted Hyundai motor vehicles. It is also manifestly clear to the court that the Government cannot recover a penny or a cent or a dollar through the criminal process. The invocation of the criminal process, in place of the arbitration process is contrary to the public interest. Any award obtained either in Kenya or London as contemplated in the Agreement would result in full recovery!

Perhaps it is also apt to remark that at this time and age it would be international suicide for the State or a court of law to refuse to uphold the autonomy of the arbitral process because multinational or bilateral arrangements or Agreements, including direct Foreign Investment Agreements are all based on the principle of party autonomy and invariably incorporate arbitration clauses. Any State or the municipal courts who fail to appreciate this important principle would do a lot of harm to the public interest.

WHAT PUBLIC INTEREST MUT THE STATE RECOGNISE

1. The powers the people of Kenya have given to the State to hold in trust are the powers set out in the Constitution and the other written laws through the legislature and the State cannot therefore violate the trust by for example as it has done in this case by failing to act in the best commercial interest of the people by failing to invoke the arbitral clause while it is dangerously running out of time under the Limitation laws and recklessly instituting criminal proceedings in an attempt to enforce clear contractual obligations. The court does of course take judicial notice that the contract was entered into by a different Administration. I hold that acting outside the law violates public policy and the state has no business stooping to such levels in its commercial, contractual or any other dealings with foreign authorities or its citizens. The circumstances of this case are such that the court cannot possibly believe that it was brought to the attention of the office of the Attorney General, yet because of the apparent publicity of the matter in the local media it is yet again difficult to believe that it did not attract the attention of that office. If it did, the institution or continuation of the criminal process is negligent and reckless to say the least. The office had a clear duty to give proper advice including the efficacy of the method adopted in securing the public

interest. In this regard I wish to endorse fully the observations of Lord Pearce on what is prejudicial to the interests of the State, in the case of *CHANDLER v DIRECTOR OF PROSECUTIONS [1964] A.C. 763 (HL)*:

“Questions of defence policy are vast, complicated, confidential and wholly unsuited for ventilation before a jury. In such a context the interest of the state must in my judgment mean the interests of the state according to the policies laid down for it by its recognized organs of Government and authority, the policies of the state as they are, not as they ought, in the opinion of the jury, to be. Anything which prejudices those policies is within the meaning of the Act prejudicial to the interests of the state.”

In this case I find that the State has state responsibility under the UNCITRAL MODEL LAW to uphold the autonomy of the arbitral process and the provisions of the Arbitration Act – and subverting this is prejudicial to the interests of the State.

Although the concept of public interest has somewhat been changing with the times and evasive of a precise definition, in the context of Kenya, public interest is reflected for example in securing and enforcing the fundamental rights and freedoms. It is also reflected in the limitations to those rights and freedoms by law, for example in limitations that are reasonably required in the interest of defence, public safety, public order, public morality or public health or for the purpose of protecting the rights of others, as stipulated in the Constitution.

Public interest is also capable of being defined by the answer to the following questions:

- (1) If the interest affected has a general application
- (2) Is there a collection or commercial interest and are public moneys being expended and to what extent and purpose in the interest under scrutiny
- (3) Whether the public or community at large can reasonably and legitimately expect fair play in the decision making process

Using the above as pointers of public interest, in the circumstances of this case, the public can legitimately or reasonably expect that the State would not act against their commercial interest in the Agreements entered by the State on their behalf. By this criteria the state fails because they are acting in a manner that will not result in securing the recovery of part of the subject matter of the contract and therefore acting clearly against the public interest. The notion of the public interest embraces within its meaning the business of the public based on the reasonable assumption that everything public officials undertake must be for the good of the public as it is their function and duty to serve the public. One can hardly be said to act in the public interest where his action will result in loss of millions of shillings belonging to the public as tax monies, by for example as in this case not properly addressing the applicable law. Moreover, public law must of necessity embrace the concepts of equity and accountability. Using this measure, the acts of the state in instituting criminal proceedings even in the face of clear contractual provisions providing for a very effective alternative remedy flies in the face of equity and accountability, this being a commercial transaction where the Government stands to lose millions of shillings unless it acts in the public interest. The Attorney general has a duty to so act and the courts have a duty to uphold the public interest where the state fails so to do, and they do this under the Constitution or judicial review jurisdiction.

WAS THE DECISION TO PROSECUTE TAKEN IN A QUASI JUDICIAL MANNER?

From the (19) principles distilled as above from the land mark cases of the High Court on the point the decision to prosecute ought to have been made in a quasi judicial manner. With respect, the letter from the P.S. which triggered off the prosecution and on which the CID acted can hardly be said to reflect this principle taking into account the importance and the international dimensions of the subject matter. On this ground a prohibition would issue as well.

PRONOUNCEMENTS OF PUBLIC OFFICIALS AS REFLECTED IN THE MEDIA

In the recent case of ***R v CITY HALL MAGISTRATES COURT ex-parte SENNIK H.C. Misc Civil Application No. 652 of 2005*** I held that even the pronouncements of Senior officials outside the court concerning a matter likely to end up in court could compromise the fairness of a trial. Even on this ground a prohibition would issue. To reinforce the point that the decision to institute criminal proceedings must be done in a quasi judicial manner the Attorney General has in the past been challenged before Constitutional courts in the exercise of his powers to enter nolle prosequere under the Criminal Procedure Act and S 26 of the Constitution. In addition, if I may add my humble contribution to the foundation so well laid by the above line of cases, I wish to repeat here my finding in the HUSSEIN MUDOBE case (supra) and further observe 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 S 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 S 77(9) of the Constitution. That under S 77(1) regulating criminal trials the requirements are:

- (1) presumption of innocence
- (2) prompt information on the nature of the charge to be faced
- (3) adequate time and facilities to prepare his defence
- (4) right to represent himself or right to legal representative of his choice
- (5) right to call witnesses and to cross examine those of the opponent
- (6) right to interpretation where applicable
- (7) no retroactivity permitted as regards the offence or the penalty
- (8) right not to be subjected to double jeopardy
- (9) right to be convicted of only defined offence and punishment as prescribed by law
- (10) right not to be compelled to give evidence at the trial
- (11) right to be tried by an independent and impartial court established by law

I did observe in my findings in the ***R v CITY HALL MAGISTRATE COURT ex-parte SENNIK HC Misc Civil Application No.652 of 2005*** that the majority of the rights as enumerated above are covered in the principle of the right of equality of arms ie the right to adversarial proceedings and equality of treatment, as between the prosecution the defence. The standard of proof in criminal cases is that of proof beyond reasonable doubt.

On the other hand the requirements as regards civil rights and obligations under S 77(9) are for a fair trial by an independent and impartial court established by law. The standard of proof is on a balance of probabilities.

From the above analysis it is quite clear that the scales in the two systems of justice are radically different and even the ingredients of a fair trial are substantially different including the standard of proof. All these go to support the contention that a decision to institute proceedings has to be done in a quasi judicial manner with the constitutional requirements in view. Failure to do so, in my view could result in a successful challenge under the Constitution, based on the concept of what constitutes a fair trial, a concept I focused on in the SENNIK CASE (supra). Finally the concept of public interest as analysed above does substantially involve ensuring fair administration of justice. Stated simply it means the

common good or weal. I would therefore also grant an order of prohibition even on these somewhat wider concepts of even hardness, square deal, and the right of equality of arms. Any proceedings instituted on the basis of external influence on the decision making body or person are unlikely to satisfy those requirements.

On the above grounds the court hereby orders the immediate issue of the judicial orders of prohibition as prayed. In the circumstances, I make no order as to costs the case having turned on public law points.

DATED and delivered at Nairobi this 7th day of July, 2006.

J.G. NYAMU

JUDGE