



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J.)

JR.APPLICATION NO. 1 OF 2021

IN THE MATTER OF AN APPLICATION FOR JUDICIAL

REVIEW ORDERS OF PROHIBITION

AND

IN THE MATTER OF LAND REFERENCE NO.25692 MAVOKO

AND

IN THE MATTER OF MACHAKOS, CHIEF MAGISTRATE'S

COURT CRIMINAL CASE NO. E177 OF 2020

REPUBLIC.....APPLICANT

AND

AL RUHIA ESTATES LIMITED.....1ST RESPONDENT

THE CHIEF MAGISTRATE, MACHAKOS.....2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION.....3RD RESPONDENT

EX PARTE:

JOHN ODUOR OKWARO

NELSON OCHIENG OKWARO.....APPLICANTS

JUDGEMENT

1. By a Notice of Motion dated 4th May, 2021 supported by the affidavit of **John Oduor Okwaro**, sworn on the same day, the *Ex parte* Applicants seek the following orders:

(1) **THAT** this Honourable court be pleased to issue an Order of Prohibition to prohibit the Respondents jointly and severally from hearing, determining and/or proceeding with the hearing of Machakos Chief Magistrate Criminal case No. E177 of 2021 against the Ex parte Applicants pending the hearing and determination of Machakos ELC No.156 of 2018 and ELC No.211 of 2011 respectively.

(2) **THAT** the Respondents be condemned to pay the costs of this application together with the application for leave to commence this Motion.

2. The Ex parte Applicants' application is based on grounds that the criminal proceedings before the 2nd Respondent in **Machakos Criminal Case No. E177 of 2020** (hereinafter referred to as "the Criminal Case") relates to a dispute concerning ownership of land whose determination falls within the jurisdiction of the Environment and Land Court [ELC]. According to the Ex parte Applicants, the 2nd

Respondent is being called upon, in the Criminal Case, to determine whether the Ex parte Applicants are in lawful possession of LR. No. 25692 Mavoko [the suit property] yet the same issue is currently pending determination before the ELC Court between the same parties. According to the Applicants, the complainants in the criminal case are Directors of the 1st Respondent and the charges preferred against them are duplications of the 1st Respondent's pleadings in **Machakos ELC No. 156 of 2018** and **ELC No. 211 of 2011** which have now been consolidated. It was the Applicants' case that the issues sought to be addressed and determined before the 2nd Respondent in the Criminal Case are already before the ELC Court for determination. It was averred that the 1st Respondent has instituted criminal proceedings despite being aware that there are orders of maintenance of status quo issued by the ELC Court and further that the Ex parte Applicants have been in occupation of the suit property since November, 2009 to date.

3. It was the Applicants' case that the 1st Respondent's action is malicious and meant to intimidate them into giving vacant possession of the suit property before the ELC Court determines the issue of ownership. According to the Applicants, such eventuality is likely to subject them to substantial loss since they have massively invested in the suit property.

4. In support of the Application, the 1st Ex parte Applicant swore a supporting affidavit on 4th May 2021 in which he deposed that in the year 2011, unknown to him, **Jennifer Waithira Ndege** and **Manwah Bwosiemo Magara** [the registered owners of LR. No 25692 Mavoko & vendors] sold the suit land to the 1st Respondent vide an agreement dated 16th December, 2011 yet the same land had been sold to the Ex parte Applicants' company namely Lakeview Investment Limited on 16th December, 2009 by an agreement which had not been rescinded. He deposed that despite knowledge of pendency of Machakos ELC No.211 of 2011, the vendors colluded with the 1st Respondent in the year 2015 to transfer the suit property to the 1st Respondent.

5. According to him, the 1st Respondent filed Machakos ELC No.156 of 2018 seeking injunction orders against the Ex parte Applicants' company from remaining of the suit property or interfering with the 1st Respondent's interest in the suit property. However, on 17th November, 2020 the ELC Court ordered for the maintenance of the status quo pending further directions. As a result of the failure to obtain injunctive orders, the 1st Respondent hatched a scheme to have the Applicants charged with the offence of forcible detainer contrary to Section 91 of the **Penal Code** alleging that the Applicants were in illegal possession of the suit property. As a result, the Applicants were arrested and charged before the 2nd Respondent on 1st December, 2020.

6. Based on the advice of their advocate, the Applicants believe that the charges preferred against them are duplication of the issues being sought by the 1st Respondent before Machakos ELC No. 156 of 2018 hence the likelihood of conflict of judgements in the event the ELC Court delivers a different judgement from that issued by the 2nd Respondent with respect to ownership of the suit property. According to the Ex parte Applicants, the 2nd Respondent ought to be prohibited from hearing, deliberating and/or determining any issues pertaining to the criminal proceedings pending full determination of the ELC cases. The deponent was apprehensive that the 1st Respondent will interfere with the suit property on the basis of the criminal proceedings since 1st Respondent in April, 2021 invaded the suit property accompanied by more than 20 armed police officers and purported to carry out survey of the suit property. In his view, the 1st Respondent's actions are meant to intimidate and frustrate the Applicants to hand over vacant possession of the suit property before the ELC Cases are heard and determined. According to the Applicants if orders they seek are not granted they will be evicted causing them to suffer irreparable loss and damage and lose the suit property.

7. In opposition, the 1st Respondent filed grounds of opposition dated 27th May, 2021 stating that:-

- 1. The court lacks jurisdiction to entertain this application since there is a pending case before the ELC being ELC 156/2018 between the Applicant and the 1st Respondent.**
- 2. The Applicant lacks locus and the application is incompetent and lacks merit.**
- 3. The application has not established any cause of action against the 1st Respondent since it is not a party to the impugned criminal proceedings.**
- 4. The application is misconceived, frivolous and vexatious and an abuse of the court process since it intends to obstruct and interfere with the statutory and constitutional mandate of the 3rd Respondent.**
- 5. The Applicant intends to deny the Complainant Al Ruhia who is the victim the right to a fair hearing.**
- 6. The Applicant has not challenged or sought to quash the proceedings at the Chief Magistrate's Court in Criminal case No. E177 of 2020.**
- 7. There is no allegation that the 3rd Respondent has acted ultra vires in instituting the criminal proceedings against the Ex parte Applicants.**
- 8. Criminal proceedings can run parallel to civil proceedings.**

8. The application was canvassed by way of written submissions.

9. On behalf of the Ex parte Applicant, it is submitted that the issues to be determined before the Criminal proceedings are purely civil in nature hence the institution of the same is an abuse of the court process. According to the Applicants the 1st and 3rd Respondents have jointly and severally used the criminal proceedings for ulterior purposes hence an abuse to criminal law process. Reliance was placed on the case of

Republic vs. The Chief Magistrate, Kibera, Nairobi [Ex parte Hezron Kamau Waithaka] Misc. Application No. 678 of 2005.

13. It was submitted that 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 and in this regard, reliance was placed on the Australian case of **Williams vs. Spautz [1992]66 NSWLR.**

10. According to the Applicants, the court's sole concern is that its process must be used fairly in the promotion of the administration of Justice and not whether the trial will be fair or unfair. It was submitted that institution of criminal proceedings is motivated by ulterior motive to coerce the Applicants to deliver vacant possession of the suit property before determination of the ELC Cases hence an abuse of the criminal justice process. In this regard, the Applicants relied on **Republic vs. Chief Magistrate Courts, Nairobi & 2 Others [Ex parte Azim Jiwa Rajwani [Misc.Appli.No.1544 of 2004, Nairobi HC Misc.Appl No.898 of 2003 Republic vs. Attorney General & Another and Republic vs. Director of Public Prosecutions & 3 Others Ex parte George Kuria Mwaura [2015] eKLR.**

11. In response to the 1st Respondent's ground opposition that it was not a party to the criminal case, it was submitted that the 1st Respondent is the complainant therein and the charge sheet alleges that the 1st Respondent is entitled to the suit property which the Applicants have purportedly illegally taken possession of.

12. The Applicants urged the court to find the grounds opposition in their entirety not merited, disregard the same and allow the Application with costs to the Applicants.

13. On behalf of the 3rd Respondent, **Bernard Ngetich**, Prosecution Counsel placed reliance on the Grounds of Opposition dated 17th May 2021 and submitted that the Applicants have not disclosed any grounds known to judicial review. According to counsel, judicial review concerns itself with the decision making process rather than the merits of the decision; the legality rather than the correctness of the decision and reliance was placed on **Misc. Application No. 648 of 2009 Republic vs. The Judicial Service Commission & Another**. In this regard, it was submitted that though the Applicants allege that there is a pending civil suit before the ELC Court, they have failed to appreciate the fact that the 1st Respondent has the title document in their name. According to counsel, in attempting to challenge the sufficiency of the prosecution case, the Applicants have delved into the merits of the case rather than the decision making process. According to the 3rd Respondent, judicial review proceedings are not the ideal forum for consideration of the merits and demerits of a criminal case and that for the Court to intervene, it must be demonstrated that the process used in arriving at the decision was procedurally illegal and unfair. Reliance for this submission was placed on Petition No. 153 of 2013 - **Thuita Mwangi & Others vs. The Ethics & Anti-Corruption Commission & Others.**

14. According to the 3rd Respondent, the decision to charge the Applicants was based on the evidence gathered upon investigations conducted by the investigations officer hence the accuracy of the evidence can only be determined by a trial court and it is not a matter for this court to consider. According to the 3rd Respondent, before the criminal court the Applicants are innocent until proven guilty hence they will have an opportunity to challenge any evidence tendered and to defend themselves in court. In support of this position, the 3rd Respondent relied on Misc. Application No. 68 of 2011 - **Michael Monari & Another vs. The Commissioner of Police & Another** and Petition No.79 of 2012 - **Francis Mbugua vs. The Commissioner of Police & 2 Others**. It was submitted that by attempting to plead their innocence before this court, the Applicants are in essence tendering their defence before the wrong forum without demonstrating that the trial court, which is versed with the criminal proceedings, is unable to consider their defence.

15. It was reiterated that the evidence so far gathered establish that an offence was committed and that the Applicants have failed to demonstrate that the 3rd Respondent's decision to prosecute them was motivated by something else other than the discharge of their constitutional mandate.

16. On whether an order of prohibition is available to the Applicants, reliance was placed on **Kenya National Examination Council vs. Republic Ex parte Geoffrey Githinji Njoroge & Others Civil Appeal No.266 of [1996/1997] eKLR** for the position that the order cannot be issued since it has been overtaken by events as the 3rd Respondent has already commenced criminal proceedings against the Applicants and witnesses have recorded statements.

17. It was submitted that pursuant to Article 157(10) of the Constitution, the Director of Prosecution's powers must be exercised independently. In this case, it was submitted, there is no tangible evidence to demonstrate that the 3rd Respondent acted against public interest or against the interest of the administration of justice and reliance is placed on Petition No. 518 of 2012 - **Paul Ng'ang'a Nyaga & 2 Others vs. The Hon. AG & 2 Others**. It was submitted that the police did investigate and the 3rd Respondent independently reviewed, analysed the evidence including the witness statements as well as documentary evidence and made a decision to charge the Applicants. The decision having been informed by the sufficiency of the evidence on record and public interest and not any other considerations, such evidence can only be tested by the trial court in a hearing hence the 3rd Respondent must be accorded a fair chance of presenting their evidence for determination. According to counsel, the Applicants allegations of ulterior motive are unfounded and do not meet the standard of proof required under the ***Evidence Act***.

18. It was the 3rd Respondent's case that the Applicants have not demonstrated that the 3rd Respondent was unreasonable in his actions and that proving the charge can only be done at trial as observed in **Beatrice Ngunyo Kamau & 2 Others vs. The Commissioner of Police & Others (supra)**. Further reliance was placed on Section 193A of the ***Criminal Procedure Code*** and **Republic vs. Director of Public Prosecution & 2 Others Ex parte Joseph Gathuku Kamuiru & Another [2014] eKLR.**

19. In conclusion, it was submitted that the Applicants have not demonstrated that the Respondent's lacked or acted in excess jurisdiction or departed from natural justice in investigating and preferring to charge the Applicant. According to the 3rd Respondent, the application is an abuse of court process meant to obstruct the course of justice hence it should be dismissed with costs to the Respondents.

Determination

20. In this case the applicants' case is in effect that the Respondents are misusing their power to give one of the parties' leverage in the land dispute which dispute is pending before the court. It is trite that the powers and discretion given to the police and the prosecution ought to be exercised lawfully and in good faith and purely for the vindication of the commission of a criminal offence and the criminal justice system. Therefore, where the same are being exercised for the achievement of some collateral purpose other than its legally recognised aim, the Court would be entitled to and must intervene.

21. In was in this regard that **Majanja, J** in Petition No. 461 of 2012 – **Francis Kirima M'ikunyua & Others vs. Director of Public Prosecutions**, when dealing with situations where there exist criminal and civil proceedings arising from the same facts pronounced himself as follows:

“It is very clear that the criminal process and the resultant court proceedings are being used to settle what is otherwise civil dispute which has been the subject of several court cases and indeed decisions. It is clear to me that the contending parties wish to use the criminal process to score points against each side in order to assert the rights of ownership. The use of the criminal process in this manner is not uncommon within this jurisdiction to find that intractable land disputes mutate into criminal matters. It is not difficult to see why. In criminal cases the State's coercive power is brought to bear upon the individual and where we have an inefficient system to settle civil claims, a person who can tie his opponent in the criminal justice system and ultimately secure a conviction will no doubt have an advantage over his opponent.”

22. In revisiting the question under which circumstances the court will grant an order prohibiting the commencement or continuation of Criminal Proceedings the Respondent cited **George Joshua Okungu and Another vs. Chief Magistrate Court Anti Corruption Court at Nairobi and Another (2014) eKLR** in which the Court summarized some of the considerations that will not form the basis for the court to interfere with the DPP's Constitutional mandate thus.

“The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defense is always open to the Petitioner in those proceedings. The fact however that the facts constituting the basic of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, *ipso facto*, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the petitioner to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognized aim.”

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

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

24. In **Mohammed Gulam Hussein Fazal Karmali & Another vs. Chief Magistrate's Court Nairobi & Another [2006] eKLR** Nyamu, J examined the policy considerations for halting criminal proceedings, noting that the court has two fundamental policy considerations to take into account which were enunciated in the case of **M. Devao vs. Department of Labour (190) in sur 464** at 481 as:

“The first is that the public interests 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 court processes may lend themselves to oppression and injustice...the court grants a permanent stay in order to prevent the criminal process 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.”

25. The circumstances which the Court takes into consideration in deciding whether or not to halt a criminal process were set out by **Musinga, J** (as he then was) in **Paul Stuart Imison Another vs. The Attorney General & 2 Others Petition No. 57 of 2009**, in the following manner:

“The instances in which a court can declare a prosecution to be improper were well considered in *Macharia & Another –vs- Attorney General & Another (2001) KLR 448*. A prosecution is improper if:

- (a) It is for a purpose other than upholding the criminal law;
- (b) It is meant to bring pressure to bear upon the applicant/accused to settle a civil dispute;
- (c) It is an abuse of the criminal process of the court;
- (d) It amounts to harassment and is contrary to public policy;
- (e) It is in contravention of the applicant's constitutional right to freedom.

26. According to *Bennett vs. Horseferry Magistrates' Court (1993) 3 All E.R. 138, 151, HL*, an abuse of process justifying the stay of a prosecution could arise in the following circumstances:

- a) where it would be impossible to give the accused a fair trial; or
- b) Where it would amount to a misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.

27. The DPP derives his prosecutorial power both from the Constitution and the *Office of the Director of Public Prosecutions Act*. Whereas Article 157(10) of the Constitution provides that the Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority, Article 157(11) provides:

In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

28. Apart from that, section 4 of the *Office of Public Prosecutions Act*, No. 2 of 2013 provides:

In fulfilling its mandate, the Office shall be guided by the Constitution and the following fundamental principles—

- (a) the diversity of the people of Kenya;
- (b) impartiality and gender equity;
- (c) the rules of natural justice;
- (d) promotion of public confidence in the integrity of the Office;
- (e) the need to discharge the functions of the Office on behalf of the people of Kenya;
- (f) the need to serve the cause of justice, prevent abuse of the legal process and public interest;
- (g) protection of the sovereignty of the people;
- (h) secure the observance of democratic values and principles; and
- (i) promotion of constitutionalism.

29. This Court has therefore held that since the promulgation of the Constitution of Kenya, 2010, the terrain under the current prosecutorial regime has changed and that the discretion given to the DPP is not absolute but must be exercised within certain laid down standards provided under the Constitution and the *Office of the Director of Public Prosecutions Act*. Where it is alleged that these standards have not been adhered to, it behoves this Court to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, the Constitution itself. It is on this basis that I understand the holding in *Nakusa vs. Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565* to the effect that :

“the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system...In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of *Domnic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003* is that interpretation of the Constitution has to be progressive and in the words of Prof M V Plyee in his book, *Constitution of the World*: “The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time..... In our role as “sentinels” of fundamental rights and freedoms of the citizen which are founded on laissez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was

characteristic in the days of one party state. Even if it be at the risk of appearing intransigent “sentinels” of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right.”

30. Where therefore it is clear that the discretion is being exercised with a view to achieving certain extraneous goals other than those legally recognised under the Constitution and the *Office of the Director of Public Prosecutions Act*, that would, in my view, constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion. As was held by **Wendoh, J** in **Koinange vs. Attorney General and Others [2007] 2 EA 256:**

“Under section 26 of the Constitution the Attorney General has unfettered discretion to undertake investigations and prosecute. The Attorney General’s inherent powers to investigate and prosecute may be exercised through other offices in accordance with the Constitution or any other law. But, if the Attorney General exercises that power in breach of the constitutional provisions or any other law by acting maliciously, capriciously, abusing the court process or contrary to public policy the Court would intervene under section 123(8) of the Constitution and in considering what constitutes an abuse of the court process the following principles are relevant: (i) Whether the criminal prosecution is instituted for a purpose other than the purpose for which it is properly designed; (ii) Whether the person against whom the criminal proceedings are commenced has been deprived of his fundamental right of a fair trial envisaged in the provisions of the constitution; (iii) Whether the prosecution is against public policy.”

31. It is therefore clear that this Court has the power and indeed the duty to bring to a halt, criminal proceedings where the same are being brought for ulterior motives or for achievement of some collateral purposes notwithstanding the constitutional and legal powers conferred upon the DPP and the police.

32. In **Meixner & Another vs. Attorney General [2005] 2 KLR 189,** the same Court expressed itself as hereunder:

“The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion if acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution...Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power.”

33. The rationale for not permitting criminal process to assist the litigants in the settlement of their civil disputes as appreciated in **Republic vs. Chief Magistrate’s Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703,** where it was held that:

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth...When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court... In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in... In this case it is asked to step in to grant an order of prohibition. Prohibition looks into the future and can only stop what has not been done. It is certiorari that would be efficacious in quashing that which has been done but it is not prayed for in this matter. There was no order granted for stay of further proceedings when leave was granted and it is possible that the private prosecution has proceeded either to its conclusion or to some extent. In the former event an order of prohibition has no efficacy and the court would be acting in vain to grant one. What is done will have been done. If there is anything that remains to be done in those proceedings, however, the order of prohibition will issue to stop further proceedings.”

34. That there is a duty cast upon the prosecutor to ensure that he has conviction that the criminal process is appropriate to the circumstances of the case was placed beyond doubt in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** where it was held that:

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

35. In the said case, the Court expressed itself inter alia as follows:

“The function of any judicial system in civilized nations is to uphold the rule of law. To be able to do that, the system must have power to try and decide cases brought before the Courts according to the established law. The process of trial is central to the adjudication of any dispute and it is now a universally accepted principle of law that every person must have his day in court. This means that the judicial system must be available to all...Although the Attorney General enjoys both constitutional and statutory discretion in the prosecution of criminal cases and in doing so he is not controlled by any other person or authority, this does not mean that he may exercise that discretion arbitrarily. He must exercise the discretion within lawful boundaries...Although the state’s interest and indeed the constitutional and statutory powers to prosecute is recognised, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious...In doing so the Court may be guided by the following principles: (i). Where the criminal prosecution amounts to nothing more than an abuse of the process of the court, the Court will employ its inherent power and common law to stop it. (ii). A prosecution that does not accord with an individual’s freedoms and rights under the constitution will be halted: and (iii). A prosecution that is contrary to public policy (or interest) will not be allowed...A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case. Evidence of extraneous purposes may also be presumed where a prosecution is mounted after a lengthy delay without any explanation being given for that delay...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...A criminal prosecution that does not accord with an individual’s freedoms and rights, such as where it does not afford an individual a fair hearing within a reasonable time by an independent and impartial court, will be the clearest case of an abuse of the process of the Court. Such a prosecution will be halted for contravening the constitutional protection of individual’s rights...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual’s liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds.”

36. Unless the prosecutor exercises his powers in accordance with the law and the Constitution, the Court will intervene in order to bring him back on track. In **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170**, the Court of Appeal held:

“.....the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.”

37. According to **Judicial Review Handbook**, 6th Edition by **Michael Fordham** at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority power.

14. Therefore, the people placed in charge of investigation and prosecution must, in deciding whether to prefer criminal charges, ask themselves whether in the circumstances, a fair trial is possible notwithstanding the material placed before them. In other words, the police and the DPP ought not to conduct themselves as if they are an appendage of the complainants. In exercising their discretion to charge a person both the police and the DPP’s office must take into account and must exercise the discretion on the evidence of sound legal principles. As was held by **Ojwang, J** (as he then was) in **Nairobi HCCC No. 1729 of 2001 – Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another**:

“...policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense...I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State’s prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes.”

38. In this case the alleged complainant has not sworn any affidavit to explain the circumstances under which the applicants are alleged to be culpable. There is simply no factual basis upon which the 3rd Respondent decided to prefer charges against the ex parte applicants in respect of a matter that is also the subject of a civil land case.

39. It follows that the burden is on the prosecutor to show by way of admissible evidence that he is in possession of material that disclose the existence of a prosecutable case since as was held in **Stanley Munga Githunguri vs. R [1986] eKLR** at page 18 and 19 by a three bench High Court constituted of Ag. Chief Justice Madan and Justices Aganyanya and Gicheru:

“A prosecution is not to be made good by what it turns up. It is good or bad when it starts.”

40. It is now clear that the mere fact that the applicant will be subject to a criminal process where he will get an opportunity to defend himself is not reason for allowing a clearly flawed, unlawful and unfair trial to run its course. As was appreciated in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001:**

“Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case.”

41. The complainants themselves have not sworn affidavits to indicate the nature of the complaint which they lodged against the applicant, if any.

42. It is however clear that the civil proceedings seeking recovery of the land were instituted before the criminal process was commenced. Whereas the mere fact that the facts of the case constitute both criminal and civil liability does not warrant the halting of the criminal case as stated **Republic vs. Chief Magistrate’s Court at Mombasa Ex Parte Ganijee & Another** (supra) it is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases otherwise it would amount to abuse of the process of the court. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process.

43. It was similarly held by the Court of Appeal in **Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others Nairobi Civil Appeal No. 56 of 2012 [2013] eKLR** that:

“While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court. This is case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations.”

44. In this case it is not denied that the facts forming the subject of the civil proceedings are the same facts upon which the criminal proceedings are being based. The standard of proof in criminal cases is beyond reasonable doubt while the standard in civil suits is below that in criminal cases. If the criminal proceedings are determined in favour of the complainant, the 1st Respondent herein, and the civil proceedings are unsuccessful, the judicial process would be made to look like a circus.

45. In the circumstances of this case, it is my view that the proceedings which were commenced first in time ought to be permitted to proceed to their logical end. Accordingly, it is my view and I hold that the criminal proceedings ought to be suspended in the meanwhile.

Order

46. In the premises, the order which commends itself to me and which I hereby issue is as follows:

- 1. An order is hereby issued directed at the 2nd and 3rd respondents prohibiting them from hearing, determining and/or proceeding with the hearing of Machakos Chief Magistrate Criminal case No. E177 of 2021 against the Ex parte Applicants pending the hearing and determination of Machakos ELC No.156 of 2018 and ELC No.211 of 2011 respectively.**
- 2. Each party will bear own costs of these proceedings.**

47. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 9TH DAY OF DECEMBER, 2021.

G V ODUNGA

JUDGE

In the presence of:

Mr Anyoka for the 1st Respondent

CA Susan