REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW MISC. APP NO. 72 OF 2019

REPUBLIC.....APPLICANT

V

NATIONAL POLICE SERVICE.....1STRESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

SENIOR PRINCIPAL MAGISTRATE'S COURT AT NAIROBI-MILIMANI.....3RD RESPONDENT

and

DR. PATRICK MWEU MUSIMBA.....1STEX PARTE APPLICANT

MRS. ANGELA MWENDE MUSIMBA.....2ND EX PARTE APPLICANT

PORTING ACCESS KENYA LIMITED.....3RD EX PARTE APPLICANT

ITECS LIMITED.....4THEX PARTE APPLICANT

CONSOLIDATED WITH

PETITION NO. 360 OF 2018

LUCIEN SUNTER….....PETITIONER

VS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

THE NAIROBI CHIEF MAGISTRATE'S COURT.....3RD RESPONDENT

JUDGMENT

Introduction

1. This judgment disposes two consolidated suits, namely, Judicial Review Miscellaneous application number JR No. 72 of 2019 and constitutional Petition No. 360 of 2018. The common thread between them is that the applicants in the judicial review application and the Petitioner in the said Petition are jointly charged in *Nairobi Chief Magistrates Court Criminal Case number 1717 of 2018*, *Republic vs Mohammed Zafrulla & others*. The judicial review application and the Petition seek to quash the said criminal proceedings and to permanently prohibit the prosecution.

2. As was held in *Korean United Church of Kenya & 3 Others v Seng Ha Sang*,[1] consolidation of suits is done for the purposes of achieving the overriding objective of expeditious and proportionate disposal of civil disputes. Consolidation saves costs, time and effort and makes the conduct of several actions more convenient by treating them as one action. The rationale behind consolidation of matters is to avoid conflicting judgments, save time and money by clubbing together matters involving common questions of fact and law.

The parties

3. The 1st and 2nd applicants in the judicial review application are Kenyan adults of sound minds residing and working for gain in Kenya. The 3rd and 4th applicants in the said case are limited liability companies incorporated in Kenya under the Companies Act.[2]

4. The Petitioner in Petition the Petition is a resident of The Hague, Netherlands.

5. The first Respondent in the Petition (who is the second Respondent in the Judicial Review application) is the Director of Public Prosecutions (herein after referred to as the DPP), established under Article **157** of the Constitution with constitutional mandate to *inter alia* institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.[3]

6. The first Respondent in the Judicial Review application is the National Police Service established under Article 243 (1) of the Constitution.

7. The second Respondent in the Petition is the Inspector General of Police established under Article 245(1) of the Constitution. His functions and powers are listed in section 10 of the National Police Service Act.[4]

8. The third Respondent in the Petition is the Directorate of Criminal Investigations established pursuant to section 28 of the National Police Service Act[5] under the direction, command and control of the Inspector-General. Pursuant to section 29(8) of the act, the Director of Criminal Investigations in the performance of the functions and duties of office, is responsible to the Inspector-General. Under section 29 (9) of the act, the Director of Criminal Investigations is— (a) the chief executive officer of the Directorate; (b) responsible for— (i) implementing the decisions of the Inspector-General in respect of the Directorate; (ii) efficient administration of the Directorate; (iii) the day-to-day administration and management of the affairs of the Directorate; and (iv) the performance of such other duties as may be assigned by the Inspector General, the Commission, or as may be prescribed by the Act, or any other written law.

9. The third Respondent in the Judicial Review application is the Senior Principal Magistrates Court, Milimani, while the fourth Respondent in the Petition is the Chief Magistrates Court, Milimani, Nairobi. Both are established under Article 169 (1) (a) of the Constitution. Their jurisdiction in criminal matters is conferred by section 6 of the Magistrates Courts Act.[6]

The factual matrix

10. Even though both cases challenge the same criminal proceedings, and notwithstanding the fact that the criminal charges arise from substantially the same set of facts and circumstances, for the sake of brevity, I will summarize the facts of each case and the Respondents' responses separately.

The Judicial Review application

11. The 1st applicant in the judicial review application, who is a director of the 3rd and 4th applicants states that on 17th April 2017, he was summoned by the 1st Respondent through the Banking Fraud Unit for interrogation on issues touching on various transactions between Chase Bank and the 3rd and 4th applicants. He states that in his statement, he informed the 1st Respondent that the transactions under investigations were and remain confidential and restricted in the sense that they involve national security matters and any queries thereto should be directed to the office of the Director General of National Intelligence Service.

12. He also states that the 2nd applicant who is as co-director of the 3rd and 4th applicants was neither summoned to record a statement nor interrogated by the 1stRespondent and apparently no other director of the companies was summoned or recoded any statement.

13. The 1st applicant also states that vide a letter dated 16th August 2018, he was summoned for another session of interrogation, where he was informed that the Director General of National Intelligence Service had confirmed that the transaction involved National Security matters and consequently cleared the applicants from any wrong doing.

14. In addition, he states that on 13th September 2018, himself and the 2nd applicant learnt through the social media and press reports that an arrest warrant had been issued against them for failing to attend court to answer various charges. He also states that the press reports confirmed that Mohammed Zafrulla had been charged in court on the same matter and had been detained pending a ruling on bail application. He further states that upon learning the foregoing, their advocate pursuant to their instructions confirmed the existence of case and on 20th September 2018 they pleaded to the charges.

15. He states that upon being supplied with all the documents on 14th March 2019, it was evident that there was wilful intention to withhold material information, and, that, no investigations and or proper investigations were carried out regarding the alleged transactions. The applicants state that the 1stRespondent failed to properly execute his duty as expected and that the 2ndRespondent had no foundational basis to institute the criminal proceedings against them. In the alternative, he states that if at all the investigations were done, then, vital information could have been unearthed, hence, there is reason to believe that the information has been intentionally omitted to create a

propaganda narrative.

16. The applicants state that the decision by the 2nd Respondent to institute the criminal proceedings against them is an abuse of office, and, that the 2nd Respondent failed to properly exercise his discretion. They also state that the criminal proceedings were based on ulterior motives, because they were commenced immediately the High Court in a separate matter ordered the release of Mohanmmed Zafrulla's passport, hence the current case was aimed at detaining him further.

17. The applicants also state that the decision reached by the 2nd Respondent to charge them was illegal, irrational and baseless, without justifiable reasons since no proper investigations were conducted, and, it amounts to abuse of powers, and violates their legitimate expectation of due process. The applicants also states that no prejudice will be suffered by the Respondents if the orders sought are granted.

The Reliefs sought

18. The applicants pray for:-

a. An order of certiorari to bring into the High Court for the purposes of being quashed the charge sheet and proceedings in CMCR Case Number 1717 OF 2018, Republic v Mohammed Zafrulla & 9 others instituted by the second Respondent against the applicants.

b. An order of prohibition directed at the first and second Respondents prohibiting them from prosecuting, continuing with prosecution and or instituting criminal prosecution against the applicants in CMCR Case Number 1717 of 2018, Republic v Mohammed Zafrulla & 9 others.

c. That the costs of this application be provided for.

d. That this honourable court be pleased to grant any further orders or reliefs it may deem just and expedient to grant.

The Second Respondent's Replying affidavit to the Judicial Review application

19. CI George O. Okello, a Police Officer in the Directorate of Criminal Investigations attached to the Banking Fraud Investigations Unit, Nairobi swore the replying affidavit dated 24th April 2019. He deposed that he investigated Criminal case number 1717 of 2018. He stated that the applicants are directors of the 3rd and 4th applicants respectively, and, that the 1st and 2nd applicants through the said companies received funds from Chase Bank Limited which money was being channelled through their company bank accounts held at Kenya Commercial Bank and Paramount Bank respectively.

20. Mr. Okello deposed that investigations revealed that Ksh. 1,150,125,587.20 was debited from two internal account numbers held at Chase Bank Limited between 16th January 2014 and 30th April 2015, and, that the transactions on the said sum did not have any narrations or supporting documents stating the reason for the disbursement. He averred that whereas the 1st applicant alleged he was an agent of the State through the National Intelligence Service (NIS), the transactions do not bear any nexus with National Intelligence Service as alleged and neither has the 1st applicant produced any documentation supporting the same.

21. He deposed that the investigations involved interviewing officials of the Bank who are the 1s,2nd,3rd and 4th accused persons in the criminal case who maintained that the 1st and 2nd applicants were the only persons who could offer any explanation on the transactions. He also averred that the investigations commenced in April 2016 when Chase Bank Limited was placed under receivership and that transactions involving the 3rd and 4th applicants were identified in an audit report as fraudulent in nature.

22. Mr. Okello averred that the investigator adequately engaged the 1st applicant by officially summoning him through the office of the Clerk to the National Assembly and he appeared and recorded a statement, but he deliberately omitted to mention anything about the purpose of the payments to the 3rd and 4th applicants. He also averred that he did not produce any Service letter Agreements (SLA) between the 3rd and 4th applicants respectively.

23. He further averred that the 1st applicant declined to share any material information touching on the said payments and directed investigators to engage the office of the Director General Intelligence (NIS). He also averred that the 1st applicant was again summoned through his mobile phone to clarify and explain grey areas relating to the transactions involving Ksh. 1,150,125,587.20, but he remained adamant and reiterated that his earlier statement was still relevant. He maintained that the 1st applicant was never informed that he had been cleared by the Director General, National Intelligence Service.

24. Mr. Okello averred that the 1st Respondent concluded his investigations and submitted the investigation file to the DPP to review and advice, and that the decision to charge was arrived at by the DPP after reviewing the investigation file. He averred that the 1st and 2nd applicants raised the issue of the documents supplied to them by the 1st Respondent, and the issue was adequately addressed before the trial court during the pre-trial conference.

Third Respondents grounds of opposition to the Judicial Review application

25. The 3rd Respondent filed grounds of opposition dated 28th May 2019 stating:-

a. That the application is unmerited, an abuse of the court process, and intended to curtail the statutory obligations of the Respondents.

b. That the applicants will have the opportunity to prove their innocence before the trial court.

c. That the application is premised on explanations that ought to be made before the requisitioning officer, hence this court would be usurping the statutory mandate of the Respondent. Further the applicants have not demonstrated any prejudice that will suffer.

d. That the applicant seeks this court to direct a public officer to exercise or not to exercise his statutory mandate.

Petition No 360 of 2018

26. The Petitioner states that he has been charged for crimes allegedly committed by a company which he is neither a shareholder nor a director and which he has no contact whatsoever. He claims that whereas the charge sheet states that the offences were committed by among others, company known as Porting Access Limited, he has no connection or relationship with the said company either as a shareholder, director or otherwise.

27. He states that he was a director of Porting Access Kenya Limited from 2010 and other directors were Patrick Musimba and Ronald Vlasman. He states that his name was used with his knowledge and consent for the formation and incorporation of the said company as he was a director of Porting Access BV, a Dutch Limited Company which was to have a majority shareholding in the said company upon its incorporation. He states that the company was incorporated after Porting Access BV successfully bid for tender for provision of number portability services in Kenya, and, that, the said company was incorporated with the sole objective of providing the said services.

28. He states that at the time of incorporating the said company, the shareholding of the company was Porting Access BV 80% and Patrick Musimba 20%, and, that other than the use of his name and formation and incorporation of the company as aforesaid, he was never involved in the affairs of the company and that he has never participated in the company in any manner either as a shareholder, director or otherwise. He also states that he has never been informed of or ever participated in the opening of any bank account or in any financial obligations relating to the said company.

29. He states that he has never been a signatory to the company accounts nor does he know the banks where the said company holds/ held any accounts and does not know any transaction consummated between the said company and any other person or entity in respect of which any payments would be made to the company between the years 2015 and 2016.

30. The Petitioner also states that his directorship was required for the purposes of founding the entity but it has never been the intention of the founders that he was to be involved in the daily operations of the company. He states that the sole authorized director of Portland BV which had majority shareholding in the company was a one Ronald Vlasman who was the solely authorized person mandated to run the daily affairs of the company to the exclusion of the Petitioner.

31. He states that in 2012, there was a change in the shareholding of the company, with Patrick Musimba having 60% and Portal Access BV's shareholding reduced to 40%, and, that, he was never informed of either the intention to effect the said changes or the eventual changes in shareholding, thus, the said Patrick Musimba not only controlled the shareholding but also he was responsible for the day to day operations of the company.

32. The Petitioner further states that he resigned as a director of the said company in January 2015 and up to and until the time of his resignation and after, he was never involved in the operations of the company, hence, he has never been aware of, involved or notified of any alleged impropriety committed by the company at any time nor was he aware of the police investigations or the alleged charges. He states that he learnt about the charges from the internet, and, his advocate pursuant to his request confirmed the charges from the court file.

33. He states that he has never been to Kenya since 2014 nor has he ever sent any written or signed instructions for the purposes of opening or operating a bank account in Kenya whether in the name of Portal Access Kenya Limited or Porting Access Limited. He states that he has never known of the existence of Chase Bank (K) Limited nor of any accounts held therein in the name of Porting Access Limited or Porting Access Kenya Limited and that he has absolutely no knowledge of the alleged theft of Ksh. 1,150,125,587.20

34. Lastly, the Petitioner denies ever being involved or participating in any plan or scheme in connection with the alleged transfer of Ksh. 409,682,900/= from Chase Bank (K) Limited to Kenya Commercial Bank and/or Paramount Bank and that the said charges are based on misapprehension of facts and the law and is an affront to his constitutional rights.

Legal foundation of the Petition

35. The Petitioner states that the facts in the charge sheet do not support any charges against him, hence, proceeding with the charges would be an abuse of court process, a breach of the Constitution and an affront to his rights. He also states that the 2nd and 3rd Respondents failed to up hold the values and principles enshrined in Article 10 of the Constitution and Articles 27 of the Constitution in that he was not afforded a chance to record his statement unlike the other suspects. He also states that the 2nd and 3rd Respondents failed to afford him a fair administrative action in violation of Article 47 of the Constitution and section 4 (3) (a) (b) of the Fair Administrative Action Act.[7] The Petitioner also states that the 2nd and 3rd Respondents did not afford him a chance to be heard before the charges were preferred against him in violation of Article 50 of the Constitution and in breach of natural justice.

36. The Petitioner also states that the 1st Respondent acted in violation of Article 157 (11) of the Constitution, and, that the 2nd and 3rd Respondents violated Articles 238 (2) and 244 (c) of the Constitution.

The prayers sought

37. The Petitioner prays for:-

a. A declaration that the second and third Respondents investigations were in breach of the Petitioner's right to fair administrative action and right to natural justice.

b. A declaration that the decision by the first Respondent to prefer charges against the Petitioner was a breach of Article 157(11) of the Constitution.

c. A conservatory order to permanently stop the Petitioner's trial.

d. An order of Judicial Review by way of certiorari to remove into this court the decision of the first Respondent in Nairobi Chief Magistrates Court Criminal Case Number 1717 of 2018 to prefer charges against the Petitioner for the purposes of quashing on account of the circumstances and constitutional violations in the manner of treatment and decision so far to prefer the said charges.

e. An order of Judicial Review by way of prohibition to prohibit further trial of the Petitioner by the first, second and third Respondents before the fourth Respondent in Nairobi Criminal Case Number 1717 of 2018 and or such further and or other proceedings that may be instituted in respect thereof.

f. An order of Judicial Review by way of prohibition prohibiting the Respondent from applying for and or issuing the International warrant of arrest and further issuing of the Interpol Red Notice against the Petitioner.

g. General damages for breach of the Petitioner's constitutional rights to freedom from discrimination (Article 27), fair administrative action (Article 47), right to natural justice and right to fair hearing (Article 50).

h. Costs of the Petition.

i. Interests on (7) above at court rates from the date of filing of the Petition until payment in full.

j. Any other orders that this honourable court deems fit and just to grant in the circumstances.

The first Respondent's Replying Affidavit to the Petition

38. Julius Musoga, an investigator with the Banking Fraud Investigations Unit of the Directorate of Criminal Investigations swore the Replying affidavit dated 26thNovember 2018. He averred that he was involved in the investigations of criminal case number 1717 of 2018, and, that between 2014 and 2016 M/s Porting Access Limited and Itecs Limited received a total of Ksh. 1,150,125,587.20 which was paid to the said companies by Chase Bank Limited currently trading as State Bank of Mauritius.

39. He averred that a search carried out at the company's Registry disclosed the Petitioner as a director among others. He also averred that besides his personal directorship in the company, a company by a similar name registered in the Netherlands M/s Porting Access BV is a shareholder with 800 shares after Patrick Musimba's 1,200 shares.

40. He deposed that after the investigations were concluded, the applicant was charged in absentia alongside the other accused persons. He also averred that the Petitioner was not interviewed because the available contact at the Registrar of companies was Mr. Musimba's who declined to make any disclosures regarding the companies. Mr. Musoga averred that the fact that the Petitioner was not active in the running of the company does not remove him from culpability in the company's transactions, and, that, the Petitioner is a *bona fide* director of the company. He also averred that investigations did not show that the Petitioner resigned from the company.

41. He deposed that the charges were preferred within the provisions of law regarding persons who cannot be availed within reasonable time but particulars are known, hence, the reasons why the warrants of arrest were issued and, that, the submission of the warrants to Interpol for action was within the law and without malice.

42. He deposed that the investigations revealed that the company in which the Petitioner is a director alongside the Netherlands Company took part in the fraud the subject of the investigations, and, that, charging the Petitioner in his capacity as a director of the said companies which received a colossal amount of money from Chase Bank Kenya Limited in a fraudulent manner cannot be termed as an infringement of his rights. He deposed that depositors money was stolen from Chase Bank Kenya Limited through fictitious transactions, and, that, the company to which the Petitioner is a director is a major beneficiary in what were purported to be loans and also that public right must also be protected. He averred that upon conclusion of investigations, the file was forwarded to the DPP with recommendations who upon independent review of the evidence recommended the suspects to be charged in criminal case no 1717 of 2018.

Applicant's Advocate's submissions in the Judicial Review application

43. The applicant's counsel submitted that the charges were arrived at without proper investigations being carried out. He also argued that the investigating officer refused and or neglected to carry out his duty. He added that there is a possibility that crucial information is intentionally being withheld. Counsel also argued that the decision to charge the applicant was based on insufficient investigations, hence, the decision is unreasonable, illegal, and irrational since there is no evidence linking the applicant to the charges. Counsel cited Article 157 (4) (11) of the Constitution, section 24 (e) of the National Police Service Act[8] and relied on *Zacharia Baraza t/a Siuni Traders v Director of Public*

Prosecutions & another[9] for the holding that the powers to investigate criminal offences are designed to serve a solitary public purpose.

44. He also submitted that Article 157 (11) of the Constitution requires the DPP to act in public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process. He argued that it is not enough for the DPP to receive a report from the 1st Respondent and proceed to prosecute criminal proceedings without a careful examination so as to establish whether probable cause has been established. Counsel also argued that the investigation diary does link the applicants with the offence. He alluded to the fact that the 1st applicant indicated that any questions be referred to the National Intelligence Service, which was not done.

45. The applicant's counsel also argued that the transactions in question were cleared by the Director of National Intelligence Service, hence, under section 17 (3) (b) of the National Intelligence Service Act,[10] the Investigating Officer was required to first obtain Security Clearance from the Director General of the National Intelligence Service. He submitted that the applicant restricted the information he could divulge as provided under section 61 of the National Intelligence Service Act.[11]

46. It was his submission that in absence of a clearance letter from the Director of National Intelligence Service, the Respondents could not have a factual basis to register the charges against the applicants. He relied on *Zacharia Baraza t/a Siuni Traders v Director of Public Prosecutions & another* (supra) for the proposition that a criminal prosecution which is started without a factual foundation or basis is always suspect for ulterior motive. In addition, he counsel relied on *ex parte Floriculture International Ltd*[12] for the holding that it is incumbent for an intending prosecutor to assess and examine carefully, the availability, credibility and credit of witnesses. He relied on *Republic v Chief Magistrates Court, Nairobi and 3 others ex parte Stephen Oyugi Okero*[13] for the proposition that any prosecution commenced without sufficient evidence and proper investigations can easily lead to the conclusion that the prosecution has been launched for ulterior motives. He also relied on *State of Maharastra & otheras v Arun Gulab Gawali & others*[14] which set out circumstances under which the high court may review prosecutorial powers and *Ronald Leposo Musengi v Director of Public Prosecution & 3 others* for the holding that the court has a duty to protect citizens against harsh and unfair treatment.

47. In addition, counsel cited *Diamond Hasham Lalji & another v Attorney General & 4 others*[15]for the holding that the burden of proof rests with the person alleging unconstitutional exercise of prosecutorial power, but if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision. He argued that the charges levelled against the applicants are baseless. Further, the applicants' counsel submitted that this is a clear case of unconstitutional exercise of prosecutorial power. He cited *Kuria & 3 others v Attorney General*[16] to buttress his argument that this is a proper case for the court to intervene. Lastly, the applicants' counsel relied on *Joram Mwenda Guantai v The Chief Magistrate, Nairobi*[17] to support his argument that this case meets the tests for an order of prohibition to issue.

The Petitioner's Advocate's submissions

48. The Petitioner's counsel cited section 28 of the National Police Service Act, [18]Articles 243 and 244 of the Constitution and submitted that the DPP and the Inspector General of Police must act within the laid down standards. He argued that the Petitioner has never been involved or participated in the affairs of the company whether as a shareholder, director or otherwise, and, that, his name was only used for the formation and incorporation of the company, and, that the Petitioner has never been a signatory to the accounts.

49. He also submitted that the Petitioner was never conducted throughout the investigations. He relied on *Hannah Wambui Githire v Director of Public Prosecutions & 3 others*[19] for the holding that prosecutors are expected to be professional in the conduct of their investigations, they must not to be driven by malice or other collateral considerations and that the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. He argued that the Inspector General of Police and the DPP did not conduct proper investigations.

50. He submitted that the discretion vested on the DPP is not absolute and must be exercised as provided under the law, and, that the DPP improperly exercised his discretion. He cited *Johnson Kamau Njuguna & another v Director of Public Prosecutions*[20] for the proposition that the court can intervene if the DPP acts outside his powers. He submitted that the Petitioner's prosecution lacks factual foundation, and, that there is no material evidence to show that the prosecution has a prosecutable case against the Petitioner. He cited *Republic v Attorney General ex parte Kipngengo Arap Ngeny* for the holding 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.In addition, counsel relied on *Republic v Director of Public Prosecutions & 2 others ex parte Praxidis Naomi Saisi*[21] which held that whereas this is not the forum to determine the applicants innocence or culpability, the DPP owes this court a duty of placing before it material upon which this court can feel that he is justified in mounting the prosecution.

51. To buttress his argument, counsel cited the *National Prosecution Policy*, (2015) which provides that public prosecutions in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction. He argued that the 1st and 2nd Respondents' violated the Petitioner's fundamental rights under Articles 10, 27, 47 and 50 of the Constitution and section 4 (3) (a) (b) of the Fair Administrative Action Act. [22] He relied on *Josephat Musila Mutua & 9 others v Attorney General & 3 others*,[23] *General Medical Council v Spackman*[24] and *Ridge v Baldwin*.[25]

The 1st and 2nd Respondents (in JR No. 72 of 2019) and 1st, 2nd and 3rd Respondents in (Pet No. 360 of 20128) advocates' submissions

52. Mr. Makori, counsel for the above parties stated that he did not wish to file any submissions. Instead, he relied on the replying affidavits filed in the two suits.

The Third Respondent's advocates submissions

53. Miss Chilaka, counsel for the 3rd Respondent in both suits submitted that an unlawful act is a matter of evidence. She argued that the police and the DPP have special powers to investigate and if satisfied there is reasonable ground, to charge the offender. She argued that the

grounds relied upon by the applicant do not in any manner show that the applicants will not get justice in court and that the application is intended to curtain the Respondents' powers. In addition, she argued that the applicants will have the opportunity to prove their innocence before the trial court. She submitted that the application is based on the grounds that ought to be argued before the trial court. She further argued that the applicants and the Petitioner have not shown that the Respondents acted in excess of their statutory powers.

Determination

54. I find it apposite to start by emphasizing that a special feature of the Constitution of Kenya, 2010 is the establishment of an independent office of the DPP whose independence is provided under Article 157 (10) of the Constitution which declares that the DPP shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his powers or functions, shall not be under the direction or control of any person or authority.

55. This position is replicated in Section 6 of the Office of the Director of Public Prosecutions Act[26]which provides that pursuant to Article 157 (10) of the Constitution, the Director of Public Prosecutions shall- (a) not require the consent of any person or authority for the commencement of criminal proceedings; (b) not be under the direction or control of any person or authority in the exercise of his powers or functions under constitution, the Act or any other written law; and (c) be subject only to the Constitution and the law.

56. The DPP is not only required to act independently in the exercise of his functions, but also ought not to be perceived to be acting under the direction or instructions or instigation of any other person. The decision to institute or not institute criminal proceedings is a high calling imposed upon the DPP by the law and must be exercised in a manner that leaves no doubt that the decision was made by the DPP independently. The prosecutor is required to act with diligence and promptness to investigate, litigate, and dispose of criminal charges, consistent with the interests of justice and with due regard for fairness, accuracy, and rights of the accused, victims, and witnesses. Where the decision is surrounded by doubt or even mere reasonable suspicion that another person has a hand in the prosecution, such a decision cannot be allowed to stand.

57. A clear reading of the architecture of Article 157 of the Constitution leaves no doubt that the DPP is required to not only act independently, but to remain fiercely so. It is also important to mention that under Article 245 (4) (a) of the Constitution, "*no person may give a direction to the Inspector General with respect to the investigation of any offence or offences."* Just like the constitutionally guaranteed independence of the DPP, this provision is aimed at ensuring that investigations are undertaken independently.

58. The issues presented in these proceedings are a direct invitation to this court to determine the circumstances under which the High Court in exercise of its vast jurisdiction conferred upon it by the Constitution can halt, stop, prohibit or quash a criminal prosecution mounted against a citizen. The Constitution vests the DPP with the sole authority, power and responsibility to exercise control over the prosecution of all criminal matters except the institution of cases at the Court?Martial.[27]

59. A fair and effective prosecution is essential to a properly functioning criminal justice system and to the maintenance of law and order. Individuals involved in a crime – the victim, the accused, and the witnesses – as well as society as a whole have an interest in the decision whether to prosecute and for what offence, and in the outcome of the prosecution. In short the proper and effective administration of the criminal justice system is a matter of great public interest.

60. It is also important to mention the general principles which should underlie the approach to prosecution.The DPP must at all times uphold the rule of law, the integrity of the criminal justice system and the right to a fair trial and respect the fundamental rights of all human beings to be held equal before the law, and abstain from any wrongful discrimination.

61. The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to seek conviction. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion not to pursue criminal charges in appropriate circumstances. The DPP is required to protect the innocent and to seek conviction of the guilty, and also to consider the interests of victims and witnesses. The DPP has an obligation to respect the constitutional and legal rights of all persons, including suspects and accused persons and should avoid any appearance of impropriety in performing the prosecution function.

62. One key consideration to guide the DPP in instituting court proceedings is to advance or protect public interest as opposed to private interest. The decision to prosecute or not to prosecute is of great importance. It can have the most far-reaching consequences for an individual. Even where an accused person is acquitted, the consequences resulting from a prosecution can include loss of reputation, disruption of personal relations, loss of employment and financial expense, in addition to the anxiety and trauma caused by being charged with a criminal offence.

63. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system. For victims and their families, a decision not to prosecute can be distressing. The victim, having made what is often a very difficult and occasionally traumatic decision to report a crime, may feel rejected and disbelieved. It is therefore essential that the prosecution decision receives careful consideration.

64. Courts have an overriding duty to promote justice and prevent injustice. From this duty there arises an inherent power *to 'stay'* an *indictment* (or stop a prosecution) if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court or infringement of a citizens' fundamental rights. Abuse of process has been defined as something so unfair and wrong with the prosecution that the court should not allow a prosecutor to proceed with what is, in all other respects, a perfectly supportable case. [28] Whether a prosecution is an abuse of court process, unfair, wrong or a breach of fundamental rights, it is for the court to determine on the individual facts of each case.

65. The common thread between these consolidated suits is that the applicants and the Petitioners are citing what they perceive to be poor investigations. They are questioning the veracity of the evidence against them and essentially pleading their innocence. It is an established

position of law that it is not for this court to determine the veracity or to weigh the strength of the evidence or accused persons defense. That is a function for the trial court hearing the criminal trial. This court can only intervene if there are cogent and proven allegations of violation of Constitutional Rights or threat to violation of the Rights or in clear circumstances where it is evident that the accused will not be afforded a fair trial or the right to a Fair Trial has been infringed or threatened or where the prosecution is commenced without a factual basis.

66. The allegation that there is no factual basis lacks basis. Investigations revealed movement of funds. There is evidence that the 1st and 2nd applicants and the Petitioner were directors of the companies to which the funds were channelled. The veracity of this evidence and the culpability of the accused persons is a matter for the trial court. The 1st applicant's assertion that the transactions had the approval of the National Intelligence Service is a perfect defence for interrogation by the trial court not this court, and, so is the Petitioner's argument that he was not involved in the companies at all, despite admitting having consented to his name being used at the point of incorporating the company.

67. This court is required to engage in a balancing act and bear in mind that a wrong decision to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system. It is therefore essential that the prosecution decision receives careful consideration in a case seeking to prohibit the trial.

68. Whether a prosecution is an abuse of court process, unfair, wrong or a breach of fundamental rights, it is for the court to determine on the individual facts of each case. The concept of a fair trial involves fairness to the prosecution and to the public as well as to the accused.[29]

69. The inherent jurisdiction of the court to stop a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances.[30] The essential focus of the doctrine is on preventing unfairness at trial through which the accused is prejudiced in the presentation of his or her case or where there is clear breach of fundamental rights to a fair trial. Courts should first consider whether or not there is anything in the trial to prevent 'a fair trial' and if there is, then the court ought to stop the prosecution.

70. The high court will only prohibit or quash prosecutions in cases where it would be **impossible to give the accused a fair trial; or 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.[31]

71. It is in public interest that prosecutions be mounted to up hold law and order and justice for the victims of crime. A criminal prosecution can also be stopped if it was commenced in the absence of proper factual foundation. The enquiry is whether there has been an irregularity or an illegality that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted.[32] With great respect, an inquiry into the allegations made in these cases does not disclose an irregularity or illegality that is a departure from the formalities, rules and principles of procedure which govern police investigations and commencement of criminal proceedings. The allegations raised in both cases are basically aimed at explaining the innocence of the accused persons as opposed to unearthing irregularities and gross breach of the law.

72. In fact, the judicial review application is so thin on legal foundation that it does not cite the established grounds for judicial review to trigger the jurisdiction of this court to unleash judicial review writs. In addition to the traditional common law judicial review grounds, section 7 of the Fair Administrative Action Act[33] lists grounds for judicial review. The applicants never made any attempt in their pleadings and submissions to assault the impugned prosecution on any of these judicial review grounds.

73. Similarly, the Petitioner, save for pleading provisions of the Constitution and section 4 of the Fair Administrative Action Act,[34] there was no attempt to prove the violations. Mere recitations of constitutional and statutory provisions is not enough. The actual violations of the provisions must be proved. Differently stated, the actual sins of the Respondents must be proved.

74. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society. Thus, under no circumstances can a person's right to a fair trial be jeopardized.[35] A criminal trial premised on unfair and questionable partisan investigations or a decision to charge arrived at unfairly and without any reasonable basis would in my view open the door to an unfair trial. There was an attempt to attack the investigations, but what came out is basically what would be the applicant's defense in the lower court not how unfair the investigation was done. The assault on the investigations also ignores the fact that the duty of the police is to gather the evidence and forward the file to the DPP who makes the decision to prosecute independently. I will address this duty later.

75. The provisions of the Constitution conferring powers upon the High Court to grant such remedies as *certiorari*, *prohibition*, *mandamus* or permanent stay of proceedings are a device to advance justice and not to frustrate it. In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the court or that the ends of justice require that the proceedings ought to be quashed.

76. The saving High Court's inherent powers, both in civil and criminal matters is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceedings in the interest of justice.

77. The High Court's inherent powers to quash, stay or prohibit criminal proceedings are wide as they imply the exoneration of the accused even before the proceedings have been culminated by way of trial. Noting the amplitude of these powers and the consequences which they carry, the Supreme Court of India[36] revisited the law on the issue and held that *'these powers should be exercised sparingly and should not carry an effect of frustrating the judicial process.'*

78. The Supreme Court of India in the above case delineated the law in the following terms:-

"The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and in the rarest of rare cases and the Court cannot be justified in embarking upon an inquiry as to the reliability or otherwise of allegations made in the complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at uncalled for stage nor can it 'soft-pedal the course of justice' at a crucial stage of proceedings…The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of the power of the court, but the more the power, the more due care and caution is to be exercised in invoking these powers." ***[37]***

79. The leading case on the application of abuse of process remains *Bennet vs Horseferry Magistrates Court & another*.[38]The court confirmed that an abuse of process justifying the stay of a prosecution could arise in the following circumstances:-

i. Where it would be impossible to give the accused a fair trial; or;

ii. 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.

80. The above categories are not mutually exclusive and the facts of a particular case may give rise to an application to stay involving more than one alleged form of abuse, and that staying a proceeding is a discretionary remedy and each case will depend on its set of facts and circumstances. Chris Corns[39]argues that the grounds upon which a stay will be granted have been variously expressed in the cases. These grounds can be classified under three categories:-

i. When the continuation of the proceedings would constitute an 'abuse of process,'

ii. When any resultant trial would be 'unfair' to the accused, and

iii. When the continuation of the proceedings would tend to undermine the integrity of the criminal justice system.

81. Criminal proceedings commenced to advance other gains other than promotion of public good are vexatious and ought not to be allowed to stand. The word *"vexatious"* means *"harassment by the process of law,'' "lacking justification"* or with *"intention to harass."* It signifies an action not having sufficient grounds, and which therefore, only seeks to annoy the adversary. The hallmark of a vexatious proceeding is that it has no basis in law (or at least no discernible basis); and that whatever the intention of the proceeding may be, its only effect is to subject the other party to inconvenience, harassment and expense, which is so great, that it is disproportionate to any gain likely to accrue to the claimant; and that it involves an abuse of process of the court.

82. The initial consideration in the exercise of the discretion to prosecute is whether the evidence is sufficient to justify the institution or continuation of a prosecution. This is a decision constitutionally vested on the DPP. Where discretion is conferred on the decision-maker the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[40]One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

83. The applicants and the Petitioner cite what they call poor investigations by the investigators. This argument ignores the fact that after concluding the investigations, the file is forwarded to the DPP for review and advice. The DPP is mandated to independently evaluate the evidence and make the decision to prosecute independently. When evaluating the evidence regard should be had to the following matters:- **(a)** *Are there grounds for believing the evidence may be excluded bearing in mind the principles of admissibility at common law and under statute?* ***(b)*** *If the case depends in part on admissions by the accused, are there any grounds for believing that they are of doubtful reliability having regard to the age, intelligence and apparent understanding of the accused?* ***(c)*** *Does it appear that a witness is exaggerating, or that his or her memory is faulty, or that the witness is either hostile or friendly to the accused, or may be otherwise unreliable?* ***(d)*** *Does a witness have a motive for telling less than the whole truth?* ***(e)****Whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute.* ***(f).*** *whether the alleged offence is of considerable public concern and* ***(g)*** *the necessity to maintain public confidence.* As a matter of practical reality the proper decision in most cases will be to proceed with a prosecution if there is sufficient evidence available to justify a prosecution. It has not been demonstrated that the decision to prosecute was influenced by irrelevant or extraneous considerations other than the above. Further, it has not been established that the DPP did not act independently in arriving at the decision to prosecute.

84. It is my view that the applicants and the Petitioner have not presented any material to demonstrate that there was no sufficient evidence or factual basis to justify a prosecution. As stated earlier, it is not the function of this court to weigh the veracity of the evidence. In my view, a prosecution should be instituted or continued if there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the accused. It has not been established that the facts presented in this case do not disclose an offence known to the law nor has it been demonstrated that the prosecution evidence is not admissible, substantial and reliable.

85. It is also my view that that in making his independent decision, the DPP should have regard to any lines of defence which is plainly open to, or has been indicated by, the accused and any other factors which in the view of the DPP could affect the likelihood or otherwise of a conviction. This assessment may be a difficult one to make, and of course, there can never be an assurance that a prosecution will succeed. Indeed, it is inevitable that some will fail. However, application of this test dispassionately, after due deliberation by a person experienced in weighing the available evidence, is the best way of seeking to avoid the risk of prosecuting an innocent person and pursuing a futile prosecution resulting in the unnecessary expenditure of public funds.

86. The constitutional provision in Article 157 (10) of the Constitution 2010 ensures that the DPP has complete independence in his decision

making processes, which is vital to protect the integrity of the criminal justice system because it guarantees that any decision to prosecute a person is made free of any external influences. This court respects this constitutional imperative and will hesitate to interfere with the functions of the DPP unless there is clear evidence of breach of the Constitution or abuse of discretion to prosecute. As stated above, no evidence has been tendered to show that the DPP abused his discretion or powers under the Constitution. The court is inclined to respect the decision by the DPP to prosecute for two reasons, (a) it is a constitutional imperative that the constitutional independence of the independence of the DPP must be respected, (b) for the court to intervene, there must be clear evidence of breach of the constitutional duty to act on the part of the DPP or abuse of discretion.

87. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles. As stated earlier, the power to quash proceedings is immense since it amounts to exonerating a suspect before trial. Such power must be exercised with extreme care and caution. It is a power which the court exercises only in exceptional cases where there is clear evidence of abuse of powers, abuse of discretion or absence of factual basis to mount the prosecution.

88. The writ of *Prohibition* arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation. However, as stated above, the illegality of the impugned decision has not been established.

89. Applying the law and the tests discussed above to the facts of this case, I find that there is nothing to show that the prosecution is unfair or an abuse of court process or abuse of police powers or judicial process. There is no material before me to demonstrate that the prosecution was undertaken without a proper factual foundation.[41] It has not been demonstrated that the prosecution is being conducted or is being undertaken without due regard to traditional considerations of candour, fairness, and justice, nor has it been shown that the trial is being conducted in a manner different from what is prescribed under the law, or that the trial is bad in law.[42]

90. In my view, the investigations were commenced after it was established that depositor's funds may have been lost at Chase Bank Limited, hence there was a factual basis. There is nothing to show that the DPP did not independently evaluate the evidence. The allegations raised by are matters to be dealt with by the trial court. Further, the applicants and the Petitioner have not demonstrated that their rights to a fair trial have been or will be infringed if the prosecution proceeds nor has he demonstrated that the prosecution will inherently violate their rights to a fair trial as enshrined in the Constitution. Further, it has not been demonstrated that the proceedings are not being conducted in public interest.

91. In view of my above reasoning, the conclusion becomes irresistible that judicial application number 72 of 2019 consolidated with Petition Number 360 of 2018 do not satisfy the threshold to warrant the orders sought.

92. Accordingly, I hereby dismiss Judicial Review Application Number 72 of 2019 and Constitutional Petition Number 360 of 2018 with no orders as to costs and direct that **Nairobi Chief Magistrates Criminal Case number 1717 of 2018**, *Republic vs Mohammed Zafrulla & Others* proceeds to hearing and determination.

Signed, Delivered and Dated at Nairobi this **17th** day of **January** 2020

John M. Mativo

Judge

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[1] {2014} eKLR.

[2] Act No. 17 of 2015.

[3] Article 157 (6) of the Constitution.

[4] Act No. 11A of 2011.

[5] Act No. 11A of 2011.

[6] Act No. 26 of 2015.

[7] Act No. 4 of 2015.

[8] Act No. 11A of 2011.

[9] {2017} e KLR.

[10] Act No. 28 of 2012.

[11] Act No. 28 of 2012.

[12]Nairobi High Court Misc. Civil App No 14 of 1997.

[13]{2015} e KLR.

[14] SC Cr App No. 590 of 2007.

[15] {2018} e KLR.

[16] {2002}2 KLR 69.

[17]{2007} 2 EA 170.

[18] Act No. 11A of 2011.

[19]{2018} e KLR.

[20] {2018} e KLR.

[21] {2016} e KLR.

[22] Act No. 4 of 2015.

[23]{2018} e KLR.

[24]{1943} 2 ALL ER 337.

[25] {1963} 2 ALL ER 66.

[26] Act No. 2 of 2013.

[27] Article 157 of the constitution.

[28] *Hui Chi-Ming vs R* {1992} 1 A.C. 34, PC.

[29]*DPP vs Meakin {2006} EWHC 1067.*

[30] See Attorney General's Reference (No 1 of 1990) [1992] Q.B. 630, CA; Attorney General's Reference (No 2 of 2001) [2004] 2 A.C. 72, HL.

[31]*See Bennett v Horseferry Road Magistrates' Court and Another [1993] 3 All E.R. 138, 151, HL; see also R v Methyr Tydfil Magistrates' Court and Day ex parte DPP [1989] Crim. L. R. 148.*

[32] Interpreting similar provisions in the constitution of South Africa, the South African Constitutional court (Nicholas AJA), Shabalala & 5 others vs A.G of Transvaal & Another CCT/23/94.

[33]Act No. 4 of 2015.

[34] Ibid.

[35] *Natasha Singh vs. CBI*{2013} 5 SCC 741.

[36] See *Maharashtra vs Arun Gulab Gawali*.

[37] See *State of West Bengal & Others vs Swapan Kumar Guha& Others*, AIR, 1982, SC 949, *Pepsi Foods Ltd & Another vs Special Judicial Magistrate & Others* AIR 1998, SC 128 & *G. Ugar Suri & Ano vs State of U.P & Others*, AIR 2000 Sc 754.

[38] {1993}All E.R 138, 151, House of Lords.

[39]Chris Corns, *Judicial Termination of Defective Criminal Prosecutions: Stay Applications*, 76 University of Tasmania Law Review, Vol 16 No. 1, 1977.

[40] Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, Statute Law in New Zealand, 3rd edn. (2003), pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

[41] Republic vs Attorney General ex-parte Arap Ngeny HCC APP NO. 406 of 2001.

[42] Indian Case *of Pulukiri Kotayya vs Emperor* L.R. 74 Ind App 65.