REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

MISCELLANEOUS APPLICATION NO. 17 OF 2018

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF PROHIBITION, MANDAMUS AND CERTIORARI

IN THE MATTER OF ARTICLES 29(D) AND 47(1) OF THE CONSTITUTION OF KENYA

IN THE OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015 LAWS OF KENYA 3, 7, 8 AND 11

IN THE MATTER OF THE LAW REFORM ACT, CAP. 26 LAWS OF KENYA SECTION 8 AND 9

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

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

THE CHIEF MAGISTRATE'S COURT KAJIADO.....2ND RESPONDENT

THE DCIO KAJIADO POLICE STATION.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

EXPARTE

PETER NYONGA NYARIGE.....1ST EXPARTE APPLICANT

PHILIP RAKITA.....2ND EXPARTE APPLICANT

JOSEPH SIRONKE.....3RD EXPARTE APPLICANT

JUDGEMENT

1. Before me is an Application dated 10th November 2018, brought under section 8 and 9 of the Law Reform Act, Chapter 26 of the Laws of Kenya and Order 53, rule 3 and 4 of the Civil Procedure Rules and all enabling provisions of the law. The Applicant is seeking the following orders:

a) An order of CERTIORARI to remove to this Honourable Court to be quashed the decision of the 1st Respondent to charge the 1st April in Kajiado Criminal Case Number 1791 of 2018; Republic vs Peter Nyarige;

b) An order of CERTIORARI to quashing the warrants of arrest issued by the 2nd Respondent in Kajiado Criminal Case Number 1791 of 2018; Republic vs Peter Nyarige for the arrest of the 1st Applicant herein;

c) An order of CERTIORARI to remove to this Honourable Court to be quashed the decision of the 1st Respondent to charge the 2nd and 3rd Respondents in Kajiado Criminal Case number 695 of 2018; Republic vs Philip Rakita & Joseph Sironke, the 2nd and 3rd applicant herein;

d) An order of <u>PROHIBITION</u> prohibiting the first Respondent and or any other officer acting on his instructions from proceeding with Kajiado Chief Magistrate's Court Criminal Case Number 695 of 2018 and 1791 of 2018 as regards the Kajiado Environment and Land Court case No. 108 of 2018 formerly Nairobi Environment and Land Court case no. 1548 of 2013;

e) An order of PROHIBITION directed at the 2nd Respondent to prohibit the 2nd Respondent from entertaining such criminal suits as brought and filed by the 1st Respondent as far as it regards to the subject matter pending in Kajiado Enviroment and Land Court case no. 108 of 2018 formerly Nairobi Environment and Land Court case no. 1548 of 2013;

f) THAT the cost of this Application be provided for.

2. The instant application is based on the grounds set out in the statement dated in this court on 6th December 2018 and the verifying affidavit of Peter Nyonga Nyarige. The Application is anchored on the grounds that; that the 1st Respondent has obtained a warrant of arrest against the 1st Applicant and intends to execute it and subsequently charge the 1st Applicant with the offence of conspiracy to defraud Johnson Kimathi Kaburia of property KAJIADO/KAPUTIEI-NORTH/4101 contrary to section 317 of the Penal Code. According to the Applicant, the allegation for which the warrant of arrest was obtained relates to a professional duty of the 1st Applicant which was carried out pursuant to an order of the Environment and Land Court in ELC Case No.1548 of 2013 issued at Nairobi on 14th March 2014.

3. The complaint that led to the seeking of the warrant of arrest and the looming prosecution is with regards to a joint survey that was consented to by the parties to the suit including the complainant and was recorded as an order of the court and the 1st Respondent has charged the 1st and 2nd Applicants in Kajiado Criminal case number 695 of 2018 on the basis of the said Kajiado ELC case no. 108 of 2018. Further that the 1st Respondent had previously looked into the complainant and made a decision not to charge the Applicants after the investigations disclosed no criminality.

4. Further grounds are such that the 1st Respondents are using a criminal court to frustrate the Applicants and to sway the outcome of the ongoing civil matter Kajiado EAC Case Number 108 of 2018 (formerly Nairobi ELC case number 1548 of 2013) which is due for a ruling on 27th January 2019 and that the 1st Respondent is abusing his power contrary to Article to Article 157(11) of the Constitution to achieve ulterior and extraneous motives which are an abuse of the process of court. Lastly, the Applicants are of the view that unless the impending arrest of the 1st Applicant is stopped the 1st Applicant, who is also seeking prohibition of his prosecution, will suffer irreparable injury.

5. The genesis of the dispute is Nairobi EAC Case Number 1548 of 2013 later transferred to Kajiado and assigned ELC Case Number 108 of 2018 in which the complainants in the criminal case, John Kimathi Kaburia and Patrick Mugambi, sued the 2nd and 3rd Applicants alleging trespass to property KAJIADO/KAPUTIEI-NORTH/4101 *(marked as PNN-5 is a copy of the Counter-cliam/ page 190 of the bundle).* The parties later recorded consent in court in which they agreed to have survey done on the affected parcels of land. The terms of the order where that a joint survey be done within 60 days and each party was to appoint separate surveyors to assist the government surveyor. Pursuant to the order, both parties appointed their preferred surveyors and the 1st Applicant was appointed to represent the 2nd and 3rd Applicants who are the Defendants in the civil suit while the complainants who appointed Timothy Pello. *(Annexure PNN-6 is a copy of the appointed letter).*

6. The 1st Applicant stated that a survey report and mutation forms were prepared by the government surveyor, shared with the parties and presented in court for adoption. *(annexure PNN-7 is a copy of the survey report).* The applicant also stated that on the 8th August 2014, both parties prepared and forwarded to court consent form endorsing the survey report consequent of which a court order was issued directing amendment of the registry index maps to conform to the findings. *(annexure marked as PNN-8 is a copy of the consent form while PNN-9(a) is a copy of the court order).*

7. The orders of the court were carried out, the mutation registered and the registry index map amended accordingly. *(annexure marked as PNN-9(b) is a copy of the mutation form duly signed by both parties).* The Appellant is deponed that the complainant in the Criminal case against myself and the 2nd and 3rd Applicants went back to court and made an application seeking to set aside the orders of the court adopting the survey report and directing amendment to the registry map index. *(marked as PNN-10 is a copy of the notice of Motion dated the 17th day of May 2015).*

8. The 1st Applicant stated that the complainants in the criminal proceedings even went to report the matter to Kajiado Police Station claiming fraud in the preparation of the survey report and mutation. It was also stated that the said warrant of arrest was obtained without full disclosure of facts to the court.

9. It was stated that the survey was carried out by a government surveyor as the lead surveyor in the presence and with the help of private surveyors appointed by both sides of the civil matter. The complainant appointed his surveyor who participated in the process up to and until the adoption of the survey report in court. The 1st Applicant is of the view that the complainant together with the 1st and 3rd Respondents have discriminately chosen to arrest and prosecute us yet our roles were peripheral and not the government surveyor or even the complainant's own appointed surveyor who had no problem with the entire process.

10. The Applicant also deponed that their actions and those of complainants were sanctioned by a lawful order of the court and are recorded as orders of a competent court and therefore cannot be a basis of prosecution in a criminal matter as long as the court that gave the orders have not found as a fact the actions were fraudulent. Further that the charging of my wife co-applications and him in Kajiado Criminal cases no.695 of 2018 and 1791 of 2018 invariably means that the court was party to a crime and therefore suggests it acted illegally.

11. The Applicant also stated that the decision to charge my co-appplicant and him by the 1st Respondent smacks of malice, ill will and has the 1st Respondent abuse its power by using the criminal justice system to settle personal scores and vendetta. He also stated that their malicious prosecution has subjected them to mental torture and 2nd Respondent irregularly and incorrectly issued the warrant of arrest and

irregularly admitted the charges. He also stated that the criminal charges are irregular and amount to an abuse of court process. It was also averred that the court has supervisory roles over subordinate courts under article 165(6) of the Constitution of Kenya as well as its revisionary jurisdiction to look into any order and to halt the proceedings.

12. The 2nd and 4th Respondents' opposed the application. They stated that the application is unmerited and therefore an abuse of the due process of the Court and its intended to curtail the statutory obligations and duties of the Respondents. Further that the Applicant has an opportunity before the trial court to prove and demonstrate his innocence and that the Application is premised on explanations that can and ought to be made before the requisitioning officer and this Honourable Court would be usurping the statutory mandate of the 1st and 2nd Respondents if it were to take up that role as proposed by the Ex-parte Applicant.

13. Further grounds for opposition are that the Ex-parte Applicant has not demonstrated any prejudice that he will suffer by honoring requisitions that seek their respective attendance made pursuant to the law. They also take the view that the Applicant's position in essence seeks that the court directs a public Officer to exercise or not to exercise his/her statutory discretion in a particular manner hence usurp the said officer's authority.

14. It was also stated that the instant application is premised on a presumptuous notion that Ex-parte Applicant has foreknowledge of what the requisitioning officer is looking for in terms of evidence and they prayed that the same should be dismissed with costs to the respondents'.

Analysis and Determination

15. The Applicants' herein is challenging the decision of the office of the DPP to mount charges against them contending that the 1st and the 3rd Respondents undertook the investigation and prosecution of them in bad faith, intending to achieve ulterior motives and/or is been used as a tool for personal score settling or vilification of the applicants and therefore an abuse of the court process. In dealing with this contention, I shall turn to both Article 157 of the Constitution as well as the Office of the Director of Public Prosecutions Act, No. 2 of 2013. Article 157 establishes the Office of the DPP and clothed him with the requisite independence in matters prosecution, the conduct of which is regulated by the Office of the Director of Public Prosecutions Act. Under **Article 157(6) of the Constitution** the DPP shall exercise state powers of prosecution and may:

> a. ***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.***
>
> *b.* ***Take over and continue any criminal proceedings commenced in any court (other than the court martial) that has been instituted by another person or authority with the permission of the person or authority.***
>
> *c.* ***Subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions.***

16. The discretionary nature of the above powers is encapsulated under Article 157 (10) of the Constitution which stipulates that:

> ***"(10) 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."***

17. The above position is acknowledged in the High Court decision in ***DOUGLAS MAINA MWANGI VS KENYA REVENUE AUTHORITY & ANOTHER, CONSTITUTIONAL PETITION NO. 528 OF 2013***, where the court held that:

> ***"When dealing with the decision as to whether or not to prosecute the office of DPP exercises independent judgment and the court cannot interfere unless it is shown that the exercise is contrary to the Constitution, in bad faith or amounts to an abuse of process".***

18. Article 157 (11) of the Constitution and Section 4 of the Office of the DPP Act donates the above-cited discretionary powers to the DPP to initiate or commence criminal proceedings which powers are not absolute and in appropriate cases the court may intervene.

19. Article 157(11) provides as follows:

> ***(11).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.***

20. On the other hand, Section 4 of the office of Director of Public Prosecutions Act, which seeks to promote Article 157 of the Constitution provides as follows:

> ***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

21. In the case of ***Vincent Kibiego vs. Attorney General, High Court Misc. Application No. 839 of 1999,*** **Kuloba J** observed as follows:

> ***"If a criminal prosecution is seen as amounting to an abuse of the process of the court, the court*** will ***interfere and stop it…"***

22. The above cited provisions are crafted in a manner which helps the DPP avoid incidents of abuse or excess of power in the exercise of such discretion which may invite the court's intervention. Furthermore, utmost caution must however be taken to ensure that the DPP's prosecutorial powers are also not unnecessarily hinged or interfered with by the court. In ***in Total Kenya Ltd & 9 others –vs- Director of Public Prosecutions & 3 others [2013] eKLR***, the court stated as follows:

> ***"Although this court has inherent jurisdiction to stop abuse of its process by prohibiting criminal proceedings, where the same are found to be oppressive or otherwise an abuse of its process, such power must be exercised ever so cautiously so as not to stifle what is otherwise the lawful discharge of a constitutional mandate by the police service and the DPP."***

23. On the duty of the police to investigate complaints, the court *in* ***Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR*** **stated**:

> ***"The police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene".***

24. I now consider whether the DPP and the Inspector General of police were justified in their action to conduct an investigation and mount charges against the Petitioner while the civil suits are yet to be heard on merits and determined by the Environment and Land Court. In ***Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703***, it was held:

> ***"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..."***

25. I am also equally in agreement with the decision in ***R vs. Attorney General exparte Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001*** where the court held:

> ***"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".***

26. Applying the foregoing in the instant case, I'm in agreement with the Applicants' assertion that the 1st Respondent is mandated to

exercise the state power of prosecution under Articles 157(6) of the Constitution and further that Article 157(11) aforementioned obligates the 1st Respondent to exercise his power with regard to public interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

27. It is trite that the court on the other hand is clothed with the jurisdiction to oversee and ensure that the DPP and the Inspector General perform the abovementioned powers in full compliance with the law. In ***Githuri vs. Republic (1985) LLr 3090***, the court observed that whenever it comes to the attention of the court that there has been a serious abuse of power, the court is obligated to express its disapproval by stopping the same so as to secure the ends of justice, and restrain the said power which may lead to harassment or persecution. The ***Court of Appeal in The Commissioner of Police & 2 others vs Kenya Commercial Bank & 4 Others (2013) eKLR*** at page 8 held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. Further that the court in such a scenario has inherent power to interfere with such investigation of prosecution process.

28. At this juncture, this court acknowledges that it is possible for criminal and civil proceedings touching on the same subject matter and involving the same parties to run concurrently. Section 193A of the *Criminal Procedure Code* Cap 75 Laws of Kenya provides for concurrent civil and criminal proceedings. It stipulates as follows:

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

29. Both the Applicants and the Respondents herein are in agreement by dint of section 193A aforementioned, an action brought before court seeking judicial review orders can not suffice or bring criminal proceedings to an end simply because there are civil proceedings going on touching on the same subject matter. Neither does it suffice to say that because there exist a civil dispute or suit based on the same set of facts as the ones in the criminal proceedings hence the entire criminal proceedings are an abuse of court process.

30. The main question to ponder in this matter is whether or not the first and 3rd Respondents have exercised their powers properly, within the constitution and the law. It is important for the applicant hearing to demonstrate with sufficiency the grounds which warrant the court's interference with the decision by the Respondents to charge and mount charges against the Applicant. In other words, it is incumbent upon the Applicants to demonstrate to the satisfaction of the court that the 2nd and 3rd Respondents somehow abused, overstepped or exercised their mandate unlawfully in carrying out the said investigation and preferring or prosecuting the Applicants for the alleged conspiracy to commit fraud and by that the same ought to be interfered with by the court.

31. In light of the foregoing principles to the instant application by considering the evidence on record, it is the Applicant's contention there was an involvement by the 2nd and 3rd Applicants in civil litigation before the Environment and Land Court (ELC), Kajiado ELC no. 108 of 2018 previously Nairobi ELC 1548 of 2013 with one Johnson Kimathi Kaburia one of the complainants in both criminal cases 695 of 2018 and 1791 of 2018 against the 2nd and 3rd Respondents on one hand and the 1st Respondent on the other hand. It was further shown that the 2nd and 3rd Applicants are involved in civil litigation before the subordinate court with one Margaret Wairimu Njuguna Mwaura i.e. Civil Suit no.22 of 2015. The Applicant further averred that the said Margaret Wairimu is a complainant in both criminal case number 695 of 2018 and 1791 of 2018 both subject of this application.

32. The Counsel for the Applicants further contended that the actions leading to the complaints by the complainants in both criminal cases aforementioned were done under the supervision of court and with the concurrence of the parties in ELC 108 of 2018. It was brought to the attention of the court that Jonathan Kimathi Kaburia a complainant in the abovementioned criminal cases has filed an application in the ELC court seeking to have the consents leading to the criminal cases set aside as an order of the court.

33. On abuse of court and ulterior motive, the Counsel for the Applicant that the criminal proceedings in question are not only an abuse of the court process but aimed at achieving an ulterior motives including pressuring the 2nd and 3rd Applicant to concede the Civil case before court. It was brought to the attention of the court that the actions being criminalized by the said Respondents were sanctioned and supervised by the court and the same was not undertaken by the applicants alone but with others who have not been charged with the Applicants.

34. Further that throughout the proceedings in the civil matter all the parties were represented by legal counsel and professional surveyors. Counsel questioned why the Applicants were charged with the exclusion of the other parties i.e. the government surveyor, Timothy Pello surveyor and counsel representing the parties who also took part in the actions which led to arrest and charging of the applicants. It was averred that the surveyors with whom he undertook the work of surveying the suit parcel of land and jointly made a report as well as presenting a mutation maps to the court for approval.

35. The applicants take the position there is no criminality in implementing the outcome of a court sanctioned process. Further that the 2nd and 3rd Applicant should not have been charged since they are lay people who hired competent professionals to represent them through a legal process. It is the applicant's contention that the civil matters in these two criminal proceedings are still pending and awaiting to be concluded and the matters in issue in both those cases are boundary disputes between the applicant and the complainants.

36. Counsel also contends that since the parcels of land of the alleged complainants do not boarder the parcel of land owned by the 2nd and 3rd Respondents which are separated by a government road, there cannot be any encroachment. There is also a pending application before ELC case no. 108 of 2018 to determine whether the consents filed in court relating to this matter were fraudulent, misrepresentation, corruption and professional malfeasance.

37. On the other hand the 2nd and the 3rd Respondents are of the view that the grounds relied upon by the Applicants do not in any way

show that the Applicants will suffer injustice at the Trial court. The 2nd and 3rd Respondent hold the view that the Applicant have not shown how he will suffer prejudice if the trial proceed. As regards EAC No. 108 of 2018, the said respondents submitted that the dispute between the 2nd and 3rd applicants and Johnson Kimathi Kaburia, one of the complainants in the criminal cases. It is their view that the Applicant is not a party to that dispute.

38. Further that there are other complainants in the criminal cases who are not parties to the civil contestation and their criminal complaints ought not to be stopped when they are strangers in the civil matter. The Respondents took the view that that have sufficiently demonstrated in the Investigating Officer's replying affidavit and the annextures thereto that the applicants committed criminal acts against the complainants and that the evidence gathered of criminal misfeasance be tested in a trial.

39. The Counsel for the 2nd and 3rd Respondents opposed the Applicants' contention that their actions subject of the impugned investigations were done under the supervision of the Environmental and Land Court. The Respondents that they have demonstrated on a prima facie basis that the 1st applicant filed and maintained a false Mutation form in order to hoodwink the court. In that regard, it was therefore submitted that the applicants are not persons of integrity, have come to this court with unclean hands and should be treated with contempt for perjuring themselves in the EAC Court.

40. The 2nd and 3rd Respondent contends that the fact that the other two surveyors were not charged is neither discriminatory nor malicious. The respondents believe that the other two surveyors were duped into signing the impugned mutation. It was further adduced by the respondents that the investigations have revealed that the survey report and mutation adopted by the ELC court at the instance of the 1st Applicant is fraught with fraud, misrepresentation and professional malfeasance and is fundamentally defective. It was also contended that the 1st Applicant abused the trust of his professional colleagues who have and will willingly and truthfully testify against him.

41. It was submitted the Counsel for the 2nd and 3rd Respondents that the Applicants failed to demonstrate that the respondents have acted with caprice, avarice, ill will, malice or any form of negative motive against them and on the contrary, the respondent has disclosed all the material to be relied upon at the criminal trial which clearly show that an offence has been committed. It was further adduced that the matter went through thorough scrutiny, including a direction for further investigation until it met the necessary evidential and public interest test before charges were recommended and that the 1st Respondent has acted within his mandate and abided by the law in bringing the charges.

42. At this juncture, this court acknowledges that it is possible for criminal and civil proceedings touching on the same subject matter and involving the same parties to run concurrently. Section 193A of the *Criminal Procedure Code* Cap 75 Laws of Kenya provides for concurrent civil and criminal proceedings. It stipulates as follows:

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

43. The Applicants herein are seeking the Judicial Review remedies of certiorari to remove and quash the decision of the 2nd and 3rd Respondents, jointly and severally, and or a decision of any other person to charge the 1st Applicant in Kajiado Criminal case number 1791; ***Republic vs Peter Nyarige***; ***Kajiado Criminal Case Number 695 of 2018***; ***Republic v Peter Nyarige*** and ***Kajiado Criminal Case Number 695 of 2018***; ***Republic vs Phillip Rakita & Joseph Sironke.*** They are also seeking an order of Prohibition prohibit the 2nd Respondent from entartaining such criminal matters as brought and filed by the 1st Respondent as far as it regards to the subject matter pending in Kajiado ELC case no. 108 of 2018.

44. The said remedies is granted as stipulated in the Fair Administrative Action Act. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. It is important to note that the judicial review remedy is no longer in the domain of the common law remedies but a constitutional remedy espoused in Articles 22, 23, 47 and 50 of the Constitution of Kenya 2010. In the Court of Appeal decision of ***Judicial Services Commission Vs Mbalu Mutuva & Another (2015) eKLR CA 52/2014,*** it was held inter alia:-

> ***"Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of rights. The right to fair administrative action is a reflection of some of the national values in Article 10 of the Constitution such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under common law was developed."***

45. I'm also inclined to go by the case of ***Aburili J. in Batange Ndemo v DPP & Others,*** where the court stipulated that the Criminal Justice System and therefore criminal trial, are a matter of public interest and are conducted in the public interest, to ensure that the Rule of Law, one of the pillars of good governance in protected and prohibited. It is for that reason that the law makers of the Constitution of Kenya 2010 deemed it fit to enshrine therein several state institutions such as the office of the Inspector General of Police and the Director of Public Prosecutions, to be the custodians of the criminal justice system in ensuring that the Rule of Law is protected and promoted.

46. The circumstances in which the court would be entitled to prohibit, bring to a halt or quash criminal proceedings are now well settled. In doing the same, the court ought to be extremely cautious in making its determination so as to avoid prejudicing the intended or pending criminal proceedings. Further, this court is well aware of the discretionary nature of judicial review remedies and the fact that the court would in certain circumstances decline to grant the same even if the same are merited. This position was well appreciated in ***Halsbury's Laws of England 4th Edition Vol. 1 (1) paragraph 12 pg. 270:***

"The remedies of quashing orders (formerly known as order of certiorari); prohibition orders (formerly known as orders of prohibition; mandatory orders (formerly known as orders of mandamus) are all discretionary. The court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief, the court will take into account the conduct of the party applying and consider, whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. [emphasis added].

Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or further, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question; would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfillment. The court has an ultimate discretion whether to set aside the decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow a temporary decisions to take their course, considering the compliance and intervening if at all later and in retrospect by declaratory orders."

47. As regards the prayer for the Judicial review Remedy of prohibition, the purpose of the same is to prohibit the body mandated with decision making, from making or taking any further or contemplated steps without jurisdiction or in breach of the rules of natural justice as in the case of ***Kenya Examination Council (supra)*** that:

"What does an order of prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land it lies, not only for excess of jurisdiction, or absence of it, but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings."

48. The Court in exercise of its discretion on whether or not to grant an order of prohibition, it takes into account the needs of good administration***. (See R vs. Monopolies and Mergers Commission Ex Parte Argyll Group Plc [1986] 1 WLR 763 and Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK).)***

49. In **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170,** the Court of Appeal held:

"It is trite that an order of prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...Equally so, 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."

50. It is noteworthy that in granting an order of prohibition the Court is not concerned about the innocence or otherwise of the applicant. This recognition was made in ***George Joshua Okungu & another vs. Chief Magistrate's Court Anti-Corruption Court at Nairobi & another [2014] eKLR*** where the Court expressed itself as follows:

It is therefore clear that whereas the discretion to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt. Similarly where the commencement or continuation of the criminal prosecution will result in abrogation of the Petitioner's rights and freedoms enshrined in the Constitution, the Court is under a duty to bring such proceedings to a halt. In so doing, it must be emphasized that the Court is not concerned about the innocence or otherwise of the Petitioner. The Court's duty is only to ensure that the Petitioner's rights and freedoms as enshrined in the Constitution are protected and upheld. As was held Wendoh, J in Koinange vs. Attorney General and Others [2007] 2 EA 256, the jurisdiction of the Court in Constitutional matters is limited to inquiring into the allegations of violation of fundamental rights as alleged by the applicant and what remedies, if any, the court can grant. As was stated in the case of Githunguri vs. Republic KLR [1986] 1:

"We speak in the knowledge that rights cannot be absolute. They must be balanced against other rights and freedoms and the general welfare of the community. We believe we are speaking correctly and not for the sake of being self-laudatory when we say the Republic of Kenya is praised and admired by other people and other systems for the independent manner in which justice is dispensed by the courts of this country. We also speak knowing that it is our duty to ask ourselves what is the use of having a Constitution if it is not honoured and respected by the people. The people will lose faith in the constitution if it fails to give effective protection to the fundamental rights. The people know and believe that* to destroy the rule *of law you destroy justice thereby also destroying the society."

51. As regards the Applicants' prayer for an order of certiorari, It is trite that an order of *certiorari* can quash a decision already made and an order of *Certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. **(See Kenya National Examinations Council case (supra) and *Meixner & Another vs. Attorney***

General [2005] 2 KLR 189, Court of App.).

52. Thus an order of certiorari is designed to prevent abuse of power. It carries with it the purpose of ensuring that an individual is accorded fair treatment by the authority to which he is subjected. In the same respect Peter Kaluma in his book, ***"Judicial Review Procedure and Practice"*** at page 118 states as follows:-

> ***"……when issued the order of certiorari brings up to the High Court a decision of an inferior court, tribunal or a public authority or other decision made to be quashed. Certiorari is concerned with the decision making process and only issues when the court is convinced that the decision challenged was reached without or in access of jurisdiction, in breach of the rules of natural justice or contrary to law."***

53. As regards the nature of certiorari, I place reliance in the case of *Captain Geoffrey Kujoga Murungi v Attorney General Misc. C.A No. 293 of 1993 (unreported)* where the court held as follows:-

> ***"Certiorari deals with decisions already made……Such an order can only be issued where the court considers that the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of natural justice; or contrary to law. Thus an order of Certiorari is not a restraining order."***

54. Thus according to ***Peter Kaluma*** in his book, ***"Judicial Review Procedure and Practice"*** at page 118 *(supra),* the effect of the order of certiorari is to restore *status quo ante.* This means that when such an order is issued, it restores the situation that existed before the decision quashed was made. This is the position taken by the Court of Appeal in the case of *Central Organizing of Trade Unions (K) v Benjamin K Nzioka and Others CA No. 166 of 1993 (Unreported) as quoted in the abovementioned book,* it was stated that:-

> ***"The quashing of the Registrar's decision simply meant as we have already stated that the status quo that existed before the bad decision of the Registrar was made on 5th July 1993 is revived and if there is any formal act that is required on the part of the Registrar to bring this about, he should have done so at once, if he has not, then he must do so now or risk the censure of this court for contemptuous behavior."***

55. In light of the above it is clear that the order of certiorari reverts back the impugned decision making process as if it never happened. This does not mean that the quashing of such a decision extinguishes the rights of the parties involved. The decision can still be made afresh in accordance with applicable laws, rules and regulations.

56. The Applicants herein are challenging the Decision by the 2nd and 3rd Respondents to investigate and mount charges against them citing that the same was undertaken in bad faith, intending to achieve ulterior motives and/or is been used as a tool for personal score settling or vilification of the Applicants and therefore an abuse of the court process. I'm alive to the fact that the Constitution clothed the Director of Public Prosecutions with powers which are to be carried out without interference from any party and even the court may not direct or interfere with the said mandate unless and until there is ample evidence that violation of the party's right under the constitution or the constitution itself. The 2nd and 3rd Respondents have levelled serious allegations against the Applicants herein and reiterated that they have demonstrated that they have ample evidence to charge them with conspiracy to commit fraud.

57. It is incumbent upon the Applicants to demonstrate to the satisfaction of the court that the 2nd and 3rd Respondents somehow abused, overstepped or exercised their mandate unlawfully in carrying out the said investigation and prosecuting the Applicants with the alleged offence. The Applicants have traced the cases in the criminal courts and linked them with ones in the Environment and land courts and opined that the same shows abuse of court process. An action brought before court seeking judicial review orders can not suffice or bring criminal proceedings to an end simply because there are civil proceedings going on touching on the same subject matter. Neither does it suffice to say that because there exist a civil dispute or suit based on the same set of facts as the ones in the criminal proceedings hence the entire criminal proceedings are an abuse of court process.

58. In my view, the applicants simply stated that the said criminal charges are an abuse of court process. It is not enough to simply state that the decision by the 2nd and 3rd Respondents to undertake an investigation and mounting criminal charges against the Petitioner constitutes an abuse of court process, irrationality, irregularity and clouded with procedural impropriety.

59. I'm not convinced that Applicants have demonstrated unlawful actions, excess or want of authority, evidence of malice, evidence of intimidation or even of manipulation of court process so as to seriously deprecate the likelihood that the applicant might not get a fair trial as provision article 50 of the constitution, and in the absence of such proof, this court is unable to bring the ongoing criminal proceedings at Kajiado Criminal Courts to a halt. In the premises, I find that the evidence led by the Applicants does not meet the threshold required for the court to issue the judicial review remedies of Certiorari and Prohibition.

60. Further, it is my view that the Environment and Land Court which has the jurisdiction to determine a dispute regarding the boundaries of the land in question. And it is only when those issues are determined that the criminal courts would be able to benefit from the outcome of the said pending civil proceedings so that the criminal court may be able to make sound findings. I'm also of the view that if the said pending criminal proceedings are allowed to proceed, there would be a possibility that the courts determining the concurrent civil and criminal suits touching on the same sets of fact may come up with conflicting outcomes and for avoidance of the same and for purposes of maintaining the integrity and dignity of the court proceedings, the Criminal proceedings ought to be stayed pending determination of the dispute on ownership of the land.

61. It must be noted that criminal proceedings are instituted in the interest of the public and considering the circumstances of the case, this court finds that the DPP was well within his powers when he made the decision to institute the applicant as there is no sufficient proof to show that that he intended to achieve a collateral purpose or other motives.

62. In wholly associate myself with the decision in ***Republic Vs Attorney General & Others Exparte Diamond Hashim Lalji & Ahmed Hashim Lalji*** where ***Odunga J*** noted that the court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings hence the applicant should appear before a competent court where he will be accorded a fair trial and a fair hearing and if dissatisfied he could appeal.

63. In this application the Fair Administrative Act of 2015 in its provisions under **section 7** earmarks various grounds decision of an inferior body, tribunal or authority can be a subject of judicial review proceedings for the writs of prohibition, certiorari and mandamus to issue.

64. In exercising the supervisory jurisdiction on any of the grounds stated therein, its incumbent upon the court to safeguard and protect constitutional mandate of the inferior body or tribunal.

65. I have carefully re-evaluated the evidence as brought out by the applicant and the rejoinder from the respective respondent and I am of the considered view on a balance of probabilities that the grounds prescribed under section 7 of the Act has not been established to warrant interference of the decision by the respondent under the Judicial Review Jurisdiction.

66. It is for these reasons I find it difficult to exercise discretion that the spectral conditions have been fulfilled to question the validity of the decision making process by the 1st and 3rd respondent in initiating proceedings before the second respondent. Accordingly, in is so far as the scope of prohibition and certiorari reliefs there is nothing the applicant has done to persuade me to overrule the decisions by the 1 st and 3rd respondents. Finally a court will not sit in judgment of the inferior body, tribunal, unless it acted contrary to the laid down constitutional principles.

67. For the above reasons, the substantive motion for the writ of prohibition and certiorari lacks merit and is therefore dismissed with no orders as to costs.

DATED, DELIVERED AND SIGNED IN OPEN COURT AT KAJIADO THIS 7TH JUNE 2019.

…….

R. NYAKUNDI

JUDGE

Representation:

Ms. Nkirote for the DPP

Mr. Musyimi for the Exparte applicant present