



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. 24 OF 2019**

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE LAW REFORM ACT, CAP 26 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE NATIONAL POLICE SERVICE ACT**

**AND**

**IN THE MATTER OF OFFICE OF THE DIRECTOR**

**OF PUBLIC PROSECUTIONS ACT**

**AND**

**IN THE MATTER OF ARTICLES 40, 47, 48 AND 50 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF A DECISION BY THE RESPONDENTS TO PREFER CHARGES AGAINST THE APPLICANT ON  
FRIDAY 1<sup>ST</sup> FEBRUARY 2019**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT**

**OFFICER COMMANDING POLICE DIVISION**

**-CENTRAL POLICE STATION.....2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF CRIMINAL**

**INVESTIGATIONS.....3<sup>RD</sup> RESPONDENT**

**MARYIDA NYAMWAYA ABOKA ALOYO.....4<sup>TH</sup> RESPONDENT**

**EX PARTE :**

**GRACE ATIENO ODONGO**

## JUDGMENT

### The Application

1. The *ex parte* Applicant herein (hereinafter the Applicant) is Grace Atieno Odongo, a female adult of sound mind working for gain in Nairobi and the sole proprietor of Docgrand Anjelma Enterprises, which she states is engaged in supplies business. She has filed an application for judicial review orders against the Director of Public Prosecution who is sued as the 1<sup>st</sup> Respondent herein. The 1<sup>st</sup> Respondent is an independent office created under Article 157 (1) of the Constitution that is in charge of public prosecutions. The Officer Commanding Police Division (OCPD) at the Central Police Station and the Director of Criminal Investigations are sued as the 2<sup>nd</sup> Respondent and 3<sup>rd</sup> Respondents respectively. The two are offices in the National Police Service, which is established under Article 245 of the Constitution and is responsible for *inter alia* investigation of offences and enforcement of the law.

2. Grace Atieno Adongo, who has been sued as the 4<sup>th</sup> Respondent, is a female adult working for gain in Nairobi, and is the complainant in intended criminal proceedings against the Applicant. The 4<sup>th</sup> Respondent's complaint is that the Applicant requested her to supply goods to the Ministry of Foreign Affairs, and that after making the said delivery on behalf of a business entity owned by the Applicant, she was not paid for the said goods. Arising from the said complaint, the Applicant, in an application by way of a Notice of Motion dated the 10<sup>th</sup> February 2019, is seeking the following orders from this court:

- a) An order of Certiorari to remove into this Court and quash the decision by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to prefer charges against the Applicant, where the Applicant was set to take plea on Friday 1<sup>st</sup> February 2019 and face charges of allegedly obtaining goods by false pretence through her business entity;
- b) An order of Prohibition to stop the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from preferring and commencing criminal proceedings against the Applicant herein where the Applicant was set to be charged in the Milimani Chief Magistrate Court Criminal Division for plea taking on Friday 1<sup>st</sup> February 2019 and be charged with the offence of obtaining goods by false pretence through her business entity.
- c) The cost of this application and the suit be awarded to the Applicant.

3. The application is supported by supporting affidavits sworn by Applicant on 30<sup>th</sup> January 2019 and 10<sup>th</sup> February 2019, a statutory statement dated 30<sup>th</sup> January 2019, and a supplementary affidavit the Applicant swore on 26<sup>th</sup> March 2019. The crux of the Applicant's case is that the Respondents have been undertaking investigations against the Applicant following the 4<sup>th</sup> Respondent's complaint as stated above. The Applicant is aggrieved with the manner in which the said investigations were conducted and alleges mistreatment and harassment. As a result, the Applicant was forced to lodge an application for anticipatory bail pending the impugned investigation, upon whose conclusion the Respondents resolved to charge the Applicant on 1<sup>st</sup> February 2019 with the offence of obtaining goods by false pretence through her business entity.

4. The Applicant states in her affidavit that she received a phone call from one Sgt. Frankline Marangu on 3<sup>rd</sup> December 2018 wherein she was summoned to appear at Nairobi Central Police Station without being informed of the reasons for the summon. The Applicant contends that on arrival at the Police Station, she was roughed up, locked in a room for over two hours, denied the right to visit the washroom and embarrassed the whole time as the police labeled her a con woman and fraudster. The Applicant contends that she was told to write a statement admitting that she owed the 4<sup>th</sup> Respondent money as alleged, and to agree to refund the same, upon which the charges against her would be withdrawn. That, in view of the manner in which she was mistreated and her fundamental rights violated, she opted to apply for anticipatory bail which was granted.

5. Terming the 4<sup>th</sup> Respondent's complaint as pure fabrication, the Applicant avers that no demand has been made to her business with respect to money owed to any person or other business entity. That in any case, even if the complaint is true, there is a clear remedy in the civil Court. It is contended that the Applicant reported to the Investigation Officer's offices throughout the entire investigations period, including on 29<sup>th</sup> January 2019 when the investigations were recorded as finalized, and the order to charge the Applicant on 1<sup>st</sup> February 2019 given.

6. According to the Applicant, the Respondents have already resolved to charge her before the Chief Magistrates Court Criminal Division. In this regard, that her fingerprints have been taken as well as a photo of her holding a placard indicating the charges she is to face. This the Applicant terms as profiling as the same will be posted on the internet's social media platforms with the aim of scandalizing the Applicant's name and warning the public against doing any business with her, and eventually leading to her dismissal from employment. The Applicant contends that the 4<sup>th</sup> Respondent and her husband who are well known to her are keen on her downfall and are driven by malice to scandalize her name and discredit her with her employer.

7. The Applicant's case is that the 4<sup>th</sup> Respondent's husband is a senior employee with the Ministry of Foreign Affairs in the Finance department. It is her averment that when her business bid for the supply of toners to the Ministry of Foreign Affairs, the 4<sup>th</sup> Respondent's husband demanded for a kickback in case the bid was successful. That, the Applicant's business however refused to heed to his demands, guided by integrity and ethical standards. The Applicant avers that as a consequence the 4<sup>th</sup> Respondent's husband ensured that her business has never been allowed to do business with the Ministry. The Applicant reiterated that in any case, the said complaint is one within the purview of a civil court. The Applicant contends that the impugned decision is therefore procedurally unfair, inefficient, unreasonable, capricious and in breach of the Rules of natural justice.

8. The Applicant avers in her supplementary affidavit that she was subjected to psychological harassment during the investigations process where she was called names and humiliated, a matter that her Advocates addressed by writing a complaint to the Officer Commanding Police Station. It is averred that the Applicant was eventually arraigned in Court and charged, wherein during the plea taking, the 4<sup>th</sup> Respondent

brought persons with cameras to take photos and witness the criminal proceedings. This, it is contended, was intended to humiliate the Applicant with the threat of circulating her photos on social media in furtherance of her ulterior motive.

9. The Applicant further contended that during the plea taking, the Court preferred that the parties explore out of court negotiations in view of the fact the parties involved were previously in good relations. That, the Applicant and her Advocates initiate the negotiations by way of a letter to the 4<sup>th</sup> Respondent's Counsel from the Applicant's Counsel, which letter has not been responded to. The Applicant contends that the said complaint by the 4<sup>th</sup> Respondent is in bad faith and aimed at settling personal scores.

### **The Responses**

#### ***The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' Case***

10. The 1<sup>st</sup> and 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed a joint response through a Replying Affidavit sworn on 18<sup>th</sup> April 2019 by Frankline Marangua, a police officer of the rank of Sergeant attached to the Directorate of Criminal Investigations, Nairobi Central, and the officer assigned with investigating the instant matter. According to the deponent, the investigations in this matter commenced after the 4<sup>th</sup> Respondent filed a complaint against the Applicant in January 2018. It is averred that the Applicant won a tender with the Ministry of Foreign Affairs through her company, and that due to financial constraints, she then requested the 4<sup>th</sup> Respondent to help her supply computer toners with the promise to repay once the tender payments were effected.

11. Further, that the Applicant sent the 4<sup>th</sup> Respondent her company documents through which included:

- a) Certificate of Registration No. BN. 72 CVYEP of Docgrand Anjelma Enterprises;
- b) Certificate of Registration Disadvantaged Group-Women No NT/PPD/DGW/21641/E of the same company;
- c) Tax Compliance Certificate dated 07/09/2017; and
- d) Copy of the Docgrand Anjelma Enterprises cheque book leaf of Barclays Bank for Account No. 2038749989.

It is contended that the Applicant sent the said documents to the 4<sup>th</sup> Respondent via "Whats App" messages from telephone number +2547146684808 on 12<sup>th</sup> January 2018, while the cheque book leaf was sent on 28<sup>th</sup> September 2018. The copies of the said documents were annexed to the replying affidavit.

12. It is deponed that on 17<sup>th</sup> January 2018, the 4<sup>th</sup> Respondent purchased eighty (80) computer tonners model 201A each valued at Kshs. 23,100, totaling to Kshs. 1, 848,000/= and supplied them to the Ministry of Foreign Affairs. That, the 4<sup>th</sup> Respondent sent her employee Mwirigi Lawrence to deliver the tonners to the Ministry on 17<sup>th</sup> January 2018, who wrote and signed Invoice number 251 for L.P.O No. 2317 and delivery note No. 303. In return, he received a Counter Receipt Voucher No. 9335466 on Form S.13 from the Procurement Department of the Ministry to acknowledge delivery of the goods. It is averred that the Ministry prepared a payment voucher for the Applicant's company of Kshs.1,848,000/= in September 2018. Further, that the Ministry on 12<sup>th</sup> September 2018 made a payment to the Applicant's Company through EFT of Kshs. 1,752,413.80 after deduction of VAT Kshs.95,586/=.

13. It is the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' contention that the 4<sup>th</sup> Respondent lodged a complaint with the Police after the Applicant ignored the 4<sup>th</sup> Respondent's request to be paid the sum owed to her, and denied having been paid any money by the Ministry. According to the deponent, the Barclays Bank Forensic Investigation Head Office established that the Applicant's company's account had been credited with the sum of Kshs. 1,752,413.80 by the Ministry on 12<sup>th</sup> October 2018. That, the Applicant on the other hand did not give any document to account for the money wired into her account despite withdrawing the amount. It was further contended that pursuant to Article 157 of the Constitution, the Director of Public Prosecutions acts independently, is not under the control of any person, and has the discretion under Article 249 to institute criminal proceedings.

#### ***The 4<sup>th</sup> Respondent's Case***

14. The 4<sup>th</sup> Respondent's response was in a replying affidavit she swore on 1<sup>st</sup> April 2019 in opposition of the instant application. The 4<sup>th</sup> Respondent avers that she has known the Applicant since the year 2017, and came to know her as the Applicant works for Kenya Commercial Bank at Salama House Branch where the 4<sup>th</sup> Respondent holds a bank account. Further, that in January 2018 the Applicant informed the 4<sup>th</sup> Respondent that she (the Applicant) had won a tender to supply goods (80 pieces of printer tonners) to the Ministry of Foreign Affairs.

15. The 4<sup>th</sup> Respondent avers that the Applicant requested her to source the goods for her since she did not have the money to buy the goods to meet the tender, and promised to pay back the money. According to the 4<sup>th</sup> Respondent, she obliged and borrowed part of the money and subsequently sourced the goods from M/s Atilance Stationers at a cost of Kshs. 1,280,000/-, and caused the same to be delivered to the said Ministry on the Applicant's behalf. The 4<sup>th</sup> Respondent further avers that the Applicant was paid by the Ministry in or about October 2018, but she refused to pay the sum owed to the 4<sup>th</sup> Respondent. According to the 4<sup>th</sup> Respondent, she had been following up on the payment and is aware the Applicant was paid Kshs. 1,752,413.80 on 12<sup>th</sup> October 2018 through her company Docrand Anjelma Enterprises, through which she had been awarded the tender.

16. It was further averred that following the Applicant's refusal to pick the 4<sup>th</sup> Respondent's call and to even talk to her, the 4<sup>th</sup> Respondent decided to report the matter to the police as she was convinced the Applicant had committed a criminal offence against her, by obtaining goods and/or money from her and refusing to pay for the same. The 4<sup>th</sup> Respondent refutes the claim that she has personal scores to settle with the Applicant, and asserts that she genuinely reported what she believes to be a crime, and the police accordingly investigated the same after which the Applicant was charged. Further, that the Applicant will have opportunity to defend herself in the criminal case wherein she can raise the issues raised in the instant application.

### **The Determination**

17. The Application was canvassed by way of written submissions. Omboko & Company Advocates for the Applicant filed submissions dated 15<sup>th</sup> April 2019, while the office of the Director of Public Prosecutions filed submissions on behalf of the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' dated 21<sup>st</sup> May 2019. Amuga & Company Advocates filed submissions dated 18<sup>th</sup> April 2019 on behalf of the 4<sup>th</sup> Respondent.

18. The Applicant addressed three main issues in her submissions. The first was whether the investigations leading to the charging of the Applicant were conducted in an unfair, unbiased and done in bad faith with ulterior motive of bearing pressure on the Applicant herein. In this regard, the Applicant cited the decision in the case of **R vs Attorney General ex parte Kipng'eno Arap Ngeny, High Court Civil Application No. 406 of 2001**, and recounted the mistreatment, harassment, threats and blackmail she underwent in the hands of the police in support of her submission that the investigations were tainted with irregularity. It is her submission that she was roughed up on the last day that she reported to the police station after the investigations were concluded, and her photos were taken. Further, the police officers vowed to share the photos on social media so as to bring the same to her employer's attention and cause her to lose her employment.

19. It is the Applicant's submission that the law requires that police investigations are conducted fairly and in good faith and where the contrary happens, the courts ought to quash such prosecution for being an abuse of power. Reference was made to the cases of **Commissioner of Police & The Director of Criminal Investigations Department & Another vs Kenya Commercial Bank Limited & 4 Others (2013) e KLR**; **Kuria & 3 Others vs Attorney General (2002) 2 KLR 69**; and **George Joshua Okungu & Another vs The Chief Magistrate's Anti-Corruption Court at Nairobi & Another (2014) e KLR**.

20. The second issue raised by the Applicant was whether the criminal proceedings preferred against the Applicant are aimed at championing a civil cause and whether an otherwise civil claim is being camouflaged as a criminal offence. The Applicant submitted that it trite law that criminal proceedings should not be used to prosecute a civil claim. The Applicant cited the decisions in **Republic vs Attorney General & 4 Others Ex Parte Diamond Hashim Lalji & Another (2014) e KLR** and **Republic v Chief Magistrate's Court Mombasa Ex Parte Ganijee & Another (2002) 2 KLR 703** that it is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. The Applicant submitted that from the facts as outlined in the charge sheet, the 4<sup>th</sup> Respondent's claim is clearly one of breach of contract, which can properly be ventilated through the normal civil courts. That, in full knowledge that the claims are false since there is no contract between them; the 4<sup>th</sup> Respondent resorted to using the police to exert undue pressure on the Applicant.

21. The last issue submitted on by the Applicant is whether the machinery of the justice system is being used for settling personal scores and for ulterior motives. The Applicant quoted extensively from the case of **Kuria & 3 Others vs Attorney General (2002) 2 KLR 69** and submitted that the said case highlights the scenarios where the judicial review court will not hesitate to halt criminal proceedings where it is apparent that the same is being used to settle personal scores, as is the case in the instant matter.

22. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that an order of prohibition is discretionary, and only tenable where a public body or official has acted in excess of their powers. It is submitted that the Applicant has not proven and/or adduced evidence of misuse of power or contravention of the rules of natural justice. They submitted that the Applicant ought to state the nature of the complaint and not merely state that the Respondents have not carried out sufficient investigations. It is also their submission that the 1<sup>st</sup> Respondent is mandated under to institute and undertake criminal proceedings against any person before any court other than a court martial, and in respect of any offence alleged to have been committed. That, pursuant to Article 157 (10) of the Constitution, the 1<sup>st</sup> Respondent 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.

23. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents cited the case of **David Njogu vs The Director of Criminal Investigations Department, Miscellaneous Application No. 658 of 2004** where the Court observed that the powers exercised by the Director of Public Prosecutions under Article 157 of the Constitution 2010, are exercised without reference to any person or authority. It was submitted that the 1<sup>st</sup> Respondent's decision to prosecute will be based on the evidence placed before him by the investigating authority and he should not be prohibited from doing an act whose prospective decision has not been made. The Respondents cited the case of **Cape Holdings Ltd vs Attorney General and Another (2012) e KLR** for the submission that the Applicant cannot pre-empt investigations, and it is solely for 1<sup>st</sup> Respondent to decide whether the complaint discloses any criminal offence(s) requiring prosecution the investigations has been completed.

24. It was further submitted that Section 24 of the National Police Service Act mandates the police to investigate any complaint lodged with them. Therefore, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in this case are only performing a statutory function to determine whether a criminal offence has been committed, and the Applicant should not bar the same. It is was contended that the Respondents should be allowed to complete investigations and make the appropriate decision in the interest of justice. The case of **Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & Others- Civil Appeal 266 of 1996** was cited for the submission that an order of prohibition is not intended to correct the course, practice or procedure of an inferior tribunal, and that the Respondents ought not to be interfered with in the running of their affairs without merit.

25. Lastly, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that the Applicant has not demonstrates the acts of bad faith by the Respondents, and that they have shown in their replying affidavit that there is reasonable cause to suspect that the Applicant has committed an offence and it is

their role to investigate and establish the truth. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents relied on the case of **Republic v Commissioner of Police and Another Ex Parte Michael Monari & Another (2012) e KLR** for this position. On whether the intended criminal proceedings is an abuse of court process and a violation of rights, it their submission that the Applicant has not stated and demonstrated which rights have been violated. That in any case, the Applicant ought to file a petition to raise the question of violation of rights, since judicial review is concerned with decisions made by administrative bodies.

26. The 4<sup>th</sup> Respondent relied on the decisions in **Hannah Wambui Githire v Director of Public Prosecutions & 3 Others (2018) eKLR** and **Republic v Commissioner of Police and Another Ex Parte Michael Monari & Another (2012) eKLR** for her submission that the Applicant has been charged in a court of competent jurisdiction after investigations into the 4<sup>th</sup> Respondent's complaint. Further, that it is not for this Court to go into the merits and demerits of the charge now pending before the Chief Magistrate's court. This, according to the 4<sup>th</sup> Respondent, would amount to interference, seeing as the Applicant has merely made blanket allegations that the charges preferred against her are pure fabrications and made maliciously.

27. On whether the criminal process and proceedings are being used to settle an otherwise purely civil dispute and personal scores, the 4<sup>th</sup> Respondent submitted that the Applicant has not proven the said allegations. Further, that as held **Hannah Wambui Githire v Director of Public Prosecutions & 3 Others (supra)**, this Court can only stop the ongoing criminal prosecution if the Applicant satisfy it that the prosecution is an abuse of the process of the court and/or it is oppressive and vexatious. It was submitted that the Applicant has not discharged this burden, and reference was made to the holding in the case of **Daniel Ndungu v Director of Public Prosecutions & Another (2013) eKLR** for the submission that the Applicant ought to face her accusers, prove her innocence or otherwise and submit to the consequences of the law should she be found culpable.

28. I have considered the parties' pleadings and submissions, and two issues arise for determination. The first is whether the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' decisions to investigate and prosecute the Applicant was in abuse of their powers, and/or motivated by extraneous considerations. The second is whether the Applicant is entitled to the relief sought.

29. In determining whether the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents abused their powers in charging the Applicant, I have considered it necessary to lay down the applicable principles of law at the outset. The Supreme Court of the United States of America in **Berger vs United States, 295 U.S. 78 (1935)** did point out the balance to be maintained in countenancing abuses of prosecutorial powers by way of judicial review, when it asserted that the government's interest in a criminal prosecution "is not that it shall win a case, but that justice shall be done," and that it is therefore a prosecutor's duty "to refrain from improper methods calculated to produce a wrongful conviction even as it is to use every legitimate means to bring about a just one."

30. The courts will therefore intervene when investigating, prosecuting and adjudicating agencies in the criminal justice system cross the line between proper and improper methods, and will act to review prosecutorial charging decisions in circumstances when there is such an abuse of prosecutorial powers. The traditional grounds on which this Court will exercise its judicial review jurisdiction were laid down in the case of **Pastoli vs Kabale District Local Government Council & Others [2008] 2 EA 300** which are that courts will intervene when a decision is tainted with illegality, irrationality and procedural impropriety. In addition, it was also emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR** that **Article 47 of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action.**

31. Specifically on the review of decisions to charge and to prosecute in criminal cases, it was held as follows in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69.**:

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

32. The Court went further to hold that:

**"It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...The fact that it has not been argued before however does not mean that the law stops dead at its tracks. An order of prohibition looks to the future and not to the past; it is concerned with the happenings of future events and little, if any, of past events...So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to**

determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions...In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings.”

33. In the case of R vs. Attorney General Ex Parte Kipgengo Arap Ngeny, High Court Misc. Civil Application No.406 of 2001, the Court observed as follows on this ground:

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

34. What this Court cannot and should not do in exercise of its judicial review powers over criminal proceedings, is to usurp the constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution, in the exercise of the power and discretion conferred upon that office under Article 157 of the Constitution. In the case of Republic vs Commissioner of Police & Another Ex-Parte Michael Monari & Another, (2012) e KLR Warsame J. (as he then was) observed as follows in this regard:

“It is also clear in my mind that the police have a duty to investigate on any complaint once a complaint is made. In deed 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 not 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.”

35. Similar sentiments were expressed in Meixner & Another vs. Attorney General [2005] 2 KLR 189, the same Court expressed itself as hereunder:

“The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion is acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution... Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it; it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power. Having regard to the law, the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision is correct. The other grounds, which the appellants claim were ignored ultimately, raise the question whether the evidence gathered by the prosecution is sufficient to support the charge. The criminal trial process is regulated by statutes, particularly the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court, which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence and that is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.”

36. Likewise, it is also not the duty of the judicial review Court to engage in an examination of the merit or otherwise of the charges to be preferred. The sufficiency or otherwise of the charges or evidence is left to the trial Court if the same does end up there.

37. Coming to the facts of the present case, it is not disputed that the investigations and prosecution of the Applicant arise from a complaint made by the 4<sup>th</sup> Respondent. The nature of the complaint is that the Applicant did request for financial assistance on the promise of repaying the same, and has not done so. Therefore, the Applicant’s prosecution arises from a dispute she has with the 4<sup>th</sup> Respondent, who moved the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents act in accordance with their mandate and duties as set down by the Constitution and the law. In this respect, under Article 157(4) of the Constitution, the Director of Public Prosecutions, who is the 1<sup>st</sup> Respondent herein, has the power to direct the Inspector General of Police to investigate any information or allegation of criminal conduct. The inspector General of Police is required to comply. Further, the power of prosecution under Article 157(6) of the Constitution rests with the 1<sup>st</sup> Respondent, and under Article 157(10), he does not require the consent of any person to commence prosecution, and shall be independent in the execution of his or her duties.

38. As explained earlier on in this judgment, Courts ought not to usurp the constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution, unless there is clear evidence that he has acted in abuse of process. In the circumstances of the instant application, this Court finds that since the decisions to investigate and prefer charges against the Applicant by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were made not on their own motion, but at the request of an aggrieved third party, the said decisions were made legally, and were not unreasonable or in abuse of powers.

39. The Applicant also alleges that she was mistreated, harassed and her rights violated by the police during her visits and/or summons to the police station. What is pertinent for this Court is whether the Applicant has provided any evidence of such mistreatment and harassment. The Applicant annexed a letter dated 6<sup>th</sup> December 2018 from her advocates addressed to the 2<sup>nd</sup> Respondent, complaining *inter alia* about how the Applicant was treated by police officers when summoned to the 2<sup>nd</sup> Respondent's offices on 4<sup>th</sup> December 2018. The said letter reads as follows:

**“6<sup>th</sup> December 2018**

**Officer Commanding Station**

**Central Police Station**

**University Way**

**Nairobi, Kenya**

**Attention: The OCS**

**RE: ILLEGAL & UNLAWFUL MOUNTING OF TRUMPED UP CHARGES AGAINST GRACE ATIENO ODONGO**

We act for Ms Grace Atieono Odongo (hereinafter referred to as our Client) under whose instructions we address you as hereunder.

That our client was summoned to your offices on the 3<sup>rd</sup> day of December 2018 whereby due to the demanding nature of her employment she requested to avail herself on the 4<sup>th</sup> day of December, 2018. Hat your officers grudgingly allowed her plea and our client beg a law abiding citizen presented herself to your station on the said 4<sup>th</sup> day of December 2018 at 10:00am.

That when our client availed herself to your police station, your officers without promptly informing our client the reason of the said summoning thoroughly roughed up and mishandled our client where she was locked up and detained in a room, denied basic services like toilet and water, humiliated and treated in a degrading and embarrassing manner.

That you later informed our client that she had through a company that is purportedly owned by herself received money and that the said money should be paid to some individuals who are best known to your officers.

That our client was coerced through intimidation to produce her said purportedly company bank account statements that will further help with your investigations but the same could not be supplied by our client as we demanded. Our client was further asked to write statement on matters which she has no idea as to what she was being asked to write the said statement on. That in further violation of our client's fundamentally guaranteed rights of an accused and detailed person, you denied our clients to communicate with third parties. That you only allowed our client to communicate with third parties in the late afternoon at around 4:00pm whereas she had been detained and thoroughly mistreated by yourself from 10.00am.

That when our client eventually got legal representation at around 5.00pm, the same was not helpful as her lawyer was not allowed to inspect the accusation and witness statements made against her so as to accord legal advice to our client.

That it is clear that the allegations being levelled against our client if at all any are not in any way criminal in nature as the same relate to business and have a recourse in the civil litigation courts. That it is a clear abuse of office and power for your office to be used to settle personal chores or vilification of issues not pertaining to that which the criminal justice system was formed to perform. Your actions amount to abuse of office, abuse of process and impunity and is the antithesis of the rule of law and the principles of justice as understood in modern civilization.

That our client was further summoned to present herself on Friday the 7<sup>th</sup> day of December 2018 at 10.00am by Detective Sgt, Frankline Marangu. Unfortunately our client will not be in a position to present herself on the said day and is requesting that you have the said summoning day rescheduled to another date.

It should however be noted that it is very unfortunate and illegal for your office e to be used to harass and oppress our client into acceding to demands of third parties that she owes money to them. It is not the purpose of criminal investigation or criminal charge of prosecution to help individuals in the advancement of their frustrations of their civil cases.

It is against this backdrop that our client has instructed us to write to you demanding which we hereby do that you execute your mandate in fairness and with due regard to the constitution and the rule of law.

**Take notice that our client reserves her right to institute proceeding for the recovery of damages against yourself for the violation of her constitutionally guaranteed rights to liberty and freedom of a person together with moving the constitutional and judicial review court to have your actions quashed. All these shall be done without further reference to yourself.**

**Yours faithfully,**

**CHARLES OMBOKO**

**KITHI & CO. ADVOCATES**

40. The complaint in the said letter therefore is about infringement of the Applicant's rights and her intimidation by the said police officers. She did not bring any evidence of, and particulars of the said infringement or intimidation and the persons involved to substantiate and support the claims in the said letter, or any legal or other proceedings taken as regards the said infringement. No evidence was also brought of the photographs she alleges were taken of her for purposes of humiliating her, and of the person or persons who took the said photographs, to enable this Court link the same to the Respondents.

41. In addition, the Applicant claims in the said letter that the said harassment was meant to intimidate her into acceding to demands that she owed money to third parties, which is also one of her grounds for this application, namely that the subject dispute is civil in nature. However, this argument cannot hold in view of the fact that the law recognizes that a criminal offence can be committed in the course of a civil transaction. Therefore, the facts constituting the basis of a civil suit may also be a basis for a criminal offence and proceedings, and are not a ground for staying the criminal process, unless the commencement of the criminal proceedings is meant to force an applicant to submit to the civil claim. Section 193A of the *Criminal Procedure Code* provides as follows in this respect:

***“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.”***

42. It is pertinent that in the present case no evidence was brought by the Applicant of any civil proceedings that have been instituted by herself or by the 4<sup>th</sup> Respondent, and the argument that the criminal proceedings were meant to force the Applicant to submit to a civil claim cannot therefore lie. On the contrary, the Applicant averred that her advocates had initiated a process of resolving the dispute amicably. This Court therefore finds that insufficient evidence has been brought by the Applicant to show any bad faith or ulterior motives on the part of the Respondents in investigating and prosecuting her for a criminal offence.

43. On the last issue as regards the relief sought, the Applicant has sought orders of certiorari and prohibition. The Court of Appeal held in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** *inter alia* as follows as regards the nature of the said remedies:

***“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...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 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... ....Only 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.”***

44. I find that as the Respondents have not been shown to have acted illegally, or in abuse of their powers, no grounds have been established for the orders of certiorari and prohibition sought by the Applicant. In addition, the Respondents cannot be restrained from undertaking their Constitutional and statutory duties. In the premises, the Applicant's Notice of Motion dated 10<sup>th</sup> February 2019 is found not to be merited, and is accordingly dismissed with costs to the 4<sup>th</sup> Respondent.

45. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 15<sup>TH</sup> DAY OF OCTOBER 2019**

**P. NYAMWEYA**

**JUDGE**