



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISC APPLICATION NO. 395 OF 2017

IN THE MATTER OF: AN APPLICATION BY JIM NJUGUNA MUTHAMA THE APPLICANT FOR LEAVE TO APPLY FOR ORDERS OF PROHIBITION.

-AND-

IN THE MATTER OF: AN APPLICATION BY JIM NJUGUNA MUTHAMA THE APPLICANT FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI & PROHIBITION.

-AND-

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES

-AND-

IN THE MATTER OF: ARTICLE 20,23,27,47,50(2),157,165(6) 7 244 OF THE CONSTITUTION

-AND-

IN THE MATTER OF: THE NATIONAL POLICE SERVICE ACT

AND

IN THE MATTER OF: THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ACT

-AND-

IN THE MATTER OF: CRIMINAL CASE NO. 95 OF 2016 BETWEEN; REPUBLIC – VS JIM NJUGUNA MUTHAMA & ANOTHER AT THE MAGISTRATES COURT AT NGONG LAW COURTS

-BETWEEN-

REPUBLIC.....APPLICANT

-VERSUS-

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

CHIEF MAGISTRATE COURT, NGONG.....2ND RESPONDENT

VERONICA WAIRIMU NJUGUNA.....INTERESTED PARTY

EX PARTE: JIM NJUGUNA MUTHAMA

JUDGEMENT

Introduction

1. By a Notice of Motion dated 30th October, 2017, the applicant herein, **Jim Njuguna Muthama**, seeks the following orders:

1. CERTIORARI; to remove into this honourable Court and quash the decision, recommendations and/or directions of the Director of Public Prosecutions through the Chief Magistrate Court at Ngong to charge the ex-parte Applicant in Criminal Case no. 95 of 2016 Ngong and the subsequent proceedings arising there from.

2. PROHIBITION; directed at the Director of Public Prosecutions and/or any other officer acting with his authority from proceeding and/or continuing with the conduct and/or prosecution against the ex-parte Applicant in Criminal Case no. 95 of 2016 Ngong.

3. PROHIBITION; directed at the Chief Magistrate and/or any other judicial officer from trying and/or carrying on any further proceedings at Ngong prohibiting the said court from proceeding or further proceeding with the Hearing and all proceedings against the ex-parte Applicant on the charges preferred in Criminal Case no. 95 of 2016 Ngong.

4. THAT costs of this Application be borne by the Respondents..

Applicant's Case

2. According to the applicant, he is facing criminal charges over the sale of Plot No. 241/Business Ongata Rongai Trading Centre being Criminal Case No. 95 of 2016 at Ngong Law Courts, while the complainant in the said criminal case is the Interested Party who is his spouse, though due to irreconcilable differences, they are living apart and are engaged in a family dispute over matrimonial properties.

3. According to the applicant, they were married in the year 1992 and during the last five years, as a result of the said marital differences, there are five (5) separate court proceedings between them regarding matrimonial properties, one of which is the subject of the said criminal case. The applicant also disclosed the existence of a Divorce Cause. The applicant listed the said pending cases as hereunder;

a. Business Tribunal Case No.931 of 2015; Nairobi; the dispute relates to collection of rent from one of the matrimonial properties.

b. E.L.C Case No. 1120 of 2015; Milimani now (Originating Summons No. 11 of 2016); the dispute relates to control and management of matrimonial properties.

c. Children Case No.1036 OF 2015; Nairobi Children's Court; the dispute relates to control, school education and maintenance of the child of the marriage.

d. Divorce Cause No. 554 OF 2015; Nairobi Chief Magistrate's Court; the issue in dispute is the dissolution of the marriage between the parties.

e. Originating Summons No.51 of 2016 High Court; Family, Division; the dispute relates to division of matrimonial properties with a financier.

4. It was averred that the subject property of the criminal case is a matrimonial property which was actually bought by the applicant during the subsistence of the marriage and that the Interested Party never contributed any money towards the purchase. However, the same was registered in the name of the Interested Party. In the Originating Summons for distribution of matrimonial property, the applicant averred that he had laid claim to the property subject of the criminal case whereas the Interested Party is using the criminal case to lay claim to the same property and exert pressure upon the applicant to give away his matrimonial property rights.

5. According to the applicant, during the subsistence of the marriage and at a time when the marriage had no differences, the said matrimonial property was sold to one **Stephen Gichia Kuria** on 13th March, 2011 and funds re-invested in other family businesses. However, though the said **Gichia Kuria** was charged alongside the applicant, the High Court prohibited the said Charges in J.R Application No. 482 of 2016; Milimani.

6. The applicant averred that around 2015, the marriage broke down completely and there have been vicious fights between him and the Interested Party with regard to distribution and control of the matrimonial properties as a result of which the Interested Party devised a method to harass him through the use of police so that he can give in to distribution of matrimonial properties in the manner desired by the Interested Party. It was this, according to the applicant, that led to his arrest, charging and incarceration resulting into the Criminal case no. 95 of 2016; Ngong, which has been filed and is being prosecuted with ill motives, malice and for extraneous purposes to settle a matrimonial dispute.

7. It was therefore averred that it is appropriate that this Court do exercise its supervisory jurisdiction under Article 165(6) of the Constitution of Kenya to grant the prerogative order of Certiorari to remove, deliver, up to the Court and quash the decision of the Director of Public Prosecutions and the Chief Magistrates Court at Ngong.

8. According to the applicant, the Director of Public Prosecutions has no absolute power to charge and prosecute since he must act within the confines of the Constitution not to be used to harass me and settle a matrimonial dispute through a criminal process.

Interested Party's Case

9. The application was opposed by the interested party.

10. According to her, she purchased Plot Number 241/Business Ongata Rongai on 17th April 2003 but lost the title documents for the said plot together with other documents for other properties, whose loss she reported to Kajiado County Council offices and was advised to swear an affidavit of the loss which she did. She was also advised by officers at the Kajiado County Council offices to write a formal letter requesting for re-issuance of another allotment letter which she similarly did and on 18th January, 2010 she was issued with a certified true copy of the original transfer document in regard to the property.

11. However on 16th October 2015 when she went to the said plot to inform the tenants about change of management for purposes of collecting rent, the tenants informed her that their land lord is one **Stephen Gichia Kuria** who collects rent. Upon a search at Kajiado County Council offices the interested party learned that the applicant herein had fraudulently sold the property to the said **Stephen Gichia Kuria** on 29th October 2010. The interested party however denied that she sold or transferred the said property to the said **Stephen Gichia Kuria**.

12. The applicant averred that she reported the matter at Ongata Rongai Police Station and upon investigations it was established that the signature appearing on the transfer document purportedly signed by herself was a forgery. Thereupon, the applicant together with **Mr. Stephen Gichia Kuria** were arrested and jointly charged at Ngong Law Court vide Criminal Number 95 of 2016. The interested party was however aware that **Mr. Stephen Gichia Kuria** filed a judicial review case number 482 of 2016 at Nairobi which was marked as spent on 28th March 2017 when the learned judge learned that the DPP the 1st respondent herein, had withdrawn the charges against the said **Stephen Gichia Kuria** under section 87(a) of the **Criminal Procedure Code**. However, the DPP has preferred charges against the applicant alone in the same case and he is facing 2 counts to wit:

i Conspiracy to defraud Contrary to Section 317 of the **Penal Code** and particulars of which are that:

“On 15th March 2011 at Kajiado County Land Registry within Kajiado County, jointly with others not before court conspired with Intent to fraud Veronica Wairimu Njuguna of her Plot No. 241/Business Ongata Rongai Trading Centre by means of transferring the said plot to Stephen Gichia Kuria”.

ii. The second count is forgery contrary to Section 350(1) of the **Penal Code** and the particulars are that:

“On the 15th day of March 2011 at unknown place within the Republic of Kenya forged a transfer instrument for plot number 241/Business Ongata Rongai Trading Centre purporting it to be a genuine transfer signed by Veronica Wairimu Njuguna”.

13. It was averred that the applicant has conceded in court documents filed at Kajiado Court in ELC Case Number 765 of 2017 that he sold the plot to **Stephen Gichia Kuria** and received the entire purchase price of Kshs. 6,350,000.00 which was paid by cheque and cash. The said cheque was paid to the applicants company known as Ivory Motors and deposited in the company's Bank Account number 0112004250811 held at Cooperative Bank. Further, the applicant recorded a statement with the police and admitted that he sold the plot and that the interested party did not sign the sale agreement with **Mr. Stephen Gichia Kuria** nor did she sign the transfer to the said purchase.

14. According to the interested party, in the Originating Summons 51 of 2016 (OS) the applicant herein mentioned sale proceeds of plot No. 241 Ongata Rongai because he knows he had sold the property which does not form part of the matrimonial property because he sold it before he filed the suit on 16th December 2016.

15. The interested party however denied that she was harassing the applicant using the police as alleged because a criminal offence was committed by the applicant which was established by the DPP and hence the charges were preferred against him. She also denied that the High Court prohibited the charges against **Stephen Gichia Kuria** but rather the matter was marked as spent when the court established that the DPP had withdrawn the charges.

16. The interested party asserted that the charges facing the applicant do not amount to abuse of the court process as alleged neither are the charges actuated by malice.

Determinations

17. I have considered the application, the affidavits in support thereof, the affidavit in opposition to the application and the submissions filed as well as the authorities relied upon in support thereof.

18. It bears repeating that in these types of proceedings the Court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings. As judicial review proceedings are concerned with the process rather than merits of the challenged decision or proceedings the court is not entitled to make definitive findings on matters which go to the merit of the impugned proceedings. In determining the issues raised herein the Court will therefore avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial Court.

19. The general rule in these kinds of proceedings is that the Court 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. Therefore mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, is not, on its own and

without more, a ground for halting such proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. An applicant who contends that he has a good defence in the criminal trial ought to be advised to raise the same in his defence before the criminal trial instead of invoking this Court's jurisdiction with a view to having this Court determine such an issue as long as the criminal process is being conducted bona fides and in a fair and lawful manner. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.

20. 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 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.”

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

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

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

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta...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...”

23. The Court proceeded:

“In the instant case it is... alleged that the criminal prosecution is an abuse of the court process epitomised by what is termed as selective prosecution by the Attorney General. 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...[W]here the prosecution is an abuse of the process of court...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...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. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed”.

24. The Court was however of the view that:

“It is not enough to simply state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an “abuse of process”, is a “manipulation”, “amounts to selective prosecution” or such other processes, or even supposing that the applicants might not get a fair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts. The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bipolar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial... In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names.”

25. The duty and mandate of the police was appreciated in Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR where it was held:

“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”.

26. It is therefore clear that whereas the discretion given to the Respondents 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. However, it must be emphasised that judicial review applications do not deal with the merits of the case but only with the process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and once the Court is satisfied that the same are *bona fides* and that the same are being conducted in a fair manner, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution’s evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.

27. That this Court can in cases where the threshold is met interfere with a criminal process must now be clear from a strict reading of section 4 of the *Office of the Director of Public Prosecutions Act*, which provides the factors which the Director of Public Prosecution is required to take into account in making a decision whether or not to embark on a prosecution. The said provision provides that:

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.

28. It follows that the discretion and powers given to the DPP under Article 157 of the Constitution cannot be said to be unfettered. As was held by **Wendoh, J** in **Koinange vs. Attorney General and Others [2007] 2 EA 256:**

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

29. Similarly in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001,** it was held:

“Although the Attorney General enjoys both constitutional and statutory discretion in the prosecution of criminal cases and in doing so he is not controlled by any other person or authority, this does not mean that he may exercise that discretion arbitrarily. He must exercise the discretion within lawful boundaries...Although the state’s interest and indeed the constitutional and statutory powers to prosecute is recognised, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters...”

30. Therefore this Court is perfectly entitled in appropriate cases to interfere with the decision of the DPP to commence and proceed with prosecution.

31. In this case, the ex parte applicant’s case is that the offence with which he is charged arises from a property bought by himself but registered in the name of the interested party herein. That property, it is admitted was sold to the said **Mr. Stephen Gichia Kuria**. It seems that it is the manner in which the said property was disposed of that is the subject of the criminal case with the interested party claiming that the same was fraudulent as she did not execute the transfer documents. Whereas I cannot make findings with respect to the transfer documents, if the property was registered in the name of the interested party whether in her own right or as a trustee for the applicant and the interested party never executed the transfer documents as she alleges, an issue as to how the transfer was effected is definitely at large and requires a determination, one way or the other.

32. In my view, where the resolution of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review. As was held in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354:**

“Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application...In cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land namely occupation, and disposition, there would be need to allow *viva voce* evidence and cross-examination of the witnesses which is not available in judicial review proceedings.”

33. In this case issues of fraud have been raised by the interested party. Issues such as fraud, forgery and similar wrongdoings are in my view issues which can only be determined during a proper trial and not on conflicting affidavits. It is therefore trite that fraud or forgery as the case may be, is a matter, which, unless the facts and the circumstances are clearly obvious, need *viva voce* evidence tested by cross-examination, where necessary, to establish. See **Trust Bank Ltd. & Another vs. Investech Bank Ltd. & 3 Others Civil Application Nos. Nai. 258 and 315 of 1999** and **Westmont Power Kenya Limited vs. Bosley Frederick & Mohamed Ali T/A Continental Traders & Marketing Civil Application No. Nai. 135 of 2003 [2003] KLR 357.**

34. It is therefore not possible based on the cold-print affidavits before me to find that the allegation of fraud and forgery are farfetched. Therefore if the interested party’s version is true, it may well found a charge based on forgery or fraud. In other words it cannot be said at this stage based on the material before the Court that the interested party had no reasonable and probable cause for lodging a complaint and for the 1st and 2nd Respondents to prefer the said charges against the applicant. As to whether the said charges will succeed is another matter altogether which matter can only be resolved by the trial court after hearing and analysing the evidence to be presented before it.

35. As stated in the above authorities, the mere fact there is no sufficient evidence to sustain a conviction is no ground for halting or terminating a criminal case. The trial Court is usually in a better position to scrutinise the evidence presented before it in determining whether such evidence prove the accused’s guilty beyond reasonable doubt. To paraphrase the decision in **Meixner & Another vs. Attorney General** (supra) to set out on that voyage would have the effect of embarking upon an examination and appraisal of the evidence to be adduced before the trial Court with a view to showing the applicants’ innocence is hardly the function of the judicial review court.

36. Whereas the applicant may well prove at the trial that the criminal charges cannot be successfully prosecuted and that he is after all innocent, it is not for this court to consider the strength of the prosecution case vis-à-vis the defence and make a determination as to which one has more weight. As opposed to where the prosecution has no evidence at all, the court will not halt a prosecution simply because the court is of the view that the evidence would not in all probability lead to a conviction. To do that would amount to this court in a judicial review proceedings stepping into the shoes of the trial court and usurping the powers of the trial court.

37. As to the existence to other proceedings, section 193A of the *Criminal Procedure Code* on this issue provides:

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.

38. In However in Republic vs. Attorney General & 4 Others Ex-Parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR this court further held:

“The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. Section 193A of the Criminal Procedure Code on this issue provides: 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.”

39. In this case, the applicant has not even attempted to create a nexus between the said pending proceedings and the criminal proceedings in order to satisfy this Court that the criminal proceedings have been commenced to achieve a collateral purpose. Although it was alleged that the criminal proceedings have been instituted with a view to achieving collateral and extraneous purposes I am not satisfied based on the evidence on the record that this is so. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the *predominant* purpose is to further some other ulterior purpose and 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.

40. Where ulterior motive is not the predominant purpose the Court ought not to interfere as long as there is evidence on the basis of which the prosecution could reasonably form the view that there was a prosecutable case. I am not in this case convinced that the predominant purpose of the commencement of the criminal proceedings is for the achievement of a collateral purpose other than the vindication of a criminal offence.

41. In any case as already stated hereinabove under section 193A of the *Criminal Procedure Code*, the concurrent existence of the criminal proceedings and civil proceedings even if ***any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings*** would not, *ipso facto*, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. Dealing with the same issue it was held in Kuria & 3 Others vs. Attorney General (supra) that:

“A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution.....In the instant case there is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even of manipulation of court process so as to seriously deprecate the likelihood that the applicants might not get a fair trial as provided under section 77 of the Constitution. It is not enough to simply state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an “abuse of process”, is a “manipulation”, “amounts to selective prosecution” or such other processes, or even supposing that the applicants might not get a fair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts. The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial... In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names.”

42. Having considered the issues raised herein I am not satisfied that the case meets the legal threshold for prohibiting the criminal proceedings from being instituted and proceeded with.

Order

43. Consequently, I find the Notice of Motion dated 30th October, 2017 unmerited and I hereby dismiss the same but in order not to poison the relationship between the applicant and the interested party further, a relationship which is already strained, there will be no order as to costs.

44. It is so ordered.

Dated at Nairobi this 6th day of March, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Uvyu for the interested party.

Mr Dulo for Mr Koceyo for the applicant.

CA Ooko