REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 440 OF 2017

IN THE MATTER OF AN APPLICATION BY SIMION NYAMANYA ONDIBA TO APPLY FORJUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF ARTICLES 10, 47, 165 (6) & (7) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CRIMINAL PROCEDURE CODE

AND

IN THE MATTER OF THE NAIROBI CHIEF MAGISTRATE'S COURT, MILIMANI LAW COURTSCRIMINAL CASE NO. 2067 OF 2016

REPUBLIC VS. SIMION NYAMANYA ONDIBA AND LABAN ONDITI RAO

AND

IN THE MATTER OF THE NAIROBI CHIEF MAGISTRATE'S COURT, MAKADARA LAW COURTS CRIMINAL CASE NO.2788 OF 2016

REPUBLIC Vs EVANS ONYANCHA, RONALD HAMISI, DENIS MOSOTI, LABAN ONDITI ANDSIMIONNYAMANYA

BETWEEN

REPUBLIC.....APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS.....1st RESPONDENT

THE CHIEF MAGISTRATE'S COURT

AT MILIMANI.....2nd RESPONDENT

THE CHIEF MAGISTRATES COURT

AT MAKADARA.....3rd RESPONDENT

THE INSPECTOR GENERAL

OF THE NATIONAL POLICE SERVICE.....4th RESPONDENT

AND

ROSE NJERI MACHARIA.....INTERESTED PARTY

EX PARTE: SIMION NYAMANYA ONDIBA

JUDGEMENT

Introduction

1. By a Notice of Motion dated 12th July, 2017, the *ex parte* applicant herein, **Simion Nyamanya Ondiba,** seek the following orders:

a. An order of certiorari to remove into this honourable court and quash the 1st respondent's decision to prefer charged against the applicant which decision is set out in the charge sheet dated 18th May 2017 and registered before the 3rd respondent in Nairobi Chief Magistrates' Court Makadara Law Courts Criminal case NO.6788 OF 2016 - Republic vs. Evans Onyancha, Ronald Hamisi, Denis Mosoti, Laban Onditi and SimionNyamanya; and the charge sheet dated 23rd December 2016 and registered before the 2nd respondent in Nairobi Chief Magistrate's Court, Millimani Law Courts Criminal Case No. 2067 of 2016 - Republic vs. Simion Nyamanya Ondiba and Laban Onditi Rao.

b. An order of prohibition prohibiting the 1st respondent, its officers and any other authority acting its instructions from prosecuting or proceeding with the prosecution of the applicant on the offence of conspiracy to defraud in Nairobi Chief Magistrate's Court, Millimani Law Courts Criminal Case No. No. 2067 of 2016 - Republic vs. Simion Nyamanya Ondiba and Laban Onditi Rao or any related charges; and the offence of malicious damage to property in Nairobi Chief Magistrates' Court Makadara Law Courts Criminal case NO.6788 OF 2016 - Republic vs. Evans Onyancha, Ronald Hamisi, Denis Mosoti, Laban Onditi and Simion Nyamanya or any related charges.

c. An order of Prohibition prohibiting the 2nd and 3rd respondents from hearing proceeding with or in any entertaining Nairobi Chief Magistrate's Court, Millimani Law Courts Criminal Case No. 2067 of 2016 - Republic vs. Simion Nyamanya Ondiba and Laban Onditi

Rao against the Applicant; and Nairobi Chief Magistrates' Court Makadara Law Courts Criminal case NO.6788 of 2016 Republic vs. Evans Onyancha, Ronald Hamisi, Denis Mosoti, Laban Onditi and Simion Nyamanya or any related charges.

d. An order of Mandamus compelling the 1st respondent to discharge its mandate and terminate the proceedings in Nairobi Chief Magistrate's Court, Millimani Law Courts Criminal Case No. 2067 of 2016 - Republic vs. Simion Nyamanya Ondiba and Laban Onditi Rao and Nairobi Chief Magistrates' Court Makadara Law Courts Criminal case NO.6788 OF 2016 Republic vs. Evans Onyancha, Ronald Hamisi, Denis Mosoti, Laban Onditi and Simion Nyamanya forthwith.

e. That the court be at liberty to make such further and other orders that as it deems fit to meet the ends of justice.

f. An order of Declaration declaring that the 1st respondent's decision to charge and prosecute the applicant for conspiracy to defraud and further malicious damage to property in respect of LR No. 209/11293/1 are a breach of the applicant's rights to fair administrative action, freedom and right to secure protection of the law.

g. Compensation for violations of Mr. Simion Nyamanya Ondiba's rights and fundamental freedoms (to be assessed by the honourable court)

h. Costs

Applicants' Case

2. According to the applicants, he is a director of **Simandi Investments Limited**, a limited liability company that is also the registered owner/proprietor known as from L.R. No. 209/11293/1 that was subsequently subdivided into LR.209/21698 and L.R. No. 209/21699 respectively.

3. The applicant averred that sometimes in August, 2016 one **Roseline Njeri Macharia** (hereinafter referred to as "the interested party") trespassed into the company's property, prompting the company to sue the interested party on 25th August, 2016 at the Environment and Land Court, Milimani in ELC Suit No. 1035 of 2016: **Simandi Investments Limited vs. Rosaline Njeri Macharia**. Contemporaneous to the said suit, the company also applied for injunction against the interested party pending the hearing and determination of the suit.

4. However, in a bid to frustrate, intimidate and terrorize the applicant into subjugation, on 23rd December, 2016 the interested party lodged a complaint at Muthaiga Police Station purporting that the applicant, jointly with others had conspired to defraud her of the company's said L.R. No. 209/11293/1. The applicant was subsequently arrested and charged at Milimani Law Courts with conspiracy to defraud contrary to section 317 of the ***Penal code***.

5. According to the applicant, the learned Magistrate directed that the matter be heard on three (3) consecutive dates, to wit 3rd, 4th and 5th July 2017 without any reason whatsoever; the end game being to hurry the proceedings and jail him to enable the interested party enjoy the company's property while he rots in jail.

6. It was averred that upon lodging the complaint above at Muthaiga Police Station, on 18th May 2017 the interested party lodged another complaint this time round conveniently at Embakasi Police Station pursuant to which the applicant was charged the offence of malicious damage to property in Nairobi Chief Magistrates' Court Makadara Law Courts Criminal Case No. 6788 of 2016 - **Republic vs. Evans Onyancha, Ronald Hamisi, Denis Mosoti, Laban Onditi and Simion Nyamanya**.

7. In the applicant's view, the charges as brought lack sufficient detail necessary for plea and defence

contrary to the Constitution and the relevant law. Further, the charges are malicious in bad faith and are clearly purposed to achieve extraneous ends not contemplated by the criminal justice process and amount to abuse of power. From the Respondents' conduct, the applicant averred it is clear the officers of the respondents are in some desperate mission to charge and prosecute him even if there is no offence committed. The applicant's position was that the real intention of the charges and the intended prosecution is to harass, frustrate and force him to abandon civil case in respect of LR No. 209/11293/1 by unfairly portraying me as a criminal.

8. It was contended that the respondents have in bad faith and maliciously opted to prefer the impugned charges of conspiracy to defraud through Muthaiga Police Station instead of Embakasi Police Station in whose jurisdiction the alleged conspiracy took place.

9. The applicant complained that while arresting and subjecting him to criminal process, neither statement was sought from him nor due investigations undertaken on the matter. It was therefore his case that the respondents have abused the power granted to them by exercising that power arbitrarily and without due investigations or justification. To him, subjecting me to prolonged trial on the charges would, taking into account all the relevant factors and circumstances be unjust, traumatic, unreasonably expensive and against the spirit and intentions of the administration of criminal law, justice, the Constitution of Kenya and the National Prosecution Policy. To the applicant, the behavior of the respondents in making the arrests and charging him abuses, and does not promote the objects and intention of the ***Penal Code, Cap 63*** of the Laws of Kenya and the criminal justice process.

10. The applicant's case was that the impugned decision to prefer charges against him is unreasonable, unlawful, based on irrelevant considerations, manifestly oppressive, violates my right to fair administrative action and violates my legitimate expectations to fair and just application of the criminal justice process.

11. The applicant accused the Courts of having failed in their duty to be impartial arbiters of criminal proceedings and instead chose to collude with the prosecution and harass and intimidate him.

12. The applicant therefore asserted that the charges are without basis and run contrary to the public interest, the interests of administration of justice and the need to prevent abuse of the legal process in the exercise of its state prosecutorial powers.

13. In a further affidavit the applicant averred that **Simandi Investments Limited** is the registered owner of L.R No. 209/21698 under the Land Registration Act (No.3 of 2012), which Company carries on its business within the Republic of Kenya.

14. It was averred that on the 17th June, 1994 the Kenya National Chamber of Commerce and Industry officials led by the Chairman one **Kassim Owango** (deceased) held a meeting at 11.00am in the boardroom of Ufanisi House on the 1st Floor and among the agendas as indicated on minute 01/1994 and minute 02/1994 was to sell L.R 209/11293/1 with a view to clear the Chamber's debts. As per the aforesaid minutes the chamber was in dire financial crisis and the only option available was to dispose of one of its property and the Chairman then **Kassim Owango** (deceased) was mandated to sell.

15. The applicant averred that he developed interest and communicated to the Chamber his desire to purchase L.R No. 209/11293/1. Accordingly, himself and his wife **Mary Nyamanya** travelled from Kisii to Nairobi with a view of visiting the site. At the Chamber's offices, they were directed to the C.E.O's offices where one **Mr. Charles Anyama** (deceased) took them through the minutes together with the then Chairman, **Kassim Owango** (deceased)) and thereafter the Chairman authorized the C.E.O to accompany them to the property which on reaching at the site, they discovered that the land was a bushy area with no developments at all but a lot of trees and shrubs.

16. According to the applicant, they went around with the C.E.O and managed to locate the beacons before returning to the Chamber's offices at Ufanisi House where we were shown an ongoing subdivision of L.R 09/11293 Embakasi, which after subdivision produced L.R No. 209/11293/1 and L.R 209/11293/2

dated 25th May, 1994. According to him, they settled on L.R No. 209/11293/1 approx 4.0469Ha of deed plan no. 184892 at a purchase price of Kshs. 60,000,000/=.

17. The applicant averred that from Ufanisi House, in the company of the C.E.O, Chairman, his wife and himself proceeded to Cannon House, 3rd Floor to the Vendor's Advocates known as **Kandie Kimutai & Co. Advocates** (deceased) whereby a Sale Agreement was drafted with an Agreement for payment of the Purchase price in 3 installments and subsequently they had the transfer forms signed. The said Advocate represented both of them that is the Vendor and the Purchasers. Upon full payment on lodging the transfer form for assessment and stamping at the Lands Ministry the applicant averred that he discovered that the deed plan was missing, misplaced and/or lost to which he reported at Parliament Police Station and used the issued abstract to apply for the certified copy of the deed plan which was issued on 17th April, 2014 from Survey of Kenya.

18. The applicant averred that he then lodged his documents with the lands registry and a transfer was effected and a title issued to himself and his wife. They however later decided to sell part of the property to utilize the proceeds in construction of godowns on the remaining part to which he contacted Boma Surveys Limited to commence subdivision after clearance of all pending rates and payment of requisite statutory fees to the Nairobi County. According to him, the said subdivision was approved by Nairobi County, Lands office and a survey map issued together with two deed plans for L.R No. 209/21698 and 209/21699.

19. The applicant averred that upon successful subdivision himself and his wife incorporated **Simandi Investments Limited** to which they transferred L.R No. 209/21698 (Originally 209/11293/1) approx.2.964Ha. By a resolution dated 8th June, 2016 **Simandi Investments Limited** resolved to sell L.R 209/21698 with a view to generate income to enable its directors develop the remaining area by erecting go-downs. Accordingly, in company of the intended purchasers they entered the said property and were discussing when two gentlemen one of Asian Origin and Kenyan approached them and wondered what they were doing on somebody's property. After a short exchange the applicant deposed that he resorted to solve the issue with the Lands office and the National Land Commission to which he protested by a letter and on 22nd June, 2016 visited their offices with his documents which were verified and after returning to the commission after a week he was informed that as per the available record and information from the files L.R No. 209/11293/1 was registered in his name and that of his wife. He thereafter proceeded to Embakasi Police Station where no much help was accorded and he therefore returned to the National Land Commission who wrote to the OCPD but he was transferred before taking any action.

20. According to the applicant, all the attached documents were obtained from relevant government offices mandated to issue them and executed by the authorized government officials and therefore it's absurd to be charged for fraud, forgery, utterance among other charges. He revealed that numerous offices and departments were involved to effect the transfers and therefore it's absurd to claim fraud and/or forgery as one cannot possibly collude with all staff at the various offices involved in a land transaction. The applicant insisted that **Simandi Investments Limited** has a title and therefore conclusive evidence that it is the absolute and indefeasible owner.

21. According to the applicant, no government official or body has recorded a statement to disown his ownership documents to the land known as L.R No. 209/11293/1 and term them as forged or fraudulently obtained, therefore the question that would beg for an answer is what formed the basis of the 1st Respondent's decision to charge him in criminal case no Makadara Law Courts Criminal Case No.2788 of 2016 - **Republic vs. Simion Nyamanya & Others** and Nairobi Chief Magistrate's Court, Milimani Law Courts Criminal Case No. 2067 of 2016 - **Republic vs. Simion Nyamanya Ondiba & Anor** other than malice and or blatant abuse of powers.

22. That the decision to charge me in criminal case number Makadara Law Courts Criminal Case No.2788 of 2016 - **Republic vs. Simion Nyamanya & Others** and Nairobi Chief Magistrate's Court, Milimani Law Courts Criminal Case No. 2067 of 2016 - **Republic vs. Simion Nyamanya Ondiba & Anor** was malicious given that no prima facie evidence has be brought before this court to support an

otherwise position.

23. According to the applicant, where two parties have titles to a piece of land it is only the Chief land registrar who can be invited to authenticate the titles in which he will be invited to do so in ELC No. 1035 of 2016. Therefore his prosecution is malicious and the same should be stopped by this Court as the allegations are so patently absurd and inherently improbable on the face of it.

1st and 4th Respondents' Case

24. In opposing the application, the 1st and 4th Respondents averred that on 23rd June, 2017 they received a complaint from **Rosemary Njeri Macharia** (interested party herein) that she had received information that there were people who had fraudulently obtained a title deed of her piece of land no. 209/11293/1 measuring 4.047 Hectares and that they were on a mission of sub-dividing with an intention of selling to unsuspecting buyers. Upon receiving the said complaint, investigations commenced and it was established that the applicant herein together with his wife **Mary Nyamanya** had fraudulently obtained a certified deed plan after purporting that the original had gotten lost and proceeded to obtain a lease and later illegally obtained a title deed for the subject piece of land.

25. According to the said Respondents, the Applicant conspired with another accused person namely **Laban Ondito Rao** who was the then vice chairman of the Chambers of Commerce sometime in 3rd April, 2014 by writing a letter to the Director of Surveyors purporting loss of the original title deed. To the contrary, investigations revealed that the vice chair person acted without knowledge or authority of the Chair person nor the Trustees who are tasked with the oversight of all Chamber of Commerce assets.

26. It was disclosed that a scrutiny of the history of the land established that in 1995, the interested party herein bought 10 acres of land along Mombasa Road from the Chambers of Commerce and industries at a price of Kshs. 24,000,000 and obtained a title deed registered in her names and this sale is confirmed by the records of the Kenya National Chambers of Commerce which show that the Governing Council held a meeting on 16th June, 1995 and in their minute 6/ 95 reported the sale of 10 acres out of the 20 acres to the interested party for Kshs. 24,000,000. Further, in the minutes dated 3rd July, 1995 of Chamber of Commerce Governing Council, it was reported that the sub-committee was following up on processing of titles including that of the interested party herein of 10 acres.

27. It was averred that the original deed plan belonged to the interested party herein and that she was the owner of the land with the original title that was charged with Guardian Bank for a loan. Indeed the officials of Guardian Bank confirmed that the original title deed for LR 209/11293 was in the custody of the bank on charge.

28. According to the Respondents the investigation team also carried out investigations at the lands office situated at Ardhi House and were able to retrieve the copies of the presentation book which established that the land belonged to the interested party herein. Further investigations revealed that the Applicant herein forged and or uttered several documents and correspondences to acquire a false title deed and also corroborated with **Laban Onditi** to commit the offences as demonstrated by the correspondences.

29. From the evidence on record, the sais Respondents contended that the claim by the Petitioner that he holds a title to the subject property is not only false but also fraud as the title acquired by the Petitioner has no basis in law since it was acquired through fraud and forgeries as demonstrated. It was revealed that the false title was only acquired on 15th January 2015 while the interested party acquired her title way back in 1995.

30. The Respondents averred that the Applicant has indeed attached to his Affidavit a letter written by the firm of **Kihara Njuguna Advocates** acting for Kenya National Chamber of Commerce and Industry confirming that it had sold 10 acres to the interested party and that she is the *bona fide* purchaser for value of the 10 acres now popularly referred to as ***City Cabbanas***. Further, vide its letters of 30th August, 2016 and 26th August, 2016, the Nairobi City County confirms that the subject property was allocated to the

interested party herein on 27th April, 1995 and that the Petitioners purported title deed was purportedly registered on 15th January, 2015 and that it was unclear of how a second title was registered without cancelling the first title.

31. It was revealed that to ascertain the true owner of the property, the Ministry of Land and Planning provided certified copies of the opening card no. 6936, copy of the presentation book of April, 1995 and a copy of the presentation book of April, 1997 which showed that the true owner of the land is **Roseline Njeri Macharia** (interested party) and not the Applicant.

32. To the 1st and 4th Respondents, the subject of the investigations that were conducted was forgery and fraudulent acquisition of title by the Petitioner and others not party to this Application and it is only through trial that the court will be in a position to evaluate the credibility of documents and testimony of the witnesses.

33. The said Respondents averred that despite the Applicant knowing that he had no legitimate title over the subject property, the Applicant engaged in malicious damage to the said property as revealed by investigations following a complaint on the damage hence the charges in criminal case no. 2788 of 2016. In their view, the totality of the evidence clearly established that the applicant committed offences under the law being; conspiracy to defraud, forgery, uttering false documents and malicious damage to property contrary the ***Penal Code***.

34. In response to the applicant's allegation that it was the interested party who trespassed the subject property, the Respondent averred that this allegation is false and misleading since investigations revealed that the land was sold to the interested party by Chambers of Commerce way back in 1995 and she holds the original title. It is therefore a false statement that she would be termed as a trespasser yet she owned the land from 1995. The purported title of the Applicant was only registered in 2015 yet the interested party had not at any point sold the land nor her title ever cancelled.

35. The said Respondents asserted that the decision to charge the applicant was made following the 1st Respondent herein having carefully and independently perused the inquiry file and was satisfied that there was sufficient evidence against the Applicant to sustain the charges against him and that it was in the public interest for charges to be preferred against him.

36. They relied on Article 157(6) of the Constitution of Kenya 2010, and averred that the 1st Respondent exercises the state powers and functions of Prosecution which entails the institution, undertaking, taking over, continuance and or termination of criminal proceedings amongst other functions and duties. To them, the 1st Respondent has reviewed the evidence as contained in the investigation file which is not limited to what has been adduced herein and as such has exercised utmost discretion and applied the two-fold test the prosecution must consider at arriving at a decision to charge. On the other hand, the Applicant has not demonstrated that in making the decision to prefer criminal charges against them, that the Respondents acted without or in excess of the powers conferred upon them by law or have infringed, violated, contravened or in any other manner failed to comply with or respect and observe the foregoing provisions of the Constitution or any other provision thereof.

37. It was their case that the Applicant has not demonstrated any abuse by the Respondents as thorough investigations were conducted in the matter, no delay has been demonstrated in the prosecution of the matter and the charges preferred are in accordance with the ***Penal Code***. Based on legal counsel they averred that the Applicant herein seeks to curtail the mandate of the criminal justice system actors as enshrined within the Constitution of Kenya by attempting to circumvent the trial process against him without any justifiable reasons as he has not demonstrated in any manner how the Respondents have acted ultra vires or acted in bad faith. Further, the Applicant has not adduced any evidence before this Court on merit to show that prejudice has been occasioned and damage suffered may render the continued prosecution of the criminal proceedings an outright abuse of the court process.

38. The Respondents' case was that the accuracy and correctness of the evidence or facts gathered in an

investigation can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of evidence gathered and properly adduced in support of the charges.

39. The said Respondent however averred that they do not act under the direction or control of any person or authority and as such Article 249 (2) of the Constitution, provides that an independent office is subject only to the Constitution and the law and is not subject to the direction or control by any person or authority.

40. It was therefore their position that the allegations by the applicants are without merit, legal reason or backing and in view of the foregoing, the court should exercise extreme care and caution not to interfere with the Constitutional powers of the Respondents to institute and undertake criminal proceedings and should only interfere with the independent judgment of the respondent if it is shown that the exercise of his powers is contrary to the Constitution, is in bad faith or amounts to an abuse of process. In this case however, the Applicant's averments that the charges are an abuse of the criminal justice system are unfounded, unmeritorious and baseless.

41. It was contended that the mere fact that there is an ongoing civil case does not prevent the Respondents from conducting a criminal trial where it has been established that offences have been committed under the Laws of Kenya.

42. Accordingly the said Respondents maintained that the Applicants failed to demonstrate that the Respondents had not acted independently or have acted capriciously, in bad faith or have abused the legal process in a manner to trigger the High Court's intervention.

2nd and 3rd Respondents' Case

43. In opposing the application, the 2nd and the 3rd Respondents relied on the following grounds of opposition:

> **1. The 2nd and 3rd respondents have and continue to act within the premises of the law as mandated by the constitution as well as statute in trying the ex parte applicant for offences recognized by law.**
>
> **2. The applicant is seeking to curtail the mandate of the criminal justice system as enshrined in the constitution of Kenya and which trial process has already commenced.**
>
> **3. The applicant has not adduced sufficient evidence before the court to show that prejudice has been occasioned and damage suffered which may render the continued prosecution of the criminal proceedings an outright abuse of the court process.**
>
> **4. The accuracy and correctness of the evidence of facts gathered in an investigation can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of evidence gathered and properly adduced in support of the charges.**
>
> **5. The facts brought before this honourable court are not within the purview of judicial review court but a trial court which proceedings should not be stopped.**
>
> **6. Section 193A of the Criminal Procedure Act (Cap 75) Laws of Kenya, clearly does not in any way stay or prohibit the handling of the criminal and civil matters concurrently given the hybrid nature of the case.**
>
> **7. The application presented before this honourable court is without merit, legal reason or backing, is an abuse of the court process, lacks merit and should be dismissed with costs to the respondents.**
>
> **8. The orders of prohibition and mandamus as ought cannot be granted as granting them**

will amount to usurping the powers of the 2nd and 3rd respondents who exercise their discretion within the limits of the law.

9. In the alternative, the trial court is best placed to assess the evidence presented herein and make a finding on the same. As far as HC ELC Case No. 1005 of 2016 is concerned, the applicant has not been barred by any of the parties to continue with the proceedings to allow for determination of who the real owner of the suit property is.

The Interested Party's Case

44. The application was opposed by the interested party herein, **Roseline Njeri Macharia.**

45. According to the interested party, she is the registered owner of all that parcel of land reference number 209/11293/1 (Grant number IR 65859) and the Title thereto was registered as (IR 65859/1 on 27th of April 1995, situate on Mombasa Road, Nairobi and which land measures 4.046 Hectares as delineated in Land Survey Plan Number 184892 dated 6th of June, 1994, which she acquired on 22ndof December 1994 from Kenya National Chamber of Commerce in consideration of the sum of Kenya Shillings forty-five million. She confirmed that she has been in occupation of the said property since the year 1995 and even established a popular restaurant therein known as City Cabanas on the said property.

46. The interested party revealed that the said property was charged to **Daima Bank Limited** on 18th October 1995 and discharged on 20th February 1997 and has further encumbrance entries to **Guardian Bank Limited** dated 19th may 1997 and to **Euro Bank Limited** dated 29th January 1999, which entries have not been discharged.

47. The interested party maintained that though her ownership and possession of the property has been peaceful and uninterrupted for the last 20 years, sometimes in august 2016, she was served with court papers for ELC Case No. 1035 of 2016 - **Simandi Investments Limited –vs. Rosaline Njeri Macharia** which sought to evict her from the suit property on the basis that the plaintiff had obtained a title to the property registered on 19th may 2017.

48. Before responding to the suit, the interested party revealed that she moved from office to office, interrogating the authenticity of the documents filed in support of the suit since it is not possible to have a property with a title deed issued in the year 1994 re-allocated to another person had obtained in the year 2015, approximately 21 years later. In the course of her due diligence, she established that the most of the documents used in the registration of the subsequent title were false and were put together in a grand scheme to defraud her of my property. She further enquired from the Kenya National Chamber of Commerce the authenticity of alleged minutes of the management committee of 17th June 1994 which purportedly resolved to sell the property to the applicant and in a letter dated 22nd November 2016, through their advocates, the chamber confirmed that minutes produced were false and that the property was sold to her in the year 1994.

49. The interested further averred that while responding to the case, she managed to obtain a sworn affidavit of **Professor Gordon Okumu Wayumba**, a licensed surveyor who prepared the deed plan No. 184892 dated 6th June 1994 and who confirmed that he was approached by one **Laban Onditi Rao** on or about 17th September 2013 to write a letter to the director of survey requesting for a certified copy of the original deed plan on the ground that the original deed plan had been lost by the Kenya National Chamber of Commerce which clearly indicates a misrepresentation and concealment of material facts by **Laban Onditi Rao**, **Simon Nyamanya Ondiba** and **Mary Nyamanya**. In the said confirmation, **Professor Wayumba** indicated that he was approached by one **Laban Onditi Rao** who informed him that the original land survey plan number (Deed Plan) 184892 dated 17th April 2014 Deed Plan for LR 209/11293/1 had been lost by the owner Kenya National Chamber of Commerce and he was required to write a letter to the director of survey to facilitate the issue of a certified copy of the original deed plan.

50. The interested party insisted that the original title to L.R. No. 209/11293/1 (I.R. No. 65859) and the supporting deed plan No. 184892 dated 6th June 1994 has never been lost as was fraudulently alleged since the original deed plan No. 184892 dated 6th June 1994 was already the basis of the registration of the title L.R. No. 209/11293/1 (I.R. No. 65859) in her name on 27th April 1995.

51. The interested party further disclosed that she made inquiry to **Mr. Benson Meshack Okumu** of Boma Surveys Limited in respect of the deed plan No. 395562 dated the 5th of February 2016 which was used in support of the certificate of title LR No. 209/21698 (Original No. 209/11293/1/2) IR (175538) dated the 19th of May 2016 in the name of **Simandi Investments Limited** of Post Office Box Number 28442-00200 Nairobi and that the said **Mr. Benson Meshack Okumu** of Boma Surveys Limited denied that he ever undertook any survey work of the property in question or the sub division of the property as indicated on the said deed plan No. 395562 dated the 5th of February 2016. He further denied that he was the licensed surveyor who undertook the sub-division as well as the survey work in support of the title L.R. No. 209/11293/1 (IR No. 161289) in the names of one **Simon Nyamanya Ondiba** and one **Mary Nyamanya.**

52. The interested party therefore averred that it is clear that any survey work on LR No. 209/11293/1 and or submitted plans to the survey department and the indication on the deed plan No. 395562 dated the 5th of February 2016 that **Mr. Benson Meshack Okumu** of Boma Surveys Limited was the licensed surveyor who undertook the sub-division of LR No. 209/11293/1 is false and an act of fraud. The interested revealed that via memo dated 26thAugust 2016 from the Chief Valuer, Nairobi City County to the Chief Accountant (Rates), the entry Account No. 10018399-V into the valuation system in the name of **Simon Nyamanya Ondiba** and **Mary Nyamanya** was reversed for the reason that it is not possible to enter the same number into the rating system twice since the property had initially been entered into the valuation system in the year 2008 with the rate-able owner being **Roseline Njeri Macharia**. She averred that it is therefore clear that the purported ownership of LR NO. 209/21698 measuring 2.9640 Hectares and delineated on land survey plan number 395562 dated 5th February 2016 and which title was allegedly registered pursuant to transfer registered as IR 175538/1 as from 19th May 2016 is based on fraudulent and forged documents.

53. The interested confirmed that she was aware that the applicant and his co-accused persons were charged with the offence of conspiracy to defraud in Nairobi Chief Magistrate's Court Milimani Law Courts Criminal Case No. 2067 of 2016: **Republic vs. Simion Nyamanya Ondiba and Laban Onditio Rao** following her complaint to the Police that the deed plan used to obtain the title in the name of **Simon Nyamanya Ondiba** was obtained fraudulently. She was also aware that the applicant has a case under section 339(1) of the *Penal Code* in Chief Magistrate's Court at Makadara Law Courts Criminal Case No. 6788 of 2016 - **Republic –vs- Evans Onyancha, Ronald Hamisi, Dennis Mosoti, Laban Onditi and Simion Nyamanya**. According to her, the applicant was arrested on 26th September 2016 at City Cabanas Restaurant while leading the co accused persons in the destruction of a wall that was erected round the property. She averred that the applicant forcefully entered the property together with the co-accused persons and started demolition of the wall erected round the property before they were repulsed by police officers from Embakasi Police Station.

54. According to the interested party, this application for judicial review is premised on material non-disclosure and lies therefore denying the court the opportunity to appreciate and interrogate all the facts surrounding the case. While she was aware that the applicant herein filed a case in the Environment and Land Court at Nairobi, ELC No. 1035 of 2016, **Simandi Investments Limited vs. Rosaline Njeri Macharia** in which he claims ownership over LR No. 209/11293/1 (Grant Number IR 65859), she averred that she is the complainant in the criminal proceedings against the applicant and her rights will be affected by the outcome of the proceedings before this court, since the subject matter of the criminal proceedings is the suit property that belongs to her.

55. The interested party denied that she trespassed on the property in August 2016 since she has been in occupation of the property since the year 1995 since the year 1995 and even established a popular

restaurant therein known as City Cabanas Restaurant. Furthermore, her title was registered in the year 1994 while the applicant's fraudulent title was registered in the year 2016.

56. The interested revealed that after it became clear that the subsequent title issued to the applicant was fraudulent, she lodged a complaint to Muthaiga Police Station on 18th May 2017.

57. In her view, the applicant seeks to abuse the court process to clip the 1st respondent's powers to institute criminal proceedings against him. To her, pendency of a civil suit does not in any way prevent the 1st respondent from instituting criminal proceedings in case investigations point to the commission of offences by the accused persons. Her case was that the applicant's averments that the charges are an abuse of the criminal justice system are unfounded, unmeritorious and baseless.

58. Based on legal counsel, the interested party contended that the applicant's contention that allocating the criminal case three hearing dates is prejudicial to him is mischievous since it is normal for courts to allocate matters more than one hearing dates.

59. The interested party asserted that it is within her right to lodge a complaint to the police in case she has reason to believe that an offence has been committed against her and the mere fact that there is an ongoing civil case does not prevent the respondents from conducting a criminal trial where it has been established that offences have been committed under the Laws of Kenya.

60. The interested party insisted that the applicant's fraudulent actions sought to disposes her of property I have owned since the year 1995 and amounted to an infringement of her right to property and that as the applicant has an opportunity to present his defence during the hearing of the cases, it would be manifestly unjust to allow the applicant go away with the alleged crimes complained of as he will suffer no prejudice in standing trial since he is presumed innocent until proven guilty.

Determination

61. I have considered the application, the affidavits both in support of and in opposition to the application, the submissions made by the parties and the authorities relied on in support thereto.

62. The principles which guide the grant of the orders in the nature sought are now well settled. Several decisions have been handed down which in my view correctly set out the law relating to circumstances in which the Court would be entitled to prohibit, bring to a halt or quash criminal proceedings. It is however always important to remember 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. The Court ought not to usurp the mandate of the Respondents herein to investigate and undertake prosecution in the exercise of their discretion conferred upon that office under Article 157 of the Constitution and that the mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review. This is so because judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is open to the applicant in those proceedings. 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.

63. 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."

64. 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."

65. In **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** it was held that:

"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, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far 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. It is further 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 be 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 intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law...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. 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...There is nothing which can stop them from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made...Under section 77(5) of the Constitution it is a constitutional right that no person who has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of the offence. What is clear from this constitutional right is that it prevents the re-prosecution of a criminal case, which has been determined in one way or another..."

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

"The function of any judicial system in civilized nations is to uphold the rule of law. To be able to do that, the system must have power to try and decide cases brought before the Courts according to the established law. The process of trial is central to the adjudication of any dispute and it is now a universally accepted principle of law that every person must have his day in court. This means that the judicial system must be available to all...Although the Attorney General enjoys both constitutional and statutory discretion in the prosecution of criminal cases and in doing so he is not controlled by any other person or authority, this does not mean that he may exercise that discretion arbitrarily. He must exercise the discretion within lawful boundaries...Although the state's interest and indeed the constitutional and statutory powers to prosecute is recognised, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious...In doing so the Court may be guided by the following principles: (i). Where the criminal prosecution amounts to nothing more than an abuse of the process of the court, the Court will employ its inherent power and common law to stop it. (ii). A prosecution that does not accord with an individual's freedoms and rights under the constitution will be halted: and (iii). A prosecution that is contrary to public policy (or interest) will not be allowed...A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a

prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case. Evidence of extraneous purposes may also be presumed where a prosecution is mounted after a lengthy delay without any explanation being given for that delay...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...A criminal prosecution that does not accord with an individual's freedoms and rights, such as where it does not afford an individual a fair hearing within a reasonable time by an independent and impartial court, will be the clearest case of an abuse of the process of the Court. Such a prosecution will be halted for contravening the constitutional protection of individual's rights...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds."

67. Whereas Article 157(10) of the Constitution provides that the Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority, Article 157(11) provides:

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

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

> ***In fulfilling its mandate, the Office shall be guided by the Constitution and the following fundamental principles—***
>
> ***(a) the diversity of the people of Kenya;***
>
> ***(b) impartiality and gender equity;***
>
> ***(c) the rules of natural justice;***
>
> ***(d) promotion of public confidence in the integrity of the Office;***
>
> ***(e) the need to discharge the functions of the Office on behalf of the people of Kenya;***
>
> ***(f) the need to serve the cause of justice, prevent abuse of the legal process and public interest;***
>
> ***(g) protection of the sovereignty of the people;***
>
> ***(h) secure the observance of democratic values and principles; and***
>
> ***(i) promotion of constitutionalism.***

69. It is therefore clear that the prevailing statutory and constitutional regime decrees that in the exercise of their powers and discretion, the Respondents must do so within certain laid down standards provided under the Constitution and the ***Office of the Director of Public Prosecutions Act***. Where it is alleged that these standards have not been adhered to, it behoves this Court to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, the

Constitution itself. I associate myself with the sentiments expressed in **Nakusa vs. Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565** to the effect that :

> **"the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system….. In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of *Domnic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003* is that interpretation of the Constitution has to be progressive and in the words of Prof M V Plyee in his book, *Constitution of the World*: "The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time…In our role as "sentinels" of fundamental rights and freedoms of the citizen which are founded on laisez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent "sentinels" of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right."**

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

> **"Under section 26 of the Constitution the Attorney General has unfettered discretion to undertake investigations and prosecute. The Attorney 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."**

71. As was held by **Ojwang, J** (as he then was) in **Nairobi HCCC No. 1729 of 2001 – Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another**:

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

72. Therefore the police are expected to be professional in the conduct of their investigations and ought not to be driven by malice or other collateral considerations and the mere fact that a complaint is lodged

does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. I say ordinarily because the mere fact that the version of one of the parties is not considered is not necessarily fatal to the prosecution. However, whereas it is alleged in this case exculpatory evidence is presented to the police in the course of investigation and for some reasons unknown to them they deliberately decide to ignore the same one can only conclude that the police are driven by collateral considerations other than genuine vindication of the criminal judicial process. Neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of malice and hence abuse of discretion and power.

73. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the DPP to investigate and prosecute ought to be interfered with.

74. In this case the applicant contended that his prosecution should be stopped by this Court as the allegations are so patently absurd and inherently improbable on the face of it In other words, the applicant's case is that he is not culpable in respect of the allegations levelled against him in the criminal case. The applicant's case in effect is that the offences with which he is charged cannot, based on the evidence in his possession, be sustained. I however associate myself with the opinion in **Meixner & Another vs. Attorney General** (supra) that:

> **"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."**

75. It was further contended that his arrest was malicious and the charges that he faces in the criminal proceedings are trumped up and ill motivated by ulterior motive on the part of the Respondents and the interested party and that there is pending a land case before the Environment and Land Court. I agree with the decision of the Court of Appeal in **Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others Nairobi Civil Appeal No. 56 of 2012 [2013] eKLR** that**:**

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

76. This Court however expressed itself in **George Joshua Okungu and Another vs. Chief Magistrate Court Anti Corruption Court at Nairobi and Another (2014) eKLR** thus:

> **"The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defense is always**

open to the Petitioner in those proceedings. The fact however that the facts constituting the basic of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, *ipso facto*, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the petitioner to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognized aim".

77. This position must be so since as was held in **Republic vs. Commissioner of Police and Another exparte Michael Monari & Another (2012) eKLR**:

"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…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".

78. Even before the amendment to the ***Criminal Procedure Code*** which introduced section 193A thereof, it was stated in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** that:

"Under section 77(5) of the Constitution it is a constitutional right that no person who has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of the offence. What is clear from this constitutional right is that it prevents the re-prosecution of a criminal case, which has been determined in one way or another. However, it does not mean that a civil suit and a criminal case cannot co-exist at any one particular time. This is because the section envisages the re-prosecution of a criminal case substantially dealt with either in fact or law, a case in which issues have been laid to rest. There is no mention in the section that the simultaneous existence of a civil and criminal case is constituting double jeopardy. The courts have, however stated that the power to issue an order of prohibition to stop a criminal prosecution does not endow a court to say that no criminal prosecution should be instituted or continued side by side with a civil suit based on the same or related facts, or to say that a person should never be prosecuted in criminal proceedings when he has a civil suit against him relating to matters in the criminal proceedings...The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution...."

79. In **Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703**, the Court was of the view that it is when the predominant purpose of the criminal proceedings is to further that ulterior motive that the High Court steps in. In other words where that motive is not the predominant purpose of the criminal proceedings, the High Court may well allow the proceedings to proceed. As this Court held in **Republic vs. Attorney General & 4 Others Ex-Parte Kenneth Kariuki Githii [2014] eKLR**:

"In this case it is the applicant's case that the subject of the criminal proceedings is similarly subject of pending civil proceedings in which the ownership of the disputed parcel of land is pending determination. However, as stated hereinabove, the mere fact that the facts disclose both criminal offence as well as civil liability does not entitle the Court in judicial review proceedings to bring to a halt the criminal proceedings

I have considered the positions taken by the parties to these proceedings and I am unable to find that there is absolutely no iota of evidence against the applicant in the said criminal proceedings. Whereas the criminal proceedings may well eventually fail that is not the same

thing as saying that there is no evidence at all. I am also not convinced that the predominant purpose of mounting the said criminal offence is to achieve some collateral purposes rather than the vindication of a criminal offence. Whereas the facts may well constitute civil liability I am not convinced that under no circumstances would they constitute a criminal offence and that is as far as I am prepared to go."

80. In this case the position taken by the 1st and the 4th Respondents is that following investigations conducted their offices it was established that the documents which the applicant relies upon to claim title to the suit property were not genuine and further that the applicant was involved in the demolition of structures on the suit parcel. Both the Respondents and the interested party have detailed the steps they took that informed their decision that the documents relied upon by the applicant were not genuine and were in fact forged.

81. In determining whether criminal proceedings ought to proceed, a distinction must be made between a situation where what is alleged is insufficiency of evidence as opposed to where the evidence to be adduced does not disclose an offence. In the former, the right forum to deal with the matter is the trial Court. In the latter, it would amount to an abuse of the criminal process to subject the applicant to such a process. However a prosecutor is not required to have a full proof case but ought to have in his possession such evidence which if believable might reasonably lead to a conviction. He does not have to have evidence which disclose a *prima facie* case under section 210 of the ***Criminal Procedure Code*** since a decision as to whether a *prima facie* case is disclosed is a jurisdiction reserved for the trial Court. He however must have evidence which satisfy him that his is a case which ought to be presented before a trial Court.

82. In this case the Respondents have according to their version collected evidence on the basis of which they have formed an opinion that criminal charges ought to be levied against the applicant. It is in fact contended that the surveyor who the applicant contends undertook the survey relied upon by the applicant has denied that he in fact did so.

83. In my view this is not a case where it can be said with certainty that the allegations levelled against the applicant even if true cannot support a conviction. Based of the said allegations I cannot say that the prosecution of the applicant is malicious or is being undertaken to achieve collateral purposes. I am further unable to find that the existence of the civil case necessarily bars the Respondents from undertaking the criminal proceedings since one of the charges facing the applicant, malicious damage to property, does not necessarily depend upon the proprietorship of the suit property.

84. In **East African Community vs. Railways African Union (Kenya) and Others (No. 2) Civil Appeal No. 41 of 1974 [1974] EA 425**, it was held by the East African Court of Appeal that the onus lies on a person seeking the grant of a prerogative order to establish that it is essential for it to issue since these are not orders that are lightly made.

85. It was therefore held in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** 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...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 affair 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."

86. I associate myself with the holding in **Republic vs. Kenya Power & Lighting Company Limited & Another [2013] eKLR** to the effect that:

"It is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted."

87. The applicant has, going by his allegations, put forward what appears to him to be a formidable defence to the criminal charges facing him. However, in these kinds of proceedings, it is not sufficient to do so since this is not the Tribunal where the merits of the applicants' case is to be determined. It would be upon the prosecution to show at the trial that the defences which the applicants have alluded to are not available to him. In these proceedings however, the rules are reversed and it is upon the applicant to show that there possibly cannot be any prosecutable case against him, a burden which is no doubt heavy as it has the result, if determined in favour of the applicant, of barring the Respondent from executing its constitutional and statutory mandate. I associate myself with the decision of **Majanja, J** in HC. Pet. No. 153 of 2013; **Thuita Mwangi and 2 Others vs. the Ethics and Anti-Corruption Commission**, that:

"While these arguments are forceful, attractive and cogent, I am afraid that the High Court at this point is not the right forum to tender the justifications concerning the subject transaction let alone test the nature and veracity of these allegations."

88. It must also be taken into account that our criminal process entails safeguards which are meant to ensure that an accused person is afforded a fair trial and the trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit the accused. Although there are some thinly veiled but feeble accusations directed at the trial Court based on the manner in which the trial court intend to proceed, there is no basis at all laid for such accusations save for the fact that the courts intend to expedite the hearing. I cannot read malice in the desire of the courts to expedite the disposal of cases before them unless it is shown that such speed does not augur well for the fair hearing of the case which is not what the applicant alleges. In my view courts should be praised rather than condemned to expediting trials.

89. Our criminal process also provides for a process of an appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words unless the applicants demonstrate that the circumstances of the impugned process render it impossible for the applicant to have a fair trial, the High Court ought not to interfere with the trial simply on the basis that the applicant's chances of being acquittal are high. In other words a judicial review court ought not to transform itself into a trial court and examine minutely whether or not the prosecution is merited.

90. In the instant case, the Applicant has failed to discharge the burden and must be ready to face his accusers as was stated by **Lenaola, J** (as he then was) in **Daniel Ndungu vs. Director of Public Prosecutions & Another (2013) eKLR**:

"In conclusion, the Petitioner ought to face his accusers, prove his innocence or otherwise and submit to the consequences of the Law should he be found culpable".

91. In the premises I find no merit in this application. As was held in **Kuria & 3 Others vs. Attorney General,** (supra):

"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."

92. Consequently, the Notice of Motion dated 12th July, 2017 fails and is dismissed with costs to the Respondents and the Interested Party.

93. Orders accordingly.

Dated at Nairobi this 5th day of March, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Daido for the 2nd and 3rd Respondents and holds brief for Mr Obuya for the interested party

Miss Kahoro for the 1st and 4th Respondents

CA Ooko