



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO.16 OF 2016

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS IN THE NATURE OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: THE PENAL CODE, (CAP 63), LAWS OF KENYA.

AND

IN THE MATTER OF: FRAUD AND FORGERY CONTRARY TO SECTION 349 AND 353 OF THE PENAL CODE (CAP 63) LAWS OF KENYA.

AND

IN THE MATTER OF: ARTICLE 47 OF THE CONSTITUTION OF KENYA, 2010, SECTION 8 AND 9 OF THE LAW REFORM ACT (CAP 26) LAWS OF KENYA AND ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010, (CAP 21) LAWS OF KENYA

AND

IN THE MATTER OF: KAJIADO CHIEF MAGISTRATE'S COURT CRIMINAL CASE NO. 1749 OF 2016 REPUBLIC VERSUS GEORGE NGURE KARIUKI

BETWEEN

REPUBLIC.....APPLICANT.

VERSUS

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

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT.

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

AND

SANKAIRE OLOIKOORA.....1ST INTERESTED PARTY.

JOHN NGENIM OLOIKOORA.....2ND INTERESTED PARTY.

DANIEL SUPEIYO SANKAIRE.....3RD INTERESTED PARTY.

EX PARTE: GEORGE NGURE KARIUKI.

RULING

INTRODUCTION

1. The Applicant through an amended Notice of Motion dated 23rd November 2016 Sought an Order of Certiorari against the 1st Respondent quashing its decision made on the 4th of October 2016 to charge the Applicant with the offence of fraud and forgery contrary to section 349 and 353 of the penal code. The Applicant further prayed that an Order of Prohibition to issue against the Respondents prohibiting them from causing the court appearance, taking of plea and taking of evidence before the 2nd Respondent in Criminal case No. 1749 of 2016 where the Applicant is the accused, or any other court proceedings based on the similar factual and evidentiary basis. The applicant sought costs to be provided for.

2. The Application was supported by the grounds espoused therein, in a Statutory Statement dated 10th November 2016 and by affidavits sworn by the applicant on 10th November 2016 and 3rd March 2017 respectively.

3. The Application was opposed by the 1st Respondent through affidavits sworn by Samuel Otieno Onyango on 16th January 2017 and 28th April 2017 Respectively.

THE EX PARTE APPLICANT'S CASE

4. The Applicants case is contained in the Statutory Statement and Affidavits I have already alluded to. It is the Applicants case that On 20th August 2014, the Director of Criminal Investigations commenced investigations following a complaint by the Ex-Parte Applicant of fraud on his properties among them Kajiado/Kaputei-North/5613. However, instead of pursuing the Ex Parte Applicant's complaint against one Sankaine Oloikoora, the Director of Criminal Investigations at the instigation of the said Sankaire Oloikoora purported to conduct investigations against the Ex Parte Applicant. The Ex Parte Applicant was not afforded an opportunity to be heard by the Directorate of Criminal Investigations in respect of his complaint or that of Sankaire Oloikoora.

5. The Applicant deponed that The 1st Respondent, relying on the report by the Director of Criminal Investigations, made a decision to charge the Ex parte Applicant on the 4th October 2016. The Ex parte Applicant was not made aware of the said decision by the 1st Respondent until the 13th October 2016, when the Summons to Appear before the 2nd Respondent was served upon him. The Ex parte Applicant is scheduled to take plea for a malicious charge before the 2nd Respondent on the 15th November 2016. It is averred that this process amounts to utter abuse of the criminal justice system as according to the applicant, the Respondents lack any legal or factual basis to institute criminal proceedings against the Applicant.

6. It was further deponed that the Directorate of Criminal Investigations deliberately failed to investigate the fraud perpetrated by the Complainant, as lodged by the Ex Parte Applicant. For this reason, the 1st Respondent's decision to have the Ex Parte Applicant charged for alleged fraud is therefore based on a flawed process and is being rushed by the Complainant to divert attention from his own criminal actions. It is an unmeritorious blatant abuse of the police and prosecutorial powers.

7. In the eyes of the Applicant, the Respondents acted maliciously, unreasonably, irrationally and in bad faith in deciding to charge the Ex-Parte Applicant with an offence clearly committed by other persons. By being charged pursuant to the 1st Respondent's directive on 4th October 2016, the Ex Parte Applicants' right to Human Dignity under Article 28 of the Constitution of Kenya, 2010 will have been violated. The Respondents have acted in a partial and biased manner in their handling of the matter by seeking to prosecute an innocent person. Therefore, it is only fair and in the interest of justice that the Ex Parte Applicant is granted the orders as sought.

8. The applicant took time to outline the factual matrix of their case and which I will endeavour to summarize. It was alleged that on or about the year 1992 the Applicant entered into Sale Agreement with one OLOIKOORA OLE KASKUA (DECEASED) for the purchase of a portion of one hundred (100) acres of his land originally known as Kajiado/Kaputei-North/874. Subsequently and upon completion, the property was surveyed and a Title Deed issued for the applicant's portion on the 5th August 2002 being L.R. NO. KAJIADO/KAPUTEI-NORTH/5613 which he took possession.

9. On or about the 15th November 2010, the Applicant averred that he received a notice from the District Commissioner's Office within the Isinya area, in whose jurisdiction the suit property lies confirming that the security would be provided for the compliance of the execution of the orders issued by the Senior Resident Magistrate's Court Kajiado. These Orders were as a result of Land Disputes Tribunal case, Case No.502/4/09 SANKAIRE OLOIKOORA, NEMUKASH OLOIKOORA AND MOSES SEMENKURA.

10. The applicant denies having ever known the existence of the tribunal proceedings and the resultant award that was subsequently adopted before the Senior Resident Magistrate's Court Kajiado. According to the applicant, the ruling made was that his title to the suit property be de-registered and the District Surveyor do re-survey the land and Title deeds be issued in the names of the Sankaire Oloikoora and Nemukash Oloikoore

11. In the applicant's view, these actions amounted to arbitrarily dispossessing him of his land without following the process as is required in law. He averred that he acquired the property legally and lawfully and his depiction as a criminal amounted to libel and was done with the malicious intent to dispossess him of his land.

12. Consequently, the Applicant deponed that he commenced proceedings vide **Machakos J.R. Miscellaneous Case No. 269 of 2010 George Ngure Kariuki vs. Kajiado Land Dispute Tribunal Sankaire Oloikoora and Nemukash Oloikoora** seeking to quash the said decision of the Land Tribunal.

13. In addition, he made a complaint to the Directorate of Criminal Investigations on or about the 20th August 2014 for investigations on fraudulent activity on several of his properties and specifically recorded a statement in respect of an attempt to illegally transfer the suit

property into the name of one Godfrey Rugendo. He alleges that he did not receive any report on the investigations carried out by the Respondent if any.

14. In response to the Affidavit sworn by Samuel Otieno Onyango on the 16th January, 2016, the applicant averred that the revocation the Title Documents of the suit property by the Land District Tribunal by the Interested Parties was done in bad faith and with the sole intention of dispossessing him of his property. This is so because the Interested Party failed to effect service of the Complaint filed before the Lands Tribunal. The proceedings proceeded concealed until such time the Decree was issued and he only came to learn about it by pure chance.

15. The Applicant maintained his assertion that he came into the suit property legally through following due procedure after transacting with the deceased.

16. It was submitted that whereas the 1st Respondent has a constitutional right and mandate to carry out investigations and criminal prosecutions the said mandate must be carried out with due regard to citizens' rights as enshrined in the Constitution of Kenya, 2010.

17. The Applicant averred that he truly believed that the investigations purported to have been carried were skewed in favor of the Interested Parties and accordingly the decision to prefer charges against him was not just.

THE RESPONDENTS' CASE.

18. The 1st Respondent averred that the crux of their charges against the Applicant was as the result of investigations into a land dispute between the Ex-parte Applicant and Oloikora Ole Kasikua (deceased). It was stated that the deceased was the registered owner of land parcel Kajiado/Kaputiei-North/874 wherein the Applicant unlawfully hived off 100 acres and registered the same in his names as Kajiado/Kaputiei-North/5613 sometimes in the year 2002, about ten years after the death of the Oloikora Ole Kasikua (deceased), on 26th January, 1992.

19. The Respondent noted that there were proceedings and order from the Kajiado Lands Dispute Tribunal Case No.502/4/2009 that the Land Registrar Kajiado de-register Kajiado/Kaputiei-North/5613 from the Applicant's name and the property be registered in the names of the Interested parties which said order was adopted by the Kajiado Senior Resident Magistrate's Court in Land Dispute Tribunal Case No. 1 of 2010 and the said orders are yet to be set aside.

20. It was averred that the Applicant filed a Judicial Review Application No.269 of 2010 before the Machakos High Court against the said ruling and order and obtained stay orders but since obtaining stay orders the applicant has never prosecuted the matter.

21. It was further averred by the Respondent that the Applicant made a complaint with the 2nd Respondent against one Godfrey Rugendo Igane on 15th August, 2014 and yet to date the applicant had yet to visit the Respondent's offices to aid the investigations. Further it came to the knowledge of the respondents that the issue touched on land parcel number Kajiado/Kaputiei-North/5613 which was irregularly transferred from Kajiado/Kaputiei-North/874 belonging to the deceased.

22. The Respondent averred that the Applicant had failed to assist the police establish how a copy of the title deed of the suit property came into his possession and neither had he availed any evidence to assist in identifying the alleged suspect Godfrey Rugendo who the Respondent averred were acquaintances with the Applicant as evidenced by the letter dated 11th March 2015.

23. The contention by the Respondents was that on the 5th of April 2016 the Interested Parties lodged a complaint and availed documents and witnesses in support of their complaint against the Applicant. Consequentially, the Applicant was invited to attend the 2nd Respondent's offices for an interview but he wilfully declined to attend and assist in investigations as well as give his side of the story and neither did he avail documents or witnesses despite being summoned by the Respondent.

24. It was averred that investigations by the 2nd Respondent over the Interested Parties complaint against the Applicant revealed that there was a fraudulent registration of land parcel Kajiado/Kaputiei-North/5613 as it became clear that it was illegally and unlawfully hived from Kajiado/Kaputiei-North/874 ten years after the death of the registered owner the Oloikora Ole Kasikua (deceased).

25. Subsequently it was contended that since the family of Oloikora Ole Kasikua (deceased) had not taken out letters of administration in respect of the deceased's estate any activity on the deceased's estate amounted to intermeddling with the deceased's estate which is a criminal act under the Law of Succession Act.

26. The subdivision of Kajiado/Kaputiei-North/874 on 18 August, 1998, approval of the mutation on 25 August, 1998 and registration of new titles on 5th August, 2002 was unlawful as the deceased had died on 26th August, 1992 over six (6) years earlier which amounts to fraud and illegality.

27. It is upon the basis of the preceding facts that it is averred by the 1st Respondent that upon perusal of the 2nd Respondents police file and recommendations it lawfully and legally directed that the Applicant be arraigned before the Chief Magistrate's Court at Kajiado to face eight counts of charges relating to forgery which said directions is the lawful and constitutional mandate of the 1st Respondent under Article 157 of the Constitution of Kenya, 2010.

THE EX PARTE APPLICANTS SUBMISSIONS

28. Counsel for the Applicant, Mr Ithondeka filed his submissions dated 28th July on the 31st of July 2017. He urged the court to consider 5

issues for determination namely:

- a. Whether the Exparte Applicant has locus to bring the Application dated 23rd November 2016
- b. Whether the Respondent violated its Constitutional Right and Mandate to conduct investigations
- c. Whether the decision by the 1st Respondent to institute and undertake criminal proceedings against the Ex-parte Applicant was lawful
- d. Whether there is a Possibility of finding an amicable solution by the parties outside court
- e. Whether the Ex-parte Applicant is entitled to the Judicial Review orders of certiorari and prohibition.

29. On the first issue, it was submitted that the Applicant had locus because he has an interest in the matter and is also challenging the 1st Respondent's decision directing that the Ex-parte Applicant be charged with the offence of fraud and forgery contrary to Section 347(a) and 353 of the Penal Code.

30. Mr Ithondeka cited Articles 22 and 258 of the Constitution of Kenya, 2010 and Section 7 of the Fair Administrative Action Act 2015 on the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. He went on to cite the cases of John Wekesa Khaoya v. Attorney General, Petition No. 60 of 2012: [2013] Eklr and of Mureithi & 2 Others (for Mbari ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] KLR 443 in support of his submission.

31. On the second issue, it was submitted that the 1st Respondent violated its Constitutional Right and Mandate to conduct investigations by deliberately failing to investigate the fraud perpetrated by the 1st Interested party, while purporting to carry out investigations on the Interested Party complaint which was made 2 years after the Ex-parte Applicant had lodged his complaint on the 15th August 2014 against the 1st Interested party which complaint remains not dealt with to date. Counsel cited Article 157 (4), The Police Act Cap 84 under Section 14(1) and Section 35 of the National Police Service Act 2011 to outline the powers of the Respondents

32. Submitting on the third issue, Ithondeka advocate asserted that the decision by the 1st Respondent to institute and undertake criminal proceedings against the Ex-parte Applicant was unlawful based on the following grounds:

- a. The decision was arrived at based on a complaint by one Sankaire Oloikoora made on the 5th April 2016 against whom the ex-parte applicant had filed complaint against in the year 2014.
- b. The 1st Respondent decided to institute criminal proceedings against the ex parte applicant whilst it failed to undertake any investigations in respect of the Complaint made against the 1st Interested Party on the 15th August 2014.
- c. The Police Officers at Kajiado Police Station denied the Ex-Parte Applicant a fair hearing by refusing to peruse the documentary evidence presented to them by the Ex-Parte Applicant in an attempt to prove legal ownership of the suit land, conducting investigation in favour of the Interested parties while refusing to undertake investigations regarding the complaint by the Ex.Parte Applicant which led to the 1st Respondent's decision to prefer charges against the Ex-Parte Applicant which amounted to breach of Rules of Natural justice.
- d. The decision by the Respondent to institute and undertake criminal proceedings against the Ex-parte Applicant was unlawful because the Ex parte Applicant was not given an opportunity to be heard by the Director of Criminal Investigations in respect of his complaint lodged against the 1st Interested Party on the 15 August 2014. when the Police Officers at Kajiado Police Station refused to undertake investigations regarding the complaint by the Ex-Parte Applicant which led to the 1st Respondent's later decision to prefer charges hence, breach of the Rules of Natural Justice.
- e. The decision to bring the said charges against the Ex-Parte Applicant was made maliciously and in a blatant abuse of the lit Respondent's powers to institute criminal proceedings under Article 157 of the Constitution since no investigations were conducted prior to the making of the decision, and if any. fell short of the standards required of them of impartiality.

33. Turning to whether the Applicant was entitled to the prayers sought, Counsel urged in the affirmative maintaining that the Respondents have exhibited malicious intent in their intended prosecution. Further that the Respondents are duty bound to act within the confines of the law and finally that the intended criminal prosecution was an abuse of the court process.

34. On the final issue, it was Mr. Ithondeka's submission that Article 159 encouraged the use of ADR and Article 157 of the Constitution gave the 1st Respondent the power to withdraw charges at any time. The case of Republic versus Abdow Mohammed Crim Case 86/2011[2013]eklr was cited with approval.

35. Counsel ended with a caveat that before the above alternative could be adopted, the Ex parte applicant need to have a refund of the money paid by the Ex-parte Applicant to the deceased's family according to the payment schedule by the Ex-parte Applicant.

THE RESPONDENT'S SUBMISSIONS

36. The 1st Respondent aptly summarised its case to four key issues:

- a. THAT the instant application is fatally defective, is incompetent and lacks merit.
- b. THAT the Applicant has no locus to bring this suit as against the Respondents.
- c. THAT the Applicant herein intends to obstruct and interfere with the Statutory and Constitutional mandate of the Respondents.
- d. THAT the Applicant intends to deny the Estate of Oloikoor Ole Kasikua(deceased) who are victims the right to a fair hearing.

37. The 1st Respondent was represented by Prosecution Counsel Akula. He submitted that the onus was upon the Applicant to show that the actions by the Respondents to charge the applicant with eight counts of fraud related charges under the Penal Code were ultra vires, unlawful, biased, against public policy, exceeded its mandate and/or made in bad faith. According to counsel, the Applicant had not demonstrated that his fundamental rights and freedoms have been breached by the Respondents in exercise of their statutory and constitutional mandate.

38. Akula relied on Article 157 of the Constitution for his submission that the 1ST Respondent is the only institution charged with the mandate to determine whether or not to prosecute the Applicant and also to decide which offences, if any, the Applicant was to be charged with.

39. As per Counsel, since the 1st Respondent exercised its Constitutional and Statutory mandate under article 157 of the Constitution, this Honourable Court cannot exercise its authority over the Respondent and prohibit it from its Constitutional and Statutory mandate with regards to its duty to enforce the purpose of Article 157 and Article 50 of the Constitution of Kenya, 2010 and Section 5 and 9 of the Victim Protection Act, 2014, the Office of the Director of Public Prosecutions and the Fair Administration Act, 2015.

40. Akula Prosecution Counsel buttressed the afore stated submissions with the cases of **Republic v DPP & Three Others Ex-parte Bedan Mwangi Nduati & Another (2015) KLR; Davi Ndolo Ngiali & 2 others v Directorate of Criminal Investigations & 4 Others (2015) eKLR; Erick Kibiwott & 2 Others v DPP & 2 Others Judicial Review Civil Application No. 89 of 2010; Kipoki Oreu Tasur v Inspector General of Police & 5 Others (2014) KLR.**

41. Counsel further submitted that the 2nd Respondent herein under Article 238, 239, 243, and 247 of the Constitution of Kenya, 2010 is mandated to enforce the purpose of Article 244 and Article 50 of the Constitution of Kenya, 2010, Section 5 and 9 of the Victim Protection Act, 2014 and the National Police Service Act which functions the 2nd Respondent has lawfully and constitutionally executed during the investigations into the unlawful, fraudulent and illegal transfer hiving of land parcel Kajiado/Kaputiei North/5613 from Kajiado/Kaputiei-North/874 by the Applicant.

42. In furtherance of his line of argument, Akula for the Respondents submitted that the trial Court is the best arena to canvass and challenge the evidence obtained by the Respondents in order to accord all parties a fair trial. He cited the court in the case Republic v Chief Magistrate's Court Nairobi & 3 Others Ex-parte Stephen Oyugi Okero (2015) eKLR where it was observed that:

"Nevertheless, sometimes it is necessary for the Court to look at the statements in order to establish if there is evidence to support the charges. Absence of evidence is a ground for quashing a criminal trial and the court cannot conclude that there is no evidence without looking at the witness statements and exhibits. I agree with the Applicant that there could be contradictions in the statements of the proposed witnesses. Those are issues that can only be resolved through hearing the veracity of that evidence can only be tested by way of cross examination which can only be done in the criminal trial"

43. Counsel proceeded to submit that the Applicant had neither demonstrated nor laid any tangible evidence before the court to support their averments and allegations. Further that the said allegations were a ploy constructed to deceive and defeat the interests of the Interested Parties and the estate of Oloikoor Ole Kasikua (deceased) and to deny them a right to a fair trial.

44. In conclusion, Akula submitted that the Applicant had not demonstrated that he is entitled to be granted any of the orders sought. It was his view that the orders were ambiguous and incapable of being executed and as such fatally defective.

45. Counsel reiterated that the onus of proving that there is a fundamental breach of the Applicants rights and freedom by the Respondents rests with the Applicant and the Applicant herein has failed to discharge this burden of proof the conduct of the Respondents in execution of their functions have breached his fundamental rights and freedoms under the Constitution.

46. It is upon this basis that Counsel for the Respondent urged the Court to dismiss this Judicial Review Application with costs to the Respondents.

ANALYSIS AND DETERMINATIONS

47. I have given much thought to Counsels' submissions on this issue with the pleadings featuring prominently at the back of my mind and thus I am confident to frame the main issues for determination as:

- a. Does the Applicant have the locus standi to bring the current Application?
- b. Have the Respondents failed to carry out their mandate as required by law and consequently contravened the rights and freedoms

of the Applicant?

c. Is the Applicant entitled to the reliefs sought?

48. Having established the premise upon which I will base my determinations, let me promptly delve into the preliminary issue of locus standi. On this issue, I agree with Mr Ithondeka's position.

49. In *John Wekesa Khaoya v. Attorney General*(supra) the High Court noted that: "...the locus standi to file judicial proceedings representative or otherwise, has been greatly enlarged by the Constitution in Articles 22 and 258 of the Constitution which ensures unhindered access to justice..."

50. Article 258 of the Constitution also provides as follows: *Every person has the right to Institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.*

51. In furtherance of this position, the court in **Mureithi & 2 Others (for Mbari ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] KLR 443** opined thus:

"Judicial review courts have generally adopted a very liberal approach on standing for the reason that judicial review is now regarded as an important pillar in vindicating the rule of law and constitutionalism. Thus a party who wants to challenge illegality, unreasonableness, arbitrariness, irrationality and abuse of power just to name a few interventions ought to be given a hearing court of law..."

The words person aggrieved are of wide import and should not be subjected to restricted interpretation. They do not include, of course, a mere busybody who is interfering in things that do not concern him but this include a person who has a genuine grievance because an order has been made which prejudicially affects his interests and the rights of citizens to enter the lists for the benefit of the public or a section of the public, of which they themselves are members. A direct financial or legal interest is not required in the rest of sufficient interest"

52. The Court of Appeal in **Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others [2017] eKLR** cited the case of **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2014] eKLR** in approval thus:

The Supreme Court in the Mumo Matemu case(supra) has provided guidelines on the interpretation of the above Articles which we find prudent to highlight:-

[67] It is to be noted that the promulgation of the 2010 Constitution enlarged the scope of locus standi, in Kenya. Articles 22 and 258 have empowered every person, whether corporate or non-incorporated, to move the Courts, contesting any contravention of the Bill of Rights, or the Constitution in general. In John Wekesa Khaoya V. Attorney General, Petition No. 60 of 2012' [2013] eKLR the High Court thus expressed the principle (paragraph 4):

"...the locus standi to file judicial proceedings, representative or otherwise, has been greatly enlarged by the Constitution in Articles 22 and 258 of the Constitution which ensures unhindered access to justice..."

.....

[71] Articles 22 and 258 of the Constitution provide that every person has the right to institute proceedings claiming that the Constitution has been contravened; and "person" in this regard, includes one who acts in the public interests."

.....

"The intent of Articles 22 and 23 of the Constitution is that persons should have free and unhindered access to this Court for the enforcement of their fundamental rights and freedoms. Similarly, Article 258 allows any person to institute proceedings claiming the Constitution has been violated or is threatened."

25. It seems to us from that interpretation that the issue as to who has locus standi before a court of law has now been crystallized. It is any aggrieved party.

53. In conclusion therefore, I find and hold that the Applicant is clothed with the requisite locus in the matter before this court.

54. Now that I have found that the Applicant had the locus to bring forth the Application I will consider the second issue that really is the gravamen of the Applicant's case. That is, have the Respondents failed to carry out their mandate as required by law and consequently contravened the rights and freedoms of the Applicant?

55. The Applicant has alleged that the Respondents have failed in their mandate to carry out their duties. The duties of the Respondents were well captured by the case of **Kenneth Kanyarati & 2 others v Inspector General of Police Director of Criminal Investigations Department & 2 others [2015] eKLR** which I fully resonate with and will as a result quote *in extenso*

53. For starters, the 1st and 2nd Respondents have powers to investigate alleged criminal offences. Such powers are obtained under the Constitution and in particular Articles 157(4) and 245(4) of the Constitution. The powers to investigate may also be said to be obtained under Article 252(1) (a) of the Constitution, which is to the effect inter alia, that each holder of an independent office may conduct investigation of its own initiative or on a complaint made by a member of the public. There is no doubt that the offices of the Director of Public Prosecutions as well as of the Inspector General of Police are Independent offices outlined in and protected by constitutional provisions.

54. Further, the National Police Service which consists of the Kenya Police Service and the Administration Police Service: See Article 243(2) of the Constitution is under the independent command of the 1st Respondent. Pursuant to the provisions of Article 243 (4), the National Police Service Act (Cap 84) has been legislated and the statute has under Section 24, detailed the various functions of the Kenya Police Service. The functions include but are not limited to maintenance of law and order, protection of life and property, investigation of crimes, collection of criminal intelligence, prevention and detection of crime as well as apprehension of offenders. Consequently, investigation of crime is one of the key functions of the 1st Respondent both under the Constitution and the relevant statute.

55. The Office of Director of Public Prosecutions Act, No. 2 of 2013 on the other hand too, and in furtherance of Article 157 (12) of the Constitution, has clearly spelt out the powers of the 2nd Respondent in investigating any allegation of criminal conduct. The 2nd Respondent also exercises independently the state powers of prosecution: See Article 157(6) of the Constitution.

56. A closer reading of both the National Police Service Act as well as the Office of the Director of Public Prosecutions Act and Articles 157 and 245 of the Constitution would reveal that the Kenya Police Force and by extension the 1st Respondent have the mandate to investigate criminal activities or conduct. Such investigations are to be undertaken under no other persons directions save for the Director of Public Prosecutions who may issue directions: see Article 157(4). Such investigations may be voluntarily initiated by the police force or upon prompting by a member of the public through a complaint or a report but must not be influenced in any manner. Such investigation too must be undertaken within the confines of the Constitution as well as with statutory provisions and limitations: see for example Article 244 (c) of the Constitution and generally Part VII of the National Police Service Act (Cap 84).

56. The court ought to be wary not to intervene when a constitutional office is conducting its duty in accordance with the powers donated to it. From where I stand, armed with an intimate reading of the evidence adduced, I find that the Respondents have acted within their mandate. The Applicants accusations, I am afraid, come apart when subjected to the constitutional microscope. I am reluctant to find fault in the manner in which the Respondents have expressed their mandate. On this I cite with approval the cases referred to herein by Akula for the Respondents. **See Republic v DPP & Three Others Ex-parte Bedan Mwangi Nduati & Another (2015) KLR; Davi Ndolo Ngiali & 2 others v Directorate of Criminal Investigations & 4 Others (2015) eKLR; Erick Kibiwott & 2 Others v DPP & 2 Others Judicial Review Civil Application No. 89 of 2010; Kipoki Oreu Tasur v Inspector General of Police & 5 Others (2014) KLR.**

57. As was stated in **R Vs. Commissioner of Police and Another Ex parte 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.”

58. The Respondents investigated the complaints made by the Interested parties and found that indeed the Applicant was fault. No sufficient reason has been adduced on the part on the Applicant to convince me otherwise.

59. As a result, I find and hold that the Applicants right have not been violated and the Respondents have executed their mandate as expected of them.

60. On the final issue of whether or not the Applicant is entitled to the reliefs sought, my preceding analysis has to bear itself out. Having reached the conclusion that the Respondents were well within their mandate, the only logical position that I can and do hold is that the Applicant cannot be allowed the prayers as sought.

DISPOSITION

61. The prayer for an Order of Certiorari to remove from this court and quash the decision of the 1st Respondent made on the 4th of October 2016 to charge the Applicant with the offence of fraud and forgery contrary to section 349 and 353 of the penal code is hereby disallowed.

62. The prayer for an Order of Prohibition to remove from this court against the Respondents prohibiting them from causing the court appearance, taking of plea and taking of evidence before the 2nd Respondent in Criminal Case No. 1749 of 2016 where the Applicant is the accused, or any other court proceedings based on the similar factual and evidentiary basis is equally disallowed.

63. Each party shall bear their own costs.

64. The Application dated 23rd November 2016 is hereby dismissed.

DATED, SIGNED AND DELIVERED AT KAJIADO THIS 6TH APRIL, 2018.

.....

R. NYAKUNDI

JUDGE

In the presence of

Ayeranga for M/s Ithondeka for the applicant

Mr. Akula for the respondent

Interested party present