



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 156 OF 2017

IN THE MATTER OF AN APPLICATION BY CHARLES MWITI MUGAMBI FOR JUDICIAL REVIEW AND ORDERS OF CERTIORARI AND PROHIBITION.

AND

IN THE MATTER OF ARTICLE 10, 47, 50, 73 AND 157 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA.

AND

IN THE MATTER OF SECTIONS 6 (A) & (B), 16 (1), (2) & (3), 29 (1), (2) & (3), 30 (10 & (2) AND 34 (1) (A), (B) & (C) OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ACT, 2013

AND

IN THE MATTER OF CRIMINAL CASE NUMBER 451 OF 2017, NAIROBI CHIEF MAGISTRATES COURT

BETWEEN

REPUBLIC.....APPLICANT

AND

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

THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....2NDRESPONDENT

THE NATIONAL POLICE SERVICE.....3RD RESPONDENT

THE CHIEF MAGISTRATE'S COURT, NAIROBI.....4TH RESPONDENT

AND

ERIC MWENDA KANYUURU.....INTERESTED PARTY

CHARLES MWITI MUGAMBI.....EX PARTE APPLICANT

JUDGMENT

The ex parte applicant's case.

1. Pursuant to this Courts leave granted on 4th April 2017, the ex parte applicant moved this Court by an application dated 21st April 2017 filed on 24th April 2017 seeking orders of *Certiorari* to quash the decision to prosecute him in criminal in Criminal Case No. 451 of 2017, Nairobi and an order staying further proceedings in the said case and costs of this suit.

2. In support of the application is the *ex parte* applicants' supporting affidavit, the statutory statement and the verifying affidavit all annexed to the application seeking leave.

3. The crux of his case is that he was the registered proprietor of all that property known as **L.R. No. 12672/51**, and that by an agreement dated **15th** September 2010 between himself and a one **David Mwenda Maingi**, they entered into a joint venture business the terms of which were that he contributed the said property while **Mr. Maingi** contributed finance/material and labour to develop the property. He states that owing to financial constraints, they could not complete the development. As a consequence, they agreed to sell the property so as to recover their respective contributions.

4. He further states that by an agreement dated **29th** August 2012, between himself and **Mr. Maingi** as the vendors, they sold the property to a one **Eric Mwenda Kanyuuru** (the Interested Party herein) on the following terms:-

a. the ex parte applicant sold the land to the interested Party herein excluding the development at a price of Ksh. 16,000,000/= payable in five instalments the last being due on or before 31st May 2013;

b. Mr. Maingi sold the developments at a cost of Ksh. 8,000,000/= payable in four instalments, the last such instalment being payable on or before 31st October 2012;

c. that the purchase price was to be fully paid prior to Mr. Maingi proving the purchaser with completion documents which included duly executed discharges of all charges.

5. The *ex parte* applicant further states that in breach of the aforesaid sale agreement, the Interested Party as at **8th** March 2013, had only paid him a sum of **Ksh. 7,500,000/=** leaving a balance of **Ksh. 5,500,000/=**. Consequently, he states that, he issued the Interested Party with a **21** day's notice demanding payment in default the contract would be terminated. Further, he avers that vide a letter dated **30th** January 2014, he notified the Interested Party that as a consequence of the aforesaid termination, he had retained the agreed **10%** of the purchase price being **Ksh. 1,600,000/=** and that the balance thereof had been deposited with the advocates. He also states that he requested the Interested Party to supply his bank account details to the said Advocates for remittance to be effected, but he failed to supply the Bank Account details, prompting the *ex parte* applicant to request his advocates to return the said sum to him for safe keeping. He also states that proposals to re-enter into a new agreement never materialized, hence, he offered the same property for sale, and on **19th** July 2016, he sold it to a one **Zakayo Kimathi Mungania** at a price of **Ksh. 30,000,000/=** and transferred it to him.

6. The *ex parte* applicant also avers that on **21st** February 2017, the Interested Party and his agents trespassed into the property prompting the said **Zakayo Kimathi Mungania** to file High Court Civil No. **137** of 2017 seeking restraining orders. Further, he averred that on **27th** February 2017, he received a letter from the Interested Party's Advocates seeking specific performance within one day, to which he responded stating that the contract had been rescinded on account of the Interested Party's breach and confirming that the sum of **Ksh. 5,900,000/=** was held in the Advocates bank account. He also averred that on **2nd** March 2017, the Interested Party sued him and the said purchaser in High Court ELC No. **143** of 2017 seeking restraining orders, cancellation of the title and specific performance.

7. The *ex parte* applicant also avers that on or about **6th** March 2017, the police arrested him for allegedly defrauding the Interested Party. He avers that he was charged on **7th** March 2017 in Criminal case No. **451** of 2017, Chief Magistrates Court, Nairobi with the offence of obtaining money by false pretences contrary to section **313** of the Penal Code.^[1] He also avers that in view of the circumstances of this case, he believes that the Respondents have abused the criminal justice system on an issue that is purely civil in nature, and that his advocates were not supplied with witness statements, despite making a request. He also avers that he suspects no proper investigations were undertaken or no statements were recorded.

Respondent's Response.

8. One of the investigating police officers, **Sgt. Nicholas Ole Sena**, attached to the Directorate of the Criminal Investigation swore the Replying Affidavit dated **12th** September 2017. He averred that on **13th** October 2016, a complaint was made to the DCI Headquarters by the Interested Party complaining that he entered into an agreement with the *ex parte* applicant for the purchase of the property in question, but later discovered that the *ex parte* applicant had defrauded him. He

9. He averred that on **15th** September 2010, the *ex parte* applicant and a one **David Mwenda Maingi** entered into a joint business with equal shares. He also averred that the applicant was the registered owner of the property, and, that the terms of the agreement were that **Mr. Maingi** was to avail all the materials and labour to the tune of **Ksh. 12** million, being the equivalent to the value of the land. Further, he averred that they agreed to incorporate a company dealing with real estate in which both were to hold equal shares, and that the said company was to transfer the land to the Interested Party as co-owners, but the transfer could not be effected as the *ex parte* applicant herein kept on dilly dallying.

10. He also averred that **David Mwenda Maingi** approached the Interested Party and requested him to partner with him in the business venture in **L.R. No. 212672/51**, owned by the *ex parte* applicant in which the said **Mr. Maingi** was a shareholder. He averred that the Interested Party agreed to the request and on **29th** August 2012, the three partners entered into an agreement the terms whereof were that the said **Mr. Maingi** agreed to sell all his shares translating to **50%** to the Interested Party. He averred that the Interested Party would refund to **Mr. Maingi** the money he spent on the project agreed at **Ksh. 8** million, which he refunded receipt whereof was acknowledged. He averred that pursuant to the said agreement, the Interested Party took over the project from where **Mr. Maingi** had left. Further, he averred that the *ex parte* applicant agreed to sell the land to the Interested Party at a cost of **Ksh. 16,000,000/=** out of which the Interested Party paid to the *ex parte* applicant **Ksh. 7,500,000/=** and the balance of **Ksh. 9,000,000/=** was to be paid in three instalments starting from November 2012 to May 2013.

11. **Mr. Ole Sena** also averred that at the time of signing the said agreement, the *ex parte* applicant disclosed to the Interested Party that the title had been charged to Co-operative Bank Ltd.; but he nevertheless undertook to discharge it. He averred that on 27th Sept 2012, the *ex parte* applicant discharged the title and immediately charged it to Kenya Commercial Bank Ltd to secure a loan **Ksh. 10,000,000/=** without informing the Interested Party.

12. He also averred that on 10th March 2014, the *ex parte* applicant purported to terminate the contract and refund the amount paid retaining **10%** for breach of contract, but the Interested Party declined to take the money. He also averred that the *ex parte* applicant proceeded to sale the same land to a one **Zakayo Kimathi Mugambi** without informing the Interested Party. Lastly, he averred that the *ex parte* applicant has not demonstrated that the National Police Service acted in excess of its powers or contravened the Constitution.

Interested Party's Replying Affidavit.

13. The Interested Party swore the Replying Affidavit dated 5th April 2018. He averred that he is the complainant in Criminal case number **451** of 2017, and that on 29th August 2012, he entered into a sale agreement with the *ex parte* applicant and the said **Mr. Maingi**. He averred that pursuant to the agreement, he was to purchase their interest and developments erected on **L.R. No. 12672/51** at an agreed purchase price of **Ksh. 16,000,000/=**. He averred that he undertook to pay a further sum of **Ksh. 8,000,000/=** to **Mr. Maingi** for the developments, and that, pursuant to the agreement he paid **Ksh. 7,500,000/=** to the *ex parte* applicant and took possession of the property, and with the approval of the *ex parte* applicant, he fenced the property and continued with the construction.

14. He further averred that notwithstanding the foregoing, he discovered that on 27th September 2012, barely a month after the aforesaid agreement, the *ex parte* applicant registered a charge over the property in favour of Kenya Commercial Bank Ltd. to secure a loan of **Ksh. 10,000,000/=** and that he did not disclose to the bank about the said agreement or the fact that he had already taken possession. He averred that as he attempted an amicable settlement, he discovered that the *ex parte* applicant had sold and transferred the property to a one **Zakayo Kimathi Mungania**, hence, he reported to the CID on 13th October 2016 who undertook investigations and a decision to charge the *ex parte* applicant was arrived at. He averred that the land was no longer registered in the *ex parte* applicants name, yet he continued receiving instalments from him, and that save for making the complaint to the CID, he had no role in the decision to prosecute the *ex parte* applicant. He averred that the *ex parte* applicant seeks to curtail the powers of the State to prosecute under Article 157 of the Constitution and that the *ex parte* applicant does not qualify for the orders sought.

15. Counsels for the *ex parte* applicant and the Interested Party filed written submissions. However, **Mr. Makori** and **M/s Spira** for the Respondents informed the Court that they did not wish to make submissions.

Issues for determination.

16. Upon analysing the facts presented by the parties herein and the submissions filed, I find that only one issue falls for determination, namely, whether or not the *ex parte* applicant has demonstrated any grounds to qualify for the orders sought.

17. **Mr. Erick Mutua**, counsel for the *ex parte* applicant submitted that the High Court has jurisdiction to interfere if the decision to charge amounts to abuse of powers, and that the purpose of Judicial Review is to ensure public bodies are accountable to the law.^[2] He argued that the Court has power to prohibit continuation of criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation.^[3]

18. **Mr. Mutua** also argued that the Constitution guarantees the right to a fair administrative action and upon violation, the High Court has powers to invoke its judicial Review powers under Article 23 (3) (f) of the Constitution. Also, he argued that one of the duties of the Court is to determine whether public power has been exercised lawfully^[4] and that the power to investigate must be exercised responsibly, in accordance with the laws of the land and in good faith.^[5] He submitted that the *ex parte* applicant has provided documentary evidence to show that the criminal justice system is being used to assist the complainant in a purely civil matter.^[6]

19. Counsel for the Interested Party submitted that the Police have a duty to commence investigations once a complaint is made^[7] and that the Court ought not usurp the constitutional and statutory mandate of the police to investigate. He submitted that for the applicant to succeed, he must demonstrate that the investigations are laced with ulterior motives and that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence.^[8] He argued that ulterior motive has not been established. He also cited the independence the DPP under Article 157 of the Constitution and argued that the constitutional discretion of the DPP ought not to be lightly interfered with.^[9]

20. Lastly, he also submitted that Judicial Review proceedings seek to question the process used to arrive at certain decisions and no single ground has been shown to warrant the orders sought.^[10]

21. A special feature of the Constitution of Kenya, 2010 is the establishment of an independent office of the DPP whose independence is provided under Article 157 (10) of the Constitution which declares that the DPP shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his powers or functions, shall not be under the direction or control of any person or authority.

22. This position is replicated in Section 6 of the Office of the Director of Public Prosecutions Act^[11] which provides that pursuant to Article 157 (10) of the Constitution, the Director of Public Prosecutions shall- (a) not require the consent of any person or authority for the commencement of criminal proceedings; (b) not be under the direction or control of any person or authority in the exercise of his powers or functions under constitution, this Act or any other written law; and (c) be subject only to the Constitution and the law.

23. The DPP is not only required to act independently in the exercise of his functions, but also ought not to be perceived to be acting under

the direction or instructions or instigation of any other person. The decision to institute or not institute criminal proceedings is a high calling imposed upon the DPP by the law and must be exercised in a manner that leaves no doubt that the decision was made by the DPP independently. The prosecutor is required to act with diligence and promptness to investigate, litigate, and dispose of criminal charges, consistent with the interests of justice and with due regard for fairness, accuracy, and rights of the accused, victims, and witnesses. Where the decision is surrounded by doubt or even mere reasonable suspicion that an interested party has a hand in the prosecution, such a decision cannot be allowed to stand.

24. A clear reading of the architecture of Article 157 of the Constitution leaves no doubt that the DPP is required to not only act independently, but to remain fiercely so. It is also important to mention that under Article 245 (4) (a) of the Constitution, "*no person may give a direction to the Inspector General with respect to the investigation of any offence or offences.*" Just like the constitutionally guaranteed independence of the DPP, this provision is aimed at ensuring that investigations are undertaken independently.

25. The issues presented in these proceedings are a direct invitation to this Court to determine the circumstances under which the High Court in exercise of its vast jurisdiction conferred upon it by the Constitution can halt, stop, prohibit or quash a criminal prosecution mounted against a citizen. It is common ground that the Office of the Director of Public Prosecutions (DPP) is a constitutional office which plays a vital role in the administration of justice in criminal matters. The Constitution vests the DPP with the sole Authority, power and responsibility to exercise control over the prosecution of all criminal matters except the institution of cases at the Court? Martial. [\[12\]](#)

26. A fair and effective prosecution is essential to a properly functioning criminal justice system and to the maintenance of law and order. Individuals involved in a crime – the victim, the accused, and the witnesses – as well as society as a whole have an interest in the decision whether to prosecute and for what offence, and in the outcome of the prosecution. In short the proper and effective administration of the criminal justice system is a matter of great public interest.

27. There are general principles which should underlie the approach to prosecution. The DPP must at all times uphold the rule of law, the integrity of the criminal justice system and the right to a fair trial and respect the fundamental rights of all human beings to be held equal before the law, and abstain from any wrongful discrimination.

28. Fundamentally, the primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to seek conviction. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion not to pursue criminal charges in appropriate circumstances. The DPP is required to protect the innocent and to seek conviction of the guilty, and also to consider the interests of victims and witnesses. The DPP has an obligation to respect the constitutional and legal rights of all persons, including suspects and accused persons and should avoid any appearance of impropriety in performing the prosecution function.

29. Also, one key consideration to guide the DPP in instituting court proceedings is to advance or protect public interest as opposed to private interest. The decision to prosecute or not to prosecute is of great importance. It can have the most far-reaching consequences for an individual. Even where an accused person is acquitted, the consequences resulting from a prosecution can include loss of reputation, disruption of personal relations, loss of employment and financial expense, in addition to the anxiety and trauma caused by being charged with a criminal offence.

30. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system. For victims and their families, a decision not to prosecute can be distressing. The victim, having made what is often a very difficult and occasionally traumatic decision to report a crime, may feel rejected and disbelieved. It is therefore essential that the prosecution decision receives careful consideration.

31. Courts have an overriding duty to promote justice and prevent injustice. From this duty there arises an inherent power to 'stay' an indictment (or stop a prosecution) if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court or infringement of a citizens' fundamental rights.

32. Abuse of process has been defined as something so unfair and wrong with the prosecution that the court should not allow a prosecutor to proceed with what is, in all other respects, a perfectly supportable case. [\[13\]](#) Whether a prosecution is an abuse of court process, unfair, wrong or a breach of fundamental rights, it is for the court to determine on the individual facts of each case.

33. It is admitted that the *ex parte* applicant sold the property in question to the Interested Party, and that he received part payment of the purchase price, and his partner received money for the developments. It is alleged that the *ex parte* applicant charged the title to the property for Ksh. 10,000,000/= while the transaction was in progress and or before completion. It is also admitted that the *ex parte* applicant sold the same property to another person and transferred it. The *ex parte* applicant states that he sold the property after the Interested Party defaulted in payment despite being given a cancellation notice. The prosecution is premised on a complaint by the Interested Party arising from the said sale. Upon investigations the police preferred the offence of obtaining money by false pretences.

34. It is not for this Court to determine the veracity or to weigh the strength of the evidence or accused persons defence. That is a function for the trial court hearing the criminal trial. This court can only intervene if there are cogent allegations of violation of Constitutional Rights or threat to violation of the Rights or in clear circumstances where it is evident that the accused will not be afforded a fair trial or the right to a Fair Trial has been infringed or threatened or where the prosecution is commenced without a factual basis.

35. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system. It is therefore essential that the prosecution decision receives careful consideration in a case seeking to prohibit the trial.

36. Whether a prosecution is an abuse of court process, unfair, wrong or a breach of fundamental rights, it is for the court to determine on the individual facts of each case. The concept of a fair trial involves fairness to the prosecution and to the public as well as to the accused.

[14]

37. The inherent jurisdiction of the court to stop a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances.^[15] The essential focus of the doctrine is on preventing unfairness at trial through which the accused is prejudiced in the presentation of his or her case or where there is clear breach of fundamental rights to a fair trial. Courts should first consider whether or not there is anything in the trial to prevent 'a fair trial' and if there is, then the court ought to stop the prosecution.

38. The high court will only prohibit or quash prosecutions in cases where it would be **impossible to give the accused a fair trial; or where it would amount to a misuse/manipulation of process** because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.^[16]

39. It is in public interest that prosecutions be mounted to uphold law and order and justice for the victims of crime. A criminal prosecution can also be stopped if it was commenced in the absence of proper factual foundation. The enquiry is whether there has been an irregularity or an illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted. ^[17]

40. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to a fair trial be jeopardized.^[18]

41. A criminal trial premised on unfair and questionable partisan investigations or a decision to charge arrived at unfairly and without any reasonable basis would in my view open the door to an unfair trial. The provisions of the Constitution conferring powers upon the High Court to grant such remedies as certiorari, prohibition, Judicial review, mandamus or permanent stay of proceedings are a device to advance justice and not to frustrate it. In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the Court or that the ends of justice require that the proceedings ought to be quashed.

42. The saving High Court's inherent powers, both in civil and criminal matters is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceedings in the interest of justice.

43. The High Court's inherent powers to quash, stay or prohibit criminal proceedings are wide as they imply the exoneration of the accused even before the proceedings have been culminated by way of trial. Noting the amplitude of these powers and the consequences which they carry, the Supreme Court of India^[19] revisited the law on the issue and held that '*these powers should be exercised sparingly and should not carry an effect of frustrating the judicial process.*'

44. The Supreme Court of India in the above case delineated the law in the following terms:- "*The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and in the rarest of rare cases and the Court cannot be justified in embarking upon an inquiry as to the reliability or otherwise of allegations made in the complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at uncalled for stage nor can it 'soft-pedal the course of justice' at a crucial stage of proceedings...The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of the power of the court, but the more the power, the more due care and caution is to be exercised in invoking these powers.*"^[20]

45. The leading case on the application of abuse of process remains *Bennet vs Horseferry Magistrates Court & another*.^[21] The court confirmed that an abuse of process justifying the stay of a prosecution could arise in the following circumstances:-

i. *Where it would be impossible to give the accused a fair trial; or;*

ii. *Where it would amount to a misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.*

46. The above categories are not mutually exclusive and the facts of a particular case may give rise to an application to stay involving more than one alleged form of abuse, and that staying a proceeding is a discretionary remedy and each case will depend on its set of facts and circumstances.

47. **Chris Corns**^[22] argues that the grounds upon which a stay will be granted have been variously expressed in the cases. These grounds can be classified under three categories:-

i. *When the continuation of the proceedings would constitute an 'abuse of process,'*

ii. *When any resultant trial would be 'unfair' to the accused, and*

iii. *When the continuation of the proceedings would tend to undermine the integrity of the criminal justice system.*

48. Criminal proceedings commenced to advance other gains other than promotion of public good are vexatious and ought not to be allowed to stand. The word “vexatious” means “harassment by the process of law,” “lacking justification” or with “intention to harass.” It signifies an action not having sufficient grounds, and which therefore, only seeks to annoy the adversary. The hallmark of a vexatious proceeding is that it has no basis in law (or at least no discernible basis); and that whatever the intention of the proceeding may be, its only effect is to subject the other party to inconvenience, harassment and expense, which is so great, that it is disproportionate to any gain likely to accrue to the claimant; and that it involves an abuse of process of the court.

49. Certiorari is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles. As stated earlier, the power to quash proceedings is immense since it amounts to exonerating a suspect before trial. Such power must be exercised with extreme care and caution. It is a power which the Court exercises only in exceptional cases where there is clear evidence of abuse of powers, abuse of discretion or absence of factual basis to mount the prosecution.

50. The applicant seeks an order of *Prohibition*. The writ of *Prohibition* arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation. However, as stated above, the illegality of the impugned decision has not been established.

51. The initial consideration in the exercise of the discretion to prosecute is whether the evidence is sufficient to justify the institution or continuation of a prosecution. This is a decision constitutionally vested on the DPP. Where discretion is conferred on the decision-maker the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully. [23] One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

52. The DPP is mandated to independently evaluate the evidence and make the decision to prosecute independently. When evaluating the evidence regard should be had to the following matters:- (a) *Are there grounds for believing the evidence may be excluded bearing in mind the principles of admissibility at common law and under statute?* (b) *If the case depends in part on admissions by the accused, are there any grounds for believing that they are of doubtful reliability having regard to the age, intelligence and apparent understanding of the accused?* (c) *Does it appear that a witness is exaggerating, or that his or her memory is faulty, or that the witness is either hostile or friendly to the accused, or may be otherwise unreliable?* (d) *Does a witness have a motive for telling less than the whole truth?* (e) *Whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute.* (f). *whether the alleged offence is of considerable public concern and (g) the necessity to maintain public confidence.* As a matter of practical reality the proper decision in most cases will be to proceed with a prosecution if there is sufficient evidence available to justify a prosecution. It has not been demonstrated that the decision to prosecute was influenced by irrelevant or extraneous considerations. Further, it has not been established that the DPP did not act independently in arriving at the decision to prosecute.

53. It is my view that the *ex parte* applicant has not presented any material to demonstrate that there was no sufficient evidence or factual basis to justify a prosecution. As stated earlier, it is not the function of this Court to weigh the veracity of the evidence. In my view, a prosecution should be instituted or continued if there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the accused. It has not been established that the facts presented in this case do not disclose an offence known to the law.

54. It is also my view that that in making his independent decision, the DPP should have regard to any lines of defence which is plainly open to, or has been indicated by, the accused and any other factors which in the view of the DPP could affect the likelihood or otherwise of a conviction. This assessment may be a difficult one to make, and of course, there can never be an assurance that a prosecution will succeed. Indeed, it is inevitable that some will fail. However, application of this test dispassionately, after due deliberation by a person experienced in weighing the available evidence, is the best way of seeking to avoid the risk of prosecuting an innocent person and pursuing a futile prosecution resulting in the unnecessary expenditure of public funds. Even though it is not for this Court to consider the defense of the accused person, which is basically a function of the trial Court, the core issue raised by the applicant is that the dispute is purely civil which I will address this shortly.

55. The Constitutional provision in Article 157 (10) of the Constitution 2010 ensures that the DPP has complete independence in his decision making processes, which is vital to protect the integrity of the criminal justice system because it guarantees that any decision to prosecute a person is made free of any external influences. This court respects this Constitutional imperative and will hesitate to interfere with the functions of the DPP unless there is clear evidence of breach of the Constitution or abuse of discretion to prosecute. As stated above, no evidence has been tendered to show that the DPP abused his discretion or powers under the Constitution. The court is inclined to respect the decision by the DPP not to prosecute for two reasons, (a) it is a constitutional imperative that the Constitutional independence of the independence of the DPP must be respected, (b) for the court to intervene, there must be clear evidence of breach of the Constitutional duty to act on the part of the DPP or abuse of discretion.

56. On the existence of civil cases, or whether the dispute in question is civil, Section 193A of the Criminal Procedure Code provides:-

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

57. Clearly, the mere pendency of the civil proceedings is not a bar to continuation of the criminal proceedings. The law permits parallel criminal and civil proceedings.

58. Applying the legal tests discussed above to the facts of this case, I find that there is nothing to show that the prosecution is unfair or an abuse of court process or abuse of police powers or judicial process. There is no material before me to demonstrate that the prosecution was undertaken without a proper factual foundation.^[24] It has not been demonstrated that the prosecution was conducted or is being undertaken without due regard to traditional considerations of candour, fairness, and justice, nor has it been shown that the trial is being conducted in a manner different from what is prescribed under the law, or that the trial is bad in law.^[25] In my view, the investigation was commenced after a complaint was lodged and the trial was commenced with a factual basis after the DPP independently evaluated the evidence. The allegations raised by the *ex parte* applicant are in my view matters to be dealt with by the trial Court. Further, the *ex parte* applicant has not demonstrated that his rights to a fair trial have been or will be infringed if the prosecution proceeds nor has he demonstrated that the prosecution will inherently violate his rights to a fair trial as enshrined in the constitution. Further, it has not been demonstrated that the proceedings were not conducted in public interest.

59. In view of my above reasoning, the conclusion becomes irresistible that the *ex parte* applicants Notice of Motion dated 21st April 2017 does not satisfy the threshold to warrant the orders sought.

60. Accordingly, I hereby dismiss the *ex parte* applicants Notice of Motion dated 21st April 2017 with no orders as to costs and direct that **Nairobi Chief Magistrates Criminal Case number 451 of 2017, Republic vs Charles Mwiti Mugambi** proceeds to hearing and determination.

Orders accordingly

Signed, Dated and Delivered at Nairobi this 16th day of July 2018

John M. Mativo

Judge

^[1] Cap 63, Laws of Kenya.

^[2] Counsel cited Michael Fordham, *Judicial Review Handbook*, 6th Edition, page 5.

^[3] Counsel cited *Kuria & 3 Others vs Attorney General* {2002}2 KLR 69 and *R vs Chief Magistrate Court, Mombasa ex parte Ganijee & Another*{2002 KLR 703.

^[4] Counsel cited *Pharmaceutical Manufacturers Association of South Africa vs Minister of Health*, Case CCT 31/99.

^[5] Citing *Commissioner of Police and Director of Criminal Investigation Department vs Kenya Commercial Bank & Others* {2012} eKLR.

^[6] Counsel also cited *George Joshua Okungu & Another vs the Chief Magistrate Court-Anti-Corruption Court, Nairobi & Another* {2014} eKLR.

^[7] Citing *R vs. Commissioner of Police and Another ex parte Michael Monari & Another* {2012} eKLR.

^[8] Citing *Lameck Okeyo & Another vs Inspector General of Police & 2 Others* {2016} eKLR.

^[9] *R vs A.G & 4 Others ex parte Kenneth Kariuki Githii* {2014} eKLR.

^[10] Citing *Hillary Kipruto Bett vs. DPP & 2 Others* {2016} eKLR.

^[11] Act No. 2 of 2013.

^[12] Article 157 of the constitution.

^[13] *Hui Chi-Ming vs R* {1992} 1 A.C. 34, PC.

^[14]*DPP vs Meakin* {2006} EWHC 1067.

^[15] See Attorney General's Reference (No 1 of 1990) [1992] Q.B. 630, CA; Attorney General's Reference (No 2 of 2001) [2004] 2 A.C. 72, HL.

^[16]*See Bennett v Horseferry Road Magistrates' Court and Another* [1993] 3 All E.R. 138, 151, HL; see also *R v Methyr Tydfil Magistrates' Court and Day ex parte DPP* [1989] Crim. L. R. 148.

^[17] Interpreting similar provisions in the constitution of South Africa, the South African Constitutional court (Nicholas AJA), *Shabalala & 5 others vs A.G of Transvaal & Another* CCT/23/94.

[18] *Natasha Singh vs. CBI* {2013} 5 SCC 741.

[19] See *Maharashtra vs Arun Gulab Gawali*.

[20] See *State of West Bengal & Others vs Swapan Kumar Guha & Others*, AIR, 1982, SC 949, *Pepsi Foods Ltd & Another vs Special Judicial Magistrate & Others* AIR 1998, SC 128 & *G. Ugar Suri & Ano vs State of U.P & Others*, AIR 2000 Sc 754.

[21] {1993} All E.R 138, 151, House of Lords.

[22] Chris Corns, *Judicial Termination of Defective Criminal Prosecutions: Stay Applications*, 76 *University of Tasmania Law Review*, Vol 16 No. 1, 1977.

[23] Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, *Statute Law in New Zealand*, 3rd edn. (2003), pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

[24] *Republic vs Attorney General ex-parte Arap Ngeny* HCC APP NO. 406 of 2001.

[25] Indian Case of *Pulukiri Kotayya vs Emperor* L.R. 74 Ind App 65.