REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

MISCELLANEOUS CIVIL APPLICATION NO. 85 OF 2017

(FORMERLY NAIROBI MILIMANI MISCELLANEOUS CIVIL APPLICATION NO. 102 OF 2017)

IN THE MATTER OF AN APPLICATION BY TAHERALI HASSAN ALI AND ZOEB EZZI FOR LEAVE TO APPLY FOR JUDICIAL REVIEW UNDER SECTION 8 &9 OF THE LAW REFORM ACT CHAPTER 26 OF THE LAWS OF KENYA AND ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010 LAWS OF KENYA

AND

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

AND

IN THE MATTER OF THE NATIONAL ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT, CHAPTER 387 LAWS OF KENYA

AND

IN THE MATTER OF THE OCCUPATION OF THE UNITS ERECTED ON ALL THAT PROPERTY KNOWN AS LAND REFERENCE NUMBER 12715/290

AND

IN THE MATTER OF CRIMINAL CHARGES PREFERRED AS AGAINST TAHERALI HASSAN ALI AND ZOEB EZZI IN KIBERA CRIMINAL CASE NUMBER 4174 OF 2016 (R VS TAHERALI HASSAN ALI & ANOR)

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY...1ST RESPONDENT

CHIEF MAGISTRATE'S COURT, KIBERA LAW COURTS.....2ND RESPONDENT

EXPARTE: TAHERALI HASSAN ALI AND ZOEB EZZI

JUDGEMENT

Introduction

1. By a Notice of Motion dated 9th March, 2017, the applicant herein seeks the following orders:

> **1) Certiorari to remove into the High Court for purposes of quashing the decision by the National Environment Management Authority to institute and undertake criminal proceedings against Taherali Hassanali and Zoeb Ezzi, purportedly as directors of Join Zein Investments Limited, at the Chief Magistrate Court, Kibera Law Court in Criminal Case No. 4174 of 2016 (R vs. Taherali Hassanali & Another) for charges, inter alia disclosed as "on diverse dates between 17th March and 10th August 2016 at around 10.00am in Syokimau area Mavoko sub County Machakos in the Republic of Kenya and being**

directors/employees of Join Ven Investments Limited were found discharging effluent into the environment without discharge licence thus contravening the said regulations" and other charges particulars of which relate to the devilment on ALL THAT PROERTY KNOWN AS Plot Number 12715/290 as contained in the charge sheet;

2) Certiorari to remove into the High Court for purposes of quashing the entire proceedings in Kibera Law Courts Criminal Case Number 4174 of 2016 (R vs. Taherali Hassanali & Another);

3) Prohibition directed at the National Environment Management Authority, the 1st Respondent, its agents and/or employees and the 2nd Respondent or such other Court restraining them from continuing, sustaining or proceeding with proceedings including but not limited to Kibera Law Courts in Criminal Case Number 4174 of 206 (R vs. Taherali Hassanali & Another) as against the Applicants herein with respect to any dealing related to ALL THAT PROERTY KNOWN AS Plot Number 12715/290;

4) THAT costs of this Application be provided for.

Applicants' Case

2. According to the applicants, at all material times relevant to these proceedings a company known as **Join Ven Investments Limited** (hereinafter referred to as "the Company") was the registered owner of All That Property Known As 1215/290, Syokimau (hereinafter referred to as **"the suit property"**) wherein residential apartments known as Three Sixty Degrees Apartments were erected and sold to third parties upon the issuance of Certificates of Occupation. It was disclosed that the management of the affairs of the units vests in a management company which has third party Purchasers constituted as shareholders. However, neither of the Applicants reside in the said units nor are they directors of the management company.

3. It was averred that the Purchasers had previously tried to use the regulators to pursue civil claims pending elsewhere but this Court in JR Number 205 of 2014 (*R-vs- Medical Officer of Health & Another*) intervened and quashed criminal proceedings taken out in circumstances respecting this development. However, warrants of arrests were issued against the Applicants in Kibera Criminal Case Number 4174 of 2016 (*R-vs- Taherali Hassanali & Another)* (hereinafter referred to as 'the Criminal Case") which were only lifted after the Applicants raised the issue of none service of the Summons and the issuance of the Decree in JR Number 205 of 2016 to the trial Court.

4. The Applicants averred that the trial Court has however declined to enforce the Decree and/or the spirit thereof and has instead subjected them to the vexing criminal trial their advancing age notwithstanding and that the matter was scheduled to come up in Court on 8th March 2017 hence the orders sought in this Application.

5. The Applicants however averred that no notice was issued to them before the 1st Respondent preferred the said Charges against them since as at the time of preferring the Charge, there was no NEMA License in existent to warrant the preferring of charges for breach thereof and neither was there a condition capable of being breached. It was therefore their position that the criminal charges and proceedings were being sustained for ulterior motives and only aimed at pursuing interests not envisaged by the ***Environmental Management and Coordination Act*** (hereinafter referred to as "the Act").

6. It was the applicants' position that the Company has lawfully regularized the issues raised and had been issued with requisite documentation and in fact Certificate of Occupation was issued by the County Government. Further, the Company had always had NEMA Licenses for its projects, the suit property inclusive. Based on legal advice, it was deposed that the 1st Respondent cannot prefer charges against proponents on basis of an expired Environment Impact Assessment License. Accordingly, the summons issued and the intended criminal proceedings were fraught with impropriety for the following reasons:

a) That the Applicant/its directors are not the proper accused persons insofar as they do not own nor occupy the units on the suit property.

b) The entirety of the 1st Respondent's decision to institute criminal proceedings against the Applicant's directors is, on the whole, irrational, unreasonable and will lead to an absurd result.

c) The 1st Respondent has wrongfully exercised its discretion by electing to prosecute the Applicant for the achievement of a collateral purpose which is to insulate the real manager of the units erected on the suit property from discharging its duties to the residents from whom they collect service charge.

7. The Applicants lamented that if they submit to the criminal jurisdiction in the manner proposed, they, having over the years established themselves and companies they hold interests in as reputable players in real estate within this jurisdiction, would stand to suffer irreparable loss and damage which may not be remedied by an order of this Honourable Court or an acquittal.

8. On 21st March, 2017, the Court granted leave to the applicant to file and serve a supplementary affidavit within 7 days. There is a further affidavit sworn on behalf of the applicants on 2nd May, 2017 which was clearly out of time. From the submissions filed herein, it seems that the applicant went ahead and filed what they call Further Supporting Affidavit sworn by the 1st *ex-parte* Applicant on 12th June 2017. That affidavit is not on record and even had it been so as the issue of its irregularity was raised on behalf of the Respondents as being prejudicial to the Respondent's case having been filed after submissions had been filed. Accordingly, I will not consider such a document filed in flagrant contravention of the directions of the Court in a manner intended to prejudice the opposite arties' side. However as regards the further affidavit as no issue was taken with respect to its late filing, I will treat the same as having been properly filed notwithstanding the fact that it was filed outside the period prescribed by this Court's directions.

9. In the said further affidavit it was reiterated that the Respondent did not notify the applicants of the matters prompting the charges levelled against the Applicants and neither did the Respondent seek to establish whether the particulars informing the said charges were factual. While repeating the allegations made in the verifying affidavit, it was averred that the suit properties having been sold in 2014 to third parties who had since take possession thereof, the affairs of the units in question including the management of the sewer plants, payment of utility bills were managed by the said third parties upon the issuance of Certificate of Occupation. The said management vested in the aforementioned management company, the Three Sixty Phase II Management Limited.

10. It was therefore the applicants' case that they could not possibly be responsible for the discharge of effluent into the environment without an effluent discharge licence in the year 2006 when the units on the suit properties were owned and occupied by Third Parties and managed by the said company. It was disclosed that contrary to what was stated in the Charge Sheet, the development of the suit properties was affected with all the regulatory licences, one issued by the 1st Respondent and that no proceedings were ever taken out by the Respondents for acts committed in breach of the said licence during its pendency.

11. It was contended that the conduct of the 1st Respondent remains unreasonable and not aimed at regulating the environment but punishing a key player within the real estate industry.

12. It was submitted on behalf of the ex parte applicant that the charge sheet was defective as the charge and particulars are vague and did not set out the particulars of the property from which the discharge is made and the nature of discharge. It was submitted that there is no offence known as discharging effluent into the environment under Regulation 6(a) and that the offence cannot be committed where there is no body of water since Regulation 6(a) does not substitute environment generally with body of water. It was therefore submitted that the particulars set out in the charge sheet do support the humble submissions herein that the offence the Applicants are being subjected to are not known under the Regulations. In this respect the applicants relied on ELRC JR Number 5 of 2015 - **R -vs- Deputy Commissioner for Labour & Others ex p Kevin Ashley & Others, Barclays Bank of Kenya vs City Council of Nairobi [2006] eKLR** and **Henry O. Edwin vs Republic [2005] e KLR.**

13. It was therefore submitted that the decision to charge the ex parte Applicant for non-existent offences amounts to gross abuse of the process of Court and that this Court has jurisdiction to halt the criminal proceedings by way of prerogative orders of Certiorari and prohibition.

14. It was submitted that unlike the Director of Public Prosecution, the exercise of the prosecutorial powers under the Environment Management Coordination Act Number 8 of 1999 has to be sparing and to balance the right to utilize property and that of the environment. The Act is more tailored towards remedial and precautionary measures rather than prosecutorial remedies. So that Orders issued by NEMA are usually called restoration and/or improvement Notices. They require of a party to undertake certain activities that would enhance the quality of the environment. It is only after the failure to comply with the Restoration Order that a decision to prosecute can be considered.

1st Respondent's Case

15. The application was opposed by the 1st Respondent. According to the 1st Respondent, the reasons put forth by the *ex parte* applicants in their application for judicial review are full of *mala fides*, dishonest and intended to hoodwink this Court into saving them from their imminent trial in Kibera Cr 4174 of 2016. It was the 1st Respondent's case that the ex parte applicants had misled this court that the impending prosecution being Kibera Cr 4174 of 2016 is related to the occupation of that property they describe as LR No. 12715/290 yet the ex parte applicants are being prosecuted by virtue of their culpability arising from the properties LR No. 12715/288 and LR No. 12715/289 registered in the name of Joinven Investments Limited. It was disclosed that by this very misrepresentation, the *exparte* applicants have annexed to their affidavit, a lease of the property LR .No 12715/290 showing that they had transferred the interest in that property way back in the year 2011 and thus they could not have been culpable for offences arising from the said property.

16. It was further averred that the ex parte applicants had attempted to put forth another deception aimed at avoiding culpability where they stated in their affidavit that they are not directors of Joinven Investements Limited and further that they were not in charge of the affairs of the 360 degrees Management Company Limited. It was however averred that on 4th May 2015, Joinven Investments Limited (hereafter Joinven) submitted an Environmental Impact Assessment (EIA) Report to NEMA for the project 'Proposed Sewerage Treatment Plant at 360 degrees Housing Scheme' which report was submitted by Joinven as the proponent by their environmental expert namely M. Ndung'u and a declaration and certificate signed by one **Bernard Odhiambo** as project Manager for the proponent. Accordingly, Joinven paid the requisite EIA processing fee of Kshs 10,000/- and an official receipt No 41908 issued along with the 1st Respondent's acknowledgement of submission of an EIA Report. It was averred that the EIA report in its brief/executive summary at page 4 thereof clearly states that the project site was on LR 12715/288 and 289 within Syokimau in Mavoko Sub County of Machakos County. The 1st Respondent was therefore lost as to why the *ex parte* applicants mentioned of LR 12715/290 in these proceedings, a fact which the 1st Respondent attributed to *malafides.*

17. It was deposed that the report was then distributed to various lead agencies as required by the law for purposes of collecting their views on the project and on 24th June 2015, it office received a comment from the Water Resources Management Authority (WARMA) raising concerns that were in the nature of an objection. On 13th July 2015, the 1st Respondent wrote to Joinven communicating the issues that it had received and that required to be addressed by Joinven and the latter responded by a letter dated 17th July 2015. Again, on the 25th August 2015, the 1st Respondent wrote to Joinven seeking further clarification of issues that were outstanding and again Joinven responded by a letter dated 31st August 2015.

18. It was the 1st Respondent's case that having been satisfied with the response by Joinven, the 1st Respondent proceeded to issue an EIA Licence for the proposed sewerage treatment plant as sought by Joinven on 28th September 2015. Subsequent to the issuance of the EIA licence, the Respondent's office received legion complaints from residents of the 360 degrees apartments and friends of the environment to the effect that there was discharge of raw and untreated effluent. Accordingly, the 1st Respondent made several inspections where it met representatives of the 360 degrees management company and representatives of Joinven where deliberations on improvement of the issue

was discussed. It was disclosed that at one point during the aforesaid deliberations, Joinven was represented by **Steve Luseno Advocate** (on record for them herein).

19. The Respondent averred that on the 18th July 2016, Joinven presented fake laboratory tests of samples from their sewerage treatment plant and to which the 1st responded by a letter dated 4th August 2016. However earlier in the month of March 2016, the 1st Respondent had conducted a laboratory test of samples drawn from the sewerage treatment plant operated by joinven and the results were very worrying.

20. Upon realising that the said meetings were not bearing fruit, the 1stRespondent issued a statutory Environmental Restoration Order addressed to Joinven requiring among other legion non compliances, that they ensure the functionality of the sewerage treatment plants for phase I, II and III. The said Restoration Order was served and received at King's Developers Limited where the primary *exparte* applicant is a resident director and they stamped receipt in acknowledgment. It was therefore averred that the *ex parte* applicants cannot plead lack of notice.

21. According to the 1st Respondent, it is not in doubt that the directors of Joinven Investments Limited are **Taherali Hassan Ali** and one **Zoeb Ezzi** as they have admitted as much in their affidavit. Further, it is not in doubt that the ***Environmental Management and Coordination Act***, at section 145, extends the liability for environmental offences to directors of corporations.

22. According to the 1st respondent in light of all the foregoing and the obvious adamant character of Joinven, it instituted the charges or proceedings being Kibera Cr 4174 of 2016 which the *exparte* applicants now want to have quashed. The 1st Respondent however contended that it cannot lie to the *exparte a*pplicants that prosecuting them for the offences they have been charged with, is unreasonable or irrational to warrant judicial review orders.

23. The 1st Respondent however averred that it was not aware of and was never a party to the proceedings in ***JR 205 of 2014 Rep vs Medical Officer of Health.***

24. It was disclosed that the *exparte* applicants in responding to warrants of arrest issued in Kibera Cr 4174 of 2016, instructed their advocate **Steve Luseno** to have the warrants lifted '**In their absence'** even before plea has been taken. The 1st Respondent deposed that since institution of Kibera Cr 4174 of 2016, the *exparte* applicants as the accused persons have refused to take plea and now even want to have the proceedings quashed.

25. It was therefore the 1st Respondent's case that these proceedings are but an abuse of the court process and that the stay in force should be vacated forthwith with an order that the *exparte* applicants proceed to take plea immediately.

28. With respect to the said Certificate of Occupation issued by the County Government of Machakos, it was averred that a certificate of occupation if at all issued, does not in any way absolve its holder from complying with other legal sectoral requirements. In this case Joinven has not always had its NEMA issued licences as alleged and that this case in particular relates to the failure to tale out an Effluent Discharge Licence as required by law. To the 1st Respondent, Environmental Impact Assessment (EIA) licences do not expire as wrongly advised by the applicants'' advocates and that EIA licence are living documents.

27. The 1st Respondent therefore asserted that the *exparte* applicants' notice of motion must therefore fail with costs.

28. It was submitted that while the ex parte applicants have pleaded that the taking of plea at the Kibera Cr 4174 of 2016 will embarrass and occasion them irreparable loss and damage, they have not explained how subjecting themselves to the due criminal process will subject them to damage.

29. Further, whereas the ex parte applicants have attempted to divert the charges against them while stating that the units erected on the suit property were sold off to 3rd parties and that consequently they cannot be liable, it was the ex parte applicants and not the 3rd parties that had the onus of setting up a sewerage treatment plant and this they commenced by setting up an Effluent Treatment Plant and applying for an Effluent Discharge Licence which could not issue due to irregularities and for which the ex parte applicants have been charged. According to NEMA, since the responsibility to set up a functioning sewerage treatment plant lies with the ex parte applicants squarely, it cannot lie to the *ex parte a*pplicants that prosecuting them for the offences they have been charged with, is unreasonable or irrational to warrant judicial review orders. It was contended that the ex parte applicants should be allowed to defend the criminal proceedings against them and this Court was urged not to interfere with the statutory mandate of the NEMA. In this regard the 1st Respondent relied on the decision of **Wendo, J** in **Peter Bogonko vs. NEMA(2006) eKLR** where it was held that:

> **"Under Section 69 (1) of the Act, NEMA in consultation with other lead agencies is charged with the duty of monitoring all environmental phenomena with a view to making an assessment of any possible changes in the environment and their possible impact or operation of any projects or activity with a view to determining its immediate and long term effects on the environment. The Court cannot curb NEMA's powers given by Statute."**

30. The 1st Respondent insisted that it is not and has never been a party to the proceedings that the *exparte* applicants refer to as ***JR 205 of 2014 Rep vs Medical Officer of Health*** which in its view were presented to the Kibera Court to mislead as they were then touted as court orders but were merely diversionary and nothing turns on them.

31. While reiterating the averments in the replying affidavit, the 1st Respondent relied on the ***Supreme Court Practice 1997*** para 53/1/4/6 and the case of **Chief Constable of North Wales Police vs. Evans 1982 1 WLR 155 at page 1160** as stating that the remedy of Judicial Review is concerned with the reviewing, not the merits of the decision in respect of which the application for Judicial Review is made, but

the decision making process itself. It was contended that NEMA and the 2nd respondent have acted well within their mandates and that there is no instance of want of jurisdiction or excesses in the nature of irrationality, irregularity or impropriety. It was therefore its position that *exparte* applicants' notice of motion is without merit and must therefore fail with costs.

32. It was the Respondent's case that the Applicants failed to demonstrate that the Respondents had not acted independently or have acted capriciously, in bad faith or abused the legal process in a manner to trigger the High Court's intervention. According to the Respondent, upon conclusion of investigation by the 2nd Respondent, the DPP analyzed the evidence presented and upon being satisfied on the sufficiency of evidence made a decision to prosecute, without any bias, influence and in an independent manner giving due regard to Article 157 of constitution and principles enunciated thereunder and the ***Office of the Director of Public Prosecution Act*** (No. 2 of 2013).

33. The Court was therefore urged not to usurp the constitutional mandate of the Director of Public Prosecution conferred pursuant to Article 157 of the Constitution and they relied on **Kenya Commercial Bank Limited & 2 others vs. Commissioner of Police and Another, Nairobi Petition No. 218 of 20122 (2013) eKLR,** where **Majanja J.** held that:

> **"the office of the Director of Public Prosecution and Inspector General of the National Police Service are independent and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within the limits provided by the law. But these offices are subject to the Constitution and the Bill of Rights contained therein and in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under the constitution".**

34. As to the circumstances under which the court will grant an order prohibiting the commencement or continuation of Criminal Proceeding, the Respondents relied on **George Joshua Okungu and Another vs. Chief Magistrate Court Anti Corruption Court at Nairobi and Another (2014) eKLR** as well as **Republic vs. Commissioner of Police and Another exparte Michael Monari & Another (2012) KLR.**

35. It was the Respondents' position that the prayers in the Application for determination thereof require the court to analyze and examine facts and evidence on the basis of which the guilt, innocence or otherwise of the Applicant shall be determined and the proper forum for consideration and resolution of the factual and evidentiary matter is the trial court and relied on W**illiam Ruto & Another vs. Attorney General HCC No. 1192 of 2004** where it was held that analysis of evidence should be done at the trial and not in the constitutional Court.

36. The Respondents therefore submitted that the Applicants failed to prove violation of his fundamental freedoms and rights and/or infringement of any law or regulation or abuse of discretion and breach of Rules of Natural Justice and the Application should therefore be dismissed with costs.

Determinations

37. I have considered the issues raised by the parties herein.

38. Before dealing with the issues raised herein, it is my view that the principles guiding the grant of the orders in the nature sought herein ought to be reiterated. 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. As judicial review proceedings are concerned with the process rather than merits of the challenged decision or proceedings the court is not entitled to make definitive findings on matters which go to the merit of the impugned proceedings. In determining the issues raised herein the Court will therefore avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial Court.

39. As has been stated by this Court before a judicial review Court is not concerned with the innocence or guilt of the applicant but rather with the fairness of the process which the applicant is being or has been subjected to. Where the Court finds that the process is unlawful or unfair, this Court has the duty to stop the same in its tracks. On other hand as long as the process is being carried out in a lawful and just manner, the mere fact that there is likelihood of an acquittal will not justify the Court in interfering. The demarcation between the two circumstances was clarified in **Meixner & Another vs. Attorney General [2005] 2 KLR 189,** where the Court of Appeal expressed itself as hereunder:

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

appellants would have caused the judicial review court to embark upon examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence and that is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court."

40. This Court however held in **Republic vs. Director Of Public Prosecution & Another Ex Parte Chamanlal Vrajlal Kamani & 2 Others [2015] eKLR** that:

> **"In my view, criminal proceedings ought not to be instituted simply to appease the spirits of the public yearning for the blood of its perceived victims. This is a country governed by the rule of law and any action must be rooted in the rule of law rather than on some perceived public policy or dogmas. The former has been branded an unruly horse, and when you get astride it, you never know where it will carry you. See Richardson vs. Mellish (1824) 2 Bing 229."**

41. As was held in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001**:

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

42. In the said case, the Court went on:

> **"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."**

43. It therefore follows that crimes must be punished and proved and that criminals must be dealt with expeditiously and decisively is not an option. A judicial system that is so porous that permits criminals to go scot-free is not worthy of its name. However, the process of arriving at the decision whether a person has committed a crime must in the words of Article 47 of the Constitution be expeditious, efficient, lawful, reasonable and procedurally fair. Anything less than that will not do.

44. Public outcry, for example, it is my view ought not to be the wind blowing the criminal process wave so that the tide of criminal prosecution is dictated by the direction the public wind blows. This was appreciated in **Dr. Christopher Ndarathi H Murungaru vs. Kenya Anti-Corruption Commission & Another Civil Application No. Nai. 43 of 2006 [2006] 1 KLR 77** in which the Court expressed itself in this fashion:

> **"Lastly, before we leave the matter, Professor Muigai told us that their strongest point on the motion before us is the public interest. We understood him to be saying that the Kenyan public is very impatient with the fact that cases involving corruption or economic crimes hardly go on in the Courts because of the applications like the one we are dealing with. Our short answer to Professor Muigai is this. We recognize and we are well aware of the fact that the public has a legitimate interest in seeing that crime, of whatever nature, is detected, prosecuted and adequately punished, the Constitution of the Republic is a reflection of the supreme public interest and its provisions must be upheld by the Courts, sometimes even to the annoyance of the public and the only institution charged with the duty to interpret the provisions is the High Court and where permissible, with an appeal to the Court of Appeal. Since the Kenyan nation has chosen the path of democracy rather than dictatorship, the Courts must stick to the rule of law even if the public may in any particular case want a contrary thing and even if those who are mighty and powerful might ignore the Court's decisions since occasionally those who have been mighty and powerful are the ones who would run and seek the protection of the Courts when circumstances have changed...The courts must continue to give justice to all and sundry irrespective of their status or former status."**

45. As a Court of law, all those who appear before it must feel that their rights will be protected no matter their status, political, social or economic standing. This must necessarily be so because as was held in **Masalu and Others vs. Attorney General [2005] 2 EA 165:**

> **"A Judge has to pass between the Government and the man whom the Government is prosecuting; between the most powerful individual in the community and the poorest and the most unpopular. It is of the last importance, that in the exercise of these duties he should observe the utmost fairness. The judicial department comes home in its effects to every man's side; it passes on his property, his reputation, his life, his all. It is to the last degree important that he should be**

rendered perfectly and completely independent with nothing to influence or control him but God and his conscience. The greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a dependent Judiciary."

46. Whereas the Court is alive to the fact that the prosecuting agencies are legally mandated to determine the cases which meet the threshold for criminal prosecution, and that it is a mandate which ought not to be interfered with lightly, as was held in **Paul Imison vs. Attorney General & 3 Others Nbi HCMCA No. 1604 of 2003**:

> **"I do not think that our Constitution which is one of a democratic state would condone or contemplate abuse of power...The Attorney General in some of his constitutional functions does perform public duties and if he were to be found wanting in carrying them out or failing to perform them as empowered by the Constitution or any other law, I see no good reason for singling him out and failing to subject him to judicial review just like any other public official. I find nothing unconstitutional in requiring him to perform his constitutional duties. A monitoring power by the court by way of judicial review would have the effect of strengthening the principles and values encapsulated by the Constitution. To illustrate my point, Judicial Review tackles error of law and unlawfulness, procedural impropriety, irrationality, abuse of power and in not too distant future, human rights by virtue of the International Conventions which Kenya has ratified. In exercising the Judicial Review jurisdiction the court would not be sitting on appeal on the decisions of the Attorney general, he will still make the decisions himself but the lawfulness, etc. of his decisions should be within the purview of the courts..."**

47. This Court therefore has the powers and the constitutional duty to supervise the exercise of the Respondent's mandate whether constitutional or statutory as long as the challenge properly falls within the parameters of judicial review. See **R vs. Attorney General exp Kipngeno Arap Ngeny** (supra).

48. In **George Joshua Okungu& another vs. Chief Magistrate's Court Anti-Corruption Court At Nairobi & Another [2014] eKLR** this Court cited with approval the holding in **Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323** and held:

> **"Whereas we appreciate the fact that the decision whether or not to prosecute the petitioners is an exercise of discretion this Court is empowered to interfere with the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable…"**

49. It is therefore important in my view for the Court to appreciate the principles guiding the judicial review relief in the field of criminal process and apply the same to the circumstances before it. In arriving at its decision however, the Court must avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial Court. Similarly, the Court in determining judicial review proceedings ought not to usurp the Constitutional and statutory mandate of the prosecutorial and the investigative agencies to investigate and undertake prosecution in the exercise of the discretion conferred upon them by the law and the Constitution. Therefore where there is no justification for interference the House of Lords in **Director of Public Prosecutions vs. Humphreys [1976] 2 All ER 497 at 511** cautioned that:

> **"A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval…If there is a power…to stop a prosecution on indictment in limine, it is in my view a power that should only be exercised in the most exceptional circumstances."**

50. 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, 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."**

51. Similarly 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."

52. Therefore 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 since judicial review proceedings are not concerned with the merits but with the decision making process.

53. 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 intended criminal proceedings t constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.

54. In this case the applicant's case is that they ought not to be charged with the offences in question since the property from where the effluent is alleged to be discharged known as Three Sixty Degrees Apartments were erected and sold to third parties upon the issuance of Certificates of Occupation. Accordingly, the management of the affairs of the units vests in a management company which has third party Purchasers constituted as shareholders and that neither of the Applicants reside in the said units nor are they directors of the management company.

55. In other words the ex parte applicants' case is that if any crime has been committed, it is not them who ought to be charged but the people under whom the management of the said units fall.

56. The 1st Respondent's case on the other hand is that the obligation to set up a sewerage treatment plant was the responsibility of the ex parte applicants and not the 3rd parties. This obligation, it was contended the ex parte applicants set out to discharge by applying for an Effluent Discharge Licence but which could not issue due to irregularities and for which the ex parte applicants have been charged. It was therefore the 1st Respondent's case that the responsibility to set up a functioning sewerage treatment plant lies with the ex parte applicants squarely.

57. It is clear that the parties herein have adopted diametrically opposed positions as regards who between the ex parte applicants and the 3rd parties had the responsibility of setting up an Effluent Treatment Plant. Obviously if it was the obligation of the 3rd parties, the ex parte applicants ought not to be liable. On the other hand if the duty to do so lies with the ex parte applicants then they cannot escape liability merely because they have parted with possession of the units in question. The long arm of the law would still follow them wherever they may go. However the determination as to who between the ex parte applicant and the 3rd parties are liable must be left for determination by the trial Court since to make such a determination in these proceedings would amount to this Court determining the guilt or innocence of the ex parte applicants. That is not the mandate of this Court exercising its judicial review jurisdiction.

58. It was further contended that there were defects in the charge sheet. Again the decision as to whether or not the charge sheet is defective must be dealt with by the trial Court and the appellate tribunal. Where the applicants have not even taken a plea, to terminate the proceedings by way of judicial review when it is not unknown that charge sheets may well be amended would amount to this Court wrongfully invoking its judicial review powers. In other words there exist more appropriate and efficient legal avenues for addressing the issue of the defect in the charge sheet. In that event, such alternatives ought to be explored first.

59. A distinction must be made between a situation where the particulars in the charge sheet do not disclose any known offence and where they are simply vague. In the former situation, as was held by **Wendoh, J** in **Barclays Bank of Kenya vs City Council of Nairobi [2006] eKLR:**

"the applicant has ably demonstrated that the offence with which the applicant was charged is non –existent and the charge sheet is therefore incompetent and fatally defective… the charge sheet and proceedings in case number 1509 (A)/05 are amenable to being quashed and I hereby order them quashed by Order of Certiorari."

60. In this case, the basis for the ex parte applicants' contention that the facts do not disclose any offence is the non-existence of a body of water. In other words the offence cannot be committed where the allegation is that the effluent was discharged into the environment. Regulation 6(a) of the ***Environmental Management and Co-Ordination (Water Quality) Regulations, 2006*** under which the charges were framed states that:

No person shall discharge, any effluent from sewage treatment works, industry or other point sources into the aquatic environment without a valid effluent discharge license issued in accordance with the provisions of the Act.

61. The charges were however framed to the effect that the applicants were guilty of discharging effluent into the environment. It is clear that what was omitted was the word "aquatic". In my view, where the particulars are just vague, that is not a basis for terminating the said proceedings. Whereas such a situation may well lead to an acquittal of the accused, it certainly is no basis for quashing the proceedings before they even start. To my mind the mere omission to insert the word "aquatic" does not justify the serious orders sought herein. If there was no body of water, the ex parte applicants may well be entitled to an acquittal, but that is a matter for the trial court.

62. It is therefore my view that there is no evidence presented before me to satisfy me that the intended action against the ex parte applicant is informed by ill-motives. 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. Judicial review or prerogative writs as they were known in the past, it has been held are orders of serious nature and cannot and should not be granted lightly. They should only be granted where there are concrete grounds for their issuance. It is not enough to simply state that grounds for their issuance exist; there is a need to lay basis for alleging that there exist grounds which justify the grant of the said orders.

63. 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."**

64. The Applicants lamented that if they submit to the criminal jurisdiction in the manner proposed, they, having over the years established themselves and companies they hold interests in as reputable players in real estate within this jurisdiction, would stand to suffer irreparable loss and damage which may not be remedied by an order of this Honourable Court or an acquittal. This contention was dealt with in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** where it was appreciated that:

> **"The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial..."**

65. I am also in agreement with the sentiments expressed in **Dream Camp Kenya Ltd vs. Mohammed Eltaff and 3 Others Civil Appeal No. 170 of 2012** that:

> **"Every litigation is inconvenient to every litigant in one-way or another. Also no one in his right senses enjoys being sued and ipso facto no one cherishes litigation of any nature unless it is absolutely necessary. With respect, we accept litigation is expensive and no litigant would enjoy the rigours of trial. The aftermath of vexatious and frivolous litigations is normally taken care of by way of costs. The discomfort of litigation would not certainly render the success of the intended appeal nugatory if we do not grant the application sought. If the learned Judge is eventually found wrong on appeal, and the applicant succeeds in its intended appeal, then the orders so made by the learned Judge would be quashed and the applicant would be compensated for in costs."**

66. As was held in **Jago vs. District Court (NSW) 106**:

> **"..it cannot be said that a trial is not capable of serving its true purpose when some unfairness has been occasioned by circumstances outside the court's control unless it be said that an accused person's liability to conviction is discharged by such unfairness. This is a lofty aspiration but it is not the law."**

67. It has not been alleged that there is a risk that as a result of the adverse publicity to be generated by the intended criminal proceedings, the applicants' right to fair trial is threatened. In fact no allegation has been made against the trial Court along those lines and in these proceedings no orders are expressly sought against the trial Court. The trial Court is in fact yet to commence the criminal proceedings involving the applicants. It cannot therefore be successfully argued that the ex parte applicants would be unduly prejudiced by the intended criminal charges. Mere discomfort and inconvenience, it is my view has never been the basis for terminating criminal proceedings otherwise no criminal proceedings would ever be undertaken.

68. Whereas it may well be true that the exercise of the prosecutorial powers under the ***Environment Management Coordination Act*** Number 8 of 1999 has to be sparingly and that there is a need to balance the right to utilize property and that of the environment and that remedial and precautionary measures would be more appropriate than prosecutorial remedies, the decision as to which mode of enforcement is more appropriate ought to be left to the agencies concerned unless it is shown that in the exercise of their discretion, the agencies are acting unreasonably or mala fides. In this case the ex parte applicants' case is that they are under no obligation to comply with the notices issued by NEMA. Therefore to contend that NEMA ought to have first issued them with restoration and/or improvement Notices before considering prosecution amounts, with due respect to blowing hot and cold at the same time.

69. In the instant case, the Applicants have failed to discharge the burden and must be ready to face their trial as was stated by **Lenaola, J** in the case of **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".**

70. Consequently the Notice of Motion dated 9th March, 2017 fails and is dismissed with costs to the 1st Respondent.

71. It is so ordered.

Dated at Nairobi this 4th day of July, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nzioka for Mr Luseno for the ex parte applicants

CA Geoffrey