REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISC. APPLICATION NO. 301 OF 2015

HANNAH WAMBUI GITHIRE .....APPLICANT

AND

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

THE PRINCIPAL MAGISTRATE, KIBERA.....2ND RESPONDENT

THE INSPECTOR GENERAL,

OF THE NATIONAL POLICE .....3RD RESPONDENT

AND

WINNIE WANJIRU KARIUKI…….……..INTERESTED PARTY

JUDGEMENT

1. By a Notice of Motion dated 24th November, 2015, the ex parte applicant herein, **Hannah Wambui Githire,** seeks the following orders:

1

(a). An order of certiorari directed at the 1st and 2nd Respondents quashing the charge sheet and the entire criminal proceedings against the Application (sic), in Kibera Criminal Case No. 135 of 2013 – Republic vs. Hannah Wambui Githire.

(b). An order of prohibition directed at the 1st and 2nd Respondents restraining them from undertaking any form of criminal proceedings against the applicant on the basis of the same facts as those alleged in Kibera Criminal Case No. 135 of 2013 – Republic vs. Hannah Wambui Githire.

(c). An order of prohibition directed at the 1st and 2nd Respondents prohibiting the court from conducting or continuing any form of proceedings in Kibera Criminal Case No. 135 of 2013 – Republic vs. Hannah Wambui Githire or any other case founded on the same facts.

(d). order of prohibition directed at the 3rd Respondent prohibiting the 3rd Respondent or any other officers subordinate to him, from arresting, harassing, intimidation (sic) or

in any other way threatening the Applicant on the basis of the same facts as those set out in Criminal Case No. 135 of 2013 – Republic vs. Hannah Wambui Githire.

2. This Court do ALL proceedings in Kibera Criminal Case No. 135 of 2013 – Republic vs. Hannah Wambui Githire.

3. Costs of and incidental to this application be provided for.

4. Such further and other relief that the Honourable Court may deem just and expedient to grant.

2. On 2nd August, 2018, **Nyamweya, J** directed the applicant to serve the 1st Respondent with submissions and hearing notice and also granted leave to the 2nd and 3rd Respondents to file their submissions and fixed the matter for hearing on 11th September, 2018. Those directions were given in the presence of **Mr Munawa** who was holding brief for **Mr D. K Thuo** or the applicant and **Mr Odhiambo** for the 2nd and 3rd Respondents. When the matter was called out on the hearing date, only **Mr Odhiambo** was present. Having confirmed from the record that 1st and 3rd Respondents were duly served and as the applicant had filed submissions which her counsel had indicated she was relying on, I proceeded to give a date for judgement.

3. According to the applicant, she is married to **Job Waweru Kariuki** and there is a civil dispute between her said husband and his sisters, **Ann Wambui Karioki** and **Winnie Wanjiru Karioki** in ELC No. 323 of 2013 relating to ownership of Plot No. 1 Kanyariri Township which case is still pending awaiting determination.

4. The applicant is however the accused in Kibera Chief Magistrates Court No. 135 of 2013 (hereinafter referred to as "the criminal case"). It was deposed that in the charge sheet the Defendants in the ELC No. 323 of 2013 allege inter alia that the applicant damaged the buildings on the said plot and stole some material therefrom. It was however contended that since the applicant's husband also claims ownership of the subject property, the said charges cannot stand and that the motive for lodging a complaint to the police for a purely civil transaction was meant to coerce the applicant's husband to abandon his claim in the said ELC No. 323 of 2013. It was therefore the applicant's contention that the said charges are merely trumped up to aid the complainant achieve the said objective.

5. It was contended that the complainant is using the 1st and 2nd Respondents to draw up charges and have the applicant arraigned in court for an improper motive hence the said charges should not be allowed to stand. Based on legal counsel the applicant asserted that the use of criminal proceedings to force the settlement of or performance of a civil obligation amounts to abuse of the Court process and should not be entertained as the same are brought mala fides and should be quashed by the court in the exercise of its supervisory jurisdiction and issue an order of prohibition.

6. In the submissions filed on behalf of the applicant, the applicant reiterated the foregoing and averred that the Court has held that there should not be two concurrent legal proceedings over the same person and/or subject matter.

7. The application was opposed by the interested party who averred that the said criminal case was commenced on 14th January, 2013 when the applicant appeared in court in relation to her criminal conduct on 1st December, 2012. However the ELC matter was commenced by **Job Waweru Kariuki**, the applicant's husband, on 7th March, 2013 hence the criminal case preceded the civil case. The deponent therefore denied that the primary motive of lodging the complaint was for purely civil transaction against the applicant to coerce her husband to abandon his said claim.

8. According to the interested party, perusal of the charge sheet shows that the complainant in the criminal case is the Town Council of Kikuyu (now defunct) and the charge is giving false information to a person employed in the public service contrary to section 129(a) of the ***Penal Code***.

9. Based on legal counsel the interested party averred that for a person to succeed in an application for orders of certiorari, the application for leave must be sought not later than six (6) moths after the date of the proceedings sought to be quashed yet in this case the proceedings sought to be quashed were commenced over three years ago.

10. The interested party therefore prayed that the application be dismissed with costs.

Determination

11. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions on record.

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

13. 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."**

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

> **"The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion if acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution... Judicial review is concerned with the decision making**

process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power. Having regard to the law, the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision is correct."

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

"The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far that which the courts indeed the entire system is constitutionally mandated to administer…In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute. It is further alleged that the criminal prosecution is an abuse of the court process epitomised by what is termed as selective prosecution by the Attorney General. It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been be argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law...In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed...There is nothing

which can stop them from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made...Under section 77(5) of the Constitution it is a constitutional right that no person who has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of the offence. What is clear from this constitutional right is that it prevents the re-prosecution of a criminal case, which has been determined in one way or another..."

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

"The function of any judicial system in civilized nations is to uphold the rule of law. To be able to do that, the system must have power to try and decide cases brought before the Courts according to the established law. The process of trial is central to the adjudication of any dispute and it is now a universally accepted principle of law that every person must have his day in court. This means that the judicial system must be available to all...Although the Attorney General enjoys both constitutional and statutory discretion in the prosecution of criminal cases and in doing so he is not controlled by any other person or authority, this does not mean that he may exercise that discretion arbitrarily. He must exercise the discretion within lawful boundaries...Although the state's interest and indeed the constitutional and statutory powers to prosecute is recognised, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious...In doing so the Court may be guided by the following principles: (i). Where the criminal prosecution amounts to nothing more than an abuse of the process of the court, the Court will employ its inherent power and common law to stop it. (ii). A prosecution that does not accord with an individual's freedoms and rights under the constitution will be halted: and (iii). A prosecution that is contrary to public policy (or interest) will not be allowed...A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case. Evidence of extraneous purposes may also be presumed where a prosecution is mounted after a lengthy delay without any explanation being given for that delay...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...A criminal prosecution that does not accord with an individual's freedoms and rights, such as where it does not afford an individual a fair hearing within a reasonable time by an independent and impartial court, will be the clearest case of an abuse of the process of the Court. Such a prosecution will be halted for contravening the constitutional protection of individual's rights...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds."

17. Whereas Article 157(10) of the Constitution provides that the Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in

the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority, Article 157(11) provides:

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

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

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

19. It is therefore clear that the prevailing statutory and constitutional regime decrees that in the exercise of their powers and discretion, the Respondents must do so within certain laid down standards provided under the Constitution and the ***Office of the Director of Public Prosecutions Act***. Where it is alleged that these standards have not been adhered to, it behoves this Court to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, the Constitution itself. I associate myself with the sentiments expressed in **Nakusa vs. Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565** to the effect that :

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

where appropriate, strike down any provision of legislation found to be repugnant to constitutional right."

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

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

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

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

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

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

24. In this case, it is contended that the criminal process has been instituted with a view to coercing the applicant's husband to abandon his claim over the land in dispute between him and the complainants. However, what has not been explained is why the complainants would lodge a complaint against the applicant herein and not her husband with whom they have a dispute.

25. It is further contended that there ought not to be two concurrent legal processes over the same person and/or subject matter. I agree with the decision of the Court of Appeal in **Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others Nairobi Civil Appeal No. 56 of 2012 [2013] eKLR** that**:**

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

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

> **"The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defense is always open to the Petitioner in those proceedings. The fact however that the facts constituting the basic of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, *ipso facto*, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the petitioner to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognized aim".**

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

> **"The police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court…As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene".**

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

> **"Under section 77(5) of the Constitution it is a constitutional right that no person who has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of the offence. What is clear from this constitutional right is that it prevents the re-prosecution of a criminal case, which has been determined in one way or another. However, it does not mean that a civil suit and a criminal case cannot co-exist at any one particular time. This is because the section envisages the re-prosecution of a criminal case substantially dealt with either in fact or law, a case in which issues have been laid to rest. There is no mention in the section that the simultaneous existence of a civil and criminal case is constituting double jeopardy. The courts have, however stated that the power to issue an**

order of prohibition to stop a criminal prosecution does not endow a court to say that no criminal prosecution should be instituted or continued side by side with a civil suit based on the same or related facts, or to say that a person should never be prosecuted in criminal proceedings when he has a civil suit against him relating to matters in the criminal proceedings...The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution..."

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

"In this case it is the applicant's case that the subject of the criminal proceedings is similarly subject of pending civil proceedings in which the ownership of the disputed parcel of land is pending determination. However, as stated hereinabove, the mere fact that the facts disclose both criminal offence as well as civil liability does not entitle the Court in judicial review proceedings to bring to a halt the criminal proceedings I have considered the positions taken by the parties to these proceedings and I am unable to find that there is absolutely no iota of evidence against the applicant in the said criminal proceedings. Whereas the criminal proceedings may well eventually fail that is not the same thing as saying that there is no evidence at all. I am also not convinced that the predominant purpose of mounting the said criminal offence is to achieve some collateral purposes rather than the vindication of a criminal offence. Whereas the facts may well constitute civil liability I am not convinced that under no circumstances would they constitute a criminal offence and that is as far as I am prepared to go."

30. 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.

31. It was therefore held in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** that:

"A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution...In the instant case there is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even of manipulation of court process so as to seriously deprecate the likelihood that the applicants might not get a fair trial as provided under section 77 of the Constitution...There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an "abuse of process", is a "manipulation", "amounts to selective prosecution" or such other processes, or even supposing that the applicants might not get affair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts."

32. 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."

33. In my view the applicant has made bare allegation without expounding on the same. The applicant seems to be of the view that since the dispute regarding ownership of the disputed land is still unresolved no criminal offence can arise from any alleged transgressions in respect thereof. I, however associate myself with the decision of **Majanja, J** in HC. Pet. No. 153 of 2013; **Thuita Mwangi and 2 Others vs. the Ethics and Anti-Corruption Commission**, that:

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

34. This Court appreciates that the court should not simply fold its arms and stare at the squabbling litigants/disputants parade themselves before the criminal court in order to show-case dead cases. The seat of justice is a hallowed place and ought to be preserved for those matters in which the protagonists have a conviction and stand a chance of seeing the light of the day. In my view the prosecution ought not to institute criminal cases with a view of obtaining an acquittal. It is against the public interest as encapsulated in section 4 of the ***Office of the Director of Public Prosecutions Act*** to stage-manage criminal proceedings in a manner intended to obtain an acquittal. A criminal trial is neither a show-biz nor a cat-walk.

35. However it must also be taken into account that our criminal process entails safeguards which are meant to ensure that an accused person is afforded a fair trial and the trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of an appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words unless the applicants demonstrate that the circumstances of the impugned process render it impossible for the applicant to have a fair trial, the High Court ought not to interfere with the trial simply on the basis that the applicant's chances of being acquittal are high. In other words a judicial review court ought not to transform itself into a trial court and examine minutely whether or not the prosecution is merited.

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

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

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

"In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names."

38. Consequently, the Notice of Motion dated 24th November, 2015 fails and is dismissed but with no order as to costs.

39. Orders accordingly.

Dated at Nairobi this 14th day of September, 2018

G V ODUNGA

JUDGE

Delivered in the presence of: