



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 154 OF 2015

**IN THE MATTER OF AN APPLICATION BY ZACHARIAH WAKHUNGU BARAZA T/A
SIUMA AUCTIONEERS FOR LEAVE TO APPLY TO THE HIGH COURT FOR JUDICIAL
REVIEW ORDERS OF PROHIBITION.**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

DCIO-STAREHE DIVISION NAIROBI1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION2ND RESPONDENT

JOSEPH MBURU

T/A SANFORD & DAUGHTERS.....1ST INTERESTED PARTY

VERONICA MARY NJERI.....2ND INTERESTED PARTY

EXPARTE

ZACHARIAH WAKHUNGU BARAZA T/A SIUMA AUCTIONEERS

JUDGMENT

1. By a notice of motion dated 26th May 2015 the exparte applicant Zachariah Wakhungu Baraza T/A Siuma Auctioneers seeks from this court Judicial Review order of prohibition to stop and refrain the DCIO Starehe Division, Nairobi and the Director of Public Prosecutions (DPP) from summoning, arresting and preferring criminal charges against him on the basis of issues arising from Milimani CM CC No. 1355 of 2015 Tripple Eight Properties Ltd Vs. Joseph Mburu T/A Sanford & Daughters & Another in which the Chief Magistrate's court granted an order of eviction which was executed by the exparte applicant.

2. The Exparte applicants case is contained in the statutory statement and supporting affidavit filed together with the application for leave granted on 19th May 2015 by Honourable Justice Korir.

3. It is deposed and asserted by the exparte applicant that he is a licenced Class B Auctioneers and duly

authorized to execute court process in Nairobi and Kiambu counties as stipulated in the copy of his practicing licence annexed as ZWB1. That on 27th March 2015, the Chief Magistrate's court in Milimani CMCC No. 1355 of 2015 issued an eviction order directed to Joseph Mburu t/a San Ford & Daughters and Veronica Mary Njeri to move out of the property known as LR No. 209/ 1635/2 situated at Pangani in Nairobi as shown by annexure ZWB2 copy of the order. That on 31st March 2015 the ex parte applicant was instructed by Tripple Eight Properties Limited to execute the order issued in the aforementioned suit at Milimani Chief Magistrate's court.

4. That on the same day 31st March 2015 the ex parte applicant applied to the Nairobi County Police Commander to be provided with security while executing the court order and paid shs 3,000/- as evidenced from ZWB3 copy of application, receipt and letter from the County Commander directed to the OCPD Starehe to provide him/the auctioneer with security executing a court order.

5. According to the ex parte applicant, when he went to execute the court order on 2nd April 2015 at about 4.00pm in the company of the police officers, from Pangani Police Station, they were not able to execute the order as they discovered that the goods that were to be moved required machines to move them out of the property and it would take not less than 10 (ten) hours to do the work. They therefore postponed the exercise as they could not finish it within time allowed in law which is by 6.30 pm.

6. The applicant therefore agreed with the police officers that the order would be executed the following week after the Easter Holidays, and as the law does not permit an eviction to be carried out twice and hence, they could not remove part of the property out of the premises as they were to hand over the premises to the plaintiff in Milimani CM CC No. 1355 of 2015 after eviction.

7. That on 3rd April 2015 the ex parte applicant left for Bungoma to attend a church function at Christ the King Catholic Church, Bungoma Town and he returned to Nairobi on 7th April 2015 at 11.30 a.m. after Easter Holidays.

8. That on 27th April 2015 when the ex parte applicant went to check if the interested party had moved out of the premises on LR No. 209/1635/2, he found that they had moved out as earlier promised.

9. That on 11th May 2015 the ex parte applicant was summoned by the DCIO Starehe Division to record a statement on an alleged malicious damage to the interested parties' property.

10. That he found the allegations of malicious damage to property malicious as he was not in Nairobi at that time.

11. That the 1st respondent DCIO summoned the ex parte applicant a second time on 15th May 2015 on which date he was told that his finger prints would be taken after which he would be arraigned in court to face charges of malicious damage to property.

12. According to the ex parte applicant, it would not have been possible for him to damage the interested parties' properties because when he first visited their premises, he was in the company of eleven (11) police officers from Starehe Police Division and that no eviction took place on that day.

13. However, that the DCIO Starehe would hear none of the ex parte applicant's statement of defence. That in his view, the issues which the interested parties are raising regarding their eviction can only be addressed by the court which issued the eviction order and not in a criminal court.

14. That the court which issued the orders for eviction has a duty to demand from the ex parte applicant to file a report on how the eviction was done and not to commence parallel proceedings in a criminal court. That by the 1st respondent demanding to know from the ex parte applicant whether or not he evicted the interested parties from LR No. 209/1635/2 he is usurping the court which issued the eviction order.

15. That the Director of Public Prosecutions entrusted with prosecutorial powers should exercise such powers fairly and reasonably but that he failed to do so.
16. That the same issues being investigated by the DCIO are the same issues pending before Milimani CMCC 1355 of 2013 hence the orders sought should be granted.
17. In response to the notice of motion, the respondents filed a replying affidavit through the affidavit sworn by No. 65240 Corporal Steven Owour attached to DCI Department investigations duties and the investigating officer of the case. CPL Owur deposes that indeed the CM'S Court at Milimani did on 27th March 2015 issue an eviction order for the interested parties to be evicted from LR 209/1635/2 situated at Pangani in Nairobi.
18. That on 2nd April 2015 the exparte applicant moved in to execute the orders but instead removed some items from LR 209/1627 instead of LR 209/1635/2. That LR 209/1627 is private property is situated in Pangani area and is leased by the 1st interested party by the owner Stephen Kinyanjui Kahungu, and that this property is distinct from LR 209/1635/2 which was the suit property described in Milimani CMCC No. 1355/2015 as shown by the annexed deed plan marked 'SO2'.
19. That on 6th April 2015 the exparte applicant's agents went with a fork lift and pushed all the items, merchandise and equipment on LR No. 209/1627 to one side of the plot claiming that they wanted to possess half of the property and in the process, did a lot of damage to the 1st interested party's property.
20. That Stephen Kinyanjui Kahungu who is not a party to the suit had leased out to the 1st interested party his premises LR 209/1627 since 30th March 2011 for shs 20,000 per month and the premises were used for stocking auctioned goods for sale in the name of Sanford and Daughters General Merchants.
21. That the exparte applicant was physically present on 2nd April 2015 when the process of eviction started and during the wrongful and illegal eviction on LR No. 209/1627 instead of the suit property subject of Milimani CMCC 1355/2015 being LR No. 209/1635/2 and that there are witnesses who were at the scene hence the defence of alibi is an afterthought.
22. That the police are mandated by Section 24 of the National Police Act to investigate any complaint brought to their attention in order to determine whether a criminal offence has been committed. That following the complaint, investigations commenced and the exparte applicant was summoned on 11th May 2015 and 15th May 2015 to record his statement which he did.
23. That had the exparte applicant done due diligence, he would have known the difference between the two separate but adjacent properties and that failure to carry out due diligence cause serious financial loss to the 1st interested party.
24. That both the exparte applicant and the plaintiff in CMCC 1355/2015 learnt that they had made a grave mistake in moving into LR 209/1627 instead of LR 209/1635/2 but dismissed claims of responsibility for malicious damage to property of the 1st interested party.
25. That the respondents are acting lawfully as stipulated by the National Police Service Act, the Office of Director of Public Prosecutions Act and the Constitution in investigating a complaint of malicious damage to property.
26. That under Section 193 A of the criminal Procedure Code, Cap 75 Laws of Kenya, the fact that any matter in issue in any criminal proceedings shall not be a ground for any stay, prohibition, or delay of criminal proceedings, as all the cases will ultimately be determined on merits.

27. That the ex parte applicant has not demonstrated that the respondents acted without jurisdiction or in excess of their powers conferred upon them by the law or that they have infringed, violated, contravened or in any other manner failed to comply with constitutional or statutory provisions.

28. That the ex parte applicant has not demonstrated that the respondents failed to act independently or have acted capriciously, in bad faith or abused the legal process in a manner to entitle them stay the arrest and or the charges sought.

29. That the applicant's application is based on non disclosure of material facts made with latent intent to mislead the court as to the true facts leading to the ongoing investigations and possible charges against him. That there is no averment that the evidence against the ex parte applicant does not meet the threshold required by law to institute the intended charges.

30. That the application has been filed in bad faith, is misconceived and abuse of the court process and meant to defeat the cause of justice.

31. That the accuracy and correctness of facts gathered in an investigation can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of evidence gathered and properly adduced in support of any criminal charges that may be preferred against the ex parte applicant.

32. The respondents urged the court to dismiss the ex parte applicant's application and allow the respondents discharge their constitutional mandate.

33. The interested parties Joseph Mburu t/a Sanford & Daughters and Veronica Mary Njeri did not participate in these Judicial Review proceedings.

34. Counsels for the ex parte applicant and for the respondents filed written submissions which they relied on and the court adopted those submissions for purposes of writing this judgment.

35. The ex parte applicant's submissions were filed on 15th November 2016, by the ex parte applicant's counsel, Mr J.S. Khakula advocate relying on the affidavit in support of the motion, the statutory statement and reiterating the facts as summarized in this judgment.

36. According to the ex parte applicant he approached this court when the respondents insisted on charging him for a criminal offence he did not commit. He averred that despite the Director of Public Prosecutions' constitutional prosecutorial mandate conferred by Article 157 of the Constitution, the court can intervene to stop the criminal prosecution as was held in **Stanley Munga Githunguri v Republic [1985] KLR 34** that the court can interfere with prosecutorial powers in the following instances:

i. Where a criminal prosecution is an abuse of court process;

ii. Where a prosecution is a contravention of a person's constitutional freedoms and rights.

iii. Where the prosecution is contrary to public interest and or policy.

37. Further reliance was placed on **John Murutu Kigwe & Another V Republic Nairobi HCC 223 of 2000** where Rawal J (as she then was) held that the court has inherent power to terminate proceedings it decides are an abuse of the court process and thus protect citizens from malicious prosecution and that may lead to unnecessary infringement and curtailing of their rights.

38. Further reliance was placed on **Samuel Kamau Macharia & Kibe Vs Attorney General Nairobi Miscellaneous Application No. 356 of 2000** where it was held that where a prosecution is instituted for any other purpose than to uphold the legitimate ends of criminal law the court will come out strongly to protect any such accused persons.

39. The ex parte applicant's counsel further relied on the English case of **Director of Public Prosecutions vs Humphreys [1976] 2 ALL ER 497** where **Lord Salmon** stated, inter alia, that:

“It is only when the prosecution amounts to an abuse of the process of court and is oppressive and vexatious that the judge has power to intervene.”

40. Further reliance was placed on the case of **Gulan & Another, vs CM's Court & Another [2006] e KLR** where the court held that powers of the High Court to stop criminal prosecution must be exercised sparingly and that the High Court must always be ready to intervene to prevent any prosecution which is vexatious, oppressive, malafides, frivolous or taken up for other improper purpose such as undue harassment of a party or abuse of court process. Further, that a criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect or laced with ulterior motive or improper purpose.

41. Counsel for the ex parte applicant went on and on citing many other decisions and the principles espoused therein on the court's intervention to stop prosecution including: **Peter D'costa vs Attorney General & Another Petition 83/2010** where the Court of Appeal stated that *“the court must be used properly and in good faith, and must not be abused. This means that the court will not allow its functions as a court of law to be misused and will summarily prevent its machinery from being used as a means of vexation it follows that where there is an abuse of court process, there is breach of the petitioner's fundamental rights on the petitioner will not receive a fair trial. It is the duty of the court to stop such abuse of the justice system.”*

42. Counsel further relied on **Justus Kathenge vs Director of Public Prosecution & Others [2014] e KLR** where the court stated inter alia, that the High Court in the exercise of its supervisory jurisdiction can analyse the information relied on by the Director of Public Prosecutions in making the decision to charge an accused person without usurping the powers of the trial court.

43. Further reliance was placed on **Ex parte Floriculture International Limited Nairobi HC Miscellaneous Application No. 1214 of 1997** (unreported) where Kuloba J (as he then was) pointed out the factors that must be taken into account before a criminal prosecution is launched and held:

“ So it is incumbent upon an intending prosecutor to assess and examine carefully the availability, credibility and credit of witnesses, the potential admissibility and reliability of evidence such as confessions and whether the witnesses are likely to turn up to testify. So there must initially be a promising case. A mere scintilla of evidence should not take one to the court and if the prosecutor in good faith nurses significant doubts about the sufficiency of evidence, there should be no criminal proceedings.”

44. It was submitted that the court in the above case noted that sufficiency of evidence is determined by getting right answers to and being satisfied with them on the question of :

- a) *Elements of the alleged crime*
- b) *The facts necessary to establish each of the constituent elements of the crime.*
- c) *Witnesses.*
- d) *Whether the witnesses are readily available and credible.*
- e) *Whether their evidence is capable of being reasonably believed.*
- f) *Is the court likely to believe that evidence.*

45. And that the court concluded that no outcome is likely to be achieved by a criminal process. It is a waste of public time; money and resources to prosecute, besides creating unnecessary social tension in the

community.

46. The *ex parte* applicant's counsel also stated that there was abuse of the respondent's constitutional mandate. He relied on **Republic Vs Chief Magistrate's court Nairobi & 3 Others *ex parte* Stephen Oyugi Okero [2015] e KLR** where the court observed that sometimes it is necessary for the court to look at the statements in order to establish if there is evidence to support the charges. That absence of evidence is a good ground for quashing a criminal trial and the court cannot conclude that there is no evidence without looking at the witness statements and the exhibits.

47. In this case, it is claimed that the statements by the interested parties and statements of other witnesses show that the *ex parte* applicant never carried out the alleged eviction and was not at the interested parties' premises on 6th April 2015 and 7th April 2015 when the alleged acts of malicious damage to property occurred. That one Mutinda who was stated to have been present at the premises of the interested parties never recorded his statement and that none of the witnesses mention that the *ex parte* applicant was present at the interested parties' premises on 3rd, 6th and 7th April 2015.

48. It was submitted that the decision to prosecute the *ex parte* applicant amounts to abuse of court process and that Section 34 of the Civil Procedure Act prohibits the taking of any other court, save the trial court any issue arising between the parties to the suit over execution of satisfaction of a decree of the court.

49. That the act complained of arose out of execution of lawful court orders issued by the CM's court hence any issue ought to be resolved through the same suit and not through the criminal case. That the dispute is purely civil hence the insistence of the charge against the *ex parte* applicant is tainted with malice as there are many gaps in the statements of witnesses. Counsel relied on **Musyoki Kimanathi vs Inspector General of Police and Others [2014] e KLR** where Majanja J stated:

“It is not in public interest or in the interest of administration of justice to use the criminal justice system as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute litigated in court.”

50. The *ex parte* applicant maintained that the decision to charge him with a criminal offence is tainted with malice, irregularities and insufficiency of evidence which calls for the intervention of the court in exercise of its supervisory jurisdiction. He urged the court to allow the motion as prayed.

51. Only the 2nd respondent Director of Public Prosecutions filed submissions on 7th March 2016 on behalf of Director of Public Prosecutions and the DCIO Starehe Division maintaining that they acted within their mandate and authority in investigating and subsequently, instituting criminal proceedings against the *ex parte* applicant based on conduct arising from the execution of an eviction order, being key players in the criminal justice system deriving their mandate from Sections 28 and 24 of the National Police Service Act for the 1st respondent, and Article 244 of the Constitution on the functions of the Directorate of Criminal Investigations, and Article 157 of the Constitution on the part of Director of Public Prosecutions, the 2nd respondent.

52. Reliance was placed on the following decision on the duty of the police to investigate complaints and the Director of Public Prosecutions' mandate to prosecute- ***HC Miscellaneous Application 519/2005 Surjit Singh vs The principal Magistrate Kibera; HC Constitution Ref.165/11 Rosemary Wanja Njau & 2 Others vs Attorney General & Others.***

53. It was further submitted that there was a genuine complaint from the interested parties that the *ex parte* applicant unlawfully entered property LR 209/1627 on 2nd and 6th April 2015 and maliciously caused damage to property using a fork lift and therefore the respondents exercised their mandates and authority in investigating the complaint.

54. Reliance was placed on **Jacob Juma vs Director of Public Prosecutions & 8 Others HC JR**

Petition 652/2009 where it was held that investigations are an integral part of the Administration of justice and that the onus is on the applicant to convince the court why such criminal investigations should be stopped. Further, that whoever alleges excess of jurisdiction on the part of the respondents, breach of natural justice or that the police considered extraneous matters or were actuated by malice must prove with evidence such allegations.

55. It was submitted that there is no demonstration on the part of the applicant as to which law had been infringed by the police investigating him.

56. On whether there is any obligation on the police to notify a suspect or other authority of an intention to investigate, it was submitted, relying on the decision in **Cargo Distributors Ltd v Director of Criminal Investigations, HC Miscellaneous Application 39/2006** that the work of the police and crime detection would be hampered seriously if every time an investigation became necessary and the police wanted to make a move, they would be required to initiate formal proceedings first and also give details to the court beyond demonstrating a reasonable suspicion of commission of a crime before obtaining a warrant to investigate.

57. Further that the police must be allowed to move with speed to prevent any destruction of vital evidence in crime detection (**HC Rev.352/2009 – David Njane Ruiyi & Another vs Republic**).

58. The respondents urged this court to adopt the decision in **Teresia Wanjiru Githinji v The Attorney General & another HC Miscellaneous 1295/2005** and direct the applicant to submit himself before the trial court where he will have the opportunity to defend himself.

59. It was submitted that the role of Director of Public Prosecution deriving his mandate from Article 157 of the Constitution is to institute criminal proceedings against any person and that in doing so he does not require the consent or authority of any person hence there was no impropriety on his part. Reliance was placed on **Kimano Kibaya vs Republic Cr. Application 453 of 2003 & David Njogu v DCI Miscellaneous Application 658 of 2004**.

60. It was therefore submitted that the High Court will be crossing into the line of the independence of Director of Public Prosecutions if it descended into the arena of finding whether there is a prima facie case against the ex parte applicant. It was also submitted that the applicant had not demonstrated that the Director of Public Prosecutions had not acted independently or had acted capriciously, in bad faith or had abused the process in a manner to trigger the High Court's intervention.

61. Further, that the decision to charge the applicant was informed by the sufficiency of the evidence reviewed and the interest of the public as per the National Prosecution Policy, 2015 and not extraneous factors.

62. That there is no evidence of breach of Rules of Natural Justice or that the applicant might not get a fair trial as guaranteed by the Constitution hence this application was filed in bad faith, is misconceived, an abuse of the court process and meant to defeat the cause of justice as there is no demonstration of the law that has been infringed or that the respondents acted in excess of jurisdiction or powers conferred by law.

63. On whether the High Court has wide Judicial Review jurisdiction to question the merits of a criminal case by analyzing evidence gathered in support of criminal charges and order the prohibition of a valid prosecution, reliance was placed on **KNEC vs Republic CA 266/96 and Halsburys Laws of England 4th Edition, VOL 1 at page 37, paragraph 128** and a submission made that the accuracy and correctness of the evidence or facts in an investigations can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered and properly adduced in support of the charges as was held in **William S.K. Ruto & Another v Attorney General & Another HC CC 1192/2004** that analysis of evidence should be done before the trial court which can competently make a finding whether or not a criminal offence was committed after hearing the evidence, as was held in **Thuita Mwangi & 2 others V EACC & 3 Others HC**

Petition 369/2013.

64. it was submitted that it would be improper if a Judicial Review court would try or attempt to determine the intended criminal case which is not before it. That what the present applicant has raised would form a basis of his defence in the trial court and not in this Judicial Review proceeding, as only the trial court can determine whether an offence has been committed. Reliance was placed on **Paul Stuart Imision & Another Vs Attorney General & 2 Others HC Petition 57/2009** and in **Dr Hastings Kinjili V Republic & Others HC Miscellaneous 271/2002** where the court held that the applicant shall have the opportunity to tell the trial court all that which he is telling the judicial review court since the laws of Kenya provide for a fair trial before the criminal court that tries him by answering any charges, challenging evidence, cross examination of witnesses and the right to counsel.

65. On whether the court should prohibit the ex parte applicant's prosecution based on the fact that there is a pending civil case on the same subject matter, it was submitted that Section 193 A of the Criminal Procedure Code, Cap 75 Laws of Kenya allows concurrent civil and criminal proceedings and that in **Rosemary Wanja Njau & 2 Others v The Attorney General HC Constitution Ref 165/2011 & Paul Mwangi Nderitu v PM Nairobi HC Miscellaneous 901/2001** it was held that the mere fact that a matter which forms the subject of criminal proceedings has with it a civil flavour should not be a basis for stopping a criminal case.

66. It was therefore submitted that the present application does not meet the prerequisite requirements for grant of Judicial Review orders sought and that the applicant should submit himself to the trial court.

67. The parties advocates adopted the above written submissions.

DETERMINATION

68. I have carefully considered the ex parte applicant's application together with the supporting documents. I have also considered the terse opposition by the respondents and the parties respective written submissions for and against the prayers sought, supported by several case law cited and statutory and constitutional provisions.

69. The main issue for determination in this case is whether the applicant is entitled to the orders sought herein. The power to prosecute is vested in the Director of Public Prosecutions vide Article 157 of the Constitution while the power to investigate the complaints leading to any prosecution is vested in the Director of Criminal Investigations under the leadership of the Inspector General of Police pursuant to section 24 of the National police Service Act.

70. The ex parte applicant's prayer before the court as per the leave of court granted on 19th May 2015 is for Judicial Review order of prohibition to issue to prohibit the Director of Criminal Investigations from summoning and or arresting him on the basis of matters arising from Milimani CM CC No.1355/2015(Tripple Eight Properties Limited V Joseph Mburu t/a Sanford & Daughters & Veronica Mary Njeri; and that this court be pleased to make further or other orders as it may deem fair and just.

71. It should be noted from the onset that there is no specific prayer sought against the 2nd respondent Director of Public Prosecutions and therefore this court shall not waste very precious judicial time deliberating on whether or not the Director of Public Prosecutions should be prohibited from prosecuting the ex parte applicant since no prohibition is sought against him.

72. According to the ex parte applicant, he is an officer of the court, a class B Auctioneer and that the subject matter allegations against him arose from his duties in executing a valid court order in Milimani CM CC 1355/2015.

73. Further, that albeit it is claimed that he maliciously damaged the interested parties' property, he

did not carry away any of their properties on the first day of going to the premises as it was late. Further, that on the said occasion, he was accompanied by 11 police officers hence he could not have damaged any property under their watch.

74. In addition, the *exparte* applicant avers that after abandoning the eviction of the interested parties from the suit premised LR 209/1635/2 on 2nd April 2015 at 4.00pm as it was late, the following day he travelled to Bungoma to attend to a church function and returned on 7th April at 11/30 am after Easter Holidays hence he does not understand how he could have damaged any properties belonging to the interested parties yet he never went back to their premises and that when he returned from Bungoma and went to check on 27th April 2015 he found that the interested parties had moved out of the premises as promised hence he did nothing else capable of being construed to mean that he maliciously damaged the interested parties' property, to warrant being summoned and or being arrested or being arraigned in court to face charges of malicious damage to property.

75. The *exparte* applicant claims that having been lawfully engaged in execution of a court order, the 1st respondent Director of Criminal Investigations had no authority to demand to know from the *exparte* applicant whether or not he evicted the interested parties as per the order and that the 1st respondent should not investigate issues which are pending before the Chief Magistrate's court at Milimani being CM CC No. 1355/2015.

76. On the other hand, the Director of Criminal Investigations through a replying affidavit sworn by No. 65240CPL Steve Owour and filed in court on 3rd December 2015 contends that as the investigating officer of the complaint lodged by the interested parties herein, he discovered that the *exparte* applicant was indeed executing a lawful court order but instead of effecting eviction of the respondents in the civil suit from LR 209/1635/2 as per the court order, the *exparte* applicant did on 6th April 2015 visit the LR 209/1627 and that his agents went with a fork lift and in the process damaged the property belonging to the 1st interested party. That the eviction process started on 2nd April 2015 when some of the property was taken hence his attempt to seek an alibi is merely an afterthought and that the police should be left to investigate the allegations against the *exparte* applicant.

77. Section 24 of the National Police Service Act mandates the police to investigate any complaint brought to their attention in order to determine whether a criminal offence has been committed. The question therefore is whether the order of prohibition can issue to prohibit any investigations into the alleged malicious damage to the interested parties' property. In **Joram Mwenda Guantai vs The Chief Magistrate Nairobi CA 228/2003 [2007] 2 EA 170** the Court of Appeal stated:

“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 court has the inherent power and the duty to secure fair treatment for all persons who are brought before the court or a subordinate court and to prevent an abuse of the process of the court.”

78. In **Mexiner & Another V Attorney General [2005] 2KLR 189** the same Court of Appeal stated:

“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 of the 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 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 20 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.”

79. In *Kuria & 3 Others Attorney General* [2002] 2 KLR 69 the court stated inter alia:

“ 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 duty of the Court to ensure that its process does not degenerate into tolls for personal score settling or vilification on issues 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 person to stand trial would violate the fundamental principles of justice which underlie the society’s sense 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 misused or abused or manipulated for ulterior motives that the power of Judicial Review is invariably invoked so as to zealously guard its 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).....

There must 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.....”

80. In *Republic V CM Mombasa Exparte Ganjee & Another* [2002] 2 KLR 703 the court held, inter alia:

“It is not the purpose of a criminal investigations or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a

civil case of one or both parties in a civil dispute, but to be impartially exercised in the interest of the general public interest.....”

81. From the above decisions, and applying the principles settled therein to this case, it is clear that Judicial Review does not deal with the merits of the decision but with the process of decision making. It deals with issues such as whether the decision maker had the jurisdiction to make the decision, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. Judicial Review proceedings cannot be invoked to settle contested matters of fact that would lead the court to delve into the merits of the dispute as the court would not have jurisdiction to do so.

82. As earlier stated, what is sought to be prohibited in this case is the summoning and arrest (or continuation of the prosecution) of the exparte applicant Zacharia Wakhungu Siuma and not a criminal trial for there is not even a charge sheet annexed to the pleadings to show what exact charges the investigators have settled on and or what decision the Director of Public Prosecutions has made regarding the complaint by the interested parties.

83. In the premises, this court must be cautious not to trespass into the jurisdiction of the investigating officer or the criminal or even civil court which may eventually be called upon to determine the issues hence this court ought not to make a determination which may affect the investigations which may affect the investigations or yet to be concluded investigations or prospective trial.

84. That this court has the jurisdiction to prohibit investigations which are being conducted with the aim of achieving an ulterior motive and not intended to achieve justice is undoubted. However, the burden of proving that the discretion power given to the police to investigate into the complaint regarding malicious damage to the 1st interested party's property ought to be interfered with by the court in order to prevent abuse of power or abuse of the court process lies on the exparte applicant.

85. It is not sufficient to allege that the intended trial is bound to flop or that the complainants have no basis or that the issues at hand constitute both criminal or civil liability; for, the court ought not to interfere with the investigative powers conferred on the police unless cogent reasons are given for doing so(See **Republic vs CM Milimani & Another Exparte Tusker Mattresses & 3 Others [2013] e KLR.**

86. In the instance case, the exparte applicant is not a party to the civil proceedings pending before the subordinate court at Milimani vide CM CC 1355/2015, in which an eviction order was issued on an interlocutory application on 27th March 2015 against the defendants/interested parties herein from LR No. 209/1635/2.

87. It is not disputed that the exparte applicant is a Class B Licenced Auctioneer who received the court order in question for execution and that he sought and obtained police assistance to execute the said order against the interested parties. What is in contention and subject of investigations by the Director of Criminal Investigations is whether in the process of executing lawful court orders, the exparte applicant went outside his mandate and maliciously damaged the 1st interested party's property as claimed by the investigating officer.

88. In my humble view, the police are entitled to investigate any allegation of commission of a criminal offence whether allegedly committed outside or within or in the course of execution of a lawful court order or in the performance of a public duty. It cannot be that because the exparte applicant was merely executing a court order then he is prima facie incapable of committing any culpable offence.

89. In the present proceedings, this court is unable to find any evidence of malice, or unlawfulness on the part of the Director of Criminal Investigations or excess or want of authority or abuse of power. There is also no evidence that the exparte applicant was subjected to wanton harassment or intimidation or even of manipulation of the court process so as to seriously deprecate the likelihood that the exparte applicant might, if the Director of Criminal Investigations completes investigations into the allegations

against the ex parte applicant and decides to charge him with an appropriate offence, then the ex parte applicant will not get a fair trial as stipulated in Article 50 and 51 of the Constitution.

90. I refuse to be persuaded that because the alleged offence was allegedly committed during the process of execution of a court order in a civil suit then the entire criminal investigations initiated against the ex parte applicant is an abuse of the court process.

91. The applicant has not demonstrated how the process of the court is being abused or misused. He has not shown the basis upon which his rights are under serious threats of being violated by the criminal investigations or eventual prosecution.

92. In the absence of concrete grounds for supposing that a criminal prosecution is an abuse of process, or is a manipulation of sorts or amounts to selective prosecution, it is not sufficient that the existence of a civil suit wherein the cause of complaint arose precludes the institution of criminal proceedings even if it were based on the same facts and Section 193A of the Criminal Procedure Code Cap 75 Laws of Kenya fortifies this position.

93. As was rightly held in **Kuria vs Attorney General** (supra)

“.....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 bipolar considerations, it is imperative for the court to balance these considerations vis a 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 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.”

94. In Kenya's post 2010 Constitution, there is a tendency by nearly every person who is being investigated for whatever criminal allegations, to rush to the Judicial Review forum to seek to prohibit any investigations or prosecution where one is mounted against them. Whereas some of the challenge is genuine and meets the threshold of being prohibited, but it is a worrying trend such that at the end of it all, unless the court is careful, it will prohibit all investigations and or criminal prosecutions since no person will ever be happy that they are being investigated or prosecuted, whether those investigations or prosecution, are done in good faith.

95. This court has not been shown that the Director of Criminal Investigations had no jurisdiction or that it acted in excess of its jurisdiction in commencing investigations into the alleged malicious damage to the 1st interested party's property by the ex parte applicant while executing a lawful court order wherein he alleges to have been done, if at all, with the assistance of 11 police officers from Pangani Station.

96. The fact that the Director of Criminal Investigations Starehe summoned the applicant to record a statement concerning the alleged malicious damage to property and that it was intended that the ex parte applicant presents himself for purposes of his finger prints being taken with a view of being charged with the alleged offence does not amount to any illegality, abuse of court process or legal process, vexatious, oppressive, malafides, frivolous or for improper purpose such as undue harassment.

97. The fact that the ex parte applicant claims that he was not present on the date when the alleged offence of malicious damage to property was committed, in my humble view, is the applicant's defence of alibi which he can mount if the investigators decide to advise the DPP to institute and the DPP decides to charge him in court. The allegation that Mr Mutinda's statement, who was alleged to have been at the

interested party's home when the alleged damage was done, was not taken by the respondents is a pointer to the sufficiency of evidence for the intended trial or prosecution of the applicant which is beyond the mandate of this court to determine. Gaps in the statements of prospective witnesses in my humble view, are not proof that the decision to prosecute the applicant is tainted with malice and ill will or that it is calculated to settle what is purely a civil dispute.

98. Furthermore, Section 34(1) of the Civil Procedure Act is only relevant as far as the issues arising between parties to the dispute in a civil suit are concerned. The section provides:

“ All questions arising between the parties to the suit in which the decree was passed or their representatives are relating to the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not a separate suit.”

99. With utmost respect to the ex parte applicant, the criminal investigations are not a separate suit. Suit as defined under the Civil Procedure Act Section 2 does not include a criminal case or matter and therefore it is a misconception on the part of the applicant to claim that criminal investigations or prosecution is a separate suit, when it has never been the case that a court exercising civil jurisdiction can convert civil proceedings into criminal proceedings except in contempt of court cases.

100. In other words, the CM's civil court would in the circumstances of this case not be seized of the jurisdiction to determine whether or not in the process of execution of that court's lawful order, the ex parte applicant maliciously damaged the interested parties property; and or proceed to order that the ex parte applicant be tried summarily or otherwise for malicious damage to property.

101. I am therefore unable to find that the criminal justice system was in this case being used as a pawn in civil disputes and or that the police were being used in the settlement of what is purely a civil dispute litigated in court, as was held in **Musyoki Kimanthi v Inspector General of Police & Others (supra)**.

102. Consequently, I am unable to find, on the material placed before me that the applicant's notice of motion dated 26th May 2015 has any merit and the same is dismissed. The stay orders in force are hereby lifted forthwith.

103. I order that each party bear their own costs of the Judicial Review proceedings as the respondents were represented by public advocates and the interested parties did not participate in these proceedings.

Dated, signed and delivered at Nairobi this 24th day of January 2017.

R.E.ABURILI

JUDGE

In the presence of:

Mr Kimathi h/b for Mr Khakula for the ex parte applicant

N/A for respondents

N/A for the interested parties