



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW NO. 334 OF 2016

**IN THE MATTER OF AN APPLICATION BY DAVID KINUTHIA KARIUKI FOR ORDERS OF
MANDAMUS, CERTIORARI AND PROHIBITION**

BETWEEN

REPUBLIC.....APPLICANT

-VERSUS-

NATIONAL POLICE SERVICE COMMISSION....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS...2ND RESPONDENT

KIBERA CHIEF MAGISTRATES COURT.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

***EX-PARTE:* DAVID KINUTHIA KARIUKI**

JUDGEMENT

Introduction

1. The applicant herein, **David Kinuthia Kariuki**, moved this Court vide a Notice of Motion dated 22nd August, 2016 seeking the following orders:

1. That an order of Certiorari by way of judicial review do issue calling into this court the proceedings in Kibera Criminal Case No. 1445 of 2016, Republic versus David Kinuthia Kariuki for purposes of quashing the same.

2. That an order of Prohibition do issue directed at the 3rd respondent prohibiting the said respondent from proceeding with the hearing in Kibera Criminal Case No. 1445 of 2016, Republic versus David Kinuthia Kariuki.

3. That an order of mandamus do issue directed at the 1st & 2nd respondents compelling them

to return to the ex parte applicant his original certificate of title for the property described as Kabete/Lower Kabete /1064 as well as his mobile phone that were withheld on 17/2/2016.

4. That the costs of this application be provided for.

Applicant's Case

2. According to the applicant, he is the registered owner of all that parcel of land described as Plot No. Kabete/Lower Kabete/1064 situated in Lower Kabete measuring 0.275 Acres which he acquired from one **James Mwaura Kanotha** who died on 7th June, 1998. The applicant explained that the said plot vested in him through Limuru Court Succession Cause No. 35 of 2002 and upon obtaining the grant the land was transferred to him name. Subsequently, he took possession of the plot and built and was carrying out subsistence farming thereon while his sister, **Elizabeth Wanjiru**, resides in the said house.

3. The applicant averred that some time on 16th February, 2016 or thereabouts he was going about his business when he received a call from his brother who informed him that he was being sought by police officers from Ongata Rongai Police Station who had left a number and asked the applicant to contact the said number as soon as I arrived. Upon calling the said number being 0720666703, the same was picked by one **Mr. Nyamwange** who informed him that he had gone to arrest the applicant because the applicant had stood surety for an accused person and had given a forged title.

4. The applicant averred that the following day he took his title No. Kabete/Lower Kabete/1064 to Rongai Police Station and upon arrival was met by the said **Mr. Nyamwange** who took his original title, his identity card and his phone from him. On 24th March, 2016, the applicant was arraigned before the court and charged with various offences to wit making a document without authority contrary to section 357(a) of the **Penal Code**, forgery of land title deed contrary to section 350 (2) as read with section 349 of the **Penal Code**, uttering a false document contrary to section 353(1) as read with section 349 of the **Penal Code**.

5. The applicant averred that on 3rd March, 2016 he made an application for the release of his identity card and telephone and on 3rd May, 2016 the court issued summons against one **PC Nyamwange** to attend court but the said officer refused to comply and on 12th May, 2016 a warrant of arrest was issued against the said **PC Nyamwange**.

6. It was averred that on 3rd June, 2016, the Court commanded the said **PC Nyamwange** to return the applicant's original identity card to him which he complied with. However the applicant's original title document and his phone are still illegally being withheld by the police.

7. It was the applicant's case that the respondents are maliciously holding his title and his phone and that the actions by the respondents are in excess of jurisdiction and in breach of his rights to ownership of property as enshrined in the constitution. The applicant reiterated that the charges leveled against him in the criminal case that he stood surety for an accused person in Criminal Case No. 3574 of 2015 were all false because he did not know the said accused person as he was in possession of his original title document for his land which was now in the hands of the police.

8. The applicant therefore asserted that the criminal charges pending before the Kibera Chief Magistrates Court were brought maliciously and with a view to abusing the court process.

1st Respondent's Case

9. In response to the application, the 1st Respondent filed the following grounds of opposition:

a. The Application as framed against the National Police Service Commission, the 1st respondent herein is premised on clear misapprehension of the Constitution, the National

Police Service Commission Act and all other laws guiding the powers and operations of the 1st respondent and the National Police Service in general.

b. The powers and functions of the 1st respondent as clearly stipulated in Article 246 of the Constitution doesn't extend to confiscating of original title deeds and mobile phones and the same is a preserve of the National Police Service through the general command of the Inspector General as clearly envisaged in Article 245 of the Constitution.

c. The entire Application as framed against the 1st respondent is evidently misconceived and bad in law since it purports to sue a party for actions outside its mandate and committed by persons not within its immediate command and direction.

d. It is only just and fair that the claim as against the 1st respondent be dismissed and its name be expunged from the proceedings.

2nd Respondent's Case

10. The 2nd Respondent, on its part opposed the application and averred that the applicant stood surety for **Richard Wairi Gitau** in Kibera Law Courts vide CR 3574/2015 Court No. 10 in a case of obtaining money by false pretenses contrary to section 313 of the **Penal Code** whereby he deposited his title deed Kabete/Lower Kabete/1064 together with his copy of national identity card No. 5359993. Later on the suspect whom he stood surety for jumped bond terms hence the court issued summons for **David Kinuthia Kariuki** to attend court and shed light about the suspect whom he stood surety for and the summons was to be served through the investigating officer.

11. It was averred that on 12th February, 2016, the investigation officers **Sgt, Martin Mbae** and **PC Erickson Nyamwenga** proceeded to a place called Kingeero Area in Kiambu county and through the assistance of area assistant chief **Mr. Gitau** traced the home of the above mentioned surety whereby a brother of the suspect was found and informed about the subject as he was to appear at Ongata Rongai Police Station to be served with summons to attend court. On the 17th February, 2016 the suspect appeared at DCI Ongata Rongai office with another alleged original title deed of the same parcel of land that is title deed No. Kabete/Lower Kabete/1064 with his national identity card and protested that he has no idea about the title deed deposited at Kibera Law Court. It was disclosed that on 7th March, 2016, the investigating officers visited **Mr. Isaac Nyaga Njiru**, Land Registrar Kiambu to verify the alleged title deed and he confirmed it to be forged document and made efforts to contact **Mr. Peter Muigai Kihiu** now retired who was purported to have issued the said title deed. On the same day the retired land registrar did appear before Kiambu Land Registry and refuted the signature on the document presented to police officers at DCI Ongata Rongai office. It was averred that on further inquiries it was established that the suspect was living at Nkoroi within Kajiado County despite the fact the details of his national identity card led investigators to Kiambu County. Later on statements were recorded on 24th March, 2016 and the Court was briefed of the outcome of the investigations after which the Court ordered that the suspect **David Kinuthia Kariuki** be charged accordingly.

12. It was therefore the 2nd Respondent's case that the Application herein was filed in bad faith, misconceived and abuse of the court process and meant to defeat the cause of justice.

13. To the 2nd Respondent, the Directorate of Criminal investigations' is established under section 28 of the **National police Service Act** under the direction, command and control of the inspector General of the National police Service whose functions include but are not limited to:

a. Collecting and providing criminal intelligence

b. Undertaking investigations on serious crimes including homicide, Narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime and cybercrime

among others;

c. Maintaining law and order;

d. Detecting and preventing crime;

e. Apprehending offenders;

f. Maintaining criminal records;

g. Conducting forensic analysis;

h. Executing the directions given to the inspector general by the Director of Public Prosecutions pursuant to Article 157 (4) of the Constitution;

i. Co-ordinating country Interpol Affairs;

j. Investigating on a matter that may be referred to it by the independent police oversight authority; and

k. Perform any other functions conferred on it by any other written law.

14. According to the 2nd Respondent, the objects and functions of the National Police Service are set out in Article 244 of the Constitution of the Republic of Kenya and the **National Police Service Act** and in the discharge of their duties and functions, the staff of the National Police Service are bound by, do respect, observe and uphold the following Constitutional provisions, *inter alia*;

a. Regard to public interest, the interests of administration of justice and the need to prevent and avoid abuse of legal process

b. Upholding the defending Constitution

c. Respecting, observing, protecting, implementing, promoting and upholding the rights and freedoms in the Bill of Rights enshrined in the Chapter Four.

d. Accountability to the public for decisions and actions taken and generally observe of Chapter Six (Leadership and Integrity)

e. Accountability for administrative acts and observance of the values and principles of public service under Chapter Thirteen.

15. It was the 2nd Respondent's case that the applicant had not demonstrated that in undertaking investigations in the complaint lodged with the National Police Service and in making the decision to prefer criminal charges against them, either the Director of Public Prosecution or any member of staff of the office of the Director of Public Prosecution or the National police Service acted without or in excess of the power conferred upon them by the law or have infringed, violated, contravened or in any other manner failed to comply or respect and observe the foregoing provisions of the Constitution of Kenya 2010 or any other provisions thereof or any other provisions of the law. The 2nd Respondent asserted that the DPP independently reviewed and analysed the evidence contained in the investigations file compiled by the Directorate of Criminal investigations including the witness statements, documentary exhibits and statements of the Applicant as required by the law. It was on the basis of the said review and analysis that the DPP gave instructions to prosecute the Applicant. It was therefore contended that the decision to charge the Applicant was informed by the sufficiency of evidence on record and the public interest and not on any other considerations. To the 2nd Respondent, the accuracy and correctness of the evidence or 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.

16. To the 2nd Respondent, the contention by the Applicant that the case against him is oppressive and malicious and amounts to an abuse of court process is unfounded and bad in law in that:

a. State powers of prosecution are exercised by the Director of Public Prosecution personally or by persons under his control and directions;

b. In the exercise of such powers, the Director of Public Prosecution:

i. Is subject only to the constitution and the law

ii. Does not require the consent of any person or authority

iii. Is independent and not subject to the direction or control of any person or authority; and

c. The high court would be crossing into the line of the independence of the DPP to descend into the arena of finding whether there is *prima facie* case against the Applicant;

d. The Applicant has not demonstrated that the DPP has not acted independently or has acted capriciously, in bad faith or has abused the process in a manner to trigger the high court's intervention.

17. It was contended that the Applicant failed to demonstrate that the DPP lacked the requisite authority acted in excess jurisdiction or departed from the rules of natural justice in directing that the Applicant be charged with offences disclosed by the evidence gathered. Therefore the 2nd Respondent averred that the Application has been filed in bad faith and is an attempt to defeat justice and should be dismissed with costs and the criminal trial against the Applicant be allowed to proceed to its logical and judicial conclusion.

Determination

18. I have considered the parties' respective cases, as contained in their affidavits as well as submissions on record. It is important to first deal with the circumstances under which the Court will stay, halt or quash a criminal process by way of judicial review proceedings.

19. The general rule is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail 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. 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. The fact however that the facts constituting the basis 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 applicant 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 recognised aim.

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

“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...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...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...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.”

21. 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.”

22. 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 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.”

23. In Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69, the High Court held:

“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”

24. The Court added that:

“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 the Court 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..."

25. In Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703, it was held:

"It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement or 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 cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth...When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court...In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in..."

26. In this case the ex parte applicants' case is that the criminal charges pending before the Kibera Chief Magistrates Court were brought maliciously and with a view to abusing the court process. However, the only basis upon which the applicant has arrived at this contention is because according to him, he did not stand surety for **Richard Wairi Gitau** in Kibera Law Courts vide CR 3574/2015. It is, however upon the ex parte applicant to satisfy the Court that the discretion given to the DPP to investigate and prosecute is being abused and ought to be interfered with.

27. This burden and standard was expounded in Kuria & 3 Others vs. Attorney General (supra) where it was held:

"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..”

28. The burden was therefore upon the applicants to place before the Court, not by mere allegations, but also by way of available evidence that the respondents’ conduct in preferring the criminal charges is reprehensible and an abuse of the Court and legal process and ought to be arrested.

29. That said I however disabuse the notion that criminal proceedings are instituted merely as a process of determining whether the conduct of the accused person amounts to an offence for the trial court to consider the conduct of the accused. A prosecution ought not to be commenced simply to enable the Court determine whether or not the allegations made against the accused are true. The people charged with conducting prosecutions must themselves show that they have credible evidence in their possession on the basis of which a conviction may result. If the prosecutor himself does not believe that the material in his possession may result in a conviction, it would be baseless to parade a person before a Court of law. Prosecution is a serious matter that ought not to be treated merely as a conveyor belt or a winnowing device for sorting out the wheat from chaff.

30. 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.

31. 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.

32. It is therefore clear that the terrain under the current prosecutorial regime has changed and that the discretion given to the DPP is not absolute but must be exercised 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 laissez-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.”

33. Whereas this is not the forum to determine the applicant’s innocence or culpability, the DPP owes this Court a duty of placing before this Court material upon which this Court can feel that he is justified in mounting the prosecution. 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.”

34. It is now clear that even in the exercise of what may appear to be *prima facie* absolute discretion conferred on the executive the Court may interfere. The Court can only intervene 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. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323**.

35. 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. It is clear that in exercising their discretion to charge a person both the police and the DPP's office must take into account and must exercise the discretion on the evidence of sound legal principles. 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”.

36. 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. Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution. A prosecution can either be mounted based on an offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officers or agencies. However, 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.

37. In my view, the correct prosecution policy is the one expounded in ***Code for Prosecutors of the Crown Prosecution Service of the United Kingdom*** (“the Code”) as reflected in our own prosecution policy, ***The National Prosecution Policy***, revised in 2015 which was relied upon by the Petitioners herein. The ***Code***, provides, *inter alia* that:

4.4 Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.

4.5 The finding that there is a realistic prospect of conviction is based on the prosecutor's objective assessment of the evidence, including the impact of any defence and any other information that the suspect has put forward or on which he or she might rely. It means that an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged. This is a different test from the one that the criminal courts themselves must apply. A court may only convict if it is sure that the defendant is guilty.”

38. ***The National Prosecution Policy***, revised in 2015 on the other hand provides at page 5 that:-

2. Public Prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction. In other words, Public Prosecutors should ask themselves; would an

impartial tribunal convict on the basis of the evidence available?”...

39. In Githunguri vs. Republic [1986] KLR 1 at page 18 and 19 a three Judge bench High Court constituted of Ag. Chief Justice Madan and Justices Aganyanya and Gicheru expressed themselves as follows:

“But from early times...the Court had inherently its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing – the Court had the right to protect itself against such an abuse...The power seemed to be inherent in the jurisdiction of every Court of Justice to protect itself from the abuse of its own procedure...every Court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the Court...Mr Chunga argued that to grant the application would be tantamount to curtailing or interfering with the powers of the Attorney-General under section 26 of the Constitution. This argument of his compels us to say that he kept freewheeling for a long time before us because perhaps he did not understand the real purport of the application. No one has made any challenge to the powers of the Attorney-General, nor would any one succeed if he were to say that the Attorney-General’s powers under section 26 can be interfered with. What this application is questioning is the mode (emphasis ours) of exercising those powers...No one will succeed in convincing us that the Court does not have inherent powers to exercise supervisory jurisdiction over tribunals and individuals acting in administrative or quasi-judicial capacity...A prosecution is not to be made good by what it turns up. It is good or bad when it starts. The long and short of it is that in our opinion it is not right to prosecute the applicant as proposed.”

40. Similarly, in Mohammed Gulam Hussein Fazal Karmali & Another vs. Chief Magistrate’s Court Nairobi & Another [2006] eKLR where Nyamu, J examined the policy considerations for halting criminal proceedings, noting that the court has two fundamental policy considerations to take into account which were enunciated in the case of M. Devao vs. Department of Labour (190) in sur 464 at 481 as:

“The first is that the public interests in the administration of justice require that the court protects its ability to function as a court of law, by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court processes may lend themselves to oppression and injustice...the court grants a permanent stay in order to prevent the criminal process from being used for purposes alien to the administration of criminal justice under the law. It may intervene in this way if it concludes that the court processes are being employed for ulterior purposes or in such a way as to cause improper vexation and oppression.”

41. I also associate myself with the decision in R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001 that:

“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. Based on the decision of Musinga, J (as he then was) in Paul Stuart Imison Another vs. The Attorney General & 2 Others Petition No. 57 of 2009, it was submitted that the circumstances which the Court should take into consideration in grant of stay were laid out in the following manner:

“The instances in which a court can declare a prosecution to be improper were well considered in *Macharia & Another –vs- Attorney General & Another (2001) KLR 448*. A

prosecution is improper if:

- a. It is for a purpose other than upholding the criminal law;
- b. It is meant to bring pressure to bear upon the applicant/accused to settle a civil dispute;
- c. It is an abuse of the criminal process of the court;
- d. It amounts to harassment and is contrary to public policy;
- e. It is in contravention of the applicant's constitutional right to freedom.

43. Based on *Bennett vs. Horseferry Magistrates' Court (1993) 3 All E.R. 138, 151, HL*, it was submitted that an abuse of process justifying the stay of a prosecution could arise in the following circumstances:

- a. where it would be impossible to give the accused a fair trial; or
- b. Where it would amount to a misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.

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

“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.”

45. As was held in *R. vs. The Judicial Commission into the Goldenberg Affair and 2 Others exp Saitoti HC Misc Appl. 102 of 2006*:

“It is not good for the DPP to argue that the Applicant should be arrested and charged so that he can raise whatever defences he has in a trial court. The Court has a constitutional duty to ensure that a flawed threatened trial is stopped in its tracks if it is likely to violate any of the applicants' fundamental rights.”

46. As appreciated in *Stanley Munga Githunguri vs. Republic* (supra)

“What kind of a mad man who has an opportunity to apply for prohibition would opt for a trial, the risk of conviction and imprisonment.”

47. In this case the Respondents have exhibited a copy of the title deed that was used in securing the release of the said **Richard Wairi Gitau**. That the titles are in respect of the same parcel of land is not in doubt. As to whether the applicant was the one who stood surety for the said accused person can only be determined by an examination of the proceedings in which the said title was given as security. Those proceedings are not before me. It is however clear that there are two different titles in respect of the same parcel of land. As to which of the two is genuine can only be determined at a full hearing on merits.

48. In order for me to find in favour of the applicant, it would be necessary for me to make a finding on

whether or not it was the applicant who stood surety for the said accused person; a finding which I cannot possibly make in these proceedings based on the material before me. In other words based on the material placed before me I cannot say for example that the case of the prosecution even if true cannot lead to conviction taking into account the position taken by the person who allegedly executed the 2nd title document. *Viva voce* evidence is required and possibly the opinion of handwriting expert before the applicant's case can be upheld.

49. It must be remembered that justice must be done to both the complainant and the accused and where there is evidence upon which the prosecution can reasonably mount a prosecution, it is not for the High Court in a judicial review proceeding to inquire into the sufficiency or otherwise of such evidence since the High Court ought not to usurp the role of the trial court in determining the merits of the criminal case. This position was appreciated in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR** where it was held:

“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”.

50. 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.

51. I have considered the applicant's case as well as the respondents' case and I am not satisfied that this is a proper case in which the court ought to bring the criminal proceedings to a halt. The applicant will be afforded an opportunity to defend himself, cross-examine witnesses and adduce evidence in support of his case and that in my view is the proper course to take in the circumstances of this case.

52. I must however state that I have found no reason why the 1st Respondent, the National Police Service Commission, was joined to these proceedings. The Commission's mandate does not encompass prosecution and no material was placed before me that would justify the joinder of the Commission to these proceedings.

53. 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.”

Order

54. Accordingly, the order that commends itself to me is that the Notice of Motion dated 22nd August, 2016 be and is hereby dismissed with costs to the Respondents.

Dated at Nairobi this 16th day of January, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Museve for Mrs Wambugu for the applicant

Mr Odunga for the 1st Respondent

CA Mwangi