REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

JUDICIAL REVIEW NO. 11 OF 2016

IN THE MATTER OF AN APPLICATION BY PATRICK NGUNGIRI MAINA FOR AN ORDER OF CERTIORARI

AND

IN THE MATTER OF AN APPLICATION BY PATRICK NGUNJIRI

MAINA FOR ORDERS OF PROHIBITION

AND

IN THE MATTER OF THE DIRECTOR OF PUBLIC

PROSECUTION

AND

IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT AT KIAMBU

AND

IN THE MATTER OF THE INSPECTOR GENERAL OF POLICE

BETWEEN

PETER NGUNGIRI MAINA ….....APPLICANT

AND

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

THE CHIEF MAGISTRATE'S COURT AT KIAMBU….....2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE…....….3RD RESPONDENT

JUDGMENT

1. In some Commonwealth jurisdictions, the Director of Public Prosecutions does not have a veto to determine if and when to bring criminal charges except in a select number of offences commonly known

as “Consent Offences”. In all other offences, the power to charge is, functionally, shared with the investigatory agencies.

2. In Kenya, the position is decidedly different. Frustrated by what was believed to be political influence of prosecutorial decisions in the pre-2010 post-colonial period, Kenyans went all in when crafting the Constitution of Kenya, 2010: The Office of the Director of Public Prosecutions (ODPP) will be, under Article 157 of the 2010 Constitution, an independent office which was given the monopoly of prosecutorial powers (complete with the power to direct the Inspector General of Police to do investigations) and the only person with the authority to exercise State powers of prosecution – including the power to:

> a. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
>
> b. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
>
> c. subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (*b*).

3. In order to break cleanly with the past and erect a truly independent ODPP, Kenyans willed the following sub-article in Article 157 of the Constitution:

> 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.

4. We now know on the authority of the Supreme Court, which I am bound to follow, that we must pay attention to our history, historiography, context and circumstances in interpreting our Constitution. Hence, in ***Re Interim Independent Election Commission [2011]eKLR, para [86]*** the Supreme Court remarked that:

> *The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights that envisions a human rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts.*

5. Hence, it is important to put in context the history that informed the text in Article 157 of the Constitution. To that extent, the following paragraph by **Author Waikwa Wanyoike** is precise and incisive in summarising the rationale and history:

> *Because of lack of tenure and the complete politicization of all senior government positions, the work of the AG in relation to prosecution was significantly compromised. The AG became an agent of repression, initiating or allowing for initiation of many unmeritorious criminal cases against persons perceived to be opposed to the political regime, while terminating or failing to prosecute many meritorious criminal cases for persons considered to be supportive of the regime. Criminal law in many ways became a tool not for procuring criminal justice but for punishing political dissent. The objectivity expected of the AG was substituted by subjective and partisan considerations. A dangerous culture of how the prosecutor handled his/her role was established.1*

6. It is, therefore, quite clear that Kenyans intended to create a robustly independent Office of the Director of Public Prosecutions. One which will not take direction from any quarters – whether from political elites or economic elites or be held at ransom by any powerful forces. This desire is what explains the strident phraseology in Article 157(10) of the Constitution.

[1]Waikwa Wanyoike, *The Director Of Public Prosecutions and The Constitution: Inspiration, Challenges And Opportunities*, in Yash Gha i& Jill Ghai (eds.), The Legal Profession and the New Constitutional Order in Kenya, at p. 170.

7. Yet, it bears recalling that, like all other offices, organs or agencies created by the Constitution, Kenyans were not oblivious to the potential misuse of the offices they were creating and power they were delegating. Their history had taught Kenyans to explicitly demand for accountability and transparency in the conduct of the affairs of each of the offices they created in the Constitution. Indeed, one might be forgiven for thinking that Kenyans were obsessed with the need to hold each State Office and Officer accountable. The overwhelming desire for accountability is the golden thread that runs through the Transformative Constitution of Kenya – so much so that Justice J.B. Ojwang', SCJ has described the Constitution as a Transformative Charter of Good Governance.

8. In the case of the ODPP, one can discern two ways they wanted the ODPP to be held accountable. The first one, is the traditional method: the Constitution created an independent Judiciary on the one hand, and quite robust rights of arrested and accused persons. In sum, these rights ensure that the State, through the ODPP can only achieve convictions over persons who are truly and verifiably guilty of the offences they are accused of committing.

9. However, there is a second way in which Kenyans wanted to script accountability for the ODPP. They did this, quite straightforwardly, by inserting a not-so-common sub-article in the Article creating the ODPP. Hence, in Sub-Article 11, the Constitution provides as under:

> *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.*

10. By this explicit provision, Kenyans demand that the ODPP must do its job such that the Criminal Justice System is only used for the public interest that is to say it cannot be use in an oppressive manner to unfairly target certain individuals or groups or, conversely, to advantage others. The overriding objectives of the Criminal Justice System must always be taken into account in making a decision on whether to charge a person or pursue criminal case against them. Nothing more and nothing less than this.

11. As our case law has now firmly established that "the Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation." (***Kuria & 3 Others v Attorney General [2002] 2KLR 69***.) Indeed, this position, although now expressly scripted into our Constitution is of vintage judicial ancestry in Kenya. As early as 2001, the High Court uttered the following iconic words on the subject:

> *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 probably cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable.*

12. Similarly, in the more recent ***R v Director of Public Prosecutions & 2 Others Ex Parte Praxidis Nomoni Saisi [2016] eKLR***, Justice Odunga, after analysing a long history of similar cases concluded that "where it is clear that the [prosecutorial] discretion is being exercised with a view to achieving certain

extraneous goals other than those recognised under the Constitution and the Office of the Director of Public Prosecutions Act, that would….constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion."

13. Indeed, in this and other cases, Justice Odunga, with whom I entirely agree, located the duty and authority of the Court in reviewing the exercise of the unfettered discretion of the DPP in the same mould as the exercise of any other executive discretionary power to which Judicial review is available. Hence, he states:

> 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 andun reasonable.

14. What unmistakably emerges so far is that the Court has the duty and authority to review the charging decisions of the DPP. However, what also emerges from our decisional law is that the Court is extremely cautious in performing that duty. Hence in the ***Kuria Case (supra)***, the Court expressed itself thus:

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

15. And more recently in ***Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR*** thus:

> *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. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. 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.*

16. The law and practice, then, are quite clear: while the discretion of the DPP is unfettered, it is not unaccountable. While the authority to prosecute is entirely in the hands of the DPP, it is not absolute. On the other hand, while the power of the Court to review the decisions of the DPP are untrammelled, they are not to be exercised whimsically.

While the Court can review the DPP's decisions for rationality and procedural infirmities, it cannot review them on merit.

17. Having stated the law and practice as clearly as I could, I will next apply them to the facts of the case.

18. It is best to tell the story from the Applicant's perspective.

19. Sometime in 2008, the Applicant says he was instructed by Mapema Holdings Ltd through its directors, Viktah Maina Ngunjiri and James Kamau Nyambura to act for Mapema in a transaction which Mapema was interested in purchasing a parcel of land in Thika. That land was LR No. 4953/2414 (the "Property"). The land was, apparently, a leasehold interest granted to the Thika Dairies Limited. Mapema instructed the Applicant to approach Thika Dairies to purchase the property from them.

20. In March, 2008, the Applicant met with two directors of Thika Dairies namely Patrick Muiruri and John Sebastian Muiruri in his offices for purposes of discussing the land transaction. Apparently, Patrick Muiruri and John Muiruri told the Applicant that they had the authority and the legal competence to execute the sale documents on behalf of Thika Dairies. The two provided the Applicant with a CR-12 document which, allegedly showed the shareholding of Thika Dairies putting the shareholding of Patrick Muiruri at 60,001 shares and John Muiruri at 5,000 shares. This was out of a total of 100,000 total shares in Thika Dairies. At that meeting, apparently, the two directors of Thika Dairies informed the Applicant that they intended that the Applicant should act for them as well in the transaction. This would mean that the Applicant would be acting for both the purchasing company and the selling company.

21. The parties agreed to prepare a Sale Agreement outlining the main provisions of their agreement: The purchase price would be Kshs. 9 Million of which a deposit of Kshs. 2 Million would be paid upon execution of the Sale Agreement. The balance of Kshs. 7 Million would be paid on or before the expiration of 90 days from the date of execution of the Sale Agreement. The Applicant was tasked to prepare the Sale Agreement outlining the major terms including the fact that the Applicant was to act for both Mapema and Thika Dairies.

22. On or about 10/03/2008, parties claiming to represent both Mapema and Thika Dairies appeared before the Applicant for execution of the Sale Agreement. Unsurprisingly, Patrick Muiruri and John Muiruri appeared for Thika Dairies. Not surprisingly, they were carrying what they claimed was the company seal for Thika Dairies. They proceeded to execute the Sale Agreement on behalf of Thika Dairies. The Applicant attested to both sets of signatures and seals.

23. Then, apparently pursuant to the Sale Agreement, Mapema Holding decided to pay the agreed deposit of Kshs. 2 Million. That sum was paid in two banker's cheques drawn in favour of Patrick Muiruri. Ostensibly, Patrick Muiruri was receiving the sum on behalf of Thika Dairies. It is important to point out that the payment and receipt of this sum to Patrick Muiruri is not denied by any of the parties: the Applicant, Patrick Muiruri or Mapema Holdings. Later, on 31/03/2008, the Applicant claims he paid Patrick Muiruri the remaining sum of Kshs. 7 Million by way of three banker's cheques. A letter by the bank appears to confirm that the payments were, indeed, made.

24. The next occurrences are more contested.The Applicant's script is that after due payment of the full purchase price, Patrick Muiruri, ostensibly acting in his capacity as Director of Thika Dairies, furnished the Applicant with the following documents for purposes of effecting the transfer:

a. The original certificate of Title for LR No. 4953/2414 (IR 72606)

b. Deed of transfer in triplicate

c. Rates clearance certificate for the Municipal Council of Thika

d. Land Rent Clearance Certificate for the year 2008

e. Commissioner of Land Consent to transfer

f. Copy of Certificate of Incorporation of Thika Dairies

g. Copies of National ID Cards for Patrick Muiruri and John Muiruri as directors of Thika Dairies

h. Three passport size photographs of Patrick Muiruri and John Muiruri.

25. The Applicant says he then prepared the deed of transfer. He also claims that Patrick Muiruri and John Muiruri signed the deed of transfer voluntarily and that they did so in their capacity as Directors of Thika Dairies. The Applicant attested their signatures.

26. On 14/03/2012, the Applicant says the transfer instrument, duly signed by all the parties, was lodged for registration. However, the Applicant says there was a mishap: he had requested his clerk, George Ruhohi, to affix the passport size photographs of John Muiruri and Patrick Muiruri and fill in the details of the two. The Applicant was, ostensibly away in the United Kingdom attending a graduation ceremony of a family member at that time. As such, the Applicant says, it was the clerk who undertook the work.

27. Unfortunately, the Applicants tell the story, in the Applicant's absence, the clerk made a huge mistake: unbeknownst to the Applicant, the Clerk affixed the wrong passport size photographs and lodged the documents for registration. In other words, it is undisputed that the photographs affixed to the deed of transfer are not those of Patrick Muturi or John Muturi or any of the directors of

28. It would appear that things came to a head at Thika Dairies thereafter. An ownership dispute ensued. One of the other Directors of Thika Dairies, Prudenzio Gaitara raised alarm that various illegal, unauthorized and irregular entries had been made in the register of companies therefore altering the shareholding, capital structure and directorship of Thika Dairies fraudulently. In particular, Patrick Muiruri, it is alleged, fraudulently increased his shares from one share to 60,001 shares. The effect of the alteration was, of course, that Patrick Muiruri became the majority shareholder and with veto powers over the Company.

29. One of the things that Prudenzio did upon discovering the alleged alteration in the ownership structure and shares in Thika Dairies, was to do a search on the properties owned by Thika Dairies. To his dismay, at least in his rendering, Prudenzio claims that he discovered for the first time that the Property had been transferred to Mapema Holdings. Claiming he did not have any idea about the sale to Mapema Holdings and that Thika Dairies had never approved the sale, Prudenzio made a complaint to the Police and commenced action against Patrick Kariuki Gaitara, Thika Dairies and Mapema Holdings seeking a temporary injunction restraining the defendants from transacting or dealing with the Property.

30. As part of litigating the civil suit, Prudenzio and Thika Dairies apparently discovered that the passport size pictures used in the Deed of Transfer did not belong to Patrick Muiruri and John Muiruri. The Applicant claims that this was an honest and inadvertent mistake by his clerk. Prudenzio and both Patrick and John Muiruri now claim that this was a forgery and an attempt to defraud. Patrick and John Muiruri deny that they ever executed the Deed of Transfer.

31. It is good to tell the story from the other side as well.

32. Prudenzio, upon discovering what he believed was fraud at Thika Dairies, filed a complaint to the Police on 01/11/2013 that the Property had been fraudulently transferred to Mapema Holdings.

33. Upon investigations, the Police discovered that the Applicant had acted for both Thika Dairies and Mapema Holdings in the transaction. They further discovered that the passport size photographs and the

ID numbers used in the Deed of Transfer were not those of Patrick Muiruri and John Muiruri as the documents claimed.

34. Patrick and John Muiruri conceded to entering into the Sale Agreement and to receiving Kshs. 2 Million. However, they were quite categorical that they never executed the Deed of Transfer or give out their passport size photographs.

35. The Police, on advice of ODPP, referred the case to a Document Examiner. His verdict was devastating to the Applicant: it confirmed that the transfer documents were not executed by Patrick Muiruri and John Muiruri.

36. Hence, armed by three sets of facts: the wrong passport size photos; the wrong National ID card numbers; and confirmation by an expert that the signatures for Patrick and John Muiruri were not authentic, the Director of Criminal Investigations recommended that the DPP charges the Applicant with two offences namely:

> i. Forgery contrary to section 347(d)(i) of the Penal Code as read together with section 349 of the Penal Code in respect of forgery of the deed of transfer for land parcel no. 4953/2414;
>
> ii. Obtaining registration of title by false pretence contrary to section 320 of the Penal Code.

37. The Applicant bristles at the idea that he forged any document and that he acted in any criminal way. He believes that the DPP's decision to prosecute him is unfounded and irrational as it is based on mis-information. He further believes that the decision failed to take into account relevant considerations and it is not rationally connected to the information before the DPP. The Applicant believes that the decision to prosecute him is unfounded, irrational and oppressive.

38. In particular, the Applicant is steadfast in his belief because he says he was merely acting in his professional capacity for which he should not be victimised.

39. Factually, the Applicant believes that the analysis done by the DPP leading to his charging decision is irrational. He raises eight factual issues in an attempt to demonstrate this irrationality:

> *a. First, the Applicant says it is plainly incorrect for the DPP to have concluded that there was no evidence that Mapema Holdings had paid the balance of purchase price of Kshs. 7 Million to Thika Dairies yet there is evidence that three bankers cheques were paid to Patrick Muiruri;*
>
> *b. Second, the Applicant faults the DPP for concluding that the signatures in the Deed of Transfer by Patrick Muiruri and John Muiruri were forged yet there was a Forensic Document Examination Report by one Emmanuel Karisa Kenga, a Forensic Document Examiner concluding that the signatures were authentic;*
>
> *c. Third, the Applicant argues that the DPP failed toconsider the significance of the presence of the common seal of Thika Dairies on the deed of Transfer document which common seal could only have been in possession of the directors of Thika Dairies;*
>
> *d. Fourth, the Applicant states that the DPP was factually wrong to conclude that the serial number of the ID Card of Patrick Muiruri was not 214306026;*
>
> *e. Fifth, the Applicant contends that the DPP was wrong to conclude that Patrick Muiruri and John Muiruri were victims of forgery when in fact they took part in the transaction;*
>
> *f. Sixth, the Applicant insists that the DPP did not give due consideration to the fact that Patrick Muiruri admitted to receiving Kshs. 2Million as the deposit ofthe purchase price;*
>
> *g. Seventh, the Applicant is dismayed that the DPP failed to give full weight to the internal conflicts*

within Thika Dairies and the fact that there were plausible allegations against Patrick Muiruri as a forgerer who had altered the ownership of shares in Thika Dairies hence impugning his credibility and character;

h. Lastly, the Applicant says that the DPP failed to summon him to shed light on the circumstances in which the documents were executed and lodged at the Lands Registry.

40. The Applicant believes that the decision to charge him was unjustly influenced by undue pressure from Patrick Muiruri in order for him to fulfil his aim to harass and intimidate the directors of Mapema Holdings and the Applicant. The Applicant is, therefore, persuaded that the decision to charge lacks any rational foundation and failed to take into account relevant consideration.

41. The Applicant also argues that the decision to charge him should be reviewed because it violates his legitimate expectations that he will not be charged as an advocate for carrying out his professional duties in a transaction. While conceding that there was an inadvertent error in that his clerk affixed the wrong photographs, the Applicant argues that he fulfilled the wishes of the parties and transferred the land from the Vendor to the Purchase and therefore he had a legitimate expectation not to be prosecuted.

42. The Applicant extends the argument on legitimate expectations to the importance of protecting advocates when they are acting within the scope of their duties as advocates. Raising the spectre of a slippery slope, the Applicant argues thus:

This violation of the Applicant's legitimate expectation creates a greater risk in that it amounts to interference with the independence of the legal profession as Advocates will now be at risk of being prosecuted for performing their functions. This will, in turn, lead to an infringement of the rights of the public under Article 50(2)(g) of the Constitution which enshrines the right to legal representation. As a result of this prosecution of the Applicant, Advocates will be cautious in the cases they take on so as to avoid prosecution thus greatly watering down the right to legal representation.

43. The Applicant has made a few other related arguments which I do not find necessary to go into details about. They include the argument that:

a. The irrational nature of the DPP decision to prosecute the Applicant contravenes the Applicant's rights including the right to freedom and security of the person enshrined under Article 29(a) of the Constitution since the Applicant is at risk of losing his liberty without just cause;

b. The right to fair administrative action under Article 47 of the Constitution since the Applicant has been arrested and charged on the basis of an unfounded and irrational decision for carrying out his professional duties;

c. The decision to charge the Applicant amounts to an infringement of his right to fair hearing as enshrined under Article 50(1) of the Constitution.

44. Applicant has also argued that the decision to charge him contravenes the DPP's duties since the charging decision, to his mind, goes against public interest as the Applicant, being an advocate of the High Court of Kenya and an officer of the Court was only serving his clients and acting in the course of his professional duties. The Applicant argues that since advocates provide essential services to the public at large, it would perilous for the DPP to be permitted to bring charges against them based on their work. For the same reason, the Applicants also argue that the prosecution is not in the interests of the administration of justice: as an officer of the Court and a defender of justice, an advocate should not be exposed to criminal prosecution for acts or omissions done in the course of their duty if such charges are based on unfounded allegations and misinformation.

45. Lastly, the Applicant has argued that the criminal prosecution is an abuse of the legal process for two other reasons. First, there is already an on-going case as regards the ownership of the Land (LR No.

4953/2414) at the Environment and Land Court where the grievances of the parties will be ventilated and a court of competent jurisdiction will untangle the issues and make a determination on the ownership of the land in question. Secondly, the Applicants insist that since he acted for both the Purchaser and the Vendor in the transaction, if any of the parties involved had grievances against him, those should have been filed at the Advocates Complaints Commission as established under section 53(1) of the Advocates Act and the Advocates Disciplinary Tribunal established under section 57(1) of the same Act.

46. The task of this Court is only to determine, based on the facts and the evidence before it, whether there is any sense in which one could say, in context, that the decision by the DPP to charge the Applicant in this case is irrational, an abuse of discretion, a failure to act fairly in the exercise of discretion, actuated by malice or other irrelevant considerations, against public interests, does not cohere with the interests of the due administration of justice, is oppressive, or is an abuse of the legal process.

47. Here, we have an Advocate who says he was acting for both the Vendor and the Purchaser in a land transaction. Both parties were corporations. He says he was instructed by both and the Sale Agreement and Deed of Transfer were signed by both parties. He feels that he is now caught between two malevolent forces: an internal conflict within the vendor corporation where share ownership has become an issue – and the perfidy of one of the directors of the Vendor Corporation, Patrick Muiruri, who, after pocketing the purchase price has now turned around and wants a reversal – both to fraudulently keep the proceeds as well as save himself from possible legal action for acting without authority.

48. The Applicant has stridently argued about the dangers of allowing the DPP to pursue criminal proceedings against an advocate acting for clients in these situations. In the first place, it is unfair, he says. He also argues that it will likely have a chilling effect: advocates will simply be a lot more cautious in acting for clients because of the fear that they could be prosecuted for their legal work.

49. On my part, I find certain troubling aspects in this case. They include the following ***seven***:

a. The Applicant chose to act for both the vendor and the purchaser without warning himself of the dangers of doing so. He compounded the risks by accepting the instructions to act for the Vendor – a corporation –without asking for or seeing any resolution or other authority by the Vendor corporation to instruct him to act for it.

b. Relatedly, the Applicant accepted to act for the Vendor Corporation without seeing any document from the Company's Board of Directors resolving to sell the land;

c. Thirdly, and, perhaps most troubling, while basic company law teaches us that there is an abiding distinction between a director and the corporation, the Applicant, acting for the corporation (and not Patrick Muiruri and John Muiruri) proceeded to cause the purchase price not to the Vendor Corporation which was the vendor and for whom he understood himself to be acting for, but to Patrick Muiruri. If the Applicant understood himself to have been acting for Thika Dairies, the least he could have done is to ensure that the cheques were paid to the account of Thika Dairies. Instead, by his own admission, he facilitated the payment of the purchase price to Patrick Muiruri.

d. Fourthly, there are genuine questions whether the full purchase price was paid. The Applicant claims that it was paid directly to Patrick Muiruri and attached three bankers' cheques to prove this. He also attached a letter from Equity Bank showing that on 31/03/2008, two cheques adding up to Kshs. 6 Million were issued by Equity Bank. However, the two cheques were purchased by Viktah Maina Ngunjiri and Chania Prime Mart. While Viktah Maina Ngunjiri is a director of Mapema Holdings, there is nothing else that demonstrates that these cheques were for related to the transaction in question. Indeed, it is doubly odd that in a transaction in which the Applicant was representing the Vendor, the cheques would be sent directly to the Vendor by third parties who are unrelated to the transaction. The oddity is compounded by the fact that there is no forwarding letter or acknowledgement of receipt of the cheques by the Vendor.

e. Fifthly, the length of time between the execution of the Sale Agreement and the lodgement of the

Deed of Transfer raises some question: the Sale Agreement was executed sometime in March 2008 and the deposit was ostensibly paid at the beginning of March and the full purchase price paid on 31/03/2008. Yet, the Deed of Transfer was not lodged until sometime in March, 2012. There is no evidence of any communication between the Applicant and the Vendor closer to the time of the lodgement of the Deed of Transfer to explain this delay. It seems more curious that the Deed of Transfer is dated 05/03/2011 even though the full purchase price was ostensibly paid on 31/03/2008 and all the documents forwarded to the Applicant then.

f. Sixthly, is the all-important question of the use of wrong photos and wrong ID Numbers in the Deed of Transfer: was this mere error caused by the venial inattention by the Applicant's clerk as the Applicant says it was or is evidence of criminal intent by the Applicant?

g. Finally, and perhaps most importantly, there is the claim that the signatures in the deed of Transfer are forged. The Applicant vehemently denies and has recruited his own Forensic Document Examiner to opine that the signatures are authentic. On the other hand, the DPP, engaged a Forensic Document Examination Expert from the Directorate of Criminal Investigations who concluded that the signatures of Patrick Muiruri and John Muiruri in the Deed of Transfer are forged.

50. To be sure, the Applicant has a seemingly plausible come-back to each of the seven points above. Indeed, it is entirely possible that those explanations might be benign and persuasive and might when considered against the Prosecution theory prevail. But that is exactly the point. There are readily obvious factual disputes in this case – enough for a rational actor to conclude that there is sufficient evidence to take the case to trial in a criminal case. It is hard to say that a Prosecutor who looks at all the factors in this case and makes the charging decision is acting irrationally or oppressively. It is equally difficult to say that such a Prosecutor is acting solely out of extraneous or other improper considerations.

51. Of course that is also not to say that the Prosecution has a cocksure criminal case. It is merely to say that all considered, it is not an irrational or oppressive decision for the ODPP to charge in this case. While there are some troubling questions on the role of Patrick Muiruri which, to my mind, verge on criminal fraud, that does not effete the equally troubling questions respecting the conduct of the Applicant in the case. Here, to paraphrase the ***Arap Ngeny Case***, a prudent and cautious prosecutor can be able to demonstrate that she has a reasonable and probable cause for mounting a criminal prosecution.

52. Consequently, like in the ***Kuria Case***, I find that "it would be in the interests of the Applicants, the Respondents, the Complainants, 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 Applicant the chance to clear his name."

53. As the ***Michael Monari Case*** remarked "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." This Court is reluctant to intervene in this case.

54. In the result, the Notice of Motion dated 29/12/2016 is dismissed with costs.

Dated and delivered at Kiambu this 23rd day of February, 2017.

....

JOEL NGUGI

JUDGE