



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 405 OF 2016

KENNEDY OTIENO AGWARO.....1ST PETITIONER
JOSEPH MUNGAI.....2ND PETITIONER
DAVID KITAWI NGODA.....3RD PETITIONER

VERSUS

THE DIRECTOR, CRIMINAL INVESTIGATIONS

DEPARTMENT.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC

PROSECUTIONS.....2ND RESPONDENT

WIBESO INVESTMENTS LIMITED.....3RD RESPONDENT

JUDGEMENT

Introduction

This petition brings into sharp focus the manner in which the duties, powers and functions of the Director of Public Prosecutions ought to be exercised. The Office of the Director of Public Prosecutions (DPP) is a constitutional office which plays a vital role in the administration of justice in criminal matters. The DPP is the sole Authority vested with the power and responsibility to exercise control over the prosecution of all criminal matters except the institution of cases at the Court?Martial.[1]

At the outset I find it appropriate to state that fair and effective prosecution is essential to a properly functioning criminal justice system and to the maintenance of law and order. The individuals involved in a crime – the victim, the accused, and the witnesses – as well as society as a whole have an interest in the decision whether to prosecute and for what offence, and in the outcome of the prosecution.

Every case is unique and must be considered on its own merits but there are general principles which should underlie the approach to prosecution. It is important to point out that the DPP must at all times uphold the rule of law, the integrity of the criminal justice system and the right to a fair trial and respect

the fundamental right of all human beings to be held equal before the law, and abstain from any wrongful discrimination.

The prosecutor is an administrator of justice, a zealous advocate, and an officer of the court. The prosecutor's office should exercise sound discretion and independent judgment in the performance of the prosecution function. The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to seek conviction. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion not to pursue criminal charges in appropriate circumstances. The prosecutor should seek to protect the innocent and conviction of the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and accused persons. The prosecutor should avoid any appearance of impropriety in performing the prosecution function.

The Petitioners case

The petitioners are directors of Tamarid Meadows Limited, (hereinafter referred to as the company) incorporated for the purposes of buying land for the development of a real estate project for sale. In May 2008, the company instructed a real estate agent to look for land along Mombasa Road. Subsequently the agent introduced the petitioners a Mr. Saul Chemo who offered to sell to them two parcels of land along Mombasa Road, that is L.R. No. 18469 and L.R. no. 337/1642 registered in the names of Volta Insurance Consultants Ltd and Al-Hassan International Traders Ltd respectively. The said agent held himself as duly authorized to transact by virtue of being a director in both companies.

Upon conducting due diligence and upon being satisfied that the properties were registered in the names of the vendors, the petitioners purchased the two parcels of land at an agreed total consideration of **Ksh. 81,000,000/=**. The requisite consents and clearances were obtained as required and the stamp duty and registration fees was paid as required and the transfer was registered in the name of the purchaser. Subsequently, the petitioners as registered proprietors, pursuant to a tile issued by the lands registry charged **L.R. No. 18469** to Kenya Commercial Bank Ltd to secure borrowing to the tune of Ksh. 170,000,000/=. Prior to the registration the charge, the Bank through its advocates conducted due diligence and was satisfied on the validity of the petitioners title relying on the strength on genuine search documents obtained from the lands registry. Also, the petitioners charged the properties to several other financial institutions all of which did due diligence prior to registration of the charge documents.

The petitioners constructed residential flats on the said land and sold some units to various purchasers and presented transfers by way of sub-leases to the lands office for registration. The requisite stamp duty, registration fees, clearances and consents were also obtained from the lands office. However, in March 2011, the Chief Land Registrar informed the Petitioners advocates that the sub-leases for the various purchasers could not be registered "because the title was not valid." This prompted the petitioners to lodge complaints with various senior officers at the Ministry of Lands.

It is also averred that due to pressure from the various purchasers, the petitioners granted the purchasers possession but they could not pay balances of the purchase price and as a consequence the petitioners could not service the Bank loans. As a consequence, Kenya Commercial Bank Ltd sued the company and the petitioners in HCCC No. 539 of 2012 seeking to enforce the personal guarantees so as to recover the loan.^[2] The petitioners successfully enjoined the Honourable Attorney General in the said case. The Attorney General entered a defence stating that the instruments presented by the petitioner were capable of being registered. The interested party and two other entities unsuccessfully sought to be enjoined in the said case. After the court declined its application, the interested party instigated the investigations by the first Respondent on the petitioners titles, which led to the institution of the criminal proceedings in criminal case number 1297 of 2016 being challenged in this petition.

The petitioners also aver that the complainant in the above criminal case is the interested party in this case, and that the three petitioners are among the seven accused persons facing the charges of obtaining credit of Ksh. 170,000,000/= from Kenya Commercial Bank Ltd and obtaining execution of a charge by

false pretences. It is also averred that the particulars of the charge sheet are similar to particulars in the said civil case. It is also averred that at all material times the petitioners and the Banks used lawyers who advised them at all stages.

The petitioners also state that the complaint in respect of which the petitioners are charged with is actively being investigated and alive before another court and that the conduct of the investigations are clearly being directed and conducted according to the directions of the interested party which actions are unlawful and not in line with the constitution. The petitioners aver that the interested party lost two applications to be enjoined in the civil suit and in retaliation resorted to instigating the criminal prosecution, hence the first and second Respondents acted in bad faith in that the police were involved belatedly in a civil dispute, which amounts to abuse of court process and that the prosecution in question is being used for ulterior motives.

It is also averred that the interested party is using the criminal prosecution to exert undue pressure on the petitioners to coerce them to abandon or settle or hand over the development of the 69 units, hence an abuse of powers by the first and second Respondents and that the criminal investigation and the prosecution is a contravention of their constitutional rights to a fair trial, a fair administrative action and amounts to abuse of legal process and contravenes Articles 25 (c), 47, 50, 245 (4) (a) & 157 (11) of the constitution.

Respondents Response

On record is the Replying affidavit of Cpl Daniel Njuki filed on 18th October 2016. He avers that a complaint was lodged on 13th January 2010 and continued to be subject to investigations culminating in criminal charges being instituted on 22nd August 2016, and that as early as December 10th, 2010 an inquiry file was forwarded to the honourable Attorney General, who was then in charge of prosecutions for perusal and advise and upon perusal he returned the file directing further investigations. Since then investigations continued until 20th May 2016 when the file was re-submitted to the DPP for perusal and advise who recommended prosecution culminating in the criminal case complained of. He denied the allegations of abuse of process and insisted that the investigations were conducted in conformity with the law.

Interested parties Response

Bedan G. Mbugua, a Director of the interested party filed a Replying affidavit on 21st October 2016 in which he averred *inter alia* that he reported alleged criminal activities of the petitioners to the police, that the interested party is the original grantee of I.R. No. 72481 (L.R. No. 18469). He further avers that acting on credible information that the petitioners company had with intention to defraud manufactured a fake grant and was passing off the same to unsuspecting members of the public as being valid, he reported the matter to the police, hence the investigations and prosecution cannot be said to be an abuse of court process and that the same was instituted in conformity with article 157 (11) of the constitution.

The existence the civil suit is admitted but it is averred that the same was instituted in bad faith, that the case is purely commercial and that section **193A** of the Criminal Procedure Code^[3] permits parallel criminal and civil proceedings. The interested party denies influencing the criminal proceedings and that there is no allegation that the criminal trial infringes Fundamental Rights of the petitioners.

Petitioners Replying Affidavit

The first petitioner filed two Replying affidavits on 2nd December 2016 in which he avers that the investigations were not conducted independently and impartially, that the purchase of the land in question was done after due diligence which included a search, sale agreement, transfer, payment of stamp duty and units were sold and taxes paid to the government and that even though the title is alleged to have been obtained in 2002 by the vendors, the petitioners purchased it in 2008 and that the petitioners company were *bona fide* purchasers for value and that the Ministry of Lands, being the custodian of titles

has never responded to this case, in particular, they have never explained how they registered 'fake documents' and that the complainants title has never been annexed to the affidavits filed in court.

Petitioners Advocates Submissions

The petitioners counsel submitted that the Respondents exercised their powers arbitrarily, that the lands office issued searches, registered the documents and accepted stamp duty and that the petitioners cannot be lumped together with the persons who allegedly did the forgery and that the prosecution is selective in that the agent and lands office staff have been left out, hence selective application of the law and that the transaction cannot be illegal unless it is so declared by a court[4] and that the prosecution was influenced by bad faith as demonstrated by Cpl Njuki's purported questioning of Attorney General judgement in the contents of his defence filed in HCCC No. 539 of 2012.[5]

Counsel also cited insufficient investigations in that the investigating officer omitted some key documents, and that the lands office stated that the petitioners documents would be registered in due course and at the same time cited ongoing investigations on the authenticity of the titles, hence, it is unfair for the Respondents to mount a prosecution when investigations are still ongoing. Counsel submitted that the prosecution was commenced without a proper factual foundation as was held in *R vs. A.G & Another ex parte arap Ng'eny*[6] and *Investments & Mortgages Bank Ltd vs Comm. of Police & the DPP & Others*[7] and no factual basis has been presented to demonstrate why the facts in issue found five years ago by the Attorney General to be insufficient to sustain a prosecution have suddenly become credible enough to mount a prosecution[8] and argued that the DPP did not file a Replying affidavit in these proceedings.

Counsel submitted that the court has a constitutional duty to ensure that a flawed trial is stopped in its tracks if it is likely to violate any of the applicants fundamental rights[9] and that the discretion given to the DPP is not absolute.[10] Counsel also submitted that Kenya Commercial Bank Ltd sued the petitioners seeking to enforce a contractual guarantee and did no alleged fraud at all.

Counsel for the first and second Respondents submissions

Counsel for the DPP filed written submissions on 20th February 2017, but there was no appearance when the matter came up before me for highlighting of submissions even though the date was taken by consent. In their written submissions, it is argued that the DPP acted in accordance with his powers under Article 157 (11) of the constitution and that the court ought not usurp the constitutional mandate of the DPP[11] and that the first Respondent exercised its powers under the law and stated that no violations of the constitution have been proved[12] and that the petitioners are not entitled to the reliefs sought.

Submissions by counsel for the interested parties

Counsel for the interested parties submitted that the investigations were undertaken in a professional manner and that the police have a duty to investigate all complaints[13] to their logical conclusion and that there was no abuse of police powers and that the DPP acted pursuant to its powers under article 157 (11) of the constitution and that this court ought not to interfere with the mandate of constitutional bodies. [14] Counsel also submitted that the existence of concurrent civil and criminal proceedings is permitted under section 193A of the Criminal Procedure Code[15] and that there was no basis for the court to stop the prosecution and further that violation of constitutional rights has not been established and urged the court to dismiss the petition.

Whether the Respondents acted in excess of their statutory and constitutional mandate

The core issue for determination in this petition is whether or not the Respondents acted in within their statutory and constitutional mandate in mounting the investigations and prosecution in question.

The undisputed facts of this case are that company was interested in purchasing a parcel of land along Mombasa Road with a view to developing Residential units for sale, that they enlisted the services of a

property agent to find for them a plot, that the agent informed them that he had two plots and that they conducted a search as required at the lands office and the searches confirmed the vendors as the registered owners of the plots and being satisfied on the validity of the titles relying on the search obtained from lands office, they entered into a sale agreement with the help of lawyers and upon successful registration of the transfer they paid the balance of the purchase price. It is not dispute that the said transfer was registered at the lands office and the requisite stamp duties and registration fees was duly paid.

The other relevant evidence is that the petitioners borrowed money from financial institutions using the said titles as security. A notable borrowing is a charge to secure a borrowing of Ksh. 170,000,000/= from Kenya Commercial Bank Ltd. Prior to the said borrowing, the Bank as expected through its advocate conducted due diligence including a search on the title and upon being satisfied as to the validity of the title, and successful registration of the charge instrument at the lands office, the Bank released the funds. It should also be noted that the charge instruments were properly registered at the lands office and the requisite stamp duty and registration fees paid. Also relevant is the fact that all the requisite clearances and consents for the above transactions were issued by the Lands office. None of these documents have been disputed.

The disturbing issue is that when transfer instruments for the various sub-leases were presented for registration, the same lands office informed the petitioners that they were not able to register the said instruments allegedly because their title was not valid.

The above facts are highly disturbing and a clear confirmation of the unacceptable rot and mess that has persisted at the lands office. The affidavit by a one Edwin Wafula annexed to the affidavit of Bedan Mbugua does not shed light at all in that there is no explanation why the lands office issued the searches confirming the vendors were the registered owners, hence giving the vendors title a clean bill of health. Relying on this document, the petitioners purchased the land. Prior to the purchase, the lands office issued clearances, consents and registered the transfer in favour of the petitioners.

The petitioners used the title to secure borrowing from Banks and as expected the Banks also conducted due diligence and searches issued by the lands office also confirmed the validity of the title and on the strength of the title the Bank agreed to grant financial accommodation to the petitioners. The charge instruments were registered by the same lands office and stamp duty and registration fees was paid as required.

The affidavit of Edwin Wafula relied upon by the interested party is disturbingly silence o these key questions and the role, actions and or omissions of the lands office and to me the affidavit is totally escapist and does deliberately failed to address the issue. It is not enough to allege that their file is missing nor does it explain why or how the lands office issued searches, registered a transfer and charge documents and accepted stamp duty if at all the title was invalid.

I also note that neither did Edwin Wafula nor did Beda Mbugua annex the alleged correct title allegedly held by the interested party. Edwin Mbugua nevertheless seems to admit the existence of a dispute in paragraph 12 where he avers that "this matter should be transferred to the Environment and Land Court to allow determination of ownership of the title."

It is also important to point out that the vendors are known and clearly disclosed in all the documents. All the parties were at all stages represented by advocates. The central point was the lands office were all the advocates conducted searches and due diligence and documents were registered as required. The Bank filed a civil suit to enforce the guarantees but the charge sheet shows a charges of obtaining money by false pretences and obtaining a security by false pretences. There is nothing to show that the charge instruments diligently processed by the Banks lawyers and executed by both the chargor and chargee were done fraudulently. The element of fraud is curiously being introduced by the police and the interested party.

Further, the sale agreement, evidence of payment of purchase price and transfer instruments duly registered at the lands office are part of the undisputed documents before the court. The documents were

duly booked and registered at the lands office and all the entries in the documents including the searches, receipt for the search, the transfer instrument and the entry in the title have not been disputed other than alleging that the file at the lands office is missing. Sincerely, on the basis of the material presented before me and in particular, upon perusal of all the documents, I find no factual basis at all to form the basis of the alleged fraud or the prosecution in question. I find reasonable grounds to conclude that the prosecution was mounted for other considerations other than the need to pursue a legitimate public interest.

Article **157 (10)** of the Constitution of Kenya 2010 requires the DPP to act independently in the discharge of his duties. This above position is also replicated under Section **6** of the Office of the Director of Public Prosecutions Act.^[16] The DPP is to not only act independently in the exercise of his functions, but also ought not to be perceived to be acting under the direction or instructions or instigation of any other person. There should be no reasonable basis to believe that the prosecution was instigated by another person.

It is on record that the alleged complaint was lodged with the police way back in 2010. It is on record that upon investigating the matter, the police forwarded the file to the Hon. Attorney General for advise and in his wisdom, he returned the file to the DPP with instructions that they undertake further investigations. Six years down the line, and shortly after the civil suit was filed by the Bank against the petitioners and the A.G was enjoined in the suit and the interested parties attempt to enjoin the case was dismissed by the court, the DPP decided to mount the prosecution. No details have been offered as to what new or additional evidence the DPP was able to unearth six years later that was missing when the A.G. recommended further investigations.

This suspicion that the DPP is not acting independently is strengthened by the fact that there is nothing new to show why the DPP decided to resuscitate prosecution that has been dormant for six years. The decision to institute or not institute court proceedings is a high calling imposed upon the DPP by the law and must be exercised in a manner that leaves no doubt that the decision was made by the DPP independently. Where the decision is surrounded by doubt or even mere reasonable suspicion as in the present case that the interested party has a hand in the prosecution, such a decision cannot be allowed to stand.

The prosecutor should act with diligence and promptness to investigate, litigate, and dispose of criminal charges, consistent with the interests of justice and with due regard for fairness, accuracy, and rights of the accused, victims, and witnesses. I find myself in agreement with the decision in *Republic vs Attorney General ex-parte Arap Ngeny*^[17] where the court stated that “*a criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motives 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.*”

The decision whether or not to prosecute is very important. It can be very upsetting for a person to be prosecuted even if later found not guilty. However, a decision not to prosecute can cause great stress and upset to a victim of crime. Therefore, the DPP must carefully consider whether or not to prosecute. This decision must be seen to have been arrived at by the DPP independently. Under no circumstances should the DPP appear to have been prompted by another person to institute any proceedings. Such a scenario, even if it is mere reasonable suspicion in the eyes of reasonable persons would amount to a violation of article **157 (10)** of the Constitution and Section **6** of the Office of the Director of Public Prosecutions Act^[18] cited above.

The prosecutor should remain fiercely independent, fair and courageous. The responsibilities entrusted to the Director of Public Prosecutions and police and public prosecutors, demand nothing less. D.A. Bellemare, M.S.M, Q.C put best the often difficult course for the prosecutor when he said:-

“It is not easy to be a prosecutor. It is often a lonely journey. It tests character. It requires inner

strength and self-confidence. It requires personal integrity and solid moral compass. It requires humility and willingness, where to appropriate, to recognize mistakes and take appropriate steps to correct them. Prosecutors must be passionate about issues, but compassionate in their approach, always guided by fairness and common sense.” [19]

In order to advance the rule of law, and in particular to protect the principle that all are equally subject to the law, the DPP (and therefore his officers) must be independent. The Constitutional provision in Article 157 (10) of the Constitution 2010 ensures that the DPP has complete independence in his decision making processes. This is vital to protect the integrity of the criminal justice system because it guarantees that any decision to prosecute a person is made free of any external influences. In the words of John Kelly TD, the prosecution system “*should not only be impartial but should be seen to be so and that it should not only be free from outside influence but should be manifestly so.*” [20] The following observations are useful to bear in mind:-

“...the use of prosecutorial discretion should be exercised independently and free from ANY interference. Prosecutors are required to carry out their duties without fear, favour or prejudice—impartially, with objectivity, unaffected by individual or sectional interests and public or media pressures, fairly, having regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect and make all necessary and reasonable enquiries and disclose the results of those enquiries, regardless of whether they point to the guilt or innocence of the suspect ...That is a role which, I fear, is not well understood in the community. It may not be a popular position but it is a very valuable and important one.” [21]

The role of the prosecutor excludes any notion of winning or losing; it is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings. [22] It is said that the prosecutor acts in the general public interest and so it must be. That is where the prosecutor’s ultimate loyalty and responsibility lie. Mere or reasonable suspicion that the DPP did not act independently, as in this case, is in my view sufficient to taint the proceedings.

Also, one key consideration to guide the DPP in instituting court proceedings is to advance or protect public interest as opposed to private interest. I am not persuaded that the prosecution of the petitioners herein advances public interest. In so finding, I have considered that the petitioners openly purchased land at a consideration of a total Ksh. 81,000,000/= after verifying the validity of the title at the lands office, transferred the land at the lands office upon payment of registration fees and stamp duty, obtained clearances and consents from the lands office and went further and developed the land thereby erecting 69 units after using the title to borrow funds from a bank, and the paid stamp duty and register transfer of subleases. All these transactions have not been disputed by the lands office nor is there evidence to link the petitioners with the alleged fraud. This prosecution in my view seeks to protect or promote the interests of the interested party as opposed to public interest.

The decision to prosecute or not to prosecute is of great importance. It can have the most far-

reaching consequences for an individual. Even where an accused person is acquitted, the consequences resulting from a prosecution can include loss of reputation, disruption of personal relations, loss of employment and financial expense, in addition to the anxiety and trauma caused by being charged with a criminal offence.

A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system. For victims and

their families, a decision not to prosecute can be distressing. The victim, having made what is often a very difficult and occasionally traumatic decision to report a crime, may feel rejected and disbelieved. It is therefore essential that the prosecution decision receives careful consideration.

However, the courts have an overriding duty to promote justice and prevent injustice. From this duty there arises an inherent power to 'stay' an indictment (or stop a prosecution in the magistrates' courts) if

the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court or infringement of the petitioners fundamental rights.

Abuse of process has been defined as something so unfair and wrong with the prosecution that the court should not allow a prosecutor to proceed with what is, in all other respects, a perfectly supportable case. [23] Whether a prosecution is an abuse of court process, unfair, wrong or a breach of fundamental rights, it is for the court to determine on the individual facts of each case. I am afraid, from the material before this court, there is nothing to show that the prosecution is fair. In fact in my view it is wrong, baseless and an abuse of police powers or judicial process. The concept of a fair trial involves fairness to the prosecution and to the public as well as to the accused.[24]

The inherent jurisdiction of the court to stop a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances.[25] The essential focus of the doctrine is on preventing unfairness at trial through which the accused is prejudiced in the presentation of his or her case or where there is clear breach of fundamental rights to a fair trial. Courts should first consider whether or not there is anything in the trial to prevent 'a fair trial' and if there is, then the court ought to stop the prosecution.

In my view, the high court should prohibit or quash prosecutions in cases where it would be **impossible to give the accused a fair trial; or 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.[26] These categories are not mutually exclusive and the facts of a particular case ought to determine whether to allow the orders sought or not.[27]The power to stay or stop a prosecution should only be exercised if exceptional circumstances exist which would result in prejudice to the accused which cannot be remedied in other ways. To me, this is a deserving case where the prosecution ought to be halted for the interests of justice.

A criminal prosecution can also be stopped if it was commenced in the absence of proper factual foundation. As stated above, from the evidence before me, there was no proper factual foundation to warrant undertaking the prosecution in question.[28] I find nothing in the material before me (even mere reasonable suspicion) to suggest that the DPP acted in accordance with article **157 (10)** of the Constitution and Section **6** of the Office of the Director of Public Prosecutions Act.[29]

The Constitution contains, in material respects, a fundamental commitment to human rights. The enquiry is whether there has been an irregularity or an illegality, that is a departure from the formalities, rules and principles of procedure according to which our law required a criminal trial to be initiated or conducted. [30] The prosecution of an accused person must be conducted with due regard to traditional considerations of candour, fairness, and justice. Where a trial is conducted in a manner different from what is prescribed under the law, the trial is bad.[31] In my view, the prosecution in question was commenced on the wrong footing and with no factual basis.

Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracize injustice, prejudice, dishonesty and favouritism. And again decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused.[32]

The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person. It is guaranteed under Article **14** of the International Covenant on Civil and Political Rights (ICCPR).[33]The fundamental importance of this right is illustrated not only by the extensive body of interpretation it has generated worldwide but, by the fact that under article **25 (c)** of our constitution, it is among the fundamental rights and freedoms that may not be limited.

The cardinal principle in criminal justice is that an accused person is presumed innocent until proven guilty. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that

such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized.^[34] The material before me to show that the criminal trial is premised on unfair and questionable partisan investigations and that the decision to charge was arrived at unfairly and without any reasonable basis and against the available evidence.

The provisions of the Constitution conferring powers upon the High Court to grant such remedies as certiorari, prohibition, Judicial review, mandamus or permanent stay of proceedings are a device to advance justice and not to frustrate it. In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceedings in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realization of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice between the State and its subjects it would be impossible to appreciate the width and contours of that salient jurisdiction.^[35]

The inherent power is to be exercised *ex debito justitiae*, to do real and substantial justice, for administration of which alone Courts exist. Wherever any attempt is made to abuse that authority so as to produce injustice, the Court has power to prevent the abuse. It is, however, not necessary that at this stage there should be a meticulous analysis of the case before the trial to find out whether the case ends in conviction or acquittal.^[36] In *Kuria & 3 Others vs Attorney General*^[37] 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 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.....The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped.....It would be a travesty to justice, a sad day for justice should the procedures or the process of the 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 utilize the procedure has been made. It has never been argued that because a decision has already been made to charge the accused person, 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 one of them because there is nothing, in terms of decisions to prohibit ...The intrusion of judicial review proceedings 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 not only 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 process 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 utilized. 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 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...”

The High Court has inherent powers to quash, stay or prohibit criminal proceedings. These powers are wide as they imply the exoneration of the accused even before the proceedings have been culminated by way of trial. Noting the amplitude of these powers and the consequences which they carry, the Supreme Court of India in a recent decision[38] revisited the law on the issue and held that ‘these powers should be exercised sparingly and should not carry an effect of frustrating the judicial process.’ The said court delineated the law in the following terms:-

“The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and in the rarest of rare cases and the Court cannot be justified in embarking upon an inquiry as to the reliability or otherwise of allegations made in the complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at uncalled for stage nor can it ‘soft-pedal the course of justice’ at a crucial stage of proceedings.....The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of the power of the court, but the more the power, the more due care and caution is to be exercised in invoking these powers” [39]

Courts have an overriding duty to promote justice and prevent injustice. From this duty there arises an inherent power to ‘stay’ an indictment or stop a prosecution in the magistrates courts if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court. The leading case on the application of abuse of process remains *Bennet vs Horseferry Magistrates Court & another*. [40] The court confirmed that an abuse of process justifying the stay of a prosecution could arise in the following circumstances:-

- i. Where it would be impossible to give the accused a fair trial; or;*
- ii. 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.*

The above categories are not mutually exclusive and the facts of a particular case may give rise to an application to stay involving more than one alleged form of abuse, and that staying a proceeding is a discretionary remedy and each case will depend on its set of facts and circumstances. **Chris Corns** in his Article entitled ‘*Judicial Termination of Defective Criminal Prosecutions: Stay Applications*’ [41] argues that the grounds upon which a stay will be granted have been variously expressed in the cases. These grounds can be classified under three categories;-

- i. When the continuation of the proceedings would constitute an ‘abuse of process,’*
- ii. When any resultant trial would be ‘unfair’ to the accused, and*

iii. When the continuation of the proceedings would tend to undermine the integrity of the criminal justice system.

The latter ground is not limited to abuse of the trial court procedures and processes but extends more generally to abuse of the administration of criminal justice process as a whole. Clearly, there can be significant overlap between these various grounds for the stay; an unfair trial, for example would tend to bring the administration of justice into disrepute. Conversely, in some circumstances the holding of a trial may not be technically unfair to the accused yet still undermine the integrity of the legal system because of some impropriety in the investigation or prosecution of the case. The justification for granting a stay extends beyond any abuse of process and includes circumstances where it would be 'unfair' to the accused for the proceedings to continue. [42]

In *Republic vs Chief Magistrate's Court at Mombasa ex-parte Ganjee & Another* [43] it was held that:-

'It is not the purpose of a criminal investigation 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 be allowed to stand if there predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in 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 a criminal proceeding 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.....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 desire of 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 the ulterior motive and that is when the High Court steps in.....'

The decision of the supreme court of Nevada in the case *Bull vs McCuskey* [44] is relevant to the present case. In the said case, a doctor filed an abuse claim in response to a medical malpractice suit that was brought to induce a nuisance settlement. The Nevada Supreme court held that the medical malpractice claim was a nuisance case and upheld the doctor's abuse of process claim.

Criminal proceedings commenced to advance other gains other than promotion of public good are in my view vexatious and ought not to be allowed to stand. The word "vexatious" means "harassment by the process of law," "lacking justification" or with "intention to harass." It signifies an action not having sufficient grounds, and which therefore, only seeks to annoy the adversary. The hallmark of a vexatious proceeding is that it has no basis in law (or at least no discernible basis); and that whatever the intention of the proceeding may be, its only effect is to subject the other party to inconvenience, harassment and expense, which is so great, that it is disproportionate to any gain likely to accrue to the claimant; and that it involves an abuse of process of the court.

Article 259 of the constitution enjoins this court to interpret the constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that contributes to good governance. In exercising its judicial authority, this court is obliged under Article 159 (2) (e) of the constitution to protect and promote the purposes and principles of the constitution. The spirit of the constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion. [45] The need to safe guard court proceedings against any form of abuse or misuse must be zealously protected at all times and that the integrity of court process must not be brought into disrepute.

In all honesty, I find nothing in the material before me to rebut the allegations of unfairness and that the right to a fair trial has been threatened. There is no tangible evidence to demonstrate that the police did not act maliciously. In fact in my view, they acted outside their powers. As stated above, the prosecution in question was commenced without proper or reasonable foundation. It is my view that the petitioners have demonstrated that their rights to a fair trial have been or will be infringed if the prosecution in Criminal case number **1297** of 2016 proceeds and that the said trial is an abuse of court process and it will inherently violate the petitioners rights to a fair trial as enshrined in the constitution.

I find that this petition has merits. Consequently, I allow this petition and orders as follows:-

*a. **A declaration** be and is hereby issued declaring that the institution and continuation of criminal investigations by the first Respondent and the prosecution of the petitioners by the second Respondent on complaints in respect of any offences related to claims of L.R. No. 18649, Mavoko Municipality, Machakos County is unconstitutional.*

*b. **An order** of injunction and or prohibition be and is hereby issued restraining the first and second Respondents from instituting or continuing with any criminal prosecution of the petitioners on complaints touching on any offences on claims relating to acquisition of title, ownership or transactions relating to L.R. No. 18649, Mavoko Municipality, Machakos County.*

*c. **A permanent** order be and is hereby issued staying the proceedings, prosecution and or continuation of criminal case number Nairobi Chief Magistrates Criminal Case No. 1297 of 2016, Republic vs Kennedy Otieno Agwaro, Joseph Mungai & David Kitawi Ngoda against the petitioners herein or any criminal proceedings against the petitioners in respect of offences related to the claims touching on acquisition of title, ownership, use or transactions on L.R. No. 18649, Mavoko Municipality, Machakos County.*

*d. **That** the Respondents do pay the costs of this petition to the petitioners.*

Orders accordingly

Signed, Delivered and Dated at Nairobi this 12th day of May 2017

John M. Mativo

Judge

[1] Article 157 of the constitution

[2] H.C.C. No. 539 of 2012, Kenya Commercial Bank Ltd vs Tamarind Meadows Ltd & Kennedy Otieno Agwaro & Others

[3] Cap 75, Laws of Kenya

[4] Joram Mwenda Guantai vs Th Chief Magistrate Court {2007} 2 EA cited

[5] Njuguna S. Ndung'u vs Ethics & Anti-Corruption Commission & 3 Others {2014}eKLR

[6] {2001}KLR 612

[7] {2013}eKLR

[8] Counsel cited R vs DPP & Another ex parte Jog Kigen {2016}eKLR

- [9] R vs The Judicial Commission into Goldenberg Affair and 2 Others ex parte Saitoti, HC Misc App 102 of 2006 cited
- [10] R vs DPP & 2 Others Ex-parte P. N. Saisi {2016}eKLR cited
- [11] Erick Kibiwot Tarus & 2 Others vs DPP {2014} eKLR cited
- [12] Jamleck Njagi Lithaa va NBI County Criminal Investigating Officer & 2 Others {2015}eKLR cited
- [13] R vs Commissioner of Police & Another ex parte Michael Monari & Another {2012}eKLR Ccited
- [14] R vs A. G. & 4 Others Ex-parte Keneth Kariuki Githii {2014}eKLR cited
- [15] Cap 75, Laws of Kenya
- [16] Act No. 2 of 2013
- [17]HCC APP NO. 406 of 2001
- [18] Supra
- [19] Infra
- [20] <http://www.paclii.org/fj/other/prosecutors-handbook.pdf>
- [21]Extract from a Speech by Anna Katzmann, SC at a dinner of the NSW Law Society's Government Lawyers CLE Conference on 30 October 2007. (Now the Hon. Anna Katzmann, Judge of the Federal Court of Australia).
- [22] (see *Boucher v the Queen* (1954) 110 CCC 263, 270).
- [23] *Hui Chi-Ming v R* [1992] 1 A.C. 34, PC
- [24]*DPP v Meakin* [2006] EWHC 1067.
- [25] See Attorney General's Reference (No 1 of 1990) [1992] Q.B. 630, CA; Attorney General's Reference (No 2 of 2001) [2004] 2 A.C. 72, HL.
- [26] See *Bennett v Horseferry Road Magistrates' Court and Another* [1993] 3 All E.R. 138, 151, HL; see also *R v Methy Tydfil Magistrates' Court and Day ex parte DPP* [1989] Crim. L. R. 148.
- [27] *R v Birmingham and Others* [1992] Crim. L.R. 117
- [28] Republic vs Attorney General ex-parte Arap Ngeny HCC APP NO. 406 of 2001
- [29] Supra
- [30] Interpreting similar provisions in the constitution of South Africa, the South African Constitutional court (Nicholas AJA), *Shabalala & 5 others vs A.G of Transvaal & Another* CCT/23/94
- [31] Indian Case of *Pulukiri Kotayya vs Emperor* L.R. 74 Ind App 65
- [32]The Supreme Court of India in *Rattiram v. State of M.P.*[32], a three-Judge Bench
- [33] International Covenant on Civil and Political Rights, UN General Assembly resolution 2200A (XXI), December 16, 1966, entered into force March 23, 1976 [hereinafter ICCPR].

[34] *Natasha Singh v. CBI*{2013} 5 SCC 741

[35] See *Kafnatakavs L. Muniswamy& Others* SAIR 1977 SC 21489

[36] *Mrs.Dhanalakshmi v. R. Prasanna Kumar & Others* AIR 1990 SC 494

[37] {2002} 2KLR 69

[38] See *Maharashtra vs Arun Gulab Gawali*

[39] See *State of West Bengal & Others vs Swapan Kumar Guha& Others*, AIR, 1982, SC 949, *Pepsi Foods Ltd & Another vs Special Judicial Magistrate & Others* AIR 1998, SC 128 & *G. ugarSuri&AnoVs State of U.P & Others*, AIR 2000 Sc 754

[40] {1993}All E.R 138, 151, House of Lords

[41] Chris Corns, *Judicial Termination of Defective Criminal Prosecutions: Stay Applications*, 76 *University of Tasmania Law Review*, Vol 16 No. 1, 1977

[42] *Ibid*

[43] {200} 2KLR 703

[44] 96 Nev 706, {1980}

[45] *Namibian case of State vs Acheson*{1991} 20 SA 805