



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 132 OF 2014

In the matter of Articles 22, 23, 159, 258 and 259 of the Constitution of Kenya

In the matter of the violation of Articles 10, 29, 25 & 40 of the Constitution of Kenya

In the matter of violation of the Occupational Safety & Health Act (Cap 514 of the Laws of Kenya)

and

The Factories & Other Places of Work Act, and the Factories & Other Places of Work (Fire Risk Reduction) Rules

**In the matter of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms)
Practice and Procedure Rules 2013**

Joaninah Wanjiku Maina.....Petitioner

vs

County Government of Nairobi.....Respondent

and

Trattoria Limited.....Interested Party

CONSOLIDATE WITH

Petition No. 129 of 2014

Joaninah Wanjiku Maina.....Petitioner

versus

The Director of Public Prosecutions.....1st Respondent

Inspector General of Police.....2nd Respondent

and

Trattoria Limited.....Interested Party

JUDGEMENT

Introduction

1. This judgement disposes two consolidated petitions, namely petition number **132** of **2014** and petition number **129** of **2014**. In petition **129** of **2014**, the petitioner states that she is the registered owner of Land Reference Number **209/2362** comprising of all that development known as Town House, located at the city centre, in Nairobi. It is not in dispute that she purchased the said property subject to all subsisting tenancy agreements.
2. The petitioner avers that the interested party has placed a cold room storage and a commercial LPG gas cylinder at fire assembly point and fire exit on the ground floor and four water tanks and a smoke extractor at the fire assembly point on the second floor.
3. It is admitted that there is a pending dispute between the petitioner and the interested party being High Court Miscellaneous Application Number **431** of 2013 touching on the same subject and that there are pending contempt of court proceedings against the petitioner in the said case.
4. The crux of petition number **129** of 2014 is that the interested part made a complaint against her to the police, prompting the police to summon her and four members of her family, her agents and or servants allegedly for maliciously damaging the interested party's property, namely, the above items which she removed or caused to be removed to "clear the fire exit point and fire assembly points."
5. Also, in petition number **129** of 2014, the petitioner avers that the actions of the Police and the DPP contravene her property rights under Article **40** of the Constitution and constitute continued interference with her rights to quiet possession of her property,[\[1\]](#) rights to security of her person and her family and rights to equal protection of the law.[\[2\]](#)
6. In petition number **132** of 2014, the petitioner has sued the County Government of Nairobi. This petition was triggered by the interested party's response in High court Miscellaneous number **431** of 2013 referred to above in which the interested party claimed to have obtained approval to install the said items from County Government of Nairobi. In pet No.**132** of 2014, the petitioner seeks *inter alia* to be provided with written documentation of the process of and the said approvals under article **35** of the Constitution.
7. The petitioner further avers that if at all any such approvals were granted by the County Government of Nairobi to the interested party as alleged, then the same were and continue to be unlawful for contravening sections 78 (1) and 81 (2) (3) & (4) of the Occupational Safety & Health Act[\[3\]](#), Section 34 (3), 41 (2), 42 (2) and 42 (3) of the Factories Act[\[4\]](#) and Rules 4, 5, 6 (1), 6 (3), 17 (1), (3) and 24 of the Factories & Other Places of Work (Fire Risk Reduction) Rules. The said provisions will be discussed later in this judgement. (Note: The Factories and Other Places of Work Act (Cap. 514) was repealed).
8. The petitioner seeks to quash the said process on grounds of illegality and cites safety and audit report prepared by Pestavic Consultants in January 2014 recommending the clearing of the exit and fire assembly points of the building, and an Environment and Audit Report from the National Environment and Management Authority prepared on 21st January 2014 recommending the removal of any obstructions from the emergency walkway.
9. The petitioner also avers that on 20th January 2014, she received a letter from the Ministry of Labour concerning the Safety and Health Risk Assessment for "Town House" in which she was given 30 days to make sure that the recommendations were complied with or face prosecution, as consequence, the petitioner risks legal action for failing to comply with the said notices from the Ministry of Labour and the National Environment and Management Authority.

10. The petitioner is concerned that she has a legal duty to comply with the above and clear the emergency exits and fire assembly points, or face criminal prosecution under the Occupational Safety and Health Act^[5] and the Factories and Other Places of Work Act.^[6] However, owing to the Respondent's actions, she is unable to discharge the said duty, instead she risks imminent arrest and prosecution. The petitioner maintains that the Respondents' actions are unlawful and infringe her property Rights.^[7]

11. In opposition to petition no. **129** of 2014, the DPP filed the affidavit of **P.C. Evan Gitonga Kimaru**. He avers that on **17th** November 2013, a one **Gaetano Ruffo** reported that his property, namely, two water tanks, smoke extractor, cold rooms, one gas cylinder, water pipes and taps had been destroyed by agents of his landlord. Investigations established that the building is owned by the petitioner and that the Nairobi City Council had issued notices marked **EGK 3** informing the petitioner "to remove items that had blocked the fire exit but the notices were withdrawn vide a letter dated 1st August 2013."

12. However, they were served with court orders before they could record statements from the petitioner and other persons in her premises. He denied harassing or intimidating the applicant or violating the petitioner's constitutional rights. He insists that investigations established that the offence of malicious damage to property had been established.

13. The interested party filed the Replying affidavit of **Gaetano Ruffo**, its managing Director. He termed the petition as frivolous and an abuse of court process. He avers that the issues in dispute in this petition were litigated in HCCC No. **126** of 2008. He also referred to a binding arbitration award which was adopted as an order of the court in Misc App No. **431** of 2013 by consent of the parties. Its terms included a permanent injunction restraining the petitioner herein from interfering with the interested party's quiet possession and enjoyment of the premises. In compliance with the award, the interested party paid additional rent for the disputed space, hence the request that the interested party clears the exit in question is a breach of the award and in any event the installations in question were approved by the County Government of Nairobi which also inspected the premises and the relevant drawings. He states that in violation of the award, on **16th** November 2013 the petitioner through some goons vandalized the installations in question prompting the interested party's complaint to the police. The court allowed the restoration of the items and subsequently the court after visiting the site ruled that the fire exit was not blocked, which orders are still in force, hence, this petition is *res judicata* since the matters before the court were determined in High court Misc. App No **431** of 2013.

14. The averment that the approvals for the said installations were granted by the County Government of Nairobi prompted the petitioner to institute petition number **132** of 2014 against the County Government of Nairobi as stated above.

15. **Karisa Iha**, the Director, of Legal affairs of the County Government of Nairobi, in a replying affidavit filed on **10th** August 2015 avers *inter alia* that County Government of Nairobi received a development application for the alteration of plan to Trattoria premises situated on L. R. No. 209/2362, Kaunda Street for approval as required under Section **31** of the Physical Planning Act^[8] and that the said plan was approved by the Director of City Planning under section **29** of the Physical Planning Act^[9] and that the County Government acted within the law and acted in good faith. He also averred that the Respondent undertook fire inspections and issued the certificate for 2015.

Petitioners Advocates Submissions

16. The petitioners counsel submitted that there exists a dispute between herself and the interested party over the use of the fire exit and fire assembly point and that there are pending contempt of court proceedings against her being High Court Misc App No. **431** of 2013 and a claim for Ksh. 1,002,228/=.

17. Counsel also submitted that petitioner had requested for written documentation pertaining to the process of applying for approvals by the interested party to install the said items, but instead the County Government of Nairobi provided only plans annexed to the affidavit of **Karisa Iha**, hence the petitioner invokes article **35** of the constitution. Counsel also submitted that if at all such approvals were granted,

the same violate the provisions of Section **78 (1)** and **81 (2) (3)** and **(4)** of the Occupational Safety and Health Act,[\[10\]](#) Section 34 (3) , 41 (20, 42 (2) and 43 () of the Factories Act (Repealed) and Rules 4, 5, 6 (1), 6 (3) , 17 (1), 17 (3) and 24 of the Factories & Other Places of Work (Fire Risk Reduction) Rules.

18. Counsel also cited two letters dated 25th June 2013 and 24th July 2013 in which County Government of Nairobi stated that the said installations were blocking the fire exits and the fire assembly points of the building and a letter dated 31st March 2015 directing the removal of the same items the second Respondent seeks to prosecute the petitioner for removing.

19. She also submitted that the National Environmental and Management Authority recommended the removal of the said items in its report. Similar concerns were raised by the Ministry of Labour and that the Safety and Audit Report of the building recommended the clearing of the fire exits and fire assembly points of the building. Similar views were raised by Britam Kenya. Counsel submitted that in view of the above reports, the attempt to invoke the criminal justice system under such circumstances is an infringement of Articles **40, 27** and **29** of the Constitution.

20. Counsel further submitted that where criminal proceedings are carried out in threatened breach of the petitioners constitutional rights or to achieve a collateral purpose other than its legally recognized claim, the court ought to halt them,[\[11\]](#)and that criminal cases should not be used as a pawn in personal civil disputes, or individual vendetta or to cause injustice and that where a remedy is provided elsewhere and available to enforce an order of a civil court, there is no valid reason why a party should invoke criminal law for the purpose of enforcement nor should criminal law be used for the purpose of brandishing a sword of punishment; and that the High Court can prohibit criminal proceedings if they are oppressive, vexatious and abuse of court process.[\[12\]](#)

First Respondent's Advocates Submissions (County Government of Nairobi)

21. Counsel for the County Government of Nairobi submitted that the constitutional rights alleged to have been violated are not absolute, and that a party is under an obligation to prove breach of constitutional rights,[\[13\]](#)and that the petitioner has not proved the alleged breach.

22. Counsel further submitted that rights under article **35(1)** of the constitution must be exercised in furtherance of another right and that the installation of the fire and smoke extractors conformed to the law and that in granting the approvals, the County Government of Nairobi was satisfied that the interested party fully complied with the set standards and argued that there are no ground for issuing *mandamus* and *certiorari* in this case.[\[14\]](#)

Second Respondents Advocates Submissions- (The D.P.P.)

23. Counsel for the DPP submitted that there are no grounds to warrant granting the orders sought; that the petitioner has not demonstrated how her rights have been violated; and that it is the duty of the court to protect functional, administrative and operational independence of the DPP[\[15\]](#)and insisted on the need for statutory bodies and tribunals to be given the leeway to discharge their mandate.

Counsel for the interested party' submissions

24. Counsel submitted that the installation of the items in question was upheld by the Arbitral Tribunal and the award was adopted by the High Court, hence this petition is *res judicata*. She added that criminal law exists to protect public interest and further it is the duty of the police to investigate crime. [\[16\]](#)Counsel also submitted that it is for the trial court to determine whether an offence was committed[\[17\]](#) and criminal prosecution can only be stopped if it is an abuse of the court process.[\[18\]](#) Counsel also insisted that no grounds had been established for granting of judicial review orders of *certiorari* and *mandamus*.

25. From the opposing positions taken by the parties in this case as enumerated above, the issues that distil themselves for determination are:- **(a)** whether or not the intended prosecution is unfair, malicious

and or is without any factual basis considering the peculiar facts and circumstance of this case; and **(b)** whether or not the petitioner is entitled to the reliefs sought in the two petitions.

26. Regarding the first issue, the undisputed facts of this case are that there has been previous court litigation between the petitioner and the interested party which culminated in an arbitration award and that there are pending contempt of court proceedings instituted by the interested party against the petitioner relating to removal of the items in question.

27. It is not disputed that the County Government of Nairobi issued notices to the petitioner to remove the same items the subject of these proceedings from the fire escape and fire assembly point but, the County Government of Nairobi states that it later on withdrew the said notice and admits that it granted approval for the said installations.

28. It is not disputed that there is a report by the National Environment and Management Authority recommending the removal of the said items and also the Ministry of Labour raised some concerns on the issue. It is also not disputed that the Safety and Audit Report of the building recommended the clearing of the fire exits and fire assembly points and that similar views were raised by Britam Kenya. These reports were not contested. To me, these reports raise fundamental issues touching on safety of all the tenants and statutory requirements on safety of occupants of the building.

29. The Nairobi County Government did not refute the above reports which clearly raised concerns on the location of the items in question nor did they address their mind to the relevant provisions of the law requiring governing fire prevention. Such provisions include section **78 (1)** of the Occupational Safety and Health Act^[19] which provides that:-

(1) All stocks of highly inflammable substances shall be kept either in a fire-resisting store or in a safe place outside any occupied building:

Provided that no such store shall be so situated as to endanger the means of escape from the workplace or from any part thereof in the event of a fire occurring in the store.

30. Also relevant is section **81** of the same act which provides as follows:-

(1) In every workplace or workroom there shall be—

(a) provided and maintained, and conspicuously displayed and free from any obstruction so as to be readily accessible, means for extinguishing fire, which shall be adequate and suitable having regard to the circumstances of each case; and

(b) present, persons trained in the correct use of such means of extinguishing fire during all working hours.

(2) Every workplace shall be provided with adequate means of escape, in case of fire, for the persons employed therein, having regard to the circumstances of each case.

(3) All the means of escape referred to in subsection (2) shall be properly maintained and kept free from obstruction.

(4) The contents of any room in which persons are employed shall be so arranged that there is a free passageway for all persons working in the room to a means of escape in case of fire.

(5) All doors affording a means of exit from the workplace for the persons employed therein shall, except in the case of sliding doors, be constructed to open outwards.

(6) While any person is within a workplace for the purpose of employment or meals, the doors of the workplace, and of any room therein in which the person is, and any doors which afford a

means of exit for persons employed in the workplace from any building or from any enclosure in which the workplace is situated, shall not be locked or fastened in such manner that they cannot be easily and immediately opened from the inside.

(7) Every window door or other exit affording means of escape in case of fire or giving access thereto, other than the means of exit in ordinary use, shall be distinctively and conspicuously marked by a notice printed in red letters of an adequate size.

(8) There shall be marked on the floor of every workroom gangways to facilitate proper arrangement of the contents of the workroom with a view to keeping all fire extinguisher points and fire exits free from obstruction and for ensuring proper housekeeping.

(9) Every occupier of a workplace shall take effective steps to ensure that all the persons employed therein are familiar with the means of escape in case of fire, and with the routine to be followed in case of fire.

31. The ruling rendered in High court Misc. App No **431** of 2013 though touching on the suit premises and in particular the removal of the said items, did not address the issues raised in paragraphs **29, 30** and **31** above nor did it address the question whether the criminal prosecution complained of is based on factual basis, nor did it address the manner in which the approval in question was granted. Hence, it is my view that the issues raised in this petition cannot be *res judicata*.

32. Further, the petitioner seeks to invoke Article **35** of the constitution and has asked to be supplied with documents pertaining to the approval in question, and it is clear that this issue was not determined in the said ruling. It is imperative that the County Government of Nairobi avails the said documents to demonstrate that the approval was properly sought, that all the procedures prescribed by law were followed including comments offered by the relevant departments and minutes. Instead of availing the necessary documents, Mr. Iha only exhibited a drawing which does not demonstrate that all the procedures were followed. The same County Government had issued a notice to the petitioner to remove the same items only to "withdraw" the same notice. As stated above, NEMA and Ministry of labour have also issued notices putting the petitioner in an unpleasant situation whereby she risks being sued for failing to comply with the notices and at the same time faces police prosecution for malicious damage to property and a possible committal to civil jail for disobeying a court order.

33. On the basis of the above material, it is logical to conclude that the prosecution in question is oppressive and that its factual basis is shaky in that it may be seen as assisting the interested party to fight the civil dispute pending in court. There are reasonable grounds to conclude that the intended prosecution was mounted for other considerations other than the need to pursue a legitimate public interest as demonstrated below.

34. Article **157 (10)** of the Constitution of Kenya 2010 requires the DPP to act independently in the discharge of his duties. This position is replicated in Section **6** of the Office of the Director of Public Prosecutions Act.^[20] 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.

35. 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.

36. 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^[21] 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.”

37. 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^[22] cited above.

38. 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.*” ^[23] 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.” ^[24]

39. Also, one key consideration to guide the DPP in instituting court proceedings is to advance or protect public interest as opposed to private interest. Prevention of fire and safety of the occupants of Town House and persons visiting the premises or occupying adjacent premises is in my view a matter of great public interest. Provision of clear and unhindered fire exits is a matter of public interest. I am not persuaded that the intended prosecution of the petitioner and others advances public interest. In so concluding, I have not only considered the facts of this case, but the relevant provisions of the law that are geared at ensuring safety in the event of a fire outbreak.

40. The case pending in court only deals with a component of the dispute and the effect of non-compliance with the laws governing safety from fire and consequences of non-compliance with such laws is a fundamental issue that cannot escape the attention of this court nor can the petitioner as the proprietor of the building be denied the opportunity to interrogate the process through which the approvals in question were granted and if need be challenge the process in a court of law.

41. 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.

42. 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

43. 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) 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.

44. 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.[25] 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. It can be perceived as helping the interested party in the litigation pending in court. The concept of a fair trial involves fairness to the prosecution and to the public as well as to the accused.[26]

45. I am aware that the inherent jurisdiction of the court to stop a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances.[27] 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.

46. 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.[28] These categories are not mutually exclusive and the facts of a particular case ought to determine whether to allow the orders sought or not.[29] 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 because as stated above, it is in public interest that the safety of all in or visiting Town house be safeguarded and in matters of this nature, it is better for the court to err on the side of caution especially so, when there are clear provision of the law safeguarding safety from fire.

47. As stated above, a criminal prosecution or police investigations 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.[30] On one hand, the petitioner risks prosecution by relevant government agencies for violating the law. On the other hand, she is being pursued for criminal prosecution for "obeying the law" but in the process "committing an offence."

48. 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 requires a criminal trial to be initiated or conducted. [31] 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.[32] In my view, the investigation in question was commenced on the wrong footing and with no factual basis.

49. Fundamentally, a fair and impartial trial or investigation has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial or an investigation 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 investigation process and a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused.[33]

50. 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).[34] 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.

51. 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.[35] A criminal trial premised on unfair and questionable partisan investigations or a decision to charge arrived at unfairly and without any reasonable basis would in my view open the door to an unfair trial.

52. 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.

53. 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.

54. 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.[36]

55. 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.[37]

56. In *Kuria & 3 Others vs Attorney General*[38] 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....”

57. 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[39] 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” [40]

58. 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.

59. The leading case on the application of abuse of process remains *Bennet vs Horseferry Magistrates Court & another*. [41] 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.

60. 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*' [42] 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.*

61. 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. [43]

62. In *Republic vs Chief Magistrate's Court at Mombasa ex-parte Ganjee & Another* [44] 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.....'

63. The decision of the supreme court of Nevada in the case *Bull vs McCuskey* [45] 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.

64. 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.

65. It is my view that the petitioner has demonstrated that her rights to a fair trial have been or will be infringed if the prosecution proceeds and that the intended prosecution is an abuse of court process and it will inherently violate the petitioner's rights to a fair trial as enshrined in the constitution.

66. The petitioner seeks judicial review remedies of *mandamus*, *certiorari* and *prohibition*. Article 165 (6) of the Constitution provides that "The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court." Article 165 (7) provides that "For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

67. On the scope of the jurisdiction of this court under Article 165 (6) & (7) of the constitution, I strongly opine that one of the fundamental principles in this regard is the issuing of prerogative orders in the form of writs of *certiorari*, *mandamus* and *prohibition*. Such writs can be availed only to stop, quash, remove, adjudicate on the validity of judicial acts. The expression "judicial acts" includes the exercise of *quasi-judicial* functions by administrative bodies or other authorities or persons obliged to exercise such functions. Atkin, L.J. thus summed up the law on this point in *Rex v. Electricity Commissioners*[\[46\]](#)

"Whenever anybody or persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially acts in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

68. In particular, the petitioner asks this court to quash the approvals granted by the County Government of Nairobi to the interested party to install the items in question at the fire exits and fire assembly points and has cited violation of several provisions of the law which are geared to ensure public safety in the event of fire. In my view, it has not been demonstrated that the provisions in question were considered nor did the Respondents address this point which goes into the root of the validity or legality of the approvals.

69. It is important to point out that in granting a writ of *certiorari* the superior court does not exercise the powers of an **appellate** tribunal. It does *not review* or *reweigh* the evidence upon which the determination of the inferior tribunal or body purports to be based. It demolishes the order or decision which it considers to be without jurisdiction or palpably erroneous but does not substitute its own views for those of the inferior tribunal. The offending order, decision or proceeding so to say is put out of the way as one which should not be used to the detriment of any person.[\[47\]](#)

70. The supervision of the superior court exercised through writs of '*certiorari*' goes on two points, as has been expressed by Lord Sumner in *King vs. Nat Bell Liquors Limited*.[\[48\]](#) One is the area of inferior jurisdiction and the *qualifications and conditions* of its exercise; the other is the *observance of law in the course of its exercise*. These two heads normally cover all the grounds on which a writ of '*certiorari*' could be demanded. In fact there is little difficulty in the enunciation of the principles; the difficulty really arises in applying the principles to the facts of a particular case.

71. In *Minerva Mills Ltd. vs. Union of India*,[\[49\]](#) the court held that "*the power of judicial review is an integral part of our constitutional system and without it, there will be no government of laws and the rule of law would become a teasing illusion and a promise of unreality.*" I am of the view that if there is one feature of our constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review, and it is unquestionably, to my mind, part of the basic structure of the constitution.

72. Judicial review is concerned with whether the law has been correctly applied, and the right procedures have been followed. A public body is under a legal duty to act or make a decision in a certain way and is unlawfully refusing or failing to do so.

73. Judicial review is a means to hold those who exercise public power accountable for the manner of its exercise, especially when decisions lie outside the effective control of the political process. The primary role of the Courts is to uphold the fundamental and enduring values that constitute the rule of law. As with any other form of governmental authority, discretionary exercise of public power is subject to the Courts supervision in order to ensure the paramountcy of the law.

74. Upon due consideration of the law on granting prerogative orders and upon considering the facts of this case and in particular the law relating to granting of development approvals, I am satisfied that that the petitioner has raised pertinent issues which go to the core of the manner in which the approvals in question were granted and in absence of cogent explanation by the County Government of Nairobi and in particular the omission to avail the relevant documents, I find that the petitioner has demonstrated a case for granting of the judicial review orders sought.

75. In view of my analysis of the facts and the law enumerated above, I find that the consolidated petitions have merits. Consequently, I allow the two petitions and orders as follows:-

a. **An order of prohibition** be and is hereby issued permanently prohibiting the Director of Public Prosecutions and or the Inspector General of Police from summoning, interrogating, arresting, investigating, instituting or continuing with any criminal prosecution against the petitioner or her agents in connection with or relating to Complaints lodged by Trattoria Limited or its Director or Agent or managing Director, a one **Gaetano Ruffo** touching on or Relating to any offences allegedly arising from or connected with the alleged malicious damage to the interested party's property at Land Reference Number 209/2362, Town House, Nairobi.

b. **A Declaration** be and is hereby issued declaring that the County Government of Nairobi has violated the petitioners rights under article 35 of the constitution.

c. **An order of Mandamus** be and is hereby issued compelling the County Government of Nairobi to produce to the court and serve the petitioner with copies of all the documents relating to the application for approval and the approval for the installation of commercial L.P.G. gas cylinder, cold room storage, water tanks and smoke extractor including all building plans, approvals and minutes of meetings relating to the approval process for the fire exit and fire assembly points for Town House located at **L.R. No. 209/2362**, Nairobi, within **30** days from the date of this judgement.

d. **An Order of certiorari** be and is hereby issued to bring to this court to be quashed the approvals granted by the County Government of Nairobi for installation of water tanks, smoke extractor, L.P.G Gas cylinder and cold storage installed at the fire exit and fire assembly point at Town House, Nairobi on **L.R. No. 209/2362**, Nairobi.

e. **That** the Respondents do pay the costs of this petition to the petitioner.

Orders accordingly

Signed, Delivered and Dated at Nairobi this **21st** day of **July**, 2017.

John M. Mativo

Judge

[1] Article 40 of the constitution

[2] Article 29 of the Constitution

[3] Act No. 15 of 2007

[4]The Factories and Other Places of Work Act (Cap. 514) was Repealed

[5] Supra Note 3

[6] Supra note 4

[7] Under Article **40** of the Constitution

[8] Act No. 6 of 1996

[9] Ibid

[10] Supra

[11]Counsel cited George Joshua Okungu & Another vs The Chief Magistrates Court Anti-Corruption Court & Another {2014}eKLR

[12] Counsel cited Commissioner of Police and the Director of Criminal Investigations Dept vs K.C.B. Civil App No. 56 of 2012

[13] Counsel cited Nairobi Law Monthly Co Ltd vs Kenya Electricity Generating Co & 6 Others {2013}eKLR, Anarita Karimi Njeru {1976-80} 1 KLR 1272 & Trusted Society of Human Rights Alliance vs A.G. & Others H.C. Pet. No. 229 of 2012

[14] Counsel relied on R vs KNEC,Civil Appeal No. 266 of 1996 & Meixer & Another vs A.G {2005}2KLR 189

[15] Counsel cited Dr. Alfred Mutua vs Ethics & Anti-Corruption & Others C.A Civil App No. 31 of 2016

[16] R vs Commissioner of Police & Another ex parte Michael Monare & another {2012}eKLR cited

[17] Paul Stuart Imison & Another vs THE A.G & 3 Others, H.C. Pet. No. 57 OF 2009 cited

[18] R. vs A.G ex parte Kipngeno Arap Ngeny HC Civ App No. 406 of 2001

[19] Act No. 15 of 2007

[20] Act No. 2 of 2013

[21]HCC APP NO. 406 of 2001

[22] Supra

[23] <http://www.paclii.org/fj/other/prosecutors-handbook.pdf>

[24] 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).

[25] *Hui Chi-Ming v R* [1992] 1 A.C. 34, PC

[26] *DPP v Meakin* [2006] EWHC 1067.

[27] 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.

[28] See *Bennett v Horseferry Road Magistrates' Court and Another* [1993] 3 All E.R. 138, 151, HL; see also *R v Methyr Tydfil Magistrates' Court and Day ex parte DPP* [1989] Crim. L. R. 148.

[29] *R v Birmingham and Others* [1992] Crim. L.R. 117

[30] Republic vs Attorney General ex-parte Arap Ngeny HCC APP NO. 406 of 2001

[31] 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

[32] Indian Case of *Pulukiri Kotayya vs Emperor* L.R. 74 Ind App 65

[33] The Supreme Court of India in *Rattiram v. State of M.P.*[33], a three-Judge Bench

[34] International Covenant on Civil and Political Rights, UN General Assembly resolution 2200A (XXI), December 16, 1966, entered into force March 23, 1976 [hereinafter ICCPR].

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

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

[37] *Mrs.Dhanalakshmi vs R. Prasanna Kumar & Others* AIR 1990 SC 494

[38] {2002} 2KLR 69

[39] See *Maharashtra vs Arun Gulab Gawali*

[40] 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

[41] {1993}All E.R 138, 151, House of Lords

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

[43] *Ibid*

[44] {200} 2KLR 703

[45] 96 Nev 706, {1980}

[46] 1924-1 KB 171 at p.205 (C)

[47] Per Lord Cairns in – ‘Walsall’s Overseers v. L. & N. W.Rly. Co (1879) 4 AC 30 at p. 39 (D)

[48] (1922) 2 AC 128 at p. 156 (E)

[49] (1980) 3 S.C.C. 625. For a critical account see Upcndia Baxi, "A Pilgrim^ Progress : The Basic Structure Revised**", in *Courage, Craft and Contention : The Supreme Court in the Eighties* 64-110 (1985).